

China Antitrust Update – Amendment to the Antimonopoly Law Promulgated

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On June 24, 2022, the *Decision of the Standing Committee of the National People's Congress to Amend the Anti-Monopoly Law of the People's Republic of China* (the “**Amendment to the Anti-Monopoly Law**”), was adopted at the 35th session of the Standing Committee of the Thirteenth National People's Congress and shall come into force on August 1, 2022^[1]. Compared to the *Draft Amendment to the Anti-Monopoly Law (Request for Public Comments)* published by the State Administration for Market Regulation (“**SAMR**”) on January 2, 2020 (in this regard, please refer to “**Haiwen Alert: Understanding the Draft Amendment to the Anti-Monopoly Law (Request for Public Comments)**”) and the *Draft Amendment to the Anti-Monopoly Law* deliberated at the 31st Session of the Standing Committee of the Thirteenth National People's Congress (the “**First Review Draft**”, in this regard, please refer to “**Haiwen Alert: Understanding the Bill to Amend the Anti-Monopoly Law (Request for Public Comments)**”), the Amendment to the Anti-Monopoly Law further responded to the concerns raised from all around during the process of making amendment.

In general, the Amendment to the Anti-Monopoly Law has responded to the issues under the established framework of the current Anti-Monopoly Law while taking into account China's experience in antitrust and competition law enforcement for more than ten years and the current stage of socio-economic development, thereby providing legal guidance for market competition and competitors' internal compliance.

• **Established a new path for regulating vertical monopoly agreements and provided reasonable grounds for the management of distribution models:** the Anti-Monopoly Law once established the principle of “prohibited unless exempted” in determining the illegality of monopoly agreements, however for a long time, no public precedent that have successfully adopted the exemptions under Article 15 of the Anti-Monopoly Law appeared up in administrative enforcement practice. In addition, administrative enforcement and judicial decisions long hold different attitudes towards the illegality of vertical monopoly agreements. This situation caused confusion in practice for undertakings (especially for the small and medium-sized enterprises (“**SMEs**”) and the undertakings using distribution models in their business).

The Amendment to the Anti-Monopoly Law took a new approach in regulating vertical monopoly agreements from two perspectives: (1) **by clarifying that as counter-arguments to unlawful vertical price restraints (commonly referred to as “resale price maintenance/RPM”), one can establish no effect of precluding or restricting competition;** (2) **by adopting a “safe harbor” exemption rule to unlawful vertical restraints.** The Amendment to the Anti-Monopoly Law authorizes the antitrust enforcement agency to formulate the “safe harbor” exemption rules based on market share and other conditions in the relevant market. A vertical restraint agreement that falls within the “safe harbor” exemption is now presumably precluded from an unlawfully monopoly agreement.

We notice that the applicability of the “safe harbor” exemption rule to vertical price restraints is not crystal clear, awaiting further clarification by subsequent complementary measures formulated and enforcement practice of the Antitrust enforcement agency. This new path of regulating vertical monopoly agreement took by the Amendment to the Anti-Monopoly Law favors business undertakings (especially the SMEs) in that it provides more reasonable space for management of distribution models. **We advise that** business undertakings pay close attention to the complementary measures to be formulated by the antitrust enforcement agency and the enforcement practices over vertical monopoly agreements, collect information on market competition in the industry in which they are active in (including inter-brand competition and intra-brand competition of relevant products) in their ordinary course of business, define prudently the relevant markets, measure their own market shares (including taking necessary stress tests), and evaluate the competitive effect of their business conducts in order to establish the compliance boundaries for their relevant business conduct.

