The case against Alibaba in China: merits and wider policy repercussions

Sandra Marco Colino*

[forthcoming in *Journal of Antitrust Enforcement*, Vol 10 (2022)]

I. INTRODUCTION: THE *ALIBABA* DECISION IN CONTEXT

On 10 April 2021, following a lightning speed investigation, China's State Administration for Market Regulation (SAMR) announced a decision levying a fine of RMB 18.228 billion (nearly EUR 2.4 billion) on Chinese tech giant Alibaba.[1] The inquiry had started in December 2020, when the SAMR seized information about the company's conduct by *inter alia* conducting dawn raids in its premises. Based on the evidence gathered, the SAMR concluded that Alibaba implemented a scheme coercing traders to sell exclusively on its platform, to the detriment of actual and potential competitors, sellers, consumers, and the economy as a whole. The penalty imposed, equivalent to 4% of the company's 2019 turnover in China, is the heftiest ever for a contravention of the Anti-Monopoly Law (AML).[2] To put it in perspective, in absolute terms it is three times higher than the next biggest fine, slapped on US multinational Qualcomm in 2015.[3]

The decision constitutes the most powerful punch to date in China's 'sweeping tech crackdown',[4] or the front opened in 2020 against BATX (Baidu, Alibaba, Tencent, and Xiaomi)—the country's very own big tech ecosystem. In the months prior to the imposition of the record-breaking fine, the SAMR had sanctioned e-commerce sites Vipshop, JD.com and

* Associate Professor, Faculty of Law, Chinese University of Hong Kong. Course Director, College of Europe, Bruges. Academic Board Member, Dictum Law Firm. PhD, European University Institute, Florence. The work described in this paper was substantially supported by a grant from the General Research Fund of the Research Grants Council of the Hong Kong Special Administrative Region (SAR), China (Project No CUHK 14600718). I wish to thank Ms. Emanuela Lecchi for her input during the early drafting process of the article. All errors are mine. I have no conflicts of interest to declare.

[1] SAMR Administrative Penalty Decision (2021) No 28 (国家市场监督管理总局 行政处罚决定书 国市监处〔2021〕28号) (*Alibaba* decision) <http://www.samr.gov.cn/fldj/tzgg/xzcf/202104/t20210409_327698.html> accessed 12 September 2021. The decision had been communicated to Alibaba on 6 April 2021, but was not made public until 10 April 2021.

[2] Anti-Monopoly Law of the People's Republic of China (中國人民共和國反壟斷法) adopted 30 August 2007, effective 1 August 2008 (AML) <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml> accessed 12 September 2021.

[3] NDRC Administrative Penalty Decision (2015) No 1 (中华人民共和国国家发展和改革委员会行政处罚决定书 (发改办价监处罚[2015] 1号) (9 February 2015) (*Qualcomm* decision) <http://www.samr.gov.cn/fldj/tzgg/xzcf/202101/t20210126_325535.html> accessed 12 September 2021.

[4] Expression borrowed from Billy Perrigo, 'Here's What to Know about China's Sweeping Tech Crackdown—and Why It Could Make U.S. Big Tech Regulation More Likely', *Time* (1 September 2021) <https://time.com/6094156/china-big-tech-regulation-us/> accessed 12 September 2021.

Alibaba's Tmall under the country's Price Law[5] for implementing misleading pricing strategies.[6] It imposed an additional penalty on Vipshop for breaching the Anti-Unfair Competition Law[7] by misusing its users' data to block sales of certain brands and influence their choices.[8] It published new guidelines for the platform economy, targeting strategies such as predatory pricing, exclusivity requirements, price fixing and algorithmic collusion,[9] as well as draft guidelines classifying platforms and laying down special responsibilities for 'super-platforms'.[10] It enacted the Supervision and Management Measures for Online Transactions,[11] with rules relating to consumer and data protection in online interactions. It further stepped up its merger scrutiny, fining Alibaba-, Tencent- and Baidu-associated companies for failing to report operations that exceeded the AML's notification thresholds.[12]

China's developments come at a time when big tech companies are facing intense legal scrutiny around the world.[13] Despite being somewhat late to the party, the SAMR is fast catching up with other enforcement agencies. But the crackdown is not just about joining the global movement to control the risks associated with the power of tech giants. It also fits into the Chinese government's broader plan to prevent 'the disorderly expansion of capital'.[14] In

[5] Price Law of the People's Republic of China (中华人民共和国价格法) effective 1 May 1998 (Price Law) <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300046121.shtml> accessed 12 September 2021.

[6] SAMR Administrative Penalty Decision (2020) Nos 29, 30 and 31 <http://www.samr.gov.cn/xw/zj/202012/t20201230_324826.html> accessed 12 September 2021. The companies would raise their prices before the sales period to subsequently pretend to be offering discounts. This was considered to be contrary to art 14(4) of the Price Law (n 5).

[7] Anti-Unfair Competition Law of the People's Republic of China (中华人民共和国反不正当竞争法) adopted 2 September 1993, last amended 23 April 2019 (Anti-Unfair Competition Law) <http://gkml.samr.gov.cn/nsjg/fgs/201906/t20190625_302771.html> accessed 12 September 2021. VipShop's behaviour was found to be in breach of Article 12.

[8] SAMR Press Release, 8 February 2021 <http://www.samr.gov.cn/xw/zj/202102/t20210208_325978.html> accessed 12 September 2021.

[9] Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on the Platform Economy (国务院反垄断委员会关于平台经济领域的反垄断指南) adopted 7 February 2021 (Platform Economy Guidelines) <http://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207_325967.html> accessed 12 September 2021.

