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ANTI-TRUST / 反垄断

China Cracks Down on Monopoly in Internet Sector 互联网行业迎来反垄断强监管时代

2021年3月至4月期间，国家市场监督管理总局高频率发布了一系列涉及互联网行业反垄断执法的典型案列，主要为：

1. 违法实施经营者集中的案列

2021年3月12日及4月30日，国家市场监督管理总局集中发布了十几起大型互联网企业（包括但不限于腾讯、滴滴、百度等互联网巨头）违法实施的经营者集中案列。经评估，相关案列均不具有排除、限制竞争的效果，国家市场监督管理总局就该等互联网公司在实施相关股权收购或股权投资前，未按规定进行经营者集中申报的行为分别处以人民币50万元的罚款。

2. 强迫商家“二选一”的案列

(a) 2021年4月10日，就阿里巴巴滥用市场支配地位，强迫平台内商家“二选一”的行为，国家市场监督管理总局处以其2019年中国境内销售额人民币4%的罚款，共计人民币182.28亿元，创下了国内反垄断罚款的最高纪录；

(b) 2021年4月13日，国家市场监督管理总局会同中央网信办、国家税务总局召开互联网平台企业行政指导会，针对互联网平台企业强迫实施“二选一”以及其他涉嫌垄断的典型操作，要求参加会议的34家互联网平台企业代表（包括但不限于阿里巴巴、腾讯、京东、拼多多、美团等）在一个月内全面自检自查，逐项彻底整改，并向社会公开《依法合规经营承诺》，接受社会监督。整改期后再发现有平台企业强迫实施“二选一”等违法行为，一律依法从重从严处罚；以及

(c) 2021年4月26日，国家市场监督管理总局根据相关举报，对美团实施“二选一”等涉嫌垄断行为进行立案调查。目前，调查结果尚未公布。

从《关于平台经济领域的反垄断指南》的落地（相关内容请参见本所《每月立法动态》2021年3月刊），到前述大规模的、涉及众多互联网巨头的反垄断执法案列不断释出，以及反垄断执法机关近期在相关工作会议上多次释放加强反垄断监管执法的信号，均预示着互联网行业迎来反垄断强监管时代，网络平台经营者需要更加注意反垄断合规风险。值得注意的是，在公布的违法实施经营者集中的案列中，国家市场监督管理总局并未充分披露相关反垄断违法案列的细节（例如对于未取得被收购企业控股权的经营者，其被认定为取得控制权的具体事实依据未被披露），违法行为的认定、罚款金额的确定等相关执法标准仍有待进一步观察。我们对此将保持持续关注。

During March and April of 2021, the State Administration for Market Regulation (the “SAMR”) has publicized several typical cases in connection with violation of anti-trust laws by internet giants and strengthened the administration and supervision of anti-trust violation practices in the internet sector. Here is a brief summary of the highlights of these cases:

1. Unlawful concentration of business operators

SAMR announced penalties on a number of Chinese internet giants (such as Tencent, Didi Chuxing, and Baidu, among others) for their failure to make filings with SAMR before undertaking certain acquisition or equity investment deals. After due investigation, SAMR determined that all such deals will not lead to exclusivity of and restriction on market competition and companies involved are penalized with a fine of RMB500,000 for each case.

2. Forced choice of “one (platform) out of two”

(a) On April 10, 2021, SAMR imposed on Alibaba Group a record-breaking fine of RMB18.228 billion, representing four percent of Alibaba Group’s full-year earnings in China in 2019, for abusing its dominant market position to impose “choose one (platform) out of two” requirements on vendors on its platform.

(b) On April 13, 2021, SAMR, with the Cyberspace Administration of China and the State Administration of Taxation, held an internet platforms administrative guidance meeting. During the meeting, 34 internet giants (including among others, Alibaba Group, Tencent, JD.com, Pinduoduo and Meituan) were ordered to conduct self-check and rectifications with respect to their anti-competitive practices such as forcing vendors to “choose one out of two” within one month, publicize their compliance undertakings and accept public supervision. Stricter and severer administrative penalties will be applied if any anti-competitive practice continue to be discovered after the required rectification period.

(c) On April 26, 2021, SAMR announced an anti-trust investigation into the food-delivery platform Meituan based on accusation by third parties of conducting market monopolistic practice including directing vendors on its platform to “choose one (platform) out of two”. The investigation is in process with the result to be expected sometime in May 2021.

