

2021 China Antitrust and National Security Review Update

Author: QIAN, Xiaoqiang LIN, Xixiang

1、2021 China Antitrust Year in Review

In response to the major task of “strengthening antitrust and guarding against unregulated expansion of capital” put forward by the central government, since 2021, the legislative, administrative, and judicial activities relating to antitrust law in China have been unprecedentedly active.

Legislative Area

· The Standing Committee of the National People’s Congress released the Draft Amendments to the Anti-Monopoly Law (“Draft Amendments”) on October 23, 2021 for public comments. The Draft Amendments take an approach of “minor revisions” , aiming at echoing to political concerns at a macro level, i.e. the development of digital economy and the implementation of fair competition review regime. Highlights of the Draft Amendments include, among others, (i) enhancing deterrence by significantly increasing the level of monetary penalties (e.g. the monetary penalty for gun-jumping in merger review with no competition concerns is proposed to be increased from RMB 500,000 to RMB 5,000,000); (ii) introducing the concept of safe harbor for monopoly agreements. The public consultation for the Draft Amendments has ended on November 21, 2021. Next, the Standing Committee will expedite the assessment of the feedbacks received during the public consultation, further deliberate on and refine the amendments, and will push forward to pass the amendments after settling relevant issues;

· The State Administration for Market Regulation (“SAMR”), National Development and Reform Commission, Ministry of Finance, Ministry of Commerce and Ministry of Justice jointly promulgated the Implementation Rules for the Fair Competition Review System (“Implementation Rules”) on June 29, 2021. The Implementation Rules aim to implement the Opinions of the State Council on Establishing the Fair Competition Review System in the Development of Market System, promulgated in 2016, by providing for a detailed review mechanism. Similar to European Union’s state aid control regime, which aims to regulate government’s behavior of distorting market competition through direct intervention such as subsidies, China’s fair competition review system aims to regulate relevant government behaviors, optimizing the business environment, and preventing the adoption of policies which exclude and restrict competition;

· Antitrust Commission of the State Council promulgated Antitrust Guidelines on Platform Economy on February 2, 2021 and Antitrust Guidelines in the Field of Active

Pharmaceutical Ingredients on December 15, 2021. SAMR promulgated Guidelines for Overseas Antitrust Compliance of Enterprises on November 15, 2021. The aforementioned guidelines are intended to regulate market competition order in those key areas with national strategic importance for national welfare and people's livelihood, and to provide compliance guidance for enterprises' business operation. In the meantime, such guidelines indicate that the aforementioned sectors will continually be the focus of antitrust enforcement in the year 2022.

Administrative Area

· Institutional Restructuring: (i) on December 18, 2021, the National Anti-Monopoly Bureau (state bureau at vice-ministerial level) was officially established with three divisions, namely, Antitrust Enforcement Division I, Antitrust Enforcement Division II and Competition Policy and Coordination Division. These three divisions are respectively in charge of the enforcement of monopoly behaviors (including abuse of market dominance, cartel agreements), merge control review and antitrust policy and international exchanges respectively; (ii) on November 20, 2021, SAMR set up the Center of Competition Policy and Big Data, with the main responsibility to carry out policy and theory research in the field of antitrust, competition policy and platform economy, etc. The center will also undertake technical support for the enforcement of antitrust law, market monitoring, electronic forensic and fixing evidence, and analysis of big data, etc.

· Merger Control Review

Non-conditional clearance: a total of about 700 cases were cleared without conditions (with a year-on-year increase of 54%), among which about 600 cases were reviewed under simplified reviewing procedure (accounting for 85% of all cases). The number of pre-merger notifications has increased rapidly. We expect that such number will continually grow in 2022;

Conditional clearance: four cases were cleared with conditions (same amount as that in 2020), which involved sectors of high technology / manufacturing, and all cases were global transactions. Among such four cases, one was cleared with structural remedies (i.e. buyer was required to divest certain business prior to the closing), and three were cleared with behavioral remedies. The average review timeline is about 11.5 months, all involving a resubmission of notification after revoking the previous notification, due to the expiration of the statutory review limitation. Haiwen represented a notifying party in one of these four cases. We expect that China will remain one of the major jurisdictions with relatively active and stringent enforcement for global transactions with competitive concerns;

Prohibition: there was one case where the proposed transaction was prohibited, i.e. the merger of two live game streaming platforms. This prohibition is the third time where China's antitrust authority has prohibited a proposed transaction, since the inception of the merger control regime in 2008;

Gun-jumping: in total, administrative punishments were imposed on 107 transactions for failure to notify / gun-jumping under the Anti-Monopoly Law (the number

increased by 764% on a year-on-year basis). Main takeaways are, (i) a vast majority of cases involve leading internet / platform companies and “a VIE structure” . ; (ii) for minority investments, situations where private equity fund investors obtained “joint control” of target company but failed to notify have attracted the attention from the antitrust authority. There were fifty cases where investors held less than 30% (with about 10 cases where investors hold less than 10%) shareholding interest and were considered obtaining joint control over the target company.