[10] Guidelines for the Classification of Internet Platforms (Draft for Comments) (互联网平台分类分级指南 (征求意见稿), and Guidelines on the Responsibilities of Internet Platforms (Draft for Comments) (互联网平台落实主体责任指南(征求意见稿) published 29 October 2021 <http://www.samr.gov.cn/hd/zjdc/202110/t20211027_336137.html> accessed 1 November 2021.

[11] SAMR, Supervision and Management Measures for Online Transactions (网络交易监督管理办法) Order No 37 adopted 15 March 2021 <http://gkml.samr.gov.cn/nsjg/fgs/202103/t20210315_326936.html> accessed 12 September 2021.

[12] Jet Zhisong Deng and Adrian Emch, 'Failure to Report Reportable Mergers: An Update from China' *Competition Policy International* (17 August 2021) <https://www.competitionpolicyinternational.com/failure-to-file-reportable-mergers-update-from-china/#_edn2> accessed 12 September 2021.

[13] See eg Samuel Stolton, 'Europe Struggles with Tech Crackdown Dilemma: How Much to Rein In European Compenies?' Politico (22 November 2021) <https://www.politico.eu/article/eu-dma-zalando-silicon-valley-european-tech-vestager/> accessed 22 November 2021; Zachary Karabell, 'China's Didi Crackdown Isn't All That Different From U.S. Moves Against Big Tech' *Time* (9 July 2021) <https://time.com/6079121/chinas-didi-crackdown-big-tech/> accessed 12 September 2021; Sandra Marco Colino, 'Towards a Global Big Tech Clampdown?' *Agenda Pública* (19 January 2021) <https://agendapublica.es/towards-a-global-big-tech-clampdown/> accessed 12 September 2021.

[14] See inter alia 'China to Keep Economic Operations "Within Reasonable Range" in 2020 – Politburo' *Reuters* (11 December 2020) <https://www.reuters.com/article/china-economy-politburo-idINKBN28L1H0> accessed 12 September 2021; 'Giants Tencent, Bytedance among the Companies Reined in by China' *BBC News* (30 April 2021) <https://www.bbc.com/news/business-56938864> accessed 12 September 2021; Lingling Wei, 'Jack Ma Makes Ant Offer to Placate Chinese Regulators' *Wall Street Journal* (20 December 2020) <https://www.wsj.com/articles/jack-ma-makes-ant-offer-to-placate-chinese-regulators-11608479629> accessed 12 December 2021.

December 2020 the Chinese Communist Party (CCP) had announced that, in the context of pursuing this objective, antitrust enforcement would be invigorated.[15] The repercussions of this statement have been felt well beyond the tech sector.[16] In fact, in October 2021 draft amendments to the AML were published, with far-reaching changes affecting mainly cartels, resale price maintenance, mergers, and penalties. [17] The digital economy is also present in the reform, as the law will now specifically refer to abuses of dominance using inter alia data and algorithms.

Importantly, the change of tactic vis-à-vis big tech lives up to the 'observe-then-act' approach often practiced by Chinese regulators.[18] After a prolonged phase of virtually unrestricted growth, the industry is now being carefully reined in. Yet the timing of the sudden turn of events, almost immediately after Alibaba's founder Jack Ma referred to Chinese banks' 'pawnshop mentality' in a speech during the 2020 Bund Summit in Shanghai,[19] has inevitably prompted speculation that the recent developments are in fact retaliatory action.[20] In this context, BATX's troubles have been portrayed as a power struggle between the government and the tech tycoons 'who were getting too powerful and perhaps too popular.'[21] The international press insists of focusing on potential ulterior motives, and the merits of the case from a competition law perspective often go by the wayside—perhaps understandably so, since the technicalities of market definition or theories of harm do not make great headlines.

This article looks (mostly) beyond the why,[22] and focuses on how the *Alibaba* case has been resolved and the impact of the decision on competition policy development in China. Certain aspects stick out when reading the decision. First, from a substantive perspective, the investigation may seem like an open-and-shut case to the international observer. Nonetheless, in 2014 the judgment of the Supreme People's Court in *Qihoo 360 v Tencent* pointed to a lax approach towards exclusive dealing practices and market dominance.[23] Seen in this light, the

---

[15] See 'China to Keep Economic Operations "Within Reasonable Range" in 2020'(n 14).

[16] For instance, in the pharmaceutical industry, on 9 April 2020 the SAMR imposed fines totalling RMB 325.5 million on a group of companies for excessive pricing and unfair trading conditions in the market for injectable calcium gluconate. SAMR, Administrative Penalty Decision (2020) No 8 <http://gkml.samr.gov.cn/nsjg/fldj/202004/t20200414_314248.html> accessed 12 September 2021. Other sectors with invigorated enforcement include finance, property or entertainment. See 'HKU Chinese Law Professor Angela Zhang on China's Tech Crackdown' *Bloomberg* (26 October 2021) <https://www.bloomberg.com/news/videos/2021-10-26/09-30-hkt-university-of-hong-kong-director-of-the-center-for-chinese-law-angela-zhang> accessed 1 November 2021.

[17] National People's Congress of the People's Republic of China, Draft Amendment to the Anti-Monopoly Law (中华人民共和国反垄断法(修正草案)) published 25 October 2021 <http://www.npc.gov.cn/flcaw/flca/ff8081817ca258e9017ca5fa67290806/attachment.pdf> accessed 1 November 2021.

[18] Lillian Li, 'Let the Bullets Fly for a While: The Intent and Tipping Point for Chinese Tech Regulation' (*Chinese Characteristics*, 15 July 2021) <https://lillianli.substack.com/p/let-the-bullets-fly-for-a-while> accessed 12 September 2021.