• **Focused on Internet platforms and new abusive behaviors** since November 2020, with respect to the platform economy, antitrust enforcement agencies have been effective in guiding platform companies towards compliance operating by issuing relevant compliance guidelines, strengthening enforcement efforts, and holding administrative colloquia meetings. It is expected that Internet platforms and new types of dominant market position abuses will remain the focus of antitrust and competition enforcement in the coming period of time. The Amendment to the Anti-Monopoly Law clarifies principally in its General Provisions chapter that “An undertaking shall not use data and algorithms, technology, capital advantage, or platform rules to engage in monopolistic conducts prohibited by this Law”, and in the chapter III Abuse of Dominant Market Position, a new article is added to clarify that “An undertaking with a dominant market position shall not use data, algorithm, technology, or platform rules to abuse a dominant market position as prohibited by the preceding article”. By

these, it reiterates its position on strengthening the regulation on Internet platforms and new types of abusive behaviors from legislative perspective. Despite the lack of precedent of law enforcement on new abusive behaviors using data, algorithms, or technology in China due to their novelty, complexity nature and controversy potentially faced in enforcement practice, “the future has already come”. We notice that an announcement made by the Competition Policy and Big Data Center of the SAMR in June 2022 indicates that it will establish an Antitrust Enforcement Business Intelligence Research and Judgment Center aiming to use natural language processing, big data, machine learning, deep learning, model building and other technologies to make possible the judging and early warning on high-stake competitive behaviors of key enterprises in major industries, which reflects the enduring scrutiny on Internet platforms and new abusive behaviors. **We advise that** business undertakings in the platform economy may, with the basic understanding of competition law enforcement methodology, re-examine if their business operations using data, algorithms or technologies may constitute relevant potential abuses, for example, the use of “algorithmic collusion” to reach monopoly agreements, the use of big data to implement differential treatment, or the use of technical means to block competitors or refuse to open API in order to refuse deals. In particular, when possessing significant market share, the undertakings shall prudently assess the legality of their relevant conducts.

• **Improved the system for classified and graded review of concentrations and given antitrust enforcement agency the power to initiate investigations on their own initiatives:** the system for classified and graded review aims to realize the streamlining of the review of merger control cases and to focus administrative resources on the review of cases involving areas important to national economy and people’s livelihood, and to further improve the quality and efficiency of the review. As background information and based on relevant policies and our knowledge, merger control cases in the fields of finance, media, technology, people’s livelihood, and those involving start-ups, new business models and labor-intensive enterprises will face more stringent review. Meanwhile, the SAMR is planning to delegate some of the merger control cases meeting certain standards to specific provincial counterparts of SAMR, for the better utilization of enforcement resources and improvement to review efficiency. In addition, it is worth noting that the Amendment to the Anti-Monopoly Law establishes from the legislative perspective the power of the Antitrust enforcement agency to initiate investigations on their own initiatives, i.e., the SAMR may require for notification as to the new investment, M&A and joint venture deals that do not meet the notification thresholds but give rise to anti-competitive concerns; if the notification is not made per request, the antitrust enforcement agency shall

investigate accordingly. **We advise that** the parties to transactions, when planning and negotiating, assess the transaction timeline and governmental approval risks in the context of the specific industry sectors involved and the potential impact on competition, reasonably allocate the approval risks between the parties through transaction document drafting, and when necessary, enhance the certainty of the transaction and/or approval by negotiating and consulting with the antitrust enforcement agency.

• **Escalated in full scale the administrative penalties for monopolistic behaviors:** for failure to merger control notification, the Amendment to the Anti-Monopoly Law specifies that for those concentrations with anti-competitive concerns, in addition to an order to reinstate the original status prior to the concentration, a fine of up to 10% of the previous year's revenue of the undertaking may be imposed; for those without anti-competitive concerns, a fine of no more than RMB 5 million yuan may be imposed. Moreover, the Amendment to the Anti-Monopoly Law introduces personal liabilities, stipulating that where the legal representative, primary person in charge or any directly liable person of an undertaking is personally liable for reaching the monopoly agreement, he or she may be imposed a fine of less than RMB 1 million yuan. A multiplier fine system is introduced, which substantially increases the penalty for refusing or obstructing merger control review and/or antitrust investigation, and raises the upper limit of the fine to 2-5 times the original level in the cases of particularly serious violation. Considering the secret nature of monopolistic behaviors, the overall escalation in administrative penalties will motivate enterprises to focus on business running compliance. In particular, the introduction of personal liability, will stimulate the “top to down” promotion of compliance system construction (for the framework and suggestions on the construction of the compliance system, please refer to “**Haiwen Alert: Construction of the Undertaking's Antitrust Compliance System**”). **It is worth mentioning that** although by principle the new law does not apply retroactively to previous concentrations that “fail-to-notify”, because of the continuous nature of concentrations, the applicability of the penalties under the newly amended Anti-Monopoly Law is yet to be clarified by enforcement practices to follow. As an observation, since 2021, increasing number of previous concentrations, discovered from self-examination and historical transaction review, were notified during the window period before the introduction of the new law so that the new law penalties can be avoided.

