

## China Antitrust Review 2021

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Thirteen years into China's antitrust regime, Chinese antitrust enforcement reflects both Western trends, including a focus on technology companies and more aggressive enforcement, and continued divergence, including likely longer timetables for clearance. Of particular note, amendments to China's Anti-Monopoly Law would increase fines and insulate authorities from merger review timelines. 2021 also saw the highest-ever monetary penalties levied and major actions targeting internet companies.

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### I. Updates to the AML and SAMR regulations

#### A. AML draft amendment

On October 23, 2021, the Standing Committee, China's national legislature, published a second draft of an amendment to China's Anti-Monopoly Law (AML).<sup>1</sup> This draft of the AML amendment (the Revised Draft Amendment) follows the State Administration for Market Regulation's (SAMR) initial draft (the Initial Draft Amendment), first released in January 2020 (our analysis on the Initial Draft Amendment can be found [here](#)). This amendment is the first proposed major revision to the AML since it became law in 2008. Although there is no official timeline, we expect that the Revised Draft Amendment will be formally adopted at some point in 2022.

One of the Revised Draft Amendment's most significant changes is the increase in maximum penalties for "serious" merger control violations, including failure to notify transactions and gun-jumping violations. Under the Initial Draft Amendment, the statutory maximum fine for merger control violations was 10% of a company's revenue in its last fiscal year, which already reflected a dramatic increase from the AML's current maximum fine—RMB 500,000 (approximately USD \$79,000). The Revised Draft Amendment goes even further. Under the Revised Draft Amendment, SAMR can impose an aggravated fine of up to two to five times the statutory fine when it finds that the party's merger violation was "extremely serious," "caused extremely adverse impacts," and "resulted in extremely serious consequences." Thus, under the Revised Draft Amendment, an infringing party could face fines as high as 50% of its revenue in its last fiscal year. Although it is unclear whether SAMR would apply such a fine, the Draft Amendment underscores an enhanced commitment to compliance with premerger notification requirements.

Notably, the Revised Draft Amendment imposes individual liability and monetary penalties on infringing parties' legal representatives.<sup>2</sup> It provides that individuals who are directly responsible for creating monopolistic agreements may face fines of up to RMB 1 million (approximately USD 156,000). It remains uncertain, however, whether and how frequently SAMR will impose individual liability in future SAMR enforcement actions.

Similar to the Initial Draft Amendment, the "stop-the-clock" mechanism in the Revised Draft Amendment allows SAMR to extend the statutory timeline for merger reviews if: (i) filing parties apply for or agree to a suspension of the merger review; (ii) SAMR has requested supplemental materials from the filing parties; or (iii) the filing parties are in negotiation

with SAMR regarding potential remedies for conditional approvals. Thus, the Revised Draft Amendment, like the Initial Draft Revision, gives SAMR greater flexibility to extend the merger review process, as it leaves considerable discretion to the agency to suspend the statutory timeline. This provision may result in further prolonged merger review timelines in China.

## B. Adoption of anti-monopoly guidelines on the sector of internet platform economies

On February 7, 2021, SAMR published the final version of the Anti-Monopoly Guidelines on the Sector of Platform Economies (the Final Guidelines) following a public consultation period that began with the release of the guidelines' draft version (the Draft Guidelines) in November 2020.<sup>3</sup> The relatively short turnaround time between the Draft Guidelines and the Final Guidelines signals the Chinese government's heightened concerns over the perceived growing influence of major internet platform companies. As anticipated in the [2020 China Antitrust Review](#), after the release of the Final Guidelines there has been an uptick in the number of merger filings in 2021 and the number of enforcement actions against large platform companies.

### 1. Merger control

The Final Guidelines reaffirmed several merger control issues set forth in the Draft Guidelines, including (i) the regulation of mergers involving the variable interest entities (VIE) structure, and (ii) SAMR's broad discretion to investigate transactions by platform companies.

