THE Dominance and Monopolies Review

Eighth Edition

Editors
Maurits Dolmans and Henry Mostyn

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PREFACE

Even before covid-19 disrupted the world as we knew it, competition law was at a crossroads, facing far-reaching and sometimes contradictory calls for reform – including with respect to monopolisation and abuse of dominance.

Some, such as President Macron and Chancellor Merkel, have argued that there is too much competition from abroad, and advocate for more permissive enforcement to facilitate 'European champions' to emerge: 'We need to adapt the EU competition law: [It's] too focused on consumer rights and not enough on EU champions' rights.'

Others maintain that there is too little competition, enforcement has been too permissive, and the rules should be tightened. Senator Elizabeth Warren, for example, has argued that 'competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere.' Similarly, Professor Joseph Stiglitz contends that 'current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace'.

A third set of commentators believes that competition policy is misdirected, that the historic focus of competition law has been too narrow, and that the consumer welfare standard should be expanded to take account of social, industrial, environmental, and other considerations (sometimes referred to as 'hipster antitrust').

And a fourth critique, voiced by Maurice Stucke and Ariel Ezrachi, maintains that many of today's problems result from too much 'toxic' competition overall, driven by ideologues, lobbyists, and privatisation, and that we need to promote a kind of 'noble competition', where rivals mutually strive for excellence.

To address these challenges, a dizzying array of reports has emerged commissioned by governments in the US, EU, UK, Germany, France, Australia and elsewhere. And from those reports, a constellation of ideas has emerged to overhaul competition law, including: reorientating the goals of antitrust policy away from the consumer welfare standard towards a broader societal test; reversing the burden of proof; per se bans on certain categories of conduct (including prophylactic controls on vertical integration); lowering the standard of judicial review; injecting political oversight into competition law enforcement; loosening the standard to impose duties to share data with rivals; introducing market study regimes; allowing authorities to impose remedies without formally establishing an infringement; and establishing mandatory codes of conduct for digital platforms.

Where does this all leave busy practitioners and businesses that are trying to navigate the complex and constantly-evolving rules concerning abuse of dominance? Helpfully, this eighth edition of *The Dominance and Monopolies Review* seeks to provide some respite, providing an accessible and easily-understandable summary of global abuse of dominance rules. As with

previous years, each chapter – authored by specialist local experts – summarises the abuse of dominance rules in a jurisdiction; provides a review of the regime's enforcement activity in the past year; and sets out a prediction for future developments. From those thoughtful contributions, we identify three notable points from last year's enforcement.

Exploitative abuses pre- and post-covid-19

Exploitative abuses have in recent years enjoyed somewhat increased attention from regulators. The covid-19 pandemic intensifies that trend. It is leading to extreme demand and price volatility for certain products, as well as fluctuations in firms' costs. As firms struggle to manage these changes, agencies are aggressively seeking to show they are preventing consumer exploitation during the crisis. Charging excessive prices or imposing unfair terms and conditions constitutes an abuse of dominance in many countries, including almost all OECD members. In the US, excessive prices are not in and of themselves a matter for competition enforcement at the federal level, but many states have laws that prohibit price gouging and the current administration recently issued an executive order designed to prevent hoarding and price gouging.

Governments across the world have indicated that they will remain vigilant to sudden and significant price hikes during the pandemic. For example, in March 2020 the European Competition Network issued a statement identifying excessive pricing as a particular concern during the outbreak, noting that 'it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g., face masks and sanitising gel) remain available at competitive prices'. In a similar vein, on 27 March, Commissioner Vestager explained that 'a crisis is not a shield against competition law enforcement' and that the European Commission (EC) 'will stay even more vigilant than in normal times if there is a risk of virus-profiteering'. Several national authorities have opened investigations or created task forces dedicated to preventing excessive prices during the crisis.[1]

Even before covid-19, however, EU agencies were increasingly pursuing exploitation theories. In 2016, Commissioner Vestager stressed that the EC would seek to 'intervene directly to correct excessively high prices'. So far, most recent exploitation cases have been in the pharmaceutical sector, but the French and German agencies have pursued exploitative abuse theories in the technology sector. We pick out four developments over the last year.

