China Antitrust Update (March-April, 2022)

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From March to April 2022, strengthening the anti-trust supervision in key industries and improving the legal system for fair competition continues to be one of the focuses in the legislation and policy-making area in China. It is worth noted that references on the regulatory policy on the platform economy has been adjusted and it would promote the healthy development of platform economy and promulgate specific measures thereof. In the law enforcement area, the State Administration for Market Regulation ("**SAMR**") has reviewed more than 100 cases and imposed administrative penalties on 3 cases of failure to notify and 1 case of cartel agreement, involving industrial sectors of real estate, financial leasing and driving schools respectively. In the judicial area, the Beijing Intellectual Property Court has announced 10 typical cases regarding competition and monopoly; the Supreme Court further clarified the jurisdiction of the courts of first instance on monopoly disputes, and made the second-instance judgment on the accused abuse of market dominance by the China Audio-Video Copyright Association, which has important guiding significance on the identification of the operators regulated by *the Anti-monopoly Law*, as well as the aspects to be considered for the identification of refusal to trade and imposing unreasonable trading conditions. In the meantime, the Supreme Court also released the judicial interpretation of the Anti-unfair Competition Law, which reflects the new supervision trend on the internet unfair competition activities.

Legislation and Policy Area

- On April 29, 2022, the Political Bureau of the CPC Central Committee held a meeting to emphasize the need to promote the healthy development of the platform economy, complete special rectification of the platform economy, implement regular supervision, and to introduce and promulgate specific measures to support the standardized and healthy development of the platform economy.

- On April 26, 2022, SAMR released its legislative work plan for 2022. *"Provisions of the State Council on the Thresholds for Prior Notification of Concentrations of Undertakings", "Provisions on the Administrative Punishment of Price-related Violations", "the Anti-unfair Competition Law", "Interim Provisions on the Prohibition of Monopoly Agreements", "Interim Provisions on the Prohibition of Abuse of Dominant Market Position", "Provisions on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition", "Interim Provisions on the Review of Concentrations of Undertakings", "Interim Provisions on Prohibiting the Acts of Eliminating or Restricting Competition by Abuse of Administrative Power", and "Measures for the Determination of Illegal Gains in Administrative Penalties by Administrations for Market Regulation"* are required to submit drafts and related materials for deliberation before June 30, 2022 and try to submit them for review at SAMR's meetings by the end of this year.

- On April 26, 2022, at the press conference held by the State Council Information Office, Gan Lin, the deputy director of the SAMR and director of the State Anti-monopoly Bureau, stated that the amendment to *the Anti-monopoly Law* has been placed on the revision agenda of the National People's Congress this year and is expected to be promulgated this year.

- On April 25, 2022, the SAMR issued a news release, announcing the proposed launch of an anti-unfair competition special project law enforcement action in 2022 to crack down fake products, "word of mouth" marketing, commercial bribery, "choose one from two" conducts and other unfair competition behaviors in order to maintain fair competition order and to promote the construction of a national unified market. Such action highlighted the following 5 aspects:

  ◎ Highlighted fields: The action will focus on the competition order in the fields regarding people's livelihood and new forms of consumption, important commodity and factor market, and the new economy, etc.

  ◎ Highlighted industries: The action will focus on irregularities in industries such as early education, intermediary agents, third-party evaluation, medical cosmetology and hair transplantation, etc.

◎ Highlighted groups: The action will focus on the protection of the legitimate rights and interests of the elderly, teenagers, women, etc.

◎ Highlighted areas: The action will focus on rural areas, urban-rural junctions, areas around medical institutions, schools, cultural and entertainment venues and other areas with frequent occurrence of violations.

◎ Highlighted products: The action will focus on important products like "healthcare" products, agricultural products and epidemic prevention products, etc.

- On March 25, 2022, the NDRC and the Ministry of Commerce have issued the *2022 Market Access Negative List*, emphasizing: (i) strictly implementing the management requirement of "one list nationwide"; (ii) effectively fulfilling the regulatory responsibilities of the government, strengthening anti-monopoly regulations, preventing the unregulated expansion, wild growth and illegal speculation of capital from impacting the order of economic and social development; (iii) establishing a system for collection and notification of cases regarding the violation of market access negative list, notifying typical cases regarding the violation of market access negative list on a quarterly basis, and incorporating the relevant information in the dynamic monitoring of the credit status of cities nationwide and publishing to the public on the NDRC website and the website of "Credit China".

