

November 2021



TABLE OF CONTENTS / 本期内容

ANTI-MONOPOLY / 反垄断

China Released New Draft Amendment to *Anti-Monopoly Law* Amid Tech Crack-down / 《反垄断法（修正草案）》公开征求意见 2

DATA SECURITY / 数据安全

CAC Seeks Public Comments on Draft Measures on Security Assessment for Data Exports / 网信办就《数据出境安全评估办法》公开征求意见 3

FOREIGN INVESTMENTS / 外商投资

Beijing Further Relaxed Certain Market Access Restrictions for Foreign Investments in Its Continued Bid to Open up Service Sector / 北京进一步放开部分服务业外资准入限制 4



ANTI-MONOPOLY / 反垄断

China Released New Draft Amendment to Anti-Monopoly Law Amid Tech Crack-down 《反垄断法（修正草案）》公开征求意见

2021年10月23日，经第十三届全国人大常委会第三十一次会议审议，《反垄断法（修正草案）》（“《2021年修正草案》”）向社会公布并公开征求意见。这是自2020年1月国家市场监督管理总局发布《〈反垄断法〉修订草案（公开征求意见稿）》（具体分析请见我所《每月立法动态》2020年2月刊）后，国家第二次就《反垄断法》的修改向社会公开征求意见。《2021年修正草案》的主要修订内容如下：

1. **经营者集中。** (i) 《2021年修正草案》首次在法律层面明确，对未达到申报标准，但有证据证明其具有或可能具有排除、限制竞争效果的经营者集中，执法机构具有主动发起调查的权力。上述主动调查权在《国务院关于经营者集中申报标准的规定》中进行了原则性规定，并在《国务院反垄断委员会关于平台经济领域的反垄断指南》中列举了具体适用情形，即主要适用于参与集中的一方经营者为初创或者新兴企业、参与集中的经营者因采取免费或者低价模式导致营业额较低、相关市场集中度较高、参与竞争者数量较少等类型的经营者集中；(ii) 明确强调应当加强民生、金融、科技、媒体等领域经营者集中的审查。虽然近年来执法机构在实践中重点监管互联网平台等特定行业的并购交易，但在法律层面特别强调对某些行业加强执法的做法并不常见，体现了执法机构对上述重点领域的高度关注，也提醒重点领域的经营者应更加注意并购交易的反垄断风险；(iii) 设置“停钟”制度，规定在经营者未按规定提交信息等情况下可以中止经营者集中审查期限的计算，具体适用规则有待进一步明确，存在个案审查期限因此延长的可能。
2. **垄断协议。** (i) 澄清“纵向垄断协议”的认定标准：针对实践中长期存在的纵向垄断协议是否应以排除、限制竞争的效果为构成要件的争议，《2021年修正草案》明确了无论是横向垄断协议还是纵向垄断协议，均需具有排除、限制竞争的效果，若经营者能够证明固定转售价格和限定最低转售价格的纵向垄断协议不具有排除、限制竞争效果的，不予禁止。但经营者如何举证证明其行为不具有排除、限制竞争效果，有待后续立法进一步细化；(ii) 增设“轴辐协议”的规制条款：“轴辐协议”在现有《反垄断法》下未予规定，但在《国务院反垄断委员会关于平台经济领域的反垄断指南》中被视为与横向垄断协议、纵向垄断协议并列的一种垄断协议类型进行了专门规定，其本质是借助纵向关系而实现的横向共谋行为。《2021年修正草案》通过明确规定组织其他经营者达成垄断协议或者为其他经营者达成垄断协议提供实质性帮助的主体应承担与达成垄断协议相同的法律责任，为规制“轴辐协议”提供了明确的法律依据；以及(iii) 引入“安全港”制度：即达成垄断协议的经营者能够证明其在相

On October 23, 2021, the *Draft Amendment* (the “Amendment”) to the *Anti-Monopoly Law* (the “AML”) was issued for public comments following its review by China’s top legislative authority, the NPC Standing Committee. The initial draft amendment was issued by the *State Administration for Market Regulation* or SAMR for public comments in January 2020 (*please refer to our China Regulatory Updates of February 2020 for details*), which was thereafter further revised and evolved to this more recent draft of Amendment. Highlights of the Amendment include, among others:

