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I. Introduction

"Hub-and-spoke agreements" are generally used to describe a triangular scheme where competing undertakings ("spokes") reach horizontal monopoly agreements through a third-party operating at a different level of the supply chain ("hub"). Given the tacit yet anticompetitive nature of hub-and-spoke agreements, many jurisdictions have seen the need for regulation.

China, in its amendment to the 2022 Antimonopoly Law ("Amended AML") incorporated Article 19 which targets hub-and-spoke agreements, clarifying that the "hub" will also be liable for organizing or offering substantive assistance to the conclusion of monopoly agreements among the "spokes." As of this writing, the PRC's State Administration of Market Supervision ("SAMR") has not publicized any specific actions towards "hub-and-spoke agreements" since the Amended AML came into effect. This article discusses the regulatory standards that may be expected from future enforcement actions against hub-and-spoke agreements under Article 19 of the Amended AML, notably the meanings of "organize" and "offer substantive assistance."

II. Overview of China's Historical Practice in Hub-and-Spoke Agreements Prior to the Amended AML

The Amended AML explicitly prohibits an undertaking from organizing other undertakings to reach a monopoly agreement or offer substantive assistance to other undertakings in reaching such agreements (Article 19). Previously, only trade associations were prohibited by the 2008 AML (the "2008 AML") from organizing undertakings within the same industry to reach monopoly agreements. The prohibition on trade associations (Article 21 of Amended AML or Article 16 of 2008 AML) remains in effect after the amendment, running in parallel with Article 19.

The first time Chinese guidelines introduced the concept of "hub-and-spoke agreements" was on 7 February 2021, when the Antimonopoly Commission of the State Council ("Antimonopoly Commission") issued the *Anti-monopoly Guidelines in the Area of Platform Economy* (the "Platform Guidelines"). The Platform Guidelines pointed out that competitors using the same platform may enter into a hub-and-spoke agreement that has the effect of a horizontal monopoly agreement, by using their vertical relations with the platform operator, or under the organization and coordination of the platform operator. Later in the *Guidelines on Active Pharmaceutical Ingredients (API) Industry* (the "API Guidelines") promulgated on September 15, 2021, the Antimonopoly Commission reiterated that an undertaking shall not organize API suppliers to reach a monopoly agreement or offer substantive assistance to reach such an agreement.

Despite historical concerns and discussions regarding hub-and-spoke agreements and their anticompetitive nature, an undertaking who organized or facilitated horizontal conspiracies among other competing undertakings has never been found directly liable in practice, possibly due to a then lack of explicit legal basis. Instead, authorities had relied on Article 13 of the 2008 AML (now Article 17, prohibiting horizontal monopoly agreements) and Article 14 of the 2008 AML (now Article 18, prohibiting vertical monopoly agreements) of the AML as instruments to hold the "spokes" and "hubs" liable respectively.

Below is an outline of some previous cases involving "hub-and-spoke" arrangements in China.

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Table 1: Summary of some cases involving "hub-and-spoke" arrangements

Case Name	Case Facts	Investigation Results
Loudi City Insurance Industry Cartel Case (2012)[2]	The insurance industry association in Loudi city had led 11 local property insurance companies and one insurance brokerage company to establish a joint new-car insurance service center. The service center was controlled by the insurance brokerage company and had signed multiple "cooperation agreements" with the 11 insurance companies. Pursuant to these agreements, the service center would be the "exclusive sales channel" for all the new car insurance of the 11 insurance companies, helping them to divide the market share and fix prices.	The authority penalized six insurance companies for reaching horizontal monopoly agreements (the other five were given exemptions), as well as the industry association for organizing the cartel. The insurance brokerage company, on the other hand, was not penalized despite it being acknowledged as an important member of the "price allies" in the authority's press release.
Dongfeng Nissan Monopoly Case (2015)[3]	The car manufacturer had imposed resale price maintenance ("RPM") restrictions on its distributors. The distributors in Guangzhou had been found to reach price fixing monopoly agreements during several meetings of the "Dongfeng Nissan Coordination Association."	The authority penalized the car manufacturer for imposing RPM restrictions prohibited by Article 14 of the 2008 AML and the distributors for reaching horizontal monopoly agreements prohibited by Article 13 in the 2008 AML. The decision did not touch upon any liability by the car manufacturer for organizing the distributors in the price-fixing cartel.