- **Increased focus on VIE structures:** Under a VIE structure, the controlling party does not own shares of the operating entity (i.e., VIE), but achieves de facto control of business operations and finances through a series of agreements. The Final Guidelines make clear that mergers involving a VIE structure must file for SAMR's review if the merger notification obligation is triggered. As discussed in Section II.B, in 2021, SAMR took multiple enforcement actions against major platform companies regarding transactions involving VIE structures, and imposed the statutory maximum penalty in several cases for failure to notify their respective transactions.
- **Acquisition of emerging internet companies:** Article 19 of the Final Guidelines grants SAMR broad discretion to investigate transactions by platform companies where turnover (defined as income from selling products and providing services) is below the statutory threshold for merger notification. Specifically, the Final Guidelines express concerns about start-ups and emerging platforms that may have relatively low turnover due to a free or low-price service model.

### 2. Vertical agreements

Compared with the Draft Guidelines, the Final Guidelines revised several provisions on vertical agreements in the platform economy. First, the Final Guidelines broadened the scope of the most-favored-nation clause as applied to platform companies, which provides antitrust authorities with greater flexibility to label agreements between platform companies and their counterparties as anticompetitive.<sup>4</sup> Additionally, the Final Guidelines note that violations of the "most-favored-nation" clause can be classified as both anti-competitive agreements and abuses of dominance. Second, the Final Guidelines highlight SAMR's growing concern that platform companies are using data, algorithms, and other technical means to monitor and enforce vertical agreements. To address these concerns, SAMR may apply data and algorithms-related behavioral remedies to any vertical merger. We expect SAMR to implement these behavioral remedies in subsequent agency actions.

### 3. Abuse of dominance

The Final Guidelines highlight specific conduct by platform companies that may constitute an abuse of dominance, such as personalized pricing based on users' shopping histories and other personal information, and retaliatory restrictions on internet traffic against uncooperative operators. The Final Guidelines retain certain exemptions for platform companies to engage in these behaviors if there are "legitimate reasons" to do so, and also add two exceptions to justify a platform's sale of products below its cost. These new exceptions could increase the flexibility of platform companies to conduct promotional activities and other related sales events. As described in Section III.A, SAMR has already brought enforcement actions on certain major internet companies in 2021, and we expect SAMR to further clarify the contours of prohibited conduct in subsequent enforcement actions in 2022.

## C. New antitrust leadership and a revamped antitrust bureau

In November 2021, China's State Council appointed Lin Gan as the new head of SAMR's antitrust unit, a major development in the antitrust enforcement landscape. In connection with announcing Gan's appointment, the Chinese government—for the first time—referred to SAMR's antitrust unit as the National Anti-Monopoly Bureau, which elevated this subdivision to the deputy ministerial-level.<sup>5</sup> This elevation indicates that China is likely to provide additional resources for antitrust enforcement. Along with the appointment of Lin Gan, the National Anti-Monopoly Bureau is also likely to expand its staff, as it published multiple job posts in November. With elevated seniority and additional resources, the National Anti-Monopoly Bureau may increase its enforcement activities in the upcoming years (consistent with recent trends), emphasizing China's growing commitment to its antitrust regulatory regime.

## II. Merger control

### A. Merger control decisions

During the past year, SAMR imposed remedies on a number of transactions and blocked one merger; notably, this was only the third time that China's antitrust authority has ever blocked a merger. Unlike Western jurisdictions' focus on structural remedies, SAMR continues to rely primarily on a variety of behavioral remedies, including non-discrimination commitments, in its merger review decisions. Consistent with past enforcement actions, SAMR imposed conditions on mergers in the semiconductor and telecommunication industries, perhaps reflecting additional scrutiny placed on mergers in "strategic" industries. Additionally, SAMR's decision to block the merger of two video game live-streaming platforms may reflect SAMR's growing scrutiny of platform companies. Below we briefly discuss two of these transactions.

#### ***Eaton/Danfoss***

In June 2021, SAMR imposed structural remedies in the acquisition by Danfoss A/S (Danfoss) of Eaton Corporation plc (Eaton).<sup>6</sup> Danfoss and Eaton are the two largest players in China's orbital motor market and have roughly equivalent market shares. SAMR concluded that the acquisition would greatly increase concentration in China's orbital motor market. To resolve its concerns, SAMR required Danfoss and the post-transaction entity to divest its orbital motor business in China.