The launch of the *Anti-Trust Guidelines for E-Platform Economy* (please refer to our March 2021 issue of *China Regulatory Updates* for more details), the spring up of the large-scale antitrust enforcement against internet giants and the signals released by regulatory authorities at relevant work conferences to strengthen antitrust supervision and enforcement, collectively represent that the internet sector will face intensified antitrust scrutiny and online platform operators need to pay more attention to compliance risks in this connection. It is also worth noting that SAMR did not fully disclose the details of the aforementioned concentration of business operators cases, thus the enforcement standards of identifying illegal acts (such as how to determine whether an internet giant has obtained control of the invested target where it only pursues a minority shareholding) and determination of the amount of fines remain to be further clarified. We will continue to monitor the regulatory and practice developments in this connection.

FOREIGN INVESTMENT / 外商投资

CBIRC Revises Implementation Rules for Regulations on Foreign Insurance Companies 银保监会修订外资保险企业管理细则

2021年3月10日，中国银行保险监督管理委员会（“银保监会”）发布了新修订的《外资保险企业管理条例实施细则》（“《实施细则》”），自公布之日起施行。《实施细则》作为2019年修订的《外资保险企业管理条例》的配套制度，具体落实了2019年以来发布的保险业对外开放政策，主要亮点如下：

1. **明确外资股东的准入条件：**《实施细则》落实了2019年修订的《外资保险企业管理条例》的相关规定，将外资保险公司的外方股东增加为三类，即外国保险公司、外国保险集团公司以及其他境外金融机构，同时明确外资保险公司的外方唯一或者外方主要股东应当为外国保险公司或者外国保险集团公司。此外，《实施细则》与银保监会此前的发文保持制度一致性，删除了有关外资股比的限制性规定。鉴于现行有效的《保险公司股权管理办法》规定了“单一股东持股比例不得超过保险公司注册资本三分之一”，银保监会进一步明确该规定与《实施细则》删除外资股比限制的适用标准，即：外国保险公司或者外国保险集团公司作为外资保险公司股东，其持股比例不受限制；保险公司和保险集团公司以外的境外金融机构作为股东，以及外资保险公司的中方股东，将适用《保险公司股权管理办法》的相关限制性规定。
2. **衔接外商投资安全审查制度：**2021年1月18日起施行的《外商投资安全审查办法》（详情请参见本所《每月立法动态》2021年1月刊）将投资“重要金融服务”领域并取得被投资企业实际控制权的外商投资纳入安全审查范围，但并未明确保险业是否属于“重要金融服务”领域。新修订的《实施细则》与《外商投资安全审查办法》进行了制度衔接，明确要求投资外资保险公司、影响或可能影响国家安全的，应当依法进行外商投资安全审查。

The China Banking and Insurance Regulatory Commission (the “CBIRC”) unveiled the newly revised *Implementation Rules for Regulations on Foreign Insurance Companies* (the “New Implementation Rules”) on March 10, 2021 with immediate effect. As a supporting document for the *Regulations on Foreign-Invested Insurance Companies* (the “Regulation”) amended in 2019, the New Implementation Rules has elaborated certain opening-up policies for foreign investments introduced into the insurance industry since 2019. Highlights of the New Implementation Rules include, among others:

1. **Clarifying entry requirements for foreign investors.** To be consistent with the Regulation, the New Implementation Rules has made it clear that three types of foreign investors (namely, foreign insurance companies, foreign insurance group companies and other types of foreign financial institutions) are permitted to invest in PRC insurance business, while only foreign insurance companies and foreign insurance group companies can be the sole or major foreign shareholder of a foreign-invested insurance company. In addition, the New Implementation Rules has removed the foreign shareholding cap restriction in insurance companies pursuant to CBIRC’s previous policies. Given that there is still a shareholding restriction on insurance companies under the currently effective *Measures for the Administration of Shareholding in Insurance Companies* that one single shareholder shall not hold more than one-third of the equity interest in an insurance company, CBIRC has clarified that such shareholding restriction will not apply to shareholders of foreign invested insurance companies if such shareholders are foreign insurance companies and foreign insurance group companies.
2. **Introducing the security review system.** The *Measures for the Security Review of Foreign Investments* effective on January 18, 2021 (please refer to the January 2021 issue of our *China Regulatory Updates* for details) has provided that foreign investments in important financial services sector with an actual control over the investee by foreign investors shall be subject to national security review, while it was unclear whether the insurance industry falls into the scope of important financial services. In this regard, the New Implementation Rules clarified that foreign investments in insurance companies which affect or may affect national security should be subject to foreign investment national security review.

