

China Antitrust Update (May-Jun, 2024)

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From May to June 2024^[1], in the legislation and policy-making area, the State Council released the *Regulation on Fair Competition Review*, the Supreme People's Court (the "SPC") published the *Provisions on Several Issues Concerning the Application of Laws in the Civil Trial of Monopoly Dispute Cases*, and the State Administration for Market Regulation (the "SAMR") published the *Interim Provisions Against Unfair Competition in Cyberspace*, the *Annual Report on China's Antitrust Enforcement (2023)*, and the *Guidelines on Review of Horizontal Concentrations of Undertakings (Draft for Comments)*. In the law enforcement area, the SAMR unconditionally cleared 79 merger cases, involving sectors of energy, semiconductors, private equity investment, materials, digital industry, logistics, transportation, etc.; and conditionally approved the acquisition of Tatsuta Electric Wire & Cable Co., Ltd. by JX Advanced Metals Corporation. The SAMR imposed administrative penalty on the establishment of a joint venture (JV) between Shanghai Highly (Group) Co., Ltd. and Qingdao Haier Air Conditioner Gen Corp for failure to notify, and published a decision of administrative penalty on monopoly agreement between five rock wool enterprises in Xinjiang. The SAMR warned Avanci over monopoly risks of its patent pool. In the judicial area, the SPC announced recent typical anti-monopoly cases, and the Shanghai Intellectual Property Court ruled in the first instance of the lawsuit over abuse of market dominance filed by Jin and Apple Inc. that Apple Inc. has market dominance in the relevant market but did not abuse its dominance.

Legislation and Policy Area

- On May 6, 2024, the SAMR published the *Interim Provisions Against Unfair Competition in Cyberspace* (the "Provisions"), which will come into force on September 1, 2024, with the following main focus^[2]:

- Sorting out the unfair competition conducts and clarifying the relevant criteria. The Provisions refine the description of traditional acts of unfair competition such as counterfeiting and confusion, false advertising, etc., on the Internet; detail on the forms and factors to be considered of online unfair competition conduct; and regulate on the new types of online unfair competition conduct through technological means, such as reversed scalping, illegal data access, and discrimination.

- The Provisions emphasize on platform's responsibility. Platform operators are urged to step up management of in-platform competition, and are prohibited from abusing data or algorithms to obtain competitive strength.

- The Provisions optimize the law enforcement case handling procedures, clarifying that the determination of jurisdiction of cases related to online unfair competition shall apply the *Provisions on Administrative Penalty Procedures for Market Regulation*, and that significant cases can be governed by the SAMR's local counterparts at or above the municipal level where the parties actually operate or the violation result occurs. The Provisions also introduce an expert observer scheme.

- The Provisions clarify the legal responsibilities, which are articulated with the *Anti-Unfair Competition Law* and the *Anti-Monopoly Law* (the "AML").

- On June 13, 2024, the State Council released the *Regulation on Fair Competition Review* (the

“**Regulation**”), which will come into force on August 1, 2024. The Regulation, for the first time in the form of administrative regulations, makes comprehensive provisions on the objects, standards, mechanisms, supervision and safeguards of fair competition review, clarifies the standards and exceptions to the application of fair competition review in the market access and exit, free flow of commodities and factors, impact on production and operation costs, and impact on production and operation behaviors; specifies the main body of the review and the review procedures, and establishes a work mechanism for joint review of critical policies and measures. A supervision and protection mechanism is also set up for the fair competition review, such as spot checks, reports handling, inspections, regulatory talks, etc., and corresponding legal responsibilities.

- On June 17, 2024, the SAMR released the *Guidelines on Review of Horizontal Concentrations of Undertakings (Draft for Comments)* (the “**Draft Guidelines**”)[4]. The Guidelines, through a combination of articles and case law, stipulate the criteria to be examined by law enforcement agencies in the review of horizontal mergers in relation to the relevant market definition, market share and market concentration, unilateral effects, coordinated effects, potential competition, market entry, buyer power, efficiency, etc., as well as specific provisions on the evidentiary materials to be involved in the review of horizontal concentrations.

