

China Antitrust Update (July-August, 2022)

Author: QIAN, Xiaoqiang LIN, Xixiang YANG Yikai

From July to August 2022, in the legislation and policy-making area in China, the newly amended Anti-Monopoly Law came into effect since August 1. Meanwhile, the pilot program to delegate the power to conduct merger review for certain simplified cases was officially launched. In the law enforcement area, the State Administration for Market Regulation (“SAMR”) has imposed and announced administrative penalties on 36 monopoly-related cases, including 28 cases of failure to notify (mainly involving Internet platforms, logistics, entertainment, financial leasing/guarantee, automobile agency, and other industries), 5 cases of cartel agreements (involving the industrial sectors of cement, concrete, credit evaluation service and motor vehicle inspection), 2 cases of vertical monopoly agreements (involving pharmaceutical and education industries), and 3 cases of abuse of market dominance (involving the industrial sectors of public water supply, gas supply and the online car-hailing service). In the judicial area, cases of disputes on the cartel agreement of driving schools joint operation, the administrative penalty dispute between Hainan Administration for Market Regulation and Shenghua Construction Co., Ltd., and the first anti-monopoly case regarding sports event are worthy of attention.



Legislation and Policy Area

- On August 17, 2022, the General Office of the Ministry of Industry and Information Technology, the General Office of SAMR and the General Department of the National Energy Administration jointly issued the *Notice on Promoting the Collaborative Development of the Photovoltaic Industry Supply Chain*, stating that vicious competition and market monopoly in the photovoltaic industry should be avoided. Local market regulation administrations should strengthen supervision and management to crack down on illegal acts such as price gouging and monopoly in the photovoltaic industry.
- On August 1, 2022, the *Anti-Monopoly Law of the People's Republic of China (2022 Amendment)* (the “**Amended Anti-Monopoly Law**”) came into effect. For highlights of the Amended Anti-Monopoly Law and insights on compliance and practice, please refer to the [Haiwen Alert: Amendment to the Anti-monopoly Law Promulgated](#)
- On August 1, 2022, SAMR officially launched the Anti-Monopoly Notification System for Concentrations of Undertakings^[1] (the “**Notification System**”), which integrates the anti-monopoly laws and regulations, the notification process and the review process for concentrations of undertakings in China. Through the system, the notifying party can submit their notification online and enquire about the progress of cases on a real-time basis. Supplementary RFIs and review decisions will be revert back to the notifying party through the system, with a view to improve the convenience of notification and the transparency of administrative enforcement.
- On July 15, 2022, in order to implement the **graded review regime**” stipulated in Article 37 of the Amended Anti-Monopoly Law, the SAMR promulgated the *Announcement on the Delegation of the Power of Merger Control Review of Certain Simplified Cases under the Pilot Program*, proposing to **delegate the power to the local market regulatory bureaus (“local AMRs”)** in Beijing, Shanghai, Guangdong, Chongqing and Shaanxi to conduct merger control review of certain simplified cases^[2]. The pilot program is in effect from August 1, 2022 until July 31, 2025, during which, the SAMR will accept notifications on a unified basis, and choose to transfer qualified cases to one of the local AMRs for handling and review, and will make a review decision based on the local AMR’s review reports and recommendation and such review decision will be delivered by the local AMR to the notifying party. Five local AMRs have already announced the guidelines for pilot delegated review respectively. So far, according to the public information, Beijing AMR has reviewed three cases, Shanghai AMR for five cases, and Chongqing AMR for one case.

● On July 5, 2022, Zhejiang Administration for Market Regulation released a local standard *the Competition Compliance Management Code for Internet Platform Enterprises* (DB33/T 2511-2022), which has been implemented throughout Zhejiang Province since August 5. Such standard is the first provincial-level standard on the competition compliance of internet platform enterprises in China.



Enforcement Areas

- Merger Control Review

- **Non-conditional Clearance:** In July and August 2022³¹, 64 and 55 cases were respectively cleared without conditions by the SAMR, involving industrial sectors of food, automobile, logistics, hotels, energy, technology, chemical, packaging, real estate, construction, supermarket and retail, electricity, materials, pharmaceutical, private equity investment fund management, etc.

