

China Publishes Draft Amendment to the Anti-Monopoly Law

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China's Anti-Monopoly Law ("AML") was adopted in 2007 and talks about possible amendments have regularly surfaced in the last few years. The State Administration for Market Regulation ("SAMR") released a draft amendment for public comments in early 2020. The process is now accelerating with a formal text ("AML Amendment") submitted to the thirty-first session of the Standing Committee of the National People's Congress for first reading on 19 October 2021. This client alert summarizes the main proposed changes to the AML, which have been published for comments.^[1]

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1. Targeting the digital economy

Emphasis on the digital economy. Technology firms and digital markets have been the subject of a broad regulatory assault in China, including one that is based on the AML. SAMR has published specific guidelines on the application of the AML to platforms in early 2021 and has imposed significant fines on these market players in the last months. For example, SAMR fined Meituan, an online food delivery platform provider, RMB 3.44 billion (~\$534 million) for abusing its dominant position.^[2] The AML Amendment specifically refers to enforcement in the digital economy by making it clear that undertakings shall not exclude or restrict competition by abusing the advantages in data and algorithms, technology and capital and platform rules. At the same time, the objectives to the AML have also been updated to include "encouraging innovation." Going forward, SAMR will need to tread the delicate line between encouraging digital innovation and curbing such advancement where it constitutes abusive market behaviour. In the most recent year, at least, in practice there has been an emphasis on enforcement rather than fostering innovation, a trend we anticipate will continue.

2. Substantive changes

Cartel facilitators. The AML arguably does not cover the behaviour of undertakings facilitating anticompetitive conduct, in particular cartels. The AML Amendment fills the gap by extending the scope of the AML to the organisation or provision of material assistance in reaching anticompetitive- agreements. This effectively means that the AML will be extended to cover behaviour leading up to the conclusion of such agreements, and third parties may be found in breach by virtue of their role in aiding the conclusion of cartels.

Abandoning per se treatment of resale price maintenance. The application of the AML to resale price maintenance ("RPM") is confusing. While SAMR seems to apply a strict "per se" approach, the courts have generally adopted a rule of reason analysis, only prohibiting RPM when it led to anticompetitive effects.^[3] The AML Amendment seems to favour the courts' approach by providing that RPM is not prohibited if the supplier can demonstrate the absence of anticompetitive effects.

Safe harbour for anticompetitive agreements. The AML Amendment introduces a safe harbour for anticompetitive agreements. Agreements between undertakings that have a market share lower than a specific threshold to be set by SAMR will not be prohibited unless there is evidence that the agreement has anticompetitive effects. Given that this is

not a complete exemption from the prohibition, it is very much the question whether this safe harbour will be at all useful to undertakings.

Merger review of sub-threshold transactions. The State Council Regulation on the Notification Thresholds for Concentrations of Undertakings already provides SAMR with the right to review transactions that do not meet the thresholds for mandatory review. This right would now directly be enshrined in the AML.

Stop-the-clock in merger investigations. SAMR will have the power to suspend the review period in merger investigations under any of the following scenarios: where the undertaking fails to submit documents and materials leading to a failure of the investigation; where new circumstances and facts that have a major impact on the review of the merger need to be verified; or where additional restrictive conditions on the merger need to be further evaluated and the undertakings concerned agree. The clock resumes once the circumstances leading to the suspension are resolved. It seems that this mechanism may be used to replace the “pull-and-refile” in contentious merger investigations.

3. Increased penalties

Penalties on individuals. The AML Amendment would introduce personal liability for individuals. In particular, if the legal representative, principal person-in-charge or directly responsible person of an undertaking is personally responsible for reaching an anticompetitive agreement, a fine of not more than RMB 1 million (~\$157,000) can be imposed on that individual. At this stage, however, cartel leniency is not available to individuals.

Penalties on cartel facilitators. As explained above, cartel facilitators will be liable for their conduct. They risk penalties of not more than RMB 1 million (~\$157,000).

Increased penalties for merger-related conduct. One of the weaknesses of the AML is the very low fines for gun jumping (limited to RMB 500,000). The AML Amendment now states that where an undertaking implements a concentration in violation of the AML, a fine of less than 10% of the sales from the preceding year shall be imposed. Where such concentration does not have the effect of eliminating or restricting competition, the fine will be less than RMB 5 million (~\$780,000).

Superfine. SAMR can multiply the amount of the fine by a factor between 2 and 5 in case it is of the opinion that the violation is “extremely severe”, its impact is “extremely bad” and the consequence is “especially serious.” There is no definition of what these terms mean and this opens the door to very significant and potentially arbitrary fines.

Penalties for failure to cooperate with investigation. Where an undertaking refuses to cooperate in anti-monopoly investigations, e.g. providing false materials and information, or conceals, destroy or transfer evidence, SAMR has the authority to impose a fine of less than 1% of the sales from the preceding year, and where there are no sales or the data is difficult to be assessed, the maximum fine on enterprises or individuals involved is RMB 5 million (~\$780,000) and RMB 500,000 (~\$70,000) respectively.

Public interest lawsuit. Finally, public prosecutors (i.e. the people's procuratorate) can bring a civil public interest lawsuit against undertakings they have acted against social and public interests by engaging in anticompetitive conduct.

[1] National People's Congress of the People's Republic of China, “Draft Amendment to the Anti-Monopoly Law” (????????????(????)) (released on October 25, 2021), available at <http://www.npc.gov.cn/flcaw/flca/ff8081817ca258e9017ca5fa67290806/attachment.pdf>.

[2] SAMR, “Announcement of SAMR’s Penalty To Penalise Meituan’s Monopolistic Behaviour In Promoting “Pick One Out Of Two” In The Online Food Delivery Platform Service Market” (??“???”????????????) (released on October 8, 2021), available at http://www.samr.gov.cn/xw/zj/202110/t20211008_335364.html.

[3] Gibson Dunn, “Antitrust in China – 2018 Year in Review” (released on February 11, 2019), available at <https://www.gibsondunn.com/antitrust-in-china-2018-year-in-review/>.

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