

e-Competitions

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The Chinese National People's Congress passes the amendment to the Anti-Monopoly Law

ALL BUSINESS SECTORS, REFORM, INSTITUTIONS, CHINA, COMPETITION POLICY, GENERAL ANTITRUST

Chinese National People's Congress, *Amendment to the Chinese Anti-monopoly law*, National Legislation, 24 June 2022 (Chinese)

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When its Anti-Monopoly Law (“AML”) went into effect in August 2008, China immediately became a significant antitrust enforcer on the world stage. On June 24, 2022, the National People's Congress, China's top legislature, passed *the Amendment to the Anti-Monopoly Law of the PRC* (the “Amendment”), the first significant changes to the AML in nearly fourteen years. The Amendment, which was signed into law by President Xi Jinping and published on June 24, will become effective on August 1. It marks a major milestone in antitrust enforcement in China.

The more significant aspects of the Amendment include:

- significantly enhanced penalties for AML violations, including the introduction of fines for individuals;
- the introduction of a discretionary “stop-the-clock” mechanism for merger reviews;
- the codification of a burden-shifting framework created by China's courts that gives companies the opportunity to defend resale price maintenance agreements; and
- new safe harbor and burden of proof provisions for matters involving vertical agreements.

Consistent with trends in other jurisdictions around the world, the Amendment also features a special focus on key economic sectors such as the digital economy.

Following the publication of the Amendment, the State Administration for Market Regulation (“SAMR”), China's lead antitrust enforcement authority, released six sets of draft implementing regulations for public comment. These cover subjects such as merger control and notification thresholds, anti-competitive agreements, abuse of

a dominant market position, and the abuse of intellectual property rights to exclude or restrict competition. SAMR is accepting comments on these regulations until July 27, 2022.

How Covington Can Help

Covington's global antitrust and competition practice guides clients through the often-complex web of antitrust and competition laws around the world to help them secure their most important business objectives. Our team, which includes many attorneys who have served in senior leadership roles at government enforcement agencies and in in-house positions, has decades of collective experience advising clients regarding their global antitrust and competition concerns. If you have any questions concerning the material discussed in this client alert, please contact any of the following members of our Antitrust/Competition practice: *Jim O'Connell* [#], *James Marshall* [#], and *Alexander Wang* [#].

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2022 Amendment to China's Anti-Monopoly Law – Key Takeaways

Enhanced penalties

- ***Monopoly agreements and abuses of dominant market positions.***
 - The AML provides that a monetary fine of 1% to 10% of the previous year's turnover, i.e., revenue, shall be imposed for such violations. The Amendment leaves that in place, but (i) increases the maximum fine for companies that have entered into, but not yet implemented, an anti-competitive agreement, and for trade associations that organize anti-competitive agreements among their members, from RMB 500,000 to RMB 3 million (or from approx. USD 75,000 to approx. USD 450,000); and (ii) adds personal liability by imposing a fine of up to RMB 1 million (approx. USD 150,000) on the individuals that are responsible for violating the AML's prohibitions against certain monopoly agreements.
 - The Amendment also clarifies that companies may violate the AML by organizing other companies to enter into anti-competitive agreements, or by materially aiding and abetting the formation of such agreements. The change is apparently aimed at the organizers and participants in "hub-and-spoke" conspiracies. Penalties in such cases will apply equally to the organizers, aiders and abettors.
- ***Merger control fines.***
 - The Amendment significantly increases the penalty for failure to file a reportable merger or for "gun-jumping," from a maximum of RMB 500 thousand (about USD 75,000) to RMB 5 million (approx. USD 750,000). If parties fail to file a transaction that the Chinese antitrust authority determines raises substantive competition concerns, they could face an alternative penalty of up to 10% of their turnover in the previous year, in addition to whatever remedies the authority may impose to address the transaction's substantive competition concerns.
- ***Impeding or otherwise failing to cooperate with an antitrust investigation***
 - Companies that are found to have impeded or otherwise failed to cooperate with an antitrust investigation—for example by withholding, concealing or falsifying materials, information, or evidence—

will face potentially higher monetary fines under the Amendment. Those penalties will increase from a maximum of RMB 200,000, or RMB 1 million in serious cases (or about USD 30,000 or USD 150,000, respectively) to up to 1% of the company's turnover during the previous year.

- Individuals will also be personally liable for up to RMB 500 thousand (about USD 75,000) for obstruction or failure to cooperate with an investigation.
- *Punitive penalties for egregious violations*
 - The Amendment further increases the penalty for “egregious violations” of the AML – for example, in cases where “the relevant factual circumstances are especially serious, the impacts of the violation are especially egregious, and the consequences/harm done are especially grave.” In such cases, fines may be doubled or increased up to five-fold at the enforcement authority's discretion.
- *Criminal liability.*
 - Although the AML did not provide for criminal liabilities for antitrust violations, such as cartels, the Amendment adds an article on criminal liabilities for certain offenses.
 - However, it is unclear precisely which AML violations could be prosecuted as criminal offenses, because in China such offenses must be stipulated under the Criminal Code, which has not yet criminalized anti-competitive conduct. Therefore, the potential criminal reach of the AML under the Amendment has not yet been determined.