- On June 18, 2024, the SAMR released the *Annual Report on China's Antitrust Enforcement (2023)* (the “**Annual Report**”)[5], which summarizes the SAMR's work on fair competition and anti-monopoly in 2023, and the regulatory achievements in the enforcement of monopoly agreements, abuse of market dominance, concentration of undertakings, abuse of administrative power to exclude and restrict competition, as well as the work in the construction of legal system, implementation of fair competition policies, competition publicity and advocacy, and international communication and cooperation. The Annual Report specifies that in 2023, the SAMR handled 27 cases tied to monopoly agreements and abuse of market dominance, with fines amounting to RMB 2.163 billion, and concluded the review of 797 cases of concentrations of undertakings.

- On June 24, 2024, the SPC published the *Provisions on Several Issues Concerning the Application of Laws in the Civil Trial of Monopoly Dispute Cases* (the “**Judicial Interpretation of Antitrust Civil Litigation**”)[6], effective from July 1, 2024, focusing on the following main aspects:

- Procedural provisions: The first chapter details the definition of monopoly civil dispute cases, ways of filing such lawsuits, jurisdiction, joint trial of cases, verification of evidence, public interest litigation, and suspension of litigation, etc.

- Definition of relevant markets: The second chapter focuses on relevant principles and requirements, burden of proof, analysis methods, and factors to be considered in relevant market definition, etc.

- Monopoly agreements: The third chapter covers concerted acts, acting party, reverse payment agreements concerning pharmaceutical patents, algorithm agreements, and cross-platform most-favored treatment in horizontal monopoly agreements. For vertical monopoly agreements, it stipulates the burden of proof, determination of anticompetitive effects and exceptions, the conduct of organizing or assisting such agreements, and exemptions, etc.

- Abuse of market dominance: The fourth chapter addresses the definition of market dominance and the

analysis and identification of various types of abusive behaviors, etc.

- Civil liabilities: The fifth chapter specifies forms of civil liabilities, determination of damages, the validity of the violations, and the statute of limitations, etc.

- Supplementary provisions: The sixth chapter concerns the application of the old and revised versions of the AML, as well as the effective date of the interpretation.

For highlights of the Judicial Interpretation of Antitrust Civil Litigation and insights on compliance and practice, please refer to the [Haiwen Alert: Trends in the AML Enforcement and Practical Implications from the Judicial Interpretation of Antitrust Civil Litigation](#).

Enforcement Area

• Merger Review

- **Non-conditional Clearance:** From May to June 2024, 79 cases were cleared without condition by the SAMR (a year-on-year decrease of 29.46% compared with that from May to June 2023, and a month-on-month decrease of 18.56% compared with that from March to April 2024), involving industrial sectors of energy, semiconductors, private equity investment, materials, digital industry, logistics, transportation, etc.

- **Conditional Clearance:** On June 11, 2024, the case of Share Acquisition of Tatsuta Electric Wire & Cable Co., Ltd. (“**Tatsuta**”) by JX Advanced Metals Corporation (**JX Metals**) was approved by the SAMR with conditions[7]. The review of this case lasted for around one and a half year, during which the SAMR “stopped the clock”, i.e. made a decision to suspend the calculation of the review period.

The acquirer, JX Metals, is principally engaged in resource development, smelting and refining, manufacturing and sales of electronic materials, and recycling of end-of-life equipment, etc. Tatsuta’s main business is the production and sales of electronic materials, wires and cables, sensors, and medical products. After the proposed deal, Tatsuta will be solely controlled by JX Metals. The SAMR concluded that the proposed deal has or is likely to have the effect of excluding or restricting competition in the Chinese markets for blackened rolled copper foil, stainless steel stiffeners for flexible printed circuits (FPCs), electromagnetic interference (EMI) shielding films, and isotropic conductive films. Accordingly, the SAMR cleared the transaction with conditions listed as below, which will be valid for eight years from the effective date and expire automatically after the period ends:

(1) When selling JX Metals’s blackened rolled copper foil, stainless steel stiffeners for FPCs, and Tatsuta’s EMI shielding films and isotropic conductive films to Chinese customers, the parties shall not, without proper reasons, engage in the following conduct on their own or ask their distributors to do so: (i) bundle sales of JX Metals’s and Tatsuta’s products or impose other unreasonable transaction conditions; (ii) obstruct or restrict customers from purchasing or using the two companies’ products separately; (iii) discriminate against customers who purchase their products separately in terms of price, quality, quantity, delivery time, after-sales service, and other commercial terms; and (iv) obstruct or restrict cooperation partners from choosing the four kinds of products provided by third parties.