- On March 25, 2022, the CPC Central Committee and the State Council promulgated the *Opinions on Accelerating the Development of a National Unified Market* (the "Opinions"). As an important measure to maintain fair competition within the national unified market, the Opinions put forward the following requirements on the supervision and regulatory of anti-monopoly:

◎ With respect to legislation, efforts shall be made to improve the system of anti-monopoly laws and rules, accelerate the amendments to *the Anti-monopoly Law* and *the Anti-unfair Competition Law*, and improve the fair competition review system, so as to maintain a unified fair competition system.

◎ With respect to specific measures on preventing anti-monopoly risks: (i) the judiciary and law enforcement of anti-monopoly and anti-unfair competition shall be strengthened and improved, obstacles in systems and mechanisms that hinder the market-oriented allocation of various production factors and the circulation of commodities and services shall be removed, and institutional deal costs shall be reduced in order to lower market deal costs; (ii) comprehensive law enforcement capability construction for maintaining a unified market should be promoted, and the law enforcement force for anti-monopoly and anti-unfair competition should be strengthened; (iii) anti-trust law enforcement in key industries shall be strengthened, including data monopoly of platform enterprises, strengthening the merger control review in fields such as finance, media, science and technology, and people's livelihood, as well as those involving start-ups, new business forms, and labor-intensive industries, and strengthening the supervision on network-based natural monopoly such as power grids and oil and gas pipeline networks.

- On March 17, 2022, the anti-monopoly work conference of the national market supervision system, held by video, comprehensively summarized the anti-monopoly work in 2021 and deployed key tasks in 2022. According to the conference, the focus of anti-monopoly work in 2022 mainly includes: (i) improving the legalization level of anti-monopoly, enhancing market expectations and confidence, focusing on improving the legal system regime of fair competition and enhancing the fair competition governance capability; (ii) stabilizing the macro-economy and safeguarding the well-being of the people, focusing on strengthening anti-monopoly regulation and law enforcement in key areas, etc.

- On March 1, 2022, the Supreme People's Procuratorate issued the *Opinions on Comprehensively Strengthening the Procuratorial Work for*

Intellectual Property Rights in the New Era, putting forward that (i) efforts should be made to strengthen the study of administrative law enforcement issues regarding the anti-unfair competition, anti-monopoly and the crackdown on malicious trademark registration, etc., and the relevant case clues discovered in the performance of duties shall be timely sent to the law enforcement departments, so as to promote the market order and protect fair competition; (ii) efforts should be made to actively promote the revision and improvement of laws and regulations on intellectual property rights, strengthen the research on the legal system regulating the abuse of intellectual property rights, and promote and improve the legislation in anti-monopoly, anti-unfair competition and other areas related to intellectual property rights.

Enforcement Area

- **Merger Control Review**

◎ **Non-conditional Clearance:** In March and April of 2022[1], 98 cases were cleared without conditions by the SAMR, involving industries of general warehouse, industrial real estate, industrial parks, property, medicine, aviation, semiconductor, finance, food, new energy, automobile, manufacturing, environmental protection, advertisement, sports, clothing, racing, intelligent traffic, etc.

◎ **Gun-jumping:** In March and April of 2022, the SAMR imposed administrative penalties on 3 case of failure to notify, involving industries of real estate and financial leasing[2]. No antitrust review was pre-notified regarding these 3 cases, however, none of them has the effect of eliminating or restricting competition, thus the SAMR imposed fines ranging from RMB 300,000 to RMB 400,000 on the enterprises involved.

- **Cartel Agreements and Abuse of Market Dominance**

◎ **Cartel Agreements:** On March 18, 2022, the SAMR announced the administrative penalty decision issued by the Yunnan Administration for Market Regulation on 4 driving training schools in Yunnan Dayao County for their cartel agreements. In this case, 4 parties concerned entered into the Dayao County Motor Vehicle Driving Training Self-discipline Convention based on joint research and discussions, which stipulated a unified minimum charging fee for motor vehicle driving training. After meetings with the relevant authorities, the parties made rectifications on their own and terminated the unified charging. The Yunnan Administration for Market Regulation held that price fixing is a serious anti-competition practice that has the consequence of eliminating or restricting competition, and ordered the parties to stop the illegal activities and imposed a fine of 3% of their sales in 2020, ranging from RMB 40,000 to RMB 190,000.

Judicial Area

- On April 22, 2022, the Supreme People's Court (the **Supreme Court**") promulgated the *Several Provisions of the Supreme People's Court on Jurisdiction of Intellectual Property-Related Civil and Administrative Cases of First Instance* (SPC Interpretation [2022] No. 13), effective as of May 1, 2022, clarifying that "the first instance civil and administrative cases involving monopoly disputes shall be under the jurisdiction of Intellectual Property courts, the intermediate people's courts at the places where the people's government of the province, autonomous region or municipality directly under the Central Government are located, and the intermediate people's courts determined by the Supreme People's Court."

