

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2022 – China

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The year of 2022 was marked by the first [amendment](#) of China's Anti-Monopoly Law (AML) since its entry into force in 2008 and the gradual shift of the enforcement focus towards the objectives of the unified national market.

Amendment of the Anti-Monopoly Law and other legislative developments

First, the AML amendment incorporated the “fair competition review system”, under which the administrative authorities must conduct *ex ante* review of their regulations governing the economic activities of market participants to ensure that such regulations do not restrict market competition. Until the amendment, the “fair competition review system” functioned since 2016 on the basis of the State Council's [Opinions](#) on Establishing a Fair Competition Review System in the Development of the Market Economy, further substantiated in the 2021 [Notice](#) on the Implementation of the Fair Competition Review System issued by the State Administration for Market Regulation (SAMR), the National Development and Reform Commission, the Ministry of Finance, the Ministry and Commerce, and the Ministry of Justice. The elevation of the legal hierarchy of the “fair competition review system” indicates an increased attention of the central government to the local rulemaking, which may preserve regional market barriers and prevent the establishment of the [unified national market](#).

Second, the AML amendment has a “digital touch” – it added the encouragement of innovation to the multiple objectives of the law and introduced several elements from the 2021 [Guidelines](#) for Anti-Monopoly Enforcement in the Field of Platform Economy. The amended law explicitly prohibited utilizing data and algorithms, technology, capital advantages, or platform rules to engage in anti-competitive practices, thus aiding antitrust efforts in the rapidly changing platform economy.

Third, in the domain of anti-competitive agreements, the amended law embedded the long-awaited clarifications that have been previously developed in the enforcement practice. Thus, the AML amendment explicitly banned “cartel facilitation”, namely organizing or providing material assistance to the undertakings to reach anti-competitive agreement. It also provided for a possibility to exempt the agreements of minor importance and introduced the “safe harbor” rules that are to be specified by the AML enforcement agency.

Fourth, in relation to merger control, the current [notification thresholds](#) were set by the State Council at CNY 10 billion and CNY 2 billion for worldwide and domestic turnovers respectively. However, pursuant to the amended AML, even if a concentration does not reach the notification thresholds, the AML enforcement authority may still require the parties to notify the transaction, as long as it “may have an effect of precluding or restricting competition”. Furthermore, the amendment significantly increased the amount of fine for the failure to notify economic concentrations for merger review: from the previously applied maximum of CNY 500,000, the undertakings now can be fined up to CNY 5 million or 10% of their annual turnover.

Besides the amendment of the AML itself, the year of 2022 was marked by the enhanced rule-making activity of the AML enforcer. On 27 June 2022, the SAMR published the drafts of six implementing regulations concerning (1) anti-competitive agreements, (2) notification of economic concentrations, (3) assessment of concentrations, (4) abuse of dominant position, (5) abuse of intellectual property rights, (6) abuse of administrative power to restrict or exclude competition.

The Supreme People’s Court (SPC) also revealed its plans to significantly revise the 2012 Judicial Interpretation concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct. The [draft](#) published for public comments clarified the standard of proof in determining the relevant market, identifying monopoly agreements, market dominance, as well as other procedural issues. To guide the lower courts in the application of the AML, the SPC has published a batch of ten [typical antitrust cases](#). These cases have clarified several AML concepts such as calculating the annual turnover for the purposes of imposing an administrative penalty, the identification of the concerted practices, relationship between public and private AML enforcement, and the judicial review of the infringement decisions and fines issued by the AML enforcement authorities.

Institutional developments

In 2022, China continued the institutional reform of the AML enforcement authorities by separating the Anti-Monopoly Bureau (AMB) from the SAMR, by elevating the former to a deputy ministerial level agency. Xu Xinjian, the director of the department of laws and regulations within the SAMR, was appointed as the first [anti-monopoly director](#), thus concurrently heading the newly established AMB. This combination of the leadership functions within SAMR/AMB as well as the fact that the AMB still doesn’t have its own website suggests that currently there is little institutional independence between the two agencies.