1. **Strengthened Merger Control Review.** (i) *Sub-threshold transactions.* The Amendment reiterated, at the level of law, that SAMR (China’s antitrust agency) has the authority to initiate a review even if a business concentration does not meet the relevant filing thresholds yet evidence indicates that it nonetheless has or may have the effect of eliminating or restricting competition. This principle has already appeared in a lower level of legislations of the *Provisions of the State Council on Filing Thresholds for the Concentrations by Business Operators* and has been further elaborated in the *Anti-Monopoly Guidelines for E-Platform Economy* (the “E-Platform Guidelines”), which for example applies to a business operator in an emerging market with the sales amount relatively low due to a free-or-low-price mode so adopted, while the relevant market is highly concentrated with a small number of competitors; (ii) *highlighted sectors.* The Amendment strengthened that SAMR shall emphasize merger review involving such key sectors as livelihoods, finance, technology, media, etc., calling for more attention from businesses in such sectors dealing with M&A transactions; and (iii) “*stop-the-clock mechanism.*” The Amendment added that SAMR may suspend the review period under such circumstances as the parties’ failure to submit proper documents, occurrence of unexpected new circumstances requiring additional examination, and the proposed restrictive conditions require further evaluation with the consent of the parties involved, the application of which in practice remains to be further clarified and may lead to more uncertainty to M&A transaction timetables.
2. **Streamlined Monopoly Agreements.** (i) *Clarified no per se treatment of resale price maintenance or RPM.* In the AML practice in China, SAMR (and its administrative predecessor) tends to hold a stricter *per se* treatment where RPM is usually established notwithstanding an effect of eliminating or restricting competition, while the judicial authorities generally would evaluate the anticompetitive effects before establishment of an RPM. The Amendment has abandoned the *per se* approach and clarified that if business operators can prove absence of the anticompetitive effects, the RPM shall not be prohibited; (ii) *facilitators with monopoly agreements.* The Amendment added a new provision that a business operator who organizes or provides material assistance to other business operators in conclusion of the monopoly agreements would be subject to the same penalties as the parties entering into monopoly agreements, filling the legislative gap of cartel facilitating arrangements such as the so-called *hub-and-spoke agreements*; and (iii) *safe harbor for monopoly agreements.* The Amendment introduced a safe harbor, which provides that if a business operator can prove that its market share in the relevant market is lower than the threshold set by SAMR, such agreements would generally not be deemed as unlawful unless they have anticompetitive effects. Similar rules were seen in previous

关市场的市场份额低于国务院反垄断执法机构规定的标准的，原则上不予禁止。目前在知识产权、汽车行业等领域的反垄断指南中已存在类似规定，但《反垄断法》层面的“安全港”市场份额认定标准等落地细则有待进一步澄清。

3. **法律责任。**与现行《反垄断法》相比，《2021年修正草案》大幅提高了违法行为的处罚标准，并细化了适用情形：**(i)** 对于违法实施的经营者集中，现行《反垄断法》规定的罚款上限是50万元，而《2021年修正草案》将根据集中行为的危害后果适用不同的罚则：对于具有或可能具有排除、限制竞争效果的集中，可处上一年度销售额10%以下的罚款，对于不具有排除、限制竞争效果的集中，罚款上限则为500万元；**(ii)** 对于垄断协议，现行《反垄断法》规定了对已经达成并实施协议的罚款上限为上一年度销售额的百分之十（未明确没有上一年度销售额的罚款机制），尚未实施协议的罚款上限则为50万元。《2021年修正草案》则明确了已实施垄断协议但没有上一年度销售额的罚款上限为500万元，并将尚未实施垄断协议的罚款上限提高至300万元，此外还增加了对于达成垄断协议负有个人责任的相关人员的法律责任；**(iii)** 尤其引发市场关注的是，《2021年修正草案》新增对于情节特别严重、影响特别恶劣、造成特别严重后果的反垄断违法行为，可以在上述已大幅提高的罚款数额基础上，处2-5倍的罚款（即最高可能达到上一年度销售额的50%）。值得注意的是，鉴于目前执法机构对于未依法申报的经营者集中案例通常认定为处于持续的违法状态，因此不排除该等情形在新法生效后适用新法的罚则的可能。

