

China Antitrust Update (January-February, 2022)

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From January to February 2022, strengthening the platform economy supervision and antitrust continues to be one of the focuses in the legislation and policy-making area in China. In the enforcement area, it is worth noting that two global transactions involving semi-conductor sectors have obtained PRC merger control clearance with conditions, which have reflected that China, similar to the authorities in other jurisdictions, has become more prudent and stricter over merger control review in high-tech sectors. In the enforcement area, it is worthy to note that, an administrative penalty was imposed on the local arm of Geistlich Pharm over its resale price maintenance by Beijing's market regulator, which shows that the pharmaceutical and medical industry and RPM may continue to be the focus of antitrust enforcement. In judicial area, there are three representative cases come into view, i.e., the first monopoly agreement case involving "Reverse Payment", the first anti-unfair competition case involving a manual clicking farming platform interfering with the search engine algorithms, and the first case reflecting the Supreme People's Court's position on the validity of the contractual terms in violation of the Anti-Monopoly Law. The ruling approach, position and the judgement of these cases will have profound influences over the compliance assessment of relevant business model in China.

Legislation and Policy Area

- On January 19, 2022, nine central government departments including the NDRC, the State Administration for Market Regulation, the Office of the Central Cyberspace Affairs Commission, the Ministry of Industry and Information Technology, etc. jointly issued the *Several Opinions on Promoting and Regulating Healthy and Sustainable Development of Platform Economy* (the "**Opinions**"), proposing relevant opinions on major issues in the field of platform economy. Specifically,
 - With respect to improvement of rules and systems, the Opinions propose to (i) amend the *Anti-Monopoly Law*, formulate and introduce provisions on prohibiting online unfair competition and price-related conduct rules for platform economy; (ii) improve the regulatory rules and system for financial sector, and adhere to the principle that all financial activities must be subject to regulation and financial business must be operated with requisite license; (iii) clarify the scope of responsibilities of platforms and strengthen responsibilities of ultra-large internet platforms; and (iv) enhance cross-department collaboration and **insist on the principle of "integrated online and offline supervision"**, according to which, all the competent regulatory authorities with the supervision function shall undertake the corresponding duties of online supervision while being responsible for offline supervision;
 - With respect to enhancement of supervision ability and level, the Opinions propose to (i) **strengthen full-chain competition regulation and law enforcement in key industries and fields**, and investigate and punish monopoly, unfair competition and other behaviors in the platform economy. Specifically, behaviors such as cartel agreements, abuse of market dominance and gun-jumping in the field of platform economy shall be strictly investigated and punished. Supervision on advertising on platforms especially advertising in key areas should be

strengthened. Crackdown on illegal operation of ridesharing platforms should be intensified. Tax authorities shall strengthen the tax assistance obligations of platform enterprises such as reporting of tax-related information, and strengthen the tax regulation on platform enterprises. Management and supervision on deposit, prepayment and other fees of the platforms shall also be enhanced. (ii) [improve supervision on payment platforms in financial sector](#) to cut the “inappropriate connection” between payment tools and other financial products. The exclusive or “choosing one from two” behaviors in the payment process shall be governed in accordance with the law and the supervision on abuse of market dominance of non-banking payment services shall be strengthened. Regulations on non-banking payment institutions should be studied and promulgated. [Use of platform data shall be regulated, and credit reporting business shall be strictly regulated](#) to ensure compliant operation with licenses in accordance with the law. Regulatory system for financial holding companies should be implemented, with shareholder qualifications being strictly reviewed on look-through basis, and comprehensive risk management and management of affiliated transactions being strengthened. [Investment by platform enterprises in financial institutions and local financial organizations should be strictly regulated](#), and platform enterprises and the financial institutions they invest in should strictly follow the requirements for capital and leverage ratio; (iii) [explore data and algorithm security regulation](#) Authorities will crack down on illegal activities of platform enterprises, such as collecting personal information beyond the scope, accessing personal information beyond authority, etc. Authorities will strictly control unnecessary data collection, and crack down on data abuse activities such as black market data trading, big data discrimination, etc. On the condition of strictly protecting trade secrets such as algorithms, third-party institutions should be supported to perform [algorithm evaluation](#), in order to guide platform enterprises to improve the transparency and interpretability of algorithms, and promote algorithm fairness.

- On 24 January 2022, China Banking and Insurance Regulatory Commission held the 2022 work conference, stressing the need to strictly prevent unregulated expansion of capital in financial sector and strengthen anti-monopoly and anti-unfair competition in financial sector.

