China Antitrust Update (Sep-Oct, 2023)

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From September to October 2023[1], in legislation and policy-making area, the State Administration for Market Regulation ("**SAMR**") released the *Guidelines on Anti-monopoly Compliance For the Concentration of Business Operators,* the *Several Measures of the Market Regulation Departments to Promote the Development of Private Economy,* the *Annual Report on Anti-Unfair Competition Enforcement in China (2022);* the Beijing Administration for Market Regulation ("**Beijing AMR**") issued the *Beijing Guidelines on Anti-Monopoly Compliance*; the Supreme People's Court ("**SPC**") released the *Guiding Opinions of the Supreme People's Court on Optimizing the Legal Environment and Promoting the Development and Growth of the Private Economy*, stating it is necessary to crack down on monopoly and unfair competition in accordance with the law, and judicial interpretations of anti-monopoly civil litigation shall be studied and issued; Shanghai Anti-Monopoly and Fair Competition Commission Office published the *Notice on Enhancing the Level of Regularized Supervision and Guiding and Encouraging Platform Enterprises to Establish a Competition Compliance Management System* and the *Guidelines for Competition Compliance Evaluation of Internet Platform Enterprises*, instructing enterprises to establish compliance management system for fair competition. In law enforcement area, the SAMR approved 124 merger cases without conditions in September and October in 2023, implicating industrial sectors of energy, transportation, trade, automobile, pharmaceuticals industry, real estate, private equity fund, etc.; and conditionally approved the case of Share Acquisition of Beijing Tobishi Pharmaceutical Co., Ltd. by Simcere Pharmaceutical Limited. The SAMR published the decisions for three administrative penalties on monopoly agreements. In judicial area, the SPC released 10 typical cases of anti-monopoly and anti-unfair competition disputes. The abuse of market dominance lawsuit filed by Li Zhen against five companies including Alibaba Group Holding Limited, Alipay.com Co., Ltd., etc. opened for trial, which involves monopolistic behaviors in the market of online retail platform services and the third-party mobile payment market.

Legislation and Policy Area

● On September 7, 2023, the Beijing AMR issued the Beijing Guidelines on Anti-Monopoly Compliance[2], which from the perspectives of importance and basic principles of anti-monopoly compliance for small and medium-sized operators, the management system of anti-monopoly compliance, risk identification and prevention of monopoly behaviors and risk disposal, cover main regulations of the Anti-Monopoly Law and its accompany regulations on four major aspects: monopoly agreements, abuse of dominance, concentration of undertakings and administrative monopoly. The Guidelines provide significant references for various types of business entities in identifying and preventing anti-monopoly risks by making "demonstrations and analysis".

● On September 11, 2023, the SAMR released the Guidelines on Anti-monopoly Compliance for the Concentration of Business Operators ("**the SAMR Guidelines**")[3]. It marked the first compliance guidance released by anti-monopoly law enforcement authorities of the State Council in the field of concentration of operators since the implementation of the Anti-monopoly Law in 2008. The SAMR Guidelines involve general principles, main provisions on merger control review, key compliance risks, compliance risk management, safeguards for compliance management, and supplementary provisions. With respect to regulations and legal liabilities of the review of merger control, the SAMR Guidelines emphasize several matters that should be paid attention to in different stages of a concentration, including whether and when to make a filling, the "jumping gun", exclusion and restriction of competition and how to formulate a compliance management system for the merger control, etc.

● On September 15, 2023, the SAMR issued the Several Measures of the Market Regulation Departments to Promote the Development of Private Economy[4], stating that anti-monopoly law enforcement shall be strengthened, and the review of merger control shall be carried out strictly in accordance with the law. Behaviors of eliminating or restricting competition by abuse of administrative power shall be prohibited according to the law. The standards for merger control filling shall be refined. Enterprises shall be instructed to take primary responsibilities for compliance and to improve their compliance awareness and ability. More guidance shall be given to enterprises dealing with overseas anti-monopoly lawsuits and investigations, and the compliance awareness and ability of enterprises to protect their own rights shall be enhanced. Study and early warning of risks related to overseas investments and merger and acquisitions shall be effectively conducted, and compliance guidelines shall be developed.

