

# Kluwer Competition Law Blog

## Chinese Antitrust in August 2021

Adrian Emch (Hogan Lovells, China) · Saturday, September 11th, 2021

Traditionally August isn't the busiest month for Chinese antitrust enforcement. This year is no exception. But that doesn't mean that Chinese antitrust regulators weren't active. On the contrary. It seems many of them used the 'summer lull' to work on a specific project: issuing antitrust compliance guidelines.

Indeed, last month, three provincial offices of the State Administration for Market Regulation (SAMR) – China's antitrust authority – each released their own antitrust compliance guidelines. On 10 August the Administration for Market Regulation (AMR) in Tianjin issued its guideline and, on 14 and 17 August, the Shaanxi and Jiangsu AMRs issued drafts of their respective guidelines.

### Local guideline drafting

These three new guidelines raise the total of antitrust guidelines by provincial AMRs (including AMRs of cities under direct administration such as Shanghai) to 13. Several of these local AMRs have issued more than one guideline. For example, Shanghai released a general antitrust compliance guide in December 2019 and doubled up with a local antitrust compliance 'standard' in November 2020.

The various AMR guidelines are different in some aspects, but similar in others. From some peculiar drafting styles and content, we can see that some guidelines have 'inspired' others. What they've got in common is that they focus both on the substance of antitrust law and on procedure – namely how to set up an effective antitrust compliance system within a company. But the degree to which a guideline focuses on substance v. procedure varies considerably across guidelines.

In terms of substance, a number of guidelines contain clarifications on antitrust violations or risks, such as on the exchange of competitively sensitive information between competitors, which go beyond the provisions of the AML and its implementing regulations and thereby provide companies with some useful guidance.

That said, a key focus for most guidelines is procedural, in particular how to set up a compliance system. Let's discuss this below.

The latest general guideline issued – the draft by the Jiangsu AMR – is quite comprehensive. So if you want to read only one of the guidelines, then the Jiangsu draft is a good option. The text is

available only in Chinese (see [here](#)), but the first of the two Shanghai guidelines has an English version, and some graphics (see [here](#)).

### **Setting up a compliance system**

For most foreign companies, the recommendations in the guidelines on how to set up an antitrust compliance system wouldn't be very newsworthy. They include setting up a system to identify, assess and then 'handle' antitrust risks and feature specific measures such as setting up an antitrust compliance control department, top management commitment to antitrust compliance, regular reporting and trainings, etc.

Perhaps the largest impact of these compliance recommendations may be on domestic companies. Not all – actually, perhaps very few – of the domestic companies in China had antitrust compliance on their radar screen in the past. Anecdotally, a large Chinese company in earnest told us a few years ago that the Anti-Monopoly Law (AML) only applies to foreign companies... Now, the antitrust guidelines being issued over the past two years are bringing about a change in the attitude among local companies. At the very least, this change will have an indirect effect on foreign investors, as they can expect their local partners to have more appetite (and budget) for antitrust compliance.

### **Prevention of antitrust violations**

Article 1 of the AML sets out quite a large number of goals that the law is meant to achieve. One of them is to prevent anti-competitive practices from occurring. This is part of the background why SAMR and the local AMRs have issued their guidelines.

As part of this preventive effort, many of the local AMRs offer consultation mechanisms in their guidelines. The general idea is that a company can contact the local AMR and ask if specific types of conduct it has engaged in or plans to engage in, are in compliance with the AML. There are differences across guidelines, but in many localities, the consultation can be made on a no-names basis (for example through outside lawyers) or directly in the company's name. The quid pro quo for coming forward with a consultation request is that, generally, the authority being consulted won't act upon the information it receives during the consultation (though it could act if it obtained the same information from another source, for example, a complainant).

It takes a leap of faith to come forward in one's own name. But the experience in consulting local AMRs we've made for clients is positive, so far.

### **Regulatory competition**

The bigger question – which you've surely asked yourself – is why does each province need to have its own antitrust compliance guideline? Especially when SAMR itself issued a guideline in September 2019, which applies throughout the country.

The answer may be that, as competition authorities, the AMRs take competition very seriously – including among themselves.

Back in 2018, SAMR made a general delegation of antitrust enforcement powers to the provincial AMRs. Having their own enforcement powers, a certain degree of competition between AMRs started to take place, quite naturally. Who brings more cases? Who has the more high-profile cases? This kind of competition between antitrust regulators is quite normal – we also see it on an international level.

Perhaps more interestingly, this dynamic has gained rapid pace since the top leadership of the country has started focusing on the AML to regulate corporate behaviour. A number of speeches from Q4 2020 onwards have propelled antitrust enforcement into the national spotlight. With this top-down backing, it has become much more rewarding for local AMRs to issue their guidelines to gain profile, among the general public and the country's leadership.

At the moment, there are ongoing discussions about beefing up the size of the antitrust enforcement teams – mainly at the central level – but it's distinctly possible the local AMRs are trying to position themselves to get a slice of the cake (that is, grow their antitrust teams or even obtain new enforcement powers, for example in the merger control space).

### **A new round?**

As long as the 'fundamentals' don't change – that is, the government's decision on beefing up antitrust teams hasn't been done, and antitrust enforcement is popular among citizens and the top leadership – we should expect this dynamic to continue. In particular, it's likely more provinces will follow with their own antitrust compliance guidelines.

However, we're not facing mere 'static' competition, but actually see 'innovation' happening too: in February 2021, SAMR issued an antitrust guideline for the platform economy. And soon after, the crackdown on internet companies – including vigorous antitrust enforcement – started.

Now, last month – on 24 August 2021 – the Zhejiang AMR released its own Competition Compliance Guideline for Platform Companies (see [here](#)).

What we need to bear in mind is that the Zhejiang AMR was the first AMR to issue a general antitrust compliance guideline back in July 2019. So, if the past is a benchmark, then we might be at the beginning of another round of local compliance guidelines, at least among the localities where online platforms are headquartered.

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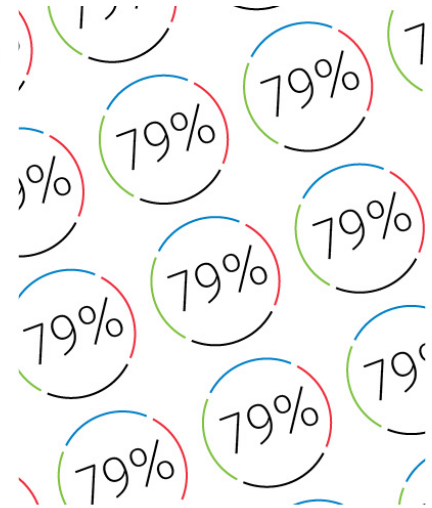
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