

2021 Antitrust Annual Report

The Brattle Group

MARCH 2022



TABLE OF CONTENTS

Executive Summary.....ii

Achievements in the Legislative Field of China’s Anti-Monopoly Work in 20213

Antitrust Enforcement Achievements8

 Institutional Reform..... 8

 Concentration of Undertakings 8

 Investigation of Monopoly Agreement Cases 13

 Investigation of Abuse of Market Dominance Cases..... 15

Antitrust-Related Judicial Litigation16

 Improvement of Relevant Judicial Interpretation 16

 Summary of Anti-Monopoly Lawsuits 17

Summary20

Learn More20

Executive Summary

In 2021, China's antitrust efforts achieved remarkable success, with significant progress made in many areas, including institutional reform, legislation, enforcement, and justice.

In terms of legislation, China introduced a series of antitrust-related regulations, departmental rules, and guidelines in 2021 to provide guidance for national and local law enforcement. Guidelines were also provided to companies to help them self-examine their compliance with antitrust regulations.

In the face of rapid development and changes in the domestic market environment, the Anti-Monopoly Law of the People's Republic of China (Draft Amendment), which – drafted in response to enforcement and judicial difficulties – amends and improves the existing Anti-Monopoly Law, was again opened for public comments.¹

China continues to focus on key industries and, in 2021, disseminated industry guidance documents that take the unique characteristics of the platform economy and active pharmaceutical ingredient (API) sectors into consideration in order to launch targeted regulatory controls. Local law enforcement agencies also introduced a series of compliance documents to provide a reference for local corporate compliance and anti-monopoly work of enforcement agencies.

In terms of enforcement, the pace of law enforcement has accelerated, enforcement efforts have increased, the number of cases in which operators have been penalized for concentrated “gun-jumping” has risen, and the amount of penalties has increased significantly. The regulation of monopoly agreements and abuse of market dominance in key areas such as platform economy and pharmaceuticals has increased as well, and several platforms have been administratively punished for either-or conduct. Additionally, the number of antitrust lawsuits on the judicial front continues to grow, especially in the internet and APIs sectors.

When considered together, all of this indicates that China's antitrust regime has entered an era of strengthened regulation.

¹ National People's Congress (NPC), “The Anti-Monopoly Law of the People's Republic of China (Draft Amendments) Submitted for Public Comments,” October 25, 2021, <https://motdave.com/page-http-www.ciplawyer.cn/html/lffld/20211025/147391.html>.

Achievements in the Legislative Field of China's Anti-Monopoly Work in 2021

In 2021, China made remarkable achievements in the field of anti-monopoly legislation, introducing a draft amendment to the Anti-Monopoly Law and four guidelines.² The State Administration for Market Regulation (SAMR) revised 14 regulations and corrected more than 1,500 policy documents.³ Combining the regional and local enforcement experiences, several provinces and cities – including Shanghai, Tianjin, Sichuan, Zhejiang, Jiangsu, Hunan, and Beijing – issued local compliance documents to provide guidelines for operators to consciously comply with and reduce anticompetitive risks.

Draft Amendment to the Anti-Monopoly Law

After consideration at the 31st Meeting of the Standing Committee of the 13th National People's Congress, the Draft Amendment to the Anti-Monopoly Law was published on October 23, 2021.⁴ This is the second time that public opinions on a revision of the Anti-Monopoly Law have been solicited; SAMR first did so when the Draft Revision to the Anti-Monopoly Law was published on January 2, 2020.

The Draft Amendment is both an amendment and a supplement to the current Anti-Monopoly Law, providing a legal basis for China to strengthen its anti-monopoly supervision and prevent the disorderly expansion of capital in the new era. It was drafted to reflect the rapid development of China's digital economy, the fact that digital platforms have become new market players, and the emergence of new business models since the law first came into effect in 2008.

The Draft Amendment introduces the following features to the Anti-Monopoly Law:

² Anti-Monopoly Guidelines for the Platform Economy, Anti-Monopoly Guidelines for the API Sector, Implementation Rules for the Fair Competition Review System, and Guidelines for Overseas Anti-Monopoly Compliance of Enterprises.

³ SAMR, "Into the Market Regulation 'National Meeting,'" January 21, 2022, <http://scjg.henan.gov.cn/2022/01-21/2386501.html>.

⁴ NPC, "The Anti-Monopoly Law of the People's Republic of China (Draft Amendments) Submitted for Public Comments," October 25, 2021, <https://motdave.com/page-http-www.ciplawyer.cn/html/lffd/20211025/147391.html>.

1. **It addresses the anti-monopoly regulatory challenges in the era of the digital economy.** This includes incorporating data, algorithms, technology, and capital elements into the regulatory system, specifying in particular that “data and algorithms, technology, capital advantages, and platform rules shall not be abused to exclude or restrict competition.” This provides a legal basis for anti-monopoly regulation in new industries and development models.
2. **It strengthens anti-monopoly penalties.** The Draft Amendment substantially raises the upper limit of fines for relevant violations in monopoly acts and operator concentration regulation. It also introduces a punitive fine mechanism to increase the cost of fines for violations.
3. **It formally incorporates “encouraging innovation.”** This language was added to reflect the compatible relationship between innovation and competition, and demonstrate the antitrust law’s goal to promote innovation by regulating monopolistic behavior and maintaining the competition mechanism.
4. **It changes the criteria for which kinds of concentrations of undertakings should be reviewed.** The Draft Amendment stipulates that the concentration of undertakings that do not meet the required declaration standards, but may have the effect of excluding or restricting competition, shall also be reviewed by the law. This indicates that the review of the concentration of undertakings is no longer limited to the absolute value of turnover, but is concerned about the more multidimensional assessment of the effects of competition.

