

China Antitrust Update (May-Jun, 2023)

Author: QIAN, Xiaoqiang LIN, Xixiang KOU, Meiruo WANG, Danlin WANG, Ning

From May to June 2023[1], in legislation and policy-making area, the State Administration for Market Regulation (the “SAMR”) released the *Provisions on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition*; published three draft antitrust compliance guidelines for comments, i.e., the *Anti-monopoly Guideline for the Standard Essential Patent Field (Draft for Comments)*, the *Antitrust Guidelines on Industry Associations (Draft for Comments)* and *Antitrust Compliance Guidelines on Concentration of Undertakings (Draft for Comments)*; and deployed the special actions to optimize the platform agreements; the State Council announced the legislative action plan for 2023, with actions contemplated including revision of the *Rules of the State Council on Declaration Threshold for Concentration of Undertakings*, and submission for consideration of the revised draft of *Anti-Unfair Competition Law*. In law enforcement area, the SAMR approved 112 merger cases without conditions in the months of May and June in 2023, implicating sectors of pharmaceutical, transportation, chemical, environmental protection, real estate, automobile, private equity fund, energy, etc. The SAMR made the decision to lift the restrictive conditions attached to the concentration of undertaking of 100% Share Acquisition of Gavilon by Marubeni. The SAMR announced decisions of administrative penalty on six cases involving monopoly agreement and three cases involving abuse of market dominance. In judicial area, the Supreme People’s Court (the “SPC”) reversed the first instance judgment of the Dispute between Yangtze River Group and Industrial Pharmaceutical over the Abuse of Market Dominance, dismissing Yangtze River Group’s initial complaints.

Legislation and Policy Area

- On May 10 and 19, 2023, the Shanghai Administration for Market Regulation[2] and the Beijing Administration for Market Regulation[3] announced the launch of special actions for anti-unfair competition law enforcement in the cities respectively. Such special law enforcement actions will be centered around three key points: (i) to investigate and deal with Internet unfair competition and to investigate and strike hard the unfair competition activities such as click farming and live sales of counterfeit products in order to escort the development of the digital economy; (ii) to focus on regulating the marketing behaviors concerning people’s livelihood, to strengthen the supervision of new types of commercial marketing behaviors, and to strike commercial bribery in key industries such as the sale of medicine, catering and tourism, etc.; (iii) to focus on the protection of the core competitiveness of enterprises and to strengthen the protection of trade secrets, business logos and business reputation.
- On May 16, 2023, the SAMR released the *Antitrust Guidelines on Industry Associations (Draft for Comments)* seeking public comments[4]. The guidelines enumerate three types of high-risk behaviors that industry associations should avoid engaging in, including: (i) promoting sensitive information exchange, discussion or communication among undertakings within the industry; (ii) publishing prices that have guiding effects like guidance prices, benchmark prices, reference prices, recommended prices, forecast prices, or publishing price calculation formulas for the reference of undertakings in the industry; and (iii) publishing inaccurate or exaggerated cost trends, supply and demand conditions and other market information. At the same time, the guidelines specify the requirements and measures of self-compliance for industry associations, legal liabilities for engaging in monopolistic behaviors, and the corresponding credit disciplinary system, etc.
- On May 31, 2023, the General Office of the State Council issued its legislative action plan for the year of 2023[5], with actions planned including revision of the *Rules of the State Council on Declaration Threshold for Concentration of Undertakings*, and submission of the draft revised Anti-Unfair Competition Law to the Standing Committee of the National People’s Congress for consideration.
- On June 9, 2023, the SAMR released the *Annual Report on China’s Antitrust Enforcement (2022)*[6]. The report shows that in 2022, the antitrust law enforcement authorities have handled and closed 187 monopoly cases with a total confiscation and penalty amount of RMB 784 million, cleared 794 merger cases including 5 conditional clearance cases, and by doing so, the antitrust law enforcement authorities have strongly maintained the fair competition in the market and promoted the continuous optimization of a market-oriented, rule of law based and

international business environment.

