

# Legal Commentary

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## A First Look at the RMB 18.2 Billion Anti-Monopoly Penalty Decision

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On the morning of April 10, 2021, the State Administration for Market Regulation (“**SAMR**”) issued on its website an administrative penalty decision and an administrative guidance document against a major digital undertaking for abuse of its dominant position in the domestic digital retail platform services market due to its exclusive dealing behaviors, so-called “choosing one of two”. The administrative penalty imposed amounted to RMB 18.228 billion, 4% of the undertaking’s 2019 domestic revenue. The penalty is the largest penalty yet imposed in Chinese antitrust enforcement, far exceeding the previous record of 6.088 billion set in 2015, and is probably also the largest administrative penalty incurred in any industry in China.

The penalty was based on provisions of the Chinese Anti-Monopoly Law that prohibit abuse of market dominance. Specifically, the Anti-Monopoly Law stipulates that dominant undertakings are prohibited from “requiring counterparties to deal exclusively with themselves without justifiable reasons” (Art. 17, para. 1, subpara. 4). Upon its investigation, SAMR determined the digital undertaking’s “choosing one of two” behaviors to constitute such exclusive dealing.

Analyzing monopolistic conduct involving abuse of market dominance generally requires a step-by-step inspection of market definition, dominant market position, abusive conduct and the effect of elimination of competition. This is also the analytical framework SAMR presents in its penalty decision, which is as follows:

### Market definition

Ordinarily, market definition is the first step in identifying anti-monopoly behaviors including an abuse of market dominance. Two factors constitute market definition, namely the relevant product market and the relevant geographic market. Here, SAMR defined the relevant market as the “domestic digital retail platform services market”, based on the Anti-Monopoly Law and general practice, as well as taking into consideration the unique characteristics of the digital platform economy and the specifics of this case.

The definition of the relevant product market is particularly notable in this case. SAMR considered the following factors in determining that digital retail platform services constitute a market distinct from traditional retail business services: (1) the cross-side network effect triggered by the two platform user groups (namely the retailers and consumers) and an analysis of substitutability; (2) the geographic region

and service periods covered by undertakings and their operational costs, ability to match potential consumers, and efficiency in responding to market demands; (3) and differences in the scope of products offered to consumers, degree of shopping convenience, and degree of efficiency in comparing and matching products.

This methodology for defining the relevant product market serves as a reference for future cases associated with the digital platform economy. Prior to this case, digital platform operators often regarded traditional offline operators as competitors, therefore assuming their market power to be insufficient to constitute a dominant position in the market. SAMR may not accept this position in their future enforcement actions. If only digital services are considered in defining the relevant product market, the market share of digital platform undertakings will increase significantly across numerous industries, greatly increasing their risk of being deemed dominant. Please see the following analysis on dominant position.

### **Dominant position**

SAMR started its analysis of the dominant market position with traditional parameters including market shares and market concentration level. SAMR found that the domestic digital retail platform services market in China is highly concentrated with few competitors, and that this particular digital undertaking held substantial market share (consistently higher than 60% in the past five years). Further, SAMR analyzed the undertaking's influence over the market, particularly highlighting its ability to set the price of services, to determine the amount of internet traffic for each operator on its platforms, and to control distribution channels. This, together with the undertaking's strong financial resources and advanced technology, placed the undertaking in a dominant market position.

In addition, SAMR generally found that the undertaking held a dominant position in the domestic digital retail platform services market because other operators were highly dependent on the undertaking in their business transactions due to the network effect and the lock-in effect features of the platform economy, while it also recognized the high barriers to entry and the undertaking's significant advantages in related areas such as logistics, payment services, cloud computing, etc.

### **Abusive conduct**

In terms of the abusive conduct, SAMR found that, since 2015, the undertaking abused its dominant position in the domestic digital retail platform services market by engaging in “choosing one of two”—prohibiting operators on its platforms from operating and participating in promotional activities on other competitive platforms, thereby restricting operators to conduct transactions only with itself, and ensuring this with a combination of punitive and remunerative measures—and determined such acts were in violation of the Anti-Monopoly Law, which prohibits dominant undertakings from “requiring their counterparties to deal exclusively with themselves without justifiable reasons” (Art. 17, para. 1, subpara. 4).

