

RETROSPECT AND PROSPECT: ANTITRUST ENFORCEMENT OF ABUSE OF DOMINANCE



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Retrospect and Prospect: Antitrust Enforcement of Abuse of Dominance

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By Jing He, Annie Xue & Melissa Feng



Antitrust Guidelines for the Platform Economy in the Era of Enhanced Antitrust Scrutiny

By Wei Huang, Wendy Zhou, Xiumin Ruan & Xi Zhang



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Retrospect and Prospect: Antitrust Enforcement of Abuse of Dominance

By Chenying Zhang

In 2020, the State Administration for Market Regulation implemented the antitrust law in both legislation and public enforcement. It has had a significant and positive effect on free market competition and consumer welfare. Specifically concerning abuses of dominance, we note the following characteristics: First, antitrust enforcement agencies paid close attention to market competition in the fields relevant to people's livelihoods, and in particular cracked down on illegal acts in the field of API. Secondly, the authorities paid close attention to the digital economy. Not only did the authorities start an investigation into Alibaba, they also released the draft *Guidelines on the Antitrust in the Sector of Platform Economy*.

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I. REVIEW OF ANTITRUST ENFORCEMENT IN CHINA IN 2020

In 2020, the global landscape has been reshaping, including an intensified competition in global economy. The effectiveness and implementation of the *Anti-monopoly Law of the People's Republic of China* have had a significant and positive effect on the order of free market competition and consumer benefits. Specifically, in terms of the legislation and enforcement:

- First, China commenced the amendment to the *Anti-monopoly Law of the People's Republic of China*. Based on the experience in the operation of law in the past 12 years, China started up the comprehensive amendment to the *Anti-monopoly Law*, which came into effect on August 1, 2008. On January 2, 2020, the proposed draft was publicly released, in which the provisions regarding the purpose of legislation, setting of law enforcement agencies, rules for identifying specific illegal acts, legal liabilities, and others were amended with major breakthroughs.
- Second, the anti-monopoly supporting systems were improved. As the antitrust enforcement agency, the State Administration for Market Regulation issued the *Interim Provisions on Review of Concentrations of Undertakings* (adopted on October 20, 2020), and amended on October 23, 2020 the *Regulations on Prohibiting the Abuse of Intellectual Property Rights to Eliminate and Restrict Competition* (promulgated on April 7, 2015).
- Third, several anti-monopoly guidelines were put in place. The Anti-monopoly Commission of the State Council has introduced six guidelines, including the *Guidelines on the Anti-Monopoly Compliance of Undertakings*, the *Guidelines on the Anti-monopoly regarding Intellectual Property Rights*, the *Guidelines on the Application of the Leniency Program in Horizontal Monopoly Agreement Cases*, the *Guidelines on the Anti-monopoly in the Automobile Industry*, and the *Guidelines on the Conciliation Procedure in Monopoly Cases*, to further improve the transparency of law enforcement and the predictability of business behaviors, prevent anti-monopoly compliance risks, and ensure the sustainable and healthy development of the undertakings. In respect of the problems arising in the competition in the platform economy, the *Guidelines on the Antitrust in the Sector of Platform Economy* were issued on November 10, 2020, and passed on February 7, 2021, providing pertinent guidelines for the antitrust regulation on online platform operators.
- Fourth, greater antitrust enforcement was made. The competent antitrust enforcement agencies investigated and handled a number of monopoly cases affecting people's necessities, such as gas, water, and raw materials, to ensure orderly competition in the sectors of people's livelihoods, and protect consumer rights and public interests. The antitrust enforcement agencies strengthened the antitrust enforcement in the field of Internet, and imposed administrative fine (RMB 500,000, which is the maximum fines) against three large online platform operators (Alibaba, Tencent-backed China Literature, and Hive Box) for their failure in making a notification of concentrations of undertakings according to the law. By imposing the fine, China government reemphasized that all enterprises are treated equally in antitrust enforcement, and built a deterrent to the punished enterprises and set a general preventive warning to all operators in the market. On December 24, 2020, the State Administration for Market Regulation (SAMR) initiated an investigation into Alibaba Group's suspected monopolistic behaviors such as "one-out-of-two" choose (the merchant may only open its shop on Ali platforms or other platforms competitive with Ali platforms).
- In 2020, profoundly significant attempts and breakthroughs were made in the legislation and enforcement regarding antitrust enforcement against the abuse of market dominance, reflecting the new trend of antitrust enforcement in China. This paper will focus on the issues with respect to analyzing and discussing the abuse of market dominance.