#### ***Illinois Tool Works/MTS***

In November 2021, SAMR imposed multiple behavioral remedies in the acquisition by Illinois Tool Works Inc. (Illinois Tool Works) of MTS Systems Corporation (MTS).<sup>7</sup> Illinois Tool Works and MTS are the two largest market participants in China's high-end electro-hydraulic servo material testing equipment market. SAMR concluded that the acquisition would increase concentration in several testing equipment markets in China. To resolve these concerns, SAMR required the parties to, among other things, continue performance and maintain the same level of service under preexisting agreements with Chinese clients, and prohibited them from selling the relevant testing products in the Chinese market at a price higher than its average price within the past 24 months.

### B. Penalties for failure to report mergers

SAMR has authority to penalize parties who fail to comply with the merger reporting requirements set forth in the AML by imposing fines up to RMB 500,000 (approximately USD 79,000) and/or by demanding that the parties unwind the transaction. In the past year, SAMR substantially increased its enforcement actions for failures to comply with these requirements. SAMR imposed fines on 95 transactions, with the vast majority of these fines imposed on platform companies. This total reflects roughly an eight-fold increase in the number of transactions in which SAMAR imposed fines, when compared to twelve such cases in 2020. SAMR also imposed behavioral remedies in a failure to report case for the first time in 2021.

#### ***Fines on internet platform companies***

In connection with issuing the Final Guidelines, SAMR increased its scrutiny of transactions involving platform companies in 2021. As a continuation of SAMR's enforcement pattern in late 2020, SAMR announced administrative penalties on companies for failure to notify SAMR of their transactions in four transactions involving major platform companies, including Alibaba, Baidu, Tencent and JD.com. In 85 of these transactions, SAMR imposed the maximum fine of RMB 500,000 (approximately USD 79,000). In so doing, SAMR cited, as notable transactions that were not reported, Alibaba's 2014 acquisition of AutoNavi (a leading digital mapping provider) and its 2018 acquisition of Ele.me (a major goods delivery service provider in China). In the remaining cases, SAMR imposed a fine of at least RMB 150,000

(approximately USD 23,580).

SAMR's fines for failures to report also included at least three transactions where the acquiring entity obtained less than 15% of the target's equity, suggesting that SAMR may increasingly scrutinize transactions involving minority-equity investments in the future.<sup>8</sup>

### III. SAMR conduct enforcement actions

Continuing its trend from prior years, SAMR and its local branches brought multiple enforcement actions in the pharmaceutical industry. Additionally, SAMR increased its enforcement actions against large platform companies due to concerns over their potential monopolistic behaviors.

#### A. Enforcement against “Choose One from Two” practices

As discussed in the [2020 China Antitrust Review](#), at the end of 2020, SAMR initiated an investigation into Alibaba Group Holding Limited (Alibaba) for alleged monopolistic conduct.<sup>9</sup> SAMR targeted Alibaba's practice of forcing vendors to enter into exclusive sales contracts with Alibaba—described as “choose one from two”—and other unspecified conduct. In April 2021, SAMR imposed a fine on Alibaba of RMB 18.2 billion (approximately USD 2.9 billion). This figure, which represents approximately four percent of Alibaba's annual sales in China in 2019, constitutes the largest fine ever imposed by China's antitrust authority. SAMR found that Alibaba abused its dominant market position by (i) prohibiting certain merchants on its platform from participating in its competitors' promotional activities, and (ii) implementing a reward and penalty framework for merchants based on their degree of compliance. In its decision, SAMR noted that Alibaba applied certain technical measures to control search rankings, manipulate sales promotions and downgrade online ratings of non-complying merchants. Along with the fine, SAMR issued an unprecedented “administrative instruction” to Alibaba that required the company to submit annual compliance reports to SAMR for three years. This action further highlights SAMR's increased focus on antitrust compliance for platform companies.

On October 8, 2021, SAMR also announced a RMB 3.44 billion (approximately USD 542.2 million) fine against Meituan, a major Chinese platform company. The agency required Meituan to refund “exclusive, cooperation deposits” – a practice where Meituan required merchants to post deposits as collateral against their promises to exclusively transact with Meituan.<sup>10</sup> SAMR found that Meituan forced merchants to enter into similar “choose one from two” arrangements and implemented technical measures, such as algorithm and data tracking, to enforce its exclusive partnerships. According to SAMR, such practices limited competition in the internet food-delivery market and violated Article 17 of the AML, which prohibits parties holding dominant market positions, such as Meituan, from forcing its counterparties into exclusive transaction agreements without justification. Similar to the Alibaba case, SAMR also issued administrative instructions to Meituan with certain behavioral guidance, including establishing an internal compliance system and producing annual compliance reports to SAMR.

