



特殊的普通合伙 Limited Liability Partnership

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## China Antitrust and Competition Update (2023 Q2)<sup>1</sup>

### Overview

During the second quarter of 2023, China has prioritized its antitrust legislation in areas such as anti-abuse of intellectual property rights, merger control, fair competition review to promote innovation, streamline merger review, and tackle misconduct of trade associations, local protectionism and other government market interventions, by releasing a number of implementing rules, antitrust guidelines and exposure drafts under the *Anti-Monopoly Law* (“AML”).

Furthermore, China’s antitrust authority, the State Administration for Market Regulation (“SAMR”), published its 2022 enforcement annual report, imposed restrictive conditions on one domestic transaction, and kept strengthening its enforcement in sectors such as pharmaceutical, insurance, civilian explosive materials, and infrastructure, by probing into several cases concerning cartels, resale price maintenance and abuse of dominance (one involves both monopoly agreements and abuse of dominance).

## I. Legislation and Key Policies

- **SAMR promulgated the *Provisions on Curbing Abuse of Intellectual Property Rights to Eliminate or Restrict Competition* and announced the *Anti-Monopoly Guidelines in the Field of Standard Essential Patent (Draft for Public Comments)***

On June 25, 2023, the SAMR revised and introduced the *Provisions on Curbing Abuse of Intellectual Property Rights to Eliminate or Restrict Competition* (“SAMR IPR Provisions”). The new Provisions shall supersede the previous ones and will be effective from August 1, 2023.

Additionally, on June 30, the SAMR published an exposure draft of *Anti-Monopoly*

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*Guidelines in the Field of Standard Essential Patent* (“Draft SEP Guidelines”), which expand on the IPR antitrust framework, particularly concerning antitrust compliance and enforcement of standard essential patent (“SEP”).

The SAMR IPR Provisions, along with the Draft SEP Guidelines (for reference for the time being), have significant implications for companies active in IP-related (especially SEP-related) sectors in almost all aspects, ranging from dealings with customers, suppliers, competitors, M&A counterparties, trade associations, etc. Below, we set forth certain highlights (For more details, please refer to the client note at <https://www.lexology.com/library/detail.aspx?g=9448357c-b9bb-44b2-951e-1a692e52a3e8>).

- **“Safe Harbor” Rule for Vertical Restraints.** The SAMR IPR Provisions provide that vertical restraints in connection with exercises of IPR can apply the “safe harbor” rule, i.e., the combined market share in each relevant market, which could be affected by the IP-related vertical arrangements (incl. licensing agreement), does not exceed 30%, or there exist at least 4 alternative technologies owned by other undertakings in the relevant market.
- **Streamlined Approach in Dealing with Dominance-Related Issues.** The SAMR IPR Provisions specify that the IPR ownership alone cannot presume market dominance. The SAMR will consider other factors, including the relevant IPR’s substitutability, downstream market reliance on products utilizing the relevant IPR, and a trade counterparty’s countervailing power. The Draft SEP Guidelines state that a SEP holder will be generally regarded as having 100% share in the relevant SEP license market without any market competition.
- **Improving Monopolistic Behavior Criteria in IPR.** Considering the nature of IPR, the SAMR IPR Provisions and the Draft SEP Guidelines add provisions on unfairly excessive prices, refine the criteria for determining abuses of market dominance, and refine the factors for consideration of justified reasons. The SAMR IPR Provisions expressly require pre-merger notification with the SAMR if a contemplated concentration involving IPR reaches the filing thresholds. The Draft SEP Guidelines further provide that a below-threshold transaction involving SEP may need to be notified if the pertinent facts and evidence show that it has or may have the effect of eliminating or restricting competition, and a failure-to-notify could trigger SAMR’s investigation.
- **Strengthening Regulation on Specific SEP-Related Issues.** This includes curbing cartels through standard setting and implementation, addressing abuse of injunctive relief, improving information disclosure vis-à-vis SEPs, ensuring adherence to FRAND commitments and Good-Faith negotiation on SEP license.