[19] For a translation of the speech, see Kevin Su, 'Jack Ma's Bund Finance Summit Speech' (*Interconnected*, 9 November 2020) < https://interconnected.blog/jack-ma-bund-finance-summit-speech/> accessed 12 September 2021.

[20] David Chau, 'China's Crackdown on "Powerful" Tech Giants May Be a "Terrible Own Goal"' *ABC News* (18 August 2021) <https://www.abc.net.au/news/2021-08-19/china-tech-crackdown-alibaba-jack-ma-risky-investment/100387392?utm_campaign=news-article-share-2-desktop-0&utm_content=twitter&utm_medium=content_shared&utm_source=abc_news_web> accessed 12 September 2021;

[21] ibid.

[22] The motivation of the SAMR is briefly explored in s V below, in the context of the analysis of the wider implications of the *Alibaba* decision.

[23] *Qihoo Technology Company Ltd v Tencent Technology (Shenzhen) Company Limited and Shenzhen Tencent Computer Systems Company Limited* (2013) No 4, announced 17 October 2014 (*Qihoo 360 v Tencent*) <http://www.court.gov.cn/wenshu/xiangqing-7973.html> accessed 12 September 2021.

SAMR's attempt to effectively tackle the dire consequences associated with this classic exclusionary behaviour becomes all the more momentous. Second, in targeting a national company, the decision puts a dent in the narrative that competition law in China serves a protectionist agenda. Third, as enforcers in other parts of the world face what feel like interminable legal battles to punish anticompetitive conduct, the SAMR has managed to impose a record penalty in just a few months. It begs the question of whether such swift action is achievable, or even desirable, in other jurisdictions.

The paper starts by covering the substance of the case. Section II considers the relevant market definition and the finding of dominance, and Section III discusses the abuses identified. Thereafter Section IV addresses the penalties imposed and other procedural issues. Section V considers the wider policy repercussions of the decision. Finally, conclusions are drawn in Section VI.

II. RELEVANT MARKET DEFINITION AND FINDING OF DOMINANCE

At a time when competition agencies around the world are coming to terms with the intricacies of relevant market definition in the digital sphere,[24] even mulling over whether the exercise is necessary at all,[25] the delineation of Alibaba's markets in the decision is of particular relevance. The SAMR's findings also come in a context of intense debate over the competition e-commerce behemoths actually face. In the EU and the US, where Amazon has been subject to antitrust scrutiny for some time,[26] the discussion has focused on whether the company could be classed as a monopolist or a monopsonist (or neither),[27] whether the relevant market is e-commerce in general or should be further subdivided, or even whether traditional brick-and-mortar retailers compete with online operators.[28]

[24] Commission Staff Working Document, Evaluation of the Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law of 9 December (12 July 2021) SWD(2021) 199 final; 1997; Viktoria HSE Robertson, 'Antiturst Market Definition for Digital Ecosystems' [2021] *Concurrences Review* 2, 3.

[25] The draft version of the Platform Economy Guidelines (n 9) listed the circumstances under which it would not be necessary to define the relevant market for determining whether dominance exists (Art 4(3)). These were removed from the final text. In a similar vein, the Supreme People's Court highlighted, in *Qihoo 360 v Tencent*, that market definition is not a goal in itself, but merely 'a tool to assess an undertaking's market power and the competitive impact of the suspected monopolistic conduct'. In the US, the Joint DOJ/FTC Horizontal Merger Guidelines (2010) point out that merger analysis 'need not start with market definition' (s 4). See further Louis Kaplow, 'Why (Ever) Define Markets?' (2019) 124 *Harvard Law Review* 438.

[26] In the EU, see *E-book MFNs and Related Matters (Amazon)* (Case AT.40153) Commission Decision C/2017/2876 [2017] OJ C264/7 (*Amazon E-books* decision), or the ongoing *Amazon Marketplace* investigation (European Commission Press Release IP/20/2077 (10 November 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077> accessed 12 September 2021). In the US, see the dispute between Hachette and Amazon ('Amazon and Hachette Resolve Bitter Dispute Over Price' *BBC News* (13 November 2014) <https://www.bbc.co.uk/news/business-30044531> accessed 12 September 2021).

[27] Paul Krugman, "Amazon's Monopsony is Not O.K.' *New York Times* (19 October 2014) <https://www.nytimes.com/2014/10/20/opinion/paul-krugman-amazons-monopsony-is-not-ok.html> accessed 12 September 2021.

[28] European Commission, Support Study Accompanying the Evaluation of the Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law (European Union, 2021) <https://ec.europa.eu/competition-policy/system/files/2021-06/kd0221712enn_market_definition_notice_2021_1.pdf> accessed 12 September 2021; Annie Lowrey, 'Amazon Is Not a Monopolist' *Intelligencer (NY Mag)* (10 October 2014) <https://nymag.com/intelligencer/2014/10/amazon-is-not-a-monopoly.html> accessed 12 September 2021 (arguing that Amazon 'faces fierce competition from traditional retailers').

The SAMR focused solely on Alibaba as a virtual retail platform.[29] This is in contrast with the European Commission's *Amazon Marketplace* investigation, centred around the company's dual role as a 'marketplace where independent sellers can sell products directly to consumers' and a 'retailer on the same marketplace, in competition with those sellers.'[30] The SAMR found that retail platforms constitute a relevant product market in their own right, distinct from offline businesses which, although functionally similar, cannot be considered close substitutes.[31] From a demand-side perspective, the justifications for this conclusion include the chance to shop anytime and anywhere in the country and to compare prices afforded by online retailers, their lower operational costs, as well as their ability to use aggregate data about consumer preferences to swiftly match supply and demand and to make adjustments to production and stock. Supply-side substitutability was also considered, and the SAMR established that the profit model of Internet operators is peculiar, since they make money from sales commissions and advertisements. It further determined that it was rare for brick-and-mortar shops to transition to online retailing.