II. CURRENT ENFORCEMENT AGAINST ABUSE OF DOMINANCE AND ANALYSIS

A. Current Enforcement Against Abuse of Dominance

1. Abuse of Dominance Laws and Regulations

There are two levels of laws and regulations now in force in China. The first level is the *Anti-monopoly Law*. Articles 17, 18, and 19 of the *Anti-monopoly Law* (hereinafter the “Law”) sets out the rules for identifying abuse of market dominance, covering respectively the types of abuse of market dominance, the elements of market dominance, and the criteria for presuming dominance based on market share. In addition, Article 47 of the Law specifies the administrative penalties on the violations thereof. The second level is the *Interim Provisions on Prohibiting the Abuse of Market Dominance* (hereinafter “Interim Provisions”), issued by SMAR, which came into force on September 1, 2019. The Interim Provisions are departmental regulations and taken as the basis for law enforcement by SMAR and local administrations for market regulation.

In March 2018, the National People’s Congress approved the State Council’s organization reform program. According to the program, the State Administration for Market Regulation (“SAMR”) was established with an anti-monopoly bureau. Since then, the joint antitrust enforcement by three agencies under a decentralized system was out, and the unified antitrust enforcement under a centralized system was put in place. On December 28, 2018, SAMR issued Notice [2018] No. 265, which authorizes all administrations for market regulation at provincial, autonomous regions, and municipal level directly (i.e. a total of 31 provincial administrations for market regulation) to enforce the antitrust law. Since then, the investment of the cases with respect to monopoly agreement and abuse of market dominance will be handled by SAMR and provincial administrations for market regulation. 2020 data shows that the number of cases investigated and handled by provincial administrations for market regulation is greater than that by SAMR.

2. Summary of Antitrust Enforcement

From January 1, 2020 to January 31, 2021, the two levels of antitrust enforcement agencies filed 38 cases of suspected abuse of market dominance, and imposed administrative penalties against 8 of them, with the fines and confiscations totaling approximately RMB430 million. According to the information and data in the announcements on the website of SMAR, a summary of the cases is given in Table 1. The cases cover various industries and sectors, such as water supply, power supply, gas, funeral service, banking, port, software, communications, chemicals, salt, tobacco, active pharmaceutical ingredients, packaging equipment, and refined oil operations. All 8 cases with administrative penalties imposed are related to people’s necessities.

Table 1: Administrative Penalties in Abuse of Dominance Cases in 2020

Number	Law Enforcement Agency	Industry/Party Involved	Illegal Act	Amount of Confiscated Illegal Income (10K RMB)	Rate of Fine (%)	Amount of Fine and Confiscation (10K RMB)
1	Shanxi Administration for Market Regulation	Natural gas Shanxi Jianke	Exclusive trading	29.72	2	164.3
2	Shanxi Administration for Market Regulation	Natural gas XZRQ	Exclusive trading	118.84	2	241.66
3	Zhejiang Administration for Market Regulation	Funeral service Jiangshan Funeral Home	Unreasonable additional trading conditions	8.6	6	73.85
4	Jiangsu Administration for Market Regulation	Water Gaochun, Nanjing	Exclusive trading	0	4	182

5	Qinghai Administration for Market Regulation	Natural gas Qinghai Minhechuan	Tie-in sales	0	9	446
6	SAMR	Active pharmaceutical ingredients KH PYH TYS	Selling goods at an unfairly high price, unreasonable additional trading conditions	10890; 605; 605	10; 9; 7	25270; 5435; 1845
7	Zhejiang Administration for Market Regulation	Active pharmaceutical ingredients Wepon Pharmaceutical	Tie-in sales, unreasonable additional trading conditions	23.2	3	247.4
8	SMAR	Active pharmaceutical ingredients Sincere Pharmaceutical Group Limited	Refusal to deal	0	2	10000

