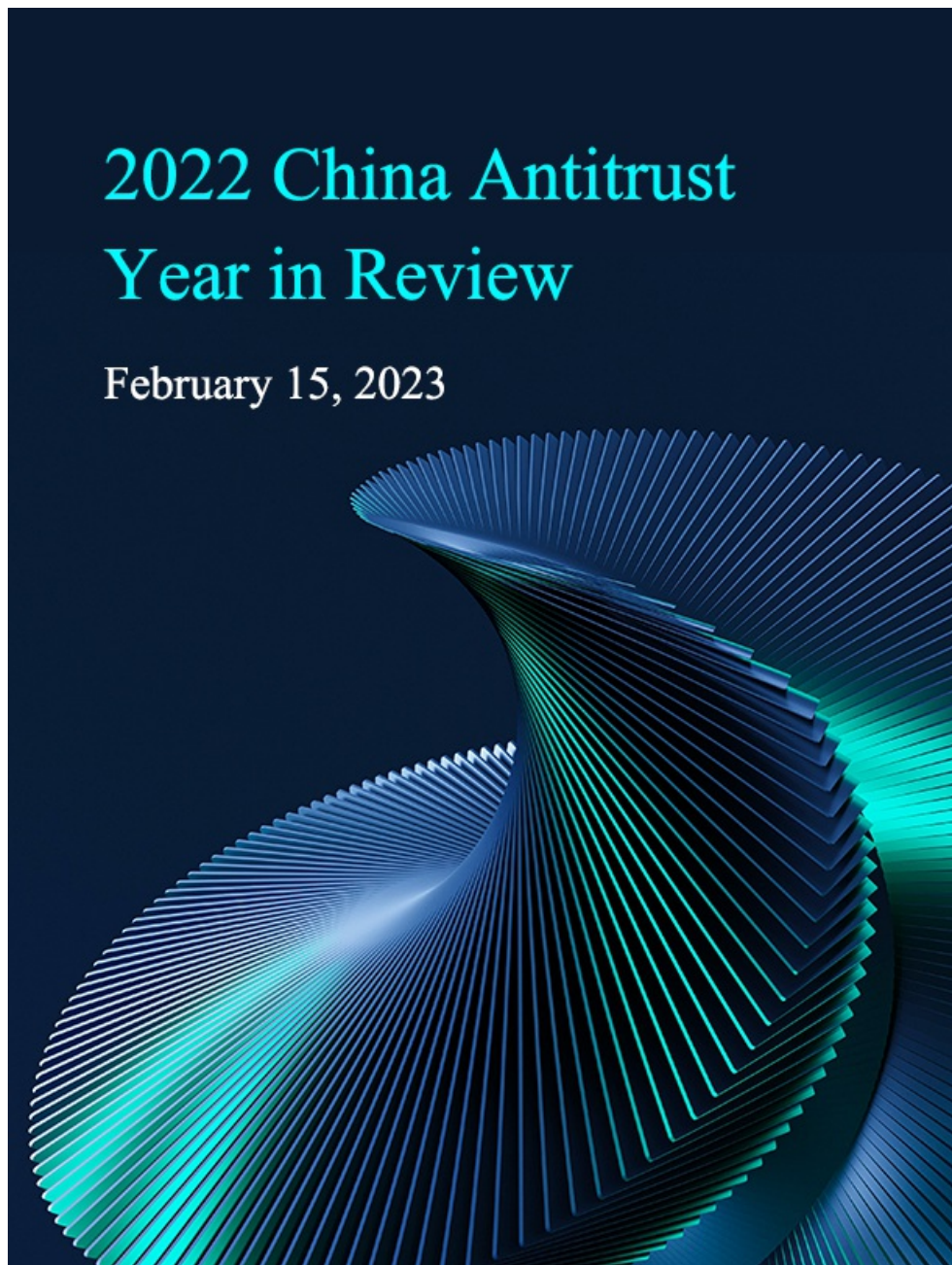


2022 China Antitrust Year in Review

Author: QIAN, Xiaoqiang LIN, Xixiang YANG, Yikai WANG, Danlin WANG Ning



In 2022, China's anti-monopoly legislation has gone through significant progresses and achievements, the antitrust enforcement and judicial litigation activities have been continuously active, and the importance of antitrust compliance for enterprises is increasingly prominent. More specifically:

■ **In the legislation area** the Anti-Monopoly Law has been amended for the first time (the "New AML") amid the fifteenth anniversary of the AML's promulgation, followed by six drafts of implementing regulations for public consultation, the Anti-Unfair Competition Law *Revised Draft for Public Comments*) and the *Provisions on Several Issues Concerning the Application of Laws in the Trial of Civil Monopoly Dispute Cases (Draft for Public Comment)*. The New

AML has adjusted the approach for the identification of vertical monopoly agreements (*from “illegal per se” to “rule of reason”*), strengthened the merger review enforcement (e.g., introduced the “stop-the-clock” mechanism, clarified the power to initiate investigations, and proposed to establish a classified and graded review regime), focused on the antitrust enforcement on online platforms and new types of abusive conducts, and fully upgraded the administrative penalties and fines for monopolistic conducts. The New AML and the above exposure draft regulations and judicial interpretation have provided more guidance and set higher bar on the antitrust compliance of enterprises.