- On March 16, 2022, the Supreme People's Court issued the *Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Anti-unfair Competition Law of the People's Republic of China* (SPC Interpretation No. 9 [2022]), which will be implemented on March 20, 2022 (the "**New Anti-Competition Law**

Interpretation"). Before the enactment of the *New Anti-Competition Law Interpretation*, the Supreme Court issued a draft of it for public comments on August 18, 2021 (the "**Draft Interpretation**").

The regulation of new types of unfair competition conducts in the Internet sector relies primarily on Article 2 of *the Anti-unfair Competition Law* (the "**AUCL**"), which states that "business operators shall follow the principles of voluntariness, equality, fairness, and good faith, abide by laws and business ethics ..."[3], and Article 12 of the same (also known as the "Internet-Specific Article"), stating that "operators shall not engage in activities that impede or disrupt the normal operation of online products or services legally provided by other business operators by taking advantage of technical means to influence users' choices or otherwise..."[4]. The interpretations of the above provisions in the New Anti-Competition Law Interpretation reflect a new trend in regulating unfair competition conducts in the Internet sector. As such, the major revisions made under the New Anti-Competition Law Interpretation are as follows:

◎ It affirmed that Article 2 of the AUCL can be applicable as a general catch-all provision. In other words, Article 2 of the AUCL can be applied to regulate the unfair competition activities that fall out of Chapter 2 (unfair competition) of the AUCL and other Intellectual Property laws;

◎ It clarified the criteria for determining competitive relationships among operators, which not only include competing in the same market but also relationships like competing for trade opportunities, diminishing competitive advantages, etc.;

◎ It provided guidance for determining "business ethics" that operators shall abide by, incorporating industry norms into the business ethics system, while leaving room for judges to determine business ethics by discretion;

◎ It refined the specific rules applicable to the Internet-Specific Article on traffic hijacking and interference, and also emphasized users' right to know and right to choose; It deleted from the Draft Interpretation the interpretation on malicious incompatibility, interpretation to the catch-all provision in the Internet-Specific Article, and the article regarding data crawling.

- On March 16, 2022, Beijing Intellectual Property Court held a press conference, announcing ten typical monopoly cases heard by the court, and releasing information about its newly established Competition-Monopoly Committee of the Professional Judges Conference and specialized competition law trial team.

  ◎ The ten typical cases mainly include the following anti-monopoly cases related to the abuse of dominant market position: the case of China Audio-Video Copyright Association ((2018) BJ 73 Civil First No. 1527), the case of Motorola ((2017) BJ 73 Civil First No. 1671), and the case of China National Petroleum Corporation ((2017) BJ 73 Civil First No. 1788).

  ◎ The Competition-Monopoly Committee was newly established in the court-level professional judges conference system to improve the level of the specialized trial of competition-monopoly cases from five aspects, i.e., the proper trial of competition-monopoly civil cases, effective trial of competition-monopoly administrative cases, strengthening the training of trial talents for competition-monopoly cases, conducting further investigation and research on competition-monopoly matters, and exploring the trial mechanism for foreign-related competition-monopoly cases.

  ◎ In recent years, the number of competition-monopoly cases accepted by the Beijing Intellectual Property Court has increased significantly, the fields and industries involved have expanded yearly, and the types of cases have become increasingly comprehensive. Among which, 184 competition-monopoly cases were accepted in the year 2020, while the number becomes 306 in 2021, witnessing an increase of nearly 66%. It is expected that the number of accepted competition-monopoly cases will exceed 500 in the year 2022. The accepted cases involve traditional industries such as manufacturing and service industries, as well as important fields such as information security and people's livelihood security. Also, more and more cases implicate new fields, new business types, and new models such as technological innovation and the digital economy.

- In the Jiazhou Red Bar/ CAVCA case, the Supreme Court determined that CAVCA is an "operator" under the Anti-Monopoly Law, possessing a dominant market position, but ruled against its accused abuse of dominance. In March 2022, the Supreme Court made a judgment on this case, rejecting the appeal filed by Jiazhou Red Bar and upholding the original judgment.

◎ In 2018, Jiazhou Red Bar in Nansha District, Guangzhou City (the "**Jiazhou Red Bar**") filed a lawsuit against the China Audio-Video Copyright Association (the "**CAVCA**"). The first instance and second instance cases were heard by Beijing Intellectual Property Court and the Supreme Court, respectively. Jiazhou Red Bar mainly claimed that the CAVCA had abused its dominant market position through conducts like exclusive dealing (requiring it to sign a contract with Tianhe which is delegated by CAVCA; while at the second instance trial, it changed the claim to refusal to deal), and imposing unreasonable trade conditions (requiring it to pay the licensing fee for the two years preceding the signing of contract), etc.