In 2019, a total of 103 monopoly cases were instituted, 46 cases were concluded, and RMB320 million was fined and confiscated. Among them, 28 monopoly agreement cases were instituted, and administrative penalties were imposed against 12 of them; 15 cases of abuse of market dominance were instituted, and administrative penalties were imposed in 4 of them; 84 cases of abuse of administrative power to eliminate or restrict competition were handled, and 24 of them were instituted and 12 were rectified; 36 cases being suspected of failing to give a notification of concentration of undertakings according to the law were investigated, and administrative penalties were imposed in 18 of them. Compared with 2020 data disclosed by SAMR², more cases in respect of abuse of market dominance were instituted, with punished cases and the amount of fine increased.

According to Article 47 of the *Anti-monopoly Law*, “In case there exists an act abusing market dominance by the undertakings in violation of this law, the antimonopoly authorities shall order the undertakings to cease such act, the illegal gains shall be confiscated, and a fine between 1 and 10 percent of the turnover from the previous year shall be imposed.” In the KH API case in 2020, one of the parties was fined 10 percent of its sales in the previous year, which, among the cases announced so far, is the only monopoly case imposed with penalty subject to the highest standard. This case calls for our particular concern, since it is a case of abuse of market dominance rather than hard core cartel.

a. Abuse of Dominance by KH and Others

Shandong Kanghui Pharmaceutical Co., Ltd. (hereinafter “KH”), Weifang Puyunhui Pharmaceutical Co., Ltd. (hereinafter “PYH”), and Weifang Taiyangshen Pharmaceutical Co., Ltd. (hereinafter “TYS”) are three companies selling the active pharmaceutical ingredients of calcium gluconate (hereinafter “APIs”). Their shares in the relevant market, namely “China’s market for APIs of calcium gluconate for injection,” were 94, 91, and 87 percent during the three years in the case. Although the three companies are superficially independent legal persons and not related to each other, PYH and YYS are actually controlled by KH in terms of personnel, business, and finance, so they are identified as one operator. The three companies disrupted the original business model in which three API companies (none of them is any of the parties to this case) each sold APIs to preparation companies, and by entering into exclusive sales agreements with API producers, or agreeing with them that 85 percent of their outputs shall be sold to the parties, or that they shall not sell APIs and shall produce APIs only for their own use, controlled the sales of APIs in the relevant market, and became the only API supplier for downstream preparation companies. After that, the parties raised the price at which they sold the APIs to others by 19 to 54.6 times, which constituted selling goods at an unfairly high price. In addition, after controlling the API market, the parties forced downstream preparation companies to enter into repurchase agreements, and thus further controlled the sales of the preparation outside the API market, harming the interests of the preparation companies. The parties not only raised the price of the preparation significantly, but also caused a shortage of supply of the preparation. This preparation is a commonly used low-cost medicine and a clinically necessary medicine, and is in the *National Essential Medicine List*. According to public reports on the Internet,³ the price of calcium gluconate injection rose from RMB 2 three years ago to about RMB 20 in 2018, and calcium gluconate injection was included in the list of medicines in shortage in Guangxi, Yunnan, Inner Mongolia, Shanghai, and other places successively, seriously hindering patients’ medication and harming

² Annual Report of Anti-monopoly Law Enforcement in China (2019), See http://www.samr.gov.cn/xw/zj/202012/t20201224_324676.html.

³ <https://baijiahao.baidu.com/s?id=1664031938465801144&wfr=spider&for=pc>.

their interests. In view that KH played a leading role, PYH played a secondary role, and TYS played an auxiliary role in the monopoly, their illegal incomes were confiscated, and a fine of 10, 9, and 7 percent of their turnover from the previous year were imposed respectively, according to Article 47 and Article 49 of the *Anti-monopoly Law*.

