



Proposed Amendments to the Anti-Monopoly Law: China further confirms its intention to strengthen its antitrust rules

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Speed Read

China has made no secret that it intends to reinforce its antitrust regime. Multiple guidelines have been recently issued and enforcement mainly (but not only) against internet companies has substantially increased. The amendment of the backbone of that regime, the 2008 Anti-Monopoly Law, has been in the making for quite some time but the latest draft of the proposed amendments now makes clear the absolute priority that China intends to give to its antitrust regime. The establishment of a new antitrust agency in China that was announced earlier in November further signals the government's commitment to strengthen antitrust enforcement. Deals and day-to-day conduct alike are all concerned; companies of all origins, those located in or outside of China, should all be made aware.

Background

On 23 October 2021, the Standing Committee of the National People's Congress, released draft amendments (**New Draft**) to the 2008 Anti-Monopoly Law (the **AML**) for public comments. It followed the State Administration for Market Regulation's (**SAMR**) earlier draft amendment (the **First Draft**), which was released in early 2020. For more details on the First Draft, please see [here](#).

As it has been the case for the First Draft, the proposed changes crystallised the existing practice of SAMR, but it also substantially increased the risks faced by companies and also individuals. Some proposed amendments are consistent with amendments that were proposed in the First Draft, but some are new.

Merger control

Introducing a “stop-the-clock” mechanism

When transactions need to be notified to and approved by SAMR, SAMR has a fixed statutory period to approve the deal after the official review starts: a maximum of 180 days. This fixed term offers greater legal certainty to notifying parties, but it also raises an acute risk: when the authority is unable to review the deal within the statutory period, parties often need to refile and reinitiate the entire review period, as most often seen in the remedy decisions.

To address this concern, the First and New Drafts propose to introduce a “stop-the-clock” mechanism, something which exists in many other jurisdictions, that would allow SAMR to suspend the review period under the following circumstances:

- where the undertakings fail to submit required materials or documents, making it impossible to proceed with the review;
- where there are any new circumstances or facts that have a significant impact on the review of the concentration of undertakings and verification becomes necessary; and
- where the restrictive conditions imposed on the undertakings require further evaluation to which the undertakings have consented.

As mentioned in our previous analysis on the First Draft, the mechanism gives flexibility to both SAMR and the parties, but it may also delay the review process and create deal uncertainties. However, we do not expect this would impact on the vast majority of the reviews, in particular those reviewed under the simplified proceeding.

Key sectors under strengthened review

The New Draft introduces a new clause identifying key sectors for which the merger control review should be strengthened. Those sectors are: (i) people’s livelihood; (ii) finance; (iii) technology; and (iv) media.

This clause is new and did not appear in the First Draft. It is, however, in line with China’s rapid growth in these sectors in recent years and the comparatively greater social and economic impact of these sectors in China. However, it is not clear to what extent this new clause will impact the merger control review of deals in these sectors.

No safe harbour for deals below thresholds

SAMR has always had the power to investigate transactions below the notification thresholds if there is evidence that they have or may have the effect of eliminating or restricting competition. This was already provided for in the 2008 State Council Order that sets out the notification thresholds and in several other existing regulations.

However, the First and New Drafts now propose to grant this power to SAMR in the AML itself. This suggests a reinforcement of SAMR’s discretion in reviewing all deals, possibly with a key focus on the sectors mentioned above.

Further increased penalties

Despite the 100-plus deals sanctioned in China for failure to file since 2014, the penalty that can be imposed for “gun-jumping” has remained the same since that date. The new penalties proposed in the New Draft are also similar as compared to those contained in the First Draft. The proposed fines are:

- For those concentrations without any effect of eliminating or restricting competition, the maximum fine for gun-jumping cases would be RMB5 million (approx. USD780,000), ie ten times higher than the current maximum fine.

- For those concentrations have or may have the effect of eliminating or restricting competition, the maximum fine for gun-jumping cases would be up to 10% of previous year's turnover.

As discussed below, the total amount of fines imposed by SAMR could also be increased “by 2 to 5 times” where “the violation is extremely serious or produces particularly vile influence or causes extremely serious consequences”.

Other noticeable developments

The New Draft deletes some changes that had been proposed in the First Draft. For example, the New Draft proposes to remain silent on: (i) the definition of “control” (which is crucial to determine whether a transaction must be filed or not); and (ii) the ability given to SAMR to regularly adjust the notification thresholds according to the level of economic development or industry scale. For more details, see [here](#).

Antitrust enforcement

Broadened definition of “monopoly agreement”

Both the First and New Drafts propose to move the definition of “monopoly agreement”, from a paragraph under the article that is technically dedicated only to horizontal monopoly agreements, to the beginning of the chapter dedicated to all types of agreements.

The result of this proposed amendment will be that the definition will formally cover both horizontal and vertical monopoly agreements, and therefore that one would need to prove that a vertical arrangement (including distribution, franchise or supply agreements) has the *effect* of eliminating or restricting competition before proving that it could breach the AML.

RPM may not be illegal *per se*, but the burden of proof lies with companies

Resale price maintenance (RPM) has been the focus of antitrust investigation and complaints in China since 2008. In the past, antitrust enforcers generally adopted the position that RPM were *per se* illegal. This was heavily debated by companies, scholars and even the judicial branch since – it is argued – RPM may also promote competition outweighing its alleged anti-competitive effect.