- **Gun-jumping:** In July and August 2022, the SAMR imposed and announced administrative penalties on 28 cases of failure to notify, mainly involving Internet companies. No antitrust review was pre-notified regarding these 28 cases, however, none of them has the effect of eliminating or restricting competition, thus the SAMR imposed fines ranging from RMB300,000 to RMB500,000 on the enterprises involved.

- Cartel Agreements: In July and August 2022, the SAMR announced five administrative penalty decisions of cartel agreements, involving the illegal monopolistic behaviors of price fixing and market allocation in the industrial sectors of cement, concrete, credit evaluation service and motor vehicle inspection.

- On July 6, 2022, the SAMR published an administrative penalty imposed by Fujian Administration for Market Regulation ("**Fujian AMR**") on seven concrete enterprises including Fujian Guangxia Concrete Co., Ltd., HangDe (Jianyang) Concrete Co., Ltd., etc.. These companies took advantage of the non-legally registered association in entering into and implementing the agreement on [market share allocation and sales price](#) of commercial concrete in the Jianyang District, which has constituted the illegal cartel agreement. When determining the specific amount of fine, Fujian AMR took into account of the nature, degree and duration of the illegal behaviors, and ordered the parties to cease the illegal behaviors and imposed a fine of [4%](#) of their sales in the last year accordingly.

- On July 9, 2022, the SAMR published an administrative penalty imposed by Shaanxi Administration for Market Regulation ("**Shaanxi AMR**") on Shaanxi Cement Association ("**Cement Association**"), and five enterprises, including Shaanxi Ecological Cement Co., Ltd., Shaanxi Shengwei Building Material Group Co., Ltd, etc. In this case, the Cement Association organized the parties concerned to reach a consensus on the prices of cement products through industry conferences, gatherings, WeChat communication, etc. and reached the agreements on jointly raising the sales price of cement for multiple times, which has constituted illegal acts of price fixing and adjusting. Shaanxi AMR believed that the [off-peak production, cost increase and transmission of external factors are factors to be considered by enterprises in adjusting prices, but are not justifiable reasons for the parties to jointly fix or increase the sales price of cement](#). Thus, Shaanxi AMR ordered the Cement Association to stop the illegal activities and imposed a fine of RMB500,000. Meanwhile, the five companies involved were imposed fines of [3%](#) of their sales in the last year.

- Henan Administration for Market Regulation ("**Henan AMR**") on the Henan Credit Construction Promotion Association ("**Credit Promotion Association**") and 30 credit assessment enterprises, which is the first case where [credit assessment enterprises](#) were penalized for monopolistic activities. In this case, from 2015 to 2019, the Credit Promotion Association organized 30 member companies to reach a fixed price cartel agreement and fix the charging standards for credit assessment services provided by the member companies through the industry self-regulatory conventions. Henan AMR, therefore, ordered the Credit Promotion Association to cease the illegal acts and imposed a fine of RMB300,000. At the same time, the 30 companies concerned were

imposed fines of 1% of their sales in the last year.

- On August 22, 2022, the SAMR published an administrative penalty imposed by Shanxi Administration for Market Regulation (“**Shanxi AMR**”) on the seven motor vehicle inspection companies in Shuozhou. In this case, Lantian and other six motor vehicle inspection companies reached and implemented a cartel agreement to fix the commodity prices and divide and allocate the sales market. Lantian was imposed a fine 5% of its annual sales in 2020, while the other six companies were fined 3% of their annual sales in 2020. The seven companies were fined more than RMB200,000 in total.

- Vertical Monopoly Agreements: In July and August of 2022, the SAMR imposed administrative penalties in 2 cases regarding vertical monopoly agreements, involving resale price maintenance (“**RPM**”) in education and pharmaceutical industries.

- RPM by Kairui Education: On July 27, 2022, the Beijing AMR imposed an administrative penalty on Beijing Kairui Alliance Education Technology Co., Ltd. (“**Kairui Education**”), who owns the exclusive right to use and to sublicense the “Sesame Street English” brand in China. Kairui Education reached and implemented a monopoly agreement on fixing the course prices by entering into cooperation agreements with franchises, publishing rules and regulations, issuing regional pricing and discount schemes and providing unified customer service replies, etc. from 2014 to 2021. The Beijing AMR believed that such activities have constituted RPM, which is one of the vertical monopoly agreements prohibited by Article 14 of the Anti-monopoly Law, and on July 12, 2022, imposed a fine of RMB942,386.47 (approximately USD139,231) on Kairui Education, equivalent to 3% of its 2020 annual sales.

