On April 10, 2021, the State Administration for Market Regulation ("SAMR"), the national antitrust enforcement agency of China, released its penalty decision against Alibaba, one of the world’s largest e-commerce companies. SAMR held that Alibaba has abused its dominant position in China’s online retail platform market by a practice called “choose one from two” – punishing merchants who operate online stores both on Alibaba and on its rival platforms or who run promotions at the same time on both platforms. Alibaba was levied a record fine of 18.2 billion CNY (approx. $2.8 billion), which represents 4% of the company’s domestic annual sales. The fine exceeds and almost triples China’s antitrust fine imposed on Qualcomm in 2015, 6.088 billion CNY, the record keeper before Alibaba. It also comes close to the amount of Google’s first antitrust ticket in the European Union for abusing its market dominance of the search engine market in 2017.

Since last year, it becomes evident that Chinese regulators are tightening scrutiny over technology giants. On December 11, 2020, China’s politburo meeting announced that it would strengthen anti-monopoly efforts and prevent “disorderly capital expansion.” On December 14, 2020, SAMR began to rein in major technology companies with a series of gun-jumping fines – for the first time imposing fines in Chinese digital economy under its Anti-Monopoly Law ("AML"), following a decade of what is called a “broad-minded and prudent” regulatory approach. SAMR has also issued the Antitrust Guideline on Platform Economy on February 7, 2021 to explain rules of determining anti-competitive behaviors of Internet platforms.

Alibaba decision is the first one in Chinese digital economy for AML violations that are decided to have harmed competition. Therefore, this decision reveals some important holdings that may affect future antitrust enforcement in this area. In addition, according to SAMR’s announcement, the investigation was formally launched on December 24, 2020 and it took less than four months to conclude the case. The quick turnaround shows the enforcement agency’s resolution. It also indicates that Chinese digital economy will stay under the spotlight of antitrust authorities and even law makers, just as in other jurisdictions. Below is a brief summary of the key holdings and potential implications of the case.

I. Market Definition: Online Retail Platform Market

SAMR held that the relevant market in this case is online retail platform market in China. On the one hand, SAMR differentiated online retail platform from offline retail business from the perspectives of demand substitutability and supply substitutability. Notably, considering a platform’s two-sided nature, demand substitutability is further divided into two viewpoints – merchants and consumers.

On the other hand, SAMR rejected to define narrower relevant markets by differentiating between B2C and C2C, between traditional online retail and emerging online retail modes (e.g., live broadcast, short video, graphic text), or among different retail categories.
II. Finding Dominance of a Platform

Finding dominance in the digital market is always complicated by its features such as network effects, two-sided and even multi-sided nature, users' multi-homing attributes, etc. Article 18 of the AML provides generally applicable factors of determining dominant market position, including market share and other factors. SAMR’s Antitrust Guideline on Platform Economy sets out how each factor will play out in the Internet platform context. Alibaba decision illustrates its application.

SAMR started with Alibaba’s market share. The market share numbers are based on two indicators, i.e. revenue of platform service and gross merchandise volume ("GMV"). SAMR considered its market share from 2015 to 2019 – the duration of the alleged abuse – and the fact that Alibaba holds large market share on a long-term basis has helped prove its dominance. In addition, SAMR also took into account other platform-specific considerations, such as lock-in effect, customer stickiness, customer switching costs, platforms’ ability to collect and process relevant data, etc.

III. “Choose One from Two” as an Abusive Conduct

Although Alibaba’s abusive practice is called “choose one from two” for short, how it is implemented in reality is much more complicated than that. According to the penalty decision, first, Alibaba would rate its merchants based on their brands, sales, and other performance. Then it would prohibit top-rated merchants from running stores on rival platforms, either by written contracts or by oral requests during negotiations. Next, it would also prohibit top-rated merchants from participating in promotion activities of rival platforms during big shopping festivals, e.g., “Double 11”, “618” – similar to Black Friday when online platforms compete most fiercely. At last, Alibaba takes a variety of measures, including rewards and punishments, to ensure its implementation.

It's worth mentioning that SAMR’s Antitrust Guideline on Platform Economy has touched upon the analysis of “choose one from two” and points out that while incentive measures (such as subsidies, discounts, preferential treatments, traffic support) won’t be necessarily anti-competitive, punitive measures for not implementing (such as blocking stores, ranking drop, traffic restrictions, technical block, deducting deposits) are usually presumed to be anti-competitive. Alibaba decision is in line with this provision. It emphasized what Alibaba has done to punish those non-complying merchants, for example, cancelling their promotion displays, expelling them from sales promotions, search ranking drop, or downgrading their ratings.

Alibaba argued that merchants agreed to implement “choose one from two” voluntarily, and they were provided with specific resources as incentives and consideration. However, the arguments were not accepted. Most merchants' testimony showed that they did not want to exclusively run on Alibaba. Moreover, they were not provided with additional funding or traffic resources, and there was no transaction-specific investment that could justify the exclusive requirement.

IV. Is It a Harsh Penalty?

Alibaba was fined 4% of its domestic annual sales in 2019, the year preceding the launch of the investigation. According to the AML, a fine for abuse of dominant position is capped at 10% of a company’s sales in the preceding year. In addition, the AML actually also empowers antitrust enforcement agencies to confiscate illegal gains. But in practice, monetary sanctions often exclude illegal gains – as in this case – usually because its computing is too difficult.
This case is also unique in that the penalty decision is accompanied by an “administrative instruction” – for the first time in China’s antitrust enforcement. The instruction includes SAMR’s guidance as to Alibaba’s competition compliance. It is not only about “choose one from two” practice, but also involves other potentially abusive behaviors, merger filing, supervision of Internet platforms, personal data protection, consumer rights protection, etc. Alibaba is asked to submit compliance reports with SAMR at the end of each year for three years and is encouraged to disclose the same to the public for supervision. Such requirement demonstrates that SAMR is attaching more importance to the role of compliance in antitrust enforcement.

V. Conclusion

As the first penalty against the abuse of market dominance in Chinese digital economy, this case provides very valuable lessons in understanding China’s competition watchdog’s legal standard, for example, as to the finding of dominance in a volatile market, or the anti-competitive effects of “choose one from two” or exclusive dealing. What could be more interesting is how the penalty decision would affect private litigations, for example, the on-going lawsuit brought by JD.com – a major rival platform – against Alibaba also for “choose one from two”, or potential follow-on actions brought by other platforms, merchants or even consumers. It may just be the beginning for Alibaba, or for antitrust enforcement snowball against tech giants in China or abroad.

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