(2) The parties shall supply blackened rolled copper foil and isotropic conductive films to Chinese customers on fair, reasonable, and non-discriminatory terms and ask their distributors to do so.

(3) Unless to meet customer requirements, the parties shall not reduce the existing compatibility level of their blackened rolled copper foil and isotropic conductive films with blackened rolled copper foil, stainless steel stiffeners for FPCs, EMI shielding films, and isotropic conductive films provided by third parties.

○ **Gun-jumping:** On May 28, 2024, the SAMR imposed administrative punishment on the establishment of a joint venture (JV) between Shanghai Highly (Group) Co., Ltd. (“**Shanghai Highly**”) and Qingdao Haier Air Conditioner Gen Corp (“**Haier Air Conditioner**”) for failure to notify^[8]. On January 19, 2023, Shanghai Highly and Haier Air Conditioner signed a *Joint Venture Agreement of Zhengzhou Haili Electric Appliances Co. Ltd.*, to establish a JV in Zhengzhou with a shareholding of 51% and 49%, respectively, to manufacture and sell rotary compressors for air conditioners. On March 13, 2023, the JV obtained its business license. The SAMR concluded that the above transaction constitutes a notifiable concentration of undertaking without obtaining prior approval, but did not have the effect of eliminating or restricting competition. Therefore, Shanghai Highly and Haier Air Conditioner were imposed a fine of RMB1.5 million, respectively, and the decision was published on the National Enterprise Credit Information Publication System.

● **Monopoly Agreement**

○ On June 20, 2024, the SAMR published an administrative penalty against five rock wool enterprises in Xinjiang for entering into and implementing a monopoly agreement^[9]. In this case, the Administration for Market Regulation of Xinjiang Uygur Autonomous Region (“**Xinjiang AMR**”) found that from June 20, 2021 to September 20, 2021, the five rock wool enterprises jointly set up the “**Northern Xinjiang Rock Wool Cooperation Alliance**” and reduced the production, hired personnel to supervise the implementation of the reduction, and ensured the implementation through multiple mechanisms such as security deposit and fine. During the foregoing period, in accordance with the agreement, each rock wool enterprise assigned its employees to join the inspection team, jointly formulated and recorded the suspension and resuming time of each production line, supervised the implementation of the agreement, and jointly implemented the locking of production line for restriction of production. Additionally, the rock wool enterprises sold products at the agreed price in accordance with the agreement to distributors and construction organizations. Based on these facts, the Xinjiang AMR determined that the conducts of the five rock wool enterprises constitute conclusion and implementation of a monopoly agreement to fix commodity prices and limitation on the number of commodities produced or sold, ordered them to cease the unlawful act, and imposed on the enterprises a fine of 1-3% of their respective turnover in the previous year, totaling approximately RMB5.2056 million. One of the enterprises applied for leniency and was granted a reduction of the fine by 80% for restoring the facts of the violation in full during the investigation, providing truthful information, and voluntarily providing facts and evidence not yet known to the authority.

● **Abuse of Market Dominance**

○ On June 27, 2024, the SAMR warned Avanci over monopoly risks of its patent pool^[10]. According to the Notice on the Establishment of Anti-Monopoly “Three Documents and One Letter” Regime published by Anti-Monopoly Commission Office of the State Council and SAMR, the official from the Antitrust Enforcement Division I of SAMR met with representatives of the Avanci patent pool face-to-face and issued a Reminder Letter, warning Avanci patent pool over monopoly risks during its licensing of

standard essential patents for automotive wireless communication, urging it to conduct careful risk checks in accordance with the AML and relevant laws and regulations, taking effective measures to prevent and rectify the relevant issues, effectively strengthening the antitrust compliance, preventing the monopoly risk, maintaining the market order of fair competition, and promoting the standardization and healthy development of the industry. On June 28, 2024, Avanci published an announcement[11], stating that the SAMR has provided valuable guidance on its joint licenses, that it will comply with the antitrust laws and related laws and regulations in China and other jurisdictions around the globe, and that it looks forward to continuing its dialog and discussions with the Chinese automakers.