- On June 15, 2023, the SAMR announced the deployment of the [special actions on optimizing platform agreements](#) [7], which will last for five-month and be implemented in four phases including mobilization and deployment, platform self-examination, local guidance and rectification, and SAMR's assessment. Such special actions [focus on large platform enterprises operating business closely related to consumers' daily life, and urge and guide the platform enterprises to conduct a comprehensive self-examination of their agreements](#). For some of the platform agreements that are missing key provisions, the special actions propose to instruct the platform enterprises to supplement and improve the terms, focusing on the protection of the rights and interests of undertakings within the platform, consumer rights protection and other key aspects. In doing this, the special actions propose to give full play to the role of expert review committee on contract supervision, specifically, organize the key business persons and legal experts to conduct centralized review on the platform agreements, prepare the issue list and timely sending feedback to the platform enterprises. Further under the special actions, the authorities will facilitate the modification and refinement of the platform agreements with the platform enterprises in accordance with the issue list, eventually aiming to effectively protect the legitimate rights and interests of consumers, undertakings in the platform and other parties.
- On June 19, 2023, the SAMR issued the [Antitrust Compliance Guidelines on Concentration of Undertakings \(Draft for Comments\)](#) [8] for public comments. The draft guidelines are specialized in the field of concentration of undertakings as addition to the *Antitrust Compliance Guidelines for Undertakings*. The undertakings may establish a specific antitrust compliance system of concentration of undertakings with reference to such guidelines based on their own circumstances such as business scale, management mode, frequency of concentration and compliance system, or incorporate relevant compliance elements of concentration of undertakings into their existing antitrust compliance management system.
- On June 29, 2023, the SAMR issued the [Provisions on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition](#) (“[Provisions](#)”) [9], which will take effect from August 1, 2023. Compared to the *Provisions on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition* promulgated in 2015, the Provisions focus on the following aspects: (i) expanding the scope of “exclude and restrict competition by abusing intellectual property rights”, covering monopoly agreements and abuse of market dominance through exercising intellectual property rights, and concentration of undertakings that has or may have competitive concerns; (ii) refining the rules for determining monopolistic behaviors through exercising intellectual property rights in accordance with the amended *Anti-Monopoly Law* (2022). More specifically, improving and refining the rules for relevant market definition, the determination and presumption of market dominance, the identification of relevant monopolistic behaviors, and the factors to be considered in merger review and the specific types of restrictive conditions, with the characteristics of intellectual property rights and regulatory practice taken into account; and (iii) strengthening the regulation of typical and special monopolistic behaviors in the intellectual property field, such as engaging in monopolistic actions through patent consortia and by consortia members, market dominant or using standard essential patents to implement “patent hijacking”, and etc.
- On June 30, 2023, the SAMR issued the [Anti-monopoly Guideline for the Standard Essential Patent Field](#) (“[Draft for Comments](#)”) [10] seeking public comments. The Draft for Comments proposes to provide guidance on the concepts, analytical principles, methods for relevant market definition, information disclosure rules, guidance on licensing commitments and good-faith negotiations of Standard Essential Patents (“[SEPs](#)”). It also sets out the specific circumstances and factors to be considered when determining illegal conducts achieved through the formulation and implementation of SEPs, such as monopoly agreements, licensing SEPs at unfairly high prices, refusal to license SEPs, tie-in sales related to SEPs, imposing other unfair transaction terms, differential treatment, and abuse of remedies, etc.

[Enforcement Area](#)

- Merger Review
 - **Non-conditional Clearance:** From May to June 2023, 112 cases were cleared without condition by the SAMR (a year-on-year decrease of 3.45% compared with that from May to June 2022, and a month-on-month decrease of 14.5% compared with that from March to April 2023), implicating

industrial sectors of pharmaceutical, transportation, chemical, environmental protection, real estate, automobile, private equity fund, energy, etc.

- **Lifting of Restrictive Conditions:** On April 22, 2013, the Ministry of Commerce issued a notice (“**Notice**”), approving the case of 100% Share Acquisition of Gavilon Holdings, LLC (“**Gavilon**”) by Marubeni Corporation (“**Marubeni**”) with conditions, with the conditions imposed all being behavioral remedies. Such restrictive conditions continued to be implemented. On January 26, 2022, Viterra Limited (“**Viterra**”) and Marubeni entered into an agreement for the acquisition of 100% of the equity interest in Gavilon Agricultural Investment Co, Ltd., and upon completion of such transaction, Viterra acquired sole control of Gavilon Agricultural Investment Co, Ltd. Their transaction was closed on October 3, 2022. Prior to the transaction, Marubeni had sole control over Gavilon’s soybean business; after the completion of the transaction, Viterra acquired sole control over Gavilon’s soybean business. In October 2022, Marubeni filed an application to lift the restrictive conditions based on the fact that it had sold all of Gavilon’s grain and ingredients business (including the soybean business). After its review, the SAMR found that during the enforcement of the Notice, the parties have fulfilled the obligations required by the Notice, and the undertakings to the concentration in this case have undergone significant changes, therefore, the continued implementation of the restrictive conditions attached to the Notice is no longer necessary, and the lifting of such restrictive conditions will not have the effect of excluding or eliminating competition in the relevant markets. As a result, the SAMR decided to lift the restrictive conditions attached to the Notice.

