

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2021 - China

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The year of 2021 was very dynamic for China's competition law. It was marked by the adoption of the new competition legislation, accelerating antitrust enforcement in the digital economy, breaking new records in terms of fines and merger prohibitions, re-organization of the competition authority, and promotion of stronger antitrust compliance programs.

Anti-monopoly legislation and enforcement for online platforms

The Anti-Monopoly Commission of the State Council has started 2021 by publishing the Anti-Monopoly [Guidelines](#) for the Platform Economy. It clarified the principles and methodology for defining the relevant market and determining the dominant position of online platforms using the concept of "essential facility". The Guidelines elaborate on the specifics of the anti-competitive conduct in the digital environment such as applying differentiated pricing or other trading conditions using big data and algorithms, screening the consumers' ability to pay, consumption preferences, purchasing habits or requiring the online retailers to market their goods or services on a single platform thus restricting inter-platform competition.

The Chinese competition authority, the State Administration for Market Supervision ([SAMR](#)) followed up by starting an [investigation](#) into Meituan's practice of imposing exclusivity obligations on its online retailers. The investigation was concluded in October and resulted in a CNY 3.4 billion fine imposed on Meituan for abuse of dominant position with an [order](#) to refund exclusive partnership deposits to online retailers and file annual compliance reports to SAMR for the next three years. The SAMR also moved against China's tech giant Alibaba by imposing CNY 18 billion [fine](#) for [abuse of dominant position](#) on the e-commerce platform services market. According to the investigation report, Alibaba was applying punitive measures to online retailers for operating online stores or running promotional campaigns on Alibaba and its rival platforms at the same time.

Ongoing reform of the Anti-Monopoly Law

The process of amending the 2008 Anti-Monopoly Law (AML) was accelerated in 2021 with the [proposed amendments](#) submitted to the Standing Committee of the National People's Congress in October. Another round of [public consultation](#) was held between October 23 and November 21. Essentially all areas of competition law enforcement were subjected to changes aimed at increasing the efficiency of AML enforcement, encourage compliance and deter potential infringements.

In the area of anti-competitive agreements, the amendments introduced penalties for individuals who act as legal representatives, managers or employees directly involved in a cartel implementation or cartel facilitation. At the same time, the draft bill introduced "safe harbors" exempting those agreements where the parties do not possess significant market power. It also provided for a possibility to exempt resale price maintenance agreements if the parties manage to demonstrate the absence of anti-competitive effects. In relation to abuse of dominant position, the amendments stipulate that undertakings in the digital economy shall not exclude or restrict competition by utilizing big data and algorithms, as well as other types of technology and platform regulations. In the domain of merger control, the amendments introduce "stop-the-clock" mechanism that would allow SAMR to suspend the ongoing merger assessment if the notifying parties fail to submit necessary documents or materials or if newly discovered factual circumstances may have a major impact on the merger review. The draft bill also increases penalties for merger-related infringements such as failure to notify, which could be penalized with fines up to 10% of annual revenue if the implemented concentration produced anti-competitive effects. Most significantly, the amendments introduced a ["general aggravation clause"](#) that would allow SAMR to raise the fines above statutory limits in cases where the anti-competitive infringements are particularly serious.

Institutional re-organization

On 18 November 2021, China inaugurated the Anti-Monopoly Bureau (AMB) as an autonomous entity, now separated from the SAMR. This raised the administrative rank of the competition authority from the department within SAMR to a distinct entity with a deputy ministerial rank. The newly established agency will feature three [organizational units](#): (1) the Competition Policy Coordination Division, charged with the task of drafting anti-monopoly regulations and guidelines; (2) [AML Enforcement Division I](#) responsible for AML enforcement in the domains of anti-competitive agreements and abuse of dominance; (3) [AML Enforcement Division II](#) will carry out merger control. The description of the responsibilities of the AMB divisions explicitly mentions the field of digital economy and the anti-competitive abuses of the intellectual property rights pointing to the high importance of the aforementioned field for the AML enforcement. The Competition Policy Coordination Division is equally expected to review the case handling activities of the two enforcement divisions, which amounts to an establishment of the internal quality checks system.

The new agency will be headed by [Gan Lin](#), who previously occupied the post of

deputy director general of the SAMR. The head of China's Anti-Monopoly Commission, Wang Yong, **emphasized** that the organizational reform reflects the increased importance that the Central Committee of the CPC and the State Council attach to the AML enforcement. Besides gaining a higher administrative rank, the AMB will be able to increase its personnel count.

Merger control

The year of 2021 was also notable for the developments in the merger control practice of the SAMR. The antitrust enforcer **announced** the imposition of **fin**es in numerous **cases** concerning failure to notify economic concentrations under AML. It should be noted, however, that the current AML provisions limit the penalties for failing to notify a concentration to a fixed sum of CNY 500,000. Since the SAMR did not ascertain the existence of anti-competitive effects in **these cases**, the imposition of fines served as a reminder to the undertakings concerned about the increased importance currently attributed to merger control.

One case stands out, however, since in addition to the penalties, the SAMR ordered the merging parties to restore competition on the relevant market. Thus, on 24 July 2021, the competition authority **fin**ed Tencent for its failure to notifying the acquisition of China Music Corporation in 2016. In addition to a fine of CNY 500,000, SAMR imposed a **number of remedies** on Tencent requiring the latter not to enter into new exclusive music rights licensing agreements with the licensor and to rescind the existing ones. The case represents the single instance of *ex post* measures ordered in relation to the implemented concentration that did not undergo *ex ante* merger control scrutiny.