Regulations and Guidance

In addition to the amendments to the Anti-Monopoly Law, China also promulgated a number of regulations and guidance documents for key industry sectors in 2021, including the Anti-Monopoly Guidelines for the Platform Economy and the Anti-Monopoly Guidelines for the API Sector, which take the characteristics of the internet platform economy and the active pharmaceutical ingredient (API) sector, respectively, into consideration to launch targeted regulatory controls.⁵

⁵ The Anti-Monopoly Committee of the State Council (AMC), “Anti-Monopoly Guidelines of the Anti-Monopoly Committee of the State Council on the Platform Economy,” AMC [2021] No. 1, February 7, 2021, https://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207_325967.html;

Anti-Monopoly Commission of the State Council, “Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on the Field of APIs,” AMC [2021] No. 3, November 18, 2021, https://gkml.samr.gov.cn/nsjg/fldj/202111/t20211118_336969.html.

China also published the Rules for the Implementation of the Fair Competition Review System and the Guidelines for Corporate Offshore Antitrust Compliance, which provide specific guidance for administrative agencies on fair competition review and corporate antitrust compliance.⁶

In addition, China published several drafts for public comments in 2021 to further improve China's anti-monopoly legal system.⁷ These include:

- Measures for Determining Illegal Income (Draft for Public Comment)
- Provisions on Prohibiting Unfair Competition Acts on the Internet (Draft for Public Comment)
- Guidelines for Classifying and Grading Internet Platforms (Draft for Public Comment)
- Guidelines for Implementing the Main Responsibility of Internet Platforms (Draft for Public Comment)⁸

⁶ SAMR, Development and Reform Commission, Ministry of Finance, Ministry of Commerce and Ministry of Justice, "Implementing Rules of the Fair Competition Review System," SAMR [2021] No. 2, June 29, 2021, http://www.gov.cn/zhengce/zhengceku/2021-07/08/content_5623453.htm;

SAMR, "Guidelines for Overseas Anti-Monopoly Compliance of Enterprises," SAMR [2021] No. 72, November 18, 2021, https://gkml.samr.gov.cn/nsjg/flidj/202111/t20211118_336972.html.

⁷ SAMR, "Measures for the Determination of Illegal Income in Cases of Administrative Penalty for Market Supervision and Administration (Draft for Public Comments)," December 6, 2021, http://www.moj.gov.cn/pub/sfbgw/zlk/202112/t20211203_443058.html;

SAMR, Provisions on the Prohibition of Unfair Competition on the Internet (Draft for Public Comments), August 7, 2021, http://www.moj.gov.cn/pub/sfbgw/zlk/202108/t20210817_434868.html;

SAMR, "Notice of Public Consultation on 'Guidelines for Classification and Grading of Internet Platforms (Draft for Comments)' and 'Guidelines for Implementing the Main Responsibility of Internet Platforms (Draft for Comments),' " October 29, 2021, https://www.samr.gov.cn/hd/zjdc/202110/t20211027_336137.html.

⁸ SAMR, "Measures for the Determination of Illegal Income in Cases of Administrative Penalty for Market Supervision and Administration (Draft for Public Comments)," December 6, 2021, http://www.moj.gov.cn/pub/sfbgw/zlk/202112/t20211203_443058.html;

SAMR, "Provisions on the Prohibition of Unfair Competition on the Internet (Draft for Public Comments)," August 7, 2021, http://www.moj.gov.cn/pub/sfbgw/zlk/202108/t20210817_434868.html;

SAMR, "Notice of Public Consultation on 'Guidelines for Classification and Grading of Internet Platforms (Draft for Comments)' and 'Guidelines for Implementing the Main Responsibility of Internet Platforms (Draft for Comments),' " October 29, 2021, https://www.samr.gov.cn/hd/zjdc/202110/t20211027_336137.html.

Anti-Monopoly Guidelines for the Platform Economy

SAMR officially released the Anti-Monopoly Guidelines for the Platform Economy on February 7, 2021.⁹ The guidelines include specific regulations on algorithms, data, either-or conduct, and other focal issues and clarify the importance of defining relevant markets.

The guidelines stipulate that, in determining the abuse of market dominance in the platform economy, the relevant market first needs to be defined in order to analyze whether the operator has a dominant position and to consider whether it constitutes abuse in conjunction with the specific circumstances of the case.

Given the special nature of the platform economy, the analysis of the relevant markets, market dominance, and competitive impact can be incredibly difficult and present challenges to antitrust regulation. In order to define the relevant markets more scientifically and rationally, the substitution analysis of market definition needs to combine the distinctive economic features in the platform economy – such as multisided markets, network effects, and lock-in effects – and consider their supply and demand substitution relationships comprehensively.

In addition, the guidelines also list the factors that often need to be considered when determining market dominance and the specific manifestations of abusive behavior, providing a strong reference for antitrust regulation and economic analysis in the platform economy.

Anti-Monopoly Guidelines for the API Sector

SAMR released the Anti-Monopoly Guidelines for the API Sector on November 18, 2021.¹⁰ The guidelines, designed to prevent monopoly agreements in the API industry, clarify the relevant market definition principles in the sector.

This means that, instead of being bound only to the classification of APIs, the focus of analysis and definition should be seen through a lens of demand and supply substitution. Likewise, the relevant API product market can be subdivided into production and distribution markets. For the determination of market dominance – since the API field widely exists in exclusive sales by API distributors – the guidelines also stipulate that, when determining the market share of API

⁹ SAMR, “Anti-Monopoly Guidelines of the Anti-Monopoly Committee of the State Council on the Platform Economy” (State Anti-monopoly Development [2021] No. 1), February 7, 2021, https://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207_325967.html.

¹⁰ SAMR, “Anti-Monopoly Guidelines of the Anti-Monopoly Committee of the State Council on the Field of APIs,” November 18, 2021, https://gkml.samr.gov.cn/nsjg/fldj/202111/t20211118_336969.html.

distribution companies, the proportion of manufacturers' sales that distribution companies control and other factors should be taken into account.

Along with detailing the characteristics of the API industry, the guidelines list the specific forms of industry monopoly agreements as well. Also noted are the anticompetitive risks of behaviors, such as information exchange, joint production, and "refusal to deal," and that discounts, rebates, and other behaviors may disguise acts that constitute restrictions on resale prices.

