

China Antitrust Update (Jan-Feb, 2024)

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From January to February 2024^[1], **in legislation and policy-making area**, the State Council issued *the State Council on the Standard for Declaration of Concentration of Business Operators*, the State Administration for Market Regulation (“SAMR”) released *the Notice on Improving the Anti-Monopoly Compliance Risk Warning Mechanism for Concentration of Undertakings*, *the Guidance Handbook for Anti-monopoly Notification of Concentration of Undertakings*, and introduced the concepts and plans for future work with respect to anti-monopoly and unfair competition. The General Office of the Anti-Monopoly and Anti-Unfair Competition Commission of the State Council (“Anti-Monopoly Commission”) issued *the Antitrust Guidelines on Industry Associations*. **In law enforcement area**, the SAMR approved 103 merger cases without conditions, implicating industrial sectors of energy, automobile, pharmaceuticals, private equity fund, food and materials, etc. The SAMR published the decisions for two administrative penalties on monopoly agreements. **In judicial area**, the Supreme People’s Court (“SPC”) overturned the first instance judgement rendered by the Ningbo Intermediate People’s Court’s for the case of four rare earth enterprises in Ningbo against Hitachi Metals, Ltd. for its abuse of market dominance, dismissing all claims brought by the four plaintiffs. This is the first monopoly case in China involving refusal to license patents that are not standard-essential.

Legislation and Policy Area

- On January 12, 2024, the Anti-Monopoly Commission issued *the Antitrust Guidelines on Industry Associations*^[1], elaborating on specific circumstances under which industry associations may violate *the Anti-Monopoly Law* (“AML”), enumerating high-risk behaviors that industry associations should avoid, guiding industry associations in strengthening antitrust compliance, and clarifying the factors to be considered in determining whether an industry association has engaged in monopolistic practices and specific legal liabilities.
- On January 26, 2024, *the State Council on the Standard for Declaration of Concentration of Business Operators* (“the Provisions”) was issued by the State Council and came into effect^[3]. The Provisions increase the turnover thresholds for notifiable concentration of undertakings, emphasize on the powers of anti-monopoly enforcement authorities to initiate investigation, and clarify that the anti-monopoly law enforcement authority of the State Council shall evaluate how well the new notification standards are implemented based on economic development. For more on the Provisions, please see [Haiwen Alert: 2023 China Antitrust Year in Review](#).
- On January 31, 2024, the SAMR published *the Notice on Improving the Anti-Monopoly Compliance Risk Warning Mechanism for Concentration of Undertakings*^[4], providing that local AMRs should further improve risk alert mechanisms and provide more sample scenarios related to notification requirements for the concentration of undertakings; **key operators should be bettered guided to establish compliance management systems in line with the Anti-monopoly Compliance Guidelines for Concentration of Undertakings, to strengthen internal control and prevention, and to improve compliance capabilities**; data integration, coordinated action, and inter-departmental communication of governments shall be strengthened, including to proactively communicate with relevant departments and industry associations related to the concentration of undertakings; key business entities and key industry sectors shall be screened out as focus, and anti-monopoly compliance risk alerts for concentration of undertakings shall be moved ahead to early stages.
- On January 31, 2024, the SAMR released *the Guidance Handbook for Anti-monopoly Notification of Concentration of Undertakings*^[5], which explains the concept of concentration of undertakings, the thresholds, time and manner of notifications, the method of determining the undertakings involved in the concentration and their turnovers, and main factors to be considered in the review of concentrations.
- On January 31, 2024, the State Council Information Office held a press conference^[6], where the director of the Second Department of Anti-monopoly Enforcement of the SAMR proclaimed that the SAMR will steadily promote normalized supervision covering ex ante compliance,