It is noteworthy that the “Reminder Letter” issued to Avanci is the first published reminder since the establishment of the “Three Documents and One Letter” system from December 6, 2023. The Administration for Market Regulation of Shannxi has disclosed that it had issued three Reminder Letters in 2023, but did not disclose the specific enterprise name of the investigation[12].

Judicial Area

- On May 29, 2024, the Shanghai Intellectual Property Court rendered a first-instance judgment in a dispute between Jin (the “**Plaintiff**”) and Apple Inc. and Apple Computer Trading (Shanghai) Co., Ltd. (“**Apple Shanghai**”, and together with Apple Inc., the **Defendants**”) over abuse of market dominance, found that Apple Inc. has a dominant position in the market for iOS smart terminal app transaction platforms in regions of the People’s Republic of China other than Hong Kong, Macao and Taiwan, but did not commit the abusive conduct of unfairly overpricing, tying, restricting and refusing to trade. As such, the Shanghai Intellectual Property Court rejected all the abuse allegation by the Plaintiff.[13]

- **Facts:** This case involves the “Apple Tax”, a channel commission that Apple Inc. charges developers for the in-app transactions in its smart terminal App Store under the iOS system. In January 2021, the Plaintiff, dissatisfied with the fact that the in-app membership price of the apps purchased from the Apple App Store was higher than that from the Android App Store, filed a lawsuit against the Defendants, claiming that Apple Inc. abused its market dominance by tying, restricting and refusing to trade, and forced the fees paid by users to be paid directly to its affiliate, Apple International Distribution Company, which deducted 30% of the commission and then distributed it to developers, who passed on the corresponding fees to consumers, resulting in the impairment of consumers’ interests.

- **Key findings and rulings:**

(1) Assessment of market dominance: The court concluded that Apple Inc. is the major undertaking of the trading platform for iOS smart terminal app transaction platforms in regions of the People’s Republic of China other than Hong Kong, Macao and Taiwan, and that Apple International Distribution Company, although also involved in the services for platform and consumer, is affiliated with Apple Inc. and other undertakings could not enter the platform. As such, Apple Inc. obviously has a market dominance in such market.

(2) Apple did not impose unfairly high prices: For the following reasons, the court found that the 30% commission did not constitute an unfair price:

(i) The large operating system of the Apple App Store makes it difficult to ascertain the specific costs

incurred by Apple Inc. to operate the platform, and it is unlikely to assess the difference between the operating costs and the commissions charged, and thus unable to determine if the commissions are excessive on the basis of the cost margins;

(ii) No evidence shows that the commission rate charged by Apple Inc. is significantly higher than the prices charged by other similar undertakings for the same or comparable goods under the same or similar market conditions;

(iii) No evidence indicates that the higher price of the same app in the Apple App Store than in the Android App Store at any given time was due to a commission charged by Apple Inc.

(3) Apple Inc. did not engage in tying or restricting and refusing to trade:

(i) Apple Inc.'s use of the IAP module only involves developers, and will not affect consumers' right of independent choice and fair trade, and the Plaintiff has no litigation interests;

(ii) Even though the Plaintiffs had relevant litigation interests: (x) the IAP module of the Apple App Store was not an independent sellable product, and Apple Inc. did not engage in tying of the IAP module; (y) the Plaintiffs failed to prove that the Defendants refused to trade; and (z) Apple Inc., although limiting the payment module to be used by the developers, did protect the interests of the counterparties to the transactions and consumers, safeguarded the security of the transactions, and maintained a reasonable business model, which did not result in excluding or restricting market competition.