- Cartel Agreements and Abuse of Market Dominance: throughout 2021, a total of 175 cases on monopolistic behaviors were initiated, with key areas of platform economy, pharmaceutical, building materials, petrochemical, etc. Among them, the National Anti-Monopoly Bureau published 26 antitrust cases with administrative penalties being imposed. More specifically:

Cartel Agreements: (i) there were 13 cases regarding horizontal monopoly agreement, involving fixed price, market segmentation, limitation on production quantity, etc., mainly in the field of the cement and pharmaceutical industries; (ii) there were 2 cases regarding vertical monopoly agreement on re-sale price maintenance, i.e., Gongniu Group Co., Ltd. and Yangtze River Pharmaceutical Group. We expect that hardcore restrictions such as horizontal monopoly agreements and vertical pricing restrictions in key sectors will remain the focus of antitrust enforcement in 2022.

Abuse of Market Dominance: there were 11 cases involving unfairly high price, refusal to trade, restriction on trade, tied-up sale, imposition of unreasonable transaction conditions, etc., mainly in the field of platform economy, pharmaceutical, petrochemical and gas industries. It is worth noting that SMAR imposed a fine of RMB 18.228 billion and a fine of RMB 3.442 billion respectively on the two Internet giants in China, for the abusive conduct called “the either-or requirement (二选一)” , a form of exclusive dealing whereby Alibaba/Meituan prohibited merchants from selling on (or participating in promotional activities of) rival online marketplaces.

Judicial Area

- On January 1, 2021, the Supreme People’ s Court promulgated the revised Provisions on Several Issues Concerning the Application of Law in the Trial of Disputes Arising from Monopolistic Acts to further perfect antitrust civil litigation procedures.

- Antitrust litigation has been rising gradually. In 2021, there are four eye-catching cases:

ByteDance/Tencent case, in February 2021, Tiktok, a subsidiary of ByteDance, filed a complaint in front of the Beijing Intellectual Property Court, accusing Tencent’ s WeChat and QQ service of abusing market dominance by restricting users from sharing content from Tiktok, which excludes and restricts competition. Tiktok demanded Tencent to stop the blocking behavior and claimed for a total of RMB 90 million for damages and reasonable expenses;

Yifang/Sina Weibo case, in November 2021, Yifang filed a complaint in front of the Changsha Intermediate People's Court, accusing Weibo's abuse of market dominance by refusing to grant permission to Yifang to use Sina Weibo's data for Yifang's sentiment tracking services. Yifang requested the court to order Sina Weibo to permit Yifang to use relevant Sina Weibo's data under reasonable conditions and to compensate Yifang for economic losses and reasonable expenses amounting to RMB 5.5 million. We understand that both ByteDance/Tencent case and Yifang/Sina Weibo case involve the policy [orientation](#) of "interconnection (互联互通)", which may give rise to the opening and sharing of critical resources, such as user relations and data, deposited by leading Internet / platform companies. The following progress and the final judgement of these cases will have a [profound influence](#) over similar business practice in digital sector in China;

Li Zhen/Alibaba case, in April, 2021, Li Zhen filed a lawsuit in front of the Shanghai Intellectual Property Court, accusing Alibaba Group, Alipay Company, Ant Technology Group, Taobao Company and Tmall Company of abusing their market dominance. By restricting users to use Alipay as the only payment channel in Taobao and Tmall, they violated Li Zhen's free choice and fair trading rights, and damaged fair competition in the payment market. The Shanghai Intellectual Property Court put this case on record and issued an acceptance notice in June 2021. This case involves the business behaviors of Alibaba affiliates in the "payment" sector;

Hitachi Metals/Ningbo rare-earth metals companies case, in 2014, four rare-earth companies in Ningbo filed a lawsuit on the grounds that Hitachi Metals abused its market dominance by using its sintered NdFeB technology patent. This is the first monopoly case concerning the refusal to licence a non-standard essential patent. In April 2021, the Ningbo Intermediate People's Court issued a judgment against Hitachi Metals, whose behavior was constituted a refusal to trade. The court held that the "essential facilities doctrine" should be applied to determine whether the refusal of the relevant patent license constituted an abuse, and further put forward five requirements for the application of this principle. Hitachi Metals appealed against the first-instance judgment in front of the Supreme People's Court. The final result of this case will have a great influence on the development of the application of "essential facilities doctrine" in China's anti-monopoly practice and on how to balance the interests between anti-monopoly law and intellectual property protection.

