

# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2023 – China

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### Legislative developments

Following the amendment of the Anti-Monopoly Law (AML) in 2022, the State Administration for Market Regulation (SAMR) unveiled a series of departmental regulations in March 2023: (1) [Provisions on Prohibiting Monopoly Agreements](#); (2) [Provisions on Prohibiting Abuse of Dominant Market Position](#); (3) [Provisions on the Examination of Concentrations of Undertakings](#); (4) [Provisions on Prohibiting the Acts of Eliminating or Restricting Competition by Abuse of Administrative Power](#). These regulations further substantiated the amended provisions of the AML, which was subjected to amendments for the first time since its adoption in 2007. Notably, the amendments introduced a “stop-the-clock” mechanism, allowing competition authority to suspend the deadlines during merger review. The aforementioned SAMR provisions explain the criteria and procedures for initiating this mechanism. Furthermore, the SAMR provisions elaborated on the specifics of competition law enforcement in the digital economy. They included specific rules concerning the use of algorithms in price-fixing, data market segmentation, and platform-based communication facilitating anti-competitive agreements.

In September 2023, the SAMR issued merger control compliance [guidelines](#) encouraging the undertakings to develop internal AML compliance mechanisms, taking into account diverse factors such as business size, management structure, merger frequency, and relationship with the existing compliance frameworks. Notably, it is the first compliance guidelines in the field of merger control issued by the competition authority since the AML’s adoption. The SAMR emphasized that the development and implementation of the internal AML compliance mechanisms will be considered when calculating penalties for the failure to notify concentrations for review.

Addressing the increasing role of the industry associations in the facilitation of anti-competitive agreements (in 2022, out of 15 anti-competitive agreements cases investigated by the SAMR, 4 concerned industry associations), China’s competition authority drafted the [Anti-Monopoly Guidelines for Industry Associations](#), which were released for public comments in May 2023. This document distinguished among various types of industry associations on the basis of their functionality (sector regulators, associations of undertakings, providers of public services, etc.) to provide for a differentiated treatment under the AML. At the provincial level, the authorities in [Guizhou](#) and [Henan](#) have developed comprehensive compliance guidelines applicable to industry associations, while [Shaanxi](#) introduced the antitrust compliance guidelines specifically for the construction materials sector. This initiative followed the imposition of [record fines](#) totalling CNY

450 million on the association of cement producers.

In 2023, the SAMR initiated the revision of the Anti-Unfair Competition Law in order to supplement the AML enforcement in the field of digital economy. The [draft revisions](#) released for public comments explicitly prohibit platform operators from exploiting data, algorithms, financial strength, and platform regulations to implement unfair competitive practices. The provincial market regulation departments have also released a number of AML compliance guidelines in the digital economy sector. Thus, the Shanghai authorities published [guidelines](#) on communication between platform operators and competition enforcers regarding AML compliance. Similarly, the authorities in [Guangdong](#) province unveiled the detailed guidelines enumerating commercial practices capable of triggering AML scrutiny and outlining key responsibilities of platform operators in maintaining competitive market conditions on the respective platforms. Likewise, the authorities in [Heilongjiang](#) published the AML compliance guidelines for platform operators encouraging the establishment of in-house antitrust compliance systems. In Hangzhou, the authorities concerned with the role of live streaming influencers in facilitating price agreements among the retailers released the [Livestreaming E-commerce Industry Compliance Guidelines \(Draft for Comments\)](#) specifically cautioning live streaming e-commerce influencers against applying “minimum price agreements” or facilitating any other form of coordination among retailers.

The year of 2023 witnessed an update of the regulatory instruments guiding the AML enforcement against the abuses of dominance related to the standard essential patents (SEPs). Notably, the SAMR has revised its [Provisions on Prohibiting the Abuse of Intellectual Property Rights to Exclude or Restrict Competition](#). This amendment incorporated prohibitions against entities using patent pools as anti-competitive arrangements and prohibited patent holders to exploit their SEPs by engaging in “patent hold-up” practices. The SAMR also released for public consultation the [Anti-Monopoly Guidelines in the Field of Standard Essential Patents](#). This document outlines various forms of AML infringements including the development and application of standards to implement anti-competitive agreements, demanding excessive royalties for SEP licenses, refusing to license SEPs, tying sales involving SEPs, imposing unreasonable trading conditions, engaging in discriminatory practices, abusing injunctive relief measures, etc.

## Enforcement practices

In the field of merger control, the year of 2023 was marked by several conditional approvals of concentrations notified to the SAMR for review: [Simcere Pharmaceutical Group/Beijing Tobishi Pharmaceutical](#), [Wanhua Chemical Group/Yantai Juli Fine Chemical](#), [Mailing Company/Huirong Technology](#), and [Broadcom/VMware](#). Notably, the *Simcere/Tobishi* acquisition represents an unprecedented case where the conditional clearance was issued following a voluntary notification that did not meet the mandatory notification thresholds. Despite the absence of a direct competitive relationship between the merging parties, the SAMR considered the likelihood of input foreclosure that would strengthen Tobishi’s position in China’s Batroxobin injections market, potentially leading to anti-competitive effects. In contrast to the other three mergers, which received approval accompanied by behavioural remedies such as preservation of supply levels, in *Simcere/Tobishi* the SAMR resorted to the imposition of structural remedies (divestiture of the Batroxobin injections business).

