Anti-monopoly Law Amendment Analysis Series (VI) – An Overview of Key Internet-related Changes

Author: Corporate Compliance Division

Introduction

The NPC Standing Committee on June 24, 2022 enacted the Amended Anti-monopoly Law, which entered into force on August 1, 2022 (the "**amended Anti-monopoly Law**"). This is the first time the Anti-monopoly Law has been amended since its promulgation nearly 15 years ago and is the legislative outcome of a four-year endeavor by China's lawmakers since the revision work was formally planned in 2018 by the Anti-monopoly Commission of the State Council. The amendment improves existing rules and systems related to antitrust matters by considering previous law enforcement practices, international practices, and new realities in domestic markets. It epitomizes China's stance on formulating and implementing competition rules compatible with a socialist market economy and the government's determination to foster a unified, open, competitive, and orderly market system.

This commentary is the sixth of our special series which aims to provide timely and granular analysis of main changes in the amended Anti-monopoly Law, and addresses a critical aspect in practice: key changes in relation to the Internet sector.

Although the current Anti-monopoly Law has generally been working effectively since promulgation, the advent and boom of new forms of business have posed incompatibilities between the existing antitrust system and law enforcement realities. The amended Anti-monopoly Law refines the regulatory framework on antitrust matters in the Internet sector to adapt to structural changes in China's domestic economy, while raising new concerns for Internet companies in China regarding antitrust compliance. This commentary gives an overview and analysis of key changes in the amended Anti-monopoly Law concerning the Internet sector.

The prohibitive principle against using Internet technologies for monopoly

According to Article 9 of the amended Anti-monopoly Law, "undertakings shall not use data and algorithms, technologies, capital advantages, platform rules, etc. to engage in any monopolistic practice prohibited by this law." This provision introduces a general principle that "prohibits business operators from using Internet technologies to conduct monopolistic behaviors", conclusively enacting the emphasis of law enforcement in recent years on combating Internet-related monopoly. It establishes the overarching

principle on antitrust regulation over the Internet sector, extending relevant antitrust rules to the platform economy. Amid the normalization of Internet regulation as a whole, it is very likely that antitrust regulation over the Internet sector will also enter a new phase where "regulation and development" carry equal weight. In this respect, how Internet companies govern their daily operating activities will become a key compliance focus.

Monopoly agreements: "organizers" and "aiders" should also assume liability

The current Anti-monopoly Law prohibits monopoly agreements among "undertakings with competitive relationships" or between "an undertaking and its trading counterparties"; however, it is silent as to parties who are neither competitors nor counterparties but who have organized or aided the conclusion of monopoly agreements. This, to some extent, presents a practical difficulty for regulators, as the current antitrust framework provides no legal basis to pursue liability against such "organizers" or "aiders" of monopoly agreements, which is an issue that is especially prominent when Internet platforms are involved.

A preliminary solution to the above problem is provided in the *Anti-monopoly Guidelines of the Anti-monopoly Commission of the State Council for Platform Economy* (the "**Anti-monopoly Guidelines for Platform Economy**") as for how to deal with undertakings that organize or aid the conclusion of monopoly agreements. On that basis, the amended Anti-monopoly Law further prescribes in Article 19 that "an undertaking shall not organize other undertakings to reach any monopoly agreement or provide substantive aid to other undertakings to reach any monopoly agreement." Moreover, the *Provisions on Prohibition of Monopoly Agreements (Draft for Comment)*, released by SAMR, would further refine this aspect of the amended Anti-monopoly Law. These provisions are set out in the following table.

Anti-monopoly Guidelines for Platform Economy[1]	**The amended Anti-monopoly Law**	**Provisions on Prohibition of Monopoly Agreements (Draft for Comment)** [2]
Article 8. Hub-and-spoke Agreements Undertakings operating on a platform and having a competitive relationship with each other may reach a hub-and-spoke agreement which has the effect of a horizontal monopoly agreement by virtue of their vertical relationship with the platform operator or through organization and coordination	Article 19. An undertaking shall not organize other undertakings to reach any monopoly agreement or provide substantive aid to other undertakings to reach any monopoly agreement.	Article 17. An undertaking shall not organize other undertakings to reach any monopoly agreement or provide substantive aid to other undertakings to reach any monopoly agreement. The term "organize" herein shall refer to the following circumstances: (I) Where the undertaking is not a party to the monopoly agreement, but plays a decisive or dominant role in reaching or implementing the monopoly agreement in terms of its

[1] 《国务院反垄断委员会关于平台经济领域的反垄断指南》[Anti-monopoly Guidelines of the Anti-monopoly Commission of the State Council for Platform Economy] (St. Council Anti-monopoly Commission [2021] No. 1, promulgated and effective Feb. 7, 2021).