On the same day of the judgment, the Plaintiff's attorney extended respect for the first instance judgment, but insisted that Apple Inc.'s practice of imposing the world's highest "Apple Tax" in China and not opening up third-party payment and download channels constitutes an abuse of market dominance, and that the Plaintiff will further appeal to the SPC. As of July 3, 2024, Apple has filed an appeal with the SPC, requesting to amend some of the wording in the first instance judgment, which includes revoking the determinations on the suitability of the subject matter, the relevant market definition, and Apple Inc.'s market dominance.[14]

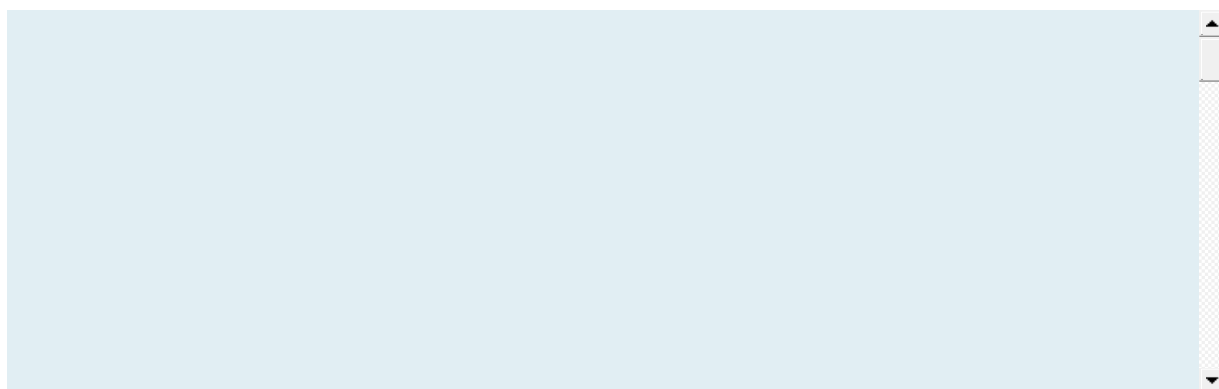
- On June 24, 2024, the SPC released 5 recent typical anti-monopoly judicial cases: subsequent civil action following vertical monopoly agreement dispute of "Automobile Sales"[16], dispute over abuse of market dominance involving "Patent on Desloratadine Citrate Disodium API"[17], hub-and-spoke agreement on "Industrial Lubricants"[18], dispute over abuse of market dominance in relation to "Patent on Rare-Earth Permanent Magnetic Materials"[19], and horizontal monopoly agreement on "Traffic Signal Control Machines"[20].

According to the SPC's announcement, the above typical cases reflect the following judicial position:

(1) **Strictly regulating monopoly agreements and effectively maintaining the vitality of market competition.** In the "Industrial Lubricants" case, the criteria for determining a hub-and-spoke agreement were clarified, and a negative evaluation was made on the conduct of a brand supplier organizing and dominating downstream sellers to reach a hub-and-spoke agreement to restrict intra-brand competition; in the "Traffic Signal Control Machines" case, it was confirmed that all agreements between competitors with the core purpose and basic content of excluding each other from the market are invalid as a whole, and the scope of invalidity of the contract in the event of violation of the AML was also clarified.

(2) Clarifying the boundaries between the legitimate exercise of intellectual property rights and the abuse of rights to exclude or restrict competition in accordance with the law, so as to achieve a balance between encouraging innovation and maintaining fair competition. In the “Patent on Rare-Earth Permanent Magnetic Materials” case, the market definition of the relevant technology involving intellectual property rights and the method of determining market dominance were clarified, and it was determined that refusal to license the non-essential patents of the production of rare-earth permanent magnet material does not constitute monopoly. In the “Patent on Desloratadine Citrate Disodium API” case, the method of analysis of restricting transactions and imposing excessive high price in the exercise of patent rights was clarified, and it was emphasized that the inevitable result of the proper exercise of specific patent rights in accordance with the law is not the effect of excluding or restricting competition in the sense of antitrust law, and that the analysis of monopolistic high price must take into consideration the market competition status and the risk of innovation, so as to ensure that the patentee receives reasonable return and maintains the innovation motivation.

(3) Improving the mechanism of convergence between administrative enforcement and the judiciary, demonstrating the synergy in safeguarding fair competition order. In the “Automobile Sales” case, the burden of proof was clarified for civil compensation litigation cases in relation to and following the imposition of antitrust administrative penalties, to effectively reduce the burden of proof on the plaintiffs.



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