With respect to specific aspects of the Amendment to the Anti-Monopoly Law, we have extracted and analyzed the following highlights.



1. Monopoly Agreements

1.1 Intended Change in Determining the Illegality of Resale Price Maintenance Agreements

Article 18 Paragraph 2 of the Amendment to the Anti-Monopoly Law provides that “an agreement specified in subparagraph 1 (fixing the price of commodities for resale to a third party) and subparagraph 2 (restricting the minimum price of commodities for resale to a third party) shall not be prohibited if the undertaking concerned can prove that such agreement does not have an effect of eliminating or restricting competition.” This new provision changes in fact the principle for determining the illegality of resale price maintenance agreements in current enforcement practice, from “prohibited unless exempted” to “rule of reason” – if proven to be without the effect of excluding or restricting competition, the resale price fixing/maintaining agreement can be precluded from an unlawful monopoly agreement, with the burden of proof resting on the undertakings.

The antitrust enforcement agency has long scrutinized resale price maintenance agreements under a strict “prohibited unless exempted” framework, with a presumption of illegality unless the parties can prove that the agreement satisfies the exemptions under Article 15 of the Anti-Monopoly Law (there are no published precedents of successful exemptions). The courts in civil proceedings, however, have made the effect of competition exclusion or restriction a prerequisite for resale price maintenance to be unlawful, with the burden of proof on the plaintiff. This provision, if adopted, is expected to harmonize the division between administrative enforcement and judicial decision on the issue, and to lead the antitrust enforcement agency towards assessing anti-competitive effects in determining the illegality of resale price fixing/maintenance agreements.

1.2 Intended “Safe Harbor” Rule for Determining Monopoly Agreements

Article 18 paragraph 3 of the Amendment to the Anti-Monopoly Law provides that “such agreement shall not be prohibited if the undertaking concerned can prove that its market share in the relevant market is lower than the criteria stipulated by the antitrust enforcement agency of the State Council and satisfy other criteria stipulated by the

Antitrust enforcement agency of the State Council.”

Before this, the “safe harbor” rule has been reflected in several antitrust guidelines. For example, *the Provisions on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition* provides that “In case that the aggregate market share of the competing businesses in the relevant market affected by the business’s conduct does not exceed 20% (or at a minimum, four other substitutable technologies subject to independent control may be obtained at reasonable costs in the relevant market), or in case that neither the business nor the transaction counterparty has a market share affected by the agreement involving intellectual property rights exceeding 30% (or, at a minimum, two other alternative technologies subject to independent control can be obtained at reasonable costs in the relevant market), it may not be deemed as an unlawful monopoly agreement.” *The Antitrust Guidelines for the Automotive Industry* also provides that “An undertaking with a market share of less than 30% in the relevant market may be presumed not to have significant market power, but the aforementioned presumption rule applies only in the case of territorial and customer restrictions in vertical agreements.” (in this regard, please refer to “**Haiwen Alert: Understanding the Antitrust Guidelines for the Automotive Industry**”).” Compared with these previous guidelines, the Amendment to the Anti-Monopoly Law establishes for the first time a market-share based “safe harbor” system for monopoly agreements from legislative perspective.