- RPM by Yishun Pharmaceutical: On July 22, 2022, the Hainan Administration for Market Regulation (“**Hainan AMR**”) imposed an administrative penalty on Hainan Yishun Pharmaceutical Co., Ltd. (“**Yishun Pharmaceutical**”), which is mainly engaged in sales of various products including the Lianzhi Inflammation Reducing Pill. Yishun Pharmaceutical has reached but has not implemented RPM monopoly agreements with some distributors regarding the retail of Lianzhi Inflammation Reducing Pill from 2019 to 2020. Hainan AMR believed that such activity has constituted RPM, which is one of the vertical monopoly agreements prohibited by Article 14 of the Anti-monopoly Law, and on June 24, 2022, imposed a fine of RMB200,000 (approximately USD29,563) on Yishun Pharmaceutical.

- Abuse of Market Dominance: In July and August of 2022, the SAMR imposed administrative penalties in 3 cases regarding abuse of market dominance, involving industrial sectors of water supply, gas supply as well as online car-hailing services. The monopolistic conducts are mainly restriction of transactions.

- On July 18, 2022, the SAMR published an administrative penalty imposed by Guizhou Administration for Market Regulation (“**Guizhou AMR**”) on Guizhou Shuitou Water Group Weining Co., Ltd. (“**Guizhou Shuitou**”) who has exclusive right to supply water in Weining. When providing water supply services for high-rise residential buildings, Guizhou Shuitou, for a series of reasons, explicitly or implicitly, by means of entering into the Water Supply Installation Contract with the new real estate water using enterprises, etc., required new real estate water using enterprises to conduct water supply construction transaction only with Guizhou Shuitou itself, otherwise it will not conduct the acceptance inspection of the construction or will suspend water supply. Guizhou AMR believed that such behavior has constituted abuse of market dominance by restricting transactions, and decided to confiscate Guizhou Shuitou’s illegal incomes and imposed a fine of 3% of its annual sales in the last year.

- On July 19, 2022, the SAMR published an administrative penalty imposed by Anhui Administration for Market Regulation (“**Anhui AMR**”) on Wuhu Wanzhi Zhongran Urban Gas Development Co., Ltd. (“**Zhongran Gas**”), who required the gas pipelines of new residential buildings to be only installed by itself when providing urban pipeline gas supply services, and Zhongran Gas is the sole business operator in the relevant market. Anhui AMR believed that such behavior has constituted abuse of market dominance by restricting transactions, and decided to

confiscate its illegal incomes and imposed a fine of 2% of its annual sales in the last year.

The above two cases indicate, to a certain extent, that the monopolistic activities of public utility enterprises are still the focus of the attention of local law enforcement authorities. So far, the monopolistic activities of public utility enterprises punished by regulatory authorities have mainly involved the water supply and gas supply industries.

○ On August 12, 2022, the SAMR published an administrative penalty imposed by Guizhou AMR on Guizhou Zhoulucheng Logistics Co., Ltd. ("**Zhoufucheng Logistics**"), who, as an agent of Didi (providing services such as assisting the Didi drivers in the application of the Online Car-Hailing Transport Certificates), required Didi drivers in Xingyi to handle the vehicle commercial insurances only through Zhoufucheng Logistics itself. Zhoufucheng Logistics' share in the relevant market is 53.17%. However, considering that Didi's share in the online car-hailing service market in Xingyi is 91.87%, and Zhoufucheng Logistics is Didi's exclusive agent for application of Online Car-Hailing Transport Certificate and payment of GPS fee, it can be deemed to have relatively strong market dominance abilities. Guizhou AMR believed that Zhoufucheng Logistics has market dominance and its behaviors constituted monopolistic activities of restricting transactions. Therefore, Guizhou AMR confiscated its illegal incomes and imposed a fine of 4% of its annual sales in the last year.



