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Antitrust in China – 2023 Year in Review

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This update provides an overview of China's major antitrust developments during 2023.

In 2023, China introduced a flurry of new regulations to help implement and clarify the amended Anti-Monopoly Law ("**AML**"), which came into effect in 2022 (see our 2022 Review). These refreshed rules provide valuable insights and guidance on the interpretation and application of the amended AML. On the merger control side, we have seen lengthy reviews involving semiconductors and other sensitive technologies where geopolitical factors might come into play. Meanwhile, authorities are continuing their enforcement efforts in industries that are close to people's livelihood, with a focus on pharmaceuticals and cartels organized by trade associations. Lastly, there have been a number of high-profile litigation cases, including the largest damage award ever issued in the history of private antitrust litigation in China. **I. Legislative and Regulatory Developments *Amendments to the implementing rules of the AML.*** Following the amended AML, the State Administration for Market Regulation ("**SAMR**") finalized a series of implementing rules and guidelines in 2023 to better facilitate the interpretation and enforcement of the amended AML. SAMR also revised or introduced some regulations to further develop China's antitrust framework. These include:

- Provisions on Review of Concentration of Undertakings (the "**Merger Provisions**")
- Regulations on Filing Thresholds for Concentration of Undertakings (the "**Merger Notification Thresholds Regulations**")
- Guidelines for Anti-Monopoly Compliance for Concentration of Undertakings (the "**Merger Control Compliance Guidelines**")
- Provisions on Prohibition of Monopoly Agreements (the "**Monopoly Agreements Provisions**")
- Provisions on Prohibition of Abuse of Dominance (the "**Abuse of Dominance Provisions**")
- Provisions on Prohibition of Elimination and Restriction of Competition Through Abuse of Administrative Powers
- Provisions on Prohibition of Elimination and Restriction of Competition Through Intellectual Property Rights (the "**IP Provisions**")

Key regulatory highlights include the following. ***The Merger Provisions.*** These provisions importantly provide more clarity on what constitutes "control" for the purposes of merger control, including factors such as historical shareholder or board meeting attendance and voting patterns. In addition, the provisions provide further guidance on turnover calculations, as well as the procedures for "stopping the clock" and reviewing below-threshold transactions, which are both issues that arose prominently in two conditional merger clearance cases in 2023 (discussed further below). ***Revised merger notification thresholds.*** In addition, SAMR also issued the revised Regulations on Filing Thresholds for Concentrations of Undertakings, which came into effect on 26 January 2024. This is the first amendment to the turnover thresholds since the introduction of the AML in 2008. Specifically, the filing thresholds are increased to reflect economic growth, such that undertakings must obtain merger clearance from SAMR if:

1. The undertakings' combined worldwide turnover is more than **RMB 12 billion (~USD 1.7 billion)** *(an increase from RMB 10 billion (~USD 1.4 billion))* and the Chinese turnover of each of at least two of the undertakings involved is more than

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RMB 800 million (~USD 113.5 million) *(an increase from RMB 400 million (~USD 57 million))*; or

2. The undertakings' combined Chinese turnover is more than **RMB 4 billion (~USD 568 million)** *(an increase from RMB 2 billion (~USD 284 million))* and the Chinese turnover of each of at least two of the undertakings involved is more than **RMB 800 million** *(an increase from RMB 400 million)*.