E-COMMERCE / 电子商务

China Strengthens Supervision of Online Transactions 国家强化网络交易监管

国家市场监督管理总局于2021年3月15日出台了《网络交易监督管理办法》（“《办法》”），自2021年5月1日起施行，2014年1月颁布的《网络交易管理办法》则同时废止。作为贯彻落实2019年1月起施行的《电子商务法》的重要部门规章，《办法》在禁止不正当竞争、消费者权益与个人信息保护等方面细化了对平台经营者、平台内经营者等网络交易经营者的要求，其中值得注意的主要是：

On March 15, 2021, SAMR issued the *Measures for the Supervision and Administration of Online Transactions* (the “Measures”), which has taken effect since May 1, 2021 and simultaneously replaced the *Administrative Measures for Online Transactions* issued in January 2014. As a detailed rule to further implement the *E-commerce Law* effective in January 2019, the Measures has specified the requirements for online platform operators, in-platform operators and other online transaction operators in terms of prohibiting unfair competition, protection of consumer rights and personal information, among

1. **规制平台强迫“二选一”**：《办法》重申了《电子商务法》对网络平台“二选一”等不正当竞争行为的规制，即网络交易平台经营者不得对平台内经营者与其他经营者的交易等进行不合理限制或者附加不合理条件，干涉平台内经营者的自主经营；并且明确列举了实施“二选一”的具体手段，例如搜索降权、提高服务收费、限制经营者自主选择快递物流等交易辅助服务提供者。对于平台经营者违反上述规定的行为，《办法》明确了应当依照《电子商务法》的相关规定进行处罚，最高可处以二百万元以下的罚款。值得注意的是，目前“二选一”行为在《网络交易监督管理办法》《反不正当竞争法》《关于平台经济领域的反垄断指南》等法律法规中均有明确规制，且法律后果不尽相同，相关规定如何衔接适用有待通过执法实践进一步观察。
2. **加强个人信息保护**：《办法》重申了《网络交易管理办法》关于收集、使用个人信息应当遵循的合法、正当、必要、知情同意等原则。此外，针对实践中部分网络交易经营者过度收集使用、与关联方共享个人信息等行为，《办法》新增了经营者在收集、使用敏感个人信息时，应当逐项取得消费者同意的要求，并明确规定经营者未经被收集者授权同意，不得向包括关联方在内的任何第三方提供其收集的个人信息。《办法》中有关个人信息保护的上述规定与全国人大常委会于2021年4月30日公布的《个人信息保护法(草案二次审议稿)》中的相关规定大体一致。

which the highlights are:

1. **Prohibition on forced choice of “one (platform) out of two”**. The Measures has reiterated the principle under the *E-commerce Law* that platform operators shall not prohibit or restrict vendors from carrying out business on multiple platforms by imposing unreasonable restrictions on or interfering with their independent business operation. Under the Measures, measures taken by platform operators to enforce the forced choice of “one (platform) out of two” requirement imposed on relevant vendors include decreasing vendors’ exposure in search results, increasing service charges to vendors and obstructing their discretion in selecting supporting service providers; and the platform operators engaging in such behavior may be subject to a fine up to RMB2 million in accordance with the *E-commerce Law*. It is noteworthy that the forced choice of “one (platform) out of two” practice is also prohibited under other regulations such as the *Anti-Unfair Competition Law* and the *Anti-Trust Guidelines for E-Platform Economy* and the punishments on violations under such regulations are not completely the same. How the administrative punishments or penalties provided under different regulations will apply against one internet platform with respect to its forced choice of “one (platform) out of two” practice remains to be further clarified.
2. **Protection of personal information**. The Measures has ordered platform operators who process consumers’ personal information to follow the general principles of legality, legitimacy, necessity and informed consent under the *Administrative Measures for Online Transactions*. In addition, the Measures has specified that the collection and use of sensitive personal information shall be subject to consumers’ consent on an item-by-item basis and prohibited the disclosure of consumers’ personal information to any third party (including related parties) without the consumers’ consent, with the purpose of restricting the excessive collection and use of consumers’ personal information in practice. The above-mentioned requirements on personal information protection are generally in line with the principles set out in the *Personal Information Protection Law (Second Draft)* released by the Standing Committee of the National People’s Congress on April 30, 2021.

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For further information, please write us at inquiry@hanyilaw.com.

CONTACT US

上海市中山西路2020号
华宜大厦1座1801室
邮编：200235
电话：(86-21) 6083-9800



Suite 1801, Tower I, Huayi Plaza
2020 West Zhongshan Road
Shanghai 200235, China
Tel: (86-21) 6083-9800