Next, the decision covers whether the market could be further compartmentalised. According to the SAMR, online retail is not segmented: by business model (it encompasses both business-to-consumer and consumer-to-consumer services); by method of sale (whether they are sought by consumers or instigated by suppliers' promotions); or by the products sold.[32] According to the agency, the supply-side analysis suggests that facilitating all of these options does not entail extra costs for the platforms, and indeed most are already offering them. As expected, the relevant geographic market was defined as China. The SAMR refers to language, tariff, and other barriers implying that neither customers nor sellers would consider resorting to overseas platforms for their transactions.[33] No obstacles dividing the national territory along regional lines were identified, allowing platforms to operate nationally and ruling out a more restricted geographical scope. The decision explains, albeit briefly, that the agency relied on a range of qualitative and quantitative data to ascertain the boundaries of the relevant market: the company's financial reports, its agreements with platform operators, minutes of meetings, interviews, statistical data.[34]

Considering demand- and supply-side substitutability is in line with the new Platform Economy Guidelines,[35] the 2009 Guidelines on the Definition of the Relevant Market,[36] the position of the Supreme People's Court,[37] and international practice.[38] Further, the separation

[29] *Alibaba* decision (n 1). This explains, in part, the relatively brief market definition exercise, confined to seven pages.
[30] European Commission Press Release IP/20/2077 (10 November 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077> accessed 12 September 2021.
[31] *Alibaba* decision (n 1).
[32] ibid.
[33] ibid.
[34] ibid.
[35] Platform Economy Guidelines (n 9).
[36] Guidelines of the Anti-Monopoly Commission of the State Council on the Definition of the Relevant Market (国务院反垄断委员会关于相关市场界定的指南) adopted 7 July 2009 <http://www.gov.cn/zwhd/2009-07/07/content_1355288.htm> accessed 12 September 2021.
[37] *Qihoo 360 v Tencent* (n 23).
[38] This is, for instance, the usual practice of the European Commission and the European Courts. See eg European Commission, 'Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law' (1997) OJ C-372/03 recital 13; Case 6/72 *Europemballage and Continental Can v European Commission* EU:C:1973:22, paras 32–36. By contrast, in the US the Joint DOJ/FTC Horizontal Merger Guidelines (2010) point out that market definition 'focuses solely on demand substitution factors' (s 4). For a comparative analysis of relevant market definition in various jurisdictions, see Magali Eben and Viktoria HSE Robertson, 'Digital Market Definition in the European Union, United States, and Brazil: Past, Present, and Future' (2021) 17 *Journal of Competition Law and Economics* (forthcoming).

of online and offline commerce is *a priori* consistent with the European Commission's approach in the *Amazon E-books* decision: substitutability between print books and e-books, it found, is not intense enough to be included in the same relevant market.[39] Yet unlike the European Commission, the SAMR did not apply the SSNIP test. This omission is not surprising: it was also absent from the relevant market definition in the NDRC's *Qualcomm* investigation,[40] and in *Qihoo 360 v Tencent* the Supreme People's Court had highlighted the limitations of this traditional test when applied to digital markets.[41] It does mean however that it remains unclear whether, in the event of a price surge, 1) enough consumers would switch between Internet and brick-and-mortar retail options for the increase to be unprofitable, and 2) if the characteristics of e-commerce platforms highlighted by the SAMR (ie greater geographical reach or flexible operating hours) would be genuinely likely to deter consumers from looking for in-person shopping alternatives. There is also no mention of Jack Ma's 'new retail' strategy or whether/how it impacts market definition in the case. For those unfamiliar with the concept, 'new retail' essentially involves integrating aspects of online and offline shopping to enhance both the consumer and the merchant experience.[42] It has proven extremely popular in China,[43] and it is precisely e-commerce titans like Alibaba that are in a privileged position to implement it: they are able to 'integrate their customer relationships and interfaces, digital payments solutions, and logistics infrastructure into physical retail operations.'[44]

Establishing Alibaba's dominance in this relevant market was relatively uncomplicated. In the 2015–2019 period, its shares oscillated between 86% and 71% for total sales value, and between 76% and 62% for total revenues. These substantial chunks of the market would serve to confirm the existence of a dominant position in most antitrust jurisdictions, and comfortably exceed the 50% threshold established in the AML for assuming dominance.[45] However, rather startlingly, shares surpassing 80% proved insufficient for the Supreme People's Court in *Qihoo 360 v Tencent*.[46] Therefore, the SAMR played it safe and considered a range of additional indicators to support its conclusion. It took into account the high concentration present in the relevant market: the Herfindahl-Hirschman Index (HHI) was between 7408 and 5350,[47] and the four-firm concentration ratio (CR4) effectively accounted for the entire industry.[48] It also pointed to Alibaba's control over price, the weak bargaining power of independent sellers on the platform, its financial resources and technical superiority, and the entry barrier erected by the high cost of switching to other platforms for operators. As a result, sellers would be locked in, and the strong network effects would make it even more difficult for other platforms to flourish.

