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## **SAMR adopts stricter view on identification of competitors in monopoly agreement case**

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### **Introduction**

On 20 July 2018 the State Administration for Market Regulation (SAMR) published a decision fining two Shenzhen tally companies a total of Rmb3,163,108 for entering into a horizontal monopoly agreement.<sup>2</sup> According to the decision, China United Tally Shenzhen and China Ocean Shipping Tally Shenzhen reached and implemented an agreement to divide sales and service areas for the tallying market in the western area of the Port of Shenzhen. In addition, the two companies raised tallying prices from May 2013 to August 2016. As such, the two companies were found to have reached and implemented a monopoly agreement and thus violated Article 13 of the Anti-monopoly Law.

This is one of the first cases to be announced by the newly established SAMR<sup>3</sup> and may therefore indicate its attitude towards certain industries and behaviours. In particular, the way in which the competitors in this case were identified could raise new compliance challenges for companies doing business in China.

### **Identification of competitors**

Given that the coordination of tallying prices and geographic market allocation was obvious and that neither China United Tally Shenzhen nor China Ocean Shipping Tally Shenzhen raised any objections to this finding, the decisive element for identifying a monopoly agreement in this case was whether the two companies could be regarded as competing parties. The SAMR recognised the companies as independent competitors.

First, the SAMR found that the companies' ownership structures did not negate their competitive relationship. Although China Merchants Logistics owned a 50% interest in both companies, it performed different roles for each. As regards China United Tally Shenzhen, both China Merchants Logistics and Zhonglian Tally Co, Ltd held 50% of the shareholding therein, and China Merchants Logistics did not hold a controlling position. In contrast, the SAMR concluded that China Merchants Logistics was a controlling shareholder of China Ocean Shipping Tally Shenzhen, with the remaining two shareholders – China Ocean Shipping Tally Corporation and China Shenzhen Ocean Shipping Agency Co, Ltd – holding 29% and 21% of the shares, respectively.

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<sup>2</sup> The full decision is available in Chinese [here](#).

<sup>3</sup> The SAMR, which was founded on 21 March 2018, consolidated the functions of China's three antitrust agencies (the National Development and Reform Commission, the Ministry of Commerce and the State Administration for Industry and Commerce).

Second, the SAMR found that the two companies had been independently operated and managed. When new tally companies had entered the Shenzhen Port market in August 2016, the two companies had stopped their communication and coordinative behaviour and resumed normal market competition.

In addition, the SAMR relied on the companies' articles of association and inquiry records of relevant staff to prove that there had been a competitive relationship between China United Tally Shenzhen and China Ocean Shipping Tally Shenzhen. However, this detailed information was not disclosed in the SAMR's decision.

### **Companies' defence dismissed**

During the investigation, China United Tally Shenzhen and China Ocean Shipping Tally Shenzhen raised two grounds of defence for their coordinated behaviour.

First, China Ocean Shipping Tally Shenzhen argued that the two companies were not competitors since they were both subsidiaries within the same group. China Ocean Shipping Tally Shenzhen claimed that China Merchants Logistics held 50% of the shares in each company. Moreover, it claimed that several overlapping companies indirectly held minority shares in the two tallying companies in addition to China Merchants Logistics.

The SAMR dismissed this argument for a number of reasons. It noted that according to the relevant provisions regulating port management issued by the State Council and the Ministry of Transport:

- port tally companies should introduce a competition mechanism to the market; and
- any two tally companies in one port cannot be controlled by the same investment entity.

Hence, before August 2016, China United Tally Shenzhen and China Ocean Shipping Tally Shenzhen had to comply with such rules by competing with each other and operating independently. In addition, after a new tally company had entered the port tally market of Shenzhen Port in August 2016, China United Tally Shenzhen and China Ocean Shipping Tally Shenzhen had ceased area division and price coordination, which indicated that the two companies could compete with each other independently.

Another defence raised by the two tallying companies was that the alleged cartel aimed to ensure that tally service prices were above the government-recommended level. They cited several pricing-related provisions of the Ministry of Transport regulations to show that the tally service fees were subject to the central government guidance before 15 September 2017.

The SAMR rejected the above ground on the basis that the Ministry of Transport had

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issued a notice to remove government control over tally service prices as of 8 December 2014. It also emphasised that even if the prices had been subject to government control, the two companies had been required to:

- act in accordance with the principles of fairness, legality and good faith; and
- set their prices independently, based on their own costs and market supply and demand.

The SAMR determined that joint price increases by two competing companies would illegally eliminate and restrict market competition.

However, it seems that the SAMR will adopt a strict view on the identification of competitors. Normally, if one shareholder owns 50% of the shares respectively in two companies, the two companies will be regarded as jointly controlled by the same shareholder (ie, the same entity). Moreover, the fact that two companies are actually competing with each other does not necessarily mean that they constitute competitors in the sense of the Anti-monopoly Law, for the reason that different subsidiaries in the same group can also compete with each other.

### **Comment**

This case is one of the first to be published following the merger of China's anti-monopoly law enforcement agencies and is also a typical horizontal monopoly agreement case that involves market division and price coordination. In addition, this case demonstrates the continued law enforcement trend of the National Development and Reform Commission investigating the maritime and port industry (following its investigation into the international ocean shipping cartel and abuse of dominance by a number of large ports, including Shenzhen Port).

Although the facts of this case are relatively simple, the SAMR notably adopted a strict view on the identification of competitors. Companies cannot argue that they do not constitute competitors simply because they are under the control of the same shareholder or actual controlling shareholder. In particular, multinationals that have different subsidiaries or joint ventures in China should be careful when organising or coordinating internal pricing or sales activities among these subsidiaries or joint ventures, as the SAMR could challenge such coordinated behaviour. Further, companies should ensure that any communication and information exchange among entities within their group avoids any potential risk of constituting a monopoly agreement.

To date, the SAMR has penalised 24 companies more than Rmb100 million in the four months since its establishment. The SAMR is expected to enhance its antitrust enforcement in various industries and could be more aggressive going forward.