

China Antitrust Update (Sep-Oct, 2022)

Author: QIAN, Xiaoqiang LIN, Xixiang YANG, Yikai

From September to October 2022^[1], in the legislation and policy-making area the General Office of the State Council issued the *Opinions on Further Optimizing the Business Environment and Reducing Systemic Transaction Costs for Market Entities*, stating that the government should effectively guarantee fair competition for market entities and refine the criteria for identifying monopolistic acts and unfair competition. The State-owned Assets Supervision and Administration Commission of the State Council (the “SASAC”) released the *Measures for the Compliance Management of Central Enterprises*, stipulating that central enterprises shall formulate specific systems or special guidelines for compliance management in anti-monopoly and anti-bribery. In the law enforcement area, a total of 119 cases were cleared by the State Administration for Market Regulation (the “SAMR”) without conditions and one case were cleared with conditions, which is the first conditionally cleared case not involving foreign investment. Hunan Administration for Market Regulation (the “Hunan AMR”) imposed administrative penalties on five driving schools for cartels agreements. In the judicial area, the Supreme People's Court (the “Supreme Court”), for the first time, affirmed the joint market dominance in anti-monopoly cases, addressing that in addition to the market shares of multiple competitors, the consistency of competitors' behaviors should also be considered. For the identification of “other concerted conducts”, the Supreme Court held that factors such as the coordination and consistency of market behaviors, the contact of intents, relevant markets, and reasonable explanations should be considered. The Beijing Intellectual Property Court has announced its acceptance of China's first anti-monopoly case concerning public data.



Legislation and Policy Area

- On September 15, 2022, the General Office of the State Council issued the *Opinions on Further Optimizing the Business Environment and Reducing Systemic Transaction Costs for Market Entities*, stating that the governments should effectively guarantee fair competition for market entities, fully implement the fair competition review system, and organize special law enforcement actions to prevent the abuse of administrative power to exclude and restrict competition by the end of October 2022; refine the criteria for identifying monopolistic acts and unfair competition strengthen and improve anti-monopoly and anti-unfair competition enforcement, investigate and punish the behaviors of malicious subsidies, low-priced dumping, and setting unreasonable trading conditions, and crack down on counterfeiting and confusion behaviors, such as “free-riding” and “chasing clout”.
- On September 16, 2022, SASAC released the *Measures for the Compliance Management of Central Enterprises* (the “Measures”), which came into effect on October 1, 2022. The Measures stipulates that central enterprises shall formulate specific systems or special guidelines for compliance management in key areas such as anti-monopoly, anti-bribery, ecological and environmental protection, production safety, labor and employment, tax management and data protection, as well as businesses with high compliance risks.
- On September 16, 2022, the China Automotive Technology Research Center (CATRC) and the China Academy of Information and Communications Technology (CAICT) jointly issued the *Guideline of Standard Essential Patent License for Automotive Industry* (the “Guideline”). The Guideline clarifies the core principles of automotive industry SEP license (including the principles of balancing of interests, the principle of fair, reasonable and non-discriminatory, the principle of entitlement to obtain licenses at any level in the industry chain, and the principle of handling differences between industries through negotiation), the principles of calculating reasonable royalties (including the SEP royalties basis, factors for calculating royalties, principle of limitation to aggregate royalty rates, reasonable selection of royalty calculation method), etc. The release of the Guideline will accelerate the development of cross-border integration between the automotive and telecommunications industries and protect

fair competition in the markets.