Provisions on Prohibiting Unfair Competition Acts on the Internet (Draft for Public Comments)

On August 17, 2021, the Provisions on Prohibiting Unfair Competition Acts on the Internet was released for public comments.

The draft provides that internet companies shall not use technical means to reduce trades between other operators and users by affecting users' choices, limiting the flow of merchandise, blocking merchandise off of shelves, or engaging in other behaviors to implement either-or conduct or hinder and disrupt the normal operation of network products or services legitimately provided by other operators. This is a direct regulation of the either-or conduct and other limited trading behavior in the platform field.¹¹

In addition, SAMR also released the Guidelines on the Classification of Internet Platforms (Draft for Comments) and the Guidelines on Implementing Subject Responsibilities on Internet Platforms (Draft for Comments) in October. Defining and classifying internet platforms based on categories and size has become another major initiative for regulators to promote the healthy development of the platform economy and protect the rights and interests of various platform users.¹²

¹¹SAMR, "Provisions on Prohibition of Unfair Competition on the Internet (Draft for Public Comments)," August 7, 2021, http://www.moj.gov.cn/pub/sfbgw/zlk/202108/t20210817_434868.html.

¹² SAMR, "Notice of Public Consultation on 'Guidelines for Classification and Grading of Internet Platforms (Draft for Public Comments)' and 'Guidelines for Implementing the Main Responsibility of Internet Platforms (Draft for Public Comments),' " October 29, 2021, https://www.samr.gov.cn/hd/zjdc/202110/t20211027_336137.html.

Antitrust Enforcement Achievements

Institutional Reform

Notably, China bolstered its antitrust enforcement system with the launch of the National Anti-Monopoly Bureau on November 18, 2021.¹³ The National Anti-Monopoly Bureau comprises three distinct divisions, each focusing on different tasks: the Anti-Monopoly Law Enforcement Department I (antitrust enforcement), the Anti-Monopoly Law Enforcement Department II (merger reviews), and the Competition Policy Coordination Department (policymaking). The Bureau also includes the Competition Policy and Big Data Center, which is intended to strengthen theoretical research and technical support on antitrust and competition policy.¹⁴ The establishment of the Bureau signals China's commitment to improving the efficiency of anti-monopoly work and enforcement.

Concentration of Undertakings

Overview of Law Enforcement

In 2021, SAMR concluded 723 merger review cases, an increase of 53% compared to 2020, including four decisions with additional restrictive conditions and one prohibited case.¹⁵

Of the 718 unconditionally approved merger cases, 585 were considered simple cases,¹⁶ which were approved after an average review period of 14.43 days.¹⁷ There were four cases where

¹³ State Administration for Market Regulation (SAMR), "The National Anti-Monopoly Bureau Launched Officially," November 18, 2021, https://www.samr.gov.cn/xw/zj/202111/t20211118_336974.html.

¹⁴ SAMR, "Reform and Innovation to Create a New Situation of Anti-monopoly Work – Interview with Gan Lin, Deputy Director SAMR, Director of the State Anti-monopoly Bureau and Secretary General of the Anti-Monopoly Committee of the State Council," December 19, 2021, https://www.samr.gov.cn/xw/mtjj/202112/t20211219_338196.html.

¹⁵ SAMR, "Into the 'National Meeting' on Market Regulation," January 21, 2022, <http://scjg.henan.gov.cn/2022/01-21/2386501.html>.

¹⁶ See "Public Notice of Unconditional Approval of Operator Concentration Cases," Anti-Monopoly Bureau, SAMR, <https://www.samr.gov.cn/fldj/aigs/wtjzajgs/>.

¹⁷ See "Public Notice of Operator Concentration Summary Cases," Anti-Monopoly Bureau, SAMR, <https://www.samr.gov.cn/fldj/aigs/jzjyajgs/>.

additional restrictive conditions were imposed. Only one included an imposed structural remedy,¹⁸ and the other three had behavioral remedies imposed.¹⁹

In addition, SAMR imposed administrative penalties on 94 cases for failure to file before the regulatory authority, with the number of penalties increasing by 623% from last year. Compared to the average fine of RMB 300,000–400,000 in 2020, most fines in 2021 reached the cap of RMB 500,000. The total amount of administrative fines reached RMB 61.35 million in 2021, an increase of 958% from last year.²⁰

Among the group of concentration of undertakings cases announced in 2021, four batches – involving 84 cases total – were primarily tech-related cases.²¹

Among the merger cases, SAMR’s July 24, 2021 administrative penalty decision related to Tencent’s acquisition of a stake in China Music Group is particularly noteworthy.²² In addition to fining Tencent for failing to file, SAMR also ordered the tech company to release the exclusive rights of online music to maintain the competitive ecology of online music streaming platforms. This was the first case since the implementation of the Anti-Monopoly Law in which China imposed additional restrictive conditions to restore the state of market competition.

¹⁸ Anti-Monopoly Bureau of SAMR, “Announcement of the Decision of the State Administration of Market Supervision on the Anti-Monopoly Review on Approval of Danfoss’ Acquisition of Part of Eaton Corporation’s Business with Additional Restrictive Conditions,” June 7, 2021, https://www.samr.gov.cn/fldj/tzgg/ftjz/202106/t20210607_330289.html.

¹⁹ Anti-Monopoly Bureau of SAMR, “Announcement of the Decision of the State Administration of Market Supervision on the Anti-Monopoly Review on Approval of Cisco’s Acquisition of Acacia Communications with Additional Restrictive Conditions,” January 19, 2021, https://www.samr.gov.cn/fldj/tzgg/ftjz/202101/t20210119_325338.html; Anti-Monopoly Bureau of SAMR, “Announcement of the Decision of the State Administration of Market Supervision on the Anti-Monopoly Review on Approval of Illinois Tool’s Acquisition of MTS’s Equity with Additional Restrictive Conditions,” November 18, 2021, https://www.samr.gov.cn/fldj/tzgg/ftjz/202111/t20211118_336984.html; Anti-Monopoly Bureau of SAMR, “Announcement of the Decision of the State Administration of Market Supervision on the Anti-Monopoly Review on Approval of SK hynix’s Acquisition of Part of Intel’s Business with Additional Restrictive Conditions,” December 22, 2021, https://www.samr.gov.cn/fldj/tzgg/ftjz/202112/t20211222_338317.html.