First, the Court of Appeal judgment in *Pfizer/Flynn*, discussed in the UK chapter of this book, brings helpful clarity to evidence required to bring an excessive pricing case. As a recap: in 2016, the Competition and Markets Authority (CMA) imposed record fines on Pfizer and Flynn for charging excessive prices for phenytoin sodium capsules, an anti-epileptic drug. In July 2018, that decision was quashed by the Competition Appeal Tribunal (CAT) on the basis that the CMA had applied the wrong legal test and had failed to consider appropriately the economic value of the product. In March 2020, the Court of Appeal upheld the CAT's judgment that the case should be remitted to the CMA, though it agreed with the CMA on some issues (which will affect the remitted investigation) and the CMA welcomed the judgment as a 'good result.'

1 For further discussion, see Cleary Gottlieb, *Exploitative Abuse of Dominance and Price Gouging in Times of Crisis*, 31 March 2020.

In a nutshell, the Court of Appeal held that competition agencies have a 'margin of manoeuvre' in deciding how to prove their cases, including the 'Cost Plus' method that the CMA had used. Importantly, though, if a defendant adduces evidence that challenges the agency's methodology (as the defendants did in this case), the agency should consider that evidence. The extent of the agency's duty to consider the evidence adduced by the defendant will depend on the extent and quality of the evidence (i.e., there is no need to investigate each and every claim the parties bring up if those claims are not sufficiently substantiated). On the facts of the case, the Court held that there was an obligation on the CMA to evaluate the defendants' evidence regarding the prices of phenytoin capsules because it was prima facie evidence that prices were fair.

Second, in the *Sanicorse* case, discussed in the France chapter, the Paris Court of Appeal annulled the French Competition Authority's (FCA) decision of imposing a €199,000 fine on Sanicorse for imposing excessive price increases for medical waste treatment. The FCA had found that Sanicorse had abruptly, significantly, and durably increased the waste disposal prices it charged hospitals and clinics. In its ruling of November 2019, the Paris Court of Appeal clarified the conditions for establishing an exploitative abuse. Repeating the dictum from the *United Brands* ruling, the Court emphasised that an exploitative abuse arises in a situation where a dominant firm 'has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition'. The Court of Appeal found that the authority had failed to demonstrate that Sanicorse's price increases were unfair, and it accordingly annulled the decision.

Third, in December 2019, the FCA found in its *Gibmedia* decision (also discussed in the France chapter of this book) that Google's termination of three advertisers' Google Ads accounts was abusive. The authority's theory is that termination policies that allegedly lack objectivity and transparency, and are discriminatory, are a form of exploitation of customers. An apparent problem with the theory, however, is that a decision to terminate supply cannot, by definition, exploit the customer – it does not 'reap a trading benefit' from the trading partner, as required by United Brands and stressed by the Paris Court of Appeal in its *Sanicorse* decision.

Fourth, in February 2019, the Bundeskartellamt found that Facebook's terms and conditions relating to its collection of user data constitute an abuse (discussed in the Germany chapter). The Bundeskartellamt held that Facebook's terms and conditions, under which users agreed to the combination of their data from, for example, WhatsApp, Instagram and Facebook, violated the GDPR. Relying on German law principles that unlawful terms and conditions can constitute an abuse of dominance, the Bundeskartellamt held that Facebook committed an exploitative abuse by combining data from different sources. In August 2019, however, the Düsseldorf Court of Appeal granted suspensive effect to Facebook's appeal against the decision, holding that there are serious doubts about its legality. The Court found that users are not exploited by Facebook's use of data because, unlike financial payments, the data can be replicated and used again. Users freely decide whether to allow use of their data by balancing pros and cons of using ad-funded social network. The Court also held that the Bundeskartellamt had failed to prove the required causal link between Facebook's abuse and its market power: it failed to show that Facebook's terms deviated from the terms that would exist in a more competitive scenario. The judgment on the merits is pending.