■ **SAMR announced the *Guidelines on Anti-Monopoly Compliance for Concentration of Undertakings (Draft for Public Comments)***

On May 15, 2023, the SAMR released the *Guidelines on Anti-Monopoly Compliance for Concentration of Undertakings (Draft for Public Comments)* (“draft Guidelines”) to guide enterprises for merger control compliance. Some highlights:

- Clarifying through case illustration that the shareholding percentage alone may not be decisive in determining the acquisition of control. Other factors to be considered include voting mechanism on senior management appointment, financial budgets, and business plans. It is noteworthy that minority equity investments may trigger the obligation to notify.
- Clarifying through case illustration that a transaction with multiple inter-related phases may require notification during the initial phase even if it does not immediately trigger an acquisition of control.
- Acknowledging that sound compliance systems for concentrations of undertakings can mitigate administrative penalties. For the first time, the SAMR explicitly states that when it investigates practices of unlawful implementation of concentrations of undertakings, the in-house establishment and implementation of anti-monopoly compliance system for concentrations of undertakings will be taken into account as mitigating factors.

■ **SAMR announced the *Guidelines on Anti-Monopoly for Industry Associations (Draft for Public Comments)***

On May 15, 2023, the SAMR announced the *Guidelines on Anti-Monopoly for Industry Associations (Draft for Public Comments)* (“draft Guidelines for Industry Associations”). Industry associations are an important force in China’s economic development and social progress. The draft Guidelines for Industry Associations are designed to guide industry associations for their compliance, violations, exemptions and legal liabilities under the AML. The key highlights are as follows:

- Clarifying high-risk behaviors that industry associations must not engage in, including:
  - facilitating the exchange or discussion of competitively sensitive information among the industry players;
  - publishing price guidelines, benchmark prices, reference prices, recommended prices, forecasted prices, or developing price calculation formulas for industry reference; and
  - disseminating false or exaggerated market information regarding cost trends, supply and demand conditions, etc.
- Specifying anti-monopoly compliance practices that industry associations must adhere to, including:
  - encouraging industry associations to promote self-discipline and compliance; and
  - requiring industry associations to enhance internal compliance management, and establish anti-monopoly compliance guidelines, mechanisms for anti-monopoly compliance commitments, incentive and disciplinary systems, along with training on such compliance programs.
- Clarifying the legal liabilities and credit penalty system for industry associations. Enforcement authorities shall factor in the respective roles played by the industry

association and the undertakings involved, the nature and severity of the illegal behavior, to determine their respective legal liabilities. If an industry association violates the AML and receives administrative penalties, the authority responsible for the registration and management of social organizations may publicly list it as an organization with abnormal activities or seriously violating laws and regulations.

■ **SAMR announced the *Regulations on Fair Competition Review (Draft for Public Comments)* and promulgated the *Implementation Guidelines for Third-Party Evaluation of Fair Competition Review***

On May 12, 2023, the SAMR revised and announced the *Regulations on Fair Competition Review (Draft for Public Comments)* (“draft Regulations”). On May 15, 2023, the SAMR also promulgated the revised *Implementation Guidelines for Third-Party Evaluation of Fair Competition Review* (“Revision”). See some highlights below.

- Compared with the existing rules, the draft Regulations attempt to formalize the scope of fair competition review concerning governmental agencies’ legislative activities (incl. policy making process) which cover market access and exit, free circulation of goods and production factors, and impact on production and operational activities. The draft Regulations also introduce “safe harbor” circumstances, such as policies aimed at promoting national scientific and technological progress, enhancing independent innovation capabilities, and implementing small-scale subsidies for SMEs.
- The draft Regulations attempt to establish a joint review mechanism for major policy measures at the local level.
- The Revision also broadens the scope of commissioned entities for third-party evaluations and adds key evaluation contents for third-party evaluations and specifies evaluation report requirements.

## II. Recent Law Enforcement and Typical Cases

■ **SAMR published the *Annual Report of Anti-Monopoly Law Enforcement in China (2022)***

On June 9, 2023, the SAMR published the *Annual Report of Anti-Monopoly Law Enforcement in China (2022)* (“2022 Report”), a fourth consecutive release since 2019.

According to the *2022 Report*, despite the COVID-19 restrictive measures, China has continued strengthening antitrust enforcement in key sectors concerning people’s livelihoods, including pharmaceuticals, public utilities, and building materials. In particular, China has investigated and handled a total of 187 monopoly cases under the AML, with the total monetary fine amount exceeding RMB 784 million (approximately US\$109.8 million) for the year 2022. Additionally, the SAMR concluded 794 cases of concentrations of undertakings (among which 5 cases were approved with restrictive conditions) and addressed 73 cases of abuse of administrative power to eliminate and restrict competition, marking a nearly 60% increase compared to the previous year. Such achievement can be attributed to the SAMR’s special enforcement action targeting the abuse of administrative

power. Furthermore, the SAMR initiated 18 cases of monopoly agreements, concluding 16 of them, with the total monetary fine amount exceeding RMB 569 million (approximately US\$79.7 million).