#### B. Fine on Yangtze River Pharma for resale price maintenance practices

On April 15, 2021, SAMR imposed a fine of RMB 764 million (approximately USD 120 million) on Yangtze River Pharmaceutical Group (YRPG) for its resale price maintenance scheme.<sup>11</sup> The fine, equivalent to approximately three percent of YRPG's revenue in 2018, imposed on YRPG set the record for antitrust fines in China's pharmaceutical industry.

YRPG is a Chinese pharmaceutical group, composed of pharmaceutical research, manufacturing and distribution divisions. YRPG has over 20 subsidiaries across the country with its sales network covering all of China. According to SAMR's ruling, from 2015 to 2019, YRPG fixed drug-transfer prices and entered into minimum resale price maintenance agreements with downstream wholesalers and retail pharmacies. In addition, to implement such agreements, YRPG developed an implementation monitoring framework, which allowed YRPG and intermediary sales agencies to track prices and penalize distributors who failed to abide by the minimum resale price agreements.

SAMR launched its investigation into YRPG in November 2019, and issued its penalty decision in 2021. Among other findings, SAMR concluded that YRPG's practices on resale price maintenance violated AML Article 14's prohibition on vertical monopoly agreements.

### IV. Conclusion

With the Draft Amendment, the Final Guidelines, and multiple significant antitrust enforcement actions, China has demonstrated during the past year an increasingly aggressive approach to antitrust enforcement. China further displayed its continued willingness to diverge from certain Western practices, such as its use of behavioral remedies in horizontal merger cases. More than a decade into its antitrust regime, China appears to be signaling a commitment to expand its enforcement efforts and to increase further the penalties associated with antitrust non-compliance.

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- <sup>1</sup> National People's Congress of the People's Republic of China, "Draft Amendment to the Anti-Monopoly Law" (????????????(????)) (released on October 25, 2021), available at <http://www.npc.gov.cn/flcaw/flca/ff8081817ca258e9017ca5fa67290806/attachment.pdf>. (Chinese language).
- <sup>2</sup> As a general matter, under PRC law, the legal representative of a company refers to a person who is authorized to exercise power on behalf of the company.
- <sup>3</sup> As discussed in the China Antitrust Review 2020, On November 10, 2020, SAMR released the Draft Anti-Monopoly Guidelines on the Sector of Platform Economies, targeting the platform sector. See SAMR Draft Anti-Monopoly Guidelines for the Platform Economy Industry (??) (November 10, 2020), available at [https://www.samr.gov.cn/hd/zjdc/202011/t20201109\\_323234.html](https://www.samr.gov.cn/hd/zjdc/202011/t20201109_323234.html) (Chinese language).
- <sup>4</sup> Namely, "[t]he conduct of the undertaking of a platform requiring the undertakings using the platform to provide it with transaction conditions equal to or better than those of other competitive platforms in terms of price and quantity of commodities."
- <sup>5</sup> State Council, "China establishes anti-monopoly bureau to secure fair competition" (November 19, 2021), available at [http://english.www.gov.cn/statecouncil/wangyong/202111/19/content\\_WS61973e4cc6d0df57f98e52d9.html](http://english.www.gov.cn/statecouncil/wangyong/202111/19/content_WS61973e4cc6d0df57f98e52d9.html).
- <sup>6</sup> Announcement of the State Administration for Market Regulation: Announcement of the Anti-Monopoly Review Decision to Approve, with Restrictive Conditions, the Concentration of Undertakings in Respect of the Acquisition of Eaton Corporation plc by Danfoss A/S (June 7, 2021), available at [https://www.samr.gov.cn/fldj/tzgg/ftjz/202106/t20210607\\_330289.html](https://www.samr.gov.cn/fldj/tzgg/ftjz/202106/t20210607_330289.html) (Chinese language).

