

# The New Anti-Monopoly Law of the People's Republic of China: Changes and Remaining Issues

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On June 24, 2022, China passed the amended Anti-Monopoly Law of the People's Republic of China (hereinafter the "Anti-Monopoly Law").<sup>1</sup> The amended version will come into force on August 1, 2022. This is the first amendment of the Anti-Monopoly Law since it was issued in 2007. This article looks at eight major changes in the Anti-Monopoly Law and discusses the issues that could emerge following its implementation.

## Issue 1: Encourage Innovation: The Challenge of Coordinating Different Legislative Goals

Article 1 of the Anti-Monopoly Law specifies multiple legislative goals, including preventing and curbing monopolistic conduct, protecting fair market competition, enhancing economic efficiency, protecting consumer interests and public interests, and promoting the healthy development of the socialist market economy. The amended Anti-Monopoly Law adds "encouraging innovation" to Article 1. There are different opinions on this change. Those who disagree with this change provide two main reasons. On the one hand, the existing legislative goals are flexible enough to ensure the promotion of innovation through competitive mechanisms. On the other hand, adding new legislative goals may increase the difficulties of coordination. Those who support this view believe that the development of the digital economy indicates that the Anti-Monopoly Law should play a more important role in promoting innovation, and this should be reflected in the legislative goals. Some undertakings support the addition of the new goal and believe that it may leave more room for defense in certain cases. Others are of the opinion that, since the mechanism of the Anti-Monopoly Law is to drive innovation through competitive pressure, "promoting innovation" is more suitable than

"encouraging innovation." Because compared with "encourage," the word "promote" in the Chinese context can better reflect the meaning of pressure. Meanwhile, some argue that "encouraging innovation" is more proper for Intellectual Property Law.

In the implementation of the amended Anti-Monopoly Law, it is important to pay attention to the effect of introducing the idea of "encouraging innovation" as a legislative goal, especially in the high-tech sector where innovation plays an important role. Introducing "encouraging innovation" into the law may increase the use of innovation-related theories of harm in cases, and undertakings may use the promotion of innovation as a defense.

## Issue 2: Provisions Related to the Digital Economy: More Remains to be Done

An important background to the amendment is the wider discussion on how to properly respond to the challenges brought about by the development of the digital economy. Lots of discussions revolve around whether the amended Anti-Monopoly Law should introduce terms such as "digital economy" and "platform economy," and whether to introduce a whole new chapter on the digital economy. Article 9 is added to the Chapter I General Provisions of the new Anti-Monopoly Law, which stipulates that "[a]n undertaking shall not use data and algorithms, technology, capital advantages, and platform rules to engage in monopolistic behaviors prohibited by this law." In Chapter III Abuses of Dominant Position, a new paragraph is added to Article 22 (former Article 17, which lists the types of abuses of a dominant position that are prohibited). The new paragraph stipulates that "[a]n undertaking with a dominant market position shall not use data and algorithms, technologies, platform rules, or other means to engage in the abuse of a

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<sup>1</sup> [http://www.news.cn/politics/2022-06/24/c\\_1128774712.htm](http://www.news.cn/politics/2022-06/24/c_1128774712.htm).

dominant market position as stipulated in the preceding paragraph.” In addition to this, a new article, Article 19, is added and stipulates that “[a]n undertaking shall not organize other undertakings to reach a monopoly agreement or provide substantial assistance for other undertakings to reach a monopoly agreement.” Although Article 19 does not mention the key elements of the digital economy such as data and algorithms, it is believed that this article may help to control collusion related to digital platforms, such as algorithmic collusion.

