China Antitrust Update (Mar-Apr, 2024)

Author: QIAN, Xiaoqiang LIN, Xixiang KOU, Meiruo WANG, Danlin WANG, Ning

From March to April 2024[1], in the legislation and policy-making area, the National Anti-Monopoly Work Conference was convened by the State Administration for Market Regulation (the "**SAMR**"), summarizing the antitrust work in 2023 and deploying key tasks for 2024. Premier Li Qiang of the State Council urged in the Government Work Report to improve regulatory rules in key fields, emerging fields, and foreign-related fields. The General Office of the Anti-Monopoly and Anti-Unfair Competition Commission of the State Council (the "**Anti-Monopoly Commission**") released the Anti-Monopoly Compliance Guidelines for Undertaking with a newly established chapter to enhance corporate compliance incentives. In the law enforcement area, the SAMR unconditionally cleared 97 merger cases in March and April 2024, involving sectors of real estate, energy, semiconductors, pharmaceuticals, private equity fund management, materials, and the digital industry, etc. The SAMR published 2 decisions of administrative penalty on abuse of market dominance. In the judicial area, the Supreme People's Court (the "**SPC**") released the Summary of the Supreme People's Court's Annual Report on Legal Application in Intellectual Property Cases (2023), clarifying the legal application in two antitrust judicial cases.

Legislation and Policy Area

● On February 29, 2024, the National Anti-Monopoly Work Conference was convened by the SAMR. The conference outlined the following points: (1) In 2023, the antitrust law enforcement authorities have handled 27 cases of monopoly agreements or abuse of market dominance (with a total confiscation and penalty amount of RMB 2.163 billion), addressed 39 cases of abuse of administrative power to exclude and restrict competition, and cleared 797 merger cases; (2) For the year 2024, the SAMR will further reinforce the foundational position of competition policy, innovate anti-monopoly supervision methods and elevate the efficiency of regulatory oversight; in the meantime, it will further rectify the outstanding issues of market segmentation and local protectionism, implement special actions of maintaining fair competition and market order, and advance the special law enforcement actions in the livelihood sector. Efforts will be made to monitor the antitrust compliance of internet platforms to foster orderly competition and innovative development within the platform economy, enhance the quality and efficiency of the merger review process, invigorate economic dynamism, facilitate the rational flow and efficient allocation of resource elements, elevate the governance capacity for fair competition, implement the fair competition review system, refine the anti-monopoly regulatory framework, improve corporate compliance, energize the market, support the equal participation of various business entities in market competition, intensify the assessment of market competition conditions in key sectors and regions, strengthen the awareness of fair competition across society, and foster international exchange and practical cooperation in the field of anti-monopoly efforts.[2]

● On March 5, 2024, Premier Li Qiang of the State Council delivered the Government Work Report at the Second Session of the 14th National People's Congress, addressing the following matters: efforts shall be made to accelerate the establishment of a unified national market, with a focus on promoting the unification of rules in areas such as property rights protection, market access, fair competition, and social credit; to formulate administrative regulations for fair competition reviews and improve regulatory rules in key fields, emerging fields, and foreign-related fields; to conduct special rectification of prominent issues such as local protectionism, market segmentation, and unfair competition in inviting investment, and strengthen the regulation and management of the bidding market; to supervise the market according to law, strictly implement supervisory responsibilities, enhance the precision and effectiveness of supervision, and resolutely maintain fair competition market order.[3]

● On April 25, 2024, the Anti-Monopoly Commission released the Anti-Monopoly Compliance Guidelines for Undertakings (the "**Guidelines**")[4]. The Guidelines refine the principles under the General Rules, propose the antitrust compliance management principles of being problem-oriented, practical, efficient, and comprehensive. The Guidelines provide clear prompts on the compliance risks that may arise in the specific business activities of undertakings and include hypothetical guiding cases. A chapter on the establishment of a compliance management organization was set up, detailing the content of compliance risk management and improving the operation and assurance of compliance management. Additionally, a new chapter has been added to promote corporate compliance incentives by linking the enhancement of corporate proactive compliance with administrative penalties, leniency regime, and suspension of investigation. The compliance incentive system clearly takes into account the establishment, implementation and the effectiveness of the company's antitrust compliance management system as factors to determining whether to provide compliance incentives. Antitrust authorities need to conduct a substantive review based on the completeness, authenticity, and effectiveness of the compliance management system at the request of the undertaking, and grant corresponding incentives according to the case situation, such as penalty exemption, suspension of investigation, exclusion or reduction of penalties, etc. Specifically:

○ Regarding the establishment of the compliance system, the Guidelines stipulate that the compliance management organization should include a "compliance governance body", a "responsible person for compliance management" and a "compliance management lead department". The Guidelines also recognize that companies can simplify the antitrust compliance management organization based on their own size, business characteristics, and operating costs, provided that effective compliance can be achieved. In addition, it details the compliance responsibilities that business departments and functional departments should each undertake.