◎ The court of the first instance made it clear that copyright collective management organizations are identified as operators under *the Anti-Monopoly Law* and based on the uniqueness and importance of collective management organizations, the court affirmed that CAVCA has a dominant market position in the market of licensed use of film works or audio-visual products in KTV operations in Mainland China. However, the court also ruled that CAVCA did not commit monopolistic conducts of abusing its dominant market position.

◎ The Supreme Court's ruling that CAVCA did not commit any act of refusal to deal was mainly based on the assessment of whether the transaction conditions proposed by both parties respectively were reasonable and whether the reasonable conditions were satisfied by the counterparty. The Supreme Court determined that the main reason for the parties' failure to conclude the contract was not because CAVCA failed to meet the reasonable conditions proposed by Jiazhou Red Bar. Therefore, the CAVCA did not commit the conduct of refusal to deal.

◎ The Supreme Court held that CAVCA did not impose unreasonable trade conditions. CAVCA had the right, on behalf of the copyright holders, to require a KTV operator (Jiazhou Red Bar), who had used their collectively managed copyrights without authorization, to retroactively pay the licensing fee for the two years preceding the signing of the contract, and CAVCA did not give differential treatment in collecting such fee. Therefore, the CAVCA did not impose any unreasonable trade conditions.

- The Supreme Court, in its ruling on the Xin Niu/Yili Group case, determined that an arbitration clause in a disputed monopoly agreement case does not exclude the jurisdiction of courts per se. In February of 2022, the Supreme Court made a judgment on this case, which embodies the most recent position of the Supreme Court on whether a monopoly agreement case is arbitrable, i.e. the court denied the arbitrability of monopoly disputes and reversed the decisions in Shell case in 2020 which affirmed the arbitrability of monopoly disputes. The Supreme Court based its reasons on: contract law and the anti-monopoly law have different legislative purposes, the anti-monopoly law has distinct characteristics of public law, and the judgment of monopolistic conduct goes far beyond the rights and obligations between contract counterparties, etc. To conclude, the Supreme Court and courts of different levels hold somewhat different positions on the arbitrability of monopolistic disputes. As such, please refer to Haiwen's previous article on "Discuss on the arbitrability of monopolistic disputes from the Xin Niu/Yili Group case"[5] for related interpretations.

1. Relevant information is as of April 25, 2022 and is calculated on the date when the case was closed. “April” hereinafter shall mean “as of April 25”.

2. Specific cases are (i) the acquisition of the equity interest in Guangri Ltd. by AGRE Asia Link Operating Platform Limited (Guoshijian Penalty [2022] No. 3); (ii) the acquisition of the equity interest in Weixun Limited by Apollo Asia Real Estate Management, LLC (Guoshijian Penalty [2022] No. 4); (iii) the acquisition of the equity interest in Zhejiang Wisdom Puhua Finance Co. by BNP Paribas Personal Finance (Guoshijian Penalty [2022] No. 5).

3. Article 2 Business operators shall follow the principles of voluntariness, equality, fairness, and good faith, abide by laws and business ethics when carrying out production or business activities.

For the purpose of the Law, unfair competition refers to any activity conducted by a business operator in its production or business activities, in violation of the provisions hereof, to disrupt the competition order in the market and infringe upon the legitimate rights and interests of other business operators or consumers.

For the purpose of the Law, a business operator refers to a natural or legal person or any other unincorporated organization engaged in the manufacturing or trading of commodities, or providing services ("commodities" referred to hereinafter include services).

4. Article 12 Business operators that engage in production and business activities making use of the cyber network shall abide by all the provisions hereof.

A business operator shall not engage in any of the following activities that impede or disrupt the normal operation of online products or services legally provided by another business operator by taking advantage of technical means to influence users’ choices or otherwise:

(1) Inserting a link into an online product or service legally provided by another business operator to compel a destination jump without the approval of such business operator;

(2) Misleading, deceiving or compelling users into modifying, closing, or uninstalling an online product or service legally provided by another business operator;

(3) Implementing in bad faith an incompatibility with an online product or service legally provided by another business operator; or

(4) Any other activity that impedes or disrupts the normal operation of online products or services legally provided by another business operator.

5. Please refer to: https://mp.weixin.qq.com/s/jK87A-R_yxX6bu50tNta-Q.

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