---

[39] *Amazon E-books* decision (n 26).
[40] *Qualcomm* decision (n 3).
[41] *Qihoo 360 v Tencent* (n 23).
[42] Winter Nie and others, The Future of Global Retail: Learning from China's Retail Revolution (Routledge, 2021).
[43] Jon Bird, 'Alibaba's "New Retail" Revolution: What Is It, and Is It Genuinely New?' *Forbes* (18 November 2018) <https://www.forbes.com/sites/jonbird1/2018/11/18/alibabas-new-retail-revolution-what-is-it-and-is-it-genuinely-new/> accessed 12 September 2021.
[44] 'The New Retail Revolution' (CGAP, September 2019) <https://www.cgap.org/research/publication/new-retail-revolution> accessed 12 September 2021.
[45] AML (n 2) art 19.
[46] *Qihoo 360 v Tencent* (n 23). This was despite evidence that 'Tencent's share of active [instant messaging] usage was over 20 times larger than that of the second largest [instant messaging] provider at the time of the dispute; and despite all the entry and expansion of [instant messaging] services in recent years, Tencent has been able to maintain close to 90% market share over time, while not one of its competitors has been able to win any meaningful share from Tencent.' Sharon Pang, 'The Chinese Supreme Court Issues the First Decision Based on Economic Analysis under Anti-Monopoly Law (Qihoo v. Tencent)' *e-Competitions* No 71285 (October 2014) 4.
[47] *Alibaba* decision (n 1).
[48] ibid.

III. ABUSIVE CONDUCT

Alibaba was found to have abused its dominance by devising a 'choose one from two' strategy,[49] aimed at effectively forcing sellers to rely exclusively on its platform. It was implemented by virtue of a sophisticated carrot-and-stick scheme, incentivising exclusivity while at the same time punishing those daring to trade on other sites. Some sellers had a contractual obligation not to work with competing platforms, while others had been verbally told to refrain from doing so. These were not terms the traders were happy about, but they had little choice. Alibaba would keep an eye on them, and if they did decide to sell elsewhere, they could be excluded from promotional exercises, get demoted in searches, and see an array of rights cancelled. This was considered to be contrary to Article 17(4) of the AML, which prohibits dominant companies from 'allowing their trading counterparts to make transactions exclusively with themselves or with the undertakings designated by them' without objective justification.[50]

As a consequence of these actions, the SAMR found that competition in the relevant market had been restricted, and the actions of Alibaba hurt both actual and potential competitors (ie other virtual retail platforms). Sellers operating on Alibaba would also have been harmed, as their freedom had been unduly constrained, shrinking intra-brand competition in the process. Consumers would be equally damaged, enjoying less choice and fewer trading rights. All of this would, according to the SAMR, hinder the optimal allocation of resources, innovation, and in the long run affect the economy as a whole.

'Choose one from two' practices had been previously scrutinised by the Supreme People's Court in *Qihoo 360 v Tencent*, with a disappointing outcome.[51] In that case, when Qihoo started to block pop-up ads for users of Tencent's instant messaging service (IMS) on devices using Qihoo's antivirus programmes, Tencent responded by making its software incompatible with Qihoo's. The former thus compelled consumers to choose between the two companies, and the latter's customer based decreased by 10% in just two days. The Court acknowledged, to an extent, the harm suffered by the company, but unfortunately downplayed the impact claiming that a) there was no drastic reduction of Qihoo's or other competitors' market shares, and b) damage to consumer welfare would be minimal given the availability of competing products. As Sharon Pang has noted, this conclusion appears to overlook the wider, long-term consequences of losing Qihoo as a competitor, the impact on the company's ability to compete in the antivirus market or other markets it may wish to enter, and the signal sent by Tencent to rivals thinking of defying its hegemony.[52]

While the Supreme People's Court appears to have taken an effects-based approach to exclusivity-inducing conduct,[53] the SAMR is clearly weary of the impact such behaviour may bear when it involves a dominant market player. The SAMR's position suggests that 'choose one from two' strategies would be treated as exclusivity obligations, and be presumptively illegal (similar to the view of the Court of Justice in *Hoffmann-La Roche*)[54] absent an objective justification (like the *Intel* case suggests).[55] Sadly, the SAMR's decision does not discuss any

[49] In Chinese, 二选一.
[50] AML (n 1) art 17(4).
[51] *Qihoo 360 v Tencent* (n 23).
[52] Pang (n 46). But see Qingxiu Bu, 'Qihu360 v Tencent: The Unsettled Antitrust War in China's IT Sector' (2015) 36 *European Competition Law Review* 369, 378, claiming that the Supreme People's Court decision 'lays down a road map for a proper and rigorous antitrust analysis.'
[53] See David Stallibrass and Sharon Pang, 'Clash of the Titans: How China Disciplines Internet Markets' (2015) 6 *Journal of European Competition Law & Practice* 418, 420–422.
[54] Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities* ECLI:EU:C:1979:36.
[55] Case C-413/14 P *Intel Corp v European Commission* ECLI:EI:C2017:632.

possible justifications. This may be a consequence of the fact that Alibaba appears to have waived its rights of defence, as seen in the next section.[56]

IV. PENALTIES AND PROCEDURAL ISSUES

In addition to the record-breaking RMB 18.228 billion fine, and an order to stop the illegal conduct, the SAMR required Alibaba to elaborate a 'rectification plan' and gave it detailed instructions to ensure compliance. Inter alia, the company has been compelled to provide self-assessment compliance reports for three years, refrain from using technology such as algorithms to implement anticompetitive behaviour, provide compliance training to staff, report any mergers surpassing the relevant notification thresholds, and protect the rights and interests of consumers.[57]