- From October 16 to 22, 2022, the 20th National Congress of the Communist Party of China (the **20th Congress**) was held. The 20th Congress Report emphasizes: to **strengthen anti-monopoly and anti-unfair competition** and to improve the basic market economy systems such as property rights protection, market access, fair competition and social credit. At the press conference of the 20th Congress, the vice president of the Supreme Court addressed to **strengthen the judicial practice of anti-monopoly and anti-unfair competition** to maintain a fair and competitive market order, and to review cases involving “pick one out of two” and “big data discriminatory pricing” on e-commerce platforms in accordance with the law.
- On October 28, 2022, the General Office of the National Development and Reform Commission and the General Department of the National Energy Administration issued the *Notice on Promoting the Healthy Development of the Photovoltaic Industry Chain* (“Notice”). As a measure to **relieve upstream and downstream production capacity and price escalation issue in photovoltaic industry**, and to enhance the security of the supply chain in photovoltaic industry, the Notice emphasized that “the *Price Law* and the *Anti-Monopoly Law* should be strictly implemented by strengthening the market monitoring, keeping track of disruptive market behavior, timely interviewing relevant undertakings and promoting compliance of business operation; unlawful coordination of fixing price, as well as monopolistic activities such as reaching cartel agreements and abusing market dominance should be strictly investigated and punished, in order to curb the excessive and unregulated capital expansion and maintain fair competition of the industry.”
- On October 28, 2022, the minister of the National Development and Reform Commission submitted a report to the thirty-seventh session of the 13th National People's Congress (“NPC”) Standing Committee, as entrusted by the State Council. The report pointed out that the state sector should firmly control the lifeline of digital technology and make greater progress in self-reliance and self-improvement in science and technology; make forward-looking plans for digital infrastructure and strengthen the roots of digital economy development; accelerate digital transformation and release the amplification, superposition and multiplication effect of data on economic development. **For the platform economy concerned greatly by the market, the report announced that the commission will support and guide the sustainable development of the platform enterprises, complete the special rectification of platform economy, implement regular supervision and introduce a number of “green light” investment cases.**
- The SAMR released the feedback on the public consultation of the four supporting regulations of the AML, including the *Provisions on Prohibition of Monopoly Agreements (Draft for Public Comments)*, the *Provisions on Prohibition of Abuse of Market Dominance (Draft for Public Comments)*, the *Provisions on Suppression of Abuse of Administrative Power to Exclude and Restrict Competition (Draft for Public Comments)* and the *Provisions on Prohibition of Abuse of Intellectual Property Rights to Exclude and Restrict Competition (Draft for Public Comments)*. SAMR stated that it would amend and improve the corresponding provisions based on the comments received.



Enforcement Areas

- Merger Control Review
 - **Non-conditional Clearance:** From September to October 2022, 119 cases were cleared without conditions by the SAMR, involving industrial sectors of private equity investment fund management, real estate, pharmaceutical, Internet, catering, materials, energy, transportation, natural gas, electricity, optical products, aviation, etc.
 - **Conditional Clearance:** On September 13, 2022, the merger case of the Establishment of a Joint Venture

between Shanghai Airport (Group) Co., Ltd. (“**Airport Group**”) and Eastern Air Logistics Co., Ltd. (**Eastern Air Logistics**”) was conditionally cleared by SAMR. This is **the first conditionally cleared case in China not involving foreign investment** to date, which had been reviewed for approximately 12 months, with the notifying party’ withdrawal and resubmission. In this case, the Airport Group and Eastern Air Logistics proposed to establish a new joint venture at Shanghai Pudong Airport to engage in intelligent airport cargo terminal services. SAMR came to a conclusion that the concentration has or may have the effect of excluding or restricting competition in the market for cargo terminal services at Shanghai Pudong Airport and in the market for international/domestic air cargo services originating from or destined to Pudong Airport, thus cleared this concentration with the following conditions.

(1) **Maintain the mutual independence** of the Airport Group and Eastern Air Logistics’ cargo terminal service business at Pudong Airport. The Airport Group and Eastern Air Logistics shall continue to compete independently and fairly in the market of cargo terminal services at Pudong Airport and shall not exchange sensitive competitive information and shall not conclude or conduct monopolistic actions.

(2) Ensure that the Airport Group, Eastern Air Logistics and the joint venture **are independent and are competing with each other**. Specific measures include: no part-time employment of personnel, restrictions on shareholders’ rights, stipulation of non-competition periods, maintenance of isolation of office space and information systems, and restrictions on office system user permissions, etc.

(3) Ensure that there is **no direct or indirect exchange of sensitive competitive information** between the Airport Group, Eastern Air Logistics and the joint venture. The joint venture shall operate independently, which includes but not limited to financial independence, personnel independence, production service independence, procurement independence, research and development independence, pricing independence and sales independence.

(4) The Airport Group and Eastern Air Logistics shall **continue to perform the cargo terminal service contracts regarding Pudong Airport** that have already being signed with the relevant clients. Upon expiration of the contracts, if the client concerned would like to extend the contract, the Airport Group and Eastern Air Logistics shall not refuse it, and the terms of the extension shall not undermine the service level before this transaction. This commitment shall **be valid for five years**

(5) The Airport Group, Eastern Air Logistics and the joint venture shall **provide airport cargo terminal services at Pudong Airport in accordance with the principles of fair, reasonable and non-discriminatory**. Under similar conditions, no discrimination shall be applied to downstream customers in respect of price, quantity and other trading conditions, no unreasonably high prices shall be applied and the total amount of cargo terminal services provided at Pudong Airport shall not be unreasonably limited.

