

China's SAMR Takes Aggressive Approach to Technology

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On July 10, 2021, the State Administration of Market Regulation (SAMR) of the People's Republic of China (China or the PRC) announced that it had denied the merger of online-game streaming companies Huya Company and Douyu International Holdings Co., Ltd., which are first and second in market share for online-game streaming in China. Tencent, which is already the market leader for online-game operations, owns Huya and has joint control over Douyu. The merger denial by the SAMR illustrates the PRC government's increased scrutiny of China's tech giants.

The merger was blocked per Article 28 of the PRC Anti-Monopoly Law (AML) and Article 35 of the *Interim Provisions on the Review of Concentration of Undertakings* (the Interim Provisions). AML Article 28 allows the SAMR to prohibit a concentration of undertakings where the concentration "will or may eliminate or restrict competition," unless the company proves that the benefit of the concentration exceeds the adverse impact or the concentration is in the public interest. Article 35 of the Interim Provisions allows companies to propose undertakings to reduce the adverse impact of concentrations, and the SAMR may exercise its discretion to allow a concentration to go forward with those undertakings implemented. In this case, the proposed undertakings were not determined to be sufficient to reduce the adverse impact on competition.

The decision illustrates China's increased focus on technology, intellectual property, and the digital economy. In the last year, China has taken legislative, regulatory, and enforcement actions aimed at technology, data, e-commerce, online gaming, etc. Likewise, the SAMR has been active in anti-monopoly regulations focused on these areas. In November 2020 the SAMR released its *Draft Anti-Monopoly Guidelines for the Platform Economy*, and in August 2020 the SAMR issued the *Anti-Monopoly Guidelines for Intellectual Property* (the IP Guidelines). The IP Guidelines are in effect and regulate specific anti-monopoly issues involving IP, as explained in the overview below.

De Facto Concentrations Under the 2020 IP Guidelines

The IP Guidelines provide specific guidance on antitrust issues involving IP, including monopoly agreements, abuse of dominance, concentrations of undertakings, and special IP issues including patent pools, standard essential patents, and collective administration of copyrights. We discussed the IP Guidelines in detail in a prior Competition Corner post [here](#).

Pursuant to Article 20 of the IP Guidelines, certain IP transactions could create a *de facto* concentration of undertakings. When determining whether an IP transaction should be deemed a concentration of undertakings, the

SAMR considers the following:

1. whether the IP constitutes a stand-alone business;
2. whether the IP has generated independent and calculable turnover in the preceding accounting year; and
3. how the IP is licensed and for what duration.

Standard Notification Procedure for M&A Transactions

The IP Guidelines' *de facto* concentration is a break from the norm for merger notification to the SAMR. Under the AML, the PRC uses a turnover-threshold test to determine when a merger filing is necessary. The turnover thresholds are set in the *Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings* (the Notification Regulations). If either of the thresholds is met, then a merger filing must be made to the SAMR for approval before the transaction can be concluded. The turnover thresholds are listed below:

- for the preceding fiscal year, the aggregate global turnover of all undertakings participating in the concentration exceeds RMB 10 billion (approximately USD 1.5 billion), and at least two of these undertakings each had a turnover of more than RMB 400 million (approximately USD 61.6 billion) within the territory of the PRC; or
- for the preceding fiscal year, the aggregate turnover of all the undertakings participating in the concentration exceeds RMB 2 billion (approximately USD 300 million) within the territory of the PRC, and at least two of these undertakings each had a turnover of more than RMB 400 million within the territory of the PRC.

The Notification Regulations apply to both foreign and domestic concentrations. In certain circumstances, merger filings have been required in China for foreign mergers that did not require filings in other jurisdictions. In addition, the SAMR has required structural or behavioral restrictions to protect competition within the PRC for transactions that did not need to make merger filings or face restrictions in other countries. For example, in 2019 ZGBH/Royal Disman was only notifiable in the PRC, and Orbotech/KLA-Tencor, TTS/Cargotec, and Fenissa/II-VI received conditional clearances in the PRC but unconditional clearances in all other relevant jurisdictions.

More Changes Are Coming

The AML came into effect in 2008, and practitioners have expected amendments. On June 11, 2021, the PRC General Office of the State Council released the Notice of the State Council's 2021 Legislative Work Plan, which included an amendment to the AML to be drafted by the SAMR. No time frame was set for the amendment to be drafted or published for comment. It is expected that the amendments will follow the SAMR's aggressive approach.

Recently, China has enacted and utilized a number of laws to assert control over its major technology companies. China should be expected to enhance its anti-monopoly regime to increase control over the market and activities of dominant technology companies, similar to Europe and the United States. As China is one of the three major world markets, companies with a China presence will need to form strategies contemplating China's anti-monopoly requirements.

While the above contains only a general overview of China's AML and regulations and their application to proposed transactions, we welcome you to contact us directly if you would like further information or assistance with respect to this subject. Winston works closely with attorneys at the firm's strategic-alliance partner, YuandaWinston, who are qualified to practice PRC law and provide comprehensive legal services across the full range of PRC antitrust and competition matters under China's anti-monopoly law, including representing clients in connection with antitrust investigations as well as antitrust issues arising in the context of licensing, joint development, pooling arrangements, and intellectual property disputes.

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