Hogan Lovells

# China tables first set of amendments to the Anti-Monopoly Law

20 January 2020

On 2 January 2020 China's antitrust authority, the State Administration for Market Regulation (SAMR), released a draft proposing amendments to the main antitrust statute in China, the Anti-Monopoly Law (AML) for public consultation.

The proposed amendments to the AML (Draft) are the first since the law came into effect in August 2008. Thus, perhaps the most important message that is being sent to the market is the very fact that the AML will be amended.

**Overview**

The Draft increases the number of AML provisions from 57 to 64, although the overall structure of the law, including the number and title of chapters, remains the same. Overall, in line with the professed goal of the revision, a "small amendment," there are relatively few proposed changes. However, this fact does not mean that the changes are without significance.

**Fair competition review system**

The Draft incorporates the "fair competition review system" (FCRS) into the framework of the AML. The FCRS is a policy initiative that was launched by the State Council of the People's Republic of China, China's cabinet, in 2016. That policy basically requires each government body throughout China to conduct a "self-assessment" of the compatibility of its rules with the principle of fair competition. There is a widespread recognition that many restrictions on competition in China, as a nation transitioning from a planned to a market-based economy, emanate from government actors (not only businesses). Hence, the FCRS is widely credited as an important step in tackling impediments to market competition in China. Its incorporation into the AML consolidates the efforts in that direction, and sends the very important signal that the central government and legislator continue to focus on challenging local government restrictions on competition.

**Enhanced punishment regime**

The inclusion of the FCRS into the AML regime had been largely expected by the antitrust community. Another set of changes has also been in the offering: Strengthening sanctions for breaches of the AML. This theme permeates throughout the Draft. The clearest example is the increase of the fine for failure to file reportable transactions under merger control rules, gun-jumping, noncompliance with merger remedies, or a prohibition decision – from the previous maximum of CN¥500,000 to a maximum of 10 percent of the companies' revenues from the last

financial year. For a large company, a CN¥500,000 fine could hardly be said to be financially punitive or to be in any shape or form a deterrent.

But other parts in the punishment regime are also strengthened, as perceived "loopholes" are closed. As such, there is a new provision to account for the possibility of fining a third party for arranging a cartel or another anti-competitive agreement between companies (hub and spoke and possibly other situations). In addition, in the Draft, SAMR proposes to give itself powers to advise other government bodies to rectify the anti-competitive conduct they are engaged in (instead of referring the case to the authority hierarchically superior to the infringing body).

**Big changes in merger control?**

In terms of the specific chapters of the AML corresponding to different types of anti-competitive behavior, the biggest changes in the Draft are made to the merger control provisions. In a way, if taken to an extreme, the proposed amendment could lead to an important modification of the existing merger control regime. At present, the merger filing obligation is based on two key premises: that the deal at hand is a reportable transaction (a concentration between business operators) and that certain revenue-based filing thresholds are exceeded.

The Draft disappoints on both aspects. The current version of the AML defines a "concentration between business operators" mainly as an acquisition of a "controlling right" by one company over another, without however providing guidance on what a "controlling right" is. In the past 11 plus years of AML enforcement, the merger filing process has been shrouded in considerable uncertainty, as neither the former merger control authority (the Ministry of Commerce) nor its successor SAMR have provided clear-cut guidance on what exactly constitutes a "controlling right" (on many occasions, the authorities argued that such guidance should be enshrined in the AML itself, not in implementing rules).

The Draft proposes to clarify the term "controlling right," which is a commendable goal of itself. However, by using an overly broad definition, it fails to provide sufficiently clear and practical guidance for market participants.

As to the numeric filing thresholds, the Draft proposes to shift back the power to fix and change the thresholds from the State Council, which had set the existing thresholds based on only revenues back in 2008, to SAMR. The Draft does not set any procedural or substantive limits to this power. If left unchecked, this legislative amendment would (at least theoretically) allow SAMR to reset thresholds on short notice and/or depart from the revenues only benchmarks we have relied on to date without putting in place any specific safeguards to ensure that this does not work in an unpredictable or even unfair way.

Another quite far reaching proposal in the Draft is to incorporate a clause in the AML which allows SAMR to review concentrations below the thresholds. This option was listed in a State Council regulation until now. While transferring it into the AML would remove any ambiguity around whether there is an adequate legal basis for the current setup, it could also be interpreted as a statement of intent (as antitrust regulators globally are musing about introducing new thresholds to capture certain transactions below the thresholds, especially in the digital economy).

In short, the Draft could lead to a merger control regime with a diminished level of legal certainty and predictability, rather than greater.

The same effect could be brought about by the proposal to introduce a "stop the clock" option for SAMR to interrupt the merger review process instead of strictly following the statutory timeline

and deadlines. While a more flexible approach to timing may work to the benefit of the merging parties in some cases, the overall effect could well be to inject additional uncertainty into the review process. Parties entering into a reportable transaction often see merger control filing as the single largest impact on timing to closing and want to know when they can start integrating the businesses: Previously it was at least possible to predict when the end point would be based on the statutory timeline, but this becomes less firm once you introduce the possibility of a "stop the clock" option.