● On September 20, 2023, the SAMR published Annual Report on Anti-Unfair Competition Enforcement in China (2022)("**Report**") [5], which shows the results of China's anti-unfair competition regulation in 2022 from the aspects of work overview, law enforcement effectiveness, rule of law construction, typical cases, local work, major events, etc. According to the Report, in 2022, the SMAR investigated and handled 9,069 unfair competition cases and imposed fines and confiscations with the total amount of about RMB 620 million.

● On October 10, 2023, the SPC released the Guiding Opinions of the Supreme People's Court on Optimizing the Legal Environment and Promoting the Development and Growth of the Private Economy[6], stressing that it is necessary to crack down on monopoly and unfair competition in accordance with the law, the rules for adjudicating competition cases shall be improved, and judicial interpretations of anti-monopoly civil litigation shall be studied and issued; in accordance with the law, forced "either-or", big data discriminatory pricing, low-price dumping, forced tying and other behaviors undermining fair competition and disrupting market order shall be severely punished; cases of disputes over unfair competition such as false publicity and commercial slander shall be trialed according to the law; the judicial protection of trade secrets shall be strengthened.

● On October 20, 2023, Shanghai Anti-Monopoly and Fair Competition Commission Office ("**Shanghai Anti-Monopoly Office**") published Notice on Enhancing the Level of Regularized Supervision to Guide and Encourage Platform Enterprises to Establish a Competition Compliance Management System and Guidelines for Competition Compliance Evaluation of Internet Platform Enterprises ("**Shanghai Bureau Guidelines**")[7]. It sets up a regularized communication and exchange mechanism between competition regulators and platform enterprises on compliance management, instructs platform companies to conduct regular completion law compliance self-assessments, and requires that written report formed by the evaluation should be used as the basis for enterprises to establish self-improvement mechanisms for competition compliance and regularly submitted to the Shanghai Anti-Monopoly Office. The Shanghai Bureau Guidelines also urges and directs platform companies to strengthen the construction of fair competition compliance management systems and develops compliance incentives. If an enterprise's self-assessment is "A" grade or above, after review by the antitrust enforcement authority, relevant departments should actively encourage and serve the platform enterprises to explore innovation, support the development of new technology and new business compliance assessment, and serve the platform enterprises to show their strengths in leading the development, job creation, and international competition, so as to accelerate the enhancement of its international competitiveness. At the same time, antitrust enforcement authorities should further optimize the normalized regulatory mechanism, using flexible methods such as commitment of compliance, interviews, and administrative guidance, etc. to instruct the platform enterprises to operate in accordance with the law, to reduce the enterprises' compliance costs, and to promote the healthy development of the industry; and antitrust enforcement authorities will provide preferential support for guidance on responding to overseas antitrust litigations and investigations and for the training on the competition compliance, etc. Enterprises with a self-assessment grade of "B" or below should, depending on the specific circumstances, work together with the competent authorities in the industry for diagnosis, then standardize and improve the status in a timely manner. Enterprises with frequent complaints shall be closely watched, and those involved in illegal behavior shall be reviewed and punished strictly in accordance with the law.

Enforcement Area

● **Merger Review**

○ **Non-conditional Clearance**: From September to October 2023, 124 cases were cleared without condition by the SAMR (a year-on-year decrease of 4.2% compared with that from September to October 2022, and a month-on-month decrease of 24% compared with that from July to August 2023), implicating industrial sectors of energy, transportation, trade, automobile, pharmaceuticals industry, real estate, private equity fund, etc.