- Monopoly Agreements

- On May 24, 2023, the SAMR published an administrative penalty on Bengbu Anye Clean Energy Co., Ltd. (“**Anye Energy**”) and Bengbu Xinyuan Gas Co., Ltd. (“**Xinyuan Gas**”) for their reaching and implementing cartel agreements. In this case, Anye Energy and Xinyuan Gas reached oral agreements twice in 2018 **uniformly fixing the prices of the bottled liquefied gas sold by them, issued price adjustment notices to gas stations (spots) asking them to sell bottled liquefied gas at the uniform price, and issued management regulations and other documents requiring gas stations (spots) to strictly implement the minimum price, with any violation leading to fines, confiscation of deposits, disqualification, etc by them.** Meanwhile, Bengbu Anxin Gas Safety Technology Service Co., Ltd. (which was jointly funded by the principals of Anye Energy and Xinyuan Gas) was entrusted to inspect and manage the gas stations (spots) and gas delivery workers under the two companies. Accordingly, Anhui Administration for Market Regulation determined that the conducts of Anye Energy and Xinyuan Gas constitute cartel agreements to fix commodity prices, and ordered them to cease their violations, confiscated their illegal incomes amounting to RMB 750,000, and imposed a fine of 4% of their 2019 annual sales respectively, which is approximately RMB 1 million in total.
- On May 28, 2023, the SAMR imposed administrative penalties on Wuhan Huihai Pharmaceutical Co., Ltd. (“**Huihai Pharmaceutical**”) and Yuanda Pharmaceutical (China) Co., Ltd. (“**Yuanda Pharmaceutical**”) for their reaching and implementing cartel agreements, and on Yuanda Pharmaceutical’s abuse of market dominance.

(1) It was found that from June 2016 to July 2019, Huihai Pharmaceuticals and Yuanda Pharmaceuticals reached and implemented a monopoly agreement by which Huihai Pharmaceuticals agreed to stop selling norepinephrine API and epinephrine API (collectively referred to as the “**APIs involved**”), and Yuanda Pharmaceuticals agreed to compensate Huihai Pharmaceuticals in two ways: (i) it will sell norepinephrine injection and epinephrine hydrochloride injection to Huihai Pharmaceuticals at low prices and then buy them back at high prices; and (ii) it will require drug preparation enterprises to sell norepinephrine injection and epinephrine hydrochloride injection to Huihai Pharmaceuticals at low prices, and then Huihai Pharmaceuticals could resold them at high prices.

(2) It was found that from May 2010 to April 2021, Yuanda Pharmaceuticals abused its market dominance: Yuanda Pharmaceutical had a dominant position in the market of the APIs involved in China, with its market share exceeding 50%; it had strong market control ability and significant technological advantages; relevant drug preparation enterprises were highly dependent on Yuanda Pharmaceutical, and it was difficult for other operators to enter the relevant market. When supplying the APIs involved to drug preparation enterprises, Yuanda Pharmaceutical attached unreasonable trading conditions without justifiable reasons, namely, the preparation enterprises were required to (i) sell norepinephrine injection and epinephrine hydrochloride injection to Yuanda Pharmaceutical **at low prices**, (ii) **rebate to Yuanda Pharmaceutical in the name of paying promotion fees and R&D service fees**, and (iii) **sell preparations in regions and at prices requested by Yuanda Pharmaceutical**.

The SAMR believed that Yuanda Pharmaceuticals and Huihai Pharmaceuticals had reached and implemented monopoly agreements, which constitute an act of “limiting the number of commodities produced or sold”; Yuanda Pharmaceuticals had abused its market dominance by attaching other unreasonable trading conditions to the transaction. Consequently, the SAMR ordered Yuanda Pharmaceuticals and Huihai

Pharmaceuticals to cease illegal conducts, confiscated their illegal incomes of approximately RMB 149 million and RMB 30.92 million respectively, and imposed fines of 3% (approximately RMB 136 million) and 2% (approximately RMB 4.13 million) on Yuanda Pharmaceuticals and Huihai Pharmaceuticals respectively of their annual sales in 2019.

