FIRST AMENDMENT OF CHINA'S ANTI-MONOPOLY LAW – KEY TAKEAWAYS

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China Antitrust Alert

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After two years of public consultation and two readings at the National People's Congress, the first amendment to the Anti-Monopoly Law of the People's Republic of China (PRC) has been promulgated under the spirit of safeguarding competition and encouraging innovation. The amendment has taken effect on 1 August 2022 (the 2022 Amendments). On 27 June 2022, the State Administration for Market Regulation (SAMR) also published six different draft implementation rules for the 2022 Amendments for public consultation (the Draft Rules). This alert discusses the key changes under the 2022 Amendments.

HIGH-STAKES ENFORCEMENT – A CLEAR MESSAGE

The 2022 Amendments emphasize the fundamental role of competition in China's market economy, and ask for strengthened enforcement through a modernized regulatory system.[1] In recent years, the SAMR has significantly increased enforcement, particularly in the internet sector,[2] which is why it is not surprising that the 2022 Amendments strengthen the penalty regime. For example:

- A business operator that does not have any revenue in the preceding year may now be fined up to RMB5 million for concluding and implementing a monopoly agreement. If the monopoly agreement has not yet been implemented, a fine of up to RMB3 million may be imposed (previously, the fine was capped at RMB500,000). In addition, such business operator's legal representative, person-in-charge, and person who is directly responsible for concluding the monopoly agreement, may now be personally fined up to RMB1 million.
- A business operator who fails to notify the SAMR of a notifiable transaction may be subject to a fine of up to 10% of its sales revenue from the preceding year (previously, the fine was capped generally at RMB500,000), or a fine of up to RMB5 million if the concentration has no anticompetitive effect.
- A business operator that obstructs an investigation of the SAMR may now be fined up to 1% of the preceding year's sales (previously, the fine was capped generally at RMB1 million), or if there are no sales, a fine of up to RMB5 million. An individual who obstructs an investigation of the SAMR may now be fined up to RMB500,000 (previously, the fine was capped at RMB100,000).
- Any fines can be “super-charged” by two to five times, if the violation, its impact, and consequences, are “exceptional."
- Social credit records of the business operator penalized under the law will be updated accordingly (and potentially affect that operator's qualification for public procurement).

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- A violation may constitute a criminal offense, to be investigated pursuant to the relevant law.

MODERNIZING MERGER CONTROL REVIEW

The 2022 Amendments require the SAMR to: (1) improve the classification and grading system for the review of concentration of undertakings; (2) strengthen the review in important industries relevant to national strategies and people's well-being; and (3) improve the quality and efficiency of the review.

As such, the SAMR may review, and also require the parties to notify, a concentration that does not meet the turnover thresholds for notification but where there is evidence that the concentration has or may have the effect of eliminating or restricting competition.[3] The Draft Rules have further proposed increasing the turnover thresholds for filing: (1) the total turnover of all the parties involved in the concentration exceeds RMB12 billion (previously RMB10 billion) globally in the previous financial year, and each of at least two of the parties has turnover in excess of RMB800 million (previously RMB400 million) in China in the previous financial year; or (2) the aggregate turnover of all parties involved in the concentration exceeds RMB4 billion (previously RMB2 billion) in China in the previous financial year, and each of at least two of the parties has turnover in excess of RMB800 million (previously RMB400 million) in China in the previous financial year.

The 2022 Amendments also grant the SAMR power to suspend the review period in merger investigations. This "stop the clock" on the merger control review period occurs when: (1) the requested information has not been submitted; (2) new material circumstances have arisen and warrant further verification; or (3) restrictive covenants to be imposed on the concentration require further evaluation and the business operator has asked to "stop the clock".

SAFE HARBOR – CERTAIN VERTICAL MONOPOLY AGREEMENTS

The 2022 Amendments introduce "safe harbor" relief for certain vertical monopoly agreements. In order to take advantage of the "safe harbor", a business operator must prove that its share in the relevant market is less than the standard set by the SAMR,[4] in addition to other conditions that have yet to be clarified.

The 2022 Amendments abandon the "presumed" state of "illegality" of resale price maintenance and floor resale price restrictions, in that, such vertical agreements can now be excused, if the business operator can prove that such an agreement does not have the effect of eliminating or restricting competition. This approach aligns with decisions issued by PRC courts.

It is worth noting that the 2022 Amendments introduce a new blanket prohibition of a business operator organizing or substantively assisting other business operators in reaching a monopoly agreement.

WHAT TO DO NEXT?

The Anti-Monopoly Law of the PRC has been instrumental in advancing competition in China's market economy and has attracted significant attention from business operators in China and globally, since 2008. The 2022 Amendments are a welcome milestone for antitrust laws in China, and establish the importance of the role of competition in China, through a regulated and modern approach.

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The focus now turns to implementation of the 2022 Amendments, where the Draft Rules are providing guidance. Business operators are encouraged to consult with their antitrust counsel on the implications of the 2022 Amendments (and Draft Rules) to their business operations in China and any strategic plans that they may be implementing, including the undertaking of any preemptive actions.

FOOTNOTES

[1] Decision of the Standing Committee of the National People's Congress on Amending the Anti-Monopoly Law of the People's Republic of China (24 June 2022) available at http://www.npc.gov.cn/npc/c30834/202206/e42c256faf7049449cdfaabf374a3595.shtml.

[2] See Rising Antitrust Enforcement Activities in China's Internet Sector (15 Jul 2021). Interestingly, Article 9 of the 2022 Amendments contains a blanket statement that business operators shall not exploit data and algorithms, technology and capital advantage, as well as platform rules, to engage in anticompetitive conduct.

[3] Notably, the State Council Regulation on Notification Thresholds for Concentration of Undertakings in 2018 already granted this right to review to the SAMR.

[4] The Draft Rules propose a 15% share of the relevant market by both the business operator and its contracting party(ies).

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