■ **In the enforcement area** (1) with respect to **merger review**, the State Administration for Market Regulation (the “SAMR”) unconditionally cleared 794 cases in 2022, with an increase of approximately 9% as compared to which in 2021, and conditionally cleared 5 cases in the sectors of semiconductor and air transportation. In the meanwhile, the SAMR has delegated the merger review of certain simplified cases to its local bureaus in Beijing, Shanghai, Guangdong, Chongqing and Shaanxi. It is expected that after the official promulgation of the new increased turnover thresholds, the number of cases reviewed by regulatory authority may decrease to certain extent. Meanwhile, the review of merger cases will be more refined, more regulatory resources will be allocated to the review of cases with competition concerns, and more interaction with external commissions in regards of foreign investment market access, national security review, data security and industrial regulatory supervision, etc. will be witnessed in high-profile cases; (2) with respect to **cartel agreements and abuse of market dominance** most of the cases published by enforcement authority involved sectors concerning people’s livelihoods, such as public utilities, pharmaceuticals and building materials, which are expected to remain the focus of the regulatory enforcement in 2023.

■ **In the judicial area** in 2022, the Chinese courts, including the Supreme People’s Court (the “SPC”), announced a number of noteworthy judicial cases involving monopolistic conducts. In terms of legal interpretation and judicial practice, these cases have provided significant guidance and instructions in jurisdiction, identification and substantive analysis of monopolistic conducts. It is expected that antitrust and competition litigations will continue to heat up and become a powerful tool for companies to assert their rights and interests or pursue their commercial appeals.

Looking ahead to 2023, as stressed in the National Market Supervision System Anti-Monopoly Work Conference and the Anti-Monopoly Law Enforcement Special Action Deployment Meeting in the People’s Livelihood Field held on February 9, 2023, “emphasizing politics, strengthening supervision, promoting development and ensuring security” will be the overall work roadmap. As one of the key aspects of work, in order to build a great country with upgraded service quality and sophisticated intellectual property, enforcement authorities will **strengthen the “normalized supervision” of the platform economy, promote antitrust law enforcement in the key areas of people’s livelihood, improve the merger review of key areas, and explore to deepen the antitrust supervision in the field of intellectual property**

Legislation Area

In 2022, the *Decision to Amend the Anti-monopoly Law* was adopted and came into force on August 1, 2022. The SAMR successively published six drafts implementing regulations for public consultation following the adoption of the New AML, and the *Anti-Unfair Competition Law*

(Revised Draft for Public Comments). The SPC published *the Provisions on Several Issues Concerning the Application of Laws in the Trial of Civil Monopoly Dispute Cases (Draft for Public Comments)*. In addition, several provinces and municipalities issued rules and guidelines on antitrust compliance applicable to the undertakings in their administrative jurisdictions.

Key legislation and its highlights in 2022 are summarized below.

No.	Relevant Laws/Regulations	Key Highlights
1	the New AML <i>Promulgated by the Standing Committee of the NPC on June 24, 2022 and implemented on August 1, 2022</i>	Monopoly agreements: - Clarifying that companies can rebut the presumption of anticompetitive effects of the concerned resale price maintenance arrangements; - Providing “safe harbors” for vertical restraints; - Introducing the “hub-and-spoke conspiracy” and stipulating legal liabilities on organizing and assisting others to enter into monopoly agreements. Abuse of market dominance: - Clarifying that undertakings shall not use data and algorithms, technologies, capital advantages and platform rules to engage in monopolistic practice prohibited by the New AML. Merger Control: - Improving the classified and graded review regime; - Clarifying the power to initiate investigations; - Introducing the “stop-the-clock” mechanism. Upgrading administrative penalties for monopolistic behaviors in a comprehensive manner.¹
2	the Provisions of the State Council on the Notification Threshold for the Concentration of Undertakings (Exposure Draft for	Merger control: - Increasing current turnover thresholds; adding new criteria for “Killer Acquisitions”; - Clarifying the notification and investigation procedures for concentrations that do not meet the turnover thresholds but give rise to

