

China Antitrust Update (Nov-Dec, 2023)

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From November to December 2023^[1], **in legislation and policy-making area** the General Office of the Anti-Monopoly and Anti-Unfair Competition Commission of the State Council ("**Anti-Monopoly Commission**") and the State Administration for Market Regulation ("**SAMR**") released the notice on establishing a system of "Three Documents and One Letter" for Anti-Monopoly. The third meeting of the Central Commission for Comprehensively Deepening Reform reviewed and passed *the Opinions on Improving the Implementation of Supervision System and Mechanism of Natural Monopoly Networks*. The SAMR studied and drafted the Draft Regulations on the Review of Fair Competition, and passed it on to the Ministry of Justice for legal review. *The Provisions of the State Council on the Standards for the Declaration of Undertakings Concentration (Revision Draft)* were adopted at the executive meeting of the State Council. **In law enforcement area** the SAMR approved 177 merger cases without conditions in November and December in 2023, implicating industrial sectors of energy, logistics, automobile, pharmaceuticals industry, private equity fund, materials, etc., and approved conditionally the case of Share Acquisition of VMware Corporation by Broadcom Corporation. The SAMR published the decisions for two administrative penalties on monopoly agreements and one administrative penalties on abuse of dominance. **In judicial area** The Case on "Brick and Tile Association" monopoly dispute was selected as one of the 39th guiding cases issued by the Supreme People's Court ("**SPC**").

Legislation and Policy Area

- On November 7, 2023, the third meeting of the Central Commission for Comprehensively Deepening Reform was convened. *The Opinions on Improving the Implementation of Supervision System and Mechanism of Natural Monopoly Networks* was reviewed and passed on the meeting. It was noted at the meeting that the link of network of sectors including power, oil and natural gas, and railways have the character of natural monopoly. It is imperative to place emphasis on the natural monopoly industries, including to implement major national strategies, plans and tasks, urging fulfillment of their duties on safeguarding national security and perform their social responsibilities, and supervising on the scope and actions of their operations. Such supervision should propel enterprises of national monopoly industries to focus on their responsibilities and main business, and increase the input of state capital into the network infrastructures, so as to improve the security and reliability of the backbone networks. **Supervision should also be imposed over the monopolistic and competitive aspects of the operations of natural monopoly industries, so as to prevent them from extending into the upstream and downstream competitive links by taking advantage of their monopolistic status.**^[2]
- On December 6, 2023, the Anti-Monopoly Commission and the SAMR released the notice on establishing a system for "Three Documents and One Letter" for anti-monopoly, establishing formally **the system for "Three Documents and One Letter"** (i.e., the Reminder Letter, the Notice of Regulatory Talk, the Notice on Legislative Investigation, and Decision of Administrative Penalty (Business Entity)/Administrative Recommendation (Administrative Organ)) for anti-monopoly, clarifying the circumstances under which the "Three Documents and One Letter" are to be issued, enhancing the effectiveness and standardization of anti-monopoly supervision, and this system will run through all areas and aspects of anti-monopoly supervision.^[3]
- On December 26, 2023, the State Council Information Office held a policy briefing, in which the head of the Department of Competition Policy Coordination of the SAMR, said that the SAMR had studied and drafted **the Draft Regulations on the Review of Fair Competition**, and had passed it on to the Ministry of Justice for legal review. Additionally in the briefing, it was mentioned that in the future, the SAMR will increase law enforcement efforts, strengthen regulatory authority, enhance institutional effectiveness, continuously strengthen and improve law enforcement against abuse of administrative power to exclude and restrict competition, and actively create a fair competition system environment for business entities.^[4]
- On December 29, 2023, *the Provisions of the State Council on the Standards for the Declaration of Undertakings Concentration (Revision Draft)* were adopted at the executive meeting of the State Council^[5], the full text of which has yet to be formally published. According to the revision

draft previously released by the SAMR for public comments in June 2022, the enforcement agency intends to increase the turnover threshold from the current rules and add new standards for killer acquisitions.

Enforcement Area

• **Merger Review**

- **Non-conditional Clearance:** From November to December 2023, 177 cases were cleared without condition by the SAMR (a year-on-year increase of 4.73% compared with that from November to December 2022, and a month-on-month increase of 55.26% compared with that from September to October 2023), implicating industrial sectors of energy, logistics, automobile, pharmaceuticals industry, private equity fund, materials, etc..

