



北京市朝阳区金和东路 20 号院正大中心 3 号楼南塔 22-31 层。邮编：100020  
22-31/F, South Tower of CP Center, 20 Jin He East Avenue, Chaoyang District, Beijing 100020, P. R. China  
电话/Tel: +86 10 5957 2288 传真/Fax: +86 10 6568 1022/1838  
网址: www.zhonglun.com

## China Antitrust/Competition Update (2022 Q3)<sup>1</sup>

### Preface Overview

With the amendment to its Anti-monopoly Law (AML) officially took effective on August 1, in the third quarter of 2022, China continued to promote the implementation of the newly amended AML and prioritized antitrust enforcement in certain key industries such as education and public utility. Among other things, China piloted Beijing, Shanghai, Chongqing, Guangdong and Shaanxi to pilot its de-centralized merger review initiative; the State Administration for Market Regulation (SAMR), China's antitrust authority, reviewed 184 merger filings, including the conditional clearance of Shanghai Airport Group/China Eastern Airlines, the first of its kind involving two state-owned enterprises without any foreign entities concerned.

## I. Legislation and Key Policies

### ■ SAMR piloted a de-centralized merger review system, and five provincial AMRs were entrusted to review simple cases

On July 15, 2022, SAMR issued the *Announcement on Piloting the Entrusted Implementation of Anti-monopoly Review of Certain Concentrations of Undertakings* (the "Announcement"). The Announcement aims to improve the efficiency of the merger control review system by entrusting five provincial AMRs (i.e., Beijing, Shanghai, Guangdong, Chongqing and Shaanxi) on a pilot basis to handle certain simple merger filing cases starting from August 1, 2022.

During the pilot period, all filings will continue to be submitted to the SAMR, which will decide on whether to designate one of the five provincial AMRs to review a simple case.<sup>2</sup>

<sup>1</sup> Prepared by Zhong Lun antitrust/competition practice group led by Scott Yu, Frank Jiang, Maria Hou and Jason Jia, with particular contribution from Ryan Xu for this issue, for reference purpose only. For more detail, please contact Scott Yu at [scottyu@zhonglun.com](mailto:scottyu@zhonglun.com) or +86 10-5957-2078, Frank Jiang at [jianghuikuang@zhonglun.com](mailto:jianghuikuang@zhonglun.com) or +86-10-5957-2131, Maria Hou at [houzhanghui@zhonglun.com](mailto:houzhanghui@zhonglun.com) or +86-10-5957-2336, Jason Jia at [jiaashen@zhonglun.com](mailto:jiaashen@zhonglun.com) or +86 10 5957 2263.

<sup>2</sup> According to Article 17 of Interim Provisions on the Examination of Concentrations of Undertakings, a transaction will qualify for the simplified procedure in China if:  
(1) the combined shares of all parties in a horizontal overlap market are less than 15 percent; and

The designated provincial AMR will then review all submissions, request for additional information and finally make a proposal to the SAMR on whether to clear the case. Upon the SAMR's confirmation of its proposal, a written approval will be issued to the notifying party by the provincial AMR in-charge. From July to September of 2022, 14 cases have been cleared by these provincial AMRs.

## II. Recent Law Enforcement and Representative Cases

### ■ Merger Control

From July to September of 2022, the SAMR and its five provincial counterparts unconditionally cleared 183 cases, covering energy, communications technology, pharmaceuticals and health, consumer retail, chemicals, automotive, finance, manufacturing, utilities among other industries.

#### **First conditionally cleared case involving only state-owned enterprises without foreign entities concerned: a new joint venture between Shanghai Airport Group and China Eastern Airlines**

On September 14, SAMR approved a joint venture to be established by Shanghai Airport Group ("SAG") and China Eastern Airlines ("CEA") with restrictive conditions, the first of its kind involving only state-owned enterprises. SAG is the owner and operator of the two international airports in Shanghai, while CEA is one of the three major airlines in China, with its domestic core hubs in Beijing and Shanghai. The joint venture will be active in automated and intelligent airport cargo terminal services.