Significantly, with respect to this case, the administrative penalties were imposed on April 9, 2020, and announced on the website of SAMR on April 14, 2020. On the same day, SAMR announced other 16 cases, directly related to this case and imposed with administrative penalties for obstructing antitrust enforcement investigations. According to the provisions of Article 42 and Article 52 of the *Anti-monopoly Law*, the operators and interested parties are obligated to cooperate with the antitrust enforcement. “In reviewing and investigating by the antimonopoly authorities, if the undertakings refuse to provide relevant materials and information, or provide incorrect materials and information, or remove, hide or destroy evidences, or other conducts to refuse or obstruct investigation, the antimonopoly authorities shall order the operators to cease such act, a fine below RMB20,000 may be imposed on individuals and a fine below RMB200,000 may be imposed on organization. If the circumstances are serious, a fine between RMB20,000 and RMB100,000 may be imposed on individuals and a fine between RMB200,000 and RMB1,000,000 may be imposed on organization; a criminal liability may be imposed if a violation of criminal law occurs” In this case, KH and PYH refused to provide relevant data and information, concealed, destroyed, and transferred evidence, rejected or obstructed the investigation carried out by the antitrust enforcement agency, so they were fined RMB1,000,000 (the fine at the highest standard under the law). The legal representatives of KH and PYH “organized and directed the employees of the companies and the unemployed in the society to violently snatch evidence, and forcibly conceal and transfer relevant evidence. When the antitrust enforcement officials ordered the parties to stop the illegal acts, the parties directed relevant personnel to violently obstruct the antitrust enforcement officials, causing injuries to some antitrust enforcement officials and seriously hindering the investigation.” Therefore, the two legal representatives were fined RMB100,000 (the fine at the highest standard under the law), and the remaining 12 were fined varying amounts between RMB20,000 and RMB100,000. The following issues in this case are of concern:

First, the identification of undertaking. Article 12 of the *Anti-monopoly Law* clearly stipulates that the subject is the “undertaking,” including natural person, legal person and other organizations, and emphasizes the identification of undertaking based on “will of undertaking,” not superficial legal status. The three companies in this case are superficially independent and not related to each other, but they cooperate with and are related to each other closely in business operation, staffing, financial resource allocation, and profit distribution, forming a *de facto* community of interests, and should be considered as one undertaking. This provision is intended to prevent the parties from setting up a shell company in order to evade penalties, and from covering up substance with form. Especially in the case of conglomerate, some independent legal persons are only vehicles, and other entities actually plan, decide on, implement, and supervise the operations. In this situation, it is necessary to accurately identify an undertaking based on the facts of the case.

Second, the damage to the order of competition in the API market and the preparation market. Since the production of APIs is subject to a production permit, the number of producers is limited, and the barrier to entry is high. As a result, in such cases, instead of substantial increase, only decrease may occur in the supply of APIs in the short to medium term, due to production permit holders’ reduction or suspension of production, giving a relative advantage to upstream API producers over downstream preparation producers. In previous cases, such as the isoniazid case,⁴ the phenol case,⁵ and the allopurinol case⁶ investigated and handled by the National Development and Reform Commission in 2017, the parties’ abuse of market dominance and damage to competition usually had direct impacts on the API market – the increase in the price of APIs indirectly led to an increase in the price of preparations. However, this case is different in the sense that the parties had the obvious subjective intention to violate the law. They not only disrupted the original business model by adding distributor between API producer and preparation producer, but also monopolized the supply of preparations through agreement. What’s more, in order to further control the sales of preparations, they extended the monopoly to the downstream preparation production, damaging the order of competition in the two markets.

Third, the application of the provision on exploitative abuse. Many instances of refusal to deal are found in previous API cases. From the perspective of business logic, refusal to deal might be intended to force the counterparty to accept unreasonable trading conditions, or in the case of integrated operation in both the API and preparation markets, to eliminate competitors. Exploitative abuse is relatively rare. The previous

⁴ *Isoniazid* case involving Second and Handewei, Administrative Penalty Decisions [2017] No. 1 and (2017) No. 2 of National Development and Reform Commission.