It is worth mentioning that, compared to the first review draft, the scope of application of this “safe harbor” exemption rule shifts from general applicability to horizontal, vertical and hub-and-spoke monopoly agreements to vertical monopoly agreements alone. Meanwhile, adding a catch-all condition to the safe harbor application, i.e. “other conditions stipulated by the Antitrust enforcement agency”, leaves room to adjust and improve for future enforcement practice. Nevertheless, how to quantify the “safe harbor” exemption rules and whether different safe harbors thresholds are to be tailored for different markets/industries, these awaits clarification and interpretation from the subsequent regulations and law enforcement practice.

1.3 Intended Introduction of “Hub-and-Spoke” Collusion and Legal Liability for Arranging and Assisting Monopoly Agreements

Article 19 of the Amendment to the Anti-Monopoly Law stipulates that “an undertaking shall not arrange, or provide substantive assistance, for other undertakings to reach a

monopoly agreement.” In addition, Article 56 of the Amendment to the Anti-Monopoly Law provides that “if an undertaking arranges, or provides substantive assistance, for other undertakings to reach a monopoly agreement, the same penalties as the undertaking who entered into the monopoly agreement shall apply.” These articles legislate the academic doctrine of “Hub-and-Spoke” collusion, but as to how to define “provide substantive assistance”, further interpretations are expected by enforcement practice.

It is notable that, as far as the concern of Internet platforms and undertakings adopting distribution system, as they are connected with many undertakings within the platform or distributors, they are intermediators and coordinators by the nature of their business models, and therefore more likely to be exposed to the “Hub-and-Spoke” collusions. We recommend that companies, in their ordinary course of business including meetings, trainings and communications with undertakings or distributors, consciously avoid becoming a platform for undertakings or distributors for them to exchange competitively sensitive information and reach illegal coordination.



2. Abuse of Dominance

With respect to the abuse of dominant market position, the Amendment to the Anti-Monopoly Law only adds the following situation to the current abusive behaviors defined in Article 22, namely, “an undertaking with a dominant market position who uses data, or an algorithm, technology or platform rules to set up barriers to other operators to impose unreasonable restrictions is an abuse of dominant market position under the preceding paragraph.” This provision reflects the scrutiny of antitrust law enforcement on new types of abuses related to Internet, such as using data and algorithms to achieve differential treatment (or “big data discriminatory pricing” or “a thousand people, a thousand prices”), using technology to block competitors or refuse to open API so as to refuse to deal, using platform rules to impose “choose one from two” mandates, or attaching other unreasonable trading conditions, etc. In case that an undertaking (mainly but not limited to Internet platforms) with a dominant market position through these conducts imposes unreasonable restrictions on other undertakings, it is likely to fall under the regulation on abuse of dominant market position and therefore incur adverse legal consequences. In this regard, on February 7, 2021, the Anti-Monopoly Commission of the State Council issued the *Guidelines for*

Anti-monopoly in the Field of Platform Economy, which contains specific guidelines on the manifestation of these abusive acts and the factors to be considered for the determination, which can serve as reference for operators for their compliance operation (in this regard, please refer to the “[Haiwen Alert: Platform Economy Anti-Monopoly Guidelines \(Request for Public Comments\)](#)”).

It is worth noting that, with respect to abusive conducts related to Internet platforms, specific conduct of platform operators or operators on the platform may be subject to regulation under the *Anti-Monopoly Law*, the *Anti-Unfair Competition Law*, the *Cybersecurity Law*, the *Personal Information Protection Law*, the *E-Commerce Law*, the *Advertising Law*, the *Price Law* and the *Consumer Protection Law*. The applicable conditions, regulatory paths and legal liabilities under different laws and regulations are different. “Choose one from two” and “big data discriminatory pricing” are typical examples. Relatedly, on October 29, 2021, SAMR publicly solicited opinions on the *Guideline to the Classification and Grading of Online Platforms* and the *Guideline for the Implementation of Obligations of Online Platforms*[2], by which comprehensively summarized and refined the responsibilities of Internet platforms from various perspectives, including competition law, data protection, intellectual property law, price law, and advertising law. In which, borrowing ideas from the EU’s *Digital Markets Act(Draft)*, the SAMR put forward higher regulatory requirements for “mega platforms”[3]. We advise that Internet platform undertakings or undertakings on the platform classify and grade the potential compliance risks involved in their business practices, taking into account their specific market position, market behaviors and market conditions, in order to understand the boundaries and orderly engage in competition.