The year of 2022 also witnessed the division of competences between the central SAMR and the local AMRs in relation to merger control. The SAMR [Announcement](#) on Delegating the Anti-Monopoly Reviews of Certain Cases of Concentrations entrusted five provincial AMRs (Beijing, Shanghai, Guangdong, Chongqing, and Shaanxi) to review merger cases that meet the simplified procedure standard and are closely connected with the designated provinces. At the same time, the SAMR has reserved the right to revoke this delegation of authority in relation to certain cases, for example when there are third-party objections during the public consultation period. The Shanghai AMR was the first AMR to publish more detailed [guidelines](#) to clarify notification thresholds, applicable procedures and merging parties’ obligations.

Emerging enforcement practices

During a [teleconference](#) held by the provincial AMR directors on 19 August 2022, the participants emphasized the importance of the “fair competition review system” and the prohibition of the abuse of administrative power, which were regarded as the rallying points for constructing the unified national market. The implementation of the “fair competition review system” has been uneven among various provinces and municipalities. For example, Nanjing has utilized high-tech artificial intelligence and big data to launch the fair competition review monitoring and evaluation system, while Shandong, Anhui, Sichuan and Chongqing adopted a third-party assessment approach to improve the quality of the internal review.

The SAMR, on the other hand, has stepped up the enforcement against the anti-competitive abuses of administrative power. In 2022, the competition agency has announced a total of 55 cases, where almost 70% concern the instances where the administrative authorities have required undertakings to exclusively deal with, purchase, or use the commodities supplied by the designated undertakings. Although Article 61 of the amended AML provides for the disciplinary liability of the responsible officials, no such sanctions were imposed in practice as the investigating AMRs concluded these cases by offering recommendations to the relevant superior departments about the instances of non-compliance by their subordinates.

In 2022, the AML enforcement in the field of digital economy concentrated on the failure to notify concentrations for merger review but without any [notable cases](#) concerning abuse of dominant position as marked the year of 2021. The largest administrative penalty of the year was imposed by Zhejiang AMR in an [abuse of dominance case](#), where the total of the penalty and confiscation of illegal proceeds reached CNY 22.46 million. In this case the public utilities company required real estate undertakings to pay unreasonable fees for the pipeline construction works. Beside this case, other AML investigations were also targeting the utilities sectors, particularly water and gas supply.

What to expect from the AML enforcement in 2023?

The overall number of infringement decisions and the amounts of penalties imposed by the AML enforcement authorities in 2022 were both lower than in 2021, which may be due to a more cautious enforcement approach during the transition period to the amended AML. After addressing the anti-competitive practices of the [online platforms](#) and prosecuting [tech companies](#) for failure to notify their concentrations in 2021, the AML enforcement focus appears to be shifting towards the objectives of the unified national market. As a result, the investigations of the anti-competitive abuses of administrative power and the anti-competitive conduct of public utilities and other companies enjoying the status of local monopolies are likely to continue.

The amended AML has also ushered a new actor to the AML enforcement stage – the people’s procuratorates. Building on the experience of the pilot program authorizing procuratorates to start public interest litigation on behalf of unidentified persons in the field of environmental law and consumer protection, the Chinese legislators have explicitly provided for the public interest litigation in the amended AML. The Supreme People’s Procuratorate followed up with a [notice](#) urging the people’s procuratorates to actively carry out public interest litigation in the anti-monopoly field, with special focus on the Internet, public utilities, medicine and other areas of

people's livelihood. The people's procuratorates are expected to supplement the work of the SAMR and local AMRs, which will require coordination between the administrative enforcement and public interest litigation.

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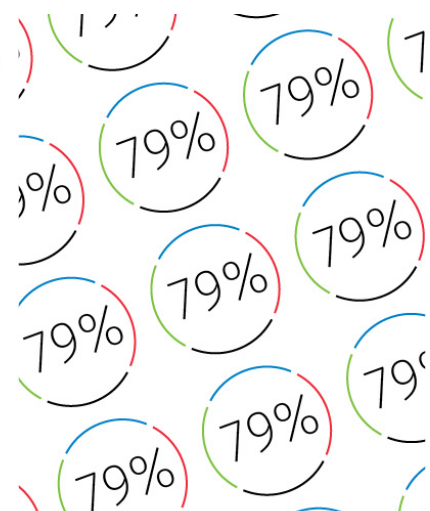
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This entry was posted on Monday, December 12th, 2022 at 8:00 am and is filed under [China, Competition Law 2022](#)

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