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China Antitrust/Competition Update (2022 Q4)¹

Preface Overview

For the last quarter of 2022, China spared no efforts in promoting antitrust and competitive legislative and enforcement activities. Among other things, the Chinese government issued an exposure draft of *the Anti-Unfair Competition Law of the People's Republic of China* for public comments; the Supreme People's Court ("SPC") is seeking public comments to revise its guiding rules on adjudicating antitrust litigations and clarified the factors to be considered in finding "other concerted conducts" for the first time; the State Council issued *Opinions on Building a Data Basic System to Better Play the Role of Data Elements*; and the State Administration for Market Regulation ("SAMR") intends to revise its rules on discretion of administrative penalties. See updates below for more detail.

I. Legislation and Key Policies

■ SAMR seeks public comments on *the Anti-Unfair Competition Law (Amended Draft for Comments)*

On 22 November 2022, the SAMR issued an exposure draft of *the Anti-Unfair Competition Law of the People's Republic of China ("draft amended AUCL")* for public comments, a third time of amendment in the past five years. The *draft amended AUCL* primarily concerns improvement of regulatory rules tackling unfair competition in the digital economy, scrutiny of behaviors distorting the competition order under new regulatory mode, strengthening the requirements and legal liabilities of anti-unfair competition, etc. For instance, the *draft amended AUCL* stipulates that an undertaking shall not take advantage of technical means to implement any of the following behaviors:

- using data, algorithms, technology, and so on to engage in unfair competition, embedding links, keyword associations, false operation options, and so on to promote its own or other products or services or intercepting, blocking, and so on the products or services of others, and using technical means, platform rules and so on to improperly exclude or hinder access to and transactions involving products or services provided by other undertakings.
- improperly obtaining or using trade secrets in the form of commercial data.
- using algorithms to implement unreasonable differential treatment or unreasonable

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restrictions on trading counterparties in terms of trading conditions by analysing user preferences, trading habits and other characteristics.

The *draft amended AUCL* also introduces such concepts as "relatively dominant market position" which can be deemed as unfairly imposing unreasonable restrictions or conditions on transaction counterparties in certain circumstances, and "malicious trading behavior" which occurs where an undertaking improperly obstructs or disrupts the normal operations of another undertaking.

■ SPC seeks public comments on *Provisions on Issues Concerning the Application of Law in Adjudicating Monopolistic Civil Dispute Cases*

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 Provisions")*. The *Draft Provisions* are designed to align with the amended Anti-monopoly Law and will supersede the SPC's existing provisions in adjudicating antitrust litigations issued in 2012 (amended and re-promulgated in 2020, the "*2020 Provisions*"). The *Draft Provisions* provide detailed guidance on finding of specific monopoly instances, drawing upon the courts' experiences in adjudicating numerous antitrust cases in the past decade. Below please find some highlights (For more detail of the analysis of *Draft Provisions*, please see our article of "China SPC Seeking Comments to Revise Antitrust Litigation Rules" at <https://www.zhonglun.com/Content/2022/12-23/1241135198.html>).

- More comprehensive coverage and clearer structure. The *Draft Provisions* include 52 articles, over 3 times more articles compared to the *2020 Provisions*. It contains six parts: Procedural Provisions, Relevant Market Definition, Monopoly Agreement, Abuse of Dominant Market Position, Civil Liability and Supplementary Provisions.
- More clarity on various procedural issues. Specifically, the *Draft Provisions* clarify that preexisting arbitration agreement does not preclude PRC court's jurisdiction and Chinese courts can exercise extra-territorial jurisdiction over certain overseas antitrust cases. The *Draft Provisions* also provide guidance on public interest lawsuit against antitrust infringers.
- Approach to defining relevant market. Among others, the *Draft Provisions propose to* lift plaintiff's burden of proof in certain antitrust lawsuits and set out special rules for market definition concerning digital platform economy.
- More elaborated considerations for finding joint conducts. The *Draft Provisions* set out various factors to be considered in finding joint conducts in special industries, including digital economy, pharma sector, etc.
- More detailed rules for determining abuse of dominance. The *Draft Provisions* stipulate that almost every type of alleged abuse of dominance should be analyzed based on comprehensive consideration of justifiable causes and anticompetitive effects and specify certain noteworthy points in evaluating IPR related monopoly behaviors.
- Enhanced clarity on civil liability. The *Draft Provisions* expressly set out that, once antitrust violation is established, the plaintiff can seek injunctive relief as well as damages, and the defendant can be ordered to taking specific actions to restore competition.

■ SAMR amended *Guidance on Regulating the Discretion of Administrative Penalties for Market Supervision*

On 8 October 2022, the SAMR amended *the Guidance on Regulating the Discretion of Administrative Penalties for Market Supervision* ("*Guidance*"), requiring its provincial counterparts to implement properly during enforcement.

The *Guidance* comprehensively implements the newly revised articles of the *Administrative Penalties Law* ("*APL*"), harmonizing the frictions and gaps between the original *Guidance* and the *APL*. The *Guidance* stipulates that an infringer may be exempted from administrative penalty where it violates laws for the first time, whose harmful consequence is minor, has taken corrective measures in a timely manner, or has sufficient evidence to prove that there is no subjective fault, unless as otherwise prescribed by laws and administrative regulations. Also, the *Guidance* provides that heavier sanctions shall be imposed where a party violates the measures to deal with the emergency during an emergency such as an epidemic situation.

