

China Antitrust Update (Mar-Apr, 2023)

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From March to April 2023^[1], in the legislation and policy-making area the State Administration for Market Regulation (the “SAMR”) released four supporting regulations of the Anti-Monopoly Law (the “AML”), deployed key legislative goals for 2023; the Supreme People's Procuratorate (the “SPP”) issued opinions stressing the exploration of anti-monopoly public interest litigation in the digital market to prevent monopolistic acts of abusing market dominance and data algorithm advantages. In the law enforcement area the SAMR unconditionally approved 115 merger cases in March and April 2023, involving sectors of aviation, real estate, food, energy, environmental protection, transportation, automobile, materials, pharmaceutical, private equity fund management, etc., and conditionally approved the Share Acquisition of Yantai Juli Fine Chemical Co., Ltd. by Wanhua Chemical Group Co., Ltd. The Shanghai Administration for Market Regulation announced the Decisions of Administrative Penalty on monopoly agreement reached and implemented by Shanghai Xudong Haipu Pharmaceutical Co., Ltd. and Tianjin Tianyao Pharmaceuticals Technology Co., Ltd., and the SAMR published the Decisions of Administrative Penalty on abuse of market dominance of Tianjin Jinyao Pharmaceutical Co., Ltd. and Rizhao WaterSupply Company Limited. In the judicial area, the Beijing Intellectual Property Court ruled on China's first case of unfair competition dispute related to data collection on short video platforms.

Legislation and Policy Area

- On March 13, 2023, the SAMR announced the 2022 Annual Report on Building of Government Ruled by Law^[2]. In 2022, the antitrust law enforcement authorities have handled 73 cases of abuse of administrative power to exclude and restrict competition, 29 cases of monopoly agreements and abuse of market dominance (with a total confiscation and penalty amount of RMB 735 million), cleared 794 merger cases, announced administrative penalties on 32 cases of failure to notify, and handled 9,069 cases of various types of unfair competition, strongly maintaining the fair competition in the market.
- On March 24, 2023, the SAMR issued four supporting regulations of the AML, namely the *Provisions on Suppression of the Abuse of Administrative Power to Exclude and Restrict Competition*, the *Provisions on Prohibition of Monopoly Agreements*, the *Provisions on Prohibition of Abuse of Market Dominance* and the *Provisions on the Review of Concentrations of Undertakings*, which has come into effect on April 14, 2023^[3]. Based on our observations in practice, the key takeaways of the amendments to the four regulations are summarized as follows:
 - The *Provisions on the Review of Concentrations of Undertakings* clarify the notification and investigation procedures for concentrations of undertakings that do not meet the notification thresholds but are of competitive concerns; optimize the factors for identifying the “acquisition of control or the ability to exert decisive influence”; clarify the calculation of turnover of undertakings to the concentration and the criteria for determining the “implementation of the concentration”; refine and optimize the “stop the clock regime”; improve the selection and supervision system of trustees; and supplement new investigation methods that can be adopted in merger review by the antitrust enforcement agencies, etc.;
 - The *Provisions on Prohibition of Monopoly Agreements* delete the 15% market share criterion and application procedure for applying the “safe harbor” regime stated in the previous exposure draft; improve the regulations

on conducts of “organizing” and “substantially assisting” monopoly agreements; further standardize the investigation procedures and the leniency system; and newly introduce the interview regime;

- The *Provisions on Prohibition of Abuse of Market Dominance* improve the antitrust regulations in the sector of platform economy by adding some of the “reasonable grounds” and forms of conducts to the relevant abusive behaviors, providing more perspectives for the compliance assessment of relevant business models in this sector; delete the relevant provisions on “self-preferencing” in the previous exposure draft; and provide more detailed guidance on the specific analysis on various types of abusive conducts;

- The *Provisions on Suppression of the Abuse of Administrative Power to Exclude and Restrict Competition* introduce the interview regime; provide for an administrative discipline interface system; and establish an interface with the fair competition review system.