[2] For the press release of the case, please refer to https://www.gov.cn/jrzg/2012-12/28/content_2301393.htm.

[3] For the press release of the case, please refer to http://drc.gd.gov.cn/gkmlpt/content/1/1059/post_1059066.html#870.

Case Name	Case Facts	Investigation Results
Payment Cipher Instrument Cartel Case (2016) [4]	The People's Bank of China's Anhui branch organized a meeting of three payment cipher instrument suppliers to exchange their intention of market division in the selling of payment cipher instruments in Anhui. The branch later issued notices regarding the agreement on the market allocation, including the corresponding monitoring mechanisms based on the Parties' consensus in the meeting.	The three suppliers were punished for reaching and implementing market allocation monopoly agreements prohibited by Article 13 of the 2008 AML. The bank branch, as the organizer and facilitator[5], was not subject to any penalties under the 2008 AML.
Glacial Acetic Acid Cartel Case (2018)[6]	Three glacial acetic acid active pharmaceutical ingredient (API) suppliers in China indirectly, through their common wholesaler, exchanged price and output-related information and their intention for price increases.	Penalties were only given to the three API suppliers for reaching price-fixing monopoly agreements prohibited by Article 13 of the 2008 AML. The wholesaler (Jiang'Xi Jinhan) who had facilitated the cartel was not penalized.

III. Regulation of Hub-and-spoke Agreements Post the Amended AML

With a clear legal basis established by the Amended AML, SAMR will be able to launch investigations against and impose penalties on a "hub" for organizing or offering substantive assistance in reaching a horizontal monopoly agreement. As of this writing, SAMR has not yet publicized any findings or enforcement actions specifically related to hub-and-spoke arrangements. Therefore, it remains uncertain how SAMR will determine the existence of hub-and-spoke arrangements, and what factors will be considered in assessing the liabilities of the hub.

On March 10, 2023, SAMR released the *Regulation on Prohibition of Monopoly Agreement* (the "Regulation") which aims to implement the provisions of the Amended AML. The Regulation came into effect on April 15, 2023, and provides further interpretation of the terms "organize" and "offer substantive assistance" as depicted in Article 19 of the Amended AML.

A. The Meaning of "Organize"

In addition to the catch-all clause, the Regulation lists two specific circumstances under which an undertaking is to be deemed as having "organized" other undertakings to reach a monopoly agreement:

(i) the undertaking is "not a party to the monopoly agreement" but "plays a decisive or leading role in determining the parties, contents, terms, and conditions of the monopoly agreement during the process of its conclusion or implementation"; or

(ii) the undertaking reaches agreements with multiple counterparties that are competitors, allowing them to

[4] For the full penalty decisions, please refer to Anhui Bureau of Industry of Commerce Penalty Decisions [2016] No.1-3 at https://www.samr.gov.cn/cms_files/filemanager/samr/www/samrnew/fldys/tzgg/xzcf/202204/t20220424_342047.html.

[5] The local branches of People's Bank of China are administration agencies, not undertakings. Therefore, although the Anhui branch is a hub by form, it did not fall within the scope of the hub-and-spoke scenario.

[6] For the full penalty decisions, please refer to SAMR Penalty Decisions [2018] No.17-19 at https://www.samr.gov.cn/fldys/tzgg/xzcf/art/2023/art_f3638ca095c947b88929541ee9ee505f.html.

"communicate intention or exchange information with one another" through the organizer and "reach horizontal monopoly agreements."

The main difference between these two circumstances is whether the "hub" has organized the conclusion of a horizontal monopoly agreement through reaching a vertical agreement with the "spoke." Unlike traditional horizontal monopoly agreements, competitors in hub-and-spoke agreements could have no direct contact. Instead, they would have communicated their intention or exchanged information through a "hub." In practice, it is usually an upstream supplier or downstream customer, the common counterparty of the "spokes," that acts as a "hub." As a result, a hub-and-spoke arrangement may appear to be multiple parallel vertical agreements between the "hub" and each "spoke," with a tacit horizontal monopoly agreement between the "spokes" hidden behind it. This is what the second circumstance listed by the Regulation aims to regulate.

