Legal Commentary

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Highlights of the Draft Amendment to the Anti-Monopoly Law

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On October 23, 2021, a second draft amendment to the *Anti-Monopoly Law of the People's Republic of China* (the "**Draft Amendment**") was issued for public comments following its review at the 31st meeting of Standing Committee of the 13th National People's Congress (the "**NPC**", the Chinese legislature). The public comment period ends on November 11, 2021.

Each step of amending the Anti-Monopoly Law has attracted widespread attention from industry, media, and relevant companies with respect to advancing comprehensive, in-depth anti-monopoly law enforcement—from the first draft amendment issued in January 2020 to inclusion of amending the Anti-Monopoly Law in the NPC's key legislative priorities for 2021. This article will briefly interpret several key revisions proposed in the Draft Amendment.

Antitrust in the Internet Sector: Keeping Pace and Creating Legal Basis

Anti-monopoly enforcement activities targeting Internet companies have lasted for nearly a year since November 2020 and have yet to diminish. During this period, the Anti-Monopoly Commission of the State Council issued the *Anti-monopoly Guidelines for the Platform Economy*. Law enforcement authorities have also signaled the importance of anti-monopoly compliance for Internet companies by strengthening law enforcement and supervising their compliance efforts. On this basis, the Draft Amendment would further regulate the data and algorithms, technology, platform rules, and other issues that monopolistic behaviors may leverage in the Internet sector, confirming China's long-term and firm advancement of antitrust in the Internet sector.

The key revisions related to the Internet sector include:

- First, in the general provisions, Article 10 provides that undertakings must not eliminate or restrict competition through abuse of data and algorithms, technology, capital advantages, and platform rules, etc.
- Second, on abuse of dominant market position, Article 22 expressly emphasizes that it constitutes an abuse of dominance if an operator with a dominant market position uses data, algorithms, technology, and platform rules to set up obstacles or impose unreasonable restrictions on other undertakings.

- However, special provisions remain to be formulated in implementing rules to the Anti-Monopoly Law on how to determine dominant market positions among digital platform undertakings. Determining dominant position of platforms, especially two-sided platforms, has always been a major problem in practice due to their multisided nature, network effects, lock-in effects, and other characteristics. This issue will need to be further clarified in the form of implementation rules.

Merger Control: Strengthening Law Enforcement in Key Sectors, Raising Maximum Fines, and Introducing the "Stop-the-Clock" Mechanism

Since December 2020, gun-jumping cases and, more broadly, merger control, have been a focus of the antitrust enforcement in China. For the first time, the Draft Amendment introduces the key sectors to the merger control regime, providing that the Chinese antitrust authorities should strengthen review of concentrations in sectors relating to: (i) people's livelihoods, (ii) finance, (iii) technology, and (iv) media in accordance with the law. It remains to be further clarified how this will be clarified in future implementation rules.

The Draft Amendment also enhances enforcement against "killer acquisitions". According to Article 26, the Chinese antitrust authorities will proactively initiate a review where a concentration of undertakings does not meet the filing thresholds but where evidence indicates that it has or may have the effect of eliminating or restricting competition. This provision restates and would incorporate into the Anti-Monopoly Law the relevant rules in the current *Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings*.

In addition, the Draft Amendment would raise maximum fines applicable for gun-jumping cases, as long expected. This revision was initially seen in the first draft amendment to the Anti-Monopoly Law in January 2020, and the Draft Amendment goes even further. Article 58 stipulates that if a concentration that reaches the filing thresholds but fails to be notified, **a fine of less than 10% of the previous year's turnover of the filing obligor will be imposed if the concentration has or may have the effect of eliminating or restricting competition, and a fine of less than RMB 5 million (approx. USD 783,000) if the concentration does not have such effect.**

Compared with the maximum fine of RMB 500,000 (approx. USD 78,300) under the current Anti-Monopoly Law, the increased maximum fine under the Draft Amendment could significantly increase the deterrence effect for undertakings, while retaining flexibility and predictability of law enforcement by not establishing a minimum level of fines. This would follow the approach for monopolistic behavior (which is 1-10% of the undertaking's turnover in the previous year under the current Anti-Monopoly Law).

Moreover, the Draft Amendment would also increase flexibility by introducing a "stop-the-clock" mechanism for merger reviews. Specifically, Article 32 provides that if one of the following circumstances is met, the enforcement authority may decide to suspend the time for its review:

- The filing party fails to submit documents and materials as required, which renders the review impossible;

- There are new situations or new facts that affect the review of the concentration, which need to be verified; or
- The remedy proposal needs to be further evaluated and the filing party agrees.

Although the "stop-the-clock" mechanism would improve the flexibility of reviews, it has no effective restrictions on the discretionary power of the authorities and does not provide a corresponding mechanism to ensure transparency of the procedures, which could bring uncertainty to transactions in practice.

Monopoly Agreements: Clarifying the Requirements for Proving Anti-competitive Effects, Introducing a Safe Harbor System

There have long been divergent views as to whether the determination of a vertical monopoly agreement also requires establishing the effect of eliminating or restricting competition, due to the position of the second paragraph of Article 13 of the current Anti-Monopoly Law[1]. As a result, vertical monopoly agreements that theoretically have less anti-competitive effect face relatively more stringent regulations than horizontal monopoly agreements in antitrust enforcement in China.