²⁰ For details, see the “Public Notice of Administrative Punishment Decisions of the Anti-Monopoly Bureau of SAMR”: <https://www.samr.gov.cn/fldj/tzgg/xzcf/index.html>.

²¹ SAMR published the decisions for 10 cases on March 12, 2021; 9 cases on April 30, 2021; 22 cases on July 7, 2021; and 43 cases on November 20, 2021. For details, see the “Public Notice of Administrative Punishment Decisions of the Anti-Monopoly Bureau of SAMR”: <https://www.samr.gov.cn/fldj/tzgg/xzcf/index.html>.

²² Anti-Monopoly Bureau of SAMR, “Administrative Penalty Decision on the Case of Illegal Implementation of Operator Concentration in the Acquisition of Equity of China Music Group by Tencent,” July 24, 2021, https://www.samr.gov.cn/fldj/tzgg/xzcf/202107/t20210724_333020.html;

Anti-Monopoly Bureau of SAMR, “The State Administration of Market Supervision Has Ordered Tencent Holdings Limited To Give Up Exclusive Music Rights and Other Penalties in Accordance With the Law,” July 24, 2021, https://www.samr.gov.cn/xw/zj/202107/t20210724_333016.html.

Economic Analysis of Conditional Approval and Prohibited Merger Cases

In 2021, the merger review of the four conditionally approved cases and the one prohibited case suggest that the antitrust regulators have relied on solid economic evidence in their competition analysis of operator concentration cases. SAMR used economic analysis methods to examine the potential competitive effects of these concentrations and relied on diversified behavioral remedies to mitigate the adverse effects of concentration on market competition.

In conducting the competition analysis, in addition to using indicators such as the Herfindahl-Hirschman Index (HHI) to analyze the relevant market concentration changes before and after the operators merged, SAMR also utilized diversion ratios to measure the degree of close competition between the two parties of the transaction. The Gross Upward Pricing Pressure Index (GUPPI) was used to measure the possibility of post-transaction entity price increases, and specific data measurements were used to analyze the impact of undertaking concentration on other market participants and market competition. The application of multiple quantitative indicators demonstrates the growing importance of quantitative economic analysis in the review of operator concentration.

As can be seen from the table below, the conditions in the four conditionally approved cases were mainly imposed with behavioral remedies, with the exception of the horizontal merger case involving Danfoss Power Systems's acquisition of part of Eaton Corporation's business. SAMR approved that transaction in June 2021 with a purely structural restrictive condition requiring the divestiture of Danfoss's cycloidal motor business.

In another case, SAMR approved SK hynix's acquisition of Intel Corporation's flash memory (NAND flash) and solid-state drive (SSD) business in December 2021 with a more unusual restrictive condition: requiring the post-concentration entity to assist a third-party competitor in entering the relevant SSD markets.

Analyzing the changes in relevant market concentration before and after the transaction as well as the transaction's impact on market competition, SAMR found that "the concentration will eliminate the electronics company's close competitors, increase market concentration and facilitate price synergies, and that the barriers to entry in this market are high, making it difficult for new effective competitors to emerge in the near term."

Therefore, in addition to the more common requirements – including a commitment to continuous supply, a guarantee of compatibility, fairness and reasonableness without discrimination, and not imposing unreasonably restrictive conditions – SAMR included the restrictive condition requiring the post-concentration entity to "help a third-party competitor

enter the PCIe enterprise SSD and SATA [serial advanced technology attachment] enterprise SSD markets,” which is quite innovative.²³

Table 1. Conditional Approval of Undertaking Concentration Cases in 2021

TRADING PARTIES	APPROVAL DATE	INDUSTRY	TRANSACTION TYPE	ADDITIONAL CONDITIONS
CISCO/ACACIA ²⁴	01.19.2021	Optoelectronic equipment	Vertical and Adjacent	Behavioral Remedy
DANFOSS/PART OF THE EATON BUSINESS ²⁵	06.07.2021	Industrial machinery	Horizontal	Structural Remedy
ITW/MTS ²⁶	11.18.2021	Industrial machinery	Horizontal	Behavioral Remedy
SK HYNIX/PART OF THE INTEL BUSINESS ²⁷	12.22.2021	Hard drive	Horizontal and Vertical	Behavioral Remedy

Source: SAMR

²³ Anti-Monopoly Bureau of SAMR, “Announcement of the Decision of the State Administration of Market Supervision on the Anti-Monopoly Review on Approval of SK hynix’s Acquisition of Part of Intel’s Business with Additional Restrictive Conditions,” December 22, 2021, https://www.samr.gov.cn/fldj/tzgg/ftjtz/202112/t20211222_338317.html.

²⁴ Anti-Monopoly Bureau of SAMR, “Announcement of the Decision of the State Administration of Market Supervision on the Anti-Monopoly Review on Approval of Cisco’s Acquisition of Acacia Communications with Additional Restrictive Conditions,” January 19, 2021, https://www.samr.gov.cn/fldj/tzgg/ftjtz/202101/t20210119_325338.html.

²⁵ Anti-Monopoly Bureau of SAMR, “Announcement of the Decision of the State Administration of Market Supervision on the Anti-Monopoly Review on Approval of Danfoss’s Acquisition of Part of Eaton Corporation’s Business with Additional Restrictive Conditions,” June 7, 2021, https://www.samr.gov.cn/fldj/tzgg/ftjtz/202106/t20210607_330289.html.

²⁶ Anti-Monopoly Bureau of SAMR, “Announcement of the Decision of the State Administration of Market Supervision on the Anti-Monopoly Review on Approval of Illinois Tool’s Acquisition of Metis’s Equity with Additional Restrictive Conditions,” November 18, 2021, https://www.samr.gov.cn/fldj/tzgg/ftjtz/202111/t20211118_336984.html.