1. Scenario I

As a comparison, the first scenario aims to regulate a type of "hub-and-spoke" agreement where the "spokes" have direct contact with each other to reach a horizontal monopoly agreement organized by the "hub." This was the case in the aforementioned *Dongfeng Nissan Monopoly Case (2015)*, in which the car manufacturer had organized meetings for distributors to coordinate their resale prices.

Such a scenario is commonly seen in SAMR's previous enforcement cases on trade associations, where a trade association typically "organizes" competitors within the industry to reach horizontal monopoly agreements by proactively convening meetings for competitors to exchange intentions to conspire, setting the core content of the monopoly agreement, or establishing monitoring systems. With the introduction of Article 19, in addition to trade associations, an undertaking who plays a decisive role in the conclusion and implementation of horizontal monopoly agreements between other undertakings will also be scrutinized.

2. Scenario II

Proving a "hub-and-spoke" agreement under the second circumstance could be more burdensome in terms of determining the existence of "horizontal monopoly agreements" as the scenario apparently does not require direct information exchanges between competitors. Under the Amended AML, there are three forms of "horizontal monopoly agreements," namely agreements, decisions, and concerted practices. Since competitors only communicate with their common counterparty and do not have direct contact, it is usually challenging to find direct evidence such as written or verbal agreements or decisions made by the competitors themselves. In the absence of such evidence, circumstantial evidence needs to prove that competitors have reached "horizontal monopoly agreements" through a "concerted practice."

Based on current Chinese rules, determining a "concerted practice" boils down to the following factors: (i) whether there is consistency in the market behavior of the competitors; (ii) whether the competitors have communicated their intentions or exchanged information; (iii) whether the competitors can provide reasonable explanations for the consistency in their market behavior; and (iv) the relevant market situation, including market structure, competition level, market change, etc. The recent ruling by the Supreme Court of the PRC ("SPC") indicates that, unless the undertakings can reasonably demonstrate that their consistent behavior was independently based on the market situation, with both "information exchange" and "consistent behavior" proven, "concerted practice" could, in principle, be established.[7]

The same principles may be applied by enforcement authorities in assessing whether there was horizontal collusion between

[7] Please see Maoming Concrete Enterprises Cartel Case (茂名混凝土企业横向垄断协议案) [2022] SPC Zhi Xing Zhong No.29, full decision can be found at https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=+kS01PPtoq4teO+y53xIvGNiVCd7MCO/4w8NPEDu5Y9keH1YA0qJMp/dgBYosE2gSdtWjLNMPdKv1/xGB4g29OOF/SeZ++sT91EnhEGaVO1uDh1CQH6otnfzR+uEqrzd.

competitors in a hub-and-spoke arrangement. This means that consistent behavior by competitors because of compliance with multiple vertical agreements entered into separately with their common trading party will not suffice. It would be essential to prove there has been "information exchanges" between the "spokes" through the "hub."

However, because the second circumstance only involves separate communications between each "spoke" and the "hub," it can be difficult to show collusion on behalf of the "spokes." Seeing as vertical information exchanges with customers/suppliers can be normal business behavior (instead of information exchanges between competitors, which is risky), it raises questions about what standard of proof is required to establish an "information exchange" in a hub-and-spoke arrangement. For instance, it is worth considering whether the "spokes" need to be fully aware that their competitors have entered into the same vertical agreements with their common counterparty, and what factors need to be weighed to establish the spokes' knowledge.

In the *API Guideline*, the Antimonopoly Commission pointed out that API suppliers may use their vertical relations with their common distributor to reach a hub-and-spoke type of horizontal monopoly agreement. The key factor to consider whether such an agreement infringes Article 13 of the 2008 AML (now Article 17, prohibiting horizontal monopoly agreements) is to look at whether the API supplier had full knowledge or should have known other competitors had entered into identical or similar vertical agreements with their common API distributor. It is likely that SAMR may also adopt the same standard of proof to establish horizontal collusion among "spokes" in the future.