Despite the renewed appetite to bring exploitation cases, these cases should in our view – in line with Advocate General Wahl's warning in the *Latvian Banks* case – remain rare and

exceptional. Otherwise, there is a risk that the concept of exploitative abuse is stretched to address policy issues beyond the scope of competition law and that require broader discussion outside individual cases.

A greater push for interim measures

The second notable development in abuse of dominance enforcement in 2019 was the EC's decision – for the first time in an antitrust case in almost 20 years – to impose interim measures on Broadcom (this decision is discussed in the EU chapter). The decision orders Broadcom to cease to apply exclusivity provisions in six agreements with manufacturers of TV set-top boxes and modems, while the Commission's full investigation continues. On announcing the decision, Commissioner Vestager stressed that interim measures decisions are 'so important', especially in 'fast-moving markets'. The Commissioner emphasised that she is 'committed to making the best possible use of this important tool' so as to enforce competition rules 'in a fast and effective manner'.

Like other developments at EU level, push for greater use of interim measures has been encouraged by national authorities, particularly in France, with the Commissioner citing France as a source of inspiration. The UK CMA has also stated that greater use of interim measures is 'essential if the CMA is to respond to the challenges thrown up by rapidly changing markets', and Germany is adopting new rules to accelerate proceedings and apply interim measures.

Two examples discussed in the French chapter illustrate the FCA's expansionist approach to interim measures, both in cases involving Google. First, in *Amadeus*, the authority found Google's decision to suspend the Google Ads accounts of a paid phone directory services operator to be an exploitative abuse (similar to the theory in the *Gibmedia* case discussed above). The Paris Court of Appeal subsequently partly annulled the decision. Second, in early 2020, the authority found that Google's refusal to pay news publishers for showing preview snippets in search results alongside a link to the publisher's site may also amount to an exploitative abuse. The decision orders Google to enter into good faith negotiations with publishers, although it also makes clear that the negotiations may result in zero monetary compensation to publishers (considering that Google sends traffic to the publishers that they can monetise via ads on their page or convert users to paid subscribers).

Several points of caution should be heeded from the appetite to bring interim measures cases. Interim measures decisions should focus on the most egregious and clear-cut abuses, such as exclusivity clauses by obviously dominant firms, rather than seeking to create new law or go against existing precedent. The efficiency and effectiveness of competition procedures should not come at the expense of investigative rigour, due process, and the right to be heard. Interim measures should not prejudge the final decision from the authority on the merits. Accordingly, they should be tailored to implementing measures that are possible in principle to reverse, if it subsequently turns out that on a full merits review there is no case to answer. Finally, the new appetite to impose interim measures should not slow down the speed of the main proceedings, as agencies get caught up duplicating investigations and satellite appeals.

Per se bans on self-preferencing

The third development is the wide-ranging proposals to overhaul competition rules to address the perceived challenges of the digital economy. Proposals in the pipeline include the EC's suggestion for further regulation of digital platforms; mandatory codes of conduct in Australia to address perceived bargaining power imbalances between platforms and media

companies; and, in the UK, the CMA's aim to develop 'a coherent and innovation-friendly approach to governing digital technologies to ensure their benefits are shared far and wide'.

Describing all these proposals is beyond the scope of the present editorial. We instead focus on one eye-catching suggestion: the suggestion – included in several of the reports commissioned by governments and agencies, such as the EU Special Advisors' Report, the Furman Report in the UK, the German ARC Amendments, and the Stigler Report – to introduce per se bans on digital platforms or companies that perform a 'regulatory function' from engaging in 'self-preferencing.' The reports, however, do not explain precisely what they mean by 'self-preferencing'. Self-preferencing is a generic expression that covers a range of different practices, for example, margin squeezing, tying and refusal to supply.