- On May 29, 2023, the SAMR published an administrative penalty on Beijing Zizhu Pharmaceutical Management Co., Ltd. (“**Zizhu Pharmaceutical**”) for reaching and implementing monopoly agreements. It was found that from 2015 to 2021, Zizhu Pharmaceutical fixed the resale prices of the drugs Jin Yuting and Yuting (collectively referred to the “**drugs involved**”) nationwide. Specifically, (i) it **set the distribution prices of the drugs involved** in distribution agreements with its distributors, agreeing that **the distribution prices must comply with Zizhu Pharmaceutical’s guidance, the retail prices shall not be lower than the prescribed prices, and that the distributors must strictly enforce the price regulations and has no right to lower the prices.** (ii) **it issued price adjustment letters, commitment letters, and price maintenance notices** to distributors and retail pharmacies in order to implement price control. (iii) **It refined its sales management system, commissioned a third-party company to monitor distributors’ sales prices, and strengthened intra-system supervision** so as to implement the monopoly agreement fixing resale prices and limiting minimum price. Accordingly, the Beijing AMR determined that Zizhu Pharmaceutical’s conducts constituted monopoly agreements to “fix resale price” and to “limit the minimum resale price”, ordered it to stop illegal acts and imposed a fine of 2% of its annual sales in 2020, approximately RMB 12.64 million.
- On Jun 2, 2023, the SAMR published an administrative penalty on Chengdu Engineering Cost Association for reaching and implementing cartel agreements. it was found that in 2019, the association interviewed 132 enterprises participating in the bidding of a project and **required these enterprises to sign and submit to the Chengdu Audit Bureau documents withdrawing their biddings for the project (i.e., an application to withdraw from the bidding of the project) (“withdrawal application”)**, and the association exerted “notices of criticism” and “records of bad behavior” to 24 companies that didn’t participate in the interview as required. The withdrawal applications were not eventually submitted to the Chengdu Audit Bureau. The Sichuan Administration for Market Regulation held that the association’s conducts restricted the independent choice of its members in participating in bidding projects, excluded and restricted competitions in the market of construction cost consulting services in Chengdu, therefore constitute monopoly agreements between industry associations and operators. Since the monopoly agreements were not implemented, the association was fined RMB 300,000.
- On Jun 2, 2023, the SAMR published an administrative penalty on Fujian Blasting Equipment Industry Association (“**Blasting Association**”), Fujian Zhangzhou Jiuyijiu Chemical Co., Ltd., Fujian Minsheng Civil Explosives Co., Ltd., and Fujian Haixia Technology Co.,Ltd. for their acts of cartel agreements. it was found that Blasting Association **organized, planned, and coordinated the member companies involved reaching into monopoly agreements** to “control production and maintain prices” for inter-Guangdong civil-explosive supplies, **limited the sales volume and prices of products of participating companies, restricted establishment of new spots in certain provinces by explosive production and sales companies, compelled them to withdraw gradually from the market in certain provinces and to not enter the markets where other companies had withdrawn from.** At the same time, **Blasting Association enforced the implementation of “production control and prices maintenance” through “restrictive and punitive” measures such as the filing of purchase and sales contracts, blacklisting and integrity deposits.** The Fujian Administration for Market Regulation decided that the Blasting Association’s behaviors constitute organizing industry operators to reach monopoly agreements, and therefore ordered it to cease its violations and imposed a fine of RMB 400,000. It was also decided that the conducts of three companies involved in this case constitute reaching and implementing cartel agreements, and they were ordered to cease illegal conducts and were fined a total of RMB 600,000.
- On Jun 19, 2023, the SAMR issued an administrative penalty on 8 insurance companies, including Chongqing Banan Branch of PICC and Chongqing Banan Branch of China Life Insurance, for their conducts of reaching and implementing cartel agreements. In this case, the 8 insurance companies all engaged in the business of selling primary and secondary school students’ safety insurance (“**Student Safety Insurance**”) in Banan District, Chongqing. It was found that they negotiated a unified sale scheme for Student Safety Insurance, **determined a unified insurance coverage, deductible, insurance amount, insurance premium, observation period for the first purchase, amongst other matters, and divided the area for selling Student Safety Insurance.** The Chongqing Administration for Market Regulation concluded that the conducts of the 8 insurance companies constitute reaching and implementing monopoly agreements, and accordingly ordered them to cease illegal behaviors, confiscated the illegal income approximately amounting to RMB 5.57 million, and imposed a fine of 1% of its 2016 annual sales, which is approximately RMB 5.94 million.
- Abuse of Market Dominance
 - On Jun 2, 2023, the SAMR published two administrative penalties on Nanjing Zhongran City Gas Development Co., Ltd. And Huaneng Rizhao

Heat Power Co., Ltd. respectively for their abuse of market dominance. These two cases are abuse of market dominance in the industries of gas supply, heat supply and other public utilities, and involve conducts like tying, charging unreasonable fees, restrictive dealings and differential treatments without justifiable reasons.

