

CLIENT ALERT

China Continues Focus on Tech Industry with High-Profile Antitrust Enforcement Actions

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Antitrust enforcement in China has picked up significant steam with a pair of blockbuster enforcement actions and a spate of high-profile tech-industry antitrust litigations. The developments suggest that Chinese antitrust regulators and private parties are moving swiftly to address what they view as anticompetitive conduct by the country's tech platform companies.

In early April, the Chinese State Administration for Market Regulation (SAMR) fined Chinese e-commerce giant Alibaba Group (Alibaba) a record \$2.8 billion over alleged monopolistic practices including restricting vendors from selling merchandise on other platforms. The fine, which capped an investigation into Alibaba of just four months, amounts to about 4% of the company's 2019 domestic revenue and is the largest fine ever imposed by Chinese antitrust regulators. Chinese regulators also ordered Ant Group (Ant), Alibaba's online financial affiliate company whose \$37 billion IPO was suspended last November, to refashion itself as a financial holding company subject to supervision by China's central bank.

The actions suggest that the Chinese government is taking decisive actions to further a stated policy goal of addressing concentration in online business. Alibaba's fine, and the Ant restructuring, appear to be just the beginning. Last week, SAMR ordered 34 of the country's largest tech companies to conduct a comprehensive self-inspection, identify and address potentially anticompetitive practices, and publicly pledge to comply with the country's Anti-Monopoly Law (AML). SAMR further indicated that, after a one-month grace period, it intends to conduct follow-up inspections, assess compliance, and deliver "severe punishment" for ongoing violations. SAMR urged the companies to learn from the Alibaba case and specifically warned against the practice of forced exclusivity (for example, Alibaba's "choose one from two" policy punishing merchants selling on platforms other than Alibaba), abuse of market dominance, anticompetitive acquisitions, and predatory pricing.

Chinese regulators' increasing focus on the tech industry is no surprise. On February 7, SAMR released the "Anti-Monopoly Guideline for the Platform Economy Industry." The guideline consists of 24 articles divided into 6 chapters. The new competition rules revise the factors for determining market dominance, including those regarding market share and competition, capability to control the market, financial power and technical conditions, level of dependence, and difficulty in entering the relevant market, and bar companies from a range of behavior, including forcing merchants to choose between the country's top internet players, price-fixing, restricting technologies, and using data and algorithms to manipulate the market. And enforcement has long been known to be underway, as Chinese government officials began to signal as early as September 2020 that restructuring would be required of online financial businesses.

SAMR explained that reports of internet-related anti-monopoly behavior have been increasing, and that the latest guidelines will "stop monopolistic behaviors in the platform economy and protect fair competition in the market." The enactment of the new rules follows last year's pledge by China's Politburo to strengthen anti-monopoly laws, and in March, Chinese President Xi Jinping calling for stronger enforcement and regulation of the platform economy.

China's antitrust crackdown on "big tech" parallels similar enforcement action in the U.S. and Europe, but on a substantially faster timetable. In the U.S., this includes DOJ, FTC, and state attorneys general investigations and enforcement litigation, while

potential government enforcement against other tech companies appears to be moving on a slower track. Industry-specific legislation is also in the offing, including the recently introduced Competition and Antitrust Law Enforcement Act sponsored by Senator Klobuchar, the new Chair of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights.

Likewise, in Europe, the European Commission is pursuing multiple antitrust investigations of large technology companies and has increased its scrutiny of such businesses over the last few years. The Commission is also exploring legislative changes in the area of competition law and big tech; it recently introduced the Digital Markets Act (DMA), which would regulate the conduct of large digital platforms—which the legislation labels “gatekeepers”—by establishing a list of obligations they will need to respect and enhancing the Commission’s enforcement powers.

Prior to imposing antitrust fines on Alibaba Group, SAMR made use of its updated arsenal of regulatory weapons in one much smaller enforcement action, fining online discount retailer Vipshop Holdings 3 million yuan (\$464,000) for violations of the new laws, including alleged anticompetitive conduct related to Vipshop’s proprietary data gathering system, which allowed the platform to manipulate customer product selection and block sales by certain brands. Last year, under the old 2008 Anti-Monopoly Law, SAMR fined Vipshop, JD.com, and Tmall 500,000 yuan (\$76,657) each for illegal pricing practices (including raising base prices prior to a discount and deceptive consumer offers), and fined Alibaba and two other technology firms for not making the proper declarations to authorities about past acquisitions.

In addition to increasing government scrutiny, tech companies are increasingly involved in private litigation over competition issues in the industry. ByteDance (better known as the developer of TikTok) recently filed a lawsuit against the world’s largest video game vendor over alleged monopolies in its WeChat and QQ platforms. The Beijing Intellectual Property Court has permitted the lawsuit to proceed. In addition, JD.com (one of China’s largest e-commerce companies) has in the past sued rival Tmall (owned by Alibaba) over exclusivity practices. SAMR has warned platforms against such practices, and the new anti-monopoly regulations provide additional firepower for private lawsuits.

So far, Chinese enforcement and litigation against the tech industry has focused on China’s home-grown giants. However, the activity holds lessons for foreign and multinational companies doing business online in China, and in some cases may illuminate China’s enforcement priorities for other industries. A close review of China’s industry-specific antitrust guidelines may offer additional clarity about how SAMR intends to evaluate market definition and market power, both on- and off-line, and further provides a broad outline of behaviors likely to draw regulatory scrutiny. Companies with substantial Chinese market presence should carefully consider practices related to exclusive dealing, restrictions imposed on the use of technology by third parties, and innovative pricing behavior to identify high-risk strategies.

The twin actions against Alibaba and Ant, along with the breakneck “self-inspection” process imposed on other tech firms, illustrate the fast pace of antitrust enforcement underway at SAMR today. Multinational companies that are used to years-long investigations and litigations in the U.S. and Europe may find value in ongoing compliance and self-assessment initiatives, with the goal of being ready to engage with SAMR or private litigants quickly should problems arise.

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