

CPI's Asia Column Presents:

Antitrust Enforcement During COVID-19: China's Response and the Long- Term Implications

By Wei Han & Yajie Gao¹



Copyright © 2020

Competition Policy International, Inc. For more information visit CompetitionPolicyInternational.com

September 2020

COVID-19 is the first economic disruption to hit China since implementation of the Anti-Monopoly Law of the P.R.C. (“AML”) in 2008. In general, enforcement of the AML remains at normal levels during the pandemic. The Chinese competition authority has gained rich experience in responding to the emergency through a series of measures. These may bring long-term implications.

I. MAJOR MEASURES TAKEN TO IMPLEMENT THE AML DURING COVID-19

A. Improve Working Procedure and Increase Enforcement Efficiency

After a short extension of the 2020 Spring Festival holiday due to COVID-19, the Chinese authorities fully resumed operation since on February 2020. On February 6, the State Administration for Market Regulation (“SAMR”) released its Notice of Adapting Reception and Other Work During the Prevention and Control of COVID-19 (the “Notice”).² Under the Notice, anti-monopoly review of concentrations would take place online. Undertaking(s) concerned could send notifications and supplementary materials to the SAMR through email. Post is also acceptable is internet is not available. The SAMR could also reply to undertaking(s) concerned with acceptance notices, lists of supplementary materials, filing notices, review decisions and other related documents through email or fax. The aim is to minimize the side effects of COVID-19 for transactions, so as to maintain the legitimate rights and interests of undertaking(s) concerned. On February 15, 2020, the SAMR issued the Ten Provisions to Support the Resumption of Work and Production,³ so as to further optimize the working mechanism of merger notification & review and shorten time period for simplified cases.

In terms of the number of cases closed by the SAMR, the efficiency for anti-monopoly review of concentrations has not decreased significantly. The market response shows that the online working mechanism even has increased the efficiency of reviews in comparison to before the pandemic. In accordance with the information published by the SAMR in early August 2020, the SAMR received notification of 217 cases, while the time for filing and closing was shortened 20.9 percent and 14.5 percent year-on-year respectively during the first half of 2020. The SAMR has received 11 thank-you flags or letters from companies both home and abroad.⁴ During the same period, the SAMR closed 62 monopoly cases and imposed fines of CNY 350 million in total. Branches of the SAMR at all levels concentrated anti-monopoly enforcement on active pharmaceutical ingredients (“APIs”), public utilities, construction materials and other livelihood-related sectors. More specifically, 6 anti-competitive agreement cases and 4 abuse of market dominance cases have been closed. Three pharmaceutical companies were fined and CNY 325.5 million were confiscated for abuses of dominance on China’s calcium gluconate raw materials market. The SAMR conditionally cleared 4 concentrations, including *Nvidia/Mellanox* in the semi-conductor, automobile and pharmaceutical sectors. 9 decisions have been made by the SAMR to punish undertakings who have implemented their concentrations illegally, so as to promote the sound development of related industries and undertakings. In order to optimize the business environment, the Chinese market regulation system spares no effort in maintaining a unified national market, strengthening anti-monopoly regulation of administrative monopolies, and closed 43 cases concerning restrictive agreements and local protections in the sectors of medical treatment and public health, transportation and housing & construction, and so on.⁵

B. Maintain the Order of COVID-19-Related Pharmaceutical Market

Excessively high prices for medical masks and other epidemic prevention and control supplies were identified in January and February 2020. Multiple local branches of the SAMR fined companies according to the Price Law of the P.R.C. instead of the AML. Since free movement of persons was restricted during the pandemic, investigation into anti-competitive agreements, abuses of dominant market positions and administrative monopolies were restricted to some extent. Having the pandemic under control, related enforcement activities are gradually going back to normal. During the pandemic, the SAMR paid special attention to the price stability for medicines and drugs and poured more resources into anti-monopoly enforcement in APIs and drugs. Municipal branches were also urged by the SAMR to expedite the investigation of cases concerning medicines and APIs. The SAMR also sped up the verification of evidence from complaints, especially that in relation to the prices of drugs and APIs for the treatment of COVID-19. Besides, the SAMR also proactively collected evidence in relation to excessively high prices, to maintain price stability.⁶ The State Council also published Key Tasks for the Second Half of 2020 to Deepen the Reform of Medical and Health System in July 2020, proposing to *“improve the supervision and alert mechanism to normalize the price of pharmaceutical supplies and enhance anti-monopoly enforcement in APIs and imported drugs.”*⁷