- **Conditional Clearance:** On November 21, 2023, the case of Share Acquisition of VMware Corporation ("[VMware](#)") by Broadcom Corporation ("[Broadcom](#)") was approved by the SAMR with conditions^[6]. The review of this case lasted for around eleven months, during which the SAMR "stopped the clock", i.e. made a decision to suspend the calculation of the review period, and the suspension period lasted for two months. Broadcom is principally engaged in the design, manufacture and sale of wired and wireless communication semiconductor products, as well as the provision of specific types of infrastructure software solutions. VMware's main business is the production of software and technical services, and its core product, virtualization software, is primarily used in data centre and cloud computing environments. Broadcom and VMware were found to have horizontal overlap in the market for endpoint protection software. Additionally, Broadcom's business of fibre channel adapters, storage adapters, and network card products was found to have an adjacent relationship with VMware's virtualization software as they share a common customer base. The SAMR concluded that the proposed deal has or is likely to have the effect of excluding or restricting competition in global and Chinese markets for non-public cloud virtualization software, fibre channel adapters, storage adapters and Ethernet network cards. Accordingly, the SAMR cleared the transaction with conditions listed as below:

(1) When selling Broadcom's fibre channel adapters, storage adapters, Ethernet network cards ("[related hardware products](#)") and VMware's server virtualization software to domestic market in China, Broadcom shall not tie-in products in any way or attach any other unreasonable trading conditions without justifiable reasons; shall not hinder or restrict customers from purchasing or using the above products alone; and shall not discriminate against customers who purchase the above products separately in terms of service level, price or function.

(2) Continue to ensure the interoperability of VMware's server virtualization software with related hardware products sold by third-parties in domestic market.

(3) Broadcom's certification team for fibre channel adapters shall maintain the current activities and continue to develop, certify, and release drivers for Broadcom's fibre channel adapters to ensure interoperability with virtualization software of third-party servers.

(4) Taking protective measures for the confidential information of third-party hardware manufacturers, including but not limited to signing confidentiality agreements with third-party hardware manufacturers, clarifying the scope of information use, storing confidential information separately, ensuring the separation of relevant personnel, and prohibiting cross-employment.

(5) Other two confidential undertakings.

The above undertakings are valid for a period of 10 years from the effective date and will be automatically terminated upon expiry of the period.

- On November 9, 2023, the SAMR announced the summary of unconditional approval of merger cases in the first 10 months of 2023 including their characteristics: (1) With respect to the type of cases, simplified cases account for 90% of the total. (2) With respect to subject composition, the number of concentration cases between domestic enterprises is the highest, 344, accounting for 57%; number of concentration cases between foreign enterprises is 193; and number of concentration cases between domestic and foreign enterprises is 68. There are 282 concentration cases involving state-owned enterprises, accounting for 47%, and there are 267 concentration cases involving foreign enterprises and 235 concentration cases involving private enterprises. (3) From the perspective of industry distribution, the cases involving real economy manufacturing industry take up the most, accounting for 39% of the total. Other industries that account for a relatively higher percentage included wholesale and retail, transportation, water, electricity, gas and heat production and supply, real estate, and information technology services. (4) In terms of transaction type, there are 312 cases of horizontal concentration involving peer competitors, 248 cases of vertical concentration involving upstream and downstream enterprises, and 124 cases of mixed concentration without horizontal or vertical relationship. In terms of transaction mode, the largest number of cases are equity acquisitions, at 350, followed by joint ventures, at 279. (5) From the perspective of the registration place of enterprises, concentration among domestic enterprises mainly involve enterprises registered in Shanghai, Beijing, Guangdong, Zhejiang and other provinces, while concentration among overseas enterprises mainly involve enterprises from the United States, France, Japan and other countries.^[7]

