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China Antitrust and Competition Update (2023 Q1)

Preface Overview

During the first quarter of 2023, the State Administration for Market Regulation ("SAMR") promulgated a series of rules implementing the amended Anti-Monopoly Law, and the Supreme Court advocated for the accelerating promulgation of judicial interpretations on the Anti-monopoly Law and Anti-unfair Competition Law. Additionally, the SAMR has strengthened its enforcement, announcing administrative penalties in four cases on grounds of monopoly agreements and abuse of market dominance involving such sectors as scenic and recreational facilities, utilities sector, and pharmaceutical.

I. Legislation and Key Policies

■ SAMR promulgated a series of regulations supporting the amended Anti-Monopoly Law

On March 24, 2023, the SAMR promulgated four rules implementing the *Anti-Monopoly Law*, specifically the *Rules on Prohibition against Monopoly Agreement*, the *Rules on Prohibition against Abuse of Dominant Market Position*, the *Rules on Anti-monopoly Review in Connection with Concentration of Undertakings*, and the *Rules on Prohibition against Abuse of Administrative Powers Intended to Eliminate or Restrict Competition*. The new rules shall supersede the previous ones effective from April 15, 2023. The major changes of such rules are summarized as below:

- The Rules on Prohibition against Monopoly Agreement
 - retaining the "safe harbor" mechanism while temporarily removing reference to specific market share threshold;
 - detailing the criteria for identifying entities that facilitate or organize monopoly agreements, disregarding the organizer's subjective intent;
 - expanding the scope of the leniency program to responsible individuals involved in monopoly agreements; and
 - establishing the feedback mechanism to whistleblowers of cartels.
- The Rules on Prohibition against Abuse of the Dominant Market Position
 - removing the self-preferencing clause from the prior exposure draft for public comments;
 - detailing the factors to be considered when determining the entities' abusive

- conduct and the potential defenses; and
- establishing the feedback mechanism to whistleblowers of abusive conducts.
- The Rules on Anti-monopoly Review in Connection with the Concentration of Undertakings
 - clarifying the factors to be considered for constituting a concentration of undertakings and joint control;
 - clarifying that when participating undertakings jointly control a third-party entity, the third party's turnover shall be equally attributed (per capita) among those of the participating undertakings; and
 - detailing the circumstance that will be deemed as implementation of concentrations, such as appointment of senior management, involvement in decision-making or management, exchange of sensitive information, and substantial business integrations.
- The Rules on Prohibition against the Abuse of Administrative Powers Intended to Eliminate or Restrict Competition
 - stipulating that the administrative advice submitted by an anti-monopoly law enforcer must specify the time limits and rectification requirements for the investigated department; and
 - detailing the procedure of questioning responsible individuals.

The update to the *Rules on Anti-monopoly Filing Threshold for Concentration of Undertakings* and the *Rules on the Prohibition of Abuse of Intellectual Property Rights to Eliminate or Restrict Competition* still remain under review and are expected to be promulgated later this year. We will keep track and provide the updates concerning these rules.

II. Recent Law Enforcement and Representative Cases

■ Merger Filings

The SAMR and its five provincial counterparts unconditionally cleared 185 cases, covering sectors including energy, communication technology, pharmaceuticals and healthcare, retail, chemicals, automotive, finance, manufacturing and utilities among other industries. No cases are conditionally approved or prohibited in Q1 of 2023.

■ Administrative Penalties

From January to March of 2023, the SAMR and its local counterparts issued penalties in 4 antitrust cases, including:

- Huangshan Taiping Lake Cruise Development Co., Ltd and other 6 undertakings were fined in total of RMB 0.43 million for reaching and implementing monopoly agreements;
- Chongqing Yongkang Gas Co., Ltd. was fined RMB 2.4 million for abusing its market dominance;
- Northeast Pharmaceutical was fined RMB 133 million for abusing its market dominance;
- Tianjin Jinyao Pharmaceutical Co., Ltd. was fined RMB 27.7 million for abusing its

market dominance.

Below are brief summaries for selected cases.