	Revision) - the Provisions on the Review of Concentration of Undertakings (Exposure Draft) - the Provisions on Prohibition of Monopoly Agreements (Exposure Draft) - the Provisions on the Prohibition of Abuse of Dominant Market Position (Exposure Draft) - the Provisions on Prohibiting the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (Exposure Draft) - the Provisions on Suppressing Abuse of Administrative Power to Eliminate or Restrict Competition (Exposure Draft) <i>Published by the SAMR on June 27, 2022</i>	competitive concerns; - Specifying the standards for determining the “implementation of concentrations”; clarifying other parties’ obligation to cooperate in the investigation of illegal implementation of concentrations; - Regulating mature standards in law enforcement practice into explicit rules. Monopoly agreements: - Introducing “safe harbor” rules for vertical restraints, providing compliance guidelines for reasonable design of distribution systems; - Stipulating legal liabilities on organizing and assisting others to enter into monopoly agreements; - Further stipulating the procedures for suspension of investigation, refining the application and determination procedures for leniency regime, and introducing interview system; - Adding conduct modes that constitute monopolistic agreements via digital economic methods; - Clarifying that “potential competitors” who have the plan and feasibility to enter the relevant markets within a certain period may also constitute “competing undertakings” under the horizontal monopoly agreements. Abuse of market dominance: - Focusing on the platform economy; - Proposing to regulate the controversial behavior of “self-preferencing” as an abuse of market dominance. Intellectual property and antitrust: - Introducing the “innovation (R&D) market” as a relevant market; - Refining the manifestations of abuse of market dominance in the field of intellectual property; - Clarifying the circumstances of monopoly agreements in the formulation and implementation of standards, and improving the provisions on the abuse of market dominance regarding SEP (standard essential patents).²
3	the Announcement on the Delegation of the Power of Merger Control Review of Certain Simplified Cases under the Pilot Program	Delegating the power to the local market regulatory bureaus (the “local AMRs”) in Beijing, Shanghai, Guangdong, Chongqing and Shaanxi to conduct merger control review of certain simplified cases³. The pilot period is from August 1, 2022 to July 31, 2025.

	<i>Promulgated by the SAMR on July 15, 2022</i>	
4	the Anti-Unfair Competition Law (Revised Draft for Public Comments) <i>Published by the SAMR on November 22, 2022</i>	• The new types of unfair competition in the digital economy have become the focus of attention: five types of unfair competition are added: malicious trading, traffic hijacking, platform blocking, and illegal data capture through keyword association or setting false operation options, etc., as well as “big data price discrimination”. • Re-introducing the concept of “comparatively advantageous position”, stipulating that operators with the comparatively advantageous market position shall not, without justifiable reasons, implement certain behaviors that unreasonably restrict the business operations of the counterparties or impose unreasonable conditions on them. • Introducing a brand-new concept of “commercial data” to regulate operators’ specific behaviors of improper access to or use of other undertakings’ commercial data. • Clarifying that platform operators should strengthen competition compliance managements and establish fair competition rules within the platform; improving the criteria for determining commercial bribery. • Improving the criteria for identifying counterfeit confusion, false advertising, prize-giving sales, and commercial defamation. • Promoting the establishment and improvement of trade secret protection system, which integrates trade secret self-protection, administrative protection and judicial protection. • Explicitly regulating the unfair competition behavior of instructing or assisting others to commit. • Adjusting administrative investigation procedures and refining legal liabilities.⁴
5	the Provisions on Several Issues Concerning the Application of Laws in the Trial of Civil Monopoly Dispute Cases (Draft for Public Comments)	Procedural aspects: • Re jurisdiction, clarifying that the arbitration agreements between the parties cannot interfere the court’s exercise of jurisdiction; for offshore monopoly conducts, stipulating that the jurisdictional court is determined by the place where the results of the direct and substantial

	<i>Published by the SPC on November 18, 2022</i>	impact on competition in the domestic market occur, the place where other appropriate connections with the dispute exist or the place of the plaintiff's domicile; • Re the burden of proof, clarifying and refining the burden of proof rules on various types of monopolistic conducts for both the plaintiff and the defendant, and as a whole, reducing the burden of proof on the plaintiff. Substantive Aspects: • Introducing and explicating concepts of “single economic entity”, “agency”, etc., helpful for the determination of monopolistic conducts; • Responding to hot topics, such as “pay-for-delay agreements”, “most-favored-nation treatment” and “platform blocking”, providing detailed guidelines for identification.
--	---	---

Enforcement Area

■ Merger Control Review

In 2022, the SAMR concluded 794 cases of merger control filings, including a total of 789 cleared cases without conditions and 5 conditionally cleared cases, and no prohibited case is involved.