Some experts question whether such legislative change fits the need to cope with the issues brought about by the digital economy. On the one hand, an article has been added about the digital economy in the General Provisions chapter and provides general principles. This supports the notion that the legislative branch attaches great importance to competitive activities in the digital realm. On the other hand, the development of the digital economy has not brought fundamental changes to the analysis framework of the Anti-Monopoly Law. The highest legislative branch of China chose to leave more specific rulemaking to be optimized through administrative regulations and departmental rules, such as the Guidelines of the Anti-Monopoly Commission of the State Council for Anti-monopoly in the Field of the Platform Economy.<sup>2</sup> With the accumulating experience of China’s Anti-Monopoly Law enforcement authority, it is expected that the supplementary rules will indeed be optimized.

### **Issue 3: Safe Harbor for Vertical Agreements: Scope to be Specified**

For horizontal and vertical agreements, the former Anti-Monopoly Law of China adopts the “prohibition plus exceptional exemption” mode. The legislation provides the horizontal and vertical agreements that shall be prohibited in principle, and leaves as exemptions agreements, among others, “[f]or the purpose of improving technologies, researching, and developing new products.” The provision makes it possible for undertakings to apply for

exemptions according to their specific situation. The amended Anti-Monopoly Law also introduces the safe harbor rule, in addition to existing exemption rules. It is worth noting that, in the process of amending the law, it was proposed that the safe harbor rule be applied to both horizontal and vertical agreements. However, the final amendment only provides that it applies to vertical agreements, as paragraph 3 of Article 18 of the new Anti-Monopoly Law (former Article 14, prohibition of vertical agreements) provides that “[w]here an undertaking can prove its market share is below the standard provided by the Anti-Monopoly Law Enforcement Authority of the State Council, and can prove the agreement meet other conditions stipulated by the Anti-Monopoly Law Enforcement Authority of the State Council, the agreement is not prohibited.” The amendment provides a legal basis for further regulatory rules for the safe harbor. It is expected that the SAMR will soon issue more specific regulatory rules concerning safe harbor of vertical agreements.

An issue that was the subject of intense debate is whether safe harbor applies only to the two types of explicitly enumerated vertical agreements (i.e. fixing resale price and restricting the minimum price for resale to a third party), or only to other vertical agreements (i.e. excluding the two enumerated types), or both. Some hold the view that the safe harbor rules only apply to the second category, other vertical agreements, as the vertical agreements with apparent anti-competitive effects should not be protected by the safe harbor. Others believe that, even for the most serious type of vertical agreements like price-fixing, safe harbor should be applied so long as the market shares of the parties involved are low. The expression of the amended law only makes it clear that safe harbor does not apply to horizontal agreements. It is still unspecified what kind of vertical agreements the safe harbor rules can apply to. It is left for the SAMR to deal with the issue. It is worth noting that China has issued Anti-Monopoly Guidelines for the Auto Industry as well as Anti-Monopoly Guidelines for the Intellectual Property Realm,<sup>3</sup> both of which

<sup>2</sup> [https://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207\\_325967.html](https://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207_325967.html).

<sup>3</sup> [https://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918\\_321860.html](https://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321860.html);  
[https://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918\\_321857.html](https://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321857.html).

include safe harbor rules. The safe harbor in these two guidelines applies to the vertical agreements that are not enumerated in the legislation, i.e. it applies to “other vertical agreements.” Moreover, the Anti-Monopoly Guidelines for the Intellectual Property Realm provides that safe harbor rules apply to both horizontal and vertical agreements. Therefore, it remains to be seen how the SAMR will deal with the scope of the safe harbor for vertical agreements as well as whether safe harbor can be applied to horizontal agreements in the future.

#### **Issue 4: Abuse of Dominance: Whether and When to Apply Exploitative Abuse**

The digital economy has an impact on the assessment of market power for companies. During the process of amending the Anti-Monopoly Law, some people advocated that certain attributes of the digital economy should be included in the provisions for the determination of market dominance. However, the final amendment does not make a fundamental change, only adding a paragraph to Article 22 (former Article 17, prohibition of abuses of dominant position), which stipulates that “[a]n undertaking with a dominant market position shall not use data, algorithms, technologies, platform rules, or other means to engage in the abuse of a dominant market position as provided in the preceding paragraph.” This means that the amendment does not add new types of abuse, but only emphasizes that it is illegal for an undertaking with a dominant market position to use digital technologies to carry out abusive conducts. In terms of enforcement, it is still necessary to break down and identify traditional abusive behaviors such as exclusive dealing, tying and bundling, and discriminative treatment.