○ **Conditional Clearance**: On September 26, 2023, the case of Share Acquisition of Beijing Tobishi Pharmaceutical Co., Ltd. ("**Tobishi**") by Simcere Pharmaceutical Limited ("**Simcere**") was approved by the SAMR with condition[8]. Source says that this case is the first time that the SAMR conditionally approved a merger transaction that "voluntarily" submitted an antitrust filing even though it fell short of the notification thresholds. The review of this case lasted for around fifteen months, and the SAMR stopped the clock during such period, i.e. made a decision to suspend the calculation of the review period in order to conduct several negotiations on relief with Simcere. The suspending period lasting for five months. Simcere is mainly engaged in the manufacture and sale of pharmaceutical products. Simcere became the only seller of batroxobin concentrate active pharmaceutical ingredient (batroxobin API) in China after signing a deal with sole supplier DSM Nutritional Products Ltd. Branch Pentapharm ("**DSM**"). Meanwhile, Simcere is engaged in the research and development of batroxobin injection. Tobishi's main business is the production and sale of batroxobin injection. Therefore, the two parties have a horizontal overlap and a vertical relationship. Simcere intended to acquire all of the shares of Tobishi. The SAMR concluded that the proposed deal may exclude or restrict competition in the Chinese market for batroxobin injection and cleared the transaction with conditions listed as below:

(1) Terminate the agreement between Simcere and DSM over the exclusive supply of batroxobin API in China.

(2) Divest Simcere's batroxobin injection business within a stipulated time frame under the Provisions on the Examination of Concentration of Undertaking. Assume the obligation of supplying batroxobin API to the buyer of the divested business, and provide necessary assistance to the buyer to establish a direct supply relationship with DSM.

(3) Post the concentration, lower price of batroxobin injections commonly used in clinical practice for end users, by no less than 20% of the current price online.

(4) Post the concentration, maintain supply to the demand for batroxobin injections commonly used in clinical practice.

(5) If within the required time frame the exclusivity agreement is not terminated, the divestiture is not completed, or the buyer fails to conduct research and development, then following the concentration, the end user price of batroxobin injections commonly used in clinical practice should be reduced by no less than 50% of the current price online.

Simcere and the combined entity may apply to SAMR for the removal of these behavioral conditions after six years from the effective date.

As a background, Simcere was required by the SAMR in January 2021 to cease the illegal behavior and fined RMB100.7 million for the abuse of dominance in the market for the sale of batroxobin API in China and its refusal to supply batroxobin API to Tobishi, which had limited Tobishi's ability to produce batroxobin injections. This case is another important anti-monopoly enforcement case in the pharmaceutical industry. The SAMR and local enforcement agencies have imposed anti-monopoly penalties on a number of pharmaceutical companies for their monopolistic conducts in 2023. For more details, please refer to the law enforcement precedents summarized in China Antitrust Update (March-April, 2023) and China Antitrust Update (May-Jun, 2023).

● **Monopoly Agreements**

○ On September 12, 2023, The SAMR published an administrative penalty on Beijing Go Association, together with its member units, for entering into and implementing a monopoly agreement[9]. In this case, Beijing Go Association held council meetings from August 2021 to February 2022, and organized eight member units responsible for organizing amateur or ranked tournaments of Go game to reach a resolution on suggested service charge rates for the amateur and ranked certificates and events in Beijing. A fact pattern of consistent adjustments of the rates was then present, showing that aside from a few exceptions, most organizations implemented the suggested rates. Based on these facts, the Beijing AMR determined that the conduct of Beijing Go Association constituted a monopoly agreement made through an industry association organizing competitors in the industry to fix the produce price change range, and concluded that the eight member units, including Beijing Xicheng District Martial Arts and Chess Sports Management Center and Beijing District Dongcheng Chess and Cards Sports Association, reached into and implemented a monopoly agreement on fixing the produce price change range. The Beijing AMR ordered the concerned parties to cease their unlawful act, and imposed on Beijing Go Association a fine of RMB 50 thousand and on eight member units each a fine of 2% of their turnover in 2021, approximately RMB 116.1 thousand in total.