[2] 《禁止垄断协议规定（征求意见稿）》[Provisions on Prohibition of Monopoly Agreements (Draft for Comment)] (issued by SAMR on June 27, 2022).

Anti-monopoly Guidelines for Platform Economy[1]	The amended Anti-monopoly Law	Provisions on Prohibition of Monopoly Agreements (Draft for Comment) [2]
by the platform operator. The following elements may be taken into account when determining whether such agreements constitute a monopoly agreement prohibited by Article 13 and Article 14 of the Anti-monopoly Law: whether such competing undertakings have reached and implemented any monopoly agreement to exclude or restrict competition in the relevant market by using technical means, platform rules, data and algorithms, etc.		subject scope, main content, performance conditions, etc.; (II) Where an undertaking enters into agreements with multiple counterparties in trading, and purposely causes such competing counterparties to communicate intentions or exchange information with each other through the undertaking to reach a monopoly agreement set forth in Articles 8 to 12 hereof. The term "substantive aid" herein shall refer to the circumstance where the undertaking does not carry out the above organization activities but provides support for reaching or implementing the monopoly agreement and such support has causality with and a significant impact on eliminating or restricting competition.

It is clear from the above table that, the *Provisions on Prohibition of Monopoly Agreements (Draft for Comment)* specify the acts of "organizing" and "aiding" the conclusion of monopoly agreements set forth in the amended Anti-monopoly Law and the Anti-monopoly Guidelines for Platform Economy. Specifically, Item (II) of Article 17 prescribes a typical hub-and-spoke agreement scenario, where an apparent vertical monopoly agreement hides the substance of a horizontal monopoly agreement. Item (I) specifies the act of organizing or aiding monopoly agreements in a broader sense, which does not require an upstream-downstream relationship between the platform and the contractual parties or a competitive relationship among the contractual parties. This clarification provides a legal basis for regulators to constrain platforms from promoting horizontal, concerted monopolistic practices through vertical relationships. It also allows regulators to prevent business operators on a platform from using third-party algorithms for monopolistic collusion.

Abuse of market dominance: clarified prohibition on using Internet technologies to abuse market dominance; newly added restriction on self-preferencing

Article 22 of the amended Anti-monopoly Law further integrates the Article 9 principle into the regulatory framework on abuse of market dominance, providing that "an undertaking with a market dominant position shall not use data and algorithms, technologies, platform rules, etc. to abuse such position as prescribed in the preceding paragraph." The Anti-monopoly Guidelines for Platform Economy previously elaborated

on how regulators will evaluate various types of business activities carried out by Internet platforms by using data and algorithms, technologies, and platform rules, which, combined with Article 22, continue a consistent policy tone on this issue.

It is notable that Article 20 of the *Provisions on Prohibition of the Abuse of Market Dominance (Draft for Comment)* adds a new type of market dominance abuse, i.e., an Internet platform with market dominance which uses data and algorithms, technologies, or platform rules to unjustifiably give itself preferential treatment when competing with undertakings who use the platform, and such preferential treatment may be: (1) treating its own products more favorably in searches or rankings; or (2) using non-public data gleaned from undertakings on the platform to develop its own products or assist its own decision-making. As SAMR mentioned in its drafting notes, Article 20 "appropriately uses theoretical research findings and legislative and law enforcement practices in overseas jurisdictions as reference", meaning that it, to some extent, follows the current legislative trend across the world to set up a "gatekeeper" mechanism targeting major Internet platforms. In this context, a key question to consider is how to regulate self-preferential conduct of gatekeeper platforms.