Specifically, according to the penalty decision of SAMR, the undertaking primarily engaged in “choosing one of two” by prohibiting operators on its platforms, verbally or in written agreements, from operating on other competitive platforms, and prohibiting such operators from engaging in promotional activities on

those platforms.

At the same time, the digital undertaking adopted a combination of remunerative and punitive measures to ensure the implementation of its “choosing one of two” policy. On the one hand, the undertaking supported compliant operators with internet traffic while, on the other hand, monitoring whether operators operated or participated in promotional activities on other competitive platforms by using manual and technological inspections. Upon finding non-compliance, the undertaking punished operators on its platforms by using its market power, platform rules, and data and algorithms. These punishments included reducing resources and support for promotional activities, disqualifying the operator’s participation in promotional activities, lowering the operator’s search rankings, canceling other major rights and interests, etc. Through combining these measures, the undertaking effectively imposed “choosing one of two” requirements on operators on its platforms.

### **Effect of eliminating or restricting competition**

SAMR found that the digital undertaking established a lock-in effect by prohibiting distributors on its platforms from operating or participating in promotional activities on other competitive platforms. This eliminated and restricted competition in the domestic digital retail platform services market, first by eliminating and restricting competition and potential competition from other competitive platforms and second by harming the interests of the operators on its platforms, hindering the optimization of allocation of resources, limiting innovation in the platform economy, and ultimately harming the interests of consumers.

### **Message for digital undertakings**

Overall, since the end of 2020, anti-monopoly enforcement in the digital economy has gained increased attention. SAMR issued on November 10, 2020 the *Antitrust Guidelines for the Platform Economy (Draft for Comments)*, of which the Anti-Monopoly Committee of the State Council promulgated the formal version on February 7, 2021. On December 11, 2020, the CPC Central Committee Politburo specifically requested in its assembly to “strengthen anti-monopoly and prevent the unregulated expansion of capital”. During the 2021 Lianghui, the Government Work Report again emphasized that it is necessary to “step up efforts against business monopolies and guard against unregulated expansion of capital, and ensure fair market competition.” Likewise, an amendment to the Anti-Monopoly Law and “enforcement of anti-monopoly” are respectively highlighted in the reports of the NPC Standing Committee and the Supreme People’s Court. The People’s Bank of China, the Ministry of Transport, the Civil Aviation Administration of China, and other industry regulators have also specifically proposed to strengthen anti-monopoly work in their respective industries, which will all involve the supervision of digital operations.

It is apparent that anti-monopoly has become a highly contentious legal field across the broader society, and the legislative, executive, and judicial branches are observing with great attention. It is generally accepted that the investigation of this digital undertaking is the beginning—not the end—of anti-monopoly enforcement in the digital economy.

Under these circumstances, undertakings in the digital economy should actively take relevant measures

to strengthen internal anti-monopoly compliance, and establish a top-down risk management system for anticompetitive behaviors, so as to minimize risks associated with non-compliance. Achieving an edge in compliance will enable digital undertakings to gain a head start in an ever-changing competitive environment.

It is worth noting that, in this case, in addition to the administrative penalty decision, SAMR also issued for the first time an administrative guidance letter, guiding the digital undertaking to: (1) conduct a comprehensive internal review in accordance with the Anti-Monopoly Law and inspect and regulate its own business practices; (2) notify concentrations of undertakings once they meet the notification thresholds outlined in the *Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings*, and not to implement concentrations of undertakings that have or may have the effect of eliminating or restricting competition; (3) not use technology, platform rules, data and algorithms, etc. to implement anti-competitive agreements and abuse its market dominance and eliminate or restrict market competition.

The administrative guidance letter also sets out detailed and comprehensive requirements and advice for the digital undertaking, requiring it to take on the responsibility as a leading platform enterprise (including fair and just use of data; data protection in accordance with law; adoption of fair, reasonable and nondiscriminatory principles in cooperating with operators on its platforms), to complete the internal compliance control systems (including to specify requirements and processes for anti-monopoly regulatory compliance management, to improve internal compliance mechanisms such as adopting compliance consultations, compliance inspections, compliance reporting, compliance examinations, and regularly running compliance trainings for senior officers and employees), and actively maintain fair competition to promote innovation and development. Other digital undertakings could refer to these guiding principles, especially those with dominant positions in specific industries.

## ***Important Announcement***

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