interim review, and ex post accountability. It was stressed that the SAMR shall promote fulfillment of enterprises' compliance responsibilities before regulatory review, and center on review services and enhance the quality and efficiency of the review during the review. At the conference, the internal working requirements of "double twenty" for simplified cases were explicitly brought up (i.e., in principle, no more than 20 days from the notification to formal acceptance of the case, and no more than 20 days from the formal acceptance of the case to the case closing). After the review, the focus should be on deterrence effect of law enforcement and enhanced accountability. The SAMR is studying to draft the benchmarks for discretionary administrative penalties for illegal concentrations of undertakings, as well as the *Working Rules for Handling Cases of Concentration of Undertakings that Do Not Meet the Notification Thresholds but Have or May Have the Effect of Excluding or Restricting Competition*, and will strengthen the supervision and regulation on illegal concentration of undertakings (including "killer-acquisitions").

- On February 1, 2024, the SAMR held a conference on price supervision and inspection, anti-unfair competition, i.e. the deployment meeting of relevant enforcement actions. It was noted at the conference that, market supervision departments at all levels investigated and closed 12,496 cases of various types of unfair competition in 2023, and imposed fines amounting to RMB 582 million. It was emphasized that relevant authorities should enhance level of price supervision and inspection and anti-unfair competition in 2024, [strengthen market price supervision](#), carry out price monitoring and oversee primary products, enhance the price enforcement and inspection in the field of education, medicines and other industries related to livelihoods, and implement normalized oversight on network platform charges. Authorities should also [increase the strength of the supervision and law enforcement of anti-unfair competition](#), [investigate unfair competition in industries relevant to people's livelihoods, such as relating to "the old and the young", medical cosmetology and consumer goods pursuant to laws and regulations](#), [make more efforts to combat unfair competition on the Internet](#), and promote the protection of trade secrets to safeguard the legitimate rights and interests of enterprises.[7]
- On February 5, the State Council Information Office held a policy briefing, at which, a spokesman for the SAMR said that the SAMR will continue to rectify undue competition and market intervention, [promote the issuance of the Regulations on Fair Competition Review](#), and carry out in-depth special operations rectifying market segmentation and local protection; focus on crucial industries closely related to the people's lives, such as medicine, education and public utilities, and intensively investigate and review a number of major and typical cases of monopoly violation; it will also refine and elaborate the system and rules of anti-monopoly and anti-unfair competition, [promote the revision of the Anti-monopoly Compliance Guidelines for Undertakings](#), study to formulate anti-monopoly guidelines such as [the Anti-monopoly Guidelines in the Field of Pharmaceuticals, the Guidelines for Reviewing Horizontal Concentration of Undertakings](#), and accelerate the formulation of [the Regulatory Norms of Fair Competition Compliance for Undertakings](#).[8]
- On February 18, 2024, the SAMR published *the Notice on the Issuing Project of the 2023 Market Supervision Industry Standard Formulation*[9], stating that the Second Department of Anti-monopoly Enforcement of the SAMR plans to formulate an industry standard entitled *Technical Specification for Anti-monopoly Review of Concentration of Undertakings*.
- On February 22, 2024, the State Council Information Office held a conference.[10] At the conference, the spokesman for the SPC said that the SPC is speeding up to formulate and will soon publish [a judicial interpretation of anti-monopoly civil litigation](#), which will consist of about 50 articles covering various aspects of anti-monopoly civil litigation, including procedures of anti-monopoly civil litigation, definition of relevant markets, identification of monopoly agreements and abuse of dominant market position, as well as relevant civil liabilities, etc.

Enforcement Area

• **Merger Review**

- **Non-conditional Clearance:** From January to February 2024, 103 cases were cleared without condition by the SAMR (a year-on-year decrease of 11.21% compared with that from January to February 2023, and a month-on-month decrease of 41.81% compared with that from November to December 2023), implicating industrial sectors of energy, automobile, pharmaceuticals, private equity fund, food and materials, etc.