In recent years, China has stepped up competitive enforcement in the digital sector. The *Alibaba* case and the *Meituan* case both involve exclusive dealing.<sup>4</sup> The prohibition on the merger of Huya and Douyu captured considerable attention.<sup>5</sup> Some suspected

violations that attracted widespread attention in society have caused controversy in the application of Anti-Monopoly Law. For example, there are different views on whether data-based consumer price discrimination should be regulated according to the discriminative treatment in the Anti-Monopoly Law. Among the discussion, an important issue is the application of exploitative abuse in China. In the Anti-Monopoly Law, Article 6 of the Chapter I General Provisions provides that “[a]n undertaking with a dominant market position shall not abuse the market position to eliminate or restrict competition.” Some hold that this article makes the anti-competition effect an indispensable precondition for the intervention of anti-monopoly law, and therefore exploitative abuse, which focuses on direct influence on consumers rather than anti-competitive effects, is not applicable in China. Others are of the opinion that the Anti-Monopoly Law does not explicitly exclude exploitative abuse and that data-based consumer price discrimination fits the characteristics of exploitative abuse. In the process of amending the Anti-Monopoly Law, some propose to delete “to eliminate or restrict competition” in Article 6 to leave space for exploitative abuse. However, the final amendment does not change the article and does not add new types of abuse. Therefore, it is still uncertain whether data-based consumer price discrimination could be regarded as exploitative abuse.

#### **Issue 5: Classification and Grading of Undertakings: Competitive Enforcement or Sector Regulation**

Article 37 of the amended Anti-Monopoly Law provides that “The Anti-Monopoly Law Enforcement Authority of the State Council shall improve the classification and grading review system for merger control, and shall strengthen merger reviews in crucial sectors such as those concerning the national economy and people’s livelihood in accordance with the law, and shall improve the quality and efficiency of merger review.” Classification and grading is a set of

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<sup>4</sup> [https://www.samr.gov.cn/jzxts/tzgg/xzcf/202104/t20210409\\_327698.html](https://www.samr.gov.cn/jzxts/tzgg/xzcf/202104/t20210409_327698.html);  
[https://www.samr.gov.cn/jzxts/tzgg/xzcf/202110/t20211008\\_335367.html](https://www.samr.gov.cn/jzxts/tzgg/xzcf/202110/t20211008_335367.html).

<sup>5</sup> [https://www.samr.gov.cn/jzxts/tzgg/ftjtz/202107/t20210708\\_332421.html](https://www.samr.gov.cn/jzxts/tzgg/ftjtz/202107/t20210708_332421.html).



notable methods for the governance of the digital sector. For example, the Proposal for Guidelines for Classification and Grading of Internet Platforms put forth by the SAMR classifies online platforms into six categories, namely, online sales platforms, life service platforms, social and entertainment platforms, information platforms, financial service platforms, and computing application platforms.<sup>6</sup> Based on factors such as user scale, business types, and restrictive capabilities, the platforms are divided into three levels, namely, super platforms, large platforms, and small- and medium-sized platforms. In competition law, especially in merger control, classification and grading are not commonly seen. In China, the formulation in the competition field first appeared in the Opinions of the CPC Central Committee and the State Council on Accelerating the Construction of a National Unified Market issued in April 2022 (“Opinions of a National Unified Market”).<sup>7</sup> Article 22 (Focusing on Increasing Anti-Monopoly Efforts) of the Opinion of a National Unified Market provides that “[t]he legal rules for the identification of anti-competition acts shall be improved, and the classification and grading system for merger control.” Since the amendment formally adds the classification and grading system, implementing regulations enforcement is expected to follow up.

