

China Antitrust and Competition Update (2023 Q3)¹

OVERVIEW

The 2023 Q3 saw steady progress in China's antitrust and competition landscape. The State Administration for Market Regulation ("**SAMR**"), China's antitrust authority, organized week-long events to promote China's fair competition policy and highlight enforcement achievements; it rolled out compliance guidelines on merger control to clarify a number of substantive and procedural issues.

Among various enforcement cases, SAMR conditionally cleared a below-threshold merger, Sincere's acquisition of Tobishi, the first of its kind since the inception of China's Anti-monopoly Law ("**AML**"). Also, SAMR published an annual report on enforcing the Anti-unfair Competition Law ("**AUCL**") in China for 2022 and the top 10 AUCL enforcement cases from 1993 to 2023.

For judicial practice, the Supreme People's Court ("**SPC**") published ten representative court cases under the AML/AUCL, and again affirms the Chinese court's jurisdiction over disputes on royalty rates for standard essential patents in global license in *OPPO v. InterDigital*, following *OPPO v. Sharp* and the *OPPO v. Nokia* cases.

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I. Legislation and Key Policies

■ SAMR Launched 2023 China Fair Competition Policy Promotion Week

On September 11, 2023, the 2023 China Fair Competition Policy Promotion Week under the theme of "Unified Market and Fair Competition for the Future" was launched in Nanjing. The 10th China Fair Competition Policy International Forum and National Fair Competition Conference were held simultaneously.

During the conference, Ms. Gan Lin, Deputy Head of SAMR and Chief of the National Anti-Monopoly Administration, remarked on China's enforcement achievements. Since the promulgation of the AML and the AUCL, China has closed over 340 cases involving monopolistic behaviors and 754,000 cases concerning unfair competition issues. In addition, the Chinese antitrust authority has reviewed 5,475 merger control cases and probed 431 cases concerning abuse of administrative power.

■ SAMR Promulgated the Merger Control Compliance Guidelines

On September 5, 2023, SAMR promulgated the Antitrust Compliance Guidelines for Concentrations of Undertakings. It provides an important reference for transaction parties to normalize their merger filing practices. Set forth below are some highlights:

- **Shareholding percentage is not the only indicator in evaluating control.** Even if a buyer acquires a minority stake in the target, it can still be deemed as gaining (joint) control if it has the ability to veto important strategic decisions such as the annual business plan, budget, and senior management appointments. This can also be indicated in SAMR's historical enforcement cases where even an acquisition of 6% shares was once deemed as a notifiable concentration.
- **A multi-step transaction may need to be notified before the first step is implemented.** In cases where multiple steps that have been agreed in advance are co-related, serve the same economic purpose, and are mutually conditional, the transaction may need to be notified before the first step is implemented. Indeed, the Chinese antitrust authority has already sanctioned certain buyers concerned in multi-step transactions for failure to notify before the first step.²
- **Domestic transactions shall watch out for overseas merger control compliance requirements.** A domestic transaction needs to be notified with competent

² See, e.g. MOFCOM Administrative Penalty Decision Against Acquisition of Toshiba Medical by Canon (Shang Fa Han [2016] No.965).

competition authorities when meeting local notification thresholds.

- **Maintaining a sound compliance system for merger control may be regarded as a mitigating factor in evaluating the liability of non-compliance cases.**

II. Recent Law Enforcement and Representative Cases

■ SAMR Published 2022 Annual Report on AUCL Enforcement in China and Top 10 AUCL Enforcement Cases for 1993 through 2023

On September 20, 2023, SAMR issued the *Annual Report on Anti-Unfair Competition Law Enforcement in China (2022)*. The report highlights SAMR's key achievements in AUCL enforcement in 2022, including: advanced the draft third amendment to the AUCL; handled 9,069 AUCL cases, imposing fines and confiscations totaling approximately RMB 620 million (approximately USD 85 million); and launched special campaign against commercial bribery in the field of medical and healthcare.

On September 21, SAMR released the Top 10 AUCL enforcement cases (1993-2023). These cases encompass a variety of infringements under the AUCL such as false propaganda, trademark infringement, commercial bribery, trade secret infringement, and online unfair competition practices. The below cases may be of your interest:

- Commercial bribery cases against Michelin, Bridgestone and Yokohama investigated by the Market Supervision Bureau of Minhang District, Shanghai, in 2016. The three companies were ordered to forfeit over RMB 40 million (approximately USD 5.5 million) and were additionally fined RMB 410,000 (approximately USD 56,000).
- False propaganda case against Luckin Coffee, investigated by SAMR in 2020. In the same year, the U.S. Securities and Exchange Commission probed Luckin Coffee (listed on Nasdaq), alleging that it defrauded investors by materially misstating the company's revenue, expenses, and net operating loss in 2019. Eventually, Luckin Coffee agreed to pay a USD 180 million penalty to resolve the charges³, and also reached a settlement of USD 187.5 million in a shareholder class-action lawsuit in 2021 for the similar allegation⁴.

■ Merger Filings

³ See the website of the U.S. Securities and Exchange Commission, <https://www.sec.gov/news/press-release/2020-319>.

⁴ See the website of Luckin Coffee, <https://investor.luckincoffee.com/news-releases/news-release-details/luckin-coffee-enters-binding-term-sheet-settle-us-securities>.