○ On September 12, 2023, The SAMR published an administrative penalty on Guizhou Jinsha Yuanda New Environmental Protection Building Materials Co., Ltd. ("**Jinsha Yuanda**") and the other three building material companies for entering into and implementing a monopoly agreement[10]. In this case, Jinsha Yuanda, Jinsha Aoke New Environmental Protection Building Materials Co., Ltd. ("**Jinsha Aoke**"), Guizhou Jinsha Energy Saving and Environmental Protection Building Materials Co., Ltd. ("**Jinsha Energy Saving**") and Guizhou Langyue New Building Materials Co., Ltd. ("**Guizhou Langyue**") reached an agreement in 2016 on stop the lease with Guizhou Langyue and the establishment of a new joint building materials operating body in Jinsha County, and Guizhou Langyue agreed to contract its ready-mixed concrete plant to Jinsha Yuanda, Jinsha Aoke and Jinsha Energy Saving for operation. In the same year, Jinsha Yuanda, Jinsha Aoke and Jinsha Energy Saving reached into a separate agreement on the production, sales, management, time frame and profit sharing ratio of the joint operation. Under such agreement, Jinsha Yuanda, shall serve as the main producer of the joint operation system, and Jinsha Aoke and Jinsha Energy Saving, shall serve as back-ups. The relevant parties fixed the price of commercial concrete provided by the new building materials operation body by jointly setting up departments of procurement, production management and sales operation, unifying the management of sales contracts, the issuance of bills, the management of the bank accounts and setting up a joint account. Based on these facts, the Guizhou Administration of Market Regulation ("**Guizhou AMR**") determined that the conduct of the four companies constituted a monopoly agreement to fix or change the price of commodities and to divide the selling market. The Guizhou AMR imposed on Jinsha Yuanda a fine of 5% of its turnover in 2021, on Jinsha Aoke and Jinsha Energy Saving each a fine of 4% of their respective turnover in 2021, as well as ordering Guizhou Langyue to cease its unlawful act, and imposed a fine of 3% of its turnover in 2021, approximately RMB 6.0082 million in total.

○ On September 12, 2023, The SAMR published an administrative penalty on 10 bottled liquefied gas firms for entering into and implementing a monopoly agreement[11]. In this case, since the second half of 2018, the 10 firms repeatedly discussed the issues of not snatching customers with low prices and avoiding vicious competition, and reached agreements, verbal or in writing, on the sales price of liquefied gas and sharing of new customer information under the guise of industry self-discipline or by taking advantage of the preparation of a new company. To ensure that these agreements were implemented, the firms further carried out various measures such as formulation of penalties and deposit payment, WeChat communication and coordination, and investigation and notification of irregularities, etc. The Jiangsu Administration of Market Regulation determined that the conduct of the 10 firms constituted a monopoly agreement to fix or change the price of commodities and to divide the sales market, and imposed on the firms a fine of 2% of their turnover in 2020, respectively, approximately RMB 8.2734 million in total.

Judicial Area

● On September 14, 2022, the SPC released 5 typical judicial cases of People's Courts each on anti-monopoly and anti-unfair competition respectively[12], which generally reflects the judicial stance of strengthening of the anti-monopoly and anti-unfair competition adjudication and of maintaining the order of fair competition in the market. More Specifically:

○ The 5 typical anti-monopoly cases concerns issues like the determination of the correlation between the exercise of patent rights and the abuse of market dominance, the determination of the refusal to deal of public enterprises and the assumption of legal responsibility, clarification on the burden of proof of the plaintiff in the related civil compensation litigation after the imposition of antitrust administrative penalties, refinement of the criteria for determining the horizontal monopoly agreements including "fixing or changing of the price of commodities", "division of the sales market", etc., and clarification on the criteria for determining the nexus in disputes over refusal to deal.

