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China Antitrust Highlights: 2022 Year in Review¹

2022 witnessed China's continued efforts to promote antitrust and competitive legislative and enforcement activities in various respects.

- The Chinese National People's Congress (NPC) approved the amendment to the *Anti-monopoly Law of People's Republic of China* (AML) in June, the first of its kind amid the fourteenth anniversary of the AML's promulgation since 2008, followed by the State Administration for Market Regulation (SAMR) publishing a set of draft implementing rules to seek public comments.
- The SAMR and its local counterparts kept prioritizing their enforcement on digital and livelihood-related sectors but also made some interesting advances in other arenas – such as sanction and rectification requirements on CNKI.com (a state-owned and largest academic database platform service provider in China), record high fines on building materials cartels, and first penalty against RPM involving franchise model.
- The SAMR optimized its merger review mechanism and has been diligent on merger control frontier despite the Covid-19 challenges – by delegating a portion of simple cases to five provincial counterparts, the Chinese antitrust authority cleared over 740 deals (incl. five conditional clearances, 8.7% YoY growth) and probed 45 failure-to-notify cases throughout the year.
- The Chinese courts have become increasingly active in adjudicating antitrust disputes – the Supreme People's Court (SPC) is revising its trial rules on antitrust litigations based on past experience and recent developments, and also published a number of landmark antitrust rulings, such as the first case involving reverse payment issue in China (AstraZenecaAB v. Jiangsu Aosaikang), the first antitrust dispute involving sports events and IP exclusive dealing (Osports Beijing v. Chinese Super League and Shanghai Imagine).
- Our experiences and observations also suggest that antitrust cases are more often intertwined with data compliance and national security issues. For example, a digital player may need to tackle antitrust and cybersecurity investigations concurrently, while one international transaction may need to go through foreign investment security review and/or data export security evaluation in addition to merger review in China.

Below are some highlights of China's antitrust regime for the year of 2022.

1. The AML amended for the first time with the SAMR seeking public comments to revise the relevant implementing rules

On 24 June 2022, the China National People's Congress adopted the long-awaited

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amendment to the AML, which became operative as of 1 August 2022. Among other things, the amended AML significantly lifts the upper limit of economic sanctions on enterprises and individuals for various violations (e.g. up to 10% of group revenues for a failure-to-notify with competition concerns, punitive fines of 2 to 5 times of the base fines for serious or aggravated violations, 5 times of the original fines for refusal or obstruction of investigation), introduces additional forms of liability such as negative credit recording, public interest antitrust litigation and criminal liability (for both enterprises and individuals). For more detail, please read our note of [“China Amends Its Anti-Monopoly Law For the First Time”](#).

On 27 June 2022, three days following adoption of the amended AML, the SAMR released six exposure drafts of AML implementing rules, which are designed to streamline and harmonize the existing operational rules with respect to filing thresholds, merger control, joint conduct, unilateral conduct, intellectual property abuse, and administrative monopolies. Among other things, the implementing rules propose to set a threshold of 15% market share for the newly introduced “safe harbour” rules applicable to vertical restraints, to significantly raise the filing thresholds (e.g., for a target in a typical acquisition, threshold revenue increased to RMB800 million from RMB400 million), and to tackle “killer acquisition” and certain IP abusive behaviours.²

2. China kept tackling digital and livelihood-related sectors for antitrust enforcement

The SAMR and its local counterparts continued their antitrust enforcement priorities on digital and livelihood-related sectors but also made some interesting advances in other arenas in 2022. For example:

- **Digital platform sector kept being scrutinized.** On 26 December 2022, the SAMR published its sanction against CNKI.com, a state-owned and largest academic database platform service provider in China, by imposing a fine of RMB 87.6 million (approximately USD 12.5 million, 5% of CNKI’s 2021 revenues) and requesting for a number of rectification measures including removal of copyright exclusive arrangement and substantially reducing the product pricing. In another decision, the SAMR fined a logistics service provider, an exclusive local agent of Didi, for exclusive dealing and unlawful bundling. Also, 38 out of the 45 failure-to-notify cases published in 2022 concern platform operators such as Alibaba, Tencent, Weibo.
- **People’s livelihood always a focus.** The Chinese antitrust authorities kept prioritizing enforcement in sectors concerning people’s livelihoods such as pharmaceuticals, building materials, public utilities. For example, on 28 June 2022, Shaanxi Cement Association and thirteen member enterprises were imposed with a total fine of RMB 450 million (approximately USD 66.38 million), setting a record high sanction in Chinese building materials sector; on 16 December 2022, the SAMR published series of sanction decisions against Zhejiang Civil Explosive Materials Trade Association and four member enterprises for concluding cartels and vertical restraints.
- **First sanction against RPM involving franchise model.** On 27 July 2022, the SAMR’s Beijing counterpart fined a Beijing education service provider for resale price maintenance (RPM) on English classes offered by its franchisees. This is the first RPM case involving franchise model, and the sanction decision received controversial discussions about whether and how the AML shall apply to a franchise contract where

² For more detail, please see our series of analysis on the implementing rules of the amended AML (in Chinese), respectively available at <https://www.zhonglun.com/Content/2022/07-01/2252243505.html>; <https://www.zhonglun.com/Content/2022/07-12/1547512587.html>; <https://www.zhonglun.com/Content/2022/08-10/1632374752.html>.

IP and many other trade terms are supposed to be uniformly enforced.