The decision mentions that the parties waived their rights to make statements and to request a hearing, although it is unclear why.[58] Moreover, Alibaba issued a letter on the day the decision was published accepting the decision,[59] signalling that it will not appeal. The company's stance fits into a trend of limited judicial scrutiny of administrative decisions, highlighted by some observers.[60] The law envisages a 60-day time limit for appeals to the administrative agency issuing the decision, or six months in the event that the parties wish to go to court. Despite this legal recognition of the right to appeal, the exercise of the right remains 'extremely rare', and when appeals do occur the courts have often found in favour of the competition authorities.[61] The recent invigoration of antitrust enforcement could bear an impact on the number of appeals. For instance, in 2020 two pharmaceutical companies appealed a decision of the SAMR that found them to have abused their dominance through excessive pricing and unfair trading conditions.[62]

V. WIDER IMPLICATIONS OF THE DECISION

When attempting to make sense of headline-grabbing cases, weeding out the noise from the 'exciting legal stuff' can be a daunting task.[63] Legal experts have praised the 'thoughtful and impressive' *Alibaba* decision,[64] yet speculation around a possible hidden agenda tends to dominate the discussion and has drawn disproportionate attention to a case that is anything but intricate on substance. The SAMR relied on established principles and theories of harm to

---

[56] See s IV below.
[57] Instructions attached to the *Alibaba* decision (n 1).
[58] *Alibaba* decision (n 1).
[59] 'A Letter to Our Customers and the Community' (*Alibaba Group*, 10 April 2021) <https://www.alizila.com/a-letter-to-our-customers-and-to-the-community/> accessed 12 September 2021.
[60] See inter alia Angela H Zhang, *'Chinese Antitrust Exceptionalism'* (Oxford University Press 2021), and Emanuela Lecchi, 'Hong Kong, China, and the Disruption of Antitrust' (2022) 31 *Washington International Law Journal* (forthcoming).
[61] Jungyan Ma, *Competition Law in China* (Springer 2020) 222.
[62] SAMR, Administrative Penalty Decision (n 17). See also Hao Zhan and Ying Song, 'Cartels 2021' (*Chambers and Partners*, last updated 16 June 2021) <https://practiceguides.chambers.com/practice-guides/comparison/639/6830/10909-10911-10912-10913-10914-10915> accessed 12 September 2021.
[63] This is a reference to Pablo Ibáñez Colomo's blog post 'The Android Decision is Out: The Exciting Legal Stuff Behind the Noise' (*Chillin' Competition*, 18 July 2018) <https://chillingcompetition.com/2018/07/18/the-android-decision-is-out-the-exciting-legal-stuff-beneath-the-noise-by-pablo/> accessed 12 September 2021. He was discussing the long-awaited *Google Android* decision, announced in the summer of 2018 (*Google Android* (Case AT.40099) Commission Decision C/2018/4761 [2019] OJ C402/19).
[64] Yong Bai and Dave Poddar, 'Antitrust in China and Across the Region' (*Clifford Chance Quarterly Update*, January–March 2021) <www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/04/asia-pacific-quarterly-antitrust-briefing---q1-2021.pdf> accessed 12 September 2021.

tackle a classic form of abuse, and thus had little room for creativity—the less chartered waters being the relevant market definition with regard to e-commerce platforms. Notwithstanding the orthodox outcome, the big picture is made up of brush strokes, and the decision can help shed light on important aspects affecting the future of competition policy in China. The focus here is on what the decision reveals about the motivation of the SAMR, protectionism in Chinese competition law enforcement, the price of swift enforcement in terms of judicial review and rights of defence.

Motivation behind the big tech crackdown

Jack Ma's critical speech may have inadvertently opened Pandora's box,[65] but to suggest that his words are the sole triggering factor of the attack on the company and the sector is an oversimplification of reality. The developments in China must be seen under the light of the ongoing global backlash against big tech.[66] Across the globe, serious concerns have emerged over tech giants 'becoming de facto institutions, not just providing crucial utilities that are central to the lives of citizens but setting the rules of the game in which society operates.'[67] Despite doubts as to the fairness of the way they amassed their market power, and how they may be using (or misusing) that power, most competition agencies took time to act, drawing scholarly criticism.[68] This global context *prima facie* suggests that the Chinese authorities' efforts to curb the power of big tech are, in terms of timing and intent, largely consistent with the developments taking place in other jurisdictions. Moreover, as explained above, the developments also fit within a wider antitrust invigoration strategy pursued by the Chinese government, as well as a traditional modus operandi whereby an observation phase during which companies are allowed to thrive is followed by intervention.[69]

From this standpoint, the Jack Ma revenge hypothesis around the *Alibaba* decision would seem less robust. Rather than the endgame, the record-breaking fine would be part of a broader crusade that might eventually hit other tech giants with similar intensity. But much still hangs on the SAMR's next moves. In April 2021, it was reported that the agency was preparing to impose a penalty of at least RMB 10 million on Tencent for failing to notify reportable mergers and 'for anticompetitive practices in some of its businesses, with music streaming in particular focus'.[70] In contrast with Jack Ma, Tencent's CEO Huateng Ma keeps a low profile, and the company has been said to enjoy 'a status akin to an enlightened ruler of an expansive tech empire.'[71] Yet the fine never materialised. Instead, the SAMR's steps against Tencent have thus far been limited to 1) blocking a merger between two videogame streaming sites in which Tencent had a stake, and 2) a fine of RMB 500,000 (around EUR 65,000) for not notifying the acquisition of China Music Group (imposed along with remedies compelling the