Judicial Area

- On May 25, 2023, the SPC made a judgment on an abuse of market dominance case concerning Yangtze River Pharmaceutical Group Guangzhou Hairui Pharmaceutical Company Co., Ltd. (“**Hairui Company**”), Yangtze River Pharmaceutical Group Co., Ltd. (with Hai Rui Company collectively referred to as the “**Yangtze River Group**”) and Hefei Enrute Pharmaceutical Co., Ltd. (“**Enrute**”), Hefei Industrial Pharmaceutical Co. (with Enrute Pharmaceutical collectively referred to as “**Industrial Pharmaceutical**”) and Nanjing Haichen Pharmaceutical Co., Ltd.. The SPC revoked the first instance judgment in the case and dismissed Yangtze River Group’s claims[11].
- **Facts:** In 2019, Yangtze River Group filed a lawsuit against Industrial Pharmaceutical, claiming the defendant abused its dominant market position, and requested the court to order Industrial Pharmaceutical to cease its illegal acts and compensate Yangtze River Group for economic losses. There was a cooperative relationship between Industrial Pharmaceutical and Yangtze River Group in respect of the API for desloratadine citrate disodium tablets (“**the API involved**”), specifically, (i) Yangtze River Group and Industrial Pharmaceutical entered into a long-term purchase and sales contract for the API involved in 2017, agreeing on the price and minimum purchase quantity of the API involved to be purchased from Enrute by Hairui Company from September 1, 2017 to December 31, 2022, and that if Hairui Company purchase or use any API that are not provided by Enright without the written consent of Industrial Pharmaceutical, Hairui Company will be required to pay liquidated damages; (ii) During the cooperation period, Industrial Pharmaceutical increased the price of the API involved from RMB 15,600/kg to RMB 48,000/kg; (iii) Industrial Pharmaceutical signed a Patent Right Transfer Agreement with Yangtze River Group transferring “Deloratadine polyacid alkali metal or alkaline earth metal salt complex salt and its pharmaceutical compositions” (“**998 Patent**”). This agreement provided that Industrial Pharmaceutical can receive a certain amount of commission fee from Yangtze River Group for the 998 patent; (iv) There was a dispute between Industrial Pharmaceutical and Yangtze River Group regarding another project “Technology Transfer Contract for Cefetamet Hydrochloride and Cefetamet Hydrochloride for Injection” (“**Technology Transfer Contract**”). Yangtze River Group claimed that Industrial Pharmaceutical had not fully performed its obligations under the Technology Transfer Contract and should refund the relevant technology transfer fees, but during the negotiation of the long-term supply contract of the API involved, Industrial Pharmaceutical forced Yangtze River Group to sign a supplementary agreement to waive the claim for the technology transfer fee in order to terminate the Technology Transfer Contract. However, the Industrial Pharmaceutical claimed that the contract could not continue to be performed because of the change of PRC’s drug management policies, and was terminated by mutual consent.

With regard to the disputes at issue, the Court of First Instance ruled that: (i) Industrial Pharmaceutical immediately stop the conducts of abuse of market dominance. The court declared null and void the agreement on the purchase quantity and price in the purchase and sales contract for the API involved between Yangtze River Group and Industrial Pharmaceutical. The court also declared null and void the Supplementary Agreement to Technology Transfer Contract for Cefetamet Hydrochloride and Cefetamet Hydrochloride for Injection signed between Yangtze River Group and Industrial Pharmaceutical; (ii) Industrial Pharmaceutical compensate Yangtze River Group for economic losses in total of RMB 68.322371 million; (iii) Industrial Pharmaceutical compensate Yangtze River Group with attorney’s fees of RMB 0.5 million. The Industrial Pharmaceutical appealed against the first instance judgment.

The SPC concluded that the conducts of Industrial Pharmaceutical did not constitute abuse of market dominance, revoked the first instance judgment and rejected the requests of Yangtze River Group.