²⁷ Anti-Monopoly Bureau of SAMR, “Announcement of the Decision of the State Administration of Market Supervision on the Anti-Monopoly Review on Approval of SK hynix’s Acquisition of Part of Intel’s Business with Additional Restrictive Conditions,” December 22, 2021, https://www.samr.gov.cn/fldj/tzgg/ftjtz/202112/t20211222_338317.html.

In addition to the HHI, other quantitative analysis metrics play an important role in merger reviews. For example, in the case of Illinois Tool Works Co., Ltd.'s (ITW's) acquisition of MTS Systems Corporation's (MTS's) Test & Simulation business, SAMR applied several quantitative economic indicators to assist in assessing the close competitive relationship between the two parties in the transaction as well as the bargaining power of the downstream users.

In its analysis of the close competitive relationship between the transaction's parties, SAMR calculated two diversion ratios based on the sales and the volume. SAMR found a 42.7% volume-based diversion ratio and a 41.3% sales-based diversion ratio from MTS to ITW, proving a close competitive relationship with ITW. In terms of longitudinal relationships, SAMR calculated a GUPPI of 21.7% based on data submitted by the parties, which was well above the threshold of 10%, proving the greater possibility of unilateral price increases by the entities after concentration.²⁸

Another notable case in 2021 was the prohibited merger between Huya and DouYu, which was the third prohibited case since the Anti-Monopoly Law came into effect and the first prohibited case in the internet sector.²⁹

In this case, SAMR defined multiple relevant markets in both the horizontal and vertical dimensions. Huya was determined to horizontally overlap with DouYu in the live game streaming, live entertainment, live e-commerce, and short video markets. At the same time, there was a vertical overlap in the upstream online game operation service market, where Tencent – Huya's sole controller and DouYu's co-controller – operates.

In analyzing the competitive effects of the proposed transaction, SAMR focused on the markets where there was horizontal overlap between the two companies, comparing the market share before and after the concentration in three dimensions: turnover, number of active users, and streamer resources. SAMR analyzed the unilateral effect brought by the concentration and found that the entity may raise prices or lower the quality of products after the concentration, harming consumer rights and damaging the rights of practitioners, such as streamers.

²⁸ Anti-Monopoly Bureau of SAMR, "Announcement of the Decision of the State Administration of Market Supervision on the Anti-Monopoly Review on Approval of Illinois Tool's Acquisition of Metis's Equity with Additional Restrictive Conditions," November 18, 2021, https://www.samr.gov.cn/fldj/tzgg/ftjz/202111/t20211118_336984.html.

²⁹ Anti-Monopoly Bureau of SAMR, "Announcement of the State Administration for Market Regulation on the Anti-Monopoly Review Decision on Prohibiting the Merger between HUYA Company and DouYu International Holdings Co., Ltd.," July 10, 2021, https://www.samr.gov.cn/fldj/tzgg/ftjz/202107/t20210708_332421.html.

From the perspective of vertical relationships, SAMR focused on Tencent’s motivation and ability to engage in a two-way vertical foreclosure in the upstream online game operation service market and the downstream live game market. SAMR determined that Tencent had an incentive to use the game copyright licenses it holds in the upstream market to block competitors of Huya and DouYu in the downstream game live streaming market, as well as an incentive to use the controlled live streaming platforms in the downstream market to foreclose Tencent’s competitors upstream. This could form a closed loop in the upstream and downstream markets after concentration to crowd out existing competitors and stifle potential competitors, causing significant competitive harm to the market.³⁰ Thus, SAMR decided to prohibit the merger.

Investigation of Monopoly Agreement Cases

In 2021, SAMR announced the penalty decisions of 15 monopoly agreement cases, including one case handled by SAMR and 14 cases handled by provincial Administrations for Market Regulation. Thirteen of the 15 monopoly agreement cases were horizontal monopolies involving fixed prices, segmented markets, and limited production quantities, while two were vertical monopolies involving resale price maintenance.

In terms of industry distribution, the pharmaceutical and building materials fields were more vigorously enforced, with three and four cases respectively, while the remaining cases were more scattered across industries, including in logistics and transportation, commercial insurance, used cars, driving schools, fire prevention service, passenger boat excursions, and others.³¹

The pharmaceutical industry has always been a key area of anti-monopoly enforcement for SAMR and, in 2021, there were two cases of horizontal monopoly agreements in the API industry and one vertical monopoly agreement.

In April 2021, the Tianjin Administration for Market Regulation (Tianjin AMR) found that three pharmaceutical companies – Tianjin Tianyao Pharmaceutical Co., Ltd., Tianjin Pacific Chemical & Pharmaceutical Co., Ltd., and Shenzhen Fuhaitong Pharmaceutical Co., Ltd. – had repeatedly

³⁰ Anti-Monopoly Bureau of SAMR, “Announcement of the State Administration for Market Regulation on the Anti-Monopoly Review Decision on Prohibiting the Merger between HUYA Company and DouYu International Holdings Co., Ltd.,” July 10, 2021, https://www.samr.gov.cn/fldj/tzgg/ftjz/202107/t20210708_332421.html.

