

# COMPETITION AND REGULATORY NEWSLETTER

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## China launches public consultation on proposed amendments to Anti-Monopoly Law

The Anti-Monopoly Law (AML), which came into effect in 2008, has been under review for the past six years. On 23 October 2021 China's national legislature, the National People's Congress (NPC) opened a public consultation on [a set of proposed amendments to the AML](#) (in Chinese). Many of the proposals were also included in the [previous draft](#) released in January 2020, but there have also been important additions.

### KEY CHANGES

The most significant proposed amendments to the AML include:

- The introduction of tougher fining powers, including for gun-jumping
- Personal liability for directors and senior management
- A "stop-the-clock" mechanism for merger reviews
- A "safe harbour" provision for certain types of agreement falling below certain market share thresholds
- A specific focus on online platforms, internet and technology
- The introduction of a public interest litigation mechanism

### *TOUGHER PENALTIES, INCLUDING FOR GUN-JUMPING*

Tougher penalties are to be imposed under the revised AML in relation to various types of anticompetitive conduct. One of the most notable changes is a significant increase in the maximum fine for implementing notifiable mergers without obtaining clearance from China's State Administration for Market Regulation (SAMR). The maximum fine SAMR can impose will increase at least ten-fold from the current CNY 500,000 (approximately £57,000) and will depend in part on the circumstances of the conduct:

- If an undertaking implements a merger which has or potentially has the effect of excluding and restricting competition, SAMR may impose a fine of up to 10 per cent of the undertaking's sales in the preceding year;
- Where such conduct does not have the effect of excluding and restricting competition, SAMR may impose a fine of up to CNY 5 million (approximately £575,000).

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Fines are also increased for other violations of the AML. For example, the maximum fine for an undertaking entering into, but not yet implementing, a monopoly agreement will increase from CNY 500,000 (approximately £57,000) to CNY 3 million (approximately £340,000). Companies obstructing an investigation or providing false information will be liable to a fine of up to 1 per cent of turnover in the previous year, compared with the current CNY 1,000,000 (approximately £115,000).

Finally, a recent (but very significant) change to the draft revised AML is the proposal to introduce a multiplier where the violation involves “*extremely significant circumstances, an adverse influence, and serious consequences*”, allowing SAMR to increase the fine imposed by two to five times the initial amount. This introduces significant uncertainty over the maximum penalty (for example, a penalty of 8% of annual turnover for price-fixing could, under this provision, turn into a penalty of 40% of annual turnover) and gives SAMR a lot of discretion over what “*extremely significant circumstances, an adverse influence, and serious consequences*” might mean.

## ***THE INTRODUCTION OF PERSONAL LIABILITY FOR DIRECTORS AND SENIOR MANAGEMENT***

Personal liability for directors and senior management has been introduced. Article 56 of the revised AML states that legal representatives, heads and directly responsible persons can be held personally accountable for anticompetitive agreements entered into by undertakings. These individuals may each be subject to a fine of up to CNY 1,000,000 (approximately £115,000).

This is consistent with the approach taken in Hong Kong. Whilst breaches of competition law do not carry criminal liability, through the introduction of personal liability in this way, individuals will be held personally liable for their actions. These tougher penalties suggest that SAMR is likely to continue to adopt a tough and active approach to taking enforcement action against anticompetitive conduct.

## ***INTRODUCTION OF A “STOP-THE-CLOCK” MECHANISM FOR MERGER REVIEWS***

Article 32 of the revised AML introduces a “stop-the-clock” mechanism, allowing SAMR to suspend its review timeline in certain scenarios. These are where the merger review cannot be conducted because the undertakings have failed to submit documents and materials required by SAMR, where there are new situations and facts with a significant impact on the review that SAMR needs to verify and where additional conditions need to be evaluated further.

While this mechanism is intended to be more efficient than the current system, which requires parties to “pull and refile” when the 180-day review period expires, it has the potential to prolong the review period in some cases and gives SAMR some discretion to issue extensive information requests in order to allow it more time to review the transaction.

## ***SAFE HARBOUR FOR CERTAIN TYPES OF COOPERATION***

Article 19 of the revised AML introduces a safe harbour provision for undertakings with a market share lower than the thresholds prescribed by SAMR. This would mean that agreements currently considered anticompetitive would only be in breach of the AML if SAMR can demonstrate that the relevant agreements harm competition. The exact market share thresholds are not yet specified, and are expected to be announced later. Similar “safe harbour” provisions are included in some sector-specific anti-monopoly guidelines issued by SAMR. For example, in the Antitrust Guidelines for the Automotive Industry, there is a safe harbour for specified types of vertical restrictions if the market share of those

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party to the agreement is below 30 per cent. In the Antitrust Guidelines on the Abuse of Intellectual Property Rights, a similar safe harbour exists where the total market share does not exceed 20 per cent.