- **Key findings and rulings:**
 - (1) The actual competitive constraints faced by an operator may be both direct and indirect; **if indirect competitive constraints have sufficient influence on the operator's behavior, the indirect competitive constraints should also be fully considered in the determination of market dominance.** API is an intermediate input, and there is a correlation between the demand for the intermediate input and the demand for the downstream products using the intermediate input. Generally, the stronger the correlation, the more important are the indirect competition constraints imposed by the downstream market of the intermediate input on the upstream operators. The operators of a particular API may face both direct competition from operators supplying the same API and indirect competitive constraints brought about by competitive constraints

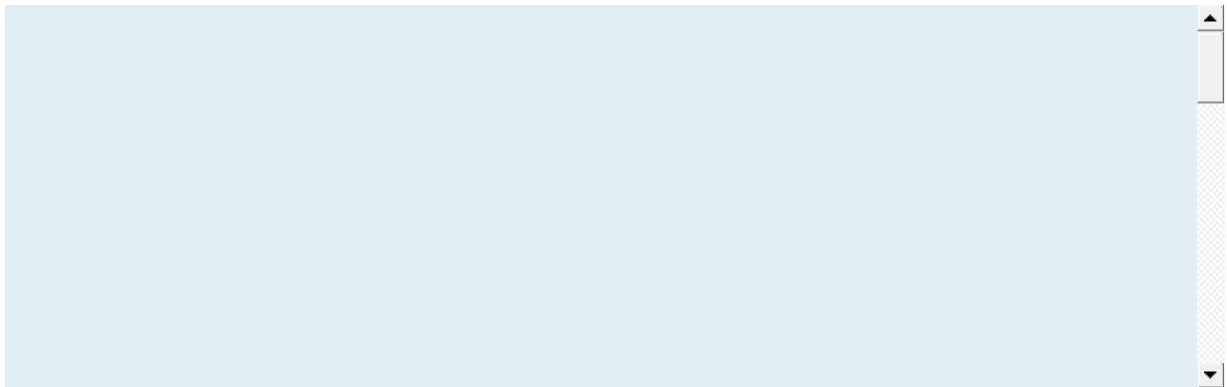
on downstream preparation operators, meaning [competition in the downstream preparation market may be transmitted to the upstream API market and create competitive constraints on that API operator.](#)

(2) When the monopolistic act at issue involves the exercise of effective intellectual property rights, the analysis of the restrictive or exclusion effect on competition of the monopolistic act at issue requires consideration of the legal effects necessarily arising from the proper exercise of intellectual property rights in accordance with relevant law. [If the so-called effect of excluding or restricting competition is the inevitable result of proper exercise of specific intellectual property rights in accordance with the law, and does not exceed the scope of legal effect contemplated by the intellectual property rights, such effect of excluding or restricting competition under the anti-monopoly law shall not be concluded.](#)

(3) The main purpose of anti-monopoly law in regulating unfairly high prices is to maintain the order of market competition, protect consumer welfare and avoid harming consumer welfare in the event of persistent market failures. [If an overpricing neither has a clear effect of excluding or restricting competition nor has an obvious detriment to consumer welfare, it is inappropriate to conclude that it constitutes an abuse of market dominance.](#) The reason is that overpricing can be self-corrected through the market dynamics. The legal analysis of overpricing needs to emphasize on its actual or potential anti-competitive effects, and to avoid damaging the investment incentives of incumbent operators and potential entrants in the market, which could lead to a “chilling effect” reducing innovation and ultimately harming consumer welfare. Therefore, [the determination and regulation of overpricing shall be particularly prudent.](#)

(4) In determining that the operator abuses its dominance in a relevant market by attaching unreasonable trading conditions on transactions in another relevant market, in general, at least two conditions should be met at the same time: (i) the first condition look into the appearance, that is, [the operator shall have explicit or implicit intention to attach unreasonable trading conditions](#), such as requiring that specific transactions must be bundled with other transactions, or requiring that transactions in other relevant markets be concluded as a prerequisite for concluding transactions in the relevant market in which the operator has a dominant market position; (ii) the second condition look into the effect and consequence, that is, [the operator shall have improperly obtained undeserved benefits or harm the interests of the counterparty to the transaction, and have excluded or restricted competition in the relevant market by attaching unreasonable trading conditions.](#)

If you are interested in further information regarding China antitrust matters, 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.



2023-07-11