³¹ For details, see the “Public Notice of Administrative Punishment Decisions of Anti-Monopoly Bureau of SAMR”: https://www.samr.gov.cn/fldj/tzgg/xzcf/index_1.html.

reached and implemented monopoly agreements to divide the fluocinolone acetonide sales market and fix and maintain the price of the API. Tianjin AMR ordered the three companies to stop the illegal activities and imposed fines, ranging from 2–4% of their 2019 sales, with the total fines reaching RMB 50.78 million.³²

In June 2021, the Jiangsu Administration for Market Regulation imposed fines on three camphor API enterprises – Wuzhou Huangpu Chemical Pharmaceutical Co., Ltd., Suzhou Youhe Science and Technology Co., Ltd., and Jiangsu Jiafu Pharmaceutical Co., Ltd. – for reaching and implementing horizontal monopoly agreements, dividing the sales market, and jointly increasing prices. Administrative penalty fines for the three companies totaled RMB 16.88 million.³³

On April 15, 2021, SAMR issued a penalty decision in the case of Yangtze River Pharmaceutical Group (YRPG) for reaching a vertical monopoly agreement. This was the first case in the pharmaceutical industry involving resale price maintenance.³⁴

In analyzing the competitive effects of YRPG’s resale price-fixing and restricting practices, SAMR used sales data from Shanghai as a sample and conducted simulations of competitive retail prices for some of YRPG’s drugs in 2018–2019, based on quantitative economic analysis methods. SAMR then compared the simulation results with actual retail prices and hospital purchase prices for the same period. The results of the economic analysis proved that YRPG not only fixed and limited the prices of its drugs in retail channels, such as pharmacies, but also maintained and even raised the benchmark prices in hospital channels through price maintenance in retail channels, excluding and limiting market competition. YRPG was imposed a substantial fine of RMB 764 million, the highest fine ever imposed for a vertical monopoly agreement in China.

SAMR’s use of economic analysis to assess the competitive impact in this case also shows the increasing specialization of anti-monopoly enforcement in China.

³² SAMR, “SAMR Issues the Decision on Administrative Punishment in the Case of Tianjin Tianyao Pharmaceutical Co., Ltd and Other 3 Enterprises Reaching and Implementing Monopoly Agreements,” Jin AMR [2021] No. 1-3, April 30, 2021, https://www.samr.gov.cn/fldj/tzgg/xzcf/202104/t20210430_328493.html.

³³ SAMR, “SAMR Issues the Decision on Administrative Punishment in the Case of Wuzhou Huangpu Chemical Pharmaceutical Co., Ltd And Other Three Enterprises Reaching and Implementing Monopoly Agreements,” SAMR [2021] No. 1-3, July 16, 2021, https://www.samr.gov.cn/fldj/tzgg/xzcf/202107/t20210716_332773.html.

³⁴ SAMR, “SAMR Issues the Decision on Administrative Punishment on Yangtze River Pharmaceutical Group for Implementing Monopoly Agreement,” SAMR [2021] No. 29, April 15, 2021, https://www.samr.gov.cn/xw/zj/202104/t20210415_327851.html.

Investigation of Abuse of Market Dominance Cases

In 2021, China's anti-monopoly enforcement agencies made penalty decisions in 11 cases of abuse of market dominance. Among them, three cases involved selling at unfairly excessive prices, one case involved "refusal to deal," four involved limiting the trade counterparty, and six involved attaching unreasonable trading conditions.

The cases were concentrated in industries including the platform economy, public utilities, and the API sector. Four cases were in the public utility sector (specifically, gas and water supply), three cases were in the API industry, three were in the platform economy area, and one case involved the sale of jet fuel. The percentage of fines imposed for these cases fluctuated between 1% and 6% of each company's sales in 2021.³⁵

In the API sector, China continues to maintain a large enforcement effort and imposes severe penalties for abuse of market dominance. For example, SAMR imposed an administrative penalty of up to RMB 100 million on Simcere in January 2021 for abusing its dominant position in the liquid Batroxobin sales market, refusing to trade without justifiable reasons, excluding and restricting market competition, and harming consumer interests.³⁶

Meanwhile, in the platform economy, the either-or conduct of platform companies has particularly attracted the attention of law enforcement agencies. In 2021, the three cases of abuse of market dominance in the platform economy all involved restricted transactions by platform companies through either-or behavior.

Specifically, SAMR imposed administrative penalties on Alibaba Group and Meitun, while the Shanghai Administration for Market Regulation imposed administrative penalties on Shanghai Sherpa's Trade Development Co., Ltd. for abuse of market dominance. The penalties were RMB 18.228 billion, RMB 3.442 billion, and RMB 1.1686 million, respectively. The RMB 18.228 billion fine imposed on Alibaba Group was the highest amount of administrative penalties imposed by China's law enforcement authorities since the implementation of the Anti-Monopoly Law.³⁷

³⁵ For details, see the Public Notice of Administrative Punishment Decisions of Anti-Monopoly Bureau of SAMR: https://www.samr.gov.cn/fldj/tzgg/xzcf/index_1.html.

³⁶ SAMR, "Administrative Penalty Decision on the Case of Abuse of Market Dominance by Simcere issued by SAMR" SAMR [2021] No. 1, January 29, 2021, https://www.samr.gov.cn/fldj/tzgg/xzcf/202101/t20210129_325644.html.

³⁷ SAMR, "State Administration of Market Regulation Issues Decision on Administrative Penalty and Administrative Guidance for Alibaba Group Holding Limited Monopolistic Conduct in The Online Retail Platform Services Market in China," April 10, 2021,

In assessing the market power of internet platforms, SAMR has taken into full consideration that internet platforms have bilateral or multilateral market characteristics, cross-border competition, network externalities, and dynamic competition. For example, in the administrative penalty decision against Alibaba Group, SAMR took into account Alibaba's layout in the associated market of online retail platforms and considered that its power in logistics, payment, cloud computing, and other areas might have a leveraging effect, further enhancing its market power in the case's relevant commodity market.

At the same time, the enforcement of abusive behavior on internet platforms is gradually using quantitative economic analysis to assess key indicators, such as relevant markets. For example, in the case of Sherpa's, when defining the relevant market, the Shanghai AMR conducted a hypothetical monopolist test based on demand characteristics and fee patterns, and adopted the Critical Loss Analysis method to study market transaction data, such as meal prices and delivery prices. The relevant product market was finally defined as the online catering delivery platform services market with English services.

In the internet economy, the decisions to enforce penalties for either-or conduct will also have a guiding influence on subsequent judicial proceedings. For example, when analyzing whether the subject in question occupies a dominant market position and if the subject's actions constitute abusive behavior, the courts will consider the economic analysis methods and conclusions used in the antitrust administrative penalty cases. Thus, these decisions have important reference significance.