(6) In addition to monitoring trustee, the joint venture undertakes to **invite China Air Transportation Association to supervise and guide the joint venture’s performance of its commitments annually**.

These commitments, other than the one in (4), shall **be valid for 8 years** from the effective date.

- Cartel Agreements:

- **Cartel Agreements:** On September 2, 2022, the SAMR published an administrative penalty imposed by Hunan AMR on five driving schools (including Xintian County Longquan Motor Vehicle Driver Training School) for their conducts of cartel agreement. In the case, the five driving schools reached a consensus on issues concerning unified office, unified registration and fees at a meeting of the Xintian County Driving Schools Center, and jointly concluded a fixed price agreement in the form of meeting minutes. After the relevant authority initiated investigations, the parties returned to their original office sites, stopped implementing the fixed price agreement and resumed independent pricing. In determining the specific amount of fine, Hunan AMR took into account the

short duration of the illegal behaviors, timely correction and operational difficulties during the epidemic, and accordingly ordered the parties to stop their violations as well as imposed a fine of 3.5% of their sales in 2018 (ranging from RMB 40,000 to RMB 70,000) respectively.



Judicial Area

- The Supreme Court determined in the judgment of Disputes over Horizontal Monopoly Agreements among Jinxian Wenzhen Art Kindergarten and Jinxian Wenzhen Liujiayi Kindergarten^[2], that **in principle, the provision of the AML on prohibition of monopolistic acts should be a mandatory provision. The party implementing the cartel agreement and claiming for damages based on the cartel agreement** is in fact requesting division of the monopoly interests, **which should not be supported by the court**

- Facts: In 2017, Jinxian Wenzhen Art Kindergarten (**Art Kindergarten**) entered into an agreement with Jinxian Wenzhen Liujiayi Kindergarten (**"Liujiayi Kindergarten"**), Wan Zhen and others, stipulating that after the beginning of each semester, the parties shall conduct accounting on tuition fees, meal expenses and education expenses received by them and use the net profits as the basis for distributing dividends to the parties. The other parties shall pay the minimum fee to the Art Kindergarten each year in proportion to their increased net profits each year. All parties promise that during the cooperation term, all matters involving the operation of the kindergarten shall be decided through collective discussion (each party shall have one vote), and the breaching party shall pay damages, etc. Art Kindergarten filed a lawsuit against the Liujiayi Kindergarten on the ground that Liujiayi Kindergarten "failed to follow the agreement" and "failed to conduct accounting", requesting for confirmation of its breach of contract and payment of liquidated damages and economic compensation. Liujiayi Kindergarten argued that the agreement involved constitutes a cartel agreement that excludes and restricts competition, and should be deemed void.

- Key points of the judgment: The Supreme Court held that the arrangement in this case explicitly stipulates fixing and increasing prices, and withdrawing individual undertakings from the relevant market, etc. which has the purpose of, and in fact has the effect of excluding and restricting competition, therefore, **the agreement constitutes a cartel agreement**. The monopolistic behaviors affect the overall efficiency of the state economic operation and public interests, therefore, in principle, the provision of the AML on prohibition of monopolistic acts should be a mandatory provision and thus **the agreement in this case should be deemed void and is not binding on the parties**. The legislative purpose of Article 50 of the AML (Article 60 of the amended AML) is to provide judicial remedies to victims of monopolistic behaviors rather than to provide business undertakings conducting monopolistic behaviors with the opportunity to make improper profits. **Such business undertaking claiming for damages is in fact requesting division of monopoly interests, and behaviors of business undertaking making profits through monopolistic conduct are prevented and forbidden by the AML. Therefore, the Supreme Court should not support such requests.**

- The Supreme Court **clarified for the first time the factors and standards to determine joint market dominance** in the case of *Disputes over Abuse of Market Dominance between Ma Lijie and China Mobile Communications Group Henan Co., Ltd.*^[3]

- Facts: In 2019, Ma Lijie filed a lawsuit against China Communications Mobile Group Henan Co., Ltd. (**China Mobile Henan**) on the ground that it treated its users differently. Some users have the right to transfer ownership, suspend number, and switch phone carriers, while some users don't have the above rights. China Mobile Henan refused Ma Lijie's request to switch carriers and restricted users of special numbers to trade with them only. Ma Lijie claimed that China Mobile Henan violated the provisions of the AML on prohibiting the undertakings from restricting transactions and discriminating treatment, therefore, and filed a lawsuit against China Mobile Henan.