• **Monopoly Agreements**

- On January 12, 2024, the SAMR published an administrative penalty against Jiaozuo Used Car Dealers Association (the “[Association](#)”) for organizing undertakings in the used car trade market to enter into and implement a monopoly agreement.^[11] In this case, the 18 used car trade market companies in Jiaozuo city, [organized by the Association, reached an agreement to charge similar published fees for used car transaction services, agreed on the basis for calculating the monthly sales of each company and divided the sales market by “handing in for high price and compensation for low price” and controlling the number of invoices issued.](#) To ensure the agreement was carried out smoothly, the Association [monitored the price implementation and actual invoicing of each company through methods such like collecting deposits, conducting on-site inspections, and comparing tax records, etc.](#) Association also used a [specific formula to calculate the monthly sales for each company and redistributed the revenue in cash or through WeChat and personal bank transfers, etc.](#) Based on these facts, the Henan Administration for Market Regulation determined that the conducts of the Association constitute organizing competitors in the industry to engage in a monopoly agreement made through an industry association, ordered it to cease its unlawful act, and imposed on the Association a fine of RMB 300 thousand; that the conducts of 18 used car trade market companies constitute a monopoly agreement to fix the or change commodity prices and divide up the sales market. These 28 companies were ordered to cease unlawful act, most of them were imposed a fine of 2% or 3% of their respective turnover in 2021, while two newly opened companies with incomplete financial data in 2021 were fined RMB 3,000 each, totaling approximately RMB 988.7 thousand.
- On January 24, 2023, the SAMR published an administrative penalty against 11 local brick manufacturers in Yanshan County, Yunnan Province, for entering into and implementing a monopoly agreement.^[12] In this case, the Yanshan Brick Manufacturing Association (the “[Brick Association](#)”) held a meeting in April 2018, during which the member units jointly adopted a decision to [impose a fine on those who are not selling at the price set by the Brick Association, and to block their road for a week.](#) In May 2018, the Brick Association held another meeting with the member units, [set the minimum brick price, decided the detailed amount of the fine on manufacturers not following the set prices, and adopted an undercover inspection mechanism.](#) In order to strengthen the oversight on brick prices, in September 2018, the Brick Association convened the units to unanimously pass the decisions it made in the previous two meetings, and [set up a price inspection team led by the Association to supervise the implementation of the minimum brick price.](#) In July 2019, the heads of the brick manufacturers held another meeting to formulate the latest minimum brick price. As of the date of the investigation, the concerned brick manufacturers had been selling bricks in accordance with the minimum price standard decided at the Brick Association’s meeting. Based on these facts, Yunnan Administration for Market Regulation determined that the conducts of 11 local brick manufacturers constitute a monopoly agreement to fix the or change commodity prices, and ordered the concerned parties to cease their unlawful act, and imposed on 11 local brick manufacturers each a fine of 3% of their turnover in 2019, totaling approximately RMB 686.3 thousand.