3. The Notification of Concentration of Undertakings

3.1 Introduction of the “Stop-the-Clock” Mechanism

The Amendment to the Antimonopoly Law introduces a “stop-the-clock” mechanism, which provides that the antitrust enforcement agency may suspend the examination period in the following circumstances, and the examination period resumes on the day when such circumstance cease to exist: (i) the undertakings fail to submit documents and materials in accordance with provisions, rendering the examination work

impossible; (ii) there arises a new situation or fact which has a material impact on the examination of the concentration between undertakings, and the examination work cannot proceed without verification; (iii) the restrictive condition attached to the concentration between undertakings needs to be further assessed, and the undertakings request suspension.

Based on our experience, the “stop-the-clock” mechanism is more likely to be a response to the lack of statutory time limits for antitrust enforcement agency to review complex cases with competition concerns (especially cases where conditional approval may be granted). Previously in certain complex cases, the notifying party may have to withdraw the filing before the end of the statutory deadline and resubmit it, thereby giving antitrust enforcement agency more time to review the case. The now introduction of the “stop-the-clock” mechanism is in line with the mainstream international practice and can help solve such practical problem.

3.2 Specify the Jurisdictions on Concentrations that Do Not Meet the Notification Standards

Article 26 of the Amendment to the Anti-Monopoly Law stipulates that “where a concentration of undertakings does not satisfy the threshold for notification as stipulated by the State Council, but there is evidence proving that the concentration has effect of excluding or restricting competition, the Antitrust enforcement agency of the State Council may require the undertakings to make a notification. Where the undertakings fail to make a notification in accordance with the preceding two paragraphs, the Antitrust enforcement agency of the State Council shall conduct an investigation in accordance with the law.” The same provision is in place under *the Interim Provisions on the Examination of Concentration of Undertakings*, now it is upgraded from an administrative regulation to a law after the adoption of the Amendment to the Anti-Monopoly Law.

The aforementioned provisions indicate the possibility of more proactive actions by antitrust enforcement agency in the future with respect to “killer acquisitions” or the priority areas of review mentioned in Section 3.3 below. In this regard, we advise that the parties to the transaction, when planning and negotiating, assess the transaction timetable and administrative approval risks in the context of the specific industry sectors involved and the potential competition impact, reasonably allocate the approval risks between the parties through transactional terms drafting. For transactions likely

to give rise to competition concerns, parties shall, in light of the specific circumstances in each case, consider prior negotiation and consultation with antitrust enforcement agency, or voluntarily notify the case, so as to avoid uncertainty and adverse publicity on the transaction caused by post-closing law enforcements.

3.3 Improved the System for Classified and Graded Examination of Concentration

Article 37 of the Amendment to the Anti-Monopoly Law provides that “the Antitrust enforcement agency of the State Council shall improve the system for classified and graded examination of concentration between undertakings, strengthen the examination of concentration between undertakings in important fields such as the national economy and people’s livelihood in accordance with the law, and improve the quality and efficiency of examination.” Relatedly, according to the *Annual China Anti-Monopoly Enforcement Reports* issued by the SAMR in the past years of 2019, 2020 and 2021, the industries of Internet, information and communication, public utilities, pharmaceuticals, semiconductors, automobiles, building materials, transportation, and petrochemicals are the areas of focus for antitrust law enforcement. The *Opinions of the State Council on Accelerating the Construction of a Unified National Market* published on April 10, 2022 requires “to improve the system for classified and graded examination of concentration between undertakings, to break the platform enterprise data monopoly, to prevent the use of data, algorithms, technical means and other ways to exclude and restrict competition, strengthen examination in the fields of finance, media, science and technology, people’s livelihood, as well as in the fields of start-ups, new business models and labor-intensive industries.” It can be expected that concentrations involving relevant investment and M&A transactions in these areas will face more stringent scrutiny, and the antitrust enforcement agency may require undertakings to make voluntary notifications for investment, M&A, and joint venture concentrations that may raise competition concerns but do not meet the notification thresholds.