- On 27 January 2022, the State Council promulgated the *4th Five-Year Development Plan for Digital Economy*, proposing to adhere to the basic principle of fair, safe and orderly competition, highlight the fundamental role of competition policies, pay equal attention to promoting development and strengthening regulation, improve the collaborative supervision rules and systems, and strengthen anti-monopoly and prevent unregulated expansion of capital.

- On January 27, 2022, the State Council issued the *4th Five-year Plan for the Modernization of Market Supervision*, making an overall plan to promote the modernization of China's market supervision, and putting forward a series of key tasks. With respect to the task of “strengthening the comprehensive management of the market order, and creating a market environment for fair competition”, in particular, the State Council puts forward “comprehensively enhancing the supervision ability of anti-monopoly and anti-unfair competition”, which mainly includes the following 3 aspects: (i) improving anti-monopoly and anti-unfair competition rules, (ii) improving the assessment mechanism of market competition status, and (iii) enhancing the level of competition law enforcement.

Enforcement Area

• Merger Control Review

- **Non-conditional Clearance:** In January and February of 2022, 77 and 39 cases were respectively cleared without conditions by the State Administration for Market Regulation ("SAMR"), involving industries of pharmaceuticals, technology, energy, automobile, logistics, chemical, hotel, material, aviation, machinery, etc.

- **Conditional Clearance:** From January to February 2022, 2 cases were cleared with conditions by the SAMR, both of which involve the semiconductor industry. As an observation, governments throughout the globe are currently strengthening their reviewing efforts over foreign investors' acquisition of their domestic high technology enterprises and are holding a stricter enforcement attitude. More specifically:

- (i) On January 20, 2022, the SAMR cleared, with conditions, [the acquisition of Siltronic's shares by GlobalWafers](#). The review lasted for 12-month, during which the filing was once being withdrawn and then resubmitted due to the expiration of the statutory review period. SAMR, in its decision, held that this transaction might have an exclusive or restrictive effect over the competition of the global and China market of 8-inch float zone wafers, so SAMR conditioned the transaction to both structural and behavioral remedies. The structural remedies include mainly: to divest the globe wafer business within 6 months from the date of decision effectiveness. The behavioral remedies include mainly: to continue supplying all kinds of wafer products to China domestic customers under the principle of Fair, Reasonable and Non-Discriminatory), and to refrain from differentiated treatment to China domestic customers. The stipulated restriction period for the above-mentioned conditions is five years.

- (ii) On January 21, 2022, SAMR cleared, with condition, [the acquisition of Xilinx's shares by Advanced Micro Devices \("AMD" \)](#). The review lasted for 11-month, during which the filing was once being withdrawn and then resubmitted due to the expiration of the statutory review period. SAMR, in its decision, held that this transaction might have exclusive or restrictive effect over the competition of the global and China CPU, CPU accelerator, and FPGA market, so SAMR conditioned the transaction to behavioral restrictions, including mainly: to refrain from tied-up sales in any form and from requiring unreasonable conditions for trading; to promote for further cooperation on top of the existing ones with China domestic enterprises; to continue supplying AMD CPU, AMD GPU, Xilinx FPGA, and related software under the principle of Fair, Reasonable and Non-Discriminatory to China domestic markets; to ensure the flexibility and programmability of Xilinx FPGA; and to sustain the interoperability between the AMD CPU, AMD GPU, Xilinx FPGA products and the third-party CPU, GPU and FPGA products. The stipulated restriction period for the above-mentioned conditions is 6 years.

- **Gun-jumping:** From January to February 2022, the SAMR imposed administrative punishment on 1 case of failure to notify, i.e. [the acquisition of Covanta Europe Assets Limited \("Covanta" \) shares by Munich Reinsurance Company \("Munich Re" \)](#). On July 26, 2019, Munich Re reached a share transfer agreement with DIF Fifth Infrastructure Co. Ltd. ("DIF"), by which Munich Re acquired 15% shares of Covanta together with the right of joint-control. By December 4, 2019, Covanta has finished the registration change for this share transfer, yet no antitrust review was notified before that. A fine of RMB 3,00,000 was imposed on Munich

Re. This case involves multi-national enterprises and the finance industry. Judging from the amount of the fine imposed, a surrender of the case might have been what' s happened.