○ The 5 typical anti-unfair competition cases broadly cover various types of cases, implicating issues both online and offline, such as the application of principle articles of the Anti-Unfair Competition Law, market confusion, false advertising, infringement of technical secrets, Internet unfair competition, etc.. Examples of these cases are the counterfeiting and confusion dispute over "Siemens", technical secret infringement dispute over the "General Solution for Photoluminescence Analysis System", unfair competition dispute over the "ShuaBao APP", unfair competition dispute over the "Dailianbang APP" and unfair competition dispute over "scalping".

● On October 13, 2023, the abuse of market dominance lawsuit filed by Li Zhen ("**Plaintiff**") against Alipay.com Co., Ltd., Zhejiang Tmall Network Co., Ltd., Zhejiang Taobao Network Co., Ltd., Ant Group Co., Ltd. and Alibaba Group Holding Limited (collectively, the "**Defendants**") opened for trial in Shanghai Intellectual Property Court.[13]

○ **Facts**: The Plaintiff alleged that the Defendants engaged in collective abuse of market dominance by limiting consumer choice in online payment services to Alipay based on its market dominance in online retail platform services market in China, which excluded and restricted competition in the online retail platform services, third-party mobile payments and data markets in China, restricted the users' right of free choice and fair dealing, therefore constituting monopolistic behavior of restraints of trade, tying, and attaching unreasonable trading conditions. The Defendants claimed that the Plaintiff failed to establish the relevant markets concerned in this case, and that the alleged behaviors do not constitute restraints of trade, tying, or attaching unreasonable trading conditions, which are justified and did not produce the effect of excluding or restricting market competition nor causing any damage. The Shanghai Intellectual Property Court rejected all of the Plaintiff's claims in the first instance judgment.

○ **Key findings and rulings:**

(1) The online payment service is an inherent part of online retail platform service, and it is not an independent product/service relative to the online retail platform service. Online retail platforms have two-sided attributes, and from the perspective customers and the demand-side, the information dissemination, transaction matchmaking, warehousing, logistics, payment and settlement, shipping and delivery and other services as provided by the platform altogether constitute an indispensable part facilitating the completion of transactions. On the alleged platforms Taobao APP and Tmall APP, non-payment services or payment services cannot be sold separately, and therefore the Plaintiff's allegation of tying was without grounds.

(2) Consumers using Tmall and Taobao platforms do not have to bear the cost of the online retail platform services themselves, and would not establish independent transactional relationship with the online payment service suppliers of the online retail platforms. The merchants on the platforms are also using integrated online retail platform services, and they do not establish independent transaction with the online payment service providers of the online retail platforms either. The Plaintiff's allegation of restraints of trade is untenable.

(3) During the period of the accused monopolistic behaviors, despite that Taobao and Tmall configured Alipay as the payment method on the platforms, there was no evidence that Taobao and Tmall APP rejected other suppliers of payment services from connecting to the retail platforms. In the meantime, the supplier of Alipay has shown strong innovation capability, and its payment service is competitive in the field of online payment services. Tmall and Taobao's choice of Alipay and the establishment of their stable business cooperation not only reflects the cooperation between the affiliated companies, but also, to a certain extent, has proven to be able to improve the safety and efficiency of transactions and the consumer welfare. In light of the need of online platform services to integrate payment services, and the fact that the payment service of Alipay possesses strong competitiveness, it is insufficient to conclude that Tmall and Taobao platforms' choice of Alipay for online payment services is unreasonable. Thus, the Plaintiff's allegation of unreasonable transaction conditions is untenable.

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If you are interested in further information regarding China antitrust matters, please feel free to contact Qian Xiaoqiang Lvshi (qianxiaoqiang@haiwen-law.com) or Lin Xixiang Lvshi (linxixiang@haiwen-law.com) or other attorneys of Haiwen & Partners.