**Few changes outside merger control**

In addition to merger control, the AML has three other chapters on prohibited anti-competitive conduct – monopoly agreements, abuse of dominance, and administrative monopolies, a term of art used to describe anti-competitive government activity.

The monopoly agreements and abuse of dominance provisions are left relatively untouched by the proposed amendments. Similarly, with a few exceptions, the AML chapter on administrative monopolies is modified only punctually.

In the monopoly agreements area, the most noteworthy point in the Draft is the absence of key changes, rather than new additions. Over the past years, there has been a broad discussion in the Chinese antitrust community, including by courts and regulators divided on the issue, as to whether resale price maintenance (RPM) is subject to an effects analysis and who bears the burden of proof. Somewhat disappointingly, the Draft does not clarify this issue. Admittedly, the Draft moves the definition of "monopoly agreement" to a different place in the chapter but – at this point – it is mere speculation as to what this move may effectively mean for the burden of proof in RPM arrangements. In addition, while the Draft clarifies that companies engaged in certain types of hardcore cartel conduct cannot seek to terminate an investigation by way of commitments, it falls short of introducing the notion of "*per se*" illegality for that type of conduct.

Even fewer changes are proposed in the abuse of dominance area. The only key change is the proposal to include a paragraph in the list of factors to be used to assess whether a company has a dominant market position. Here, the Draft proposes to add a list of factors relevant for "business operators in the internet industry": network effects, economies of scale, lock-in effects, and data processing and handling capacities. Against the background of the current wave of antitrust enforcement actions against internet businesses globally, it is understandable that SAMR would want to include that provision. However, enforcement priorities change over time, hence the focus on a single sector of the overall economy in the law itself looks misplaced.

In the administrative monopolies area, as noted, the key changes are to bring the FCRS within the AML framework and streamline the procedure. As part of that change, SAMR would gain the right to conduct an investigation directly against the infringing government body. Other changes in the administrative monopoly chapter of the AML are minor in nature.

In addition to the chapters of the AML which comprise substantive law, two chapters deal with procedural issues – investigations against anti-competitive agreements and abuse of dominance, as well as legal liability for breach of its provisions.

The chapter on investigations against monopoly agreements and abuse of dominance remains largely intact. The three major changes proposed in the Draft include:

- SAMR can enlist the support of the police "when necessary." Looking at past enforcement cases, this may refer to situations where a company forcefully resists a SAMR investigation.

- SAMR proposes to be given the power to revoke a merger control decision if the merging parties have provided false or inaccurate information.
- The Draft provides that SAMR is entitled to run an investigation against government bodies directly, which in turn are under an obligation to cooperate with SAMR.

In the chapter on legal liability, there are various proposals to strengthen sanctions, as noted above. In addition, the Draft adds a sentence that anti-competitive conduct amounting to a crime is to be investigated under criminal law provisions. At the moment, China's Criminal Law only prohibits certain types of bid-rigging and "forced transactions" (in almost a literal way). The way it is formulated, however, the sentence in the Draft could be read as a statement of intent. Perhaps this points to the fact that there could be amendments made to the Criminal Law in the future that will add further kinds of anti-competitive conduct to the list of criminally sanctionable antitrust offenses.

## Conclusions

The Draft is the first set of proposed amendments of the AML since the law came into force over 11 years ago. That is actually quite a long time, given the volume of cases handled, and the changes to the Chinese economy that have taken place in the interim.

In line with the professed goals of the drafters, the Draft only proposes punctual changes, not a radical overhaul. Key changes proposed in the Draft are to bring the FCRS into the AML framework, a strengthening of all types of sanctions, and a revision to merger control rules which could potentially make it more difficult to predict whether a transaction is reportable and if so how long it will take to obtain clearance. It is one thing to toughen up the punishments for violations to bring them in line with other regimes around the world and make them more of a deterrent. But it is not particularly helpful for businesses to face increased fines for failure to file when it is less clear which transactions are required to be reported in the first place, or what the thresholds are likely to be, and given the impact of merger control filing on the timing for closing of a transaction to have less clarity around the end point for the merger control review process

After conclusion of the stakeholder consultation period on 31 January, SAMR is to review the comments submitted and consider them for an amended draft. Then we can either expect SAMR to release a new version of the draft amendment for public comment or send a draft to the State Council as the next step in the normative process. Once the State Council is satisfied with the proposed set of amendments, it should make public its own version and, subsequently, submit the proposal to the Standing Committee of the National People's Congress to commence the formal legislative process.

If you would like to obtain an *in-house* Hogan Lovells translation of the draft AML amendment, please contact us.

## Contacts

**Adrian Emch**
Partner, Beijing
**T** +86 10 6582 9510
adrian.emch@hoganlovells.com

**Jun Wei**
Chair of the Greater China Practice, Beijing
**T** 86 10 6582 9501
jun.wei@hoganlovells.com

**Rachel Xu**
Senior Associate, Beijing
**T** +86 10 6582 9439
rachel.xu@hoganlovells.com

**Qing Lyu**
Associate, Shanghai
**T** +86 21 6138 1629
qing.lyu@hoganlovells.com

**Andrew McGinty**
Partner, Hong Kong
**T** +852 2840 5004
andrew.mcginty@hoganlovells.com