The New Draft proposes a new paragraph under the vertical monopoly agreement clause (primarily concerning RPM) providing that, as long as the companies concerned can prove that there is no effect of eliminating or restricting competition, it is not prohibited under AML. Along with the proposed re-position of the “monopoly agreement” definition as mentioned above, it is possible that RPM may in practice be reviewed based on a more rule of reason approach. However, given that the burden of proof is still with the companies themselves, it is yet to be seen in practice how companies will generally be able to persuade SAMR that there is no anticompetitive effect.

Aiding and abetting monopoly agreements

Both the First Draft and the New Draft add a new clause prohibiting business operators from aiding and abetting the entering into monopoly agreements by other business operators. This means that third parties (including possibly trade associations, counsel, economists or accountants) could also be caught if they facilitate the formation of monopoly agreements.

Safe harbour for monopoly agreements

The New Draft also introduces a new safe harbour clause for monopoly agreements. Agreements will not be prohibited if it is proved that the parties' market share is lower than (unspecified) thresholds set by SAMR. In fact, there are already safe harbour thresholds in existing sector guidelines (eg antitrust guidelines in the automotive sector, and antitrust regulation on IPR abuses). With the inclusion of the new safe harbour clause in the New Draft, it is possible that SAMR will set detailed safe harbour thresholds in other guidelines as well.

Fines

The fine for violation of monopoly agreement rules has somewhat decreased from the First Draft, though it is still a significant increase as compared to the current AML. In particular:

- For antitrust infringements by parties that had no revenues in the last financial year, the maximum fine would increase from RMB500,000 (approx. USD78,000) to RMB5m (approx. USD780,000), whereas the First Draft proposed RMB50 million (approx. USD7.8m).
- For antitrust infringements by parties for entering into monopoly agreements that have never been implemented, the maximum fine would increase from RMB500,000 (approx. USD78,000) to RMB3m (approx. USD470,000), whereas the First Draft proposed RMB50m (approx. USD7.8m).
- For antitrust infringements by trade associations, the maximum fine would increase from RMB 500,000 (approx. USD78,000) to RMB 3m (approx. USD470,000), whereas the First Draft proposed RMB5m (approx. USD780,000).
- The New Draft also proposes the possibility of financial penalties on individuals. It is proposed that legal representatives and the person in charge of or directly responsible for reaching monopoly agreements would face a maximum fine of RMB1m (approx. USD160,000).

The amount of fines imposed for antitrust breaches in China have substantially increased, including since the First Draft. However, the New Draft now proposes that SAMR can multiply “the amount of fine by 2 to 5 times” in cases where the “violation is extremely serious or produces particularly vile influence or causes extremely serious consequences”. With no further explanation, this clause suggests that SAMR will now have substantial discretionary power to fine companies. This power would also apply to gun-jumping cases under merger control reviews as indicated above. It appears that SAMR will now be empowered to impose fines way above the current 10% turnover ceiling.

Specific reference to Internet sector

The New Draft proposes to add a new clause in the Chapter covering all general provisions, that emphasises the legislators' focus on the Internet sector. Under this new provision, business operators would be prohibited from “abusing data, algorithms, techniques, capital advantages and platform rules so to eliminate or restrict competition”. It seems that this provision could be used even in the absence of any dominance.

The New Draft also adds a specific type of abuse of dominance – similar to the new principle just mentioned –ie “where a dominant undertaking creates obstacles by using data, algorithms, techniques and platform rules and imposes unreasonable restrictions”.

This is no surprise given the active enforcement actions against digital platform players in the past year. The New Draft shows the intention that the digital economy will continue to be the key focus in terms of antitrust enforcement in China.

Other highlights

There are also some other highlights that are worth mentioning. For instance, the New Draft adds a new clause on the fair competition review system. This system was originally introduced in 2016. Following recent implementation rules for the fair competition review system released this June, the New Draft proposes to put this review system at AML level. The aim is to restrain government bodies from unwarranted interventions against businesses and protect a fair market.

In terms of individual liabilities, the current AML only involves administrative liabilities. The only exception is that obstructions of investigation could potentially lead to criminal liability. However, under the New Draft, a catch-all provision stipulates that violation of the AML may trigger criminal liabilities. The extent to which an antitrust violation can be directly linked with criminal liabilities is still unclear. We have already discussed this point in detailed when the First Draft was published (please see [here](#)).

The New Draft also emphasises that SAMR and its officials have an obligation to keep confidential individual's privacy and personal information. It is quite apparent that this links with another key focus for legislators – data protection, along with the **new Personal Information Protection Law that came into effect on 1 November 2021**.

Earlier this month, **the new Chinese antitrust agency was established**, which sheds further light on the government's commitment to strengthen antitrust enforcement. The new agency – the “State Antimonopoly Bureau” – is likely to be an “upgraded” version of the current Anti-Monopoly Bureau that sits within SAMR. The establishment of the new agency will also likely result in an increase in the number of antitrust officials.

Conclusion

We understand that the process to amend the AML has been ongoing since at least 2017. After almost four years of discussion, this New Draft has now been released for public comments by the central legislative body.

This is in line with recent official statements suggesting that the AML amendments are one of the major legislative works in 2021. It would not be a surprise if the process is completed in the coming months. If this is the case, then along with the establishment of the new “State Antimonopoly Bureau”, the Chinese antitrust enforcement will start a new chapter for the next decade.

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