The classification and grading system may highlight distinguishing characteristics of the merging entities. The identification of these characteristics may help design better supporting rules, adjust analysis methods, allocate enforcement resources, and improve the quality and efficiency of case handling. With the trend of strengthening the supervision of online platforms globally, it is important to note that competition enforcement should not be confused with sector regulations. Considering that merger review is a type of *ex ante* competitive control, which makes it by nature similar to sector regulations, the difference between the two should be paid more attention to. The anti-monopoly enforcement authority of China should follow the principles of anti-

monopoly law, and avoid confusing the classification and grading system, especially grading, with sector control. More specifically, attention may be paid to the competitive enforcement in certain sectors and the triage of cases that can use simplified procedures.

In terms of sectors, the Opinions of a National Unified Market report highlights several areas apart from the abstract “sectors such as those concerning the national economy and people’s livelihood.”<sup>8</sup> Finance, media, technology, and other sectors, as well as the concentration of undertakings involving start-ups, new forms of businesses, and labor-intensive industries, are mentioned. These areas are expected to be the focus of merger reviews. In terms of triage of cases, the central anti-monopoly authority of China has been in charge of all merger review cases. The pressure on enforcement is high due to limited enforcement resources. The established triage of cases into normal cases and cases that could use simplified procedures (“simple cases”) increases the efficiency of enforcement to some extent. What could be done next is to explore whether and, if so, how simple cases can be assigned to local authorities, especially at the provincial level. Such a standard can be established by taking into consideration factors such as revenue, transaction volume, industry, and economic relevance to a specific region.

## **Issue 6: The Fair Competition Review System: The Relationship with Administrative Monopoly Control to be Made Clear**

An important aspect of the amendment is to reflect the fair competition review system. The amendment adds a new article, Article 5, to the Anti-Monopoly Law. The article provides that “[t]he State establishes the fair competition review system. The fair competition review shall be conducted in the formulation of the rules involving the economic activities of market players by administrative agencies and organizations empowered by laws or regulations to perform the function of

<sup>6</sup> [https://www.samr.gov.cn/hd/zjg/202112/t20211228\\_338510.html](https://www.samr.gov.cn/hd/zjg/202112/t20211228_338510.html).

<sup>7</sup> [http://www.gov.cn/zhengce/2022-04/10/content\\_5684385.htm](http://www.gov.cn/zhengce/2022-04/10/content_5684385.htm).

<sup>8</sup> [http://www.gov.cn/zhengce/2022-04/10/content\\_5684385.htm](http://www.gov.cn/zhengce/2022-04/10/content_5684385.htm).

administering public affairs.” Fair competition review is a system established following the enforcement of the Anti-Monopoly Law. Up until this most recent amendment, the system did not exist in any current law in China. The origin of the system can be traced back to the Opinions of the State Council on Establishing A Fair Competition Examination System in the Building of the Market System issued in June 2016.<sup>9</sup> In October 2017, the National Development and Reform Commission, the Ministry of Finance, the Ministry of Commerce, and Other Departments jointly issued the Detailed Rules for the Implementation of the Fair Competition Review System (for Interim Implementation),<sup>10</sup> which has been revised in 2021.<sup>11</sup> The fair competition review system revolves around four categories of standards – standards affecting market access and exit, standards affecting free flow of commodities and production elements, standards affecting production and operation costs, and standards affecting production and operation behaviors. The system reviews regulations on the economic activities of market participants formulated by administrative agencies and organizations empowered by laws or regulations. In recent years, Chinese governments at all levels have increased the implementation of this system and achieved positive results.