## ■ Merger Filings

During Q2 of 2023, the SAMR and its five provincial counterparts unconditionally cleared 164 cases, covering sectors including mining, energy, retail and consumer, real estate and infrastructure, chemicals, automotive, pharmaceuticals and healthcare, finance and insurance, manufacturing, etc. One case is conditionally cleared and one case's restrictive conditions were removed. Below are summaries of these two cases.

### **Conditional Clearance: Wanhua Chemical Group Co., Ltd.'s acquisition of equity in Yantai Juli Fine Chemical Co., Ltd.**

On April 7, 2023, the SAMR granted conditional approval of a transaction between two domestic enterprises: Wanhua Chemical Group Co., Ltd. ("Wanhua Chemical") for its acquisition of the equity in Yantai Juli Fine Chemical Co., Ltd. ("Yantai Juli"). Both parties are involved in the production and sale of caustic soda and toluene diisocyanate, resulting in a horizontal overlap. At the same time, there exists a vertical relationship between them as caustic soda is a raw material for toluene diisocyanate.

The SAMR determined that since the market structure for caustic soda in China is fragmented and the influence of both parties is limited, the concentration will not result in customer foreclosure. Therefore, the concentration will not eliminate or restrict competition in the market of caustic soda in China. However, the concentration may have the effect of eliminating or restricting competition in the market of toluene diisocyanate in China.

Considering that the restrictive conditions submitted by the notifying party can address competition concerns, the SAMR decided to approve the concentration with certain restrictive conditions. These include commitments that the annual average price of supplying toluene diisocyanate to customers in China after closing the transaction shall not exceed the average price of 24 months as of the commitment date; unless justified by valid causes, the production of toluene diisocyanate in China shall be maintained or expanded after the closing, with continuous efforts in R&D.

### **Removal of Restrictive Conditions: Marubeni Corporation's Acquisition of Gavilon Holdings, LLC**

On June 25, 2023, the SAMR announced the removal of restrictive conditions on Marubeni Corporation's 100% equity acquisition of Gavilon Holdings, LLC.

On April 22, 2013, the Ministry of Commerce, the then antitrust authority for merger control in China, approved the concentration of Marubeni Corporation ("Marubeni") acquiring 100% equity of Gavilon Holdings, LLC ("Gavilon") with restrictive conditions. These conditions

required Marubeni to maintain the separation and independence of its soybean business for export and sales to China from Gavilon and to accept the supervision of an independent monitoring trustee.

Following the acquisition, Gavilon Agricultural Investment Co., Ltd. held the entire grain and feed business of Gavilon (including the soybean business). On January 26, 2022, Viterra Limited ("Viterra") signed an agreement with Marubeni to acquire all shares of Gavilon Agricultural Investment Co., Ltd.. The transaction was completed on October 3, 2022. After the closing of the transaction, Viterra solely controlled Gavilon and its soybean business.

In October 2022, Marubeni applied for the removal of restrictive conditions based on the fact that it had divested all grain and feed businesses of Gavilon (including the soybean business). After verification, the SAMR determined that there had been significant changes in the previous concentration, and thus the restrictive conditions were no longer necessary. The removal of such conditions would not have the effect of eliminating or restricting relevant market competition. Accordingly, the SAMR removed the restrictive conditions initially imposed on Marubeni.

## ■ Administrative Penalties

From April to June of 2023, the SAMR and its local counterparts issued penalties in ten antitrust cases, below are summaries of some remarkable cases.

### **SAMR fined Grand Pharmaceutical Group Limited and WuHan Healcare Pharmaceutical Co., Ltd. for monopoly agreement and abuse of market dominance**

On May 28, 2023, the SAMR imposed administrative penalties on Grand Pharmaceutical Group Limited ("Grand Pharmaceutical") and WuHan Healcare Pharmaceutical Co., Ltd. ("WuHan Healcare") for monopoly agreement and abuse of dominance. The total amount of fines exceeded RMB 300 million (approximately US\$40 million), including RMB 285 million for Grand Pharmaceutical (RMB 149 million and RMB 136 million of illegal gains confiscated for the monopoly agreement and abuse of market dominance) and RMB 35 million for WuHan Healcare (RMB 30.92 million of illegal gains confiscated and was fined amounting to RMB 4.12 million for the monopoly agreement).