[65] See s I above.
[66] Sandra Marco Colino, 'Towards a Global Big Tech Clampdown?' *Agenda Pública* (19 January 2021) <https://agendapublica.es/towards-a-global-big-tech-clampdown/> accessed 12 September 2021.
[67] Lillian Li (n 18).
[68] See eg Lina M Khan, 'Amazon's Antitrust Paradox' (2017) 126 *Yale Law Journal* 710; Dina Srinivasan, 'The Antitrust Case against Facebook: A Monopolist's Journey towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy' (2019) 16 *Berkeley Business Law Journal* 39.
[69] See s I above.
[70] Pei Li and Julie Zhu, 'China Readies Tencent Penalty in Antitrust Crackdown—Sources' Reuters (29 April 2021) <https://www.reuters.com/world/china/exclusive-china-readies-tencent-penalty-antitrust-crackdown-sources-2021-04-29/> accessed 12 September 2021.
[71] Li Yuan, 'Why China's Most-Hated Internet Company Decided to Play Nice' *The New York Times* (2 June 2021) <https://www.nytimes.com/2021/06/02/technology/china-tencent-monopoly.html> accessed 12 September 2021.

company to give up its exclusive music rights).[72] The stark difference in the penalties imposed is partly explained by the different nature of the alleged violations—abuse of dominance carries tougher sanctions than failing to report a merger. However, at first blush it does lend support to allegations of a preferential treatment afforded to Tencent.[73]

Protectionism in Chinese antitrust enforcement

In imposing the highest ever fine on a national company, the SAMR has potentially thrown protectionist narratives relating to China's competition policy—which had been exacerbated by the 2015 *Qualcomm* fine—into disarray.[74] In fact, the depiction of the AML as a 'weapon that China could use against foreign companies' had previously been challenged on multiple grounds.[75] Before the introduction of the AML, as Professor Angela Zhang has observed, China already had laws allowing the authorities to regulate foreign businesses.[76] Therefore, the adoption of a new law to exert further control was not necessary. Moreover, targeting overseas companies in antitrust investigations is common everywhere, not particular to China. Qualcomm itself has been fined in other jurisdictions, including the EU.[77] Even though the *Alibaba* decision appears to further dispel protectionist concerns, China's antitrust history is still somewhat short to allow for the observation of enforcement patterns.

The effectiveness of the SAMR's strategy and its hidden costs

Despite being a relatively young antitrust jurisdiction, with just over a decade of enforcement experience, China has managed to take swift, effective steps to tame its big tech giants. The speediness of the *Alibaba* investigation is undoubtedly impressive. In the EU, resolving an instance of abuse of dominance in just a few months is nothing short of a pipe dream. On average, European Commission antitrust investigations take over four years,[78] and in the event

[72] Both developments are covered in Adrian Emch, 'Huya/Douyu and Tencent/China Music Group: A "New Normal" for Chinese Merger Control?' (*Kluwer Competition Law Blog*, 22 August 2021) <http://competitionlawblog.kluwercompetitionlaw.com/2021/08/22/huya-douyu-and-tencent-china-music-group-a-new-normal-for-chinese-merger-control/?print=pdf> accessed 12 September 2021.

[73] See inter alia Yuan (n 69); Nian Liu and others, 'Tencent takes quiet path through China's Tech Turbulence' *Financial Times* (24 June 20 <https://www.ft.com/content/97d8395b-6115-4147-b4d8-953ddbf729a4> accessed 12 September 2021.

[74] See, inter alia, Thomas K Cheng, 'The PRC NDRC Case Against Qualcomm: A Misguided Venture or Justified Enforcement of Competition Law?' (2017) 5 *Journal of Antitrust Enforcement* 76; Michael Martina, 'China Antitrust Proposals Trigger Foreign Business Fears Over IP Protection' *Reuters* (1 April 2016) <https://www.reuters.com/article/us-china-antitrust-idUSKCN0WY4KG> accessed 12 September 2021; Thomas J Horton, 'Antitrust or Industrial Protectionism? Emerging International Issues in China's Anti-Monopoly Law Enforcement Efforts' (2015) 14 *Santa Clara Journal of International Law* 109; Dexter Roberts, 'US Companies Fear Growing Protectionism in China' *Bloomberg Business* (3 September 2014) <https://www.bloomberg.com/news/articles/2014-09-03/chinas-antimonopoly-push-creates-anxiety-for-u-dot-s-dot-businesses> accessed 12 September 2021; Matthew Miller, 'China's Latest Anti-trust Probes Revive Protectionism Concerns' *Reuters* (7 August 2014) <https://www.reuters.com/article/us-china-antitrust-idUSKBN0G70VA20140807> accessed 12 April 2021; Britton Davis, 'China's Anti-Monopoly Law: Protectionism or a Great Leap Forward?' (2010) 33 *Boston College International and Comparative Law Review* 305.

[75] See eg Sandra Marco Colino, 'The Antitrust F Word: Fairness Considerations in Competition Law' [2019] *Journal of Business Law* 329; Angela Huyue Zhang, 'Problems in Following EU Competition Law: A Case Study of Coca-Cola/Huiyuan' (2011) 3 *Peking University Journal of Legal Studies* 96, 99.

[76] Zhang (n 79) 99.

[77] *Qualcomm (predation)* (Case AT.39711) Commission Decision C/2019/5361 [2019] OJ C375/25.

[78] European Court of Auditors, Special Report 'The Commission's EU Merger Control and Antitrust Proceedings: A Need to Scale Up Market Oversight' (2020) para 54

of appeals cases may drag on for over a decade.[79] Studies have pointed to the negative impact of the lengthy proceedings on the effectiveness of enforcement, more so in 'rapidly growing digital markets where a fast reaction is needed to avoid potential damage.'[80] From this perspective, the prompt outcome of the Alibaba case would be optimal to effectively address the problems caused by the company's exclusionary practices in the e-commerce sector.