For more comments in this regard, please see [*Haiwen Alert: Four Supporting Regulations of the Anti-Monopoly Law Promulgated*](#).^[4]

- In early April, 2023, the SAMR deployed key legislative goals for 2023, and inclined to further implement fair competition policies, optimize a fair competition environment, actively promote the draft of the *Regulations on Fair Competition Review*, revise the *Provisions on Prohibition of Abuse of Intellectual Property Rights to Exclude and Restrict Competition* and other provisions; effectively improve the level of normalized supervision of the platform economy, and formulate the *Regulations on Supervision and Management of Internet Platform Enterprises in Implementing the Responsibility for Compliance Management* and other regulations.
- On April 13, 2023, the State Council Information Office held a series of themed press conferences on “Authorities Talking about the Opening”^[5]. Luo Wen (the minister of the SAMR) and Gan Lin (the vice minister of the SAMR) introduced that:
 - The SAMR will take administrative penalties, interviews and reminders, administrative guidance, rules and guidelines, and other gradual and regular antitrust regulatory measures to regulate the online platform service market; strengthen the guidance on competition compliance, and investigate and handle monopoly cases in accordance with the law while urging the complete cessation of monopolistic conducts such as “choosing one from two”.
 - With respect to the digital economy and the platform economy regulatory initiatives, the SAMR will improve fundamental regulations and rules on the digital economy, perfect the guidelines, standards and other supporting systems; investigate and explore the establishment of a sound hierarchical layered and corresponded regime of regulatory accountability; innovate the normalized regulatory model, implement the responsibility of the Internet platform enterprises compliance management; improve the dynamic management mechanism of compliance risk of the Internet platform, formulate the indicators of compliance evaluation on segmented sectors, and improve government departments' sampling and assessment, daily supervision, positive incentives, penalties for violations; and promote the conscious implementation of the responsibility of Internet platform enterprises.
 - The SAMR will complete the revision of the *Anti-Unfair Competition Law* soon.
- On April 18, 2023, the SPP issued the “Opinions on Strengthening the Online Regulation of the Procuratorial Organs in the New Era”^[6], explicitly stressing that it will, in accordance with law, explore and promote anti-monopoly public interest litigation to prevent monopolistic acts of abusing market dominance and data algorithm advantages, resulting in harm to the public interest of society; crack down and govern unfair competition activities such as scalping, live sales of counterfeit products, traffic hijacking, extortive rights defense, false advertising and

malicious application for trademarks, domain names, deep links to maintain a good order of fair competition in the digital market.

Enforcement Area

- Merger Review

- **Non-conditional Clearance:** From March to April 2023, 115 cases were cleared without condition by the SAMR (a year-on-year increase of 0.87% compared with that from March to April 2022, and a month-on-month decrease of 4.95% compared with that from January to February 2023), involving industrial sectors of aviation, real estate, food, energy, environmental protection, transportation, automobile, materials, pharmaceutical, private equity fund management, etc.

- **Conditional Clearance:** On April 7, 2023, the case of Share Acquisition of Yantai Juli Fine Chemical Co., Ltd. ("**Yantai Juli**") by Wanhua Chemical Group Co., Ltd. ("**Wanhua Chemical**") was approved by the SAMR with condition^[7]. The review of this case lasted for nearly eight months, and the parties once withdrew and then refiled the case. Both Yantai Juli and Wanhua Chemical are engaged in the production and sale of caustic soda and toluene diisocyanate (TDI). After the transaction, Wanhua Chemical will obtain sole control over Yantai Juli. The SAMR found that the proposed transaction will or is likely to eliminate and restrict competition to the domestic market of TDI in China, and has cleared the transaction with conditions listed as below, and the post-concentration entity may apply to the SAMR for the lifting of the conditions after five years from the date of closing:

(1) After closing the transaction, the annual average price of parties supplying TDI to customers in domestic China market shall not be higher than the average price for the 24 months before the commitment date under similar trade terms. In the event that the price of major raw materials decreases to a certain extent, the price of supplying TDI to customers in China's domestic market shall be adjusted downward in a fair and reasonable manner;

(2) After closing the transaction and unless otherwise justified, the parties shall maintain or expand the production of TDI in China, and continue the R&D and innovation;

(3) Supply TDI to customers in the domestic China market adhering to the principles of fairness, reasonableness and non-discrimination. Unless otherwise justified, the parties shall not refuse, restrict or delay the supply of products to customers in the domestic China market; the parties shall not reduce the quality of supply and the level of service to customers in the domestic China market; and they shall not treat customers in the domestic China market who are under same conditions differently, except for reasonable commercial practices.

(4) Unless otherwise justified, the parties shall not force the customers in the domestic China market to purchase TDI products exclusively from them or carry out tying arrangements.