For example, keeping an indispensable asset to oneself and refusing to supply it to rivals is an example of abusive self-preferencing. But the refusal to deal in case law makes clear that it is, so far, not abusive for a dominant company to favour itself by reserving for its own use an asset that is not indispensable, but merely 'advantageous.' On the contrary, it is generally pro-competitive for companies to develop their own innovations, and use those innovations as the tools to compete against one another. As Advocate General Jacobs explained in *Bronner*:

> *it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business . . . Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it".*

This makes sense, for several reasons. First, there is an inherent contradiction between competition and duties to supply rivals; competition rules seek to encourage companies to compete vigorously against each other, not cooperate. Second, a duty to supply interferes with fundamental rights to dispose of property and to conduct business. Third, duties to supply reduce incentives to innovate for both the supplying company and the company that receives supply. Fourth, in industries with fast innovation cycles, a duty to integrate rivals into constantly-evolving technologies may delay – or preclude – new developments.

The Courts, therefore, only allow interference with the freedom to contract in exceptional and limited circumstances. By contrast, we are concerned that a per se ban on self-preferencing could have several unintended consequences: hampering vertical integration, which is presumptively efficient; eliminating synergies; and leading to delayed or mothballed product improvements.

Consider Google's introduction of a thumbnail map on its results pages in response to location-based queries: the UK High Court held that this was 'pro-competitive' and an 'indisputable' product improvement. Not only was Google's introduction of the thumbnail map not likely to harm competition, but the conduct was also objectively justified. This was because showing rival maps would have degraded the overall quality of Google's search services, for example, via delays in returning results. Under the contemplated presumptions against self-preferencing, however, companies would have to ask themselves before launching this type of improvement whether they could prove the negative (i.e., that it would not lead to long-run exclusionary effects). That appears to be a difficult threshold to cross before launch.

Accordingly, we believe we should be looking at measures that make a real improvement to consumer welfare and avoid chilling innovation and investment. Neat-sounding slogans – such as a presumptive and generic ban on self-preferencing – can prove harmful in practice.

As a recent CMA report into competition and regulation recognised, 'greater regulation is – on average – associated with less competition. For instance, countries with lower levels of product market regulation tend to have more competitive markets and enjoy higher rates of productivity and economic growth.' Similarly, in her speech on 'Remembering Regulatory Misadventure', FTC Commissioner Wilson recalled that attempts to prescribe 'fairness', 'non-discrimination', and 'reasonable and just' prices in the airline and railroad industries led to distortions of competition and restricted output. Removing these regulations 'significantly reduced consumer prices and increased output, generating billions of dollars in consumer surplus'. This is not to say that regulation is not desirable for objectives other than fostering competition, but regulation to encourage competition is likely to result in outcomes that any pro-competition and pro-innovation regime should avoid.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this eighth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
June 2020

Chapter 8

CHINA

Zhan Hao and Song Ying[1]

I INTRODUCTION

Article 17 of the Anti-Monopoly Law (AML) is the primary legal basis for regulating the abuse of market dominance in China. According to Article 17, undertakings with a dominant position in the relevant market are banned from conducting the following abusive activities:

a selling commodities at unfairly high prices or buying commodities at unfairly low prices;
b without justifiable reasons, selling commodities at prices below cost;
c without justifiable reasons, refusing to deal with their trading counterparties;
d without justifiable reasons, requiring trading counterparties to exclusively deal with themselves or with the undertakings designated by them;
e without justifiable reasons, conducting tie-in sales of commodities or imposing other unreasonable trading conditions on transactions;
f without justifiable reasons, applying differential treatments on trading prices and other terms among trading counterparties with equal standing; or
g other acts of abuse of dominant market position determined as such by the AML enforcement authorities under the State Council.

In brief, the year 2019, as the first year since institutional reform was completed, has seen recognised development in legislation and enforcement activities.

The legislative update is reflected by the release of several new regulations entering into force from 1 September 2019 and drafts for comments, among which are interim provisions on monopoly agreement, abuse of market dominance and administrative monopoly Acts respectively, providing clearer guidance on China's antitrust enforcement activities.

From the perspective of public enforcement, the State Administration for Market Regulation (SAMR), as the consolidated antitrust enforcement agency, kept a more rigorous enforcement attitude towards anticompetitive conduct. In 2019, SAMR published 19 decisions on alleged monopoly agreements and abuse of market dominance in aggregate.