Judicial Area

● In August 2022, the Supreme People's Procuratorate (the **Supreme Procuratorate**) issued *the Notice on Implementing the Anti-monopoly Law and Actively and Steadily Carrying out Procuratorate Work for Public Interest Litigation in the Anti-monopoly Field*^[4], which emphasizes that:

○ We should implement the Amended Anti-Monopoly Law, actively and steadily carry out the procuratorate work for public interest litigation in the anti-monopoly field, focus on the important issues such as monopolistic behaviors prohibited by the laws, important fields relating to national economy and people's livelihood, key links in the chain of market competition rules, and public welfare damage that seriously harms the rights and interests of a large number of consumers, etc., and pay close attention to internet, public utilities, medical and pharmaceutical industries and other livelihood security fields.

○ The anti-monopoly civil public interest lawsuits shall be under the jurisdiction of the procuratorate at or above city level where the illegal behaviors or harmful consequences take place, or the domicile of the person violating the laws. Major, sensitive and complex cases regarding compliance operation of internet leading companies, internet industry policies, industrial standards and international competitions, etc. shall be directly filed and handled by provincial procuratorates or the Supreme Procuratorate.

● On July 25, 2022, the Supreme People's Court (the **Supreme Court**) promulgated *the Opinions of the SPC on Providing Judicial Services and Protection to Accelerating the Construction of a Unified and Large Market in China* and supporting typical cases, among which there is a typical case regarding dispute over cartel agreement of "driving schools joint operation", where the Supreme Court clarified the criteria for the application of exemptions for cartel agreements, and explained that the scope of invalidity of relevant agreements is not limited to the clauses of cartel agreements themselves, but should also include the clauses closely related to them and without independent significance and the clauses regarding the implementation of cartel agreements.

○ Facts: 15 driving training institutions in Zhejiang Taizhou entered into a joint operation agreement and a self-discipline convention, which specifies that they shall jointly invest in and establish a joint venture, fix the prices of driving training services, and restrict the flow of training vehicles and coaches among these institutes. The supporting services (such as application, physical examination, card printing, etc.) of the original 15 institutions were uniformly managed and charged by the joint venture. Taizhou Luqiao Geely Motor Driving Training Co., Ltd.

and Taizhou Luqiao Chengrong Drivers Training Co., Ltd. filed a lawsuit to the court on the ground that such 15 institutions implemented the cartel agreements, and requested the court to invalidate the agreement and the self-discipline convention.

- Key points of the judgment: The Supreme Court held that the Anti-monopoly Law adopts **a regulatory approach combining general prohibitions and specific exemptions**. When determining whether exemptions apply to monopolistic behaviors, the court should first define the specific content of the alleged monopolistic behaviors, determine whether the alleged monopolistic behaviors are prohibited by the Anti-monopoly Law, then determine whether the relevant evidences can prove that the alleged monopolistic behaviors fall within the scope of the exemptions provided in Article 15 of the Anti-monopoly Law. The business operators shall provide sufficient evidence to prove that the relevant behaviors have **positive competition effect or economic or social effect** mentioned in one of the exemptions, and **such effect must be specific and realistic, and cannot just rely on a general speculation or abstract presumption**. In addition, contractual clauses in violation of the Anti-monopoly Law provisions on cartel agreements, **clauses closely related to cartel agreement clauses, and clauses regarding the implementation of cartel agreements** shall all be invalid, otherwise the risks of monopoly behaviors will not be adequately eliminated and reduced^[5].

- On August 5, 2022, the Supreme Court released the Judgment of Second Instance on Penalty Imposed by Hainan AMR on Hainan Shenghua Construction Co., Ltd.^[6] With respect to the focus of dispute — whether it is legitimate and justifiable for Hainan AMR to calculate fines based on the total annual sales of the business operator, the Supreme Court clarified it from the perspectives of literal interpretation, interpretation of legislative purposes, and principle of proportionality, holding that **it is legitimate and justifiable to calculate fines based on the total annual sales of the business operator**.