• **Monopoly Agreements**

- On November 9, 2023, the SAMR published an administrative penalty on 21 local concrete firms in Hangzhou city for entering into and implementing a

monopoly agreement.^[8] In this case, it was found that the 21 local concrete firms established the "Xiaoshan Concrete Association" in 2016, by using the special requirements of supply time and transportation radius for commercial concrete, collaborated with all commercial concrete production firms of the district to avoid competition, coordinate the price increases, and allocate the market. The responsible persons of the concrete firms in Xiaoshan District, Hangzhou City convened meetings on multiple occasions with other commercial concrete enterprises in Xiaoshan District, and reached a verbal agreement to establish an industry body, jointly increase concrete prices, and allow the trade association to allocate markets. In December 2016, the 21 concrete firms agreed on the quota of each party, set up two sales companies with capital contribution according to such quota, allocated production volumes, and operated within the designated areas with Jincheng Road as the boundary. Additionally, the parties formulated rules for the sale of commercial concrete, which were reviewed and approved by the responsible persons and shareholder meetings of the two sales companies. The main content of such rules includes "targeted sales with quota", "returning the overcharge and paying the shortage", reporting any business with a volume of more than 2000 cubic meters to the sales companies, prohibiting unilateral production expansion, and fines for violations of such rules. Based on these facts, Zhejiang Administration for Market Regulation determined that the conducts of the 21 local concrete firms constitute a monopoly agreement to fix the or change commodity prices, restrict production or sales volume, or divide up the sales market, ordered the concerned parties to cease their unlawful act, and imposed on 21 local concrete firms each a fine of 2% or 5% of their turnover in 2017, approximately RMB 174 million in total.

- On December 8, 2023, the Fujian Administration for Market Regulation ("Fujian AMR") published an administrative penalty on Fuzhou Real Estate Appraisal Association (the "Association") for entering into and implementing a monopoly agreement.^[9] In this case, the Association led relevant appraisal companies to sign a Commitment Letter in November 2019, stipulating the progressive fee standards for real estate appraisal services in Fuzhou, fixing the lowest service charges and discount rates for different types of services, as well as fixing the service charges for mortgage appraisal, bid appraisal, decoration appraisal in the Fuzhou area. In August 2020, the Association formulated a Guidelines for Appraisal Quotation for Tendering and Bidding for Real Estate Appraisal Projects to standardize the bidding behavior of appraisal entities, and restricted their price competition by means of notifications, service suspensions, and economic penalties. Based on these facts, the Fujian AMR determined that the conduct of the Association constituted organizing competitors in the industry to engage in a monopoly agreement made through an industry association, and ordered to rectify its unlawful act, and imposed on the Association a fine of RMB 300 thousand.

• Abuse of Market Dominance

- On December 22, 2023, the SAMR published an administrative penalty on Shanghai No.1 Biochemical & Pharmaceutical ("Shanghai No.1 Pharma") and other three pharmaceutical companies for abusing their market dominance^[10]. In this case, the other three affiliated entities Wuhan Huihai Pharmaceutical Co., Ltd. ("Wuhan Huihai"), Wuhan Kede Pharmaceutical Co., Ltd. ("Wuhan Kede") and Hubei Minkang Pharmaceutical Co., Ltd. ("Minkang Pharmaceutical", collectively with Wuhan Huihai and Wuhan Kede, "Huihai firms") together decided and collaborated to jointly act as agents for the import of Polymyxin B Sulfate active pharmaceutical ingredients ("Polymyxin B Sulfate APIs"), and require their overseas supplier, a Danish company Xellia Pharmaceuticals, not to sell the Polymyxin B Sulfate APIs to other enterprises. In June 2015, Huihai firms entered into a cooperation agreement with Shanghai No.1 Pharma, agreeing that Huihai firms would supply the Polymyxin B Sulfate APIs to Shanghai No.1 Pharma, Shanghai No.1 Pharma would be responsible for the registration, application, and production of injectable Polymyxin B Sulphate, and would grant Huihai firms the exclusive distribution rights and collecting processing fees; additionally, the parties agreed to jointly negotiate the bids for the drug. As the manufacturer, marketing license holder, bidding entity, and direct sales entity of injectable Polymyxin B Sulphate, Shanghai No.1 Pharma worked closely with the provincial agent team established by Huihai firms to jointly determine the sales price of injectable Polymyxin B Sulphate. During the concerned period, Huihai firms obtained monopolistic profits from the APIs by deceptively raising the sales price of APIs, while Shanghai No.1 Pharma shared the monopolistic profits by collecting and repeatedly increasing processing fees. Based on these facts, Shanghai Administration for Market Regulation determined that the conducts of Huihai firms and Shanghai No.1 Pharma constitute abuse of their dominance in the injectable Polymyxin B Sulphate market to sell the drug at unfairly high prices, ordered them to cease their unlawful act, confiscated their illegal incomes of approximately RMB 1.004 billion, and imposed on Shanghai No.1 Pharma and Minkang Pharmaceutical a fine of 3% of its turnover in 2022, on Wuhan Huihai and Wuhan Kede a fine of 8% of its turnover in 2022, approximately RMB 215 million in total.