Antitrust-Related Judicial Litigation

Improvement of Relevant Judicial Interpretation

In 2021, the Supreme People's Court issued a number of antitrust-related judicial interpretation documents, including the "People's Court Judicial Protection Plan for Intellectual Property

https://www.samr.gov.cn/fldj/tzgg/xzcf/202104/t20210409_327698.html; SAMR, "State Administration of Market Supervision Issues Decision on Administrative Penalty for Abuse of Dominant Market Position by Shanghai Sherpa's Trade Development Co., LTD," April 12, 2021,

http://www.samr.gov.cn/fldj/tzgg/xzcf/202104/t20210412_327737.html; SAMR, "State Administration of Market Supervision Imposes Administrative Penalty on Meituan for Implementing Either-or Behavior in the Online Food and Beverage Delivery Platform Services Market in China," October 8, 2021,

https://www.samr.gov.cn/xw/zj/202110/t20211008_335364.html.

(2021–2025)” and the “Provisions on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Arising from Monopolistic Acts.”

Issued by the Supreme People’s Court in April 2021, the “People’s Court Judicial Protection Plan for Intellectual Property (2021–2025)” specifies the improvement of anti-monopoly adjudication rules in the field of internet platforms and the proper handling of disputes in the internet field. The plan also proposes to increase the punishment for infringement and precisely apply the punitive compensation system.³⁸

The “Provisions on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Arising from Monopolistic Acts” was issued by the Intellectual Property Court of the Supreme People’s Court in May 2021 to further improve civil anti-monopoly litigation procedures. It states that “the parties may apply to the people’s court to entrust a professional institution or professional to make a market survey on the specialized issues of the case or economic analysis report.... The people’s court may refer to the provisions of the civil procedure law and the relevant judicial interpretation regarding the appraisal conclusion and judge the market survey or economic analysis report stipulated in the preceding clause.” Such language suggests the importance of the application of economic analysis in judicial decisions.³⁹

Summary of Anti-Monopoly Lawsuits

In 2021, the national courts heard about 37 anti-monopoly litigation cases, including 29 civil litigation cases and eight administrative litigation cases. The focus of civil anti-monopoly litigation is mainly on monopoly agreements and abuse of market dominance, while the anti-monopoly administrative litigation is focused on objections to the administrative punishment of horizontal monopoly agreements and the accusation of administrative monopoly.

Reflecting the development of the digital economy and the increasing awareness of intellectual property protection, the main industries involved in anti-monopoly lawsuits include the internet, entertainment, electronic technology, medicine, and automobile industries, with a number of cases found in the internet industry in particular. Additionally, there are an

³⁸ The Supreme People’s Court, “People’s Court Judicial Protection Plan for Intellectual Property (2021–2025),” Fa Fa [2021] No. 14, April 22, 2021, <https://www.court.gov.cn/zixun-xiangqing-297981.html>.

³⁹ The Intellectual Property Court of the Supreme People’s Court, “Provisions on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Arising from Monopolistic Acts,” May 3, 2021, <https://ipc.court.gov.cn/zh-cn/news/view-410.html>.

increasing number of litigation cases that involve both anti-monopoly concerns and other concerns such as data protection, platform governance, and intellectual property.

The 2021 lawsuit between TikTok and Tencent was the first anti-monopoly lawsuit case in the internet sector since the promulgation of the Anti-Monopoly Guidelines for the Platform Economy (Draft for Comments) in 2020. TikTok accused Tencent's WeChat and QQ of restricting its users from sharing videos, and sued Tencent for abuse of market dominance, claiming RMB 90 million. In February 2021, the Beijing Intellectual Property Court formally accepted the case.⁴⁰

Under the advocacy of platform interconnection, the case involves the focal issue of whether blocking internet links constitutes an illegal act, so the final verdict in the case will significantly impact future judicial decisions in related cases.

Another case that has received attention is *eefung v. Weibo*,⁴¹ the first data monopoly case in China. Eefung sued Weibo, arguing that Weibo's refusal to grant data licenses constituted a monopoly, and has requested the Changsha Intermediate People's Court to order Weibo to open up its data and compensate for damages. As the country's first data monopoly case, the outcome will have an important impact on domestic anti-monopoly theory and judicial practice in China.

In the pharmaceutical field, the API monopoly case of *Yangtze River Pharmaceutical Group v. Hefei Industrial Pharmaceutical Institute Co., Ltd.* commenced in May 2021 at the Intellectual Property Court of the Supreme People's Court and is still at trial.⁴² The case's judicial process is of great interest, especially in conjunction with the "Anti-Monopoly Guidelines on the Field of APIs" issued in 2021 and SAMR's administrative penalty decision on the Yangtze River Pharmaceutical Group vertical monopoly agreement.

In December 2021, the abuse of market dominance case of aseptic packaging company *Shandong Xinjufeng Technology Packaging Co., Ltd. v. Tetra Pak*, a leading international aseptic packaging company, was heard in Beijing High Court. The defendant in the case, Tetra Pak, had been imposed an administrative fine of RMB 668 million by the State Administration for

⁴⁰ Guancha, "Beijing Intellectual Property Court Accepts Douyin v. Tencent Monopoly Dispute," February 7, 2021, https://www.guancha.cn/ChanJing/2021_02_07_580689.shtml.

⁴¹ China Law Experts, "Weibo Sued by eefung for Data Monopoly," December 2, 2021, <http://ilawchina.com/html/detail/427.html>.

⁴² For the first instance judgment, please refer to Civil Judgment No. 1271 of Nanjing Intermediate People's Court, Jiangsu Province (2019) Su 01 Min Chu No.1271.

Industry and Commerce in 2016, and its tying, restriction of transactions, and loyalty discounts had been found to constitute an abuse of market dominance by the enforcement authorities. The plaintiff hired an economics expert to issue a professional report on the damages caused by Tetra Pak's infringement in the lawsuit, which is still at trial.⁴³

In addition, some penalized enterprises filed administrative lawsuits in 2021 against the anti-monopoly administrative penalties. Their disputes were mainly focused on the horizontal monopoly agreements, especially the controversies over the law enforcement agencies' determinations on their price-fixing behavior. There were four administrative lawsuits involving the penalty decisions of the law enforcement agencies on horizontal monopolies throughout the year. Among them, two cases were decided in 2021, with the plaintiff losing the case in both instances.

