

China's Anti-monopoly Law and new Merger Review Rules: Time of Change?

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The Chinese competition regulator started the New Year with a flurry of activity on the policy development front. Key among these were the public consultations released in early January on the [proposed amendments to China's 12-year-old Anti-monopoly Law \(AML\)](#) and the [draft 'Interim Provisions on Undertaking Concentration Review' \(Merger Review Rules\)](#). These proposals signal important changes coming to China's antitrust and merger control regime in 2020, including a new focus on the internet sector and stricter penalties for gun-jumping and other breaches in the merger review process.

(A) Proposed amendments to the AML

(i) New focus on the internet sector

In line with the global trend of increasing scrutiny over big tech and big data, SAMR is proposing to add to its arsenal enforcement tools specifically designed for analysing competition concerns in the tech sector.

At a high level, "encouragement of innovation" has been added as a new objective of the AML. A non-exhaustive list of factors to be considered in assessing dominance in the internet sector is also added, including network effects, economies of scale, lock-in effects, and the ability to access and process data. While the list of proposed factors are generally in line with international trends of economic thinking, the inclusion of data may prove controversial. Some would argue that, in this digital age (and especially in China), access to user data is neither difficult nor expensive given that data is available from multiple sources and is not exclusive to any one company. Although no additional obligations have been

imposed on technology companies in the draft, the proposed changes signal potential greater scrutiny of the tech industry in China.

(ii) Stricter penalties

As was widely anticipated, the proposed amendments to the AML introduce stricter penalties for violations of the AML, particularly in relation to merger control.

- First, where an undertaking commits any one of four specified violations, including failure to notify a transaction, gun-jumping, breach of a requirement in a conditional clearance decision and breach of a prohibition decision, SAMR may impose a fine of up to 10% of the undertaking's sales (without specifying whether this refers to global or Chinese sales) in the preceding year.
- Second, under the proposed amendments, undertakings will be "held accountable" for the truthfulness of the notification and relevant materials, but without further clarification on what this means and the potential consequences.
- Third, where undertakings reach monopoly agreements (e.g. price-fixing) which have not yet been implemented, it is proposed that the penalty will increase from the current RMB 500,000 (approximately £56,000) to a maximum of RMB 50 million (approximately £5.6 million).

- Finally, the draft amendments also state that criminal consequences will be pursued if the monopolistic conduct amounts to a criminal offence. Contraventions of the AML are not criminal offences, but the proposed amendment makes it clear that the Chinese Criminal Law will apply to anti-competitive behaviour that is also criminal in nature, even if the AML (generally carrying civil liability) applies. In addition, any potential future revisions of China's Criminal Law could also have an impact on antitrust enforcement.

While these changes are clearly intended to increase deterrence against breaches of the AML, how SAMR interprets and applies these provisions will prove to be key. The proposed changes give much greater discretion for SAMR in deciding the level of fines and, with it, increased uncertainty to companies under investigation. It may also give companies greater incentive to defend their position and challenge SAMR's approach in finding a breach or determining the level of fine, as there is potentially much more at stake.

(iii) Introduction of a “stop-the-clock” system in merger review

Under the AML amendment proposals, the merger review procedure may now be suspended under three specific circumstances: (1) if the notifying party files for or agrees to a suspension; (2) if a party needs to submit supplementary documents or information as requested by SAMR; and (3) if SAMR and notifying parties are negotiating remedies.

On the one hand, this could bring more flexibility for the notifying parties and SAMR without the need to “withdraw and re-file” (as is currently the case when SAMR does not have sufficient time to complete its review within the three statutory phases set out in the AML); on the other hand, the new system also has the potential to incentivise SAMR case handlers to request further information as a means to having more time to review the merger in question. This could potentially lead to concerns around transparency

and certainty in the merger review process, as the current proposed wording does not specify any limit on the permissible suspension period or the maximum number of times that this power may be exercised.

(iv) Powers to stop or unwind mergers not meeting the jurisdictional thresholds

The proposed amendments to the AML include a new article which confers powers on SAMR to stop or unwind transactions even when jurisdictional thresholds are not met. While the current [Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings](#) already provide for review of transactions falling below the jurisdictional thresholds, the proposed new article ‘elevates’ its status by including it in the AML itself, and expands the scope to allow SAMR to stop and unwind any such transaction. This introduces a high degree of potential uncertainty, but the key lies in how often SAMR will exercise this power. It has been very rarely used to date and there is nothing to suggest that the introduction of this new article to the AML should change that.

(v) New prohibition of coordinating or assisting other undertakings in reaching monopoly agreements

Under the current AML, parties who coordinate or assist others in reaching monopoly agreements, but are not participants to the monopoly agreements, are not caught under the prohibition on monopoly agreements. The proposed draft revised AML introduces a new article which addresses this loophole in the law, such that these organising/assisting parties can also be caught by the AML. While this new prohibition would facilitate SAMR's enforcement, it also prompts certain questions, including: (i) whether subjective intention is required for a violation under this new prohibition; and (ii) whether a primary contravention (i.e. finding of a monopoly agreement) is required for a violation of this new prohibition.

(B) New Merger Review Rules

Following the release of proposed amendments to the AML, SAMR launched a public consultation on the new draft Merger Review Rules. Notably, the draft consolidates various existing measures, provisions, guidelines and regulations related to merger review. The draft Merger Review Rules also set out certain positions that SAMR has been adopting in practice, and thus helps to give more certainty to notifying parties.

One example is in the application of the simplified notification procedure. The current rules state that the simplified procedure is available where there is a change from joint to sole in a joint venture. However, in practice, if the resulting sole controller competes with the joint venture, SAMR would apply an additional test and allow the simplified procedure only if the

combined market share of the joint venture and the sole controller does not exceed 15%. This position is now explicitly specified in the draft Merger Review Rules.

(C) Future outlook

The proposed changes to the AML and the draft Merger Review Rules are a reflection of past Chinese competition law enforcement experience and future challenges anticipated by SAMR. These changes, if finalised into law, will herald more robust antitrust enforcement in China. While the codification and increased clarity of SAMR's practices are positive developments, the proposed changes may also entail a certain degree of uncertainty and discretion in future enforcement by SAMR. Changes to the Chinese antitrust regime will be an area to look out for in 2020.



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