

RECORD-BREAKING ANTITRUST FINE:

INTERNET PLATFORMS UNDER THE SPOTLIGHT IN CHINA, AGAIN

While it may not come as a surprise to hear that internet platforms (e.g. e-commerce websites, and social media, etc.) are increasingly subject to competition scrutiny in China,¹ the past week witnessed some of the most significant attempts to date by Chinese authorities to address competition and other regulatory issues in the digital space, including the imposition of a record-breaking fine of over US\$2.5 billion on China's e-commerce giant Alibaba for breaching the Anti-Monopoly Law in China (AML). For the first time, an 'administrative guidance letter' was published to accompany the fine, with Alibaba having to confirm its compliance for the next three years. There are also ripple effects throughout the entire digital sector in China. We examine in this article some of the key considerations arising from these recent events.

Swift actions taken against Alibaba, Ant Group and other industry players

Following a high profile dawn raid on Alibaba on 24 December 2020,² on 10 April 2021, the State Administration for Market Regulation (SAMR) published its decision to **fine** Alibaba a record RMB18.228 billion (approximately US\$2.78 billion) for abusing its market dominance in China's online retail platform services. Two days later, Ant Group, China's leading fintech service provider, was **requested** by China's financial regulators, including the People's Bank of China, to rectify issues including unfair competition in the digital payment business. The next day, on 13 April, SAMR (alongside other government agencies) **held** an administrative guidance meeting with 34 of China's largest internet companies, including Tencent, Baidu and Meituan, urging them to rectify any anticompetitive and problematic practices in one month and publicly pledge to comply with the law.

Record-breaking fine

Although the fine on Alibaba is enormous in terms of value and about three times the amount Qualcomm was fined in 2015 (RMB6.088 billion; approximately US\$975 million) also for abuse of dominance in China, the fine in itself does not necessarily represent a particularly harsh stance against Alibaba. The fine represents 4% of Alibaba's Chinese revenue in 2019, which is considerably lower than the statutory maximum of 10%, and in fact lower than the percentage applied to Qualcomm (8%), Tetra Pak (7%) and other companies for abuse of dominance infringements.

The relatively moderate percentage may have resulted from Alibaba's cooperation during the investigation, which lasted for only four months (compared with, for example, 15 months for Qualcomm). In the penalty decision, SAMR acknowledged that its decision took into consideration Alibaba's "*in-depth internal investigation*" and "*cessation of illegal conduct and proactive rectification, etc.*" This sends a clear signal about the importance of cooperation in antitrust investigations in China.

'Choose one of two' and beyond

The abusive conduct in question concerns a business practice called 'choose one of two' ('二选一'), a form of exclusive dealing whereby Alibaba prohibited merchants from selling on (or participating in promotional activities of) rival online marketplaces. SAMR found the practice created a lock-in effect to reduce the competitive pressure on Alibaba and improperly maintain and consolidate its market position. It therefore distorted competition (both actual and potential), harmed the interests of merchants (including undermining their commercial autonomy) and consumers, and stifled innovation and the development of the platform economy. SAMR also found that there was no justifiable reason for the conduct in question.

¹ Please see our previous client briefing on China's first antitrust guidelines for internet platforms [here](#); and the change in merger control policy in respect of the VIE structure [here](#).

² Please see our previous [blog article](#) on the Alibaba dawn raid.

This conduct will likely remain high on the regulatory agenda. SAMR explicitly warned against this practice, noting it is “*extremely harmful and must be resolutely cured*”. Any company operating in China, whether in the digital space or not, should take heed and refrain from engaging in such practice.

In addition to imposing a record-breaking fine on Alibaba, SAMR issued an ‘administrative guidance letter’ (**Guidance Letter**) for the first time in China’s AML enforcement history. The Guidance Letter requires Alibaba to formulate a rectification plan based on the 16 requirements set out in the Guidance Letter, and to submit a compliance report for the next three years. These 16 requirements go beyond the ‘choose one of two’ practice Alibaba was fined for, ranging from competition law compliance and making merger filings to data and consumer protection. Notably, SAMR has asked Alibaba to “*increase the opening up of data, payment, applications and other resource ports in the platforms in accordance with the law...and promote cross-platform interconnection and interoperability.*” Although the details and scope of this requirement is not publicly available, clearly this could have far-reaching implications for Alibaba and potentially other tech companies in China.

A holistic regulatory approach

It is noteworthy from the slew of regulatory activity in the past week that SAMR has a broader agenda than simply punishing Alibaba for the ‘choose one of two’ conduct. SAMR and other government bodies are increasingly taking a holistic approach to the broader issues associated with China’s digital economy.

While no other Chinese internet platforms have been subject to similarly high fines to date, SAMR and other Chinese regulators have demonstrated their commitment to tackling problems in the digital space - both within and outside competition law - by way of administrative guidance.

- Ant Group, which has been undergoing a rectification programme since December last year, met China’s financial regulators on 12 April to further discuss regulatory concerns. While the focus is on financial regulation, Ant Group was requested to rectify problems amounting to unfair competition in its digital payment business.
- On 13 April, SAMR and other government bodies held an administrative guidance meeting with 34 of China’s largest internet companies, urging them to fix anti-competitive practices (including ‘choose one of two’), and problems such as counterfeit goods, data leakage and illegal tax practices, within the space of one month.
- SAMR requested each of the 34 companies to publicly pledge to comply with the law and to publish their compliance commitments on SAMR’s website within the same week of the meeting.³ While not identical in substance, the companies typically pledged to comply with competition law, protect consumer rights and data privacy, and make other improvements relevant to their individual business.

While the regulatory activities described above appear to concern China’s domestic internet companies only, any company operating in China’s digital space, domestic or foreign, should brace themselves for increased scrutiny in view of the clear regulatory focus on this sector.

Conclusion

The high-profile regulatory activities we witnessed in the past week mark a milestone in China’s regulation of tech companies, both for the record-breaking pecuniary penalty and the scope of the regulatory agenda. These activities echo the call for “*strengthened antitrust efforts*” by China’s top leadership back in December 2020,⁴ and are broadly consistent with the global regulatory attention on the digital sector, as most recently outlined in this [newsletter](#). For businesses operating in the digital sector, competition and regulatory issues should continue to stay high on their agenda, both in China and globally.

³ The compliance commitments are available [here](#), [here](#) and [here](#) (all in Chinese).

⁴ See the relevant [report](#) by China’s state news agency Xinhua.

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