SAMR's earlier *Guidelines for Internet Platforms to Fulfil Primary Responsibilities (Draft for Comment)*[3] has proposed similar rules on extremely large platforms by stipulating that, "an extremely large platform operator, when engaging in fair competition with undertakings using the platform, shall not unjustifiably use platform-acquired, non-public data of undertakings and users on the platform that are generated or provided during their use of platform services"; and that, "when providing relevant products or services, an extremely large platform operator shall treat the platform (or its affiliates) and undertakings using the platform on an equal basis, and shall not give preferential treatment to itself (or its affiliates)." Although the above provisions are not set in stone since the Guidelines have not entered into force, Article 20 of the *Provisions on Prohibition of the Abuse of Market Dominance (Draft for Comment)* and the *Guidelines for Internet Platforms to Fulfil Primary Responsibilities (Draft for Comment)* show congruence in terms of wording, though the former seems more specific than the latter. In addition, the main criteria for defining an extremely large platform are quantitative, objective thresholds such as turnover. By contrast, there are different methods to determine whether an Internet platform has a market dominant position, which leads to uncertainty. If Article 20 of the *Provisions on Prohibition of the Abuse of Market Dominance (Draft for Comment)* is adopted and becomes effective, it would mean that some Internet platforms not deemed "extremely large" may also be restricted with respect to self-preferencing activities, which may significantly impact their choice of business models.

Market players may have different views on "self-preferential conduct". In fact, "self-preferencing" is commonly regarded as a reasonable business need of vertically integrated companies and is to some extent pro-competitive, because a vertically integrated company can leverage its competitive edge in its specialized field to become an active presence in upstream and downstream markets, enhancing market access and boosting competition within those horizontal markets. Meanwhile, for Internet platform companies, collaboration across the value chain further optimizes management. Therefore, in our opinion, less strict restrictions on "self-preferencing", or at least a relatively higher threshold for identifying

[3] 《互联网平台落实主体责任指南（征求意见稿）》[Guidelines for Internet Platforms to Fulfil Primary Responsibilities (Draft for Comment)] (issued by SAMR on Oct. 29, 2021).

platforms that should be subject to such restriction, may be a better choice for the draft regulations above to avoid stifling progress across the Internet sector.

Concentrations of undertakings: higher thresholds for notification, mandatory notification conditions for concentrations below the thresholds, and enhanced penalties for illegal concentrations

A draft amendment to the *Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings* would raise the bar for reporting concentrations of undertakings while adding a new circumstance requiring notification, as specified in the following table.

The current Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings[4]	The draft amendment to the Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings[5]
Article 3 Where a concentration of undertakings satisfies either of the following thresholds, the concentration shall be notified in advance to the anti-monopoly law enforcement agency of the State Council, and no such concentration may be implemented without clearance of the prior notification: ■ Over the preceding fiscal year, the combined global turnover of all undertakings participating in the concentration exceeded RMB **10 billion**, with at least two of such undertakings respectively attaining a turnover of more than RMB **400 million** within China; or ■ Over the preceding fiscal year, the combined turnover within China attained by all undertakings participating in the concentration exceeded RMB **2 billion**, with at least two of such undertakings respectively attaining a turnover of more than RMB **400 million** within China.	Article 3 Where a concentration of undertakings satisfies either of the following thresholds, the concentration shall be notified in advance to the anti-monopoly law enforcement agency of the State Council, and no such concentration may be implemented without clearance of the prior notification: ■ Over the preceding fiscal year, the combined global turnover of all undertakings participating in the concentration exceeded RMB **12 billion**, with at least two of such undertakings respectively attaining a turnover of more than RMB **800 million** within China; or ■ Over the preceding fiscal year, the combined turnover within China attained by all undertakings participating in the concentration exceeded RMB **4 billion**, with at least two of such undertakings respectively attaining a turnover of more than RMB **800 million** within China.
N/A	Article 4 Where a concentration of undertakings does not meet the notification thresholds set forth in Article 3 hereof but satisfies both of the following conditions, the concentration shall be notified in advance to the anti-monopoly law enforcement agency of the State Council, and no such concentration may be implemented without

[4] 《国务院关于经营者集中申报标准的规定》[Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings] (as revised by St. Council, Decr. 703; promulgated and effective Sept. 18, 2018).

[5] 《国务院关于经营者集中申报标准的规定（征求意见稿）》[Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings (Draft for Comment)] (issued by SAMR on June 27, 2022).

The current Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings[4]	The draft amendment to the Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings[5]
	clearance of the prior notification: ■ One of the undertakings participating in the concentration had a turnover of more than RMB 100 billion within China over the preceding fiscal year; ■ The market value (or valuation) of the other undertaking in a merger prescribed in Item (I), Article 2 hereof or any other undertaking in any activity prescribed in Items (II) and (III) of Article 2 hereof is no less than RMB 800 million, and the turnover within China of such undertaking over the preceding fiscal year accounts for more than one third of its global turnover during the same period.