Note that the alternative threshold (aimed at capturing "killer acquisitions") as suggested in the draft amendments in 2022 is not included in the final version of the revised thresholds. ***The Merger Control Compliance Guidelines.*** SAMR introduced these guidelines predominantly to encourage undertakings to implement antitrust compliance systems, in particular, systems to prevent gun-jumping and other violations of China's merger control regime. The guidelines clarify the sanctions for gun-jumping, which can be up to 10% of the undertaking's revenue in the prior year for cases that have the effect of restricting competition (that can be multiplied by two to five times for particularly serious cases) or up to RMB 5 million (~ USD 700,000) for cases that do not restrict competition. The guidelines further provide detailed guidance on SAMR's expectations in relation to antitrust compliance systems, and "strongly encourage" undertakings with more than RMB 400 million revenue in China (~ USD 66 million) to implement such systems. Most notably, the guidelines indicate that an anti-gun-jumping compliance system may be considered a mitigating factor for gun-jumping enforcement actions. ***The Monopoly Agreements Provisions.*** In the draft version published in 2022, SAMR clarified that vertical agreements would come within the "safe harbour" in the amended AML if the parties could show, among other things, that they did not exceed a 15% market share threshold. Unfortunately, the welcome clarification was dropped in the final version. Nevertheless, SAMR introduced greater clarity in other areas by explaining that an undertaking may be in breach of the AML for coordinating/facilitating others to enter into monopoly agreements if it: (i) has "decisive influence" over the content of the agreement (even if it is not a party to the agreement); or (ii) acts as the conduit for others to communicate and reach a horizontal agreement (i.e., a hub-and-spoke arrangement). SAMR also clearly signaled its continued focus on the platform economy by adding a specific provision banning undertakings from using data, algorithms and technology to effectively exchange information or coordinate conduct in order to conclude a monopoly agreement. The provisions also provide for an ostensibly broad leniency regime that appears to apply to any undertaking that voluntarily reports the conclusion of a monopoly agreement to the authorities. ***The Abuse of Dominance Provisions.*** In addition to providing general guidance on how to determine market dominance, SAMR added guidance indicating that a refusal to trade can be indirectly inferred from a dominant entity imposing unreasonable prices against trading counterparties, and included a new provision stipulating that a refusal to trade may be justified in the platform economy context if a dominant undertaking has refused to trade on the grounds that the counterparty has failed to comply with rules on fairness, reasonableness and non-discrimination in the platform economy (which appears to be a reference to SAMR's 2021 platform economy regulations). Further, the final Abuse of Dominance Provisions (unlike the draft) expressly designate national security, cybersecurity and data security as factors to be considered when determining whether there are justifications for certain forms of abusive conduct (e.g. restrictions of trade), which aligns with the growing importance of those issues in China in general. ***The IP Provisions.*** SAMR's 2023 revisions to the IP Provisions confirmed that there will be a safe harbour for IP-related vertical agreements (e.g. an exclusive IP licensing agreement) where the parties have less than 30% share in any relevant markets and there are at least four substitutes to the relevant intellectual property. In addition, the revised provisions specifically prohibit "excessive pricing" in IP licensing transactions, and introduce a new rule that prohibits an IP licensor from unreasonably requiring an IP licensee to cross-license its own IP rights to the licensor without the licensor providing "reasonable consideration". ***Further Legislative Efforts.*** In addition to the various finalized regulations discussed above, SAMR introduced several draft regulations in 2023, including the Draft Anti-Monopoly Guidelines for Industry Associations and Draft Anti-Monopoly Guidelines for Standard Essential Patents. Indeed,

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it appears that sustained legislative efforts can be expected in 2024, given indications from the Ministry of Justice that it would accelerate efforts to revise the Anti-Unfair Competition Law, and announcements by SAMR that it would begin formulating antitrust guidelines for the pharmaceutical sector, as well as horizontal merger guidelines. **II. Merger Control** In 2023, SAMR closed 797 merger review cases in total. Of these, 782 (~98%) received unconditional approval, four received conditional clearance, and eleven were withdrawn by the filing parties after SAMR's acceptance of their case. Overall, SAMR took an average of just over 3 weeks to close a case, which is likely because around 90% of cases were reviewed under the simplified procedure, and the fact that SAMR is increasingly delegating simplified cases to its provincial branches for more efficient reviews. In the context of conditional clearances, SAMR took an average of 309 days to complete its review, which is a decrease from the average of over 450 days in 2022. Notably, in the latter three conditional clearances of the year, SAMR consistently exercised its new power to extend the review period by "stopping the clock"—which it did for an average of 131 days. Stop-the-clock is considered SAMR's new tool to extend its review period, and is likely to gradually phase out the previous practice of "pull and refile". As noted, SAMR issued four conditional clearances in 2023, which are summarized below. Three decisions are worth highlighting: the *Broadcom/VMware* megamerger (where Gibson Dunn represented VMware as global counsel), *MaxLinear/Silicon Motion* and *Simcere/Tobishi* (SAMR's first-ever "below threshold" conditional approval). **(1) *Broadcom/VMware.*** On 6 September 2022, Broadcom and VMware submitted their notification to SAMR, but SAMR did not formally accept the case until 25 April 2023. On 25 September 2023, SAMR decided to stop the clock, and resumed the clock on 17 November 2023. SAMR finally issued a conditional approval on 21 November 2023. As part of the conditional clearance, SAMR imposed a set of behavioural remedies on a 10-year basis to address its antitrust concerns. These include:

- No tying or bundling of the merged entity's relevant products, or any restriction or discrimination against customers that purchase those products separately;
- Requirements to maintain interoperability between VMware's virtualization software and third-party hardware products sold in China;
- Requirements for Broadcom to maintain its certification practice to ensure interoperability with third-party virtualization software; and
- Measures to protect confidential information of third-party hardware manufacturers.

(2) *MaxLinear/Silicon Motion.* The MaxLinear/Silicon Motion case was conditionally cleared by SAMR in July 2023. The case was officially accepted for review on 28 October 2022. SAMR then decided to stop the clock on 6 January 2023, and only restarted the clock on 14 July 2023, marking an approximately 6-month suspension. Substantively, SAMR raised several concerns regarding the market for NAND flash controllers. Despite effectively finding that the parties had no horizontal or vertical overlaps, SAMR imposed (among others) the following commitments:

- Continue supplying Chinese customers on FRAND terms;
- Maintain existing business contracts and relationships with Chinese customers;
- Keep Silicon Motion's existing China field engineers as part of the merged entity's R&D function, such that Chinese customers of Silicon Motion's NAND flash controllers can continue to receive technical support; and
- Keep Silicon Motion's NAND flash controller R&D functions in Taiwan.

(3) *Simcere/Tobishi.* This case marked the first time that SAMR has imposed remedies on a deal that fell below the merger notification thresholds. By way of context, Simcere had a monopoly over Batroxobin, an active pharmaceutical ingredient ("**API**"), in China. Post-transaction, the merged entity will have 100% market share in the relevant upstream and downstream markets. In addition, SAMR has previously fined Simcere for abuse of

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dominance back in January 2021. These were suspected to be the reasons why Simcere voluntarily notified SAMR of its acquisition of Tobishi, despite the deal falling below the filing thresholds. As part of the conditional clearance, SAMR imposed a series of behavioural remedies on Simcere, for a period of 6 years:

- Terminate its exclusivity agreement with DSM, which is the only global manufacturer of Batroxobin;
- Divest all its assets for developing its Batroxobin injection, and supply the divestiture buyer with the API and necessary assistance to establish a direct supply relationship with DSM;
- Reduce the price of Batroxobin injections by at least 20% post-transaction (or 50% if the divestiture is not completed), and guarantee supply to meet domestic demand in China;

(4) *Wanhua/Juli.* This concerned the acquisition of Yantai Juli Fine Chemical by Wanhua Chemical Group. This was one of the first conditional clearances that SAMR issued on a domestic acquisition. The behavioural remedies include SAMR's typical measures, such as, requiring the parties to: (i) sell to customers on fair, reasonable and non-discriminatory terms; (ii) maintain or increase their production volumes; (iii) continue their research and development efforts; and (iv) stay away from coercive exclusive dealing. **III. Non-Merger Enforcement** Like previous years, the enforcement decisions published by SAMR indicate that enforcement efforts in 2023 continued to focus on the usual suspects, including public utilities, pharmaceutical corporations, energy suppliers, construction material manufacturers, and industry associations. The number of major actions and the size of the fines brought against pharmaceutical companies stood out (although these remain very modest compared to fines in other jurisdictions). In total, SAMR and local AMRs brought enforcement actions against over ten companies in six cases of anticompetitive conduct, and imposed an average fine of ~RMB 196 million (~USD 27 million). Half of the published pharmaceutical enforcement actions were focused on abusive price gouging, and the remaining cases were primarily focused on anticompetitive agreements related to cartel behavior or resale price maintenance. The largest single fine against a pharmaceutical company, which also appears to have been the largest single fine among the published decisions of 2023, was ~RMB 689 million (~USD 97 million). The fine was imposed on one of the entities involved in the *Sph No. 1 Biochemical & Pharmaceutical* case, where four pharmaceutical companies were penalized for having abused their collective total dominance of the Chinese market for polymyxin B sulfate injections. **IV. Antitrust Litigation** In September 2023, the Supreme People's Court ("**SPC**") published ten representative cases concerning monopoly and unfair competition issues. There are two cases worth highlighting:

- The ***General Motors*** case[1], in which the SPC held that, where a regulator / authority has issued an administrative decision against an undertaking for monopolistic or anti-competitive conduct, the claimant in the follow-on actions for civil damages will have a lower burden of proof. Specifically, the claimant will not need to prove that the defendant engaged in monopolistic conduct (as that had already been established in the administrative decision), and will only need to prove that: (i) the defendant is indeed the undertaking referred to in the administrative decision; and (ii) the claimant suffered loss because of the defendant's monopolistic conduct.
- The ***Tobishi/Simcere*** case[2], in which the SPC held that, the jurisdiction of a refusal to deal case should be where the effect of the conduct took place. For example, in this case, Simcere refused to supply APIs to Tobishi , which prevented Tobishi from producing the relevant downstream product. The SPC found that the effects of Simcere's refusal to deal took place where Tobishi's factory was (i.e. in Beijing). Therefore, the Beijing Intellectual Property Court should have jurisdiction over the case.

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There are also a number of interesting cases which offer valuable insights into the legal issues and possible interpretations of the AML from an antitrust litigation perspective:

- ***JD.com v. Alibaba*** - In December 2023, the High People's Court of Beijing ruled that Alibaba had engaged in coercive exclusivity conduct (known as "choose one out of two) and was in breach of the AML. The lawsuit first started in 2018, when JD.com filed a complaint against Alibaba for abusing its dominance of its online marketplace and mandating online merchants to choose between Alibaba and JD.com, thereby forcing merchants into exclusivity agreements. In the decision, the Court ordered Alibaba to pay JD.com RMB 1 billion, which is the largest damage award in the history of private antitrust litigation in China.
- ***Li Zhen v. Alibaba*** – This concerned a claim filed by an individual consumer against Alibaba for abuse of dominance. Specifically, the plaintiff alleged that Alibaba and its affiliates forced consumers to only use Alipay's payment services on Taobao and Tmall. In October 2023, the Shanghai Intellectual Property Court ruled in favour of Alibaba, noting that:
    1. Payment service is not a standalone service but an integral part of the overall online-retail platform service. There is no independent transactional relationship between consumers or merchants on one hand, and payment service providers on the other hand. Therefore, no exclusivity or restrictions on the transaction can be imposed by Alibaba in this respect;
    2. Since Alipay's payment service is part of the wider online retail platform service, there is no payment or non-payment service separately sold to consumers and merchants on Taobao and Tmall. As a result, there is no basis to claim that Taobao and Tmall tied payment and non-payment services together; and
    3. There was no evidence that Taobao and Tmall refused the access of third-party payment services to their platforms.

    The plaintiff is now appealing the case to the SPC.
- ***Hitachi Metals*** – In December 2023, the SPC overruled the finding that Hitachi Metals' refusal to license a non-standard essential patent to four Chinese manufacturers amounted to an abuse of dominance. This marked the end of a 9-year lawsuit, and was also the first decision in China touching on refusal to license non-standard essential patent. In particular, the SPC rejected the lower court's analysis and determined that Hitachi Metals did not possess the alleged level of market dominance, and hence the SPC did not proceed to examine the alleged abusive practices. The SPC also took the view that the patents in dispute were neither essential nor critical, and there were many alternative options available in the market.

V. Conclusion Since the amendment of the AML, we have seen continued efforts by SAMR to establish a more defined and comprehensive antitrust framework. Going forward, we expect to see further guidelines and directions from SAMR to refine the applications of the amended AML. Indeed, as noted above, both the Ministry of Justice and SAMR have announced that efforts to further develop and sophisticate China's antitrust regulatory framework are continuing in earnest. Businesses are encouraged to self-assess regularly and introduce internal antitrust compliance protocols to minimize any risk of infringement. In addition, reviews of concentrations in sensitive sectors (e.g. semiconductors) will continue to be challenging in view of the geopolitical climate.

_____ [1] Supreme People's Court (2020) Supreme Law of the People's Republic of China No. 1137 [2] Beijing Intellectual Property Court (2022) No. 1136 of Beijing 73 Minchu

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