2、 2021 China National Security in Review

Overview of China's Foreign Investments Security Review

The National Security Law effective since July 2015, is the fundamental law in relation to China's national security, which establishes the regulation framework for national security review. Article 59 of the National Security Law summarizes the scope of national security review, which is "foreign investments that influence or may influence national security, specific goods or core technologies, Internet information technology

products and services, construction projects involving national security affairs, as well as other major affairs and activities.”

The Foreign Investment Law effective since January 2020, being a fundamental law for foreign investment, establishes the foreign investments security review system in Article 35, providing that “the State shall establish a security review system for foreign investment, under which the security review shall be conducted for any foreign investment that would affect or may affect national security. The decision made upon the security review in accordance with the law shall be final.”

Under the aforesaid frameworks, in December 2020, China’ s National Development and Reform Commission (“NDRC”) and the Ministry of Commerce (“MOFCOM”) jointly issued the Measures for the Security Review of Foreign Investments (the “Security Review Measures”), effective since January 18, 2021. The Security Review Measures further provides a security review system that foreign investments should adhere to. Prior to its implementation, the security review system concerning foreign investors’ investment in China is scattered in the following applicable rules:

- Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors(《关于外国投资者并购境内企业的规定》) issued by MOFCOM in 2009, which provides that “In the case of merger and acquisition of domestic enterprises by foreign investors and obtaining of actual control of such domestic enterprises which involve key industries or have an impact on key industries or may compromise national and economic security or cause transfer of actual control of domestic enterprises which own well-known trademarks or China’ s time-honored brands, the parties involved shall submit a filing to the Ministry of Commerce” ;
- Notice on Establishment of Security Review System Pertaining to Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (《国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知》) issued by the General Office of the State Council in February 2011, which provides specific scope, content, operational mechanism and review procedures of foreign investments security review;
- Provisions of Ministry of Commerce on Implementation of Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (《商务部实施外国投资者并购境内企业安全审查制度的规定》) issued by MOFCOM in August 2011, which further elaborates the applicable scope and procedures of foreign investments security review;
- Trial Measures on National Security Review for Foreign Investments in Pilot Free Trade Zones (《自由贸易试验区外商投资国家安全审查试行办法》) issued by the General Office of the State Council in April 2015.

The Security Review Measures integrates and perfects the aforementioned rules together. According to the Security Review Measures, for foreign investments that would or may affect national security, foreign investors or relevant domestic parties should proactively declare the investments to the office of the operational mechanism prior to implementing such investments. The office of the operational mechanism (or the “reviewing authority”) is set up within NDRC and headed by NDRC and MOFCOM.

The office undertakes the daily work of foreign investments security review. More specifically:

- Types of investments/transactions subject to review: according to the Security Review Measures, the term “foreign investment” means investment activities directly or indirectly conducted within China by foreign investors, which includes the following: (i) investments in newly constructed projects made in China, or the establishment of enterprises in China, made by foreign investors, whether independently or jointly with other investors; (ii) acquisitions by foreign investors of equity rights in, or assets of, enterprises in China by means of merger or acquisition; (iii) investments made in China by foreign investors through other means. Therefore, indirect investments by foreign investors, such as through agreement control, shareholding entrustment, trust, reinvestment, overseas transactions and subscription of convertible bonds, are also likely to fall into the scope of security review.

- Covered sectors: foreign investment in the following sectors is subject to national security review:

Military sectors: investments in sectors related to national defense and security such as military and military-related industries; or in geographic locations in close proximity of military facilities or defense-related industries facilities. Note that foreign investments in such sectors will be subject to security review, which is not premised on the element of “obtaining control” ;