- Key points of the judgment: In general, **more severe penalties shall be imposed on monopolistic conducts** considering its great harmfulness, which is not only limited to the scope of illegal business operations, but is also harmful to the market competition mechanism and economic efficiency. Therefore, **it is justifiable to interpret “annual sales of the last year” in Article 46 of the Anti-monopoly Law as total annual sales**. To review whether a specific fine amount determined by the regulatory authority is legitimate and justifiable, a comprehensive judgment shall be made in light of the specific conditions of each individual case and under the principles of helping achieve the legislative purpose of the Anti-monopoly Law to prevent monopolistic conducts and ensuring the fairness of the judgements of each individual case. **The following factors can be taken into account:** the harmfulness of monopolistic conducts, such as the nature of the behavior (the cartel agreements are generally more harmful than vertical monopoly agreements to market competition), duration, scope of relevant market involved, illegal turnovers and the impact on the operator's overall business; the subjective malice of the operators, such as whether they knowingly commit offences and maliciously violated the law; the position and role of the operators in the illegal conducts, such as whether they are organizers or leaders of the monopolistic conducts; whether illegal incomes have been confiscated; whether the operators resist administrative investigations and penalties or voluntarily cease their illegal conducts, etc.

- The Supreme Court made an judgment of second instance on the first anti-monopoly case regarding sports event: Sports Entertainment (Beijing) Culture and Media Co., Ltd. (“**Sports Entertainment**”) filed a lawsuit against Chinese Super League Co., Ltd. (“**Super League**”) and Shanghai Yingmai Culture Communication Co., Ltd. (“**Yingmai**”) for abuse of market dominance^[7].

- Facts: Chinese Football Association (“**CFA**”) authorized Super League to develop and manage relevant copyrights and commercial resources of Chinese Super League matches. Super League selected Yingmai as the exclusive photography partner through a bidding process. Then CFA published a notice on its official website, specifying that “In order to guarantee and protect Yingmai's commercial rights and interests, all media institutions and their staff, who apply for the photography license of the CFA, shall strictly observe relevant regulations of the CFA and Super League. All photos taken of Chinese Super League matches shall only be used

for news report of their own media, and shall not be used for commercial purposes". Thereafter, many photographers appeared to provide photos, videos and other materials of Chinese Super League matches for platforms other than Yingmai, and disputes arose between Yingmai and these photographers as well as other business operators. In September 2018, Sports Entertainment, as the plaintiff, filed a lawsuit against Super League and Yingmai to Shanghai Intellectual Property Court on the grounds of vertical monopoly agreement and abuse of market dominance, and also reported to the SAMR that the CFA is involved in administrative monopoly.

○ Key points of the judgment: The Supreme Court held that the organizer of a sports event have the exclusive civil right of operating the resources of sports events (commercial rights of sports events) in accordance with the law. The Anti-monopoly Law prevents and prohibits the abuse of right to eliminate or restrict competition. However, *the monopoly caused by the exclusive nature of a right shall not be deemed as the abuse of a right*. Exclusivity of a right or exclusive right itself is not prevented and prohibited by the Anti-monopoly Law, but the improper exercise of exclusive right may be prevented and prohibited by the Anti-monopoly Law. The grant of operation right itself is usually legal and *if the grant of exclusive operation right is commercially reasonable and reflects competition in the process, then it is a result of fair competition, which, in principle, shall not be regarded as an abuse of market dominance.*

1. see: jyzj.samr.gov.cn

2. Delegated review criteria: (1) at least one notifying parties is domiciled in the relevant region where the local AMRs are delegated to review; (2) the target (over which an undertaking acquires the control through acquisition of equity, assets, contracts, etc.) is domiciled in the relevant region; (3) in case of the establishment of a joint venture, the joint venture is domiciled in the relevant region; (4) the relevant geographic market for the concentration of undertakings is a regional market, and falls entirely or primarily within the relevant region; and (5) other cases as determined by the SAMR. The review of simplified cases falling under any of the above criteria will be delegated to the local AMRs.

3. Relevant information is as of August 31, 2022 and is calculated on the date when the case was closed. "August" hereinafter shall mean "as of August 31".

4. Source: SPC official website, https://www.spp.gov.cn/spp/xwfbh/wsfbh/202208/t20220801_569635.shtml.

5. The SPC (2021) Zui Gao Fa Zhi Min Zhong No.1722 Civil Judgment.

6. The SPC (2021) Zui Gao Fa Zhi Xing Zhong No.880 Civil Judgment.

7. The SPC (2021) Zui Gao Fa Zhi Min Zhong No.1790 Civil Judgment.

* 杨清心律师、王丹琳、张玉立亦参与写作

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