3. Optimized merger review mechanism with new record cases despite covid challenges

To streamline the merger review process, the amended AML introduces the “stop-the-clock” mechanism and the SAMR also delegated a portion of simple cases to five provincial counterparts (Beijing, Shanghai, Guangdong, Chongqing and Shaanxi) to assist in reviewing merger cases with local nexus. As of 31 December 2022, China unconditionally cleared 736 cases (an YoY increase of 8.7% year, among which about 14% were handled by the SAMR’s local counterparts and over 90% were processed as simple cases), conditionally cleared five cases and blocked no deal.

Among the five conditionally clearances, three cases (Global Wafers/Siltronic, AMD/ Xilinx, II-VI/Coherent) concern ICT sector and the other two cases (Shanghai Airport/China Eastern Airlines, Korean Air/Asiana Airlines) concern airport and airline operations. One noteworthy point is the Shanghai Airport/China Eastern Airlines deal, where the Chinese antitrust authority for the first-time imposed restrictive conditions on a purely domestic deal involving two state-owned enterprises.

4. Chinese courts playing increasingly important role in antitrust disputes

On 18 November 2022, the SPC published an exposure draft of the *Provisions of the Supreme People’s Court on Issues Concerning the Application of Law in Adjudicating Monopoly-Related Civil Cases for public comments* (“Draft SPC Provisions”). The Draft SPC Provisions are designed to align with the amended AML and will supersede the SPC’s existing provisions in adjudicating antitrust litigations issued in 2012 (amended and re-promulgated in 2020). Among other things, the Draft SPC Provisions provide detailed guidance on finding of specific monopoly instances, drawing upon the courts’ experiences in adjudicating numerous antitrust cases in the past decade. Some highlights of Draft Provisions include more clarity on various procedural issues, specific approaches to defining relevant market, more elaborated considerations for finding joint conducts, more detailed rules for determining abuse of dominance and enhanced clarity on civil liability. For more detail, please read our note of [“China SPC Seeking Comments to Revise Antitrust Litigation Rules”](#).

Also, the Chinese courts have ruled and are reviewing a growing number of antitrust litigations, playing increasingly important role in resolving various key antitrust issues such as whether an arbitration agreement can preclude court’s exclusive jurisdiction over antitrust dispute (Longsheng Xingye v. Honeywell³), whether a pharmaceutical patent “reverse payment” agreement can be subject to antitrust scrutiny (AstraZeneca v. Jiangsu Aosaikang⁴), whether exclusive IP arrangement in sports event activities has anti-

³ See, e.g. Beijing Longsheng Xingye Technology Development Co., Ltd. v. Honeywell Automation and Control Solutions (China) Co., Ltd. & Resideo Smart Homes Technology (Tianjin) Co., Ltd. ((2022) SPC ZhiMinZhong No.1276), where the SPC further clarified that the AML has obvious public-law nature, the identification and handling of the antitrust behaviour exceeds the relationship of rights and obligations between the parties, so the trial object of antitrust disputes arising in the signing and performance of contract is far beyond the scope of the arbitration clause as agreed between the parties. In another ruling, the SPC affirmed Beijing High People’s Court ruling that the pre-existing arbitration clause included in a distribution agreement can preclude a court’s exclusive jurisdiction despite the antitrust element. See, e.g. (2019) SPC Minshen No. 6242.

⁴ See, e.g. AstraZenecaAB v. Jiangsu Aosaikang Pharmaceutical Co., Ltd. ((2021) SPC ZhiMinZhong No.388). It is the first adjudication over reverse payment agreement concerning pharmaceutical patents in China, where the SPC suggests the key factors be considered to find whether a reverse payment constitutes a cartel: the possibility that the patent at issue becomes invalid due to the invalidation request by comparing the actual situation of signing and performing the relevant agreement with the hypothetical situation of not signing or performing the relevant agreement.

competitive effect (Osports Beijing v. v. Chinese Super League and Shanghai Imagine⁵), whether damages in private action following an antitrust investigation can be supported (Miao Chong v. Shanghai GM⁶) and so on.

5. More intersection between antitrust and data compliance/security review

Based on our experiences and observations, a digital platform player will more likely be exposed to various regulatory scrutiny for its operation in China, including antitrust, cybersecurity, etc., in particular if data and algorithm become the core element of such operator's business. Indeed, we assisted one platform operator to deal with antitrust and cybersecurity investigations concurrently in 2022. In addition, for an international transaction having China nexus, in addition to the merger filing which is a common checkpoint for deal planning, other regulatory requirements such as foreign investment security review and data export security evaluation have also become more frequently caught by Chinese regulators' radar. Accordingly, we recommend multinationals keep an early eye on China cybersecurity and national security in assessing regulatory issues related to a global deal.

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If you have any questions about China's antitrust/competition or other regulatory issues, please feel free to contact us.

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⁵ See, e.g. Osports (Beijing) Culture Media Co., Ltd v. Chinese Super League Co., Ltd. and Shanghai Imagine China Cultural Communication Co., Ltd. ((2021) SPC ZhiMinZhong No.1790). It is the first antitrust lawsuit regarding exclusive IP arrangement in sports event in China. The SPC held that the organizer of a sports event enjoys the exclusive right to operate the event and such exclusivity does not necessarily violate the AML, to the extent that the granting of such exclusive operating rights is commercially reasonable and reflects competition in the process of granting.

⁶ See, e.g. Miao Chong v. Shanghai Yilong Automobile Service Co., Ltd.((2020) SPC ZhiMinZhong No.1137). It is the first case where civil compensation following an administrative sanction is supported by the SPC.