There are different opinions on the nature of the fair competition review system. Some hold the view that the fair competition review system and the anti-monopoly legal system are in a parallel relationship. The mainstream opinion is that the fair competition review system belongs to the anti-monopoly legal system. However, there is not a consensus on the relationship between the fair competition review system and the control of abuse of administrative power to eliminate or restrict competition (“administrative monopolization”). In organizational design, the fair competition review and the control of administrative monopolization are subject to the supervision of different sub-divisions of the Division for Competition Policy Coordination of

the State Administration for Market Regulation (“SAMR”). Most local government departments also follow this classification. In the process of amending the law, some argued that an independent chapter should be developed for the fair competition review system. Others contend that the provision on abstract administrative monopolistic conducts, which is in the Chapter V Abuse of Administrative Power to Eliminate or Restrict Competition, could be expanded to incorporate the fair competition review system.<sup>12</sup> Since the amendment only mentions the fair competition review system in principle in the general provisions, and there is no reflection in the specific provisions, the relationship between the fair competition review system and the administrative monopolization is not clearly defined at the legislative level. This issue still needs to be better specified in the future.

### **Issue 7: Bigger Fines: The Degree of Deterrence Considerably Increased**

How to increase the deterrence power of anti-monopoly law is a key focus of this amendment. According to the former Anti-Monopoly Law, the anti-monopoly law enforcement authority could only impose a fine of not more than RMB 500,000 yuan on undertakings that implement a concentration in violation of the law. The amendment significantly increases the fines in a number of ways. For example, for monopoly agreements, the first paragraph of Article 56 of the amended Anti-Monopoly Law provides that:

“[w]here undertakings reach and perform a monopoly agreement in violation of this Law, the Anti-monopoly Law Enforcement Agency shall order them to stop the violations, confiscate the illegal gains, and shall concurrently impose a fine of not less than 1% and not more than 10% of the sales revenue made in the previous year; if there is no sales revenue made in the previous year, a fine of not more than CNY 5,000,000 shall be imposed; if the

<sup>9</sup> [http://www.gov.cn/zhengce/content/2016-06/14/content\\_5082066.htm](http://www.gov.cn/zhengce/content/2016-06/14/content_5082066.htm).

<sup>10</sup> <http://www.gov.cn/xinwen/201710/5234731.htm>.

<sup>11</sup> [https://gkml.samr.gov.cn/nsjg/fldj/202107/t20210708\\_332422.html](https://gkml.samr.gov.cn/nsjg/fldj/202107/t20210708_332422.html).

<sup>12</sup> Article 37 of China’s Anti-Monopoly Law provides that “[n]o administrative organs may abuse its administrative power to formulate any provisions on eliminating or restricting competition.”

monopoly agreement has not been fulfilled, a fine of not more than CNY 3,000,000 shall be imposed. If the legal representative, person in charge or directly liable persons of the undertakings is personally responsible for reaching the monopoly agreement, a fine not more than CNY 1,000,000 may be imposed.”

To take another example, for illegal concentration, Article 58 provides that, among others, “a fine not more than 10% of the respective sales revenue of the undertakings shall be imposed; if there is no effect of eliminating or restricting competition, a fine not more than CNY 5,000,000 shall be imposed.”

Article 63 as a new article also attracts considerable attention, as it provides that “[i]f the circumstances of a violation of this Law is especially serious, the impact is especially bad and the consequences are especially serious, the Anti-Monopoly Law Enforcement Authority of the State Council may determine a specific amount of fine amounting to not less than two times but not more than five times of the amount of the fine prescribed in Articles 56, 57, 58 and 62 of this Law.” The four articles quoted by Article 63 are on monopoly agreement, abuse of dominance, illegal concentration, and refusing or obstructing an anti-monopoly investigation, respectively. Concerns were raised that this potential high amount of fine may lead to chilling effects.

The amendment also adds a credit-based penalty. The newly added Article 64 provides that “[w]here an undertaking receives administrative punishment for violating this Law, the information shall be recorded in the credit records in accordance with the relevant provisions of the State, and be publicized to the society.” In addition, the newly added Article 67 links to criminal penalties, as it provides that “[w]here a violation of this Law is criminally punishable, the offender shall be held criminally liable in accordance with the law.” Considering the Criminal Law of China adopts the principle of legality and the unified criminal code legislative mode, the criminal liability related to monopoly still needs to be reflected in the amendment of the Criminal Law in the future. In this regard, the research on anti-monopoly-

related crimes deserves more academic research.