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

- **Abuse of Market Dominance** From January to February 2022, there was 1 case involving **public water supply services** The Administration for Market Regulation of Anhui Province imposed an administrative penalty on Fengyang Yimin Water Supply Co., Ltd., for its abuse of market dominance. According to the administrative decision, Fengyang Yimin Water Supply Co., Ltd. abused its market dominance (100% share in the relevant market) in the public water supply service in areas such as Fengyang county, etc., by restricting trade and imposing unreasonable transaction conditions, which excluded and restricted competition and damaged the legitimate rights and interests of the transaction counterparties. Fengyang Yimin Water Supply Co., Ltd. was ordered to stop its illegal behaviors and to return relevant deposits of RMB781,700, was confiscated illegal gains of approximately RMB1.41 million, and imposed a fine of 4% of its annual sales in 2020 in the amount of approximately RMB1.62 million.

- **Cartel Agreements:** From January to February 2022, there was 1 case involving **pharmaceutical and medical industry** The Administration for Market Regulation of Beijing ("**BJ AMR**") imposed an administrative penalty on Geistlich Trading (Beijing) Co., Ltd. ("**Geistlich Beijing**" , a local arm of Geistlich Pharma, a Swiss pharma company), for its conclusion and implementation of vertical monopoly agreements. According to the administrative decision, from 2008-2020, Geistlich Beijing reached and implemented resale price maintenance ("**RPM**") to its trading counterparts within the territories throughout the country where its sales business has been carried out, which excluded and restricted market competition and damaged the public interest and consumers. Geistlich Beijing was ordered to stop its illegal behaviors and imposed a fine of 3% of its annual sales in 2020 in the amount of approximately RMB 9.12 million. As one of the facts examined by BJ AMR and considerations for BJ AMR' s determination of administrative penalties, it is mentioned in the administrative decision that, (i) the products involved in the case sold by the Geistlich Beijing belong to the national Class III medical apparatus and instruments and need the approval of the State Food and Drug Administration; (ii) the market entry for such products is very high, and the sales volume and sales volume of such products are leading in the industry. (iii) therefore, Geistlich Beijing and its products involved in the cases have a certain advantage position in the industry and the distributors have certain dependency on rely on Geistlich Beijing and its products involved in the cases. The director of Administration for Market Regulation of Beijing, once mentioned in an interview in early 2022 that they are investigating three monopoly cases in pharmaceuticals industry. Geistlich Trading (Beijing) Co., Ltd. Seems to be one of the pharmaceutical and medical industry and RPM may continue to be the focus of anti-monopoly enforcement.

Judicial Area

- On January 14, 2022, the Supreme People' s Court (**SPC**") promulgated the *Guiding Opinions on Giving Full Play to the Judicial Role in Facilitating the Development of Micro, Small and Medium-sized Enterprises*, providing to protect the survival and development space of micro, small and medium-sized enterprises, to try anti-monopoly and anti-unfair competition cases in a fair and

efficient manner, to severely punish illegal behaviors such as “choosing one from two”, dumping, forced tied-up sale, blocking, and fake orders and reviews. Efforts shall be made to identify the abuse of data, algorithms, technology, capital advantages and platform rules, etc. by operators to exclude or restrict competition according to the law, in order to prevent the unregulated expansion of capital and protect the survival and development space of micro, small and medium-sized enterprises.

- On January 27, 2022, the SPC published its reply to Proposal No.6544 of the fourth meeting of the 13th National People’s Congress: *Proposal on Strengthening Internet Antitrust Law Enforcement to Prevent Capital from Interfering with Public Opinions*, indicating that it will perfect the jurisdiction rules for internet cases, release judicial interpretations for anti-monopoly civil actions in time based on the amended *Anti-Monopoly Law* and specify the ruling standards.

- China’s first “Reverse Payment” case (*AstraZeneca vs. ASK Pharm*) In January 2022, the SPC published a ruling for a second-instance trial (with the ruling made on December 17, 2021), granting AstraZeneca to withdraw its appeal against the first-instance judgment for a patent infringement lawsuit it filed against Jiangsu Aosaikang Pharmaceutical Co. Ltd. (“ASK Pharm”)