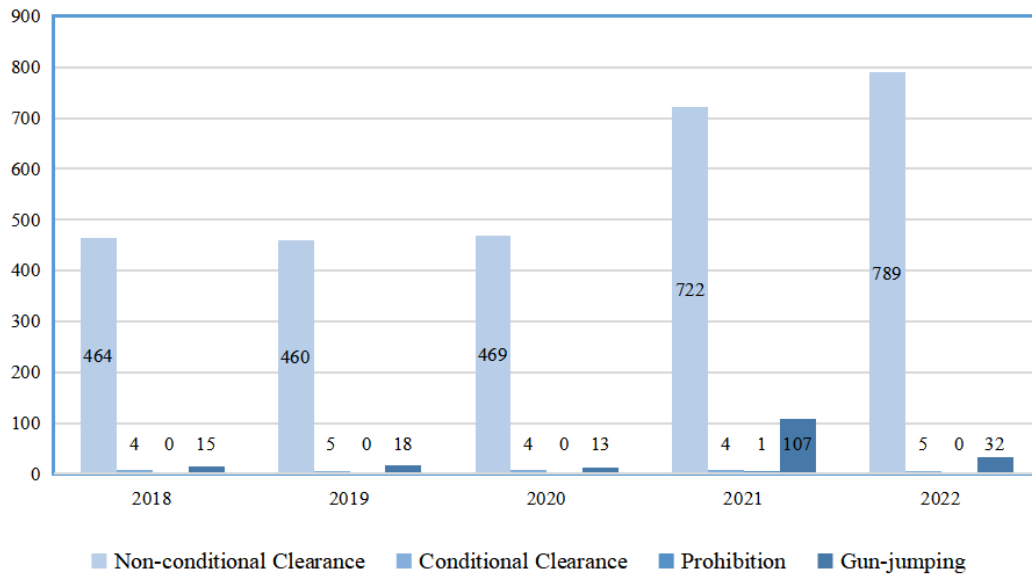
In respect of conditionally cleared cases, three cases involved the information and communication technology industry, and two cases are relevant to the air transportation and airport operation industry, and the merger case of the Establishment of a Joint Venture between Shanghai Airport (Group) Co., Ltd. and Eastern Air Logistics Co., Ltd. is the first conditionally cleared case to date in China not involving foreign investment.

In addition, the five local AMRs cleared a total of 94 cases without conditions in 2022: 20 cases cleared by the Beijing AMR, 43 cases cleared by the Shanghai AMR, 10 cases cleared by the Guangdong AMR, 19 cases cleared by the Chongqing AMR, and 2 cases cleared by the Shaanxi AMR.

The SAMR imposed administrative penalties on 32 case of gun-jumping.

Statistics on the Merger Control Cases from 2018 to 2022

the Number of Merger Control Cases in China from 2018 to 2022



Cases with Conditional Clearance in 2022

No.	Clearance Date	Case	Relevant Markets	Remedies
1	January 20, 2022	GlobalWafers / Siltronic	the global and China markets for 8-inch float-zone wafers	Structural Remedies: To divest the float-zone wafer business within 6 months from the effective date of decision. Behavioral Remedies: - To continue to supply all types of wafer products to customers in China under the principle of Fair, Reasonable and Non-Discriminatory (“FRAND”); and to refrain from differentiated treatment to customers in China; - The post-concentration entity shall not refuse to renew the contract with the Chinese customers without justifiable reasons, and the renewal terms shall not be less favorable than those in the original contracts;

				To continue training for relevant personnel to ensure the implementation of commitments. The above commitments shall be valid for 5 years from the effective date.
2	January 21, 2022	Advanced Micro Devices (“AMD”) / Xilinx	the global and China markets for FPGA	Behavioral Remedies: - To refrain from tied-up sales in any form and from attaching unreasonable transaction conditions when selling AMD CPUs, AMD GPUs and Xilinx FPGAs to the Chinese domestic market; - To promote further cooperation with Chinese enterprises and to continue to supply AMD CPUs, AMD GPUs, Xilinx FPGAs, and related software and accessories on FRAND terms to Chinese domestic market; - To ensure the flexibility and programmability of Xilinx FPGA; - To guarantee the interoperability of the AMD CUPs, AMD GPUs, Xilinx FPGAs products sold in China with third-party CPUs, GPUs and FPGAs products; - To take measures to protect the information of third-party CPUs, GPUs and FPGAs manufacturers and to enter into confidentiality agreements with third-party manufacturers; to store the relevant confidential information separately. The above commitments shall be valid for 6 years from the effective date.
3	June 28, 2022	II-VI / Coherent	Global and/or China markets for the following product markets: - the upstream high-power carbon dioxide laser optics market; - the downstream high-power carbon dioxide	Behavioral Remedies: - To continuously perform the existing supply contracts involving carbon dioxide laser optics, and procurement contracts and relevant commercial terms involving glass-based laser optics for excimer laser; - To steadily supply carbon dioxide laser optics to customers on FRAND terms; - To follow the principles of multi-source supply and non-discrimination for the

			- laser market; - the upstream low-power carbon dioxide laser optics market; - the downstream low-power carbon dioxide laser market; - the upstream excimer laser market; - the downstream excimer laser market	procurement of glass-based laser optics for excimer lasers and not to set up conditions in the procurement that favor its own business; To commit to take effective measures to protect competitively sensitive information of third party manufacturers. The above commitments shall be valid for 5 years from the effective date.
4	September 13, 2022	Shanghai Airport (Group) Co., Ltd. (“ Airport Group ”) / Eastern Air Logistics Co., Ltd. (“ Eastern Air Logistics ”) / JV	- the market for cargo terminal services at Shanghai Pudong Airport; - the market for international/domestic air cargo services originating from or destined to Pudong Airport	Behavioral Remedies: - To maintain the mutual independence of the two parties’ cargo terminal service business at Pudong Airport. The two parties shall continue to compete independently and fairly in the market of cargo terminal services at Pudong Airport and shall not exchange sensitive competitive information and shall not conclude or conduct monopolistic actions. - To ensure that the two parties and the joint venture are independent and are competing with each other; - To ensure that there is no direct or indirect exchange of sensitive competitive information between the two parties and the joint venture; - The two parties shall continue to perform the cargo terminal service contracts regarding Pudong Airport that have already being signed with the relevant clients; - The two parties and the joint venture shall provide airport cargo terminal services at Pudong Airport in accordance with FRAND principles; - In addition to monitoring trustee, the joint venture undertakes to invite

