Kluwer Competition Law Blog

Chinese Competition Law 2.0

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Chinese antitrust is going through what are likely the most important changes since its inception: an amendment of the Anti-Monopoly Law and the establishment of a new enforcement body.

Anti-Monopoly Law amendment

On 23 October 2021, the Standing Committee of the National People's Congress – China's legislature – published a draft revision of the Anti-Monopoly Law (**AML**) after its first reading (**Draft**).

The AML has remained unchanged since it came into effect in 2008. When the revision of the AML was put on the legislative agenda of the current antitrust agency – the State Administration for Market Regulation (**SAMR**) – in 2019, the goal was to do a "minor revision." In other words, the idea was to make very few, punctual changes to the AML text, while leaving the overall structure and the core principles intact.

However, the world has changed since then, in particular since the Politburo called for "reinforcing anti-monopoly and preventing capital from expanding in a disorderly fashion" in December 2020. From then onwards, the country's top leadership has seemingly embraced antitrust and has used it as one of the tools in its crackdown on the Internet sector. No wonder then that the Draft increasingly looks more like a "major revision" – if not by the number of changes, then at least in terms of their impact.

In three areas, in particular, we think the Draft will have a big impact on companies: the scope of the anti-competitive agreements prohibition; the merger control procedure; and the sanctions for anti-competitive conduct.

Agreements

In the agreements area, the Draft would extend the cartel prohibition to intermediaries who do not themselves operate in the affected relevant market. For example, a consultancy organizing a cartel for its customers, or a joint distributor for a number of competing manufacturers, would also be caught. This 'hub and spoke' constellation would be sanctioned in the same way as a direct

agreement among cartelists.

The Draft also attempts to recast the burden of proof for the anti-competitive agreements analysis, but does not seem to be fully coherent in that attempt. On the one hand, the Draft proposes a safe harbor based on market shares (to be set by the antitrust authority). If the market shares by the parties to the agreement are below the safe harbor, then the agreement would be presumed valid. This would apply to both horizontal and vertical agreements. Hence cartels would be presumed legal if the market shares of the cartelists were small enough.

On the other hand, the Draft clarifies that a company accused of resale price maintenance (**RPM**) – *i.e.*, a supplier fixing the resale prices of its distributors – can exempt its conduct if it manages to prove that the RPM agreement does not have anti-competitive effects. In a way, the Draft attempts to 'reverse' the findings by the Supreme People's Court (**SPC**) in the *Yutai* case (discussed in last month's China Antitrust Column). In *Yutai*, the SPC held that a showing of anti-competitive effects is required for holding RPM conduct to be illegal, but the antitrust agency can presume that such effects exist. Now, the Draft states that it is the company under investigation/the defendant in a private lawsuit that needs to prove the *absence* of anti-competitive effects, not the antitrust agency or plaintiff to prove their existence.

The interplay between the new sets of provisions raises some questions, as market share is usually a key parameter for assessing whether a type of conduct has anti-competitive effects. Would RPM generally not be illegal if the company imposing it has a market share below the safe harbor, but would be presumed illegal above?

In the abuse of dominance provisions, there isn't any reference on who needs to prove anti-competitive effects. Does this mean there's a different mechanism at play and it would be on the antitrust agency and plaintiff to prove the existence of these effects?

Merger control

In the merger control area, significant changes are underway. First, the Draft would change the basic premise of the Chinese merger control regime – namely that only transactions above the filing thresholds are subject to merger review. Now, the Draft stipulates that the antitrust agency is empowered to "call in" transactions below the thresholds and impose remedies if it has reason to believe the transactions could have anti-competitive effects.

This below-the-thresholds option was already contained in a State Council regulation implementing the AML from 2008. The lower rank of the norm (regulation) may have given the option less "authority" and, in any event, the regulation does not provide the antitrust agency the explicit legal basis to impose remedies. Furthermore, the 2008 implementing regulation requires the antitrust agency to initiate the investigation based on a specific procedure which however has never been formulated in the rules. It is perhaps for these reasons that the antitrust agency has never actually relied on the below-the-thresholds option, at least not in public decisions. Therefore, enshrining this option in the AML itself could be a significant upgrade of the agency's enforcement powers. Second, unlike an earlier draft AML amendment version circulated by SAMR in early 2020, the Draft does not contain any guidance on the concept of a "controlling right." This is a key concept for assessing whether a given transaction is subject to merger review. Unfortunately, there is no definition in the AML currently in effect. And the Chinese antitrust

regulators have refrained from defining it or providing sufficiently detailed guidance. On several occasions, the reason adduced by the regulators was that the definition should be enshrined in the AML itself. Well, here comes the opportunity, but the Draft says nothing – clearly, a missed opportunity!

Third, the Draft puts forward a new 'stop-the-clock' feature for merger review. The antitrust agency would be able to suspend the timeline for the review procedure if the parties do not provide the information or materials requested; if there are new circumstances or new facts with a significant impact on the procedure; or – with the parties' consent – if the agency needs to assess (*e.g.*, market-test) remedies proposed by the parties. Although many antitrust jurisdictions internationally have the 'stop-the-clock' feature in their tool box, this would be a departure from China's past practice which has been based on fixed timelines. Given that it will be the antitrust agency – not the parties – who ultimately determines whether the conditions for stopping the clock are met, the 'bargaining power' will likely further tilts towards the agency. Therefore, in our view, the inclusion of this feature will inject more uncertainty into the merger review process.