⁵ *Phenol* case involving Chongqing Southwest No.2 Pharmaceutical Factory, Competition Enforcement Announcement [2016] No. 12, Administrative Penalty Decision Yu I&C E P [2016] No. 15.

⁶ *Allopurinol* case involving Chongqing Qingyang Pharmaceutical Co., Ltd., Competition Enforcement Announcement [2015] No. 12, Administrative Penalty Decision Yu I&C E P [2015] No. 15.

chlorpheniramine case⁷ was a typical case in which both exploitative abuse and exclusionary abuse are found. In that case, the party refused to deal in order to sell APIs at high prices and to sell other APIs by means of tie-in sales. In this case, what the three companies did was purely exploitative abuse. Based on this, plus the aforementioned subjective intention, their behaviors were held illegal.

Fourth, imposing a fine at high rate. The rates of fines imposed on the parties to this case, 10, 9, and 7 percent respectively, were relatively high, especially for cases of abuse of market dominance. The previous highest rate of fine was 8 percent in such cases involving sale at unfairly high price, including the Er-Kang case (i.e. the aforementioned chlorpheniramine case) and the Qualcomm case. Article 49 of the *Anti-monopoly Law* sets out the considerations for an antitrust enforcement agency to determine the amount of fine. In this case, the parties eliminated and restricted competition in the relevant markets and seriously damaged the interests of preparation companies and patients (the products involved are relevant to the lives and health of patients), which meets the requisites serious circumstance, vile nature, and long duration, so fines were imposed at high rates, in addition to confiscation of illegal incomes. The circumstance and nature considered here refer to the circumstance and nature of monopoly, which damages fair competition order, not those of violent obstruction to antitrust enforcement, which harms the authoritativeness of public antitrust enforcement.

Fifth, the violent obstruction to antitrust enforcement. This case is an extremely rare case of violent obstruction to law enforcement. According to Article 52 of the *Anti-monopoly Law* currently in effect, KH and PYH and their respective legal representatives were fined RMB 1,000,000 (maximum fine on entity) and RMB100,000 (maximum fine on individual) respectively. However, the amounts of fines under the *Anti-monopoly Law* are relatively low for the nature and consequences of their behaviors, and does not conform to the principle of proportionality for administrative law enforcement. It is required to, according to the rules on determining legal liability in current laws, impose a fine amounting to a certain percentage of each offender's sales in the previous year. This is stipulated in Article 59 of the *Amendment to the Anti-monopoly Law* (Draft for Comments) issued in January 2020.

This case did not end there. PYH filed an administrative lawsuit with the Beijing No. 1 Intermediate People's Court in connection with the administrative penalty for monopoly.⁸ This case was heard by the court on December 15, 2020 and the hearing was broadcast live on the Internet. No verdict has yet been pronounced.

b. Comments on Antitrust Enforcement

The antitrust enforcement over the 13 months since January 2020 exhibits the following characteristics: First, antitrust enforcement agencies paid close attention to the market competition in the fields relevant to people's livelihoods, which is in line with the previous philosophy of philosophy. According to the author's summary of the cases of abuse of market dominance announced since 2008, as of January 31, 2021, penalties have been imposed in a total of 52 cases of abuse of market dominance; most of the cases occurred in civil energy (gas and water), salt, tobacco, telecommunications, radio & TV, and API industries, and one of the cases occurred in chip industry (Qualcomm), chemical industry (Eastman), software industry (Jiuyuan Yin Hai - Changhui), and packaging industry (Tetra Pak) respectively. In terms of the number of cases, water and API ranked first, with 9 cases in each field. Second, antitrust enforcement agencies severely cracked down on illegal acts in the field of API. Many antitrust enforcement cases occurred and severe penalties were imposed in the field of API. In this field, abuse of market dominance has various manifestations, including refusal to deal, restriction on deal, tie-in sales, unreasonable additional trading conditions, and selling goods at an unfairly high price, which almost cover all types of "abuse" listed in Article 17 of the *Anti-monopoly Law*, so antitrust enforcement is difficult, time-consuming, and costly. In terms of penalty, the rate of fine is relatively high. Third, antitrust enforcement agencies put more efforts into antitrust enforcement and further standardized antitrust enforcement. As shown by the foregoing data, the number of cases filed, the number of cases concluded, and the amount of fine all increased. According to the provisions of the *Anti-monopoly Law*, if an operator abuses its market dominance, the operator shall be ordered to stop such illegal acts, its illegal income shall be confiscated, and a fine shall be imposed on it. However, in previous cases, illegal incomes were seldom confiscated. According to the author's summary, as of December 31, 2019, illegal incomes were confiscated in only 18.5 percent of the cases. In contrast, illegal incomes were confiscated in 5 cases among the 8 cases since January 2020, a significantly increased proportion.