整体而言，《2021年修正草案》体现了我国加强与优化反垄断审查及监管的整体趋势，投资人与企业在并购及经营活动应注意提高反垄断风险意识。我们将对《反垄断法》的后续修订以及实践中的落地情况保持持续关注。

DATA SECURITY / 数据安全

CAC Seeks Public Comments on Draft Measures on Security Assessment for Data Exports 网信办就《数据出境安全评估办法》公开征求意见

2021年10月29日，国家互联网信息办公室（“网信办”）发布《数据出境安全评估办法（征求意见稿）》（“《征求意见稿》”），向社会公开征求意见。作为《网络安全法》、《数据安全法》和《个人信息保护法》的重要配套规定，《征求意见稿》旨在细化和落实上述法律中关于数据出境的相关规定，为数据出境安全评估工作提供指引。

《征求意见稿》主要重申、明确并整合了《网络安全法》、《数据安全法》和《个人信息保护法》规定的触发网信办数据出境安全评估的五种情形：**(i)** 关键信息基础设施的运营者收集和产生的个人信息和重要数据；**(ii)** 出境数据中包含重要数据；**(iii)** 处理个人信息达到一百万人的个人信息处理者向境外提供个人信息；**(iv)** 累计向境外提供超过十万人以上个人信息或者一万

lower-level legislative guidelines in the intellectual property and automobile sectors, yet relevant practical details including specific market share standards remain to be determined.

3. **Significantly Increased Penalties.** **(i)** For merger control cases, the maximum fine was proposed to be raised from just RMB500,000 under the current AML, to 10% sales in the preceding year (or RMB5 million if a concentration does not have an anticompetitive effect), a significant raise targeting at gun-jumping activities; **(ii)** for monopoly agreements, the maximum fine for implemented agreements remained to be 10% of the sales in the preceding year (or RMB5 million if there is no sales as clarified by the Amendment), but for unimplemented monopoly agreements, the maximum penalty is proposed to be increased from RMB500,000 to RMB3 million under the Amendment, and the Amendment also added personal liabilities of up to RMB1 million for individuals responsible for the conclusion of monopoly agreements; and **(iii)** upon the occurrence of particularly severe circumstances, impacts, and consequences of an AML violation, the fine could be increased by two-to-five times, which may bring the highest fine to 50% of sales in the preceding year.

Overall, the Amendment has reflected a general legislative trend to enhance and improve China's antitrust enforcement, and calls for more caution and attention from investors and business operators in dealing with AML compliance issues.

On October 29, 2021, the Cyberspace Administration of China (the “CAC”) released for public comments the draft *Measures on Security Assessment for Data Exports (Draft for Comments)* (the “Draft Measures”), setting forth more implementation guidance rules with respect to the cross-border data transfer as outlined in the *Cybersecurity Law*, the *Data Security Law* and the *Personal Information Protection Law*.

Most notably, the Draft Measures reiterated, clarified and consolidated circumstances where the outbound data transfer security assessment by CAC would be triggered under the *Cybersecurity Law*, the *Data Security Law* and the *Personal Information Protection Law*, which include **(i)** export of personal information and critical data collected or generated by the *Critical Information Infrastructure Operators* or CIIO; **(ii)** export of any other critical data; **(iii)** export of personal information by a personal information processor who handles personal information of over 1,000,000 individuals; **(iv)** export of personal information

人以上敏感个人信息；以及(y)国家网信部门规定的其他需要申报数据出境安全评估的情形。值得注意的是，“重要数据”在目前法律法规中缺乏统一清晰的定义，有待进一步明确；并且，面向C端用户的互联网企业等个人信息处理者在实践中较容易触发上述“百万”“十万”等个人信息数量标准，建议相关公司提前考虑数据本地化等应对方案。

