

China Set to Revise Its Anti-Monopoly Law with More Aggressive Provisions

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China is poised to revise the [Anti-Monopoly Law](#) (AML), its 12-year-old comprehensive competition statute that was passed in 2007 and went into effect in 2008 (hereinafter, the 2008 AML). The State Administration for Market Regulation (SAMR) released a [draft revision to the Anti-Monopoly Law](#) for public comment on January 2, 2020 (hereinafter, the 2020 AML Draft). If adopted as law, several key changes in the 2020 AML Draft would provide SAMR—China’s state antitrust agency newly merged in 2018—with more powerful enforcement tools in both procedural and substantive aspects.

BACKGROUND

The 2020 AML Draft has been anticipated for two years since the National People’s Congress for 2018 identified revisions of the AML as a legislative priority and collected feedback from domestic regulators and academics. Within the framework of China’s competition law and policy, the 2008 AML functions as a fundamental legal code supplanting previous measures as the legislative basis for policymaking, administrative enforcement, and litigation activities involving competition issues. While other laws including the [Price Law](#) (passed 1997) and [Anti-Unfair Competition Law](#) (AUCL, passed in 1993, last amended in 2019) are also effective, an updated AML would take center stage in most public and private enforcement against anti-competitive conduct, and remain the only law covering merger control.

Key Changes

The 2020 AML Draft, despite many changes, retains the structure of the 2008 AML, which sets forth rules mainly concerned with “monopoly agreements” (Chapter II), “abuse of dominance” (Chapter III), and “concentration of undertakings” (Chapter IV). In addition, there are rules against “abuse of administrative power to eliminate or restrict competition” (Chapter V) that apply to government agencies or other organizations taking on government agency roles. Procedural rules (Chapter VI) and legal liabilities (Chapter VII) are separately set out for all matters subject to an antitrust agency’s review or investigation. The following highlights some key changes as organized in the proposed new law.

A. Substantive Change: Monopoly Agreement

A definition of “monopoly agreements” is now placed in a new **Article 14**, before the prohibition on horizontal agreements (Article 15) and vertical agreements (Article 16), as opposed to appearing in the horizontal provision in the 2008 AML. This re-location of the definition would likely help reduce the confusion surrounding how agreements in a vertical setting are defined and whether they are assessed similarly to horizontal agreements.

A new **Article 17** prohibits “organizing and facilitating other undertakings to conclude monopoly agreements.” This addition is significant as it can now cover a “hub-and-spoke” scheme where a company acts as an agent that orchestrates a price-fixing ring. Arguably, this provision can also apply if a company unknowingly takes on a facilitating role, as the provision does not contain an intent element.

The revised **Article 18** (*cf.* Article 15 of the 2008 AML) adds an “indispensability” requirement to the merging parties’ burden of proof in an “efficiencies” defense to a challenged agreement—*i.e.*, parties need to prove that their agreement is necessary to realizing intended efficiencies.

B. Substantive Change: Abuse of Dominance

The revised **Article 20(6)** (*cf.* Article 17(6) of the 2008 AML) expands the scope of finding an abuse of dominance by looking at whether a party was “without justifiable reasons, applying differential prices and other transaction terms among their *trading counterparts*”—expanding the group of differently treated parties that can claim abuse of dominance as compared to the “*trading counterparts on an equal footing*” in the 2008 AML.

The revised **Article 21** (*cf.* Article 18 of the 2008 AML) adds a paragraph requiring additional considerations of the “network effect, economies of scale, the lock-in effect, and abilities to learn and process relevant data” in determining a company’s dominant position in the Internet sector.

C. Substantive Change: Merger Control

The revised **Article 23** (*cf.* Article 20 of the 2008 AML) adds a broad definition of “control” obtained in transactions that would trigger a notification requirement, which can be “exerted or potentially exerted,” “directly or indirectly,” and “individually or jointly.”

The revised **Article 24** (*cf.* Article 21 of the 2008 AML) explicitly empowers SAMR to investigate failures to file and those deals that fall below the reportable thresholds but are suspected of anti-competitive effects. If competitive effects are found through an investigation, SAMR may block the deal (revised **Article 34**).

D. Changes to Procedure Rules and Legal Liabilities

Procedurally, in merger reviews, SAMR would now have some leeway by tolling the statutory timeline (revised **Article 30**) and revoking previous decisions on the basis of false or inaccurate information (new **Article 51**). If it involves a hardcore cartel, **Article 50** (*cf.* Article 45 of the 2008 AML) now closes the door to applications for a suspension of the agency’s investigation.

In terms of civil liabilities, in monopoly agreement cases, the now **Article 53** (*cf.* Article 46 of the 2008 AML) increases the maximum fines by 100 times—from 500,000 yuan to 50 million yuan—that can be imposed on companies that have concluded a monopoly agreement but either have no sales in the previous year or have not implemented the agreement. The same article also increases the maximum fines imposable on trade associations from 500,000 yuan to 5 million yuan. In mergers, the revised **Article 55** (*cf.* Article 48 of the 2008 AML) changes the maximum fines from a fixed 500,000 yuan to 10 percent of a party’s sales in the previous year if the parties fail to file or act against an agency decision opposing or restricting aspects of the deal.

Noticeably, criminal liabilities are also allowed through an addition to **Article 57** (*cf.* Article 50 of the 2008 AML), which has specified neither the underlying conduct nor the corresponding liabilities, likely just opening a door to further legislation and regulation.

CONCLUSION

In summary, the 2020 AML Draft included some significant substantive changes involving

- **Monopoly agreements:** an increase of fines (100-fold on companies in monopoly agreements that either have no sales in the previous year or have not acted on the agreement; 10-fold on trade associations), widened application of monopoly agreement provisions (involving “hub-and-spoke” schemes and vertical agreements), and no ability to suspend investigation into hardcore cartels;
- **Abuse of Dominance:** a more dynamic and arguably wider application of the abuse-of-dominance provisions by differentiating trading parties who are not necessarily similarly situated and expanding the considerations for companies in the internet sector; and
- **Merger control:** an exponential increase of fines on merging parties who fail to notify SAMR of the transaction or acted against a decision issued by the agency, and a wider range of deals requiring notification to the agency through an expanded definition of “control.”

Procedurally, under the new provisions, SAMR would have a greater flexibility in merger reviews by tolling the statutory timeline, reaching a wider range of deals, and revoking previous decisions on the basis of false or inaccurate information. Parties could face heftier civil liability and likely criminal sanctions.

Overall, the proposed changes support (and suggest) a more aggressive antitrust enforcement regime in all aspects including monopoly agreements, abuse of dominance, and merger control in China.

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