Northeast Pharmaceutical fined for abuse of market dominance

On January 18, 2023, the Liaoning Administration for Market Regulation imposed administrative sanctions upon Northeast Pharmaceutical Group Co., Ltd. ("Northeast Pharmaceutical") for abusing dominant market position, alleging that, from November 2018 to June 2019, Northeast Pharmaceutical abused its dominant position within the Chinese L-Carnitine API market for selling L-Carnitine API medications at unfairly high price. Northeast Pharmaceutical was imposed with fines amounting to RMB 133 million in total, which is equivalent to 2% of its 2018 revenue.

The first group company received multiple penalties for different monopolistic conducts carried out by subsidiaries

On March 14, 2023, the Tianjin Administration for Market Regulation imposed administrative sanctions upon Tianjin Jinyao Pharmaceutical Co., Ltd. ("Jinyao Pharmaceutical"), a subsidiary of Tianjin Pharmaceutical Co., Ltd. ("Tianjin Pharmaceutical"), for **abusing dominant market position**, alleging that Jinyao Pharmaceutical abused its dominant position in the Carmustine injection market by selling the products at unfairly high price. Given that Tianjin Pharmaceutical actively cooperated with the investigation, initiated rectification measures, substantially reduced the sales price of Carmustine injection, and increased supply, it was imposed with a fine amounting to RMB 27.7 million in total, which is equivalent to 2% of its 2019 revenue,

On March 24, 2023, Tianyao Pharmaceutical Technology Co., Ltd. ("Tianyao Pharmaceutical"), the parent of Tianjin Pharmaceutical, received a notice from the Shanghai Administration for Market Regulation on its intention to penalize Tianyao Pharmaceutical for reaching and implementing a monopoly agreement to allocate Fluorouracil injection sales markets. The proposed administrative penalties include ordering the cessation of illegal activities and imposing a fine amounting to RMB 29.9 million in total, equivalent to 3% of the Tianyao Pharmaceutical's 2020 revenue in China.

It is noteworthy that, in addition to the above two penalties, Jinyao Pharmaceutical had been fined by the SAMR in 2021 for colluding with competitors on fixing the sale price of Fluorouracil injection and allocating the Fluorouracil injection sales markets. Accordingly, Tianyao Pharmaceutical being a group became the first one receiving multiple antitrust fines for various monopolistic behaviors in the past few years.

■ Court Cases

Supreme Court overturned jurisdiction transfer decision in LvPing v. Apple

The Supreme People's Court recently overturned the jurisdiction transfer decision in the

first trial of the *LvPing v. Apple Electronics Trading (Beijing) Co., Ltd* concerning abuse of dominant market position. The Supreme Court determined that the original trial court failed to list out all of the defendants in its ruling and fell short in delivering the decision to all involved parties. This oversight could potentially harm the defendants' right to information and ultimately weaken their arguments. Consequently, the Supreme Court remanded the case to the Shanghai Intellectual Property Court for a retrial.

Supreme Court upheld consumer's claim against SAIC General Motor, clarified burden of proof allocation rules in cases subsequent to administration penalties

The Supreme Court recently handed down its final judgement on Miao Chong v. SAIC General Motor Sale Co., Ltd. and Shanghai Yilong Automobile Sales & Service Co., Ltd., ordering the defendant to compensate the plaintiff for the economic losses totaling RMB 10,000 and reasonable expenses amounting to RMB 7,500.

Previously, on November 19, 2016, SAIC General Motor Sale Co., Ltd. was fined RMB 201 million by Shanghai Development and Reform Commission for its resale price maintenance practice related to distribution its vehicles. In June 2018, car owner Miao Chong sued both SAIC General Motor Sale Co., Ltd. and its dealer, seeking damages and other reasonable expenses. The Shanghai Intellectual Property Court rejected all of the plaintiff's claims, resulting in the plaintiff's appeal.

The Supreme People's Court clarified that, when an enforcement agency's decision confirming the existence of the monopolistic conduct has not been challenged in an administrative lawsuit within the statutory time limit, or the existence of monopolistic conduct has been confirmed by an effective judgment of a court, the plaintiff shall not be required to prove again the existence of the monopolistic conduct in civil monopoly lawsuits, unless sufficient contrary evidence is present to invalidate the facts.

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

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