The year of 2021 also saw the first merger prohibition decision issued by SAMR in relation to the domestic undertakings. The only other merger prohibitions in *Coca Cola/Huiyuan* (2009) and *Maersk/MSC/CMA* (2014) cases concerned acquisitions involving foreign companies. On 10 July 2021, SAMR announced its **decision** to ban the merger between Huya Inc. and Douyu International Holdings Limited. Huya was incorporated in the Cayman Islands in March 2017 and listed on the New York Stock Exchange. It was controlled by Tencent. Douyu was incorporated in the Cayman Islands in January 2018, listed on NASDAQ and jointly controlled by Tencent and Douyu founders. According to the SAMR decision, Tencent had a market share exceeding 40% in upstream online games operation services, making the company a market leader. Huya and Douyu had their aggregate market share exceeding 70% in downstream online games broadcasts, ranking first and second on the relevant market. The proposed concentration would strengthen Tencent's dominant position in China's online games live broadcast market and would create an ability and incentive to implement certain exclusionary practices. The commitments proposed by the merging parties were insufficient to alleviate anti-competitive concerns and the merger was prohibited.

Localization of the antitrust compliance programs

Besides the SAMR at the national level, the AML enforcement is carried out by the local (provinces, autonomous regions, and municipalities) AMRs. In 2021, local AMRs in Sichuan, Jiangsu, Hunan, Shaanxi, Tianjin, have published a series of guidelines concerning AML compliance programs to be implemented by the businesses under their supervision. Overall, these local guidelines further substantiate the provisions of the State Council's Antitrust Compliance Guide for Business Operators, which mandates the establishment of antitrust compliance systems by the enterprises.

These local antitrust compliance guidelines clarify certain provisions of the Antitrust Compliance Guide, such as whether certain agreements, decisions or concerted practices constitute AML infringements and what are the factors to consider when ascertaining the existence of market power. The local guidelines also target specific industries and address antitrust compliance in relation to most typical commercial practices therein. For example, Sichuan and Hunan guidelines address market conduct of public service operators, construction industry and digital platforms. Shaanxi AMR accorded special attention to the pharmaceuticals sector. In addition, local guidelines cover the compliance issues related to the exchange sensitive information among competitors, which aim to provide undertakings with useful guidance and this prevent potential AML infringements.

Entering new era of antitrust enforcement in 2022

The above-mentioned highlights of 2021 suggest that stricter AML enforcement on domestic markets is set to become a “new normal” for China’s economic statecraft and market regulation. The decisive move against the anti-competitive practices of the online platforms, which have been allowed to accumulate substantial market power due to lax regulatory supervision and almost largely ineffective merger control, signals the authorities’ determination not to allow further market power accumulation by the privately owned digital economy enterprises. The ongoing revision of the AML and institutional re-organization of the competition authority also aim to further “sharpen the teeth” of the antitrust watchdog.

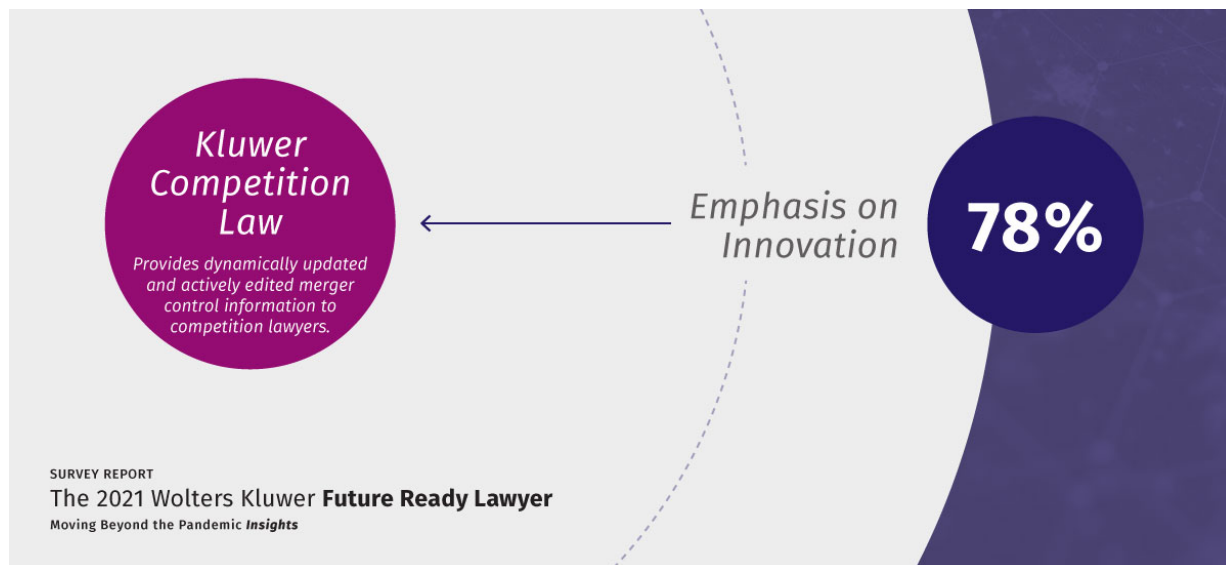
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