Important sectors: investment in important sectors related to national security, such as important agricultural products, important energy sources, important resources, manufacture of major equipment, important infrastructure facilities, important transportation services, important cultural products and services, important information technology and Internet products and services, important financial services, key technologies and other important sectors, to the extent that actual control of the invested enterprise is acquired. For such investments: (i) further assessment on whether the foreign investor obtains actual control of the investee enterprise is required. The Security Review Measures provides a rather broad definition of the term “actual control” , including where (a) the foreign investor’ s equity interest in the enterprise is not less than 50%; (b) the foreign investor’ s equity interest in the enterprise is less than 50% but its voting rights enable it to exercise major influence over the resolutions of the board of directors, shareholders’ meeting or shareholders’ general meeting; (c) other circumstances that enable the foreign investor to exercise major influence over the business decision making, human resources, finances, technology, etc. of the enterprise; and (ii) further assessment on whether the investment sector falls within important sectors is also required. The Security Review Measures only lists a general scope of “important sectors” . In practice, the reviewing authority normally evaluates whether a security review filing is required on a case-by-case basis, taking into consideration the specific circumstances of the concerned foreign investment.

Our Observations

Since the implementation of the Security Review Measures from January 2021:

- With respect to the number of security review filings, a handful of filings have been submitted. Some of the filings are made passively by the parties after being contacted and requested by the reviewing authority. The rest of the filings are made proactively by the parties, which involve foreign investors' mergers and acquisitions of domestic enterprises in military sectors or important sectors;
- With respect to the types of foreign investments covered by the security review, please note that a foreign-to-foreign transaction is not a statutory exemption, the risk of being subject to national security review shall be assessed based on facts and specific circumstances (including the sectors that the transaction may involve);
- With respect to the standards and considerations of the review, as there are currently no detailed rules, regulations or guidelines for implementing the Security Review Measures, issues such as what constitutes "actual control rights" and what falls within "important sectors" of foreign investments remain to be clarified by detailed rules and reviewing practices. As to the security review precedents, the reviewing authority is not legally required to and in practice will not disclose its decisions to the public, regardless of what decisions it makes, with no precedents for reference. Therefore, in general, the reviewing authority has relatively great discretion in interpreting and assessing, on a case-by-case basis, the unclear issues such as "actual control rights", "important sectors", and "foreign investment that would or may affect national security". Such issues remain to be further clarified as the enforcement progresses.

As illustrated above, sector-wise, the Security Review Measures only outlines sectors subject to the security review in a relatively general manner. We noticed that there are some descriptions with respect to the national security in the recent strategic policies from the national level that might be noteworthy:

- The Outline of the 14th Five-Year Plan released on March 13, 2021 proposes food security, financial security and energy security, as well as bio-safety risk prevention and control. Specifically:

Food security: ensuring absolute security of staple food, basic self-sufficiency of grain, and adequate supply of major agricultural and sideline products; carrying out international cooperation on major agricultural products, improving the mechanism for managing importing agricultural products, diversifying sources of import, creating domestic large international grain merchants and agricultural conglomerate companies; enacting the food security law.

Financial security: enhancing supervision of systemically significant financial institutions and financial holding companies, improving the long-term regulatory mechanism of internet finance; establishing a sound management framework of cross-border capital flow, strengthening regulatory cooperation; ensuring the security and controllability of core information technologies in the financial sector, and safeguarding the financial infrastructure security.

Energy and resource security: enhancing the ability of sustainable and stable energy

supply and risk management and control, ensuring that basic coal supply is secure, that core oil and gas demand is met by domestic supply, and that power supply is stable and reliable; moving ahead with the planned distribution and control of strategic coal-to-liquid and coal gas bases, and securing the strategic channels and key nodes.

Biosafety risk prevention and control: establishing the system for biosafety risk prevention, control, and governance, enhancing national capacity of biosafety governance; making overall planning for biosafety infrastructure; intensifying regulation on biosafety resources, formulating and improving the catalog of human genetic resources and biological resources, and establishing a sound risk assessment mechanism of biotechnology research and development; putting into practice the biosafety law; strengthening international cooperation on biosafety and taking an active part in the development of international biosafety rules.

· On November 18, 2021, the Political Bureau of the Central Committee of the CPC held a meeting to deliberate the National Security Strategy (2021 - 2025). According to the Xinhua News Agency, the meeting emphasized the need to ensure food security, energy and mineral resources security and important infrastructure security, and to strengthen the protection of overseas interests, and accelerate the improvement of governance ability in biosecurity, cyber security, data security, artificial intelligence security etc.

For more detailed questions regarding the antitrust and competition, foreign investments security review in China , please feel free to contact Haiwen partners Qian Xiaoqiang (qianxiaoqiang@haiwen-law.com), LIN Xixiang (linxixiang@haiwen-law.com), or your usual Haiwen & Partners contact.

2022-01-25