1 Zhan Hao is the managing partner and Song Ying is the partner at AnJie Law Firm.

II YEAR IN REVIEW

i Public enforcement

Investigation cases published by the SAMR

In 2019, the SAMR and its local branches initiated 103 investigations into anticompetitive conduct, among which 15 investigations are about abuse of market dominance, and closed 44 of them. In 2019 SAMR's website published five market dominance cases with two suspended cases and three cases resulting in punishment.

Investigation into Phenobarbital API by the Jiangsu AMR (suspended)[2]

On 20 February 2019, the Jiangsu AMR issued the decision of suspending the investigation into Nantong Jinghua Pharmaceutical Co, Ltd. The company was suspected of engaging in unjustifiable refusal to deal by abusing its dominant market position in the phenobarbital active pharmaceutical ingredient (API) market. Except for being sold continuously to sporadic pharmaceutical production and distribution companies such as Shangqiu Xinxianfeng Pharmaceutical Co, Ltd and Henan Wanlong Pharmaceutical Co, Ltd and sold one time to two pharmaceutical production companies in Shanxi, the API of phenobarbital produced by the party has never been sold to any other domestic pharmaceutical production companies. In addition, some of the regular customers of the party and many domestic pharmaceutical production companies have all been refused by the party when they offered to buy the API. Pursuant to Article 45 of the AML, Nantong Jinghua Pharmaceutical Co, Ltd proposed commitments to the Jiangsu AMR on 16 November 2017 and apply for the investigation suspension, and Jiangsu AMR ultimately suspended the investigation on 20 February 2019.

Investigation into gas supply by Jiangsu AMR (suspended)[3]

On 20 February 2019, the Jiangsu AMR issued the decision of suspending investigation into Yancheng ENN Gas Co, Ltd. The company was suspected of engaging in unjustifiably imposing unreasonable trading conditions by abusing its dominant market position in the pipeline gas supply market. In the supporting construction contract of pipeline natural gas facilities concluded between the party and the users when opening an account for gas consumers of industry and commerce groups, it is agreed that 'the dividing point of property right for gas supply and usage facilities shall be the property line of Party A (note: the user), i.e., gas facilities outside the property line belong to Party B (note: the party) while those inside the property line belong to Party A' and 'upon gas supply, Party B shall be responsible for maintenance and management of the gas transmission and distribution facilities at the backward direction of the gas flow on the dividing point of property right (included) and provide one year's warranty free of charge for gas facilities (excluding gas facilities and appliances of the use) at the direction of gas flow on the dividing point of property right after they pass the acceptance inspection, and they shall be maintained by Party A itself after the warranty period' where 'backward direction of the gas flow on the dividing point of property right (included)' refers to the area outside property line and 'the direction of gas flow on the dividing point of property right' refers to the area inside property line. Pursuant to

2 www.samr.gov.cn/fldj/tzgg/xzcf/201903/t20190308_291810.html.

3 www.samr.gov.cn/fldj/tzgg/xzcf/201903/t20190325_292290.html.

Article 45 of the AML, Yancheng ENN Gas proposed commitments to the Jiangsu AMR on 24 August 2017 and applied for the investigation suspension, and Jiangsu AMR ultimately suspended the investigation on 20 February 2019.

Investigation into Eastman by Shanghai AMR (completed)[4]

On 16 April 2019, the Shanghai AMR imposed a fine of 24.38 million yuan on Eastman (China) Investment Management Co, Ltd for abuse of market dominance in relation to mainland China's ester alcohol film-forming agent market. The company was accused of limiting the trade parties to only trade with it without any justifiable causes through the following methods: (1) signing and implementing exclusive agreements with relevant domestic coatings companies that included provisions on minimum purchase quantities and take-or-pay clauses; and (2) signing and implementing exclusive agreements with most favoured nation (MFN) clauses subject to the effective conditions of minimum purchase quantity. The fine was equivalent to 5 per cent of Eastman (China) Investment Management Co, Ltd's 2016 sales revenue.