In the case of *Yunlin Building Materials Co., Ltd. v. Chongqing Administration for Market Regulation*,⁴⁴ the Chongqing Higher People's Court ruled that the conduct of the plaintiff, Yunlin Building Materials, amounted to entering into or implementing a monopoly agreement to fix or change the price of goods. The court did not support the plaintiff's claim that Chongqing AMR wrongly penalized Yunlin in terms of the monopoly agreement.

Another administrative lawsuit involved administrative penalties on 19 concrete enterprises imposed by the Guangdong Administration for Market Regulation for reaching and implementing verbal horizontal monopoly agreements. Guangzhou Intellectual Property Court also upheld the defendant's decision to impose a penalty.⁴⁵

Two other relevant cases are in the process of trial. One involves 12 fire prevention inspection companies suing the defendant Hainan Administration for Market Regulation in Hainan Free Trade Port Intellectual Property Court,⁴⁶ and the other is the case of a calcium gluconate API distribution enterprise suing SAMR in Beijing Higher People's Court. The latter is the first administrative litigation case involving the central agency for anti-monopoly enforcement, and it involves a huge administrative fine of RMB 300 million, which SAMR imposed on the

⁴³ BJ News, "Packaging Giant Tetra Pak Sued for Market Monopoly Involving Damages of RMB 100 Million," January 14, 2022, <https://www.chinanews.com.cn/cj/2022/01-14/9652064.shtml>.

⁴⁴ See Chongqing High People's Court (2021) Yu Xing Shen No. 87 Administrative Ruling.

⁴⁵ Intellectual Property Matters, "Guangzhou Intellectual Property Court Handed Down a Number of Administrative Cases Involving Anti-Monopoly," November 29, 2021, <https://new.qq.com/omn/20211129/20211129A0A9VO00.html>.

⁴⁶ IPLEAD, "Hainan Free Trade Port Intellectual Property Court Hears First 12 Cases of Antitrust Administrative Penalties," December 16, 2021, <https://ciipr.njust.edu.cn/5a/23/c11094a285219/page.htm>.

plaintiff.⁴⁷ In addition to questioning the reasonableness of the enforcement agency's determination of the horizontal monopoly agreement, both cases also raised objections to the calculation of the fine, especially the high fine amount in the case of the calcium gluconate API distribution enterprise dispute. SAMR's decision on the plaintiff's illegal income and the amount of the penalty became the focus of controversy.

In the field of standard-essential patents (SEPs), there is a preference for using patent dispute cases to reach negotiation agreements between the giants of the telecom industry. For example, on May 12, 2021, Ericsson announced a global settlement agreement with Samsung, in which the two companies signed a global patent license agreement that includes cellular technologies such as 5G.⁴⁸ Similarly, in August 2021, InterDigital announced that it had reached a settlement with Xiaomi in which the two companies signed a worldwide license agreement for standard-essential patents.⁴⁹ On October 8, 2021, OPPO officially announced a patent cross-licensing agreement and cooperation with Sharp, declaring the settlement of a cellular patent dispute between the two parties that had spanned multiple countries worldwide since 2020.⁵⁰ In addition, the dispute between OPPO and Sharp pushed the Supreme People's Court to clarify China's jurisdiction over SEP global licensing conditions in its August 2021 decision, a milestone for China's active participation in global IP governance rulemaking.⁵¹

Summary

Throughout 2021, the opening year of China's 14th Five-Year Plan, there were comprehensive developments in antitrust work. The establishment of the National Anti-Monopoly Bureau heralded the full-scale elevation of antitrust work to an important level, while the draft amendments to the Anti-Monopoly Law and the promulgation of several antitrust guidelines

⁴⁷ Nanfang Metropolis Daily, "Beijing High Court Hears the Case of Two Calcium Gluconate API Distribution Enterprises against the State Administration of Market Regulation," November 23, 2021, <https://new.qq.com/omn/20211123/20211123A06Z5D00.html>.

⁴⁸ Ericsson, "Ericsson and Samsung Sign Global Patent License Agreement," May 12, 2021, <https://www.ericsson.com/zh-cn/press-releases/2021/5/ericsson-and-samsung-sign-global-patent-license-agreement>.

⁴⁹ Ijwei.com, "Xiaomi and InterDigital End Patent Litigation, Reaching Global Patent License Agreement," August 4, 2021, <https://finance.sina.com.cn/tech/2021-08-04/doc-ikqciyzk9498134.shtml>.

⁵⁰ OPPO, "OPPO and Sharp Sign Patent License Agreement, Ending Global Litigation," October 8, 2021, <https://www.oppo.com/cn/patent/news/press/470/>.

⁵¹ Sina.com, "The Supreme Court's Final Ruling in the OPPO Sharp Case Clarifies That China Has SEP Global Rate Jurisdiction," September 3, 2021, https://k.sina.com.cn/article_7648860463_1c7e8592f00100w5zt.html.

and compliance guidance documents have improved the anti-monopoly legal system and provided a reference for anti-monopoly enforcement and justice in key areas.

Antitrust regulators further strengthened their enforcement efforts in areas such as the internet and API industry, and there has been a higher involvement of economic analysis in enforcement and judicial cases. Quantitative analysis tools were applied to several typical enforcement cases in 2021, while antitrust-related judicial litigation cases increased. An economic-based approach was increasingly applied to analyzing and arguing key issues, providing an important reference for judicial decisions.

Ultimately, antitrust work in China rose to new levels in 2021, and it can be expected that antitrust regulation will continue to be strengthened in the future to protect and promote the development of various industries in a more regulated manner.

Learn More

To follow our WeChat Public Account, please scan the QR code below or enter “Competition Research” in the WeChat official account search box.