C. Intensify Guidance on Competition Compliance, Guarantee Pandemic Prevention & Control and Resumption of Work & Production

During the pandemic, the SAMR proactively issued a series of policy documents to prevent and control the pandemic as well as to resume work and production (“PCP&RWP”). On April 5, the SAMR issued Notice of the Support for Anti-Monopoly Enforcement Concerning Pandemic Prevention & Control and Resumption of Work & Production. Accordingly, anti-monopoly review of concentrations concerning PCP&RWP were expedited in accordance with laws and regulations. Cooperative agreements in relation to PCP&RWP are legally exempted. Monopolies in terms of obstruction of PCP&RWP are to be investigated and punished more seriously and more quickly. Support for fair competition review policy is to be enhanced. The authorities are to actively provide anti-monopoly compliance guidance to undertakings, so as to meet the requirement of PCP&RWP.⁸ The SAMR branches from Heilongjiang, Jiangxi, Jilin and others have also published competition compliance guidance during the pandemic.

The SAMR shares phone numbers, email addresses, fax numbers, public boards and other contacts for anti-monopoly business and promises to reply within 2 working days. Requests from various stakeholders have been responded to, while undertakings have also obtained compliance guidance and consultation services. The SAMR pays close attention to updates on public opinions, directing the Sichuan branch to initiate investigation into potentially monopolistic problems reported by the media.⁹ During the first half of 2020, the SAMR answered 1,400 calls and replied to 96 public messages left on its official website.¹⁰

D. Comprehensively Implement the Fair Competition Review System

In June 2020, the SAMR, together with the National Development and Reform Commission, the Ministry of Finance and the Ministry of Commerce released the Notice of the SAMR and Other Three Central Departments to Further Advance the Work Concerning Fair Competition Review System,¹¹ so as to improve the review mechanism. The SAMR set up a network working platform, to supervise and direct authorities at all the local levels to clear documents

which obstruct market unification and fair competition, especially those concerning industry entry in connection with company attribute, qualification standard and industry subsidy, in accordance with the Notice of the SAMR and Other Three Central Departments to Initiate the Clearance of Policies and Measures in Obstruction of Market Unification and Fair Competition. The aim is to create a healthy market for the resumption of work and production. In the first half of 2020, the SAMR led the overall clearance of policies issued by the end of 2019 and annulled and/or amended nearly 6,000 policies, to regulate conducts of the authorities.¹²

E. Boost Online Decision-Making

Digital technologies play a significant role in China's fight against the pandemic.¹³ Generally speaking, China's judicial system spends relatively longer on monopoly cases. The pandemic barely affects China's anti-monopoly decision-making. Several judgements made during the pandemic have also aroused public attention. For example, in late January 2020, the Beijing Intellectual Property Rights Court made judgement of the first instance for *Hytera v. Motorola*, declaring that Motorola had not breached provisions against abuse of dominant market position.¹⁴ In March, Jiangsu Nanjing Intermediate People's Court made judgement of the first instance for *Yangzijiang Pharmaceutical v. Hefei Yigong, Nriet, Nanjing Haichen, etc.*, recognizing that the respondents had imposed unreasonable transaction conditions and set unreasonably high price for APIs.¹⁵ China has continued to promote online decision-making in recent years, taking the several internet Chinese courts as typical examples. Pushed by the pandemic, online decision-making has gained wider application scope. The Supreme People's Court published the Notice of Strengthening and Regulating Online Judicature During COVID-19¹⁶ on 14 February, proposing a comprehensive set of online lawsuit activities, including case filing, mediation, evidence exchange, hearing, judgments, and delivery, etc.

