

# More Grief for the “Big Guys”: Draft Revision of the China Anti-Monopoly Law Introduces Further Restraints on Influential Market Players

by Qing (Jason) Lin

On January 2, 2020, China's State Administration for Market Regulation, or the SAMR, released the Draft Revision of the Anti-Monopoly Law of China (the “Draft AML Revision”) for public comment. The Draft AML Revision is significant in a number of respects, several of which will be highlighted below: (i) it makes it more likely that a transaction could trigger anti-monopoly review, (ii) it expands the concept of collusion to business operators who coordinate and assist in “collusion”, (iii) it increases the level of penalties for non-compliance generally, and (iv) it introduces new factors that could lead to more players being considered “dominant” in the Internet industry.

## **Anti-monopoly review triggers broadened**

The Draft AML Revision introduces a new definition for “control” that is likely to trigger anti-monopoly review. It also authorizes the AML authorities to investigate transactions that eliminate or restrict competition, even if they did not exceed the threshold that would trigger filing obligations.

- Definition of control right

The current Chinese Anti-Monopoly Law, effective on August 1, 2008 (the “AML 2008”), refers to a control right only in the context of acquisitions of equity or assets or in contractual arrangements for control of a company. The Draft AML Revision defines “control right” as a right that is likely to have a decisive influence over production, operations or other material matters of another market player. This broad definition will cause more transactions to come within AML review. For example, if minority acquirers obtain veto powers over certain crucial business matters of a target that the AML authorities consider to be decisive control rights, AML review would likely be triggered.

- Control right and gun-jumping

“Gun Jumping”, in the AML context, refers to unlawful co-ordination between market players prior to the approval by SAMR or its predecessor, Ministry of Commerce, (the

## **Related People**

- Qing (Jason) Lin

## **Related Capabilities**

- Antitrust & Competition Law
- China
- International Arbitration & Litigation
- International Trade

“AML authorities”) of their proposed transaction. There are two gun-jumping scenarios: procedural gun jumping and substantive gun jumping. Procedural gun jumping occurs when a market player failed to notify the AML authorities of a transaction that would have triggered the filing threshold. Substantive gun jumping occurs when the parties to the transactions are competitors and co-ordinate their conduct prior to the approval of the transaction for which a notification had been filed. The Draft AML Revision adopts a “decisive influence” standard in its new control definition. If a buyer prematurely exercises decisive influence over the ordinary course of business of the target, or if the buyer and the seller prematurely exchange sensitive information, even if AML filing was properly made, the AML authorities are likely to consider that gun jumping has occurred.

- Reviews of transactions not exceeding the filing threshold

Before these new revisions, an AML filing was not required under circumstances where the filing threshold had not been crossed. The Draft AML Revision now requires the AML authorities to conduct an AML review of any transaction “likely to have the effect of eliminating or restricting competition.” An illustrative case is the DiDi-Uber China merger. In August 2016, Uber China merged with DiDi without an AML filing because DiDi and Uber argued that neither company was profitable at the time of the merger and that Uber China’s turnover in the previous financial year did not exceed the applicable filing threshold. However, the AML authorities believed that the DiDi-Uber China merger enhanced DiDi’s ability to raise prices and arguably harmed customers as a result. The DiDi-Uber China merger illustrates the necessity of assessing what is likely to happen if a merger or acquisition transaction proceeds as compared to what would happen if it is terminated.

- Possible structural sanctions

The Draft AML Revision further provides that the AML authority can impose structural sanctions if it determines the concentration as competitively harmful, such as an order to dispose of equity or assets, or to divest a business. As a consequence, transactions not exceeding the filing threshold and not filed could be unwound in the future if they capture the attention of, and are considered anti-competitive by, the AML authorities.

### **Prohibition on aiding and abetting others**

The Draft AML Revision prohibits a business operator from aiding and abetting other upstream or downstream market players to form a monopoly agreement. This contrasts with the AML 2008 which prohibits only collusion at the same level (that is, agreements between competitors).

A typical example is “hub-and-spoke” activities. A “hub” manufacturer usually has multiple “spoke” distributors on layered levels at different locations. The “hub” manufacturer might have an incentive to aid and abet the competing “spoke” distributors in forming a horizontal monopoly agreement amongst the “spoke” distributors in order to, for example, fix the price of products for resale to third parties. In December 2019, the Shanghai Municipal Administration for Market Regulation (“Shanghai AMR”) issued a

Shanghai Anti-Monopoly Compliance Guide for Business Operators, which said that Shanghai AMR would focus on “hub-and-spoke” type horizontal monopoly agreements. The SAMR has also published on its website an enforcement case in 2019, in which a car manufacturer was fined 2% of its previous year’s sales revenue because of its promotion of horizontal monopoly agreements amongst its downstream car dealers.

### **Increase in penalties**

The Draft AML Revision increases the fine for an intended monopoly agreement (that is, where the agreement is yet to be implemented) from a maximum of RMB500,000 to RMB50 million. This fine and other penalties (including orders to cease and desist, confiscation of illegal gains, and fines from 1% to 10% of sales revenue of the previous year) applicable to monopoly agreements would also now apply to business operators that have committed “aiding and abetting” violations.

Another new provision in the Draft AML Revision introduces criminal liability for monopolistic conduct. The AML 2008 provided that business operators could only be held criminally liable for refusing to cooperate in anti-monopoly investigations.

### **Recognizing dominant market position in the internet industry**

The Draft AML Revision provides some new tools for the AML authorities to designate internet companies as “market dominant”. Factors that the AML authorities can now consider include network externalities, economies of scale, lock-in effect, and capability of collecting and processing data. This change reflects the significant role that internet companies now play in China’s economy and the influence that they exercise over consumers.

In recent years, an increasing number of consumers and small companies have been exercising their private rights of action under the AML to seek relief against large Internet companies in China. With the promulgation of the Draft AML Revision, we expect more small companies and consumers to challenge the power of Chinese Internet giants for abuse of dominant market position.

*Dorsey & Whitney LLP is a foreign law firm registered with the Ministry of Justice of the People’s Republic of China. Under current Chinese regulations, we are allowed to provide information concerning the effects of the Chinese legal environment, but, like all international law firms with offices in the PRC, we are not authorized to issue opinions, determinations, or certifications in respect of, the application of PRC law. We work in cooperation with a number of Chinese law firms. Should you require a legal opinion in respect of any Chinese law matter, we would be happy to assist you in obtaining one from a Chinese firm.*