⁷ Chlorpheniramine case involving Hunan Er-Kang and Henan JiuShi, Administrative Penalty Decisions SAMR P [2018] No. 21 and [2018] No. 22.

⁸ Case Number: [2020] BJ 01 A F No. 459, <http://tingshen.court.gov.cn/live/16319054>.

III. LEGISLATION ON PROHIBITING ABUSE OF MARKET DOMINANCE

Legislations governing abuse of market dominance introduced in 2020 include the drafted revisions to the *Anti-Monopoly Law*, the *Regulations on Prohibiting Behaviors of Abusing Intellectual Property Rights to Exclude and Restrict Competition* (2020 Revision, hereinafter *IPR Abuse Regulations*), and the *Guidelines on the Antitrust in the Sector of Platform Economy* formulated by the Anti-Monopoly Committee of the State Council. This paper will not look into the *IPR Abuse Regulations* as the revision was made on the basis of the departmental rules released by the State Administration for Industry and Commerce (“SAIC”) in 2015 and the revisions only involving the change of law enforcement agencies but not the substances and procedures.

A. Current Anti-Monopoly Law and Relevant Revisions

The current *Anti-Monopoly Law* was enacted in 2007 and implemented on August 1, 2008. Provisions with respect to abuse of market dominance within the law are mainly found in Article 17, 18 and 19 under Chapter III – identification of violations, as well as in Article 47 concerning administrative punishments for the violations. The drafted revision to the law unveiled in January 2020 by the State Administration for Market Regulation (SAMR) increased from 57 articles of eight chapters of the current law to 64 articles of eight chapters. Although the number of provisions relating to the identification of market dominance remained unchanged, the revisions featured some breakthroughs in this regard:

1. Defining a Dominant Position in the Digital Economy

New business models, emerging as a result of technological advances, boosted the formation of ecosystems where platforms act as a core and important bridge. While bringing conditions for economic development and innovation, this has caused a series of basic juridical logic issues, such as disputes over data ownership, privacy protection, and issues regarding legitimate collection, use and management of data and information. Due to the inherent “quasi-public attributes” of platforms, or features such as network effects and externalities, conducts on the platforms concerns the vital interests of ordinary consumers, including Big Data Killing (a form of price discrimination through which Internet platforms charge higher prices to frequent users than new ones), exclusive transactions, and data misappropriation. It is also why the operating behaviors of platform enterprises have attracted great attention from the regulators. Article 11 of the *Interim Regulations for Prohibiting Behaviors of Abusing Dominant Market Position* released by the SAMR in 2019 stipulated how to determine the market position of undertakings engaged types of businesses in the new economy, in light of the features of dynamic competition, cross-field competition, and network effects, among others, peculiar to Internet platform-based economy. The latest drafted revisions to the *Anti-Monopoly Law* detailed factors that should be considered when determine whether an undertaking in the field of digital economy has a dominant position in the market including the operating model adopted by the undertaking, its technical characteristics, market innovation and its ability in gathering and handling related data. Considering lessons from cases involving the likes of Facebook, Google and Amazon in the European Union and the United States, China’s new rule will have a profound influence on the field of digital economy and platform economy in the future

