

China Antitrust and Competition Update (2023 Q4)¹

OVERVIEW

In the fourth quarter of 2023, we saw some notable advancements in China's antitrust and competition regime. Among others, the State Council updated the 15-year-long merger filing thresholds by substantially increasing the turnover requirements for transactions reportable in China; the SAMR establishes the system of "Three Notices and One Letter" to enhance the effectiveness and standardization of antitrust enforcement procedures; at the local level, the Guangdong AMR issued the Guideline for Competition Compliance of Internet Platform Operators, which notably provides a detailed classification and grading of internet platforms.

In 2023, the SAMR cleared 778 merger cases in total, including four conditionally cleared transactions. In Q4 2023, SAMR conditionally cleared Broadcom's acquisition of VMware. Additionally, the SAMR and its local counterparts imposed a number of antitrust penalties amounting to tens of millions in pharmaceuticals and building materials sectors.

As for court cases, JD.com inked a landmark victory in its 7-year-long legal battle against Alibaba's "Pick One from Two" Policy. Specifically, the Beijing High Court has awarded JD.com RMB 1 billion in damages, marking the largest amount ever granted in a private antitrust case in China. In another legal case, the Shanghai Intellectual Property Court has ruled in favor of Alibaba and Alipay, upholding their argument that payment services are an essential component of e-commerce, so Alibaba's requirement for all consumers to exclusively use Alipay as the payment channel on Taobao and Tmall is not considered abusive.

I. Legislation Developments

■ Chinese Merger Filing Thresholds Updated

On December 29, 2023, the State Council approved the amendment to the "*Rules on Anti-monopoly Filing Thresholds for Concentration of Undertakings*". Up to date, the new rules

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are yet unveiled. However, it is expected that the new rules will include a substantial increase in turnover requirements for transactions to be considered reportable in China.

In the draft version released for public comments in 2022, the new turnover thresholds were:

- the combined global turnover of all participating undertakings in the preceding fiscal year exceeds RMB 12 billion (2022: approx. US\$ 1.7 billion, increased from RMB 10 billion) and the individual Chinese turnover of at least two of the participating undertakings in the preceding fiscal year exceeds RMB 800 million (2022: approx US\$ 114 million, increased from RMB 400 million); OR
- the combined Chinese turnover of all participating undertakings in the preceding fiscal year exceeds RMB 4 billion (2022: approx US\$ 571 million, increased from RMB 2 billion) and the individual Chinese turnover of at least two of the participating undertakings in the preceding fiscal year exceeds RMB 800 million (2022: approx US\$ 114 million, increased from RMB 400 million).

The draft version also contained a specific threshold for "killer acquisition," but it remains uncertain whether this threshold has been retained in the final version.:

- the Chinese turnover of one of the participating undertakings in the preceding fiscal year exceeds RMB 100 billion (2022: approx. US\$ 14.3 billion); and
- the market value of any other merged entities or acquired entities exceeds RMB 800 million (2022: approx US\$ 114 million), and the Chinese turnover of such entity in the preceding fiscal year accounts for one-third of its global turnover.

■ The System of "Three Notices and One Letter " was Established to Enhance the Effectiveness and Standardization of Antitrust Enforcement Procedures

On December 6, 2023, to enhance the effectiveness and standardization of antitrust enforcement procedures, promptly prevent and curb monopolistic behaviors, the Office of the State Council's Anti-Monopoly and Anti-Unfair Competition Commission and the SAMR announced to establish the "Three Notices and One Letter" system for antitrust enforcement, which includes the Notice of Interview, the Notice of Investigation, the Notice of Administrative Penalty Decision (to Business Entity) / Administrative Proposal (to Administrative Agency), and the Reminder and Urgence Letter. This initiative is anticipated to help antitrust authorities mobilize more enforcement resources for prioritized cases from antitrust matters with less competition concerns.

■ The Guangdong AMR Issued the Guideline for Competition Compliance of Internet Platform Operators

On November 1, 2023, the Guangdong Administration for Market Regulation (AMR) issued the "Guideline for Competition Compliance of Internet Platform Operators". The Guideline is applicable to operators of public resource trading platforms managed by government departments or industry organizations, as well as those who engage in the sale of goods

or provision of services through self-built websites, mobile applications (APPs), and other internet-based platforms. Notably, it incorporates the regulatory framework concerning classification and grading as outlined in the SAMR's "Guideline for Internet Platform Classification and Grading (Draft for Comments)". It provides a detailed classification and grading of internet platforms based on their functions, business models, application scenarios, and user scale, facilitating operators of different types of platforms to identify unique risks and enhance their awareness of anti-monopoly compliance. It is noteworthy that the Guideline do not impose additional obligations on super-platforms or large-scale platforms, nor does it directly associate the classification and grading system with the determination of market dominance.