- Cartel Agreements

- On April 13, 2023, The Shanghai Administration for Market Regulation (the "**Shanghai AMR**") published an administrative penalty on Shanghai Xudong Haipu Pharmaceutical Co., Ltd. ("**Haipu Pharmaceutical**") and Tianjin Tianyao Pharmaceuticals Technology Co., Ltd. ("**Pharmaceuticals Technology**", together with Haipu Pharmaceutical, the "**Parties**") for entering into and implementing a monopoly agreement to fix or change the price of products and divide the sales market. In this case, the Parties entered into a "horizontal alliance" agreement, consensus and long-term tacit understanding for fluorouracil injection in October 2015, agreeing

that (1) the Parties jointly increased the bidding price of fluorouracil injection and the supply price of business companies in various regions by communicating with each other during bidding, refraining from price wars and continuously negotiating prices, etc.; (2) the Parties divided the domestic China market based on their respective traditional advantageous sales regions, occupying the sales markets in 15 provinces respectively, cooperating and ensuring that the other Parties won the tenders in their respective designated markets by not participating or quoting high prices during the bidding process, and limiting the other Parties' sales volume in their own designated markets. The Shanghai AMR ordered the Parties to cease their unlawful act, and imposed on Haipu Pharmaceutical and Pharmaceuticals Technology a fine of 3% of their turnover in 2020, approximately RMB 57.05 million in total.

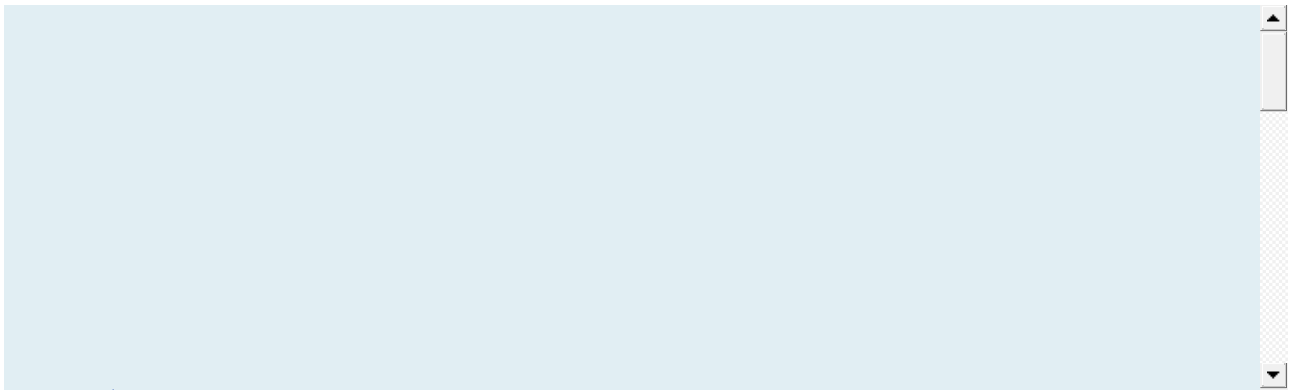
- Abuse of Market Dominance

- On March 22, 2023, the SAMR released an administrative penalty issued by Tianjin Administration for Market Regulation (the "**Tianjin AMR**") on Tianjin Jinyao(金耀) Pharmaceuticals Co., Ltd. (**Jinyao(金耀) Pharmaceuticals**) for its abuse of dominant market position. In this case, Jinyao(金耀) Pharmaceuticals had a dominant position in the market for carmustine injection in China, with a 100% market share and the ability to control the price, quantity and other trading conditions of relevant products, and it is difficult for other operators to enter the relevant market. From June 2017 to September 2020, with production and sales costs basically stable, Jinyao(金耀) Pharmaceuticals significantly increased the sales price of carmustine injection beyond normal extent, by approximately 7.5 times compared to the price in 2016. The Tianjin AMR determined that the conducts of Jinyao(金耀) Pharmaceuticals had constituted the abuse of market dominance by selling products at unfairly high prices, and on that account, the Tianjin AMR ordered Jinyao(金耀) Pharmaceuticals to cease its unlawful acts and imposed a fine of 2% of its annual sales in 2019, which was approximately RMB 27.72 million.

It is noteworthy that the Jinyao(金耀) Pharmaceuticals and the Pharmaceutical Technology are, respectively, the holding subsidiary and the subsidiary of holding subsidiary of Jinyao Pharmaceuticals Co., Ltd. (**"Jinyao(津药) Pharmaceuticals"**). In April 2021, Tianyao Pharmaceuticals (the former name of Jinyao (津药) Pharmaceuticals) had been ordered to cease unlawful acts, confiscated illegal income and imposed a fine of 4% of annual sales in 2019, approximately amounting to RMB 44.02 million, by the Tianjin AMR for entering into and implementing a monopoly agreement to divide the market and fix the price of fluphenazine acetate API. These facts demonstrate the trend of antitrust enforcement in China of being increasingly stringent, in the sense that companies in the same group may be repeatedly investigated and imposed with administrative penalties by antitrust authorities for their monopolistic conducts of all sorts, and strengthen the observation that the pharmaceutical industry has long been a key area of antitrust enforcement.

