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Chemical Giant Eastman is Slapped with a Fine for Abuse of Market Dominance in China

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China's competition watchdog SAMR made a penalty decision, adopted by its Shanghai branch Shanghai Market Regulation Bureau ("SMRB"), publicized on its official website[1] on April 29, 2019, right before the International Labor Day holiday. This decision is addressed to Eastman (China) Investment Management Co., Ltd. ("Eastman China"), a Chinese subsidiary of the US Chemical firm Eastman Chemical Company, for restricting transactions by abusing its dominant market position. The fine amount is equal to 5% of Eastman China's 2016 sales revenue, roughly USD 3.6 million.

Eastman should not be unfamiliar with China's antitrust enforcement, since it is already the second fine ticket it received in China within two years. Back in December 2017, Eastman China was punished by Shanghai Price Bureau, the Shanghai branch of former NDRC, for a separate antitrust violation of resale price maintenance, although the fine was only around USD 0.35 million.

Since it is the first antitrust enforcement decision made by SMRB since its establishment, much attention was drawn to this case to observe its enforcement tendency if any. Indeed, this case has reflected the attitudes of China's antitrust enforcement authority on a few substantive and procedural issues, and thus is worthy of attention for firms operating on Chinese market.

I. The Whole Group or Only the Chinese Subsidiary as Liable Entity

Firms frequently ask whether the whole group or only the Chinese subsidiary of foreign companies will be the addressee of penalty decision adopted by China's antitrust enforcement authority?

Although absent detailed rules to gauge this issue, a general standard is implicated in the current *Eastman* decision, in which only Eastman China is listed as the penalty addressee but not the US parent company. It is explained in the decision that Eastman's headquarter only reviews the sales policies of Eastman China in formality and does not directly engage in the sales activities of Eastman in Mainland China. In addition, another manufacturing entity of Eastman in mainland China is not listed as the penalty addressee either, on the ground that it has no decisional power on the sales policies of products manufactured by itself.

Nevertheless, there are indeed precedents, in which the headquarter of foreign companies were directly fined or fined together with its Chinese subsidiaries. In the *Qualcomm* case, Qualcomm Inc. was the penalty addressee because it is viewed as the party that made the violating patent licensing policies for the whole group. In the *Tetra Pak* case, the SAMR found that the parent company of Tetra Pak group and its Chinese

[1] http://gkml.samr.gov.cn/nsjg/fldj/201904/t20190429_293282.html

subsidiaries had collectively made and implemented the violating sales practice, and thus listed all of the above as the penalty addressees.

II. Economic Analysis May Play a Larger Role in the Enforcement Going Forward

Economic analysis tools have been traditionally more frequently employed by the agency in the arena of merger review in China than in the behavioral regulation against monopoly agreements and abuse of market dominance in the past antitrust enforcement of China. However, in the current *Eastman* case, the SMRB resorted to economic analysis tools in both the market definition and assessment of dominant market position, which may indicate a tendency that economic analysis will play a larger role in the antitrust enforcement going forward. Specifically, SMRB employed the methodology of *Critical Loss Analysis* to draw the borderline for the relevant market, and also used *Lerner Index* to verify the market power of Eastman and restrictive effects in the relevant market.

III. Heightened Antitrust Risks: Disguised Forms of Exclusive Purchase May Also Be Caught

The Former NDRC and SAIC investigated many cases that involved direct requirement of exclusive dealing from the seller itself or from other undertakings designated, which are usually affiliates of the offending company, but not against other indirect forms of exclusive purchase requirement. However, the *Eastman* decision is the first case that China's antitrust enforcement extended its attention to other masked variants of exclusive purchase requirement, such as minimum purchase agreements together with reinforcing clauses such as take-or-pay, most-favored-nations, or favorable rebates. It therefore implies that companies operating in China now face heightened antitrust risks, since the agency is intent to not only strictly penalizing behaviors listed in the text of the laws, but also pay attention to the nature of behavior, in line with the practice of other main competition jurisdiction.

In fact, the draft version of the Provisions Prohibiting Abuse of Market Dominance Conduct which was issued by the SAMR this year for public comment, stipulates that transaction restrictive behaviors include "disguised forms via setting specific trading conditions or by other indirect means."

IV. Minimum Purchase Requirement of Above 60% of Demand May Be Risky; 2-3 Years Contract May Be Viewed as Too Long

Firms are often curious about what percentage of minimum purchase requirement may be viewed as having the same effect as exclusive dealing. Before the *Eastman* case it was hard to give an answer from practical perspective. In the *Eastman* case, the penalty decision said that Eastman set the minimum purchase requirement above 80% of certain customers' annual demand in five contracts, and above 60% of the customer's annual demand in one contract. The agency also considered the 20% market share that was foreclosed in aggregate by the offending contracts in assessing the anticompetitive effects. In addition, the SMRB deemed a 2-3 years term contract as a long-term agreement, which may make the anticompetitive effects significant. For compliance purpose, companies may take the above benchmark of 60% of demand and 2-3 years as reference in practice.