II. Law Enforcement and Representative Cases

■ Merger Filings

In 2023, a total of 778 merger filings were cleared, among which 4 filings were conditionally cleared. In Q4 2023, one deal, Broadcom's acquisition of VMware, was conditionally cleared.

Conditional Clearance: Acquisition of VMware by Broadcom

On November 21, 2023, SAMR conditionally cleared the merger between two US-based semiconductor giants. The SAMR imposed the following behavioral conditions to address potential antitrust concerns:

- No advantages for combined purchases versus separate purchase of VMware Server Virtualization Software and Broadcom Relevant Hardware Products.
- Continuous interoperability of VMware Server Virtualization Software with Third Party Relevant Hardware Products.
- Broadcom's FC HBAs certification team in ECD shall continue to use best efforts to continue to develop, certify and release Drivers for Broadcom FC HBAs to ensure their interoperability with Linux or Windows as necessary to support Server Virtualization Software in China market, as consistent with past ECD practices.
- Protect Confidential Information of Third-Party Hardware Manufacturers.

The SAMR included another two confidential commitments in its decision. All these restrictive conditions are valid for 10 years.

■ Administrative Penalties

Twenty-One Cement Producers in Zhejiang Province Fined for Price Cartel

On November 9, 2023, twenty-one cement producers were fined by the Zhejiang AMR for fixing the price of commodity cement, allocating the sales market in a district of Hangzhou and limiting the product quantity produced and sold. A total fine of RMB 174 million was imposed. Interestingly, this enforcement action followed the exposure of the price-fixing scheme by a regional court during a separate criminal case.

SPH No.1 Biochemical & Pharmaceutical Co., Ltd. (“SBPC”) and Three Other Companies Fined for Abuse of Market Dominance

On December 22, 2023, the SAMR announced that it had seized RMB 337.9 million in illegal gains from SBPC and imposed an additional fine of RMB 124.2 million on the company. This penalty was levied because SBPC had significantly inflated the price of an antibacterial drug, charging up to 62 times more than what the same drug cost in other countries. Furthermore, the SAMR also confiscated RMB 666.2 million in unlawfully acquired income from three companies that had a grip on the import of the active pharmaceutical ingredient required for manufacturing the drug. These companies had unreasonably hiked the prices of this ingredient and were subjected to extra penalties amounting to RMB 91.1 million. It's worth noting that this marks the sixth antitrust penalty issued against pharmaceutical firms in 2023, highlighting the SAMR's continued focus on enforcing regulations within the pharmaceutical sector.

■ Court Cases

The Beijing High Court Ruling: JD.com Wins Largest-ever Antitrust Private Damages Action Against Alibaba's “Pick One from Two” Policy

On December 29, 2023, the High People's Court of Beijing issued a landmark ruling against Alibaba, finding that the company had abused its dominant e-commerce market position by compelling merchants to enter into exclusive agreements, a practice locally known as a "pick one from two" policy, which harmed JD.com. As a result of this ruling, JD.com was awarded RMB 1 billion in damages, which became the largest-ever for private antitrust cases in China. This marks the first court decision that followed the SAMR's historic penalty of RMB 18.2 billion imposed on Alibaba for engaging in anticompetitive conduct in 2021. This development highlights the growing trend of Chinese courts taking a more proactive stance in antitrust lawsuits and serves as an encouragement for consumers and other stakeholders to pursue legal actions in response to SAMR's penalties against anti-competitive behaviors.

The Shanghai Intellectual Property Court Ruling: Alibaba's Requirement For All Consumers to Exclusively Use Alipay as the Payment Channel on Taobao and Tmall is Not Considered Abusive

On October 13, 2023, the Shanghai Intellectual Property Court issued a ruling regarding Alibaba's practice of requiring all customers to exclusively use Alipay as their payment method on Taobao and Tmall. The plaintiff had alleged that Alibaba, being a dominant player in the online retail platform services market, was engaging in abusive behavior by mandating the use of Alipay for shopping on these platforms, which are part of the Alibaba Group. However, the court determined that the payment services offered on these online retail platforms are an integral part of the platform's overall services, rather than being separate and independent products or services. Furthermore, the court found that the decision by Tmall and Taobao to utilize Alipay's payment services had a reasonable basis. Ultimately, the court concluded that the evidence presented was insufficient to establish that the exclusive use of Alipay on Taobao and Tmall constituted either a tying and bundling arrangement or the imposition of unreasonable transaction terms.