F. Promote Systematic Openness in Competition Area

China has taken an active part in the negotiation of free trade agreement(s) with Korea, Norway, Israel and Peru, and signed the Statement of Heads of the BRICS Competition Agencies. China has initiated negotiation with Portugal and Singapore for the memorandum of understanding for anti-monopoly cooperation and has enhanced enforcement communications with its counterparts from the US, the EU, Japan and Korea. China has signed the Joint Statement on Consolidating Efforts to Combat the Negative Economic Consequences of COVID-19 with the BRICS countries and completed the Compilation of Anti-Monopoly Laws and Regulations of Countries Along the Belt and Road (Initiative). China is also preparing for the 7th BRICS Competition Conference to be held the next year.¹⁷

On May 27, 2020, the SAMR sent representatives for the online video conference co-organized by competition authorities from the BRICS countries to fight against COVID-19. The *status quo* of the prevention and control of the pandemic was introduced by the competition authorities from all the BRICS countries. Measures in merger control, anti-monopoly enforcement and competition advocacy since the breakout of the pandemic were exchanged. The following work arrangement to strengthen cooperation among the five competition authorities and to fight against the pandemic together was discussed.¹⁸

II. COVID-19'S LONG-TERM IMPLICATIONS FOR AML ENFORCEMENT

A. Deeper Understanding of the Role Played by Anti-Monopoly Law

The enforcement of the AML during the pandemic illustrates the coordination between competition policy and other economic and social policies during this extraordinary period. China's enforcement of anti-monopoly law still lacks experience in dealing with major emergencies. Through adapting to the special requirement raised by the pandemic, the Chinese competition authority has gained a deeper understanding of the role played by the application and scope of competition policy in emergencies, as well as the elasticity of anti-monopoly law. China's quest for marketization has not been challenged by COVID-19 at all. Further opening up to the outside world and optimizing the business environment remain the Chinese authorities' top priorities. Anti-monopoly law will play an increasingly important role in the development of China's economy. The SAMR is much better prepared for other emergencies to come.

B. Value the Construction of Anti-Monopoly Response Mechanism in the Face of Major Emergency

1. Prepare detailed rules, including block exemptions and expedited procedures

Even if China has released supporting rules for the AML, the four guiding opinions on the automobile industry, intellectual property rights, leniency and commitments more specifically,¹⁹ more detailed guidance is still needed, generally speaking. As of September 2020, China has not introduced detailed rules or guiding opinions for the AML in pandemics, natural disasters and other major emergencies. Even if the Notice of the Support for Anti-Monopoly Enforcement Concerning Pandemic Prevention & Control and Resumption of Work & Production²⁰ published by the SAMR has touched on some related topics, they are not detailed enough, such as those concerning the conditions for block exemption of anti-competitive agreements. COVID-19 is an alert for the SAMR to do research into the application of the AML to major emergencies in advance and to prepare related rules, such as the bankruptcy defense in merger control, cartel exemptions during special periods, and exceptions from fair competition review (such as government subsidies to fight against major emergencies), etc.

Taking COVID-19 as an example, in order to stimulate consumption, local Chinese authorities issued consumption coupons. Since only limited digital platforms are qualified to issue the consumption coupons, it has triggered controversies as regards whether the fair competition review system has been violated.²¹ The SAMR is suggested introducing expedited process and block exemption mechanism during the construction of anti-monopoly response mechanism, such as expedited procedure for fair competition review in the face of emergencies and expedited or block exemption mechanism for certain anti-competitive agreement.

2. Turn to digital technologies when applying the AML in an emergency

During the pandemic, both administrative bodies and judicial organs in China turned to digital technologies when enforcing anti-monopoly laws to large extent. The human resources of China's anti-monopoly agencies are limited, while major emergencies, such as COVID-19, exert huge pressure on the authorities to act flexibly and quickly. In this regard, it is predicted

that digital technologies will play an irreplaceable role in the construction of anti-monopoly response mechanism against major emergencies.

C. Treatment of the Relationship Between Competition Policy and Industrial Policy Faces Bigger Challenges After COVID-19

1. Relationship between competition policy and industrial policy within the framework of China's dynamic economy

China is modulating its economic development strategy and is moving towards a new era of development pattern – prioritizing the domestic economy. 5G, artificial intelligence, big data, internet and other sectors affiliated with the “new infrastructure” will become the new drivers for the advancement of China's economy. Under the pressure for economic recovery after the pandemic, implementation of competition policy will face huge obstacles from industrial policy, especially considering local governments' pursuit of short-term economic interests.