During Q3 of 2023, SAMR and its five provincial counterparts unconditionally cleared 165 cases. Two cases are conditionally cleared.

First Below-Threshold Merger Control Case Voluntarily Notified and Conditionally Cleared: Simcere's Acquisition of Tobishi

On September 22, 2022, SAMR conditionally cleared the acquisition of Beijing Tobishi Pharmaceutical Co., Ltd. (“**Tobishi**”) by Simcere Pharmaceutical Co., Ltd. (“**Simcere**”). Notably, this is the first below-threshold merger case that was voluntarily notified and considered as having a potential anti-competitive effect on the relevant market by SAMR, resulting in conditional clearance.

Simcere is the exclusive seller in the upstream Chinese market for batroxobin API, after entering into an exclusive agreement with Dutch company DSM, and is involved in the R&D business of batroxobin injections, while Tobishi is the only producer in the downstream market. SAMR identified potential competition concerns in both horizontal and vertical respects, specifically the elimination of potential competition in the downstream market and the foreclosure of downstream competitors.

Ultimately, SAMR approved the transaction with the following restrictive conditions: the divestiture of Simcere's batroxobin injection R&D business, termination of the exclusive arrangement between Simcere and DSM for batroxobin API, price reduction and commitment on the supply of batroxobin injection, and further reduction of batroxobin injection price where the divestiture, termination of exclusive supply arrangement or R&D of batroxobin injections after the divestiture is not proceeded as scheduled.

Set forth are some key takeaways:

- SAMR, for the first time, recognized that a below-threshold transaction could have anti-competitive effects. This aligns with its expanded authority outlined in the revised AML in 2022 – SAMR is authorized to call in and halt below-threshold transactions having potential anti-competitive effects.
- Simcere and Tobishi have been involved in a number of antitrust disputes and investigations in recent years. This may lead Simcere, being the filing obligor, to voluntarily notify the transaction. We recommend the transaction parties evaluate the industry sentiment and weigh on the exposure of being called in when determining their merger notification strategy.
- In this case, SAMR defined the relevant market as the Chinese market for batroxobin API and for batroxobin injection. The practice that one single API constitutes a

separate relevant market has been observed in several precedents, and is anticipated to persist going forward.

Conditionally Cleared Case: Acquisition of Silicon Motion by MaxLinear

On July 26, 2023, SAMR conditionally cleared the acquisition of Silicon Motion by MaxLinear to address identified competition concerns on the market for the third-party NAND flash memory main control chip market in China. The decision takes into account the significant dependence of Chinese downstream customers on their established and stable business connections with Silicon Motion, which might be disrupted post-transaction.

The next day after SAMR's approval, MaxLinear unilaterally announced the termination of this deal. On August 16, Silicon Motion announced its decision to terminate the transaction as well, complaining MaxLinear's willful and material breaches of the agreement. The two parties are currently trapped in disputes on such termination.

■ Administrative Penalties

In 2023 Q3, SAMR and its local counterparts have imposed penalties in the following antitrust cases:

- Guizhou Jinsha Yuanda New Environmental Protection Building Materials and other 3 undertakings were collectively fined approximately RMB 6 million (approximately USD 0.8 million) for concluding and implementing price fixing and market allocation arrangements.
- A total of 8 members of Beijing Go Association were fined approximately RMB 116,000 (approximately USD 16,000) for concluding and implementing price fixing arrangement. In addition, Beijing Go Association was fined RMB 50,000 (approximately USD 7,000) for its role in organizing said monopoly agreements. Notably, this is the first antitrust penalty case in the domestic sports industry.
- 10 bottled liquefied petroleum gas operators in Nanjing were fined in total of approximately RMB 8 million (approximately USD 1 million) for concluding and implementing price fixing and market allocation arrangements.

■ Court Cases

SPC Released 10 Representative Anti-Monopoly and Anti-Unfair Competition Court Cases

On September 14, 2023, SPC released a total of 10 representative AML/AUCL cases. Specifically:

- Three of the five antitrust cases involve abusive behaviors including: excessive pricing, exclusive dealing, refusal to deal and imposing unreasonable trading conditions. Another two cases involve vertical monopoly agreements (the General Motors resale price maintenance case) and horizontal monopoly agreements, respectively.
- The five anti-unfair competition cases involve different types of disputes, including: confusion (the Siemens case), false propaganda, infringement of technological secrets, online unfair competition practice, etc.

SPC Affirms Chinese Court's Jurisdiction over Global SEP Royalty Rate Dispute

On September 4, 2023, the SPC issued the final ruling on the jurisdiction objection of the SEP (Standard Essential Patent) royalty dispute between InterDigital and OPPO, overruling InterDigital's appeal and upholding the first-instance ruling made by Guangzhou IP Court. This is another SPC ruling that affirms Chinese courts' jurisdiction over disputes of global SEP royalty rates following the OPPO v. Sharp and the OPPO v. Nokia cases.

In its ruling, the SPC explained that the geographical basis for jurisdiction over SEP royalty disputes can include various factors, including where the patent is granted, where the license is implemented, where the licensing agreement is negotiated, or where the assets available for seizure or execution are located. In the current case, the fact that OPPO manufactured licensed products in China suggests that the main implementation place for the licensing agreement is within China. Consequently, China is deemed to have appropriate connections with the dispute at issue, regardless of whether the other contracting factors are outside of China.