				China Air Transportation Association to supervise and guide the joint venture's performance of its commitments annually. The fourth commitment shall be valid for 5 years and the other commitments shall be valid for 8 years from the effective date.
5	December 26, 2022	Korean Air Lines / Asiana Airlines	- the services markets of scheduled air passenger transport, 12 routes between Seoul and Zhangjiajie / Xi'an / Shenzhen / Hangzhou / Nanjing / Guangzhou / Beijing / Changsha / Shanghai / Dalian / Tianjin / Yanji, and 3 routes between Busan and Qingdao / Beijing / Shanghai; - the cargo services markets of China - Korea and Korea - China	Structural Remedies: - Upon the request of the new entrants, whereas certain conditions are met, both parties to the transaction and the undertaking post transaction will return a certain number of flight slots of specific airports on the corresponding routes to the flight slots coordinator of the relevant airports; - Upon the request of new Korean entrants, both parties to the transaction and the undertaking post transaction shall return parts of the traffic right on four specific routes held by both parties to the transaction and the undertaking post transaction. After the returning of traffic right, the market share of the undertaking post transaction on the relevant routes can be reduced to less than 50%. Behavioral Remedies: - The annual supply of both parties to the transaction and the undertaking post transaction on routes between Seoul - Guangzhou and Seoul - Dalian shall remain the same as in 2019; - On the 15 specific routes, both parties to the transaction and the undertaking post transaction shall not refuse the new entrant's request to sign related agreements on the relevant routes without justified reasons; for the existed relevant agreements between the parties and Chinese airlines, shall not refuse the request for renewal and resigning; - Both parties to the transaction and the undertaking post transaction shall, in

				accordance with the FRAND principle, provide relevant air passenger ground services in airports in South Korea to new Chinese entrants to the 15 specific routes; shall ensure reasonable pricing when the existing contracts for air passenger ground service are renewed; shall not refuse the request by new entrants to sign agreements, nor refuse the request to renew the existing agreements on relevant routes without justified reasons; • Both parties to the transaction and the undertaking post transaction shall not increase the price of air tickets of relevant routes and air passenger ground services without proper reasons; shall not implement pricing behaviors that eliminate or restrict competition; shall take reasonable and necessary data protection measures and build data protection systems. The above commitments shall be valid for 10 years from the effective date.
--	--	--	--	---

■ Monopoly Agreements and Abuse of Market Dominance

Throughout 2022, a total of 26 cases on monopoly agreements and abuse of market dominance were decided by local AMRs and subject to administrative measures, involving sectors of [active pharmaceutical ingredients](#), [medical apparatus and instruments](#), [cnki.net platform](#), [building materials](#), [public utilities such as water supply](#), [gas supply](#), etc. The cases are summarized below:

No.	Case	Date announced	Issue	Total fine (RMB '000)	% of Turnover
1	Administrative Penalty on Abuse of Market Dominance of Fengyang Yimin Water Supply Co., Ltd.	2022.2.10	Exclusive dealing; impose unreasonable trade conditions	1,627.7	4%
2	Administrative Penalty on Monopoly Agreement of Geistlich Trading (Beijing) Co., Ltd.	2022.2.28	Maintaining minimum resale price	9,123.5	3%
3	Administrative Penalty on Monopoly Agreement of Four Driving Training Schools in Yunnan Dayao County	2022.3.18	Price fixing	452.2	3%
4	Administrative Penalty on Abuse of Market Dominance of Ningxia Changran Natural Gas Co., Ltd.	2022.5.26	Tying without justifiable reasons	357.8	2%
5	Administrative Penalty on Abuse of Market Dominance of Shaoxing Shangyu District Water Supply Co., Ltd.	2022.6.9	Exclusive dealing; impose unreasonable trade conditions	7,391.3	3%
6	Administrative Penalty on Abuse of Market Dominance of Shaoxing Keqiao Water Supply Co., Ltd.	2022.6.10	Exclusive dealing; impose unreasonable trade conditions	9,911.5	3%
7	Administrative Penalty on Monopoly Agreement of Sheyang County Association of Rice	2022.6.20	Monopolistic conduct of associations	400	N/A
8	Administrative Penalty on Monopoly Agreement of Eight LPG Companies in Central Zunyi City	2022.6.20	Price fixing; market dividing	1,427.9	1%-2%
9	Administrative Penalty on Monopoly Agreement of Six Entities including Yunnan Chuangxin Fake-Proof Stamper Co., Ltd. Honghe Branch	2022.6.30	Price fixing	34.6	3%
10	Administrative Penalty on Monopoly Agreement of Liaoyuan Tongda Motor Vehicle Testing Co., Ltd. and Other Entities	2022.6.30	Price fixing	215.9	2%-3%