The first condition under the new Article 4 would basically apply to all major Internet platforms in China, and it would not be difficult for their mergers or acquisitions to satisfy the second condition (i.e., the market value or valuation of the target company is no less than RMB 800 million and its domestic turnover comprises over one third of its overall turnover during the preceding fiscal year). Also, per our experience, a target company with a valuation of RMB 800 million or more is normally at a Series B financing level, and the "one third" threshold can be easily satisfied if the transaction target is a domestic undertaking in China. Given the above, we believe that Article 4 is intended to address M&A transactions that may "pinch off young shoots"; that is, acquisitions that may have the effect of eliminating competitors in their early stages of development. Article 4 would require such transactions to be notified as concentrations of undertakings and to undergo examination even if their turnover does not meet the notification thresholds. Therefore, if this provision takes effect, the number of transactions requiring notification is likely to increase.

In addition, as for transactions falling short of the notification thresholds, although the current Anti-monopoly Law gives authority to the anti-monopoly law enforcement agency to investigate such transactions, it does not offer any legal basis to require the transaction parties to notify the transaction. By contrast, according to Article 26 of the amended Anti-monopoly Law and Article 7 of the *Provisions on Review of Concentrations of Undertakings (Draft for Comment)*, where a concentration of undertakings does not meet the notification thresholds but has or may have the effect of eliminating or restricting competition, the State Administration for Market Regulation is empowered to require notification or supplementary notification of such concentration of undertakings. Therefore, special attention should be paid to the fact that, after the amended Anti-monopoly Law enters into force, if an undertaking is required by the anti-monopoly authority to notify its transaction as a concentration of undertakings, the closing of the transaction will be forced to be delayed and the transaction process will be severely affected.

In addition to notification thresholds, the amended Anti-monopoly Law also adjusts the penalty amounts that may be imposed on undertakings which fail to make a required notification. Specifically, as amended, the Anti-monopoly Law will impose penalties on undertakings that implement illegal concentrations based

on whether the illegal concentration has the effect of eliminating or restricting competition. For illegal concentrations that do not have the effect of eliminating or restricting competition, the upper limit of penalties will be raised from the current RMB 500,000 to RMB 5 million; for illegal concentrations that may eliminate or restrict competition, the amended law will impose penalties of no more than 10% of the violator's sales amount in the preceding year, in addition to existing measures such as ordering violators to cease their concentrations and to return to the status quo ante. Given the enhanced penalties and increased cost of violations, Internet companies are advised to evaluate the antitrust risks of their transactions in a more prudent manner.

Individual accountability assumed by business leaders

The amended Anti-monopoly Law attaches greater importance to antitrust compliance by the legal representative and person-in-charge of undertakings. As the enabling law of subsequent antitrust regulations, the law formally establishes in Article 55 the mechanism under which the antitrust authority is empowered to arrange regulatory talks with the legal representative or person-in-charge of an undertaking suspected of violating the Anti-monopoly Law. This is an endorsement of the regulatory authority's moves in recent years to summon senior executives of Internet companies for regulatory talks and require them to conduct self-inspection and rectification of their non-compliant behaviors. With the amended Anti-monopoly Law taking effect, such means are likely to be frequently used in future regulatory actions.

Moreover, the amended Anti-monopoly Law imposes penalties on individuals involved in monopolistic activities, providing that "where the legal representative, principal-in-charge, and directly responsible person of an undertaking are personally accountable for the conclusion of a monopoly agreement, a fine of no more than RMB 1 million may be imposed on them." Although the definitions of "person-in-charge", "principal-in-charge", and "directly responsible person" still await further clarification, law enforcement practices in other countries such as the United States have shown that, in addition to high-level officers and beneficiaries, mid-level employees may also be held accountable for an undertaking's monopolistic conduct.[6] Also, while the act of refusing or obstructing a regulatory investigation may be subject to criminal liability (e.g., the crime of disrupting the performance of official duties), the amended Anti-monopoly Law further stipulates in Article 67 that violation of the Anti-monopoly Law *per se* may constitute a criminal offence. As there is no provision under the current criminal law system in China to specially criminalize monopolistic conduct, implementation of Article 67 may require and thus lead to corresponding legislative efforts in the criminal law, which is a space to be closely watched in the near future.

