SLAUGHTER AND MAY/

CLIENT BRIEFING

MARCH 2021

REGULATING DIGITAL: CHINA'S FIRST ANTITRUST GUIDELINES FOR INTERNET PLATFORMS

China's State Administration for Market Regulation (**SAMR**) **published** (in Chinese) on 7 February 2021 the final version of the Anti-Monopoly Guidelines for the Platform Economy (**Guidelines**), following a public consultation process in November 2020 on an earlier draft (**Draft Guidelines**)[1]. As the first of its kind in China, the Guidelines provide internet platforms (e.g. e-commerce websites; social media, etc.) with tailored guidance on compliance with China's competition law, at a time when Chinese internet platforms are increasingly subject to regulatory scrutiny.[2] We outline in this publication some of the salient aspects of the Guidelines and their implications for internet platforms – both domestic and foreign – operating in China.

Data and algorithms in the Guidelines

The interplay between data, algorithms and antitrust rules is a notable theme running through the Guidelines. We highlight below three ways in which data is specifically addressed in the Guidelines.

a) Data, algorithms and anticompetitive agreements

The Guidelines note that data and/or algorithms may be misused for both i) illegal collusion between competitors; and ii) vertical anticompetitive arrangements such as fixing downstream resale prices and restricting other transaction conditions.

However, the Guidelines do not provide more detailed guidance on how and when the use of data and/or algorithms may infringe competition law. Therefore, the Guidelines are a pointer to the fact that this is on SAMR's radar, but suggest that there is not yet a firm position on what approach SAMR would take from an enforcement perspective. In practice, businesses should refrain from engaging in data practices with an obviously anti-competitive intent, and closely watch this space for any future SAMR guidance and enforcement activity.

b) Data as a factor for assessing market power

In assessing dominance (for abuse of dominance cases) and the competitive effects of mergers, the Guidelines recognise as a relevant factor an undertaking's ability to control and process relevant data. Data-heavy businesses may therefore face a higher risk of being treated as dominant, and could potentially attract more scrutiny in merger review, even where traditional factors e.g. market shares would suggest otherwise. This is in line with a global focus by competition authorities on the advantage data may confer – for example, in the European Commission's conditional approval of Google's acquisition of Fitbit, the Commission investigated the competitive effects that may result from Google's acquisition of data collected through Fitbit's wearable devices.[3]

c) Data access as a remedy in merger cases

The Guidelines note that data may be used as a remedy to address competition concerns in merger review, in particular that a business may be required to divest its data, open up its networks, data or platform infrastructure, etc. While it is

[1] See our previous **newsletter** where we covered the Draft Guidelines.

[2] See our **blog post** on recent SAMR enforcement activities concerning China's internet companies.

[3] See the European Commission's **press release** on its conditional approval of Google/Fitbit.

unclear when such remedies may be optimal or effective in addressing competition concerns, internet platforms possessing large amounts of data should be prepared for such possibility when negotiating merger conditions with SAMR.

Market definition

The Guidelines provide that SAMR would usually need to define the relevant market across its spectrum of enforcement activities (i.e. anti-competitive agreements, abuse of dominance, and merger reviews). This marks a notable shift from the Draft Guidelines, which suggested that the regulator may not need, in certain circumstances, to define the relevant markets when assessing anti-competitive agreements and abuses of dominance. The shift of emphasis represents a welcome move for internet platforms, which can take some comfort that there should not be a significant departure from the existing practice of needing to define the market that would be relevant only to this sector.

MFN clauses

The Guidelines note that where platform operators seek transaction conditions (e.g. in terms of pricing or quantity) from in-platform vendors which are equal to or better than what the latter provides to other competing platforms (i.e. most-favoured nation or MFN clauses), this may constitute an anti-competitive agreement or an abuse of market dominance.

While MFN clauses are not necessarily anti-competitive, and could in fact be beneficial to competition and consumers, the explicit reference to MFN clauses in the Guidelines again shows that they are on SAMR's radar and may place them at heightened risk for enforcement. Companies considering the use of MFN clauses are recommended to seek early legal advice to gauge any competition risk which may be involved.

Essential facilities

The Draft Guidelines noted that both platforms and data may constitute essential facilities. By contrast, under the Guidelines, only platforms may be regarded as essential facilities. This change helpfully (and rightly) reduces the potential scope for applying the essential facility doctrine in the platform economy. However, it nonetheless suggests that the SAMR may regard platforms as an essential facility without further clarity on when this might be the case. In view of the recent lawsuit brought by ByteDance against Tencent[4] (where ByteDance is arguing that Tencent is an essential facility), such clarity may first come from the Chinese courts, although private litigation judgments may not be entirely applicable to SAMR's public enforcement, as we have seen in cases relating to resale price maintenance in China.

Merger control

The Guidelines affirm that mergers involving variable interest entity (**VIE**) structures are subject to merger review. This echoes SAMR's first enforcement action against three companies involving VIE structures for gun-jumping in December 2020,[5] and solidifies the shift from the previous understanding that VIEs were unacceptable for Chinese merger review due to their dubious legal status.

The Guidelines also envisage circumstances in which SAMR may investigate a merger in the platform economy that falls below the traditional filing thresholds but with anti-competitive effects. These include circumstances where one party is a start-up, one party adopts the free or low price business model, the relevant market is concentrated or the number of competitors is small. While the intention is likely to capture what is commonly termed as 'killer acquisitions',[6] it could in theory allow SAMR to review global transactions with little nexus to China (despite their falling below SAMR's filing thresholds). Having said that, SAMR has always had the power to do this (although it rarely used it), so arguably the

---

[4] See the **news report** that in February 2021 ByteDance filed a lawsuit against Tencent over its restrictions on sharing Douyin (owned by ByteDance) content on Tencent's instant messaging apps WeChat and QQ, seeking RMB90 million ($13.94 million) in compensation.

[5] See our previous **client briefing** on China's first enforcement action against VIE companies for failure to notify reportable merger cases.

[6] A killer acquisition typically refers to a situation where the incumbent large firm acquires a small innovative target and terminates the development of the target's innovation to pre-empt future competition from the small firm. SAMR's **press interview** (Question 9; in Chinese) accompanying the publication of the Guidelines suggests it had such acquisitions in mind, which could otherwise avoid merger scrutiny for falling below the traditional filing thresholds.

Guidelines do not change the status quo. It therefore remains to be seen whether and how the Guidelines will alter SAMR's approach to taking jurisdiction over merger cases in the platform economy sector.

Conclusion

The Guidelines will be important for internet platforms operating in China for months if not years to come. Its publication echoes the theme of "regulating the competition order in the platform economy" as identified in SAMR's 2020 **work review** (in Chinese), and the message of "strengthened antitrust efforts" emanating from China's top leadership in December 2020.[7]

However, China is not alone in ramping up scrutiny of the digital economy. Last December, the European Commission tabled before the European Parliament proposals for new rules governing digital platforms.[8] The Competition and Markets Authority of the UK is setting up a Digital Markets Unit to oversee digital platforms.[9] This global trend means businesses in the digital sector should have competition law at the top of their regulatory agenda, both in China and globally.

CONTACT

NATALIE YEUNG
PARTNER
T: +86 10 5965 0601 / +852 2901 7275
E: natalie.yeung@slaughterandmay.com

HAIYI LIU
T: +852 2901 7266
E: haiyi.liu@slaughterandmay.com

[7] See the relevant **report** by China's state news agency Xinhua.

[8] See our previous client briefing on the draft rules of the Digital Markets Act and the Digital Services Act **here**; also see our blog post **here**.

[9] See our previous **blog post** on this initiative.