11	Administrative Penalty on Monopoly Agreement of Seven Concrete Enterprises including Fujian Guangxia Concrete Co., Ltd Fujian Guangxia Concrete Co., Ltd.	2022.7.6	Price fixing; market dividing	15,829	3%-4%
12	Administrative Penalty on Monopoly Agreement Organized by Shaanxi Cement Association of Thirteen Cement Enterprises	2022.7.9	Price fixing	451,575.1	2%-3%
13	Administrative Penalty on Abuse of Market Dominance of Guizhou Shuitou Water Group Weining Co., Ltd.	2022.7.18	Exclusive dealing	1,630.9	3%
14	Administrative Penalty on Abuse of Market Dominance of Wuhu Wanzhi Zhongran Urban Gas Development Co., Ltd.	2022.7.19	Exclusive dealing	3,154.4	2%
15	Administrative Penalty on Monopoly Agreement Organized by Henan Credit Construction Promotion Association of 30 Credit Assessment Enterprises	2022.7.22	Price fixing	526.1	1%
16	Administrative Penalty on Monopoly Agreement of Hainan Yishun Pharmaceutical Co., Ltd.	2022.7.22	RPM	200	N/A
17	Administrative Penalty on Monopoly Agreement of Beijing Kairui Alliance Education Technology Co., Ltd.	2022.7.27	Maintaining minimum resale price	942.3	3%
18	Administrative Penalty on Abuse of Market Dominance of Guizhou Zhoufucheng Logistics Co., Ltd.	2022.8.12	Exclusive dealing	348.1	4%
19	Administrative Penalty on Monopoly Agreement of Seven Motor Vehicle	2022.8.22	Price fixing; market dividing	208.4	3%-5%

	Inspection Companies in Shuozhou City				
20	Administrative Penalty on Monopoly Agreement of Five Driving Schools including Xintian County Longquan Motor Vehicle Driver Training School	2022.9.2	Maintaining minimum resale price	321.7	3.5%
21	Administrative Penalty on Abuse of Market Dominance of Rizhao Water Group Supply Co., Ltd.	2022.12.15	Abuse market dominance by charging customers fees that should have been borne by itself	2,185.7	1%
22	Administrative Penalty on Monopoly Agreement Organized by Zhejiang Civil Explosive Equipment Association of the Member Companies	2022.12.16	Price fixing; RPM; limiting the amount of production and sales; group boycott; monopolistic conduct of associations	34,599.3	2%
23	Administrative Penalty on Abuse of Market Dominance of CNKI.net	2022.12.26	Unfair high prices; exclusive dealing	87,600	5%
24	Administrative Penalty on Abuse of Market Dominance of Yongfu County Water Supply Company	2022.12.29	Exclusive dealing	312	3%
25	Administrative Penalty on Monopoly Agreement of Straumann (Beijing) Medical Device Trading Co., Ltd.	2022.12.30	Maintaining minimum resale price	34,385.5	3%

Judicial Area

In 2022, several courts including the SPC announced a number of noteworthy judicial cases involving monopoly behaviors. These cases have provided significant guidance and instructions on jurisdiction, ruling and substantive analysis of monopolistic conducts from the perspective of law interpretation and judicial practice.

On procedural rules, the courts clarified that the arbitration clauses between the parties to the contract shall not be seen as obvious and absolute basis for excluding courts' jurisdiction over monopoly agreements disputes, in response to the previous hotspot issues in antitrust judicial area, the relation between jurisdiction of court and arbitration clauses. This rule is also reflected in *the Provisions on Several Issues Concerning the Application of Laws in the Trial of Civil Monopoly*

On substantive rules, the courts made it clear that reverse payment for drug patent might constitute a monopoly agreement, specified the standards for identifying concerted conduct and the necessity of joint market dominance analysis, and clarified the analytical approach on granting exclusive operation right, exclusive dealing, refusal to trade, differential treatment and imposing unreasonable trading conditions. In the meantime, the courts specified that the provisions under the AML on prohibition of monopolistic conducts are mandatory by law, and contractual terms in violation of such provision should be null and void.

The important judicial cases involving monopolistic conducts in 2022 are summarized below.