Regarding the monopoly agreement concluded by and between the two parties, the SAMR found that Grand Pharmaceutical and Shanxi Zhendong Taisheng Pharmaceutical Co., Ltd. were the only qualified producers of norepinephrine active pharmaceutical ingredients and epinephrine active pharmaceutical ingredients ("APIs") in China. WuHan Healcare, through a consignment arrangement, effectively controlled the sales of APIs produced by Shanxi Zhendong Taisheng. Despite being market competitors, WuHan Healcare and Grand Pharmaceutical entered into a monopoly agreement, where WuHan Healcare agreed to cease selling APIs, and in return, Grand Pharmaceutical would sell epinephrine injection

and norepinephrine hydrochloride injection ("injections") at a low price and repurchase them at a high price. Secondly, they would compel relevant preparation manufacturers to sell injections to them at a low price, which they would then resell at a high price. The SAMR concluded that the monopoly agreement between the two parties eliminated and restricted competition in the API market, causing harm to relevant preparation manufacturers, consumers, and public interests.

In terms of abuse of dominance, the SAMR found that Grand Pharmaceutical holds a dominant position in the API market in China. Leveraging this position, Grand Pharmaceutical imposed unreasonable demands on relevant preparation manufacturers when supplying APIs. They compelled these manufacturers to sell injections at a low price, provide rebates, and sell preparations in specific regions and at specific prices as per Grand Pharmaceutical's requests, without any legitimate justification. This abusive behavior by Grand Pharmaceutical led to the elimination and restriction of competition in the injections market, resulting in significant harm to relevant preparation manufacturers, consumers, and public interests.

#### **SAMR fined China Resources Zizhu Pharmaceutical Co., Ltd. for RPM agreement**

On May 29, 2023, the SAMR announced the penalty notice issued by the Beijing Administration for Market Regulation ("BAMR") against China Resources Zizhu Pharmaceutical Co., Ltd. ("Zizhu Pharmaceutical"). Zizhu Pharmaceutical was ordered to cease its illegal activities and was imposed with a fine amounting to RMB 12,643,552.67 in total, which is equivalent to 2% of its 2020 revenue.

In September 2021, the BAMR initiated the investigation against Zizhu Pharmaceutical for suspected monopoly agreements. The investigation revealed that from 2015 to 2021, Zizhu Pharmaceutical engaged in Resale Price Maintenance (RPM) agreements with its first- and second-tier mainland distributors for two types of oral emergency contraceptives. Zizhu Pharmaceutical fixed the resale prices and set the price floor for the distributors, issued price adjustment letters / pricing notices, and established sales price supervision and control mechanisms. Therefore, Zizhu Pharmaceutical was found to have reached and implemented RPM agreements, harming consumer interests and public welfare.

#### **■ Court Cases**

##### **Supreme Court ruled in favor of API producer Hefei Industrial in pharma antitrust appeal**

On May 25, 2023, the Intellectual Property Tribunal of China's Supreme People's Court ("SPC") reversed a lower court's decision and ruled in favor of API producer Hefei Industrial Pharmaceutical Institute ("HIPI") and its subsidiary Hefei Enruite Pharmaceutical ("Enruite") in an antitrust appeal. HIPI and Enruite were respondents in the original lawsuit. A third respondent was Nanjing Hicin Pharmaceutical ("Hicin"). The complainants were Yangtze River Pharmaceutical Group ("YRPG") and its subsidiary Yangtze River Pharmaceutical

Group Guangzhou Hairui Pharmaceutical (“Hairui”) which purchased desloratadine citrate disodium (“DCD”) API from HIPI and Hicin to produce a second-generation antihistamine drug (“SGAD”) called “Bei Xue”.

In the final ruling, the SPC considered that although there was strict correspondence and deep interdependence between APIs and preparations, the competitive constraints in the relevant market should also be specifically and fully analyzed when defining a separate relevant market. Therefore, the SPC decided that, despite the fact that HIPI did have a dominant position in the DCD API market in China, it faced strong competition constraints from other types of SGAD that can be produced without the need for its DCD ingredient and its market power was not strong compared to that of YRPG. The SPC then determined that HIPI’s increase of the price for DCD API (the alleged monopolistic conduct) was based on the legitimate rights of HIPI as the rights-holder of a patent crucial to the production of the DCD API.

Previously, on April 15, 2021, the SAMR fined YRPG RMB 764 million (approximately US\$118 million) for engaging in RPM, which is equivalent to 3% of its 2018 revenue. The SAMR found that between 2015 and 2019, YRPG reached agreements with drug wholesalers, retail pharmacies, and other downstream entities to fix the resale prices of medicines and set out the minimum resale prices for its products across the country.