In 2023, the SAMR [lifted](#) the hold separate obligation imposed in 2013 on the acquisition of Gaohong by Marubeni Corp. For almost a decade Marubeni's and Gaohong's soybean export and sales operations in China had to be managed independently. After Marubeni transferred all its grain and ingredients business acquired from Gaohong to a third party, the SAMR decided that the initial concentration has undergone substantial changes and the behavioural remedies were no longer necessary for preserving competition on the relevant markets. The imposition of the long-term hold separate obligations has been a [distinct feature](#) of the merger control "with Chinese characteristics", which allows the merger control authorities to apply a less conflictual alternative to prohibiting the notified concentration outright.

Since 2022, the SAMR was experimenting with [delegation](#) of merger review powers to the provincial and municipal market supervision departments in Beijing, Shanghai, Guangdong, Chongqing and Shaanxi. According to the first year's [records](#), a total of 287 concentrations, constituting 40.7% of all merger cases reviewed under a simplified procedure, have been assigned for review to one of these authorities. For these cases, the average acceptance period was approximately 23.8 days, and the average review period was 18.5 days. The competent authority was determined on the basis of the domicile of the acquiring entity, target company and the relevant geographic market. Notably, the Shanghai AMR received 45% of the total number of delegated merger cases, whereas the market regulator in Shaanxi reviewed only five cases during the reporting period.

On 14 September 2023, the Supreme People's Court (SPC) released its annual [top 10 cases](#) relevant to the enforcement of the AML and [Anti-Unfair Competition Law](#). Among these, the five AML cases clarified the application of the law in the following circumstances: (1) the interplay between exercise of patent rights and abuse of dominance, taking into account effects on innovation and competition and making good use of economic analysis to assess the effects of anti-competitive practices; (2) refusal to deal by the public utilities in a case of competition in the funeral industry; (3) jurisdiction of the courts in cases concerning refusal to deal; (4) allocating the burden of proof and determining compensation in private litigation following public AML enforcement to reduce the burden of proof on the plaintiff and improve the cohesion between administrative enforcement and judicial proceedings; (5) identifying horizontal monopolies involving practices like price fixing and market segmentation, to allow courts to supervise and support the administrative AML enforcement.

In 2023, the SAMR carried out a dedicated AML enforcement [campaign](#) targeting sectors that are particularly relevant to people's livelihood. The AML enforcement in the pharmaceuticals sector resulted in a series of investigations conducted by the SAMR and provincial regulatory authorities in Beijing, Shanghai, Tianjin, and Liaoning, leading to the completion of five monopoly cases and imposition of fines and confiscation orders totalling CNY 550 million. The AML enforcement was also intensified in the public utilities sector by regulatory authorities in Jiangsu, Shandong, and Anhui addressing competition problems with supply of natural gas and centralized heating. The AML enforcement authorities in Chongqing, Hubei, and Guizhou investigated a number of cases in the insurance and building materials industries. The market regulatory authorities in Gansu, Heilongjiang, Anhui, Jiangxi, Hunan, and Ningxia have concentrated their efforts on investigating and rectifying cases of abuse of administrative power affecting government procurement, addressing bid rigging and other anti-competitive practices.

The pharmaceuticals sector also witnessed the imposition of the most stringent administrative penalties to date imposed on a state-owned enterprise engaged in monopolistic conduct. The

Shanghai municipal AMR found a wholly-owned subsidiary of [Shanghai Pharmaceuticals Holding](#) abusing its market dominance by applying excessively high prices to the sales of polymyxin B sulfate for injections. The AML enforcement authority ordered the company to cease anti-competitive activities, confiscated illegal gains in the amount of CNY 338 million, and imposed a fine of approximately CNY 124 million representing 3% of the company's relevant turnover in 2022. It is worth noting that the AMR has attributed liability for abuse of dominant position to the respective subsidiary without considering the liability of the parent company. This approach can be contrasted with the SAMR's 2021 decision prosecuting private company [Yangtze River Pharmaceutical Group](#) for resale price maintenance where the liability was attributed to the controlling parent company.

## Key Takeaways

In 2023, the competition law enforcement in China was characterized by the shift of regulatory attention from the [fair competition policy review](#) to antitrust enforcement within sectors integral to the social welfare. The five representative antitrust cases published by the SPC are all pertaining to essential public welfare services, including health care, funeral services, automobile sales and servicing, and building materials. The enhanced antitrust enforcement in these areas aims to safeguard consumer rights and is instrumental for facilitating the free flow of production factors, thereby contributing to the construction of a unified national market. The complexities and emerging competition problems in the field of digital economy led to the increased use of the soft law instruments such as non-binding guidelines calling for voluntary compliance by the undertakings and clarifying the regulatory approaches of the enforcement authorities.

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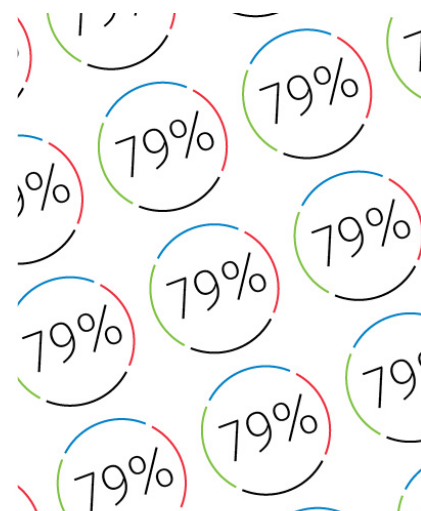
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This entry was posted on Wednesday, January 24th, 2024 at 9:00 am and is filed under [China](#), [Competition Law 2023](#)

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