#	Case	Facts	Key points of the Judgment
1	AstraZeneca /ASK Pharm	AstraZeneca was the holder of the concerned patent, and it filed a complaint against ASK Pharm accusing ASK Pharm of patent infringement by producing a certain type of medicine. A third-party, Vcare, reached into a Memorandum with the previous holder of this patent, BMS, under which Vcare and its affiliates (ASK Pharm as one among these affiliates) promise not to challenge the validity of the concerned patent, and that BMS and its successor, AstraZeneca in this case, promised not to raise any claim against Vcare and its affiliates for their patent infringement conducts following January 1, 2016.	This case has made it clear for the first time that reverse payment for drug patent might constitute a monopolistic agreement . The court pointed out that the key to the judgment of whether reverse payment for drug patent contracts constitute unlawful monopolistic agreements shall reside in the exclusion or restriction of competition. As such, generally, the analysis shall be based on the possibility of patent annulment had the generic drug applier not withdrawn its annulment action. Based thereon, conclusions could be made on whether and to what extent the agreements have harmed the competition.
2	Baidu/Woai Net	Baidu claimed that Woai Net, through conducts like setting up mission-dispatch platforms, had assisted users in fabricating clicking data, and thereby interfered with the search engine rank results.	This case is China's first anti-unfair competition case involving a manual click-farming platform interfering with the search engine algorithms . The court held that the defendant's conduct of fabricating click data for the target websites has caused additional cost to Baidu for

			maintaining search engine services, jeopardized the Plaintiff's normal service environment, interfered with the competitive order of the market, and constituted the unfair competition behavior.
3	Thirteen Driving Training Institutions including Jili and Zhedong Driving Training Company	The fifteen driving training institutions reached into a joint venture agreement and a self-discipline convention, thereby agreeing to establish a joint venture to fix the price of driving training service, restricting the flow of the training vehicles and coaches. The auxiliary services of each driving training institutions were handled by the joint venture and the corresponding fees are charged by the joint venture for such services.	The court held that in principle, the provision of the AML on prohibition of monopolistic conducts is mandatory by law, and contractual terms in violation of such provision should be null and void. The judgment further ruled that the joint venture agreement and self-discipline convention involved in the case are horizontal monopoly agreements prohibited by law and thus should be null and void.
4	Jiazhou Red Bar/CAVCA	Jiazhou Red Bar claimed mainly that the CAVCA had abused its dominant market position through conducts like exclusive dealing (requiring it to sign a contract with Tianhe which is delegated by CAVCA; while at the trial for second instance, it changed the claim to refusal to deal), and imposing unreasonable trade conditions (requiring it to pay the licensing fee for the two years preceding the signing of contract).	The SPC held that (i) CAVCA did not commit any act of refusal to deal. Based on the assessment of whether the transaction conditions proposed by both parties respectively were reasonable and whether the reasonable conditions were satisfied by the counterparty, the SPC determined that the main reason for the parties' failure to conclude the contract was not because CAVCA failed to meet the reasonable conditions proposed by Jiazhou Red Bar; (ii) CAVCA did not impose unreasonable trade conditions. CAVCA had the right, on behalf of the copyright holders, to require a KTV operator Jiazhou Red Bar in this case, who had used the collectively managed copyrights without authorization, to retroactively pay the licensing fee for the two years preceding the signing of the contract, and CAVCA did not give differential treatment in collecting such fee.

5	Xin Niu/Yili Group	Xinni, as the seller, signed two Fresh Milk Purchase and Sale Contracts with Lindian Yili, as the buyer. Xinni claimed that the concerned contracts involved several monopoly clauses restricting competition, and that Lindian Yili and Qiqihar Yili caused losses to Xinni in performing the contracts with Xinni. Based on the above, Xinni requested the court to declare the contracts null and void.	Based on the reasons that the <i>Contract Law</i> and the AML have different legislative purposes, the AML has distinct characteristics of public law, and the judgment of monopolistic conduct goes far beyond the rights and obligations between contract counterparties, etc., the court ruled that the arbitration clauses in the concerned contract shall not be the obvious and absolute basis for excluding courts' jurisdiction.
6	Sports Entertainment /Chinese Super League and Yingmai	Yingmai was granted exclusive operation right to operate the official pictures of Chinese Super League Competition through a bidding process. Sports Entertainment took pictures of the scene of the Chinese Super League Competition without authorization and sold the pictures, during which the Chinese Football Association published a notice to guarantee and protect Yingmai's exclusive right. Sports Entertainment filed a lawsuit against Super League and Yingmai on the grounds of exclusive dealing and abusing market dominance.	The organizer of a sports event has the exclusive civil right of operating the resources of sports events by law. The monopoly caused by the exclusive nature of a right shall not be deemed as the abuse of a right, but the improper exercise of exclusive right may be prevented and prohibited by the AML. The grant of operation right itself is usually legal and if the grant of exclusive operation right is commercially reasonable and reflects competition in the process, then it is a result of fair competition, and in principle, shall not be regarded as an abuse of market dominance.
7	Jinxian Wenzhen Art Kindergarten /Jinxian Wenzhen Liujiayi Kindergarten	Jinxian Wenzhen Art Kindergarten (“ Art Kindergarten ”) entered into an agreement with Jinxian Wenzhen Liujiayi Kindergarten (“ Liujiayi Kindergarten ”), Wan Zhen and others, agreeing that after the beginning of each semester, the parties shall conduct accounting on expenses received and use the net profits as the basis for distributing dividends to the parties, and the other parties shall pay the minimum fee to the Art Kindergarten each year in proportion to their increased net profits each year. All parties promised that during the cooperation term, all matters involving the operation of the kindergarten shall be decided	The monopolistic behaviors affected the overall efficiency of the state economic operation and public interest, therefore, in principle, the provision of the AML on prohibition of monopolistic acts should be mandatory and thus the agreement in this case should be declared null and void. The legislative purpose of Article 50 of the AML (Article 60 of the amended AML) is to provide judicial remedies to victims of monopolistic behaviors rather than to provide opportunity to make improper profits for business undertakings conducting monopolistic behaviors.