Nevertheless, it might be a case of 'be careful what you wish for'. Unfortunately, the defendants' waiving of some of the procedural guarantees and the absence of judicial review are key factors accounting for the abridged proceedings.[81] Interestingly, outside of China concerns have been expressed about the potential negative impact of appeals on competition proceedings. According to the Furman Report, for instance, appeals may enhance competition authorities' 'risk aversion',[82] and they are partly to blame for the absence of abuse cases relating to digital markets in the UK to date.[83] Moreover, while recognising that rights of defence are crucial, the Report insists that they need to be 'set against the rights of those who would suffer from the underenforcement resulting from appeals that impose an undue burden on authorities and limit their ability to act.'[84]

Excessively long proceedings are certainly challenging, and it is crucial to consider ways to shorten the current process. Moreover, the contrast between the judicial and administrative developments in China exposes the complexities of antitrust analysis in digital markets for non-specialised courts. Having said that, a system that guarantees full jurisdiction of the courts to review of administrative decisions is imperative to ensure the necessary procedural guarantees.[85] It may be worth exploring whether, for instance, the methods currently relied on to distinguish pro- and anticompetitive conduct could be refined so as to alleviate the (somewhat gruelling) evidentiary burden currently placed on the European Commission. But the time added by appeals is not a burden we should forego; it is essential to elude the perils of excessive agency discretion.[86]

As a final observation, it is worth reflecting on whether China's big tech crackdown may have been *too* effective. In 2021, the shares of Alibaba, Tencent and other tech giants plummeted, in part as a consequence of the legal troubles they have been facing.[87] This is in stark contrast with the fate of their US counterparts whom, despite facing similarly intense

---

<https://www.eca.europa.eu/Lists/ECADocuments/SR20_24/SR_Competition_policy_EN.pdf> accessed 12 September 2021.

[79] Some of the most notorious examples include the *Intel* investigation, which started in 2006 with a complaint, and as of 2021 the final decision of the General Court is still pending, and the *Google* Shopping case, triggered in 2010, with the General Court handing down its judgment in 2021 and a possible appeal to the Court of Justice on the horizon.

[80] European Court of Auditors Special Report (n 76) para 97.

[81] See s IV above.

[82] Jason Furman and others, Unlocking Digital Competition: Report of the Digital Competition Expert Panel (March 2019) (Furman Report) para 3.134 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 12 September 2021.

[83] ibid.

[84] ibid, para 3.130.

[85] Case C–272/09 P *KME Germany AG and others v European Commission* ECLI:EU:C:2011:810.

[86] On this topic, see Pablo Ibáñez Colomo, 'When Did the Rule of Law Come to Be Seen as an Inconvenience?' *Chillin' Competition* (30 June 2021) <https://chillingcompetition.com/2021/06/30/when-did-the-rule-of-law-come-to-be-seen-as-an-inconvenience/> accessed 12 September 2021.

[87] Kensho Motowaki, 'Tencent and Alibaba Lose $330Bn in Market Value Since End of 2020' *Nikkei Asia* (2 September 2021) <https://asia.nikkei.com/Business/Markets/Tencent-and-Alibaba-lose-330bn-in-market-value-since-end-of-2020> accessed 12 September 2021; 'Tencent Shares Slide After Beijing Crackdown on Music Rights' *BBC News* (26 July 2021) <https://www.bbc.co.uk/news/business-57966023> accessed 12 September 2021.

scrutiny, continue to grow and prosper.[88] The difference may be related to the powerful consequences of 'strategic public shaming' in China. [89] The effect has been described as a 'terrible own goal' on the part of the Chinese government.[90] Nevertheless, the potential impact of antitrust decisions on the stock prices of those who act in breach of the law should not be a guiding principle for enforcement.

VI. CONCLUSION

In the *Alibaba* decision, the SAMR tackled highly detrimental exclusionary conduct, and did so largely following international practice. The outcome shows that China has managed to build a robust antitrust system with admirable speed, and the sophistication of the analysis conducted by the SAMR demonstrates that the agency is equipped to tackle the challenges of the digital economy for antitrust enforcement. In designing the policy to address the new reality, it is vital that robustness and impartiality remain a priority. In this sense, the SAMR ought to continue to target anticompetitive practices in the sector regardless of the perpetrator, without hints of favouritism or protectionism. In addition, an increase in the judicial review of administrative decisions should stem naturally from the invigoration of antitrust expressly pursued by the government. Courts may have to be trained to adequately deal with the complexities of the cases, but access to appeals and suitable rights of defence are fundamental to safeguard the fairness of the administrative process.

[88] Vivek Kumar, 'Monstrous Earnings Ahead: Facebook, Microsoft, Alphabet, Apple and Amazon in Focus' *Nasdaq* (24 October 2021) <https://www.nasdaq.com/articles/monstrous-earnings-ahead%3A-facebook-microsoft-alphabet-apple-and-amazon-in-focus-2021-10-24> accessed 1 November 2021; Kari Paul, 'Facebook Reports Fastest Quarterly Growth in Five Years' *The Guardian* (28 July 2021) <https://www.theguardian.com/technology/2021/jul/28/facebook-growth-earnings-business-quarter> accessed 12 September 2021.

[89] Angela Huyue Zhang, *'Chinese Antitrust Exceptionalism'* (Oxford University Press 2021) 95–105.

[90] Chau (n 20) quoting Richard McGregor.