4. Summary of Related Administrative Penalties under the Amendments to the Anti-Monopoly Law

The Amendment to the Anti-Monopoly Law enhances its deterrent effect in various ways. Please see below a summary of the comparison of the administrative penalties for

relevant monopolistic acts under the current Anti-Monopoly Law and the Amendment to the Anti-Monopoly Law, for undertakings' reference.

Violation	The Anti-Monopoly Law	The Amendment
Monopoly Agreement	- Reach and implement: an order to stop the violations, confiscate the illegal gains and impose a fine of 1-10% of the sales revenue made in the previous year; - Reach but not been implemented: a fine of less than 500,000 yuan may be imposed.	- Reach and implement: Same as the left column. Added: if there are no sales for the previous year, impose a fine of less than RMB 5 million yuan; - Reach but not been implemented: a fine of less than RMB 3 million yuan may be imposed; - Individual liability: the legal representative, the primary person in charge or any directly liable person of the undertaking is personally liable for reaching the monopoly agreement, he or she may be imposed less than 1 million yuan "Hub-and-Spoke" collusion: the organizer of the monopoly agreement apply the penalties mentioned above.
Abuse of Dominant Market Position	Order to stop the violations, confiscate the illegal gains and impose a fine of -10% of the sales revenue made in the previous year.	No changes.
Illegal Concentration of Business Operators	Order to restore the state before the concentration, and impose a fine of less than RMB 500 thousand yuan.	- With competition concern: order to reinstate the original state prior to the concentration, impose a fine of up to 10% of the sales revenue made in the previous year; - Without competition concern: a fine of less than RMB 5 million yuan.
Refuse, Obstruct the Investigation	- Enterprise: a fine of less than RMB 1 million yuan; - Individual: a fine of less than RMB 1 million yuan.	- Enterprise: impose a fine of less than 1% of the sales revenue made in the previous year (if there are no sales for the previous year or the sales are difficult to calculate, impose a fine of less than RMB 5 million yuan); - Individual: a fine of less than RMB 500 thousand yuan.
Multiplier Fine System	N/A	- Where a violation falls under particularly serious circumstances and has a particularly execrable impact and particularly serious consequences, the antitrust enforcement agency may determine the specific amount of the fine to be two to five times the original amount; - Theoretically, may impose a fine of less than 50% of the sales revenue made in the previous year.
Credit Record	N/A	Made in its credit record which shall be disclosed to the public.
Fines Consideration	Nature, extent and duration shall be considered in determining the specific amount of a fine.	Added "removal of consequences" factor to determine the specific amount of a fine.

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1. For Request for Public Comments on the Amendment the Anti-Monopoly Law issued

by the Standing Committee of the National People's Congress, please refer to: [http://www.npc.gov.cn/flcaw/userIndex.html?](http://www.npc.gov.cn/flcaw/userIndex.html?lid=ff8081817ca258e9017ca5fa67290806)

[lid=ff8081817ca258e9017ca5fa67290806](http://www.npc.gov.cn/flcaw/userIndex.html?lid=ff8081817ca258e9017ca5fa67290806)

2. For announcement of SMAR on the Guideline to the Classification and Grading of Online Platforms and Guideline for the Implementation of Obligations of Online Platforms for public comments, please refer

to: http://www.samr.gov.cn/hd/zjdc/202110/t20211027_336137.html

3. A "Mega Platform" is defined as a platform in China that has no less than 50 million active annual users in the previous year, has a major business with outstanding performance, has a market capitalization (or valuation) of no less than RMB 100 billion at the end of the previous year, and has a strong ability to restrict access to consumers (users) by operators within the platform.

2022-07-05