		through collective discussion (each party having one vote), and the breaching party shall pay for indemnities, etc. Art Kindergarten filed a lawsuit against the Liujiayi Kindergarten on the ground that Liujiayi Kindergarten “failed to follow the agreement” and “failed to conduct accounting”, requesting for confirmation of its breach of contract and payment of liquidated damages and economic compensation.	
8	Ma Lijie/ China Mobile Henan	Ma Lijie filed a lawsuit against China Mobile Henan on the ground that it treated its users differently. Some phone number owners have the right to transfer account, suspend account, and switch company, while some users don’t have the above rights. China Mobile Henan refused Ma Lijie’s request to switch company and restricted users of special numbers to trade with them only.	Multiple undertakings showing different behavior modes for the same type of business in most cases reflects normal market competition in the market, and it is not necessary to consider the possibility of joint market dominance. <i>It is necessary to consider if there is joint market dominance only when multiple undertakings in the relevant market all act the same for a type of business, and showing consistency of behaviors between the undertakings.</i>
9	Li Binqun/ Hunan Xiangpintang	Five undertakings Hunan Xiangpintang are monopolistic operators selling bottled water on the second floor of Changsha South Railway Station. They have fixed price of 555ml Yibao bottled water on RMB 3 per bottle when normal price in Changsha market is RMB 2 per bottle.	The AML provides that “other concerted conducts” constitutes one of the forms of monopoly agreement, which shall mean that the competing undertakings, through communicating with each other, tacitly act in parallel without a written or oral agreement or resolution. <i>To determine “other concerted conducts”, the following factors can be taken into account: (i) whether the market behaviors of undertakings are coordinated and consistent; (ii) whether there has been any exchange of intentions or information exchange between the undertakings; (iii) the structure, competition status and changes of the relevant market; and (iv) whether the undertakings can make a reasonable explanation for the coordinated consistency of their behaviors.</i>

If you are interested in further information regarding China antitrust, please feel free to contact Qian Xiaoqiang Lvshi (qianxiaoqiang@haiwen-law.com) or Lin Xixiang Lvshi (linxixiang@haiwen-law.com) or other attorneys of Haiwen & Partners.

* 建輝荷待市一尔丈滕敦蔣佖

[1] For specific insights of the New AML, please refer to the Haiwen Alert: Amendment to the Anti-monopoly Law Promulgated, <https://mp.weixin.qq.com/s/li6cp8DcgltjxGdOqNYC3Q>.

[2] For specific insights regarding the six supporting rules of the New AML, please refer to the Haiwen Alert: Six Supporting Drafts of the New AML, <https://mp.weixin.qq.com/s/LGJwxJTcEysOfU2COITk7w>.

[3] (1) The Beijing AMR is responsible for following areas: Beijing, Tianjin, Hebei Province, Shanxi Province, Inner Mongolia Autonomous Region, Liaoning Province, Jilin Province, Heilongjiang Province;

The Shanghai AMR is responsible for following areas: Shanghai, Jiangsu Province, Zhejiang Province, Anhui Province, Fujian Province, Jiangxi Province, Shandong Province;

The Guangdong AMR is responsible for following areas: Guangdong Province, Guangxi Autonomous Region, Hainan Province;

The Chongqing AMR is responsible for following areas: Henan Province, Hubei Province, Hunan Province, Sichuan Province, Guizhou Province, Yunnan Province, Xizang Autonomous Region.

The Shanxi AMR is responsible for following areas: Shaanxi, Gansu Province, Qinghai Province, Ningxia Autonomous Region and Xinjiang Autonomous Region.

(2) Delegated review criteria: (i) at least one notifying parties is domiciled in the relevant region where the local AMRs are delegated to review; (ii) the target (over which an undertaking acquires the control through acquisition of equity, assets, contracts, etc.) is domiciled in the relevant region; (iii) in case of the establishment of a joint venture, the joint venture is domiciled in the relevant region; (iv) the relevant geographic market for the concentration of undertakings is a regional market, and falls entirely or primarily within the relevant region; and (v) other cases as determined by the SAMR. The review of simplified cases falling under any of the above criteria can be delegated to the local AMRs.

[4] For more specific comments on the Anti-Unfair Competition Law (Revised Draft for Public Comments), please see the Haiwen Alert: the Anti-Unfair Competition Law (Revised Draft for Public Comments), <https://mp.weixin.qq.com/s/TPMliCpb44t-5WETTPgeUg>.

2023-02-15