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China’s antitrust penalty for Alibaba: reading between the lines

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On 10 April 2021, the State Administration for Market Regulation (SAMR), China’s competition authority responsible for the enforcement of the Anti-Monopoly Law (AML), announced the imposition of CNY 18 billion fine on Alibaba for abusing its dominant position on the e-commerce platform services market. The decision concludes the investigation launched at the end of 2020 and is published just four days after the statement of objections was presented to Alibaba (on 6 April 2021) since the company has waived its right to make comments, formulate defences or request an oral hearing with the competition authority.

When defining the relevant market, SAMR identified significant differences and clear absence of substitutability between online and offline commerce, both from the supply and demand sides. When analyzing whether B2C (business-to-business) and C2C (consumer-to-consumer) transactions should be distinguished, the Chinese competition authority noticed that most platforms support both types of transactions and the shifting between the two models does not entail large costs, which left no justification for separating B2C and C2C segments into distinct product markets. SAMR also did not distinguish between different types of goods traded via online platforms since a single platform supported e-commerce transactions regardless of the type of goods being marketed.

The dominant position of Alibaba, operator of two e-commerce platforms (Taobao and Tmall), was ascertained on the basis of its market share exceeding 50% in 2015-2019 calculated in relation to the total sales value and total revenues realized by Alibaba in the given period. By fixing commission rates, using platform rules and algorithms (for searches and pricing) Alibaba was able to significantly affect the sales of individual traders. The company’s financial and technical resources coupled with the first-mover advantage solidified the importance of Alibaba’s platforms as major market access channels for numerous retailers. As a result, the retailers’ costs of switching away from Alibaba’s platforms were very high: they would lose an established customer base that routinely used Alibaba’s platforms as purchase channels; they would also lose high brand recognition maintained on the platforms through its promotion activities. The lock-in effect for traders and the network effect for potential competitors further complicated new market entry.

SAMR established that in order to strengthen its market position and prevent the development of competing platforms, Alibaba used a combination of rewards and punishments to force/induce the retailers to market their products exclusively on Alibaba's platforms. The anti-competitive effects of these practices were especially strong in relation to retailers with high brand recognition and sales volumes, as exclusivity from their part would grant the platform a competitive edge over its competitors which cannot attract these highly positioned retailers. According to SAMR's findings, written agreements granting exclusivity to operate only on Alibaba platforms, as well as verbal agreements reached with the major retailers led to the same outcome. Another anti-competitive practice established by the competition authority was related to restrictions on retailers to carry out promotional activities on other platforms.

The implementation of the exclusivity was carried out through various types of monitoring of retailers' activities on other platforms, followed by their downgrading or reduction of various rights/privileges on Alibaba's platforms (such as restricting their access to the promotional activities, reducing their visibility in the searches, etc.) in case the breach of exclusivity was detected. These practices have reduced competition between the platforms, as well as competition between the retailers (inter-brand and intra-brand) and prejudiced the interests of consumers by reducing their choice. SAMR also noted negative effects on the efficient allocation of resources and the development of the platform economy in terms of scale and innovation.

As a result, Alibaba was ordered to cancel its exclusivity policies in relation to operating or promoting goods on multiple platforms and was imposed a fine, set at 4% of the 2019 turnover, in the amount of CNY 18 billion (approx. USD 2.8 billion). According to the statements made by the company's executives, neither the penalty nor the removal of exclusivity would materially impact the company's e-commerce business.

In addition to the infringement decision, SAMR issued an "administrative guidance letter" which includes more far-reaching instructions to Alibaba that have not been the subject of the present investigation. For instance, SAMR requested Alibaba to set up a robust anti-monopoly compliance mechanism, both internal and external; to notify all concentrations that fall under the AML notification thresholds; to improve the complaints handling mechanism; to report on the implementation of these measures to SAMR on the early basis for the next three years.

Since it is highly unlikely that SAMR's decision will be appealed, it currently sets the precedent for all e-commerce platform operators in terms of the exclusivity obligations that could not be imposed on the retailers. The decision also continues the wave of increased antitrust scrutiny in the digital economy sector where China intends to discipline its largely privately-owned tech giants. One of the objectives of these antitrust interventions is to curb monopolistic practices and another is to encourage cooperation among the Chinese tech giants to foster innovation and development of the digital economy.

This approach has already produced the first results as rival e-commerce giants Alibaba and Tencent have agreed on launching Taobao Deals app on Tencent's social media platform WeChat, which would allow Alibaba's retailers to reach out to WeChat users and accept payments through WeChat Pay operated by Tencent. As in other economic sectors, the enforcement of the AML is guided by the industrial policy priorities such as building digital eco-systems and the effectiveness of other governance mechanisms that would curb the monopolistic practices by the "digital gatekeepers". Following the Alibaba decision, SAMR jointly with the Cyberspace Administration of China and the State Taxation Administration has summoned 34 tech firms and urged them to bring their commercial practices in compliance with AML.

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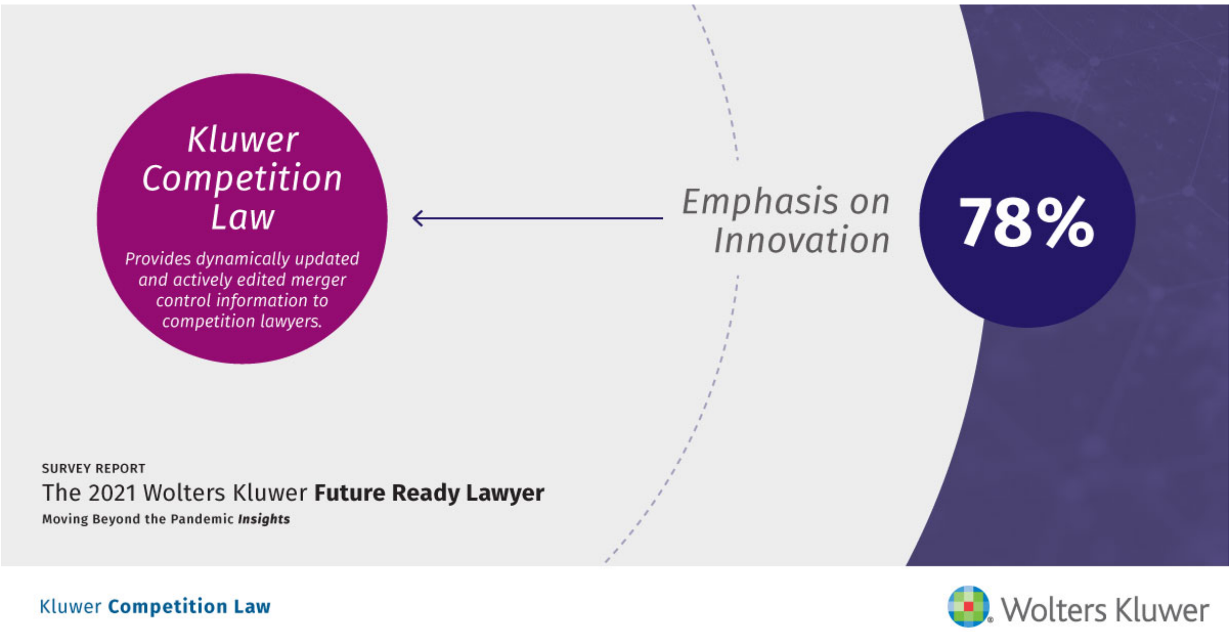

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