2. Relationship between competition policy and industrial policy in the complicated international economic environment

In recent years, the economic landscape all over the world has become more complicated than ever before, while the obvious trend of reverse globalization, the rise of protectionism and nationalism in some countries and regions can be seen. In this macro international environment, almost every jurisdiction is confronted with the issue of how to coordinate competition policy and industrial policy. For example, both the White Paper on Levelling the Playing Field as Regards Foreign Subsidies released by the European Commission in June 2020 and the Chinese state capitalism: A challenge for the European market economy issued by the German Monopolies Commission in July 2020 are partially related to the competition policy of China. It has topped the Chinese authorities' working plan as regards how to coordinate the relationship between competition policy and industrial policy and let anti-monopoly law play its due role so as to enhance China's “development and reform policy” and promote fast economic advancement with higher quality, against the backdrop of the new international economic environment and downward pressure on domestic economy.

3. Coordinate competition policy and industrial policy through fair competition review system and guarantee the fundamental position of competition policy

On March 30, 2020, the Opinions of the Central Committee of the Communist Party of China and the State Council on Building a More Complete System and Mechanism for Market-Oriented Allocation of Factors were published, re-emphasizing the fundamental position of competition policy, break-up of administrative monopoly and prevention of market monopoly. China's determination to further advance market economy has been reiterated. Even against the backdrop of this state policy document, it is predicted that the constraint imposed by industrial policy and competition policy on each other will be fiercer than ever before and that anti-monopoly enforcement in China will be confronted with more challenges, considering the effects brought by COVID-19 and the increasing uncertainties brought by international relationships. Next, the Chinese authorities should spare more efforts on implementing the fair competition review system, such as through the Notice of the SMAR and Other Three Central Departments to Initiate the Clearance of Policies and Measures in Obstruction of Market Unification and Fair Competition most recently released, to review industrial policies

in every sector, establish third-party assessment rules and promote the establishment of competition neutrality principle.

D. Strengthen Competition Advocacy and Avoid Negative Influences Brought by COVID-19 to the Competition Culture

Cultivation of competition culture has made some progress during the last 12 years since the AML came into effect as of 2008. For example, in recent years, multiple local governments have enacted anti-monopoly compliance documents and intensified competition advocacy through all possible channels. During the pandemic, the Chinese authorities were tolerant with some monopolistic conducts which are illegal in normal life. The Chinese competition authority should be alerted of releasing wrong message and guide market players to differentiate certain conducts in special period and the legal requirements for normal environment (such as the special exemption of anti-competitive agreement). After the pandemic, Chinese authorities are advised to intensify competition advocacy through reviewing and advocating the special anti-monopoly enforcement measures taken during the pandemic, clearing possible misunderstandings and actively cultivating competition culture in China's society.

E. Deepen International Communications and Cooperation in Advancing Competition Policy

On August 30, 2020, Mr. Wang Yi, Foreign Minister of the P.R.C. delivered a speech with the theme of Unity and Cooperation, Openness and Tolerance, and Jointly Safeguard the Progressive Trend of Human Peace and Development in Institut français des relations internationales. During the speech, Minister Wang proposed that China will further expand domestic demand, broaden opening up to the outside world, share its own development dividends with other countries, drive the world's recovery with its own recovery and lead the world's development with its own development.²²

In the face of the complicated international environment, China should keep boosting the international communications and cooperation of competition policy. Taking the BRICS countries as typical example, on July 23, the BRICS Anti-Monopoly Policy Coordination Committee held a video conference. Director General of the SAMR, Mr. GAN Lin, attended the conference and introduced the preparation work for the 7th BRICS Competition Conference to come in 2021. During the conference, heads of the competition authorities from the BRICS countries signed the Statement of Heads of the BRICS Competition Agencies and extended the validity period of the Memorandum of Understanding on Cooperation in the Field of Competition Law and Policy in BRICS, which is due by May 2020. During the conference, the Joint Statement on Consolidating Efforts to Combat the Negative Economic Consequences of COVID-19 was released, expressing the position of further deepening cooperation among the BRICS countries in the field of competition and jointly responding to the economic challenges brought about by COVID-19. Discussions were also held as regards cooperation between the BRICS countries in other areas of competition policy. Next, on the basis of the Sino-Europe Competition Policy Week, the BRICS Countries Competition Conference and other incumbent platforms, China should continue with more bilateral and multilateral anti-monopoly cooperation agreements and attach importance to the negotiation and communications of competition provisions in series of major economic and trade agreements.