A similar approach has been adopted in other jurisdictions, such as the European Union (EU). The European Court of Justice (ECJ)'s previous jurisprudence suggested that it is not necessary for the "spokes" to be fully aware of the anticompetitive objectives pursued by other "spokes" and the "hub." In *VM Remont*s, [8] the ECJ ruled that an undertaking may be held liable for concerted practices if it was aware of such anticompetitive acts by its competitors and the service provider, or if it could have reasonably foreseen such anticompetitive acts by its competitors and the service provider and was prepared to take the entailed risks. In *Eturas,*[9] the ECJ held that a travel agency could be deemed to have participated in a concerted practice if it was aware that a message sent to them by a platform would lead to an infringement, and it did not publicly distance themselves from the illegal act.

US laws have relied on some "plus factors" to prove concerted practice in hub-and-spoke agreements. For example, in *Interstate Circuit*, horizontal conspiracy may be inferred where: (1) competitors enter into vertical agreements with the same upstream or downstream firm; and (2) absent express or implied agreement among competitors to enter parallel vertical agreements with the firm, it would be economically irrational for an individual competitor to agree to such vertical restraint.[10] Similarly, in *Toys "R" Us v. FTC*, in order to reduce competition from low-price warehouse club stores, Toys "R" Us (TRU), the largest toy retailer in the US at that time, demanded its toy manufacturers to cease supplies to the clubs through separate vertical agreements. Contrary to TRU's assertion that these were separate and parallel vertical agreements, the court inferred a horizontal boycotting conspiracy among the manufacturers based on: (i) the boycott being an abrupt shift from past practice; (ii) the manufactures were depriving themselves of a profitable sales outlet and would only enter into agreements with TRU with the prerequisite that other manufacturers were also partaking; (iii) TRU had communicated the message "I'll stop if they stop" from one manufacturer to another to

[8] Case C-542/14, *SIA 'VM Remonts' (formerly SIA 'DIV un KO') and Others v. Konkurences padome*, ECLI:EU:C:2016:578.

[9] Case C-74/14, *Eturas UAB and Others v. Lietuvos Respublikos konkirencijos taryva (Eturas)*, ECLI:EU:C:2016:42

[10] See the written contribution from the United States submitted for Item 7 of the 132nd Competition Committee meeting on 3-4 December 2019, available at one.oecd.org/document/DAF/COMP/WD(2019)88/en/pdf.

convince them that other manufacturers had accepted the same conditions[11].

Assuming that Chinese authorities adopt a "should have known" standard in the future, they may also rely on these "plus factors," (e.g. an abrupt change of commercial practices, whether the competitor would enter into a vertical agreement without an assurance that other competitors were also joining, whether the vertical agreement only benefits the competitors when all competitors accept the same rules, the market structure, the competition level, etc.) to establish that spokes would have had knowledge of the vertical exchanges between other spokes and the hub, and thus there is an indirect "information exchange" between the spokes. The standard of proof and other factors need to be considered and further explored.

B. The Meaning of "Offer Substantive Assistance"

The Regulation specifies that "offer substantive assistance" includes scenarios such as "offering necessary support" and "creating crucial convenience" to the "spokes" to reach a monopoly agreement. However, the Regulation does not specify the meanings of these terms.

Both "organize" and "offer substantive assistance" are ways of facilitating the "spokes" to reach a horizontal monopoly agreement. The difference may lie in the significance of the role played by the "hub." Even without substantive assistance provided by the "hubs," "spokes" may still reach a horizontal monopoly agreement.

Compared to the earlier Exposure Draft released in January 2022, the officially amended AML does not target all undertakings "offering assistance" to the conclusion of a horizontal monopoly agreement. Instead, it only captures undertakings providing "substantive assistance." This suggests that undertakings offering less crucial or minor facilitation (e.g. helping spokes to book a hotel as a meeting venue) for horizontal collusion may not be subject to antitrust penalties. However, as noted earlier, since the Regulation does not further clarify what constitutes "necessary support" or "creating crucial convenience," the determination of what assistance would be considered "substantive" remains at the discretion of the enforcement authorities.

C. Are Spokes Safe?

In a situation where an upstream supplier fixes the resale price of its dealers, it can be difficult to distinguish whether the price fixing resulted from the vertical restraints imposed by the supplier, or price collusion among the dealers, with the supplier acting as a "hub."

There have been cases where both the supplier and the dealers were punished. For instance, in *Dongfeng Nissan* (2015), both the supplier and the dealers were penalized, but for separate infringements, which partly was due to the lack of a hub and spoke clause under the 2008 AML. The former was penalized for restraints imposing RPM policies and management measures, while the latter was penalized for direct coordination on price-fixing.