Merger control

- **“Stop-the-clock” mechanism:** Drawing on international practices (e.g., in the EU), the Amendment introduces a “stop-the-clock” mechanism to merger control in China. This mechanism enables the authority to suspend the AML merger review timeline at its discretion in specific situations—for example, if the filing parties fail to submit documents and materials as required; if new circumstances and facts with a potentially major impact on the merger review emerge and need to be verified; or if the parties' proposed remedies require additional evaluation (and, in that situation, the parties request a pause in the timing).
- **Proposed adjustment of notification thresholds:** Consistent with global trends of adjusting notification thresholds to account for inflation, SAMR is seeking to increase China's 14-year old notification thresholds in a separate proposed rule-making published on June 27, 2022.
 - Under the proposed thresholds, companies (“undertakings”) will be required to file a suspensory pre-merger notification with SAMR for transactions if either of the following two thresholds is satisfied:
 - the combined global turnover of the undertakings concerned in the concentration in the previous financial year exceeded RMB 12 billion (approximately US\$ 1.79 billion) and the PRC turnover of each of at least two undertakings in the previous financial year exceeded RMB 800 million (approximately US\$ 119 million) (these are increases from RMB 10 billion and RMB 400 million, respectively); or alternatively,
 - the combined PRC turnover of the undertakings concerned in the concentration in the previous financial year exceeded RMB 4 billion (approximately US\$ 59.8 million) and the PRC turnover of each of at least two undertakings in the previous financial year exceeded RMB 800 million (approximately US\$ 119 million) (these are increases from RMB 2 billion and RMB 400 million, respectively).
- SAMR has also proposed adding a new alternative threshold, apparently to address so-called “killer

acquisitions” of startups and other smaller companies. Under this proposed threshold, companies that do not satisfy the above thresholds will be required to file if:

- the PRC turnover of the buyer in the previous financial year exceeded RMB 1 trillion (US\$ 14.9 billion);
- the market value, capitalization, or valuation of the target/seller is RMB 800 million (approximately US \$ 119 million) or greater; and
- if the PRC turnover of the target/seller in the previous financial year accounted for more than 1/3 of its global turnover.

Vertical agreements

- **Safe harbors** : Drawing on international practices, the Amendment introduces a “safe harbor” to the competitive assessment of vertical agreements under the AML. However, given the qualification criteria that SAMR has proposed, the practical benefits of the safe harbor may be limited.
 - The safe harbor would apply to vertical agreements between parties whose share of the affected market falls below a threshold as long as it meets certain other criteria for the exemption. The Amendment leaves the details of the safe harbor to SAMR to develop.
 - In a separate proposed rulemaking, released for comment on June 27, SAMR proposed a market share cap of 15% and that the safe harbor apply only in cases where there is no evidence that the agreement at issue excludes or restricts competition. SAMR has also proposed that parties may seek to qualify for the safe harbor by submitting an application to the antitrust authority for review.
- **Resale Price Maintenance (RPM) Agreements** : The Amendment clarifies that an agreement that limits or fixes resale prices will not be prohibited under the AML if the parties can prove that it does not have the effect of restricting or eliminating competition. This codifies the approach taken by China’s Supreme People’s Court, which has said that RPM agreements are presumptively unlawful unless the defendant can establish that the agreement is not anticompetitive under the AML. This legislative change represents a potentially significant shift away from the traditional approach taken by Chinese antitrust enforcement agencies, which have previously treated resale price maintenance as close to *per se* illegal.

Special focus on key sectors such as the digital economy

The Amendment does not change the standards for determining “dominance” or an “abuse of a dominant market position” under the AML. However, it adds language to the AML that is focused on the practices of tech companies. For example, the Amendment includes “General Principles” prohibiting companies, regardless of whether they are deemed “dominant,” from using data, algorithms, technology, capital advantages, or platform rules to engage in anti-competitive conduct. It also specifies that a “dominant” firm can be found to have abused its dominant market position if it uses data, algorithms, technology, or platform rules (“capital advantages” are not referenced in this context) in a way that harms competition.

“Public interest” antitrust litigation

Private rights of action are permitted under the AML, but China’s legal system does not currently provide for a right of class action, notwithstanding a mechanism that allows the public prosecutor’s office (the “People’s Procuratorate”) to bring civil suits in the public interest. The Amendment specifies that public prosecutors at the

city level or above (*i.e.*, city, provincial or national level) may file such actions in cases involving antitrust violations that adversely affect the public interest.

Government restrictions on competition: the “Fair Competition Review” scheme

The Amendment adds China’s Fair Competition Review scheme, which governs rule-making conduct by government agencies, to the AML, to ensure that government rules and policies do not impose unwarranted restrictions on competition. The Fair Competition Review scheme seeks to subject the rules, regulations, and policies of the government agencies to antitrust scrutiny prior to their promulgation. In the process, the competitive effects of such proposal are assessed, any justifications for restrictions are identified, and less restrictive alternatives which would achieve the intended public policy goal are recommended, with the goal of avoiding or reducing adverse impacts on competition. The scheme was first established by China’s State Council in an Opinion in 2016 and detailed implementation rules were adopted in 2017. It has now been formally codified in the AML.

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