III. CONCLUSION

The economy in China has recovered fully. Anti-monopoly enforcement in China went almost as usual during the pandemic, even if the Chinese competition authority lacks experience with dealing with major emergencies. The Chinese competition agencies have maintained the effective operation of the market during the pandemic through optimizing work process, upgrading enforcement efficiency, focusing on the pharmaceutical sector, strengthening competition compliance guidance for undertakings, implementing the fair competition review system, and actively advancing online decision-making. On the other hand, COVID-19 has also compelled the Chinese competition authority to have a deeper understanding of the role played by anti-monopoly laws, which promote the construction of anti-monopoly response mechanisms against major emergencies. In the complicated domestic and international environment, how to coordinate the relationship between competition policy and industrial policy will face bigger challenges. China should further advance competition advocacy, avoid side effects brought by COVID-19 to the competition culture in China and enhance international communications and cooperation in competition policy.

¹ Wei Han, Associate Professor, Executive Director, Competition Research Center of the University of Chinese Academy of Social Sciences. Yajie Gao, PhD candidate, Centre for Commercial Law Studies, Queen Mary, University of London.

² Available at http://gkml.samr.gov.cn/nsjg/fldj/202002/t20200206_311108.html.

³ Available at http://www.gov.cn/xinwen/2020-02/26/content_5483335.htm.

⁴ Available at <http://www.cicn.com.cn/zqgsb/2020-08/03/cms129388article.shtml>.

⁵ Available at http://www.samr.gov.cn/xw/df/202008/t20200803_320456.html.

⁶ Available at http://www.samr.gov.cn/zt/jyq/zjdt/202003/t20200315_313019.html.

⁷ Available at http://www.gov.cn/xinwen/2020-07/23/content_5529467.htm.

⁸ Available at http://www.gov.cn/zhengce/zhengceku/2020-04/06/content_5499512.htm.

⁹ Available at http://www.samr.gov.cn/zt/jyq/zjdt/202003/t20200315_313019.html.

¹⁰ Available at <http://www.cicn.com.cn/zqgsb/2020-08/03/cms129388article.shtml>.

¹¹ Available at http://www.gov.cn/zhengce/zhengceku/2020-05/15/content_5511833.htm.

¹² Available at <http://www.cicn.com.cn/zqgsb/2020-08/03/cms129388article.shtml>.

¹³ Wei Han & Fei Deng, Health Code and Digitalization of Antitrust Filings and Trials: China's Experiments in Coping with COVID-19, *Antitrust*, Vol. 34, No. 3, Summer 2020.

¹⁴ Available at <https://new.qq.com/omn/20200119/20200119A0CITX00.html>.

¹⁵ Available at https://www.sohu.com/a/386626158_742371.

¹⁶ Available at <https://www.chinacourt.org/article/detail/2020/02/id/4803035.shtml>.

¹⁷ Available at http://www.samr.gov.cn/xw/df/202008/t20200803_320456.html.

¹⁸ Available at http://www.samr.gov.cn/fldj/gjhz/202007/t20200709_319487.html.

¹⁹ The State Administration for Market Regulation, *Compilation of Anti-Monopoly Laws, Regulation and Guidance 2019*, China Industry and Commerce Press, 2020.

²⁰ Available at http://www.gov.cn/zhengce/zhengceku/2020-04/06/content_5499512.htm.

²¹ Available at <http://finance.sina.com.cn/china/gncj/2020-04-07/doc-iimxyqwa5475071.shtml>.

²² Available at http://news.youth.cn/jsxw/202008/t20200831_12473056.htm <https://www.ifri.org/fr/espace-media/videos/video-conference-wang-yi-conseiller-detat-ministre-affaires-etrangeres-de>.