Judicial Area

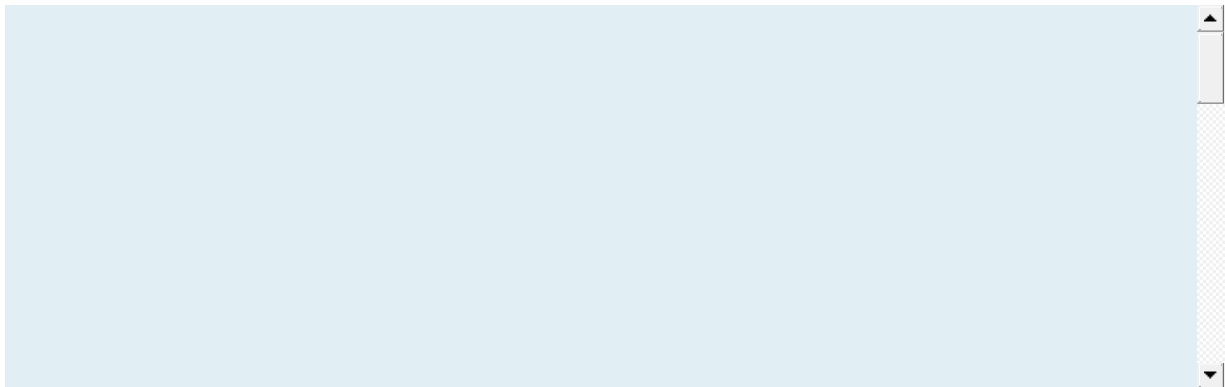
- On January 23, 2024, Proterial, Ltd. (formerly known as Hitachi Metals, Ltd. “[Proterial](#)”) released a statement on its official website stating that the Supreme Court has rejected the Ningbo Intermediate People’s Court’s first-instance judgment in 2021, and ruled that Proterial’s conduct does not constitute an abuse of market dominance by refusal to deal.^[13] This is the first monopoly case in China involving refusal to license patents that are not standard essential patents.^[14]
- **Facts:** This case involves patents related to “sintered NdFeB magnets”. In 2014, Proterial refused to license its sintered NdFeB magnets patents to Ningbo Ketian Magnet Co., Ltd., Ningbo Permanent Magnetics Co., Ltd., Ningbo Tongchuang Strong Magnet Material Co., Ltd. and Ningbo Huahui Magnetic Industry Co., Ltd. (collectively, the “[Plaintiffs](#)”). The Plaintiffs filed a lawsuit against Proterial, alleging that Proterial’s conduct violated the AML.

In April 2021, the Ningbo Intermediate People’s Court ruled in its first-instance judgment that the concerned relevant product market shall be defined as “the licensing market of the sintered NdFeB essential patents held by Proterial”, and therefore Proterial, as the sole patentee in such hypothetical market, owns all market shares. As such, it was held that Proterial’s refusal to license the patent to the Plaintiffs constitutes an abuse of market dominance by refusal to deal, and it was ordered that Proterial pay a total of RMB 14.3 million in damages and is enjoined from refusing to license the patent. Proterial appealed to the Supreme Court against the judgment of the first instance.

- **Key findings and rulings**[15]: The Supreme Court ruled in the judgment of the second instance that [the concerned relevant product market should be defined as the market for production technology of sintered NdFeB material, and that the definition of the relevant product market in the judgment of the first instance lacks factual and legal basis](#). The Plaintiffs did not provide evidence to prove Proterial's dominance in the relevant market, so that their claim that Proterial should bear civil liability for abusing its market dominance was not established. More specifically.

(1) With respect to the relevant product market definition, [the Plaintiffs claimed that Proterial's sintered NdFeB patents are irreplaceable and therefore constitutes an independent relevant market, which is inconsistent with the reality of actual production and sales of sintered NdFeB and the disclosure of the relevant technological development. The Plaintiffs failed to provide sufficient evidence on how and why Proterial's patents were technologically insubstitutable](#). In terms of patent layout and use, companies producing and selling sintered NdFeB without having obtained Proterial's license have never been blocked by Proterial by fact, and no law enforcement or any judicial authorities have substantively determined that such companies have infringed on Proterial's relevant patents. In addition, the Plaintiffs' claim that Proterial's patented technology is "essential patents" is contradicted with their other position that the production of sintered NdFeB does not constitute patent infringement.

(2) With respect to the determination of the market dominance, [where there are multiple competing technologies in the market for the relevant technology, the market shares of the downstream products implementing such technology tend to be more accurate and convenient to reflect the market of such technology and the market position of the competitors who own the technology](#). In light of the insignificant market share of Proterial and the companies who are licensed to implement Proterial's patents, it is difficult for them to control the trading conditions of the relevant market. As such, the evidence submitted in this case was insufficient to prove that Proterial's patents are technologically insubstitutable, rather, it showed that Proterial's patents are technologically substitutable and technologically difficult to deter other competitors developing similar technologies or producing similar goods entering the relevant market. Therefore, the Plaintiff's claim that Proterial's patents are commercially insubstitutable is not established, and Proterial does not have market dominance in the global market for sintered NdFeB material production technology.



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