- Key points of the judgment: The relevant market involved is mobile communication service market in Henan

Luoyang. To determine whether China Mobile Henan has market dominance, the Supreme Court held that, if multiple undertakings adopt different behaviors for the same type of business, such behavior is usually normal market competition among the competitors, and it is not necessary to consider the joint market dominance. **It is necessary to consider if there is joint market dominance only when multiple undertakings in the relevant market all adopt the same behaviors for the same type of business, reflecting the consistency of behaviors between the undertakings.** In this case, there are only three service providers in the relevant market, which are China Mobile Henan, China Unicom Henan and China Telecom Henan. China Mobile Henan admitted in the second instance that the three mobile communication service providers have adopted basically the same standard terms in the relevant business. Based on this, the Supreme Court determined that the three mobile communication service providers in Henan Province had been carrying out business with consistency in the relevant market for a long period of time. Moreover, considering the market share data, the Supreme Court held that the three providers above should be identified as having joint market dominance.

- The Supreme Court **clarified for the first time the four factors to determine “other concerted conducts” under the AML** in the judgment of *Monopoly Dispute among Li Binqun and Hunan Xiangpintang Industry and Trade Co., Ltd., etc.*^[4] and held that **the Plaintiff has the burden of proof on three factors**

- Facts: In November 2018, Li Binqun filed a lawsuit to Hunan Changsha Intermediate People’s Court on the ground that no normal temperature drinking water is provided in the waiting hall on the second floor of Changsha South Station and the accused five operators including Xiangpintang Industry and Trade Co., Ltd.

(“**Xiangpintang**”) are monopolistic operators selling bottled water on the second floor of Changsha South Railway Station. They have fixed price of 555ml Yibao bottled water to RMB3 per bottle when normal price in Changsha market is RMB2 per bottle, which has violated the provisions of the AML and the Price Law by entering into cartel agreement through concerted conducts. Xiangpintang and the other accused operators argued that the price was determined in accordance with their respective costs, without any intentional contacts and pricing coordination.

- Key points of the judgment: The Supreme Court held that price competition is the most important and basic type of competition among operators in the market economy. The AML provides that “other concerted conducts” constitutes one of the forms of monopoly agreement, which shall mean that the competing undertakings, through communicating with each other, tacitly implement exclusive and restrictive behavior without a written or oral agreement or resolution. To determine “other concerted conducts”, the following factors can be taken into account:

1. whether the market behaviors of undertakings have coordination and consistency;

2. whether there has been any contact of intents or information exchange between the undertakings, specifically:

- the AML does not prohibit undertakings from acting independently based on the market and competition conditions, including following or imitating their competitors;

- The price of goods must be clearly marked. Undertakings conducting business in the same area may know each other’s price of the same product, which is a normal outcome of open and transparent price;

- As the bottled water in this case is public consumer goods, ordinary consumers have a general understanding of whether the pricing is reasonable;

- Based on the evidence in this case and that the same bottled water product is priced the same among different undertakings in a specific narrow area, it is difficult to preliminarily infer that there has been contact or information exchange among competitors.

3. the market structure, competition and changes in the relevant market; and

4.whether the undertakings can have a reasonable explanation for the coordinated consistency of their behaviors.

The plaintiff shall bear the burden of proof on the first three factors.

- On August 5, 2022, the Beijing Intellectual Property Court accepted an anti-monopoly lawsuit concerning public data of vehicle insurance filed by Shanghai Yuhan Automotive Technology Co., Ltd (“**Yuhan**”) engaging in second hand car trading, against BeijingYuchexing Information Technology Co., Ltd (“**Yuchexing**”), the operator of “Ningmengcha”. **This is China’s first anti-monopoly case concerning public data** Yuhan claimed that Yuchexing, using its monopoly position established through having easy access to the public data on the national motor vehicle insurance information platform, charged unfair high prices for queries from data users including Yuhan, and discriminated non-members of China Automobile Dealers Association, which violated the principle of fairness and openness of public data and damaged legitimate rights of the public data users and therefore, constitutes the abuse of the market dominance prohibited by the AML. This case is currently under trial.

1. Relevant information is as of October 31, 2022 and is calculated on the date when the case was closed. The “October” hereafter shall mean “as of October 31, 2022”.

2. For more details please see the SPC (2021) Zui Gao Fa Zhi Xing Zhong No.2253 Civil Judgment.

3. For more details please see the SPC (2021) Zui Gao Fa Zhi Min Zhong No.1977 Civil Judgment.

4. For more details please see the SPC (2021) Zui Gao Fa Zhi Min Zhong No.1020 Civil Judgment.

2022-11-07