- AstraZeneca, as the plaintiff, was the holder of the concerned patent, and it filed a complaint in front of the Nanjing Intermediate People’s Court against ASK Pharm accusing ASK Pharm of patent infringement. Upon the trial of the first instance, the court found that a third-party, Vcare, had instituted an annulment action for the concerned patent, during which the previous holder of this patent, BMS, reached into a Memorandum with Vcare, agreeing mainly that, Vcare and its affiliates (ASK Pharm as one among these affiliates) promised not to challenge the validity of the concerned patent, and that BMS and its successor, AstraZeneca promised not to raise any claim against Vcare and its affiliates for their patent infringement conducts following January 1, 2016. Upon the trial of the first instance, the court held that the drug in question falls into the scope of the concerned patent. But considering the signed Memorandum, no conduct of infringement was found and the complaint was overruled. Unsatisfied with this judgement, AstraZeneca appealed to the SPC. Later during the review period of the appeal, AstraZeneca sought to withdraw it. The SPC, after having reviewed the withdrawal, held that the Memorandum in question has the appearance of a “reverse payment for drug patent”, so that a court-initiated review to a certain extent shall be conducted on potential antitrust law violations. Further, the standards and considerations for such review were put forward by the court. In the end, upon preliminary review, the SPC held that since the protection period of the patent has expired, therefore, the potential antitrust law violations no longer subsisted, the signing parties of the Memorandum were not involved as parties of this litigation, and because of the lack of evidence, no obvious antitrust law violation could be concluded at the time, and that no further review was necessary. A final ruling approving AstraZeneca to withdraw its appeal was then made.

- This case has made it clear for the first time that reverse payment for drug patent might constitute a monopolistic agreement, and also specified the standards for review, showing perspective enhancement in respect of administrative enforcement and judicial focus: the SPC, in its ruling, pointed out that, for reverse payment for drug patent contracts aiming at not challenging the validity of the patents, the key to the judgment of whether they constitute unlawful monopolistic agreements shall reside in

the exclusion or restriction of competition. As such, generally, the analysis shall be based on the comparison between the actual case when the agreements were signed and performed, and the hypothetical case when the agreements were not signed or performed, focusing on the possibility of patent annulment if the generic drug applier did not withdraw its annulment action. Based thereon, conclusions could be made on whether and to what extent the agreements have harmed the competition.

- **China' s first anti-unfair competition case involving a manual clicking farming platform interfering with the search engine algorithms: Baidu/Woai Net case.** On the grounds that the Internet company, by conducts like setting up missions-dispatch platforms, assist users in fabricating clicking data, and thereby interfere with the search engine rank results, the plaintiff, Beijing Baidu Internet Information technology Co. Ltd.("**Baidu**") brought the defendant Shenzhen Woai Internet Technology Co. Ltd. ("**Woai Net**") in front of Haidian District People' s Court, claiming for the elimination of impact and compensation for economic loss amounting to RMB 5,000,000 yuan.

- Haidian District People' s Court held that the defendant' s conduct of fabricating clicking data for the target websites, in essence, is fabricating the users' need for a search, to better match the target result to certain key words and increase the weight of the target website in the search engine, thereby interfering with the plaintiff' s ranking algorithm. Such conduct not only caused the increased cost incurred to Baidu for normal search engine operation services, jeopardized the Plaintiff' s normal service environment, but also interfered with the competitive order of the market. After deliberation, the court held for the first instance that Woai Net shall make a statement on newspaper to eliminate impact, and shall compensate for economic loss of RMB2,000,000 yuan and reasonable cost of RMB 50,000 yuan. This is the first anti-unfair competition case nationwide involving a manual clicking farming platform interfering with the search engine algorithms.

- **The SPC has specified that contractual terms in violation of the *Anti-Monopoly Law*, in principle, void in an individual case of 13 driving training institutions including Jili.** In January 2022, the Intellectual Property Tribunal of the SPC published the judgment (issued on December 22, 2021) of a case, involving horizontal monopoly agreements, according to which, **in principle, the provision of the *Anti-Monopoly Law* on prohibition of monopolistic acts should be a mandatory provision, and contractual terms in violation of such provision should be void.** The judgment further ruled that the joint operation agreement and self-discipline convention involved in the case are horizontal monopoly agreements prohibited by law and thus should be void. The main reason why the SPC determined that the *Anti-Monopoly Law* is mandatory provision rather than administrative provision is that anti-monopoly involves the overall efficiency of the state economic operation and public interests. This case gives an explicit opinion on the validity of contracts violating the *Anti-Monopoly Law*, which provides guidance for the trial of similar cases in the future. Previously, in practice, there were some disputes on whether the *Anti-Monopoly Law* is administrative provision or mandatory provision, and furthermore, there were different views and judgments on whether an agreement violating the *Anti-Monopoly Law* is void.

For more detailed questions regarding the antitrust and competition in China , please feel free to contact Haiwen partners Qian Xiaoqiang (qianxiaoqiang@haiwen-law.com), LIN Xixiang(linxixiang@haiwen-law.com), or your usual Haiwen & Partners contact.