Judicial Area

- On December 20, 2023, the SPC published the 39th batch of eight guiding cases.^[11] Among which, in the Guiding Case No. 221, a monopoly dispute between Zhang and Yibin Heng Investment Group Co., Ltd., Sichuan Yibin Wu Building Materials Industry Co., Ltd. and others, it was ruled that the undertaking's loss incurred during the period of participation in and performance of the horizontal monopoly agreement is not protected under the law.
- Facts:** In March 2010, a trade association in Yibin ("Trade Association") was established with members including a brick factory under Zhang's name ("Brick Factory"). In July 2009, the "Yibin Brick Industry Work Conference" was convened, during which the members negotiated and agreed on the establishment of the Brick Association Council and the Coordination Office, required that the brick factories in Cuiping District and within its 30-kilometers radius, in Baixi and within its 15-kilometers radius to cooperate with Yibin Ren Trading Co., Ltd. ("Ren Company") to jointly establish a local brick association and prevent outside suppliers from entering such area. Discontinued manufacturers under such arrangement (including the Brick Factory) would receive monthly leasing and contracting fees from the Ren Company, while continued manufacturers would pay market management

and technical guiding fees to Ren Company. In July 2009, the predecessor of the Trade Association entered into a "Suspension and Rectification Contract" with the Brick Factory and other brick manufacturers. On March 6, 2013, the Sichuan Industry and Commerce Bureau determined that the conducts of Trade Association constitute a monopoly agreement of organizing the member units in competition to jointly agreed to suspend the production of some factories, thereby controlling the production quantity of bricks and the direct withdrawal of the discontinued member units from competition in the brick and tile market in Yibin, which substantively limited market competition. Zhang, as the Plaintiff, later sued the Trade Association and related members to the court, and alleged that he had suspended the production according to the "Suspension and Rectification Contract" and merely received an insignificant amount of suspension support fees before September 2011; the aforementioned actions essentially had the effect of excluding the Plaintiff's participation in competition, constitute a monopolistic behavior, and infringed on the Plaintiff's legitimate rights and interests. Zhang claimed that the Trade Association and concerned sponsor member units, as well as Yibin Heng Investment Group Co., Ltd., should be ordered to jointly compensate for his economic losses and reasonable expenses.

- **Key findings and rulings:** The SPC ruled that Zhang's right to claim for compensation as the implementer of the horizontal monopoly agreement in question for his so-called economic losses from other implementers of the monopoly agreement should be considered in accordance with the legislative purpose of Article 50 of the *Anti-Monopoly Law*[12] ("**AML**"), the characteristics of the concerned monopolistic behavior, and the legal effect of compensation for damages.

(1) The legislative purpose of the foregoing provision is to provide a civil judicial channel for stopping and combating monopolistic behavior, and to provide civil remedies for persons who have suffered damage due to such monopolistic behavior. **If the Plaintiff is not a victim but instead the implementer of the monopolistic behavior under the AML, its claim for damages is essentially a demand for the allocation of monopolistic interest, which is not the in line with the object of remedy as intended under the AML.**

(2) **The person claiming for compensation of damages must act in a legitimate and lawful manner.** People who actually participate in and carry out illegal activities, even if suffering losses due to such illegal activities, should not receive any relief due to the illegitimacy of their own acts.

(3) **Granting damages to the implementers of monopolistic behavior may have a negative legal effect of encouraging relevant monopolistic behavior.** The implementer of a horizontal monopoly agreement is not entitled to claim for compensation for his so-called economic damages by other parties to such agreement.

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.