Potential impact of the public interest litigation mechanism on Internet enterprises

The amended Anti-monopoly Law provides in Article 60 that, where an undertaking commits monopolistic acts that harm the public interests, a people's procuratorate at the level of cities divided into districts or

[6] Caron Beaton-Wells, *U.S. Policy and Practice in Pursuing Individual Accountability for Cartel Conduct: A Preliminary Critique*, THE ANTITRUST BULLETIN 56(2), footnote 35 (2011), available at: https://www.researchgate.net/profile/Caron-Beaton-Wells/publication/273514695_US_Policy_and_Practice_in_Pursuing_Individual_Accountability_for_Cartel_Conduct_A_Preliminary_Critique/links/5a4ea311a6fdcc7b3cda7c0c/US-Policy-and-Practice-in-Pursuing-Individual-Accountability-for-Cartel-Conduct-A-Preliminary-Critique.pdf.

above may lodge a civil public interest lawsuit before a people's court in accordance with law. Given earlier proposals by NPC deputies, this provision may cater to individual consumers or self-employed business owners who are unable to file an anti-monopoly lawsuit due to insufficient funds, limited litigation resources, or unaffordable burden of proof[7]. In fact, earlier practice has already provided a glimpse of the application of the public interest litigation mechanism to the regulation of Internet platforms. The Supreme People's Procuratorate commented on a leading 2020 case that, in the "administrative public interest litigation case lodged by the Qianxi County People's Procuratorate of Guizhou Province to urge rectification of unfair competition conduct by an online catering platform", the Qianxi Procuratorate's pre-litigation act of urging rectification has a leading significance in "actively and stably extending the scope of application of the public interest litigation system and maintaining the economic order in cyberspace[8]." The Supreme People's Procuratorate also appealed for endeavors to promote public interest litigation for antitrust and anti-unfair competition purposes at its recent press conference[9]. Furthermore, by the end of 2020, the standing committees of 18 provincial-level people's congresses have adopted decisions or resolutions to authorize their procuratorates to explore public interest litigation while handling public interest infringement in the Internet sector[10].

Given the broad meaning of "social public interest", it is reasonable to expect a great number of public interest lawsuits will be lodged by procuratorates after Article 60 takes effect. Thus, Internet enterprises are advised to cope with complaints raised by consumers or vendors more actively and keep alert to antitrust compliance risks during their day-to-day operations.

Conclusion

14 years after the promulgation of the Anti-monopoly Law, the 2022 amendment is a result of China's unremitting efforts to address constantly emerging concerns along its fruitful journey toward making and implementing competition rules compatible with a socialist economy and fostering a unified, open, competitive, and orderly market system. The amended Anti-monopoly Law is bound to exert significant influence on all facets of China's market economy such as corporate compliance and antitrust law enforcement. This commentary is merely one of a special series of articles to give in-depth analysis of the amended Anti-monopoly Law by considering concerns and pain points market players face in their compliance with the country's antitrust laws.

[7] *Antitrust Law Amendment: Special Focus on the Internet Domain with Class Action Proposed as An Option*, available at: https://www.yicai.com/news/100971889.html; *CPPCC Member Li Shouzhen: Antitrust Law Revision Is Needed to Curb Monopoly in Digital Economy*, available at: http://www.zggpjz.com/keji/shuma/5676.html.

[8] *Leading Cases concerning Cyberspace Governance Released by the Supreme People's Procuratorate*, available at: https://www.spp.gov.cn/spp/xwfbh/wsfbh/202101/t20210125_507452.shtml.

[9] *Press Conference of the Supreme People's Procuratorate to Reflect on Public Interest Litigation Work in 2021*, available at: https://www.spp.gov.cn/spp/baqfgcxhtk/xwfbh.shtml.

[10] *A Strong Signal from the Supreme People's Procuratorate to Advance Cyberspace Governance!* available at: https://www.spp.gov.cn/spp/zdgz/202101/t20210125_507542.shtml.

Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

If you have any questions regarding this publication, please contact:

Chen MA

Tel: +86 10 8525 5552
Email: chen.ma@hankunlaw.com

Shipo (Angus) XIE

Tel: +86 10 8524 5866
Email: angus.xie@hankunlaw.com

Da SHI

Tel: +86 10 8525 5549
Email: da.shi@hankunlaw.com