此外，《征求意见稿》也规定了网信办对于数据出境安全评估的审查要点、审查期限，以及数据处理者在数据出境前的自评义务、与境外接收方订立合同的要求等，相关企业可根据《征求意见稿》提前开展自查工作。

FOREIGN INVESTMENTS / 外商投资

Beijing Further Relaxed Certain Market Access Restrictions for Foreign Investments in Its Continued Bid to Open up Service Sector 北京进一步放开部分服务业外资准入限制

2021年10月18日，国务院发布了《国务院关于同意在北京市暂时调整实施有关行政法规和经国务院批准的部门规章规定的批复》（“2021版《批复》”），同意自2021版《批复》发布之日起在北京市暂时调整《外商投资电信企业管理规定》、《中华人民共和国中外合作办学条例》、《营业性演出管理条例》、《外商投资准入特别管理措施（负面清单）（2020年版）》等规定的实施，并自即日起停止执行2019版《批复》。

在2019版《批复》的基础上，2021版《批复》将进一步扩大北京地区在电信、文娱、教育等领域的外资开放程度。例如，在备受市场关注的增值电信业务领域，除了承继2019版《批复》关于在北京市服务业扩大开放综合试点示范区和示范园区内取消互联网接入服务业务（仅限为用户提供互联网接入服务）等增值电信业务外资股比限制的开放措施，2021版《批复》还新增了以下开放措施：(i)在北京全市范围内，向外资开放国内互联网虚拟专用网业务（外资股比不超过50%）；以及(ii)在中关村国家自主创新示范区海淀园，取消信息服务业务（仅限应用商店）外资股比限制。

继《批复》发布后，商务部也于2021年10月22日印发了《“十四五”利用外资发展规划》，提出将持续推进我国在电信、互联网、教育、文化、医疗等领域的外商投资准入限制。我们期待相关立法层面的进一步落

involving over 100,000 individuals or of sensitive personal information involving over 10,000 individuals; and (y) other situations as determined by the CAC. It remains unclear as to some important concepts such as “critical data” in the Draft Measures. Also, internet companies processing personal information serving individual consumers may easily meet the aforementioned thresholds in practice and would need to be more prepared in advance and consider alternative plans such as data localization if needed.

In addition, the Draft Measures also elaborated key considerations by CAC in its data export review, the review period, data processor’s obligations to conduct risk-assessment by itself before cross-border data transmission and the relevant requirements for contracts between the onshore data processor and a foreign receiving party, among others.

On October 18, 2021, the State Council released the *Approval on the Interim Adjustment of Relevant Administrative Regulations and Certain Departmental Rules Approved by the State Council in Beijing (edition 2021)* (the “Approval”), approving temporary adjustments, with immediate effect, to certain provisions of the *Provisions on the Administration of Foreign-Funded Telecommunications Enterprises*, the *Regulations on Chinese-Foreign Cooperative Education*, the *Regulation on the Administration of Commercial Performances*, the *Special Administrative Measures on Access of Foreign Investments (the Negative List – 2020 Edition)*, etc. Its previous edition issued in 2019 was terminated at the same time.

Compared to the 2019 edition, the Approval further expanded openness of foreign investments in telecommunications, entertainment, education and other fields in Beijing. For example, in the more concerned value-added telecoms sector, in addition to the removal of restrictions on foreign investment in internet access services (limited to internet access services provided for users) in the relevant pilot zones and parks in Beijing as provided in the 2019 edition, the Approval further (i) allowed foreign companies to invest in virtual private networks with ownership capped at 50%; and (ii) canceled the shareholding limit on information services (limited to app stores only) for foreign invested companies in the Haidian Park of Zhongguancun National Demonstration Pilot Zone for Independent Innovation.

On October 22, 2021, the Ministry of Commerce also released the *Plan for Development by Utilizing Foreign Investment during the 14th Five-Year Period*, signaling China is still pushing toward further opening-up of such business sectors as telecoms, internet, education, culture and medical services, though the implementation rules are yet to be specified.

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