2. Collective Dominance

Issues regarding market monopoly by oligopolies are common within various jurisdictions. Aware of that, China’s *Anti-Monopoly Law* provided a way to define “abuse of collective dominance.” However, inference provided for in the current provisions on identification of collective dominance is solely made on the market share of the undertakings, that is, collective dominance exists where two undertakings jointly have a market share of two-thirds, or three undertakings jointly have a market share of three-fourths, in a relevant market. The lack of other identification factors leads to an application dilemma in practice. For instance, when demonstrating the decision on penalties in the isoniazide and chlorphenamine cases, the law enforcement agencies mentioned the inference criteria for determining the position of collective dominance by market share, as stipulated in Article 19 while demonstrations were either not made or vague in proving oligopolies enjoy “collective” dominance as “a whole.” As a result, the violation is determined according to their respective independent dominant market position, without fully disclosing the fact that these undertakings “collectively” abused a dominant position. Even worse case is that, Article 19 had even been misused in civil lawsuits, such as in the case of *Fang GU v. China Southern Airlines Company Limited* for refusal-to-trade,⁹¹ and the case of *Xinyu WANG v. China Telecom Corporation Limited Xuzhou Branch* for monopoly dispute.¹⁰² In the second case, the plaintiff requested the court to hold that the defendant committed in the conduct of abusing a dominant market position, for which one of the focus lied in whether the defendant had market dominance. The court

9 (2014) Y.G.F.M.S.Z. No. 1141 Civil Judgment for the case of *Fang GU v. China Southern Airlines Company Limited* for refusal-to-trade, before Guangdong Higher People’s Court.

10 (2014) N.Z.M.C. No. 256 Civil Judgment for the case of *Xinyu WANG v. China Telecom Corporation Limited Xuzhou Branch* for monopoly dispute, before Nanjing Intermediate People’s Court.

in the case held that there are three undertakings on the relevant market, China Mobile, China Unicom and China Telecom, and their collective market share exceeded three-fourths, the inference criteria as required in Paragraph (3) of Article 19 of the *Anti-Monopoly Law*. Meanwhile the defendant was unable to prove its market share was less than one-tenth. The court accordingly inferred that the defendant is an undertaking with market dominance. The wrong stemmed from the misunderstanding of “collective.” The drafted revisions made improvements by refining identification factors, with the inclusion of market structure, transparency in the relevant market, the degree of homogenization among relevant commodities, and behavioral consistency among undertakings, among other factors.

B. Guidelines on the Antitrust in the Sector of Platform Economy (“Platform Guidelines”)

The *Platform Guidelines* were released on November 10, 2020 for public comments and has not yet been adopted. The *Platform Guidelines* highly agree with the structure of the *Anti-Monopoly Law*. The *Platform Guidelines* consist of six chapters, namely General Provisions, Monopoly Agreements, Abuse of Market Dominance, Concentration of Undertakings, Abuse of Administrative Power to Exclude and Restrict Competition, and Supplementary Provisions, further divided into 24 articles in total, and provide comprehensive and detailed provisions on the application of the *Anti-monopoly Law* in the field of platform economy.

1. Objectives of the *Platform Guidelines*

With protecting fair market competition and promoting innovation and healthy development in the field of platform economy as the starting point and foothold, the purpose of the *Platform Guidelines* is to reduce market entry barriers, creating an open and inclusive development environment, fully stimulating the innovation vitality and development momentum of market entities, and improving the overall international competitiveness of China’s platform economy. This is consistent with the new goal of “encouraging innovation” in the first article of the drafted revision of the *Anti-Monopoly Law*.

2. Particularity of the *Platform Guidelines*

Wide-ranging and require expertise, of the platform economy, it is necessary to give more detailed and targeted guidance to this industry by fully considering its dynamism, systematicity and complexity, apart from alignment with the current laws, regulations, rules and guidelines. This is conducive to accurately grasping the development rules of platform economy and supervision rules for anti-monopoly, constructing scientific anti-monopoly supervision rules, strengthening competition analysis and legal argumentation, improving the level of specialization and standardization of anti-monopoly law enforcement, and creating a targeted, predictable and transparent legal system for development of platform economy.