In this regard, the Draft Amendment moves upward the position of the second paragraph of Article 13 in the Monopoly Agreement chapter and turns it into a blanket provision, providing that the term "monopoly agreement" refers to any agreement, decision or other concerted practice that eliminates or restricts competition, so that it is clear that both horizontal and vertical monopoly agreements must have the effect of eliminating and restricting competition.

In addition, the Draft Amendment at Article 17, paragraph 2 further specifies that vertical monopoly agreements, fixing resale prices, or setting minimum resale prices will not be prohibited if the undertaking can prove that they do not have the effect of eliminating or restricting competition.

Another highlight of the Monopoly Agreement chapter is the introduction of a safe harbor system. In recent years, attempts have been made in many implementing rules or guidelines to establish safe harbors for monopoly agreements based on market share, and the Draft Amendment provides a formal legal basis for doing so. Specifically, Article 19 of the Draft Amendment stipulates that if an undertaking can prove that its market share in the relevant market(s) is lower than the standard set by the Chinese antitrust authorities, Articles 16, 17, and 19 prohibiting both horizontal and vertical monopoly agreements will no longer apply, except where there is evidence showing that the agreement has eliminated or restricted competition.

This provision creates the framework for a safe harbor system for monopoly agreements at the legislative level. Once implemented, this will greatly improve the predictability of the risks of monopoly agreements. It remains to be seen in in the future how the Chinese antitrust authorities will further develop the market share-based safe harbor standard.

[1] Article 13, paragraph 2 of the current Anti-Monopoly Law reads "the term 'monopoly agreement' refers to any agreement, decision or other concerted practice that eliminates or restricts competition", but the first paragraph of Article 13 only refers to horizontal monopoly agreements, while vertical monopoly agreements are provided for under Article 14, which lacks the same provision.

Fair Competition Review System: Formal Inclusion in the Anti-Monopoly Law

The prohibition of administrative monopoly has always been a prominent feature of the Anti-Monopoly Law. On this basis, the *Opinions on Establishing a Review System for Fair Competition in the Course of Building of the Market System* (the "**Opinions**"), issued by the State Council on June 14, 2016, call for the establishment of a fair competition review system to regulate relevant administrative actions, prevent the introduction of rules that eliminate or restrict competition, and gradually eliminate and abolish regulations and practices that hinder a unified national market and fair competition.

To solve the chronic problem of administrative monopoly, implementation of the fair competition review system requires more than the Opinions alone. In this regard, Article 5 of the Draft Amendment stipulates that the state will establish and implement a fair competition review system, which will be more conducive to its role and conform to the country's overall ambitions of promoting a market that features fair competition.

Increasing Administrative Penalties and Introducing Criminal Liability

In terms of administrative penalties, the Draft Amendment comprehensively increases penalties for violations of the Anti-Monopoly Law. In addition to the above-mentioned increase in the maximum fines for gun-jumping cases, maximum fines are also significantly increased for monopoly agreements to which the undertakings had no turnover in the previous year, those who have not implemented a monopoly agreement, and where the industry associations have organized a monopoly agreement.

In addition, similar to the *Personal Information Protection Law of the People's Republic of China,* which will become effective on November 1, 2021, the Draft Amendment also imposes penalties on the legal representative, the main person in charge of an undertaking, and the person directly responsible for reaching a monopoly agreement. The maximum fine imposed on such personnel is RMB 1 million (approx. USD 156,600).

Moreover, it is worth noting that, according to Article 63, if "the circumstances, impact, and consequences of any violation are particularly severe", the monetary fine could be increased by two to five times based on the range mentioned above. The severity of this article would be unprecedented (according to which, the highest fine may reach 50% of an undertaking's turnover in the previous year). Therefore, undertakings need to pay more attention to and bear in mind the anti-monopoly risks and compliance in their business operations.

Besides administrative penalties and fines, the Draft Amendment also paves the way for the introduction of criminal liability. Under the current Anti-Monopoly Law, monopolistic behavior does not directly lead to criminal liability, but only involves administrative penalties, fines, and/or civil liability. Article 52 of the current Anti-Monopoly Law stipulates that refusal to provide relevant materials and information to the antitrust authorities in an investigation could potentially lead to criminal liability in severe cases (for example, such conduct could constitute the crime of obstructing a state functionary).

By contrast, Article 67 of the Draft Amendment includes provisions on criminal liability for monopolistic behaviors: "[i]f an undertaking engages in monopolistic behavior and causes losses to others, it shall bear civil liability in accordance with the law. Where a violation of the provisions hereof constitutes a crime,

criminal liability shall be investigated in accordance with the law." This provision clearly conveys the legislature's attitude toward strengthening the crackdown on monopolistic behaviors and to increase the deterrence effect of the Anti-Monopoly Law. Industry and companies should closely monitor how this article may be implemented as it involves the convergence of the Anti-Monopoly Law and the Criminal Law.

Important Announcement

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