Given the horizontal overlap and vertical link between the parties, SAMR defined and analyzed (i) the Pudong Airport cargo terminal service market, and (ii) the international/domestic market of air cargo transportation services with Pudong Airport being the departure/destination hub. The SAMR opined the deal has or may have the effect of eliminating or restricting competition since the parties' combined share in the Pudong Airport cargo terminal service market exceeded 70% in 2020, and the market entry barriers are high. Accordingly, SAMR decided to impose the following remedies:

- SAG and CEA to hold separate their cargo terminal activities at Pudong Airport, including refraining from exchanging competitively sensitive information;
- Hold separate activities of SAG, CEA and the JV, including employees, workspace and IT system;
- SAG, CEA and the JV shall not directly or indirectly exchange competitively sensitive information, and the JV shall operate independently in terms of finance, HR, production and services, procurement, R&D, pricing and sales;

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there is a vertical relationship or the parties are active in neighbouring markets, and the parties have a share of less than 25 percent in each market;

(II) the acquisition target or joint venture does not engage in economic activities in China; or

(III) two or more parties have joint control of a joint venture, and one or more parties among them acquire control.

- SAG and CEA shall continue performing their existing contracts with customers on cargo terminal services at Pudong Airport and shall not refuse clients' requests for renewal of any such contract in the next 5 years;
- SAG, CEA and the JV shall provide cargo terminal services at Pudong Airport in accordance with the fair, reasonable and non-discriminatory (FRAND) principle;
- The JV undertakes to invite the China Air Transport Association every year to supervise and guide its commitment compliance.

## ■ Administrative Penalties

From July to September of 2022, the SAMR and its local counterparts imposed penalties on 11 antitrust cases, including 8 concerning monopoly agreements and 3 concerning abuse of dominance.

### **The First Sanction against Resale Price Maintenance Involving Franchise Model**

On July 27, 2022, the Beijing AMR imposed a penalty on Beijing CollegePre Union Education Technology Co., Ltd. (the "Beijing CollegePre") for resale price maintenance (RPM) on English classes offered by its franchisees. The company was fined approx. RMB 1 million, 3% of its revenue in 2020. 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 IP and many other trade terms are supposed to be uniformly enforced.

Beijing CollegePre is the operator of Sesame Street English learning programs in China. It licenses Sesame Street programs to franchisees, which then sell English classes to parents under the Sesame Street brand. From 2014 to 2021, Beijing CollegePre were alleged to restrict the class prices offered by its franchisees by various means, including issuing regulations on price adjustments, implementing regional pricing and discount programs, and unifying customer service responses on price inquiries. Under the cooperation agreement with Beijing CollegePre, franchisees needed to obtain Beijing CollegePre's approval for any price change, and breach of such requirement could result in penalties by Beijing CollegePre.

## ■ Court Cases

### **Supreme People's Court: Antitrust fines should be calculated based on the total sales instead of sales of products concerned in the anti-competitive behavior**

The Supreme People's Court ("SPC") recently handed down its final judgment on *Hainan ASR v. Hainan Shenghua Construction Co., Ltd.*, holding that it is reasonable to interpret the "sales of the preceding year" stipulated in Paragraph 1 of Article 56 of the AML as total sales of the company concerned, instead of sales of products in question.

On November 19, 2020, Shenghua was fined approx. RMB 1 million, 1% of its total sales in 2018, by Hainan AMR for its RPM practice related to fire safety testing products and services. Shenghua claimed that it was improper to impose a fine based on its total sales for 2018, as less than 1% of its total sales was generated from the fire safety testing business.

The SPC stated that, literally speaking, the wording of Article 46 of the AML is straight forward - it refers to "the sales of the preceding year" without further qualification; delving into the legislative intent of the AML, it is meant to prevent and prohibit monopolistic conducts, and the generally harsher penalties against monopolistic conducts are in the need of achieving such legislative purpose.

### **Supreme People's Court: Sports Event Organizer's Exclusive Right to Operate Does not Necessarily Violate the AML**

SPC recently made its final judgment on *Osports (Beijing) Culture Media Co., Ltd ("Osports") v. Chinese Super League Co., Ltd. ("CSL") and Shanghai Imagine China Cultural Communication Co., Ltd. ("Imagine China")*, which is the first antitrust lawsuit regarding sports events in China.

On December 9, 2016, CSL selected Imagine China as the official exclusive photographing partner of its matches through an open tender. Despite of such situation, Osports took pictures of the CSL matches and used them for commercial purposes, which prompted a lawsuit over unfair competition filed by Imagine China. In September 2018, after failing the lawsuit, Osports filed a counterclaim against CSL and Imagine China on the grounds of vertical monopoly agreement and abuse of dominance, which was rejected by the Shanghai Intellectual Property Court. Therefore, Osports appealed against the decision to the SPC.

The SPC rejected the appeal, holding that CSL's and Imagine China's conduct did not constitute abuse of dominance. The SPC held that the organizer of a sports event enjoys the exclusive right to operate the event and does not necessarily violate the AML, provided that the granting of such exclusive operating rights is commercially reasonable and reflects competition in the process of granting.