

Asia

Analyzing Nascent Competitor Acquisitions Rationally

By Frances Xu & Howard Chan



2021, A New Era of Chinese Antitrust Law

By Frances Xu & Howard Chan¹

China Antitrust Enforcement Round-Up

Ever since the 18th National Congress of the Communist Party of China (“CPC”), China has gradually bolstered competition policy and enforcement as a core pillar of economic development.

In December 2020, during the annual Central Economic Work Conference between the Central Committee of the CPC and the State Council, the “strengthening of the antitrust” was highlighted for the first time as one of the key economic objectives for the country in the coming year.

The Conference stated that antitrust is an intrinsic requirement for promoting the development of the economy. In particular, the Conference focused on antitrust enforcement in relation to digital platforms, and the need to address issues such as the finding of dominance in relation to platforms, managing the collection of data, and protecting consumer rights.

In the spirit of enhancing antitrust scrutiny, the amendment of the Anti-Monopoly Law (“AML”) has become a priority on the legislative agenda of the Standing Committee of the National People’s Congress in 2021. We predict that the amendment will likely expand potential liability for antitrust infringements, and will also increase the powers and capabilities of SAMR as the antitrust regulator.

Spotlight on Platform Economies

The digital sector has thrived in China over the past decade. Digital technologies including big data, the internet of things, and artificial intelligence have become inseparable from all areas and segments of the Chinese economy.

In the past, the Chinese regulator, the State Administration for Market Regulation (“SAMR”) has taken a “tolerant” approach in order to promote innovation and growth in the digital sector. However, as the sector matures, this position seems to have changed, in particular:

- Conduct that is potentially anti-competitive will be appropriately identified and investigated, including newer forms of conduct prevalent in the digital sector such as “choosing one between two” restrictions in platform contracts, use of data analytics to engage in discriminatory or predatory pricing, and self-preferencing conduct. In particular, SAMR is keen to more effectively identify dominance so that it can adequately act against potentially abusive conduct. The regulator is also reported to have considered breaking up some of the internet giants on the market, and this remains a possible course of action.
- Merger control will be used to more effectively monitor and deter “disorderly” over-expansion of capital. In 2020, SAMR made clear for the first time that transactions involving “variable interest entity” (“VIE”) structures should be notified for merger

¹ Kewei Law Firm and Herbert Smith Freehills, respectively.

control review. In December, the regulator further required Internet companies to conduct internal investigations to self-report any previous failures to file. SAMR is also believed to be considering lowering the notification thresholds for transactions involving the digital economy.

In November 2020, SAMR published its draft Antitrust Guidelines for the Platform Economy Industry (the “Platform Guidelines”) for consultation, reflecting the importance of antitrust enforcement in this sector. The structure of these draft Platform Guidelines broadly followed the framework of the AML, providing sector-specific guidance in relation to each of the key aspects of the law: relevant market definition, prohibition of monopoly agreements, prohibition of abuses of dominance, merger control and abuses of administrative power. In each area, SAMR sought to provide commentary on relevant factors to be taken into account that are unique to platform economies, such as the impact of network effects, multi-sided markets and control over vast amounts of data.

SAMR demonstrated its determination in enforcement against the digital sector, first by imposing fines against three internet companies for historic failures to file merger control filings for transactions involving VIE structures; and then by announcing a formal investigation into Alibaba for various alleged infringements, including its “choosing one between two” restrictions.

The Platform Guidelines were published in their final form in February 2021, with some significant changes against the earlier draft. These include:

- The final Platform Guidelines discard the proposed mechanism for SAMR to bypass the market definition exercise in abuse of dominance cases where it is difficult or impossible to define the relevant markets.
- The final Platform Guidelines retain from the draft version the discussion relating to “choosing one between two” restrictions in platform contracts and the use of data analytics to engage in discriminatory pricing as examples of abusive conduct, and further list out relevant factors in determining whether the conduct amounts to an infringement.
- In relation to predatory pricing, the final Platform Guidelines include a number of circumstances where this may be acceptable within a reasonable period of time.
- In relation to refusal to deal, the final Platform Guidelines drop the reference to data as potentially being an essential facility.
- In relation to “Most Favored Nation” clauses, the final Platform Guidelines now refer more broadly to “price parity across platforms.”

A Recap of 2020

Throughout 2020, SAMR intensified its efforts in perfecting its regulatory toolkit for enforcing the AML. In August 2020, SAMR published its “2019 Compilation of Antitrust Regulations and Guidance,” which formally adopted four key guidelines relating to the enforcement of the AML, namely:

- The Guidelines to the Application of the Leniency Regime in Horizontal Monopoly Agreement Cases;
- The Guidelines to Commitments from Undertakings in Monopoly Cases;
- The Antitrust Guidelines for the Automobile Sector; and
- The Antitrust Guidelines for the Intellectual Property Field.

These guidelines provided welcome certainty and clarity for both domestic and foreign companies operating in China on a number of key aspects of the AML regime, including the leniency and commitments procedures. These guidelines were stated to be retrospectively effective as from 4 January 2019, and therefore took immediate effect upon announcement.