Some penalty-related hot issues raised in the process of amending the law were not reflected in the amendment. For example, some proposed to delete the minimum penalty (1 percent of sales revenue) for monopoly agreement and abuse of dominance cases to provide more flexibility for the anti-monopoly law enforcement authority. Others argued that the confiscation of illegal income should be removed as the calculation of illegal income could be so difficult as to become a burden for the enforcement authority. In addition, as the basis for calculating fines, some put forward that the “sales revenue” should be limited to the revenue of products or services related to the anti-monopoly conduct in the case. These controversial issues will accompany the implementation of the Anti-Monopoly Law. Regulations from the enforcement authorities such as penalty guidelines may help solve these issues.

### **Issue 8: Public Interest Litigation: What to Expect**

The amendment provides that people’s procuratorates can initiate anti-monopoly civil public interest lawsuits, which has far-reaching significance. The amendment adds an Article 60, the second paragraph of which provides that “[w]here an undertaking commits monopolistic conduct damaging to the public interest, the people’s procuratorate at or above the districted city level may initiate civil public interest litigation in the people’s court in accordance with the law.” The discussion on the role of people’s procuratorate in antitrust litigations has begun before the issue of the 2007 Anti-Monopoly Law. However, the former legislation did not reflect this aspect. Overall, the public interest litigation in China is yet to be further developed. Even the public interest litigation based on the Law of the People’s Republic of China on the Protection of Consumer Rights and Interests is not large in amount. The anti-monopoly legal system is highly specialized and evidence collection can be difficult. If the people’s procuratorate can play a substantive role in anti-monopoly civil public interest litigation, it is expected that the

cultivation of China's competition culture and the healthy development of the market order will be positively affected. In the process of amending the law, some suggested that in addition to the people's procuratorate, consumer rights protection organizations should also be added as an eligible subject of anti-monopoly civil public interest litigation. However, this suggestion was not adopted in this amendment.

In July 2015, the Supreme People's Procuratorate of China issued the Plan for the Pilot Project of Reform of Instituting Public Interest Litigations by the Procuratorial Organs (the "Plan").<sup>13</sup> According to the Plan, "[i]n the performance of their duties, if the procuratorial organs discover conducts that harm the public interests, such as environmental pollution and infringing upon the legitimate rights and interests of many consumers in the field of food and drug safety, and if there is no qualified subject to file a lawsuit or the qualified subject does not file a lawsuit, the procuratorial organs may file a civil public interest lawsuit.' The Plan also sets pre-trial procedures, as it stipulates that "[b]efore initiating a civil public interest lawsuit, the procuratorial organ shall urge or support the organs or relevant organizations provided by law to initiate a civil public interest

lawsuit in accordance with the law. Relevant organizations identified by law shall handle the matter according to the law within one month after receiving the opinion to urge or support the prosecution, and promptly report their handling of the situation to the people's procuratorate in writing form." "If, after the pretrial procedures, organs or relevant organizations as prescribed by law fail to file a civil public interest lawsuit and if public interests are still subject to infringement, the prosecutorial organs may file a civil public interest lawsuit. Civil public interest lawsuit filed by the prosecutorial organs shall have specific defendants, concrete claims, and preliminary evidence on the damages to the public interests, and complaints about public interest litigation shall be prepared therefor."

In recent years, China's prosecution system has increased support for public interest litigation in areas such as environmental protection. Since the amendment of the Anti-Monopoly Law provides only a principle provision, the prosecution system should, based on the Plan and the Civil Procedure Law of the People's Republic of China, explore how to fully engage its potential in anti-monopoly civil public interest litigation through better design of regulations and enforcement mechanisms.

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<sup>13</sup> [https://www.spp.gov.cn/zdgz/201507/t20150703\\_100706.shtml](https://www.spp.gov.cn/zdgz/201507/t20150703_100706.shtml).