- On April 27, 2023, the SAMR released an administrative penalty issued by Shandong Administration for Market Regulation (the "**Shandong AMR**") on Rizhao Water Group Water Supply Co., Ltd. (**Rizhao Water**) for its abuse of dominant market position. In this case, Rizhao Water is the only public water supply company in main urban area of Rizhao City, thereby having a dominance in the public water supply market in main urban area of Rizhao City. In the process of renovating water facilities in residential areas and establishing new households for direct drinking water dispensers, Rizhao Water charged the operators of direct drinking water dispensers for pipeline access, renovation and construction of water meter wells, which should have been borne by Rizhao Water itself, on the pretext that direct drinking water dispensers are business facilities and the water shouldn't be regarded as residential water. During the investigation, Rizhao Water has refunded all the fees charged to the payers and has stopped charging pipeline access fees for access to the direct drinking water dispensers. On these accounts, the Shandong AMR determined that Rizhao Water's conducts had constituted the abuse of market dominance by attaching unreasonable conditions to transactions, and accordingly ordered it to cease illegal conducts and imposed a fine of 1% of its annual sales in 2020, approximately RMB 2.18 million.

- On April 20, 2023, the SPC held a press conference^[8] at which the spokesperson said that since the establishment of the Intellectual Property Tribunal of the SPC, 156 monopoly cases were accepted, and in 2022, 47 new monopoly cases of second instance were received, 57 cases were concluded. In respect of cases concluded in 2022, the following types of cases were more often seen: (1) cases involving the exercise of intellectual property rights; (2) cases concerning people's livelihood; and (3) cases involving the convergence and standardization of administrative enforcement and judicial procedures.
- On March 16, 2023, Beijing Intellectual Property Court made a ruling on the dispute over anti-unfair competition behaviors between Beijing Chuangrui Culture Media Co., Ltd. ("**Chuangrui**") and Beijing Weibo Shijie Technology Co., Ltd. ("**Weibo**")^[9]. This case is the first unfair competition case in China regarding data collection on short video platform, which clarifies the legal nature and independent economic value of non-original data collection, distinguishes the rights protected by copyright law and the rights and interests protected by anti-unfair competition law, and conferring legal protection to the legitimate rights and interests of short video platform operators in collecting, storing, processing and transmitting data.
 - **Facts:** Chuangrui and Weibo are both short video platform operation service providers. The Douyin App operated by Weibo has considerable popularity in short video market in China. Without consent from Weibo, Chuangrui used technical methods to obtain video files, comments, and users' information from the Douyin App, and provided them to the public through the Shuabao App operated by Chuangrui. Weibo sued Chuangrui claiming that Chuangrui's actions had constituted unfair competition, requiring it to cease the violations, publish a statement eliminating the impacts, and compensate Weibo for economic losses of RMB 40 million.
 - **Key findings and rulings:** (1) The economic value generated by Weibo through short videos on the Douyin App as a whole is different from the economic value generated by its use of single video content. The copyright law protects the costs paid by each internet user to create each short video, not the costs paid by the collector of the short video platform. Weibo has made substantial investments in the accumulation and maintenance of the short videos on Douyin App, and enjoys an important operating interest in the short videos as a whole. If the law does not protect Weibo's interests, it will reduce Weibo's incentives to operate short video platform and even affect the development of short video industry. Therefore, the overall collection of short videos involved in the case has independent commercial value for Weibo. (2) The collection of all short videos, users' information, and users' comments involved constitutes the data collection of the Douyin platform. Through lawful operation, Weibo invested huge manpower, material and financial resources to collect, store, process and transmit the data on Douyin platform. The scale aggregation effect of data collection can bring huge economic benefits to Weibo and form a competitive advantage in the market competition. The competitive interests formed by Weibo based on the collection of non-original data in this case shall be legitimate interests protected by the anti-unfair competition law. (3) Chuangrui by improper means captured and transferred the material contents of the data collection in Douyin, seized the competitive resources of Weibo, weakened Weibo's competitive advantages, harmed consumer welfare, and damaged the order of market competition in the short video industry. The damages caused by the actions complained of were far greater than the benefits obtained by consumers and the public. Thus, Chuangrui's actions violate the principle of honesty and the business ethics, therefore constitute behaviors of unfair competition. The court consequently ruled that: Chuangrui should publish a statement to eliminate the impacts for Weibo regarding the unfair competition actions, and compensate Weibo's economic losses with RMB 5 million.



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