In relation to merger control, SAMR also published the Interim Provisions on Undertaking Concentration Examination on 27 October 2020, which consolidated various pieces of guidance issued by SAMR's predecessor, the Ministry of Commerce ("MOFCOM"). This demonstrated SAMR's efforts to provide more streamlined and comprehensive guidance and to increase clarity and transparency for businesses on important aspects of the merger control regime, such as the calculation of turnover, eligibility for simplified procedure and the investigation process.

In terms of enforcement, SAMR (and its regional counterparts) concluded investigations in 108 cases of alleged anticompetitive conduct and agreements, and took action in 18 gun-jumping cases where parties had implemented transactions in breach of the merger control rules. The

aggregate fines imposed amounted to RMB 391 million.

In addition to the focus on the digital sector as discussed above, SAMR's enforcement priorities remain in sectors that have a great impact on the welfare of consumers, including the pharmaceutical, public utility, and construction and real estate sectors. In particular, SAMR has continued focus on antitrust issues in the Active Pharmaceutical Ingredients ("API") markets, which it identified as being an area requiring greater regulation during 2019. On 9 April 2020, SAMR fined three pharmaceutical companies for abuse of dominance in the distribution of injectable calcium gluconate API for over RMB300m in aggregate, for selling at unfairly high prices and imposing unfair terms on downstream distributors. SAMR also guided its local counterparts in investigating conduct relating to 12 different API markets during 2020.

SAMR has also been working together with other government bodies in China, as can be seen in the Notice on the Establishment of a Cooperation Mechanism for Regulating Civil Aviation Prices jointly issued by SAMR and the Civil Aviation Administration of China in December 2020.

International Cooperation and Capacity Building

SAMR continues to strive towards being a world class regulator, with clear efforts to improve the legal and economic analysis used in its decisions in recent years. In late 2020, SAMR also published an annual report of enforcement activity for the first time, detailing major antitrust developments during in 2019.

The increase in enforcement activity also demands a higher technical capability of the Chinese antitrust enforcement agency. Accordingly, SAMR is understood to be closely following actions taken by regulators from major antitrust jurisdictions, including the European Union, in the past few years (especially those in the Internet sector and data). In particular, we note that SAMR dropped its initial proposals to allow the finding of dominance without defining the relevant market in the final form of its Antitrust Guidelines for Platform Economies, which was contained in the original consultation draft of these guidelines but departed from international practices. This reflects SAMR's effort to align its position to its peers overseas, respecting the operation of market economy and articulating the function and role of antitrust policy.

This has also translated into greater international cooperation: in addition to its long-standing cooperation with the European Commission, SAMR has recently signed memorandums of understanding to cooperate on antitrust enforcement with a number of regulators around the world. These include the competition regulators of the Philippines, Japan, Korea, Russia and Belarus. During 2020, China also hosted the 7th BRICS International Competition Conference and the China-EU Competition Policy Week, driving the conversation on antitrust policy and enforcement with its key strategic allies.

Looking forward, we also expect that SAMR could increasingly use this international collaboration in order to bolster its enforcement activity. For example, SAMR is reportedly investigating a number of car manufacturers for colluding to restrict the

rollout of emissions reduction technology, a matter that is also being investigated in a number of other jurisdictions including the European Union and Korea. We anticipate that Chinese regulators will continue to follow the footsteps of regulators overseas with regard to legal application in the antitrust sphere. After the COVID-19 pandemic is brought under control, SAMR will likely welcome the assistance from its peers abroad for capability building, and international antitrust cooperation will be further boosted.

Past, Present, and Future of Chinese Antitrust

At its inception, the principal goal of the competition law of China was to prevent the improper intervention of the government in competition in the market. As part of the transition of the Chinese economy into a socialist market economy, the Chinese AML contained a dedicated chapter on abuse of administrative power to eliminate or restrict competition in order to curb the government's use of executive power to interfere in the market economy. In 2016, the State Council issued the Opinions on Establishing A Fair Competition Examination System in the Building of the Market System, introducing the fair competition review regime as a further step to regulate administrative behavior, prevent any administrative bodies from implementing measures that would exclude or restrict competition, and to gradually abolish any regulation or administrative measure that hindered the establishment of a single national market and fair competition. As such, the prevention of improper government intervention has been a priority for competition

enforcement since the AML was first introduced in 2008.

Over the intervening years, antitrust compliance within the Chinese government continued to improve, the Chinese antitrust enforcement agency accumulated greater enforcement experience, and the socialist market economy matured. The enforcement priority of the Chinese antitrust enforcement agency shifted towards conduct in the private sector. From a domestic angle, the focus has become to curb the expansion of capital from monopolising the domestic market, whereas from a global angle, another focus has been preventing dominant upstream suppliers of crucial inputs from abusing their market power over Chinese companies.

As such, we expect to see a rise in the number of abuse of dominance cases and anticipate

more complaints or litigation brought by competitors or downstream customers in order to use antitrust law strategically. Competition risk therefore will become greater for Chinese companies, Internet giants and multinational corporations possessing core resources alike. In order to better manage antitrust risks in China, it will be increasingly important for multinational corporations to invest more resources to antitrust compliance, in order to be able to act and react in a timely and appropriate manner.

All in all, a new era of antitrust law is dawning in China. This may bring turbulence, but also greater opportunities. We are hopeful that the Chinese market economy will become more robust and energetic as a result.