### ***SPECIFIC FOCUS ON ONLINE PLATFORMS, INTERNET AND TECHNOLOGY***

The proposed amendments reflect China's continuing focus on antitrust enforcement against online platforms, and the internet and technology sectors. For example, a specific prohibition is introduced on using data, algorithms, technology, capital advantage or platform rules to harm competition and the revised AML states that SAMR shall enhance the review of mergers between tech companies.

It is clear from these proposed amendments that SAMR intends to continue to monitor the conduct of tech and internet companies and platform operators closely.

### ***INTRODUCTION OF A PUBLIC INTEREST LITIGATION MECHANISM***

The proposed amendments also introduce a new public interest litigation mechanism, under which China's highest prosecuting agency, the People's Procuratorate, will be able to lodge civil public interest litigation at a People's Court in China if an undertaking engages in anticompetitive conduct and goes against the public interest.

### **NEXT STEPS**

The consultation closes on 21 November 2021. The proposed amendments are anticipated to undergo two more rounds of deliberation and Chinese media reports suggest that the amendments may be passed before the end of the year.

### **OTHER DEVELOPMENTS**

#### **MERGER CONTROL**

#### **EUROPEAN COMMISSION OPENS INVESTIGATION INTO POSSIBLE ARTICLE 21 EU MERGER REGULATION BREACH BY HUNGARY IN VIG/AEGON TRANSACTION**

On 29 October 2021 the European Commission announced that it has decided to [open an investigation](#) into whether Hungary's decision to block the acquisition by Vienna Insurance Group (VIG) of two Hungarian subsidiaries of the Aegon Group (Aegon) was in breach of Article 21 of the EU Merger Regulation.

Under the proposed transaction as notified to the European Commission on 15 July 2021 and approved by the Commission on 13 August, VIG, which is the holding company of an international insurance group offering services mainly in Central and Eastern Europe, acquired sole control of Aegon CEE which includes Aegon's insurance, pension and asset management businesses in Hungary, Poland, Romania and Turkey. However, in April 2021 the Hungarian government had vetoed the transaction, citing emergency legislation on foreign direct investment which was introduced in response to the COVID-19 pandemic.

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When announcing the opening of the investigation the Commission raised its concerns that the Hungarian Government's prohibition decision may have breached Article 21 of the EU Merger Regulation, which confers upon the Commission sole jurisdiction to assess deals that have an EU dimension. Member States shall not apply their national laws to such concentrations but they can take appropriate measures to protect their legitimate interests, subject to those measures being compatible with EU law. Any measures other than those which are aimed at genuinely protecting public interest, plurality of the media and prudential rules, must be communicated to the Commission for assessment prior to being implemented.

However, Hungary failed to communicate the measure to the Commission prior to its implementation, nor did it provide an adequate explanation of the reasons underpinning its veto decision. Consequently, the Commission has decided to open an investigation into whether Hungary may have breached Article 21 and, in particular, whether the veto aims to protect a legitimate interest and whether it is compatible with EU law.

**ANTITRUST****CHINA PUBLISHES DRAFT RULES ON ONLINE PLATFORMS**

On 29 October 2021 China's SAMR published two sets of draft rules for public consultation. These rules include the [Guidelines for the Classification and Grading of Online Platforms](#) (in Chinese) and the [Guidelines for the Implementation of Subject Obligations of Online Platforms](#) (also in Chinese).

The Platform Classification Guidelines set out how online platforms may be classified according to their sector and size and other criteria that should be taken into account. The six sector categories are online sales, life services, social entertainment, information, financial services, and computing applications. The three grades are super platforms (with at least 500 million annual active users in China), large platforms (with at least 50 million annual active users in China) and a third category consisting of both mid-sized and small platforms.

The Platform Obligations Guidelines set out general requirements for online platforms, some of which are related to antitrust. For example, when competing with rivals operating on their platform, super-large platforms (those with at least 50 million annual active users in China in the preceding year, a prominent core business, a market value of at least CNY 100 billion (approximately £11.5 billion), and a relatively strong ability to limit in-platform operators' contact with users) must not use non-public data generated or provided by in-platform operators and users during their use of the platform services unless they can justify this conduct. Super-large platforms must also promote interoperability between the services they provide and the services provided by other platform operators. These draft guidelines and recent comments from Chinese officials demonstrate that China will continue to focus its enforcement efforts on the technology and internet sectors and closely scrutinise any monopolistic conduct or practices of unfair competition by online platforms.

**GENERAL COMPETITION****CMA TO RECEIVE FUNDING TO ROLL OUT PROJECTS INCLUDING DIGITAL MARKETS UNIT**

On 27 October 2021 the UK government published its [Autumn Budget and Spending Review](#) for 2021.

The Competition and Markets Authority (CMA) is set to receive £130.5 million by 2024-25, which includes funding to further roll out the [recently established](#) Digital Markets Unit (DMU) within the CMA. The review shows that, in total, the CMA will receive £370.9 million between 2022 and 2025.

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The government's consultation on its proposals for a new competition regime for digital markets, which will be overseen by the DMU, ran from 20 July 2021 to 1 October 2021 (see our previous [blog post](#)). The government has committed to producing legislation on this in due course.

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