3. Rules of the *Platform Guidelines* on Prohibiting Abuse of Market Dominance

The *Platform Guidelines* focuses on the identification of market dominance of undertakings in platform economy and the common abuse of market dominance in this field.

- First, it expounds the common thinking of anti-monopoly law enforcement when identifying the abuse of market dominance, namely making further elaboration by the specific identification factors in Article 18 and Article 19 of the *Anti-Monopoly Law* as the framework when making analysis.
- Second, it enumerates in detail the factors that can be used to determine or infer the market dominance of an undertaking, including the market share of the undertaking, the competition situation of relevant markets, the ability of the undertaking to control the market, the financial and technical conditions of the undertaking, the dependence of other undertakings, the difficulty of entering the market, etc., and clarifies the specific items of each factor in the context of “platform.” For example, when determining the “market share of an undertaking,” the transaction amount, transaction quantity, number of users, page view, duration or other indicators, as well as the continuance of such market share may be taken into consideration.
- Third, it refines the manifestations of abuse of market dominance in the platform field detail by detail, such as unfair price behavior, sales below cost, refusal to trade, restricted trade, tie-in sales or imposing unreasonable trading conditions, differential treatment, and responds to the hot issues of widespread concern in society, such as “one-out-of-two,” data monopoly, and Big Data Killing.

IV. OUTLOOK ON LAW ENFORCEMENT IN THE FUTURE

From the perspective of China's anti-monopoly practice, comparing with civil litigation, the public law enforcement of the two-level market regulators plays a more prominent role in maintaining market competition order. At present, China's anti-monopoly legal system is gradually improving, covering the anti-monopoly law, judicial interpretation of the Supreme People's Court, SAMR departmental rules and guidelines of the Anti-Monopoly Committee of the State Council. For the special competition issues of specific industries, effective and targeted guidance and governance can be carried out by issuing guidelines. For example, in 2020, two drafts for comments were issued to regulate platform economy and active pharmaceutical ingredients (API) field respectively. In future law enforcement, this model will continue as new problems emerge in development.

In addition, the practice of law enforcement shows that there is insufficient punishment for illegal acts in the current legislation. On the one hand, it is necessary to increase the business accountabilities of offenders in the new anti-monopoly law, and on the other hand, the proportion of fines within the scope of statutory discretion should be higher to achieve effective deterrence. In the implementation of the *Anti-Monopoly Law*, according to the past experience, the case of collateral public law enforcement and civil law enforcement is rare. Take the *Abbott RPM* case for example, the administrative law enforcement convicted Abbott guilty, but the finding was not supported in civil litigation because of insufficient evidence offered by the plaintiff; in another example, *Huawei v. IDC* for abusing its dominant market position, the civil lawsuit was supported, but the law enforcement agency accepted IDC's undertakings in administrative law enforcement. In December 2020, SAMR conducted an anti-monopoly investigation on Alibaba; JD.COM earlier filed a civil lawsuit with Beijing Higher People's Court on the limited transaction behavior of "one-out-of-two," the case is under trial, and it is the first case in which public law enforcement and civil litigation proceed in parallel. This will have a far-reaching influence on the enforcement of China's anti-monopoly law.

The development of digital economy produces a revolutionary effect on the market competition pattern, especially considering the characteristics of Internet-based platform economy, namely, dynamic competition, cross-border competition and network effects. A violation of the law will have a massive influence in both scope and depth. From the macro aspects of the market, it also concerns the industrial pattern and the innovation vitality of enterprises. Failure of effective supervision will lead to drastic changes in market structure and further result in competition disorder. A series of law enforcement and legislative measures, such as imposing the most severe punishment on failure of notification of concentration of undertakings by three Internet platform enterprises (Alibaba Investment, China Literature, and Hive Box) according to law, charge against Alibaba and issuance of the *Platform Guidelines*, all indicate the trend of strengthening supervision. This will become a focus in governing the market competition order in the future.



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