Sanctions

The largest impact of the Draft lies in the area of sanctions for anti-competitive conduct. The Draft raises the level of sanctions very considerably and potentially across the board.

The fines for concluding and implementing anti-competitive agreements or engaging in an abuse of dominance remain at 1-10% of the perpetrator's annual revenues. The same fine will be imposed on the non-market players who set up an illegal agreement (such as the 'hub' in a hub-and-spoke setting). For those who conclude but do not implement an anti-competitive agreement, the fine level is raised to RMB 3 million (around USD 470,000) from RMB 500,000 (around USD 80,000).

In addition, the legal representative, responsible manager, or directly involved employee faces personal liability: fines of up to RMB 1 million (around USD 160,000). This is the first time that individuals can face sanctions for substantive infringements of the AML (procedurally, non-cooperation in investigations is already sanctionable now). Being held personally liable may well prove to be a game-changer in antitrust enforcement in China.

The fines for failing to file reportable transactions under merger control rules are also increased significantly. Currently capped at RMB 500,000 (around USD 80,000), the fines will be up to 10% of annual revenues if the transaction is found to have anti-competitive effects or RMB 5 million (around USD 780,000) if it does not.

For obstruction of an investigation, the fine on companies is increased from up to RMB 1 million to a maximum of 1% of annual revenues.

Other important changes include the possibility for the antitrust agency to take into account the fact that illegal gains are hard to calculate when setting the exact level of the fine (within the statutory limits), and the possibility for the Protecturate's office to file class-action type of civil lawsuits to seek compensation for damages resulting from anti-competitive conduct.

Among the most far-reaching changes are two further sanctioning rules: on the one hand, the Draft proposes to add a new 'general aggravation clause' which would allow the antitrust agency to

impose a fine two to fives times the statutory limits if the situation underlying the AML infringement or the outcome is particularly serious, or the impact is particularly malicious. Taken literally, this could mean that the maximum fine for an implemented anti-competitive agreement, abuse of dominance, or anti-competitive M&A deal without a filing could be as high as 50% of annual revenue!

On the other hand, the Draft states that an AML sanction could be recorded in the perpetrator's social credit information and be disclosed to the public. Given that the government is in the process of building and expanding the social credit system, this sanction may prove to have a very considerable deterrent effect on companies and individuals alike.

New antitrust authority

On 15 November 2021, news broke out that Gan Lin was appointed Head of the National Anti-Monopoly Bureau (**NAMB**) and reports indicated that the NAMB would have vice-ministerial status. Since Mrs Gan at the same time retains her position as vice minister of SAMR, the news were interpreted in the sense that a new antitrust agency with higher status is being set up.

Official confirmation is still pending, but based on the current information, it looks like the NAMB will be a semi-autonomous body *under* SAMR, rather than a smallish division fully integrated *within* SAMR. The National Intellectual Property Administration and the National Medical Products Administration are two bodies under SAMR with semi-autonomous status under SAMR, which could serve as reference for the creation of the NAMB.

At the same time, the NAMB is likely to have a larger staff than the current Anti-Monopoly Bureau within SAMR. Back in October 2021, SAMR published job descriptions for 18 new hires for the antitrust team. We can expect that these new hires will transfer to the NAMB. It's also possible that the secondees currently dispatched to the Anti-Monopoly Bureau from SAMR's local branches transfer to the NAMB. The talk in town is that further officials from other administrative bodies such as the Ministry of Commerce or the National Development and Reform Commission may be seconded to the NAMB. However, it remains to be seen how much bigger than current levels the NAMB will be on a permanent basis. A large increase in staffing levels may require further political sign-off.

In any event, the creation of the NAMB is a step in the right direction, as the Chinese antitrust enforcement team may potentially become more autonomous in its decision-making (at least at the technical level).

Next steps

The legislative amendment and the agency upgrade represent the most far-reaching changes since the AML came into effect over 13 years ago. It's a big reset. "Competition law 2.0" if you want.

For companies doing business in China, they mean that engaging in anti-competitive conduct will likely become much more costly (due the significantly higher fines and more stringent sanctions) and more likely to be investigated (due the increased human resources available for antitrust

enforcement).

Therefore, now is a good time for increased antitrust compliance efforts. Companies are well-advised of handling any antitrust compliance risks ahead of the entry into force of the amended AML and before the NAMB starts its first enforcement campaign.

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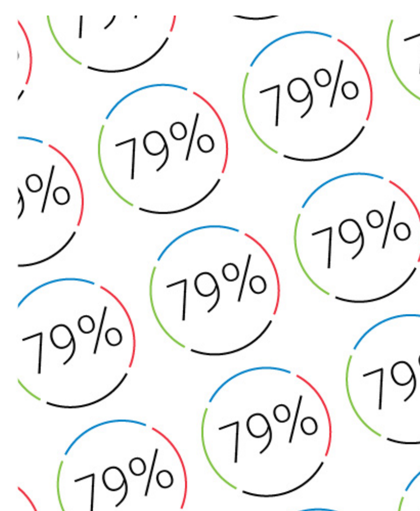

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