■ **The State Council Issued *Opinions on Building a Data Basic System to Better Play the Role of Data Elements***

On 19 December 2022, the Central Committee of the Communist Party of China and the State Council issued *Opinions on Building a Data Basic System to Better Play the Role of Data Elements* ("*Opinions*"). Among other things, the *Opinions* point out the need to reasonably lower the threshold for market players to obtain data, enhance the sharing and universality of data elements, stimulate innovation and entrepreneurship creation, and strengthen anti-monopoly and anti-unfair competition. The *Opinions* put forward requirements from four aspects:

- to establish a data property rights system that protects rights and interests and uses in compliance;
- to establish a data element circulation and transaction system that is compliant, efficient, combining on-site and off-site scenarios;
- to establish a data element income distribution system that reflects efficiency and promotes fairness; and
- to establish data element governance system to tackle "data monopoly" and promote fair competition.

II. Recent Law Enforcement and Representative Cases

■ **Merger Filings**

From 1 October to 11 December, the SAMR and its five provincial counterparts unconditionally cleared 161 cases in total, with 145 simple cases (no prohibited or conditionally cleared cases), covering energy, communications technology, pharmaceuticals and health, chemicals, automotive, finance, trade and logistics, manufacturing, utilities and some other industries.

SAMR cleared the new joint venture case between China Unicom and Tencent

The SAMR official website shows that the case of establishing a new joint venture by Unicom Innovation and Venture Capital Co., Ltd. ("*China Unicom*") and Shenzhen Tencent Industry Venture Capital Co., Ltd. ("*Tencent*") was unconditionally approved in October 2022. On 22 November 2022, China Unicom announced that the establishment of the joint venture was still in the process, and has not yet completed the registration of establishment, which has no significant impact on its production and operation and will be conducive to

amplifying the advantages of both parties and expanding the content distribution network and edge computing supply chain in the long term.

■ Administrative Sanctions

SAMR issued 25 typical cases of special action to prohibit administrative monopoly

In November 2022, the SAMR issued 25 typical cases involving administrative monopoly, covering sectors such as insurance, tourism, pharmaceuticals and health, education, environmental protection and infrastructure construction, etc. As part of its enforcement of the special actions to prohibit the abuse of administrative power to eliminate and restrict the market competition, the SAMR alongside with its local counterparts prioritized in areas of people's livelihood and business environment, tackling a number of unlawful and anti-competitive administrative behaviors such as exclusive dealing, obstruction of free circulation of goods, restricting non-local undertakings from participating in local bidding activities, etc.

Zhejiang fined one trade association and four enterprises for implementing cartels and vertical restraints in civil explosive sector

On 16 December 2022, the Zhejiang Administration for Market Regulation issued a number of administrative sanction decisions on the practice of reaching and implementing monopoly agreements by an industry association and four enterprises in the civil explosive sector, alleging that the trade association and the enterprises concerned engaged in cartels such as fixing prices, restricting production or sales quantity, and joint boycott, as well as resale price maintenance.

The industry association, being the organizer of the aforesaid monopoly practices, was fined with RMB0.4 million, while each of the other four enterprises was imposed with fines equivalent to 2% of their 2020 revenues, amounting to RMB52.9221 million in total.

SAMR issued 10 typical cases of violations concerning medicines and medical materials during the Covid-19 epidemic

On 20 December 2022, the SAMR issued 10 typical cases (the second batch) of violations concerning medicines and medical supplies during the Covid-19 epidemic, including illegal price inflating, false and illegal advertising, counterfeiting and other violations of law. SAMR authorizes local counterparts to further strengthen the supervision and enforcement of law, continue adopting strict measures, guarantee the prices stabilization and quality standard, and guide operators to improve self-discipline in price and operate in compliance with the law.

■ Court Cases

Supreme People's Court: factors in determining "other concerted conducts" are clarified through specific case for the first time

Recently, the SPC issued the final judgment of *Li Binqun v. Hunan Xiangpintang Industry and Trade Co., LTD., etc.* ((2021) SPC ZhiMinZhong NO.1020), and clarified the four factors in determining "other concerted conducts" for the first time.

The SPC ruled that "other concerted conducts" is a form of monopoly agreement where competing undertakings have not concluded any written or oral agreement or decision, but have communicated with each other, and have carried out concerted conducts to exclude

or restrict competition with tacit understanding. The following factors can be comprehensively considered in determining "other concerted conducts":

- whether the market behaviors of the undertakings are coordinated and consistent;
- whether there exists any communication or information exchange among undertakings;
- the market structure, competition and market changes of relevant market(s);
- whether the undertakings can make reasonable explanations for the coordination and consistency of the behavior.

Guangdong Court awarded NetEase 50 million RMB for damages in game infringement and injunction in an appellate ruling

On 30 November 2022, the Guangdong High People's Court awarded NetEase damages of RMB50 million (over USD7 million) and an injunction relief in an unfair competition case against Shenzhen Mini Play Company involving Minecraft and Mini Play's similar sandbox game Mini World. The Court further ordered Mini Play to delete 230 infringing game elements from Mini World. This has become the highest damages award in China for game infringement.

The Guangdong Court held that, by plagiarizing the design of game elements, Mini Play directly seized the key and core personalized commercial value of other's intellectual achievements, and seized business opportunities by improperly obtaining other's business benefits, which constituted unfair competition.