However, in most RPM-related cases, only suppliers (i.e. the hubs) were penalized for implementing RPM. For instance, in *Changan Ford* (2019), Changan was penalized by SAMR for restricting downstream dealers' rights to set prices independently, and thus reducing intra- and inter-brand competition and harming fair competition and consumer rights. The dealers of Changan, however, were not punished in this case. Similarly, in the *Toyota* case (2019), Toyota was penalized for implementing RPM, but the dealers were not penalized, despite their engaging in discussions on pricing and discounts through a "Coordination Association," similar to the behavior in the *Dongfeng Nissan* Case.

The boundaries between hub-and-spoke and RPM may not be crystal clear. According to a note by the EU on hub-and-spoke arrangements[12], an important factor to consider

[11] See the written contribution from the United States submitted for Item 7 of the 132nd Competition Committee meeting on 3-4 December 2019, available at one.oecd.org/document/DAF/COMP/WD(2019)88/en/pdf.

[12] See the written contribution from the European Union submitted for Item 7 of the 132nd Competition Committee meeting on 3-4 December 2019, available at https://one.oecd.org/document/DAF/COMP/WD(2019)89/en/pdf#:~:text=A%20hub-and-spoke%20arrangement%20will%20therefore%20often%20be%20characterised,coordination%20is%20less%20explicit%20than%20in%20an%20agreement.

is the level of intervention by the dealers. If the RPM restraints are primarily driven by dealers (e.g. dealers come to the supplier and request it to intervene to ensure harmonized pricing), it is more likely to be considered a hub-and-spoke arrangement. If the RPM restraints are primarily driven by the suppliers' own intention to reduce intra-brand price competition, it is more likely to be considered an RPM vertical restraint. However, since the interests of suppliers and dealers often align, it could be hard to determine who is the driver of the price-fixing conduct.

Based on previous regulatory practice under the 2008 AML, in most RPM cases, unless dealers directly fix prices, they are generally not penalized. This may be attributed to the lack of hub-and-spoke legislation, as well as to the fact that the "hub" (i.e. the supplier) often plays a more active role as an organizer in price coordination among competitors. However, with the entry into effect of Article 19, dealers (i.e. the spokes) should also be aware of the legal risks associated with hub-and-spoke arrangements in their future business operations.

IV. The Hub's Liabilities

Under Article 56, para 2 of the Amended AML, an undertaking that has "organized" other undertakings to reach a monopoly agreement or has "offered substantive assistance" to other undertakings to reach such an agreement will be subject to the same range of fines, i.e. 1-10 percent of annual sales, as parties to the monopoly agreement.

The provision does not distinguish liabilities between "organizers" and "significant facilitators." However, based on the practice of the enforcement authorities, factors considered when determining fines include the nature, level, and duration of the infringement. It is likely that undertakings that only "offer substantive assistance" may face lower fines than those that actively "organize" the horizontal monopoly agreement, given their less active and significant roles compared to the "organizers."

The Regulation clarifies that "hubs" may also apply for leniency and may be granted full or partial immunity by reporting the monopoly agreement they facilitated and providing evidence thereof to the enforcement authorities.

V. What to Expect

The introduction of Article 19 of the Amended AML sends a strong signal to companies to exercise caution when dealing with upstream or downstream firms, and in particular to refrain from intervening in competition or acting as a conduit for information exchanges among other undertakings through their vertical relations.

It is expected that SAMR will enforce hub-and-spoke agreements with a clear supporting legal basis at hand after the effectiveness of the Amended AML, though establishing horizontal collusion among competitors can be challenging when they only have indirect contact through a common counterparty.

It may also be hard to distinguish between RPM and price-fixing related hub-and-spoke agreements. Although it is uncertain whether and how the enforcement authorities will consider the legal liabilities of dealers (i.e. spokes) under the scenario where RPM and price-fixing related hub-and-spoke agreements are interweaved, dealers should be aware of the legal risks associated with hub-and-spoke arrangements in their business operations.

Although there already is a legal basis for regulating hub-and-spoke agreements, we look forward to further guidelines from the Antimonopoly Commission and SAMR, particularly regarding the determination of what constitutes "organizing" and "offering substantive assistance."