○ Regarding the implementation of the compliance system, the Guidelines emphasize the total-process-management of compliance risks by (1) for risk identification and assessment, retaining the general guidance in the previous version of the Guidelines, and adding detailed prompts for various types of risks; (2) for risk alerts, clarifying the scope of high-risk personnel and recommending that companies regularly carry out risk assessment, reminders, prevention and control for such personnel; (3) for risk handling, specifying the control and response measures that can be taken for compliance risks.

○ Regarding the supervision and support of the compliance system, the Guidelines aim to improve the operation, management, supervision and support mechanisms, and propose a number of measures such as mechanisms of review, reporting, training, supervision, assessment and improvement, and informatization to ensure the effective operation of the compliance system.

Enforcement Area

● **Merger Review**

○ **Non-conditional Clearance:** From March to April 2024, 97 cases were cleared without condition by the SAMR (a year-on-year decrease of 25.95% compared with that from March to April 2023, and a month-on-month decrease of 8.49% compared with that from January to February 2024), involving industrial sectors of real estate, energy, semiconductors, pharmaceuticals, private equity fund management, materials, and the digital industry, etc.

● **Abuse of Market Dominance**

○ On March 20, 2024, the SAMR published an administrative penalty decision on Jiangxi Xiangyu Pharmaceutical Co., Ltd. ("**Xiangyu Pharmaceutical**") for its abusing of market dominance.[5] In this case, Shanghai Administration for Market Regulation ("**Shanghai AMR**") found that from June 2016 to March 2020, Xiangyu Pharmaceutical, through its cooperation with the only manufacturer of iodized oil active pharmaceutical ingredient ("**API**"), mostly dominated the supply of such APIs. With its market share in China market for the sale of iodide oil API exceeding 50%, Xiangyu Pharmaceutical is presumed to have a market dominance. During the concerned period, Xiangyu Pharmaceutical sold the API to iodized oil injection manufacturers at unfairly high prices, which were significantly higher than the selling prices of other undertakings under similar market conditions, and increased the selling price of iodized oil beyond the normal range, with the price increase markedly exceeding the cost increase, despite the costs remaining essentially stable. Based on these facts, Shanghai AMR determined that the conducts of Xiangyu Pharmaceutical constitute abusing of market dominance by selling products at unfairly high prices. Xiangyu Pharmaceutical was ordered to cease the illegal conduct and was imposed a fine of 4% of its turnover for the year 2019, amounting to a total fine of approximately RMB 1.5636 million.

○ On March 29, 2024, the SAMR published the administrative penalty decision on Shanglin County Sanli Liuxian Tap Water Company ("**Liuxian Tap Water Company**") for abusing its market dominance.[6] In this case, Guangxi Administration for Market Regulation ("**Guangxi AMR**") found that the market share of Liuxian Tap Water Company in the centralized water supply service market of Sanli Town, Shanglin County, Nanning City, was 100%. As a public utility, it had single monopoly over water supply services and thus held a market dominance. From August 2008 to March 2023, Liuxian Tap Water Company required users to fill out a pre-set standard water service application form when applying for water supply, and effectively mandated users to pay for a minimum of 8 degrees (1 degree = 1 cubic meter) regardless of actual water usage under the guise of "voluntary agreement", otherwise no water service would be provided. Based on these facts, Guangxi AMR determined that the conducts of Liuxian Tap Water Company constitute abusing of market dominance by imposing unreasonable trading conditions in transactions. Liuxian Tap Water Company was ordered to cease the illegal conduct, confiscated it illegal gains of RMB 153,800, and was imposed a fine of 2% of its turnover for the year 2022, amounting to RMB 33,700, with a total of approximately RMB 187,500.

Judicial Area

● **On April 26, 2024, the SPC released the Summary of the Supreme People's Court's Annual Report on Legal Application in Intellectual Property Cases (2023), which identified 41 law**

application issues from the intellectual property cases concluded by the court in 2023[7]. The cases related to the application of antitrust law are as follows:

○ Appeal from a company in Chongqing against the Chongqing Administration for Market Regulation in relation to the Anti-Monopoly Administrative Penalty[8]: The conducts of fixing commodity prices through a monopoly agreement not only includes setting a minimum or specific price but can also encompass fixing a price range, calculation method or standard, etc. These conducts may all constitute indirect control over prices and potentially a part of a monopoly agreement.

○ Appeal from Wang and others against the Wuhan Taxicab and Livery Association in relation to the Monopoly Dispute[9]: Where a plaintiff only sues to request the People's Court to confirm that the defendant's specific behavior constitutes a monopoly, but not request the defendant to bear civil liability, there is no litigation interest in such suit, meaning lacking in the necessity and effectiveness of the litigation, and the People's Court may rule to reject or dismiss such claim.

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