Investigation into water supply by the Tianjin AMR (completed)[5]

On 12 July 2019, the Tianjin MAR imposed a fine of 7,438,622.77 yuan on Tianjin Water Supply Group Co, Ltd for abuse of market dominance in relation to water supply. The company was accused of engaging in unjustifiably imposing the following unreasonable trading conditions: requiring the real estate development enterprises to use, when constructing secondary water supply facilities, the intelligent electric control cabinets and remote monitoring substations produced by Tianjin Huacheng Water Supply Engineering Co, Ltd designated by the Tianjin Water Supply Group. The fine was equivalent to 3 per cent of Tianjin Water Supply Group Co, Ltd's 2016 sales revenue.

Investigation into water supply by the Jiangsu AMR (completed)[6]

On 12 October 2019, Jiangsu MAR imposed a fine of 2.05 million yuan on Suqian Zhengyuan Water Supply Co, Ltd for abuse of market dominance in relation to water supply. The company was accused of engaging in unjustifiably imposing the following unreasonable trading conditions: requiring the real estate development enterprises to engage the company for the construction of the building water installation projects. The fine was equivalent to 4 per cent of Suqian Zhengyuan Water Supply Co, Ltd's 2016 sales revenue.

Summary

In summary, the above cases relate to abuse of market dominance handled by the SAMR. Ones handled by its provincial branches in 2019 are listed below.

4 www.samr.gov.cn/fldj/tzgg/xzcf/201904/t20190429_293241.html.

5 www.samr.gov.cn/fldj/tzgg/xzcf/201907/t20190712_303427.html.

6 www.samr.gov.cn/fldj/tzgg/xzcf/201911/t20191126_308830.html.

Investigated party	Industry	Investigating authority	Monopoly conduct	Case initiated	Status
Nantong Jinghua Pharmaceutical Co, Ltd	Pharmaceutical	Jiangsu AMR	Unjustifiable refusal to trade	2016	Suspended on 20 February 2019
Yancheng ENN Gas Co, Ltd	Gas supply	Jiangsu AMR	Unjustifiably imposing unreasonable trading conditions	–	Suspended on 20 February 2019
Eastman (China) Investment Management Co, Ltd	Chemical	Shanghai AMR	Unjustifiably limiting the trade parties to only trade with it	2017	Completed by issue of penalty
Tianjin Water Supply Group Co, Ltd	Water supply	Tianjin AMR	Unjustifiably imposing unreasonable trading conditions	2016	Completed by issue of penalty
Suqian Zhengyuan Water Supply Co, Ltd	Water supply	Jiangsu AMR	Unjustifiably imposing unreasonable trading conditions	2017	Completed by issue of penalty

ii Private enforcement

Hytera v. Motorola[7]

On 14 September 2017, the plaintiff, Hytera Communications Corporation Limited (Hytera) brought a lawsuit to Beijing Intellectual Property Court, alleging that the defendants Motorola Systems (China) Investment Co, Ltd, Motorola Systems (China) Co, Ltd, Motorola Systems (China) Co, Ltd, Beijing Branch (together Motorola) had abused market position in the communication market of specific cities' metro private network. The plaintiff petitioned the court for Motorola to stop its monopolistic behaviour and compensate the loss of 49.266 million yuan and reasonable expenses of 1.056 million yuan. After almost 20 court investigations and hearings since 2017, on 31 December 2019, the court issued the first instance judgement, which found that Motorola, while dominant in some of the relevant markets claimed by the plaintiff, did not conduct abuse of dominance and dismissed all the claims of the plaintiff.

The parties' debate focused on the definition of relevant market and whether Motorola had abused its market domination. Hytera alleged that Motorola has a dominant position in the wireless communication market of Chengdu Metro private network. Motorola announced that if the user had used Motorola's product previously, the subsequent product would have better connectivity performance when continuing to use Motorola's product. Hytera alleged that this action restricted the Chengdu Metro to dealing with Motorola, excluding Hytera from entering the bid and that the defendant's refusal to open the API for connectivity also constituted refusal to deal, with these behaviours cause material damage to Hytera.

The defendant argued that the relevant market of this case should be the China wireless communication equipment market for urban rail transit. Even in the 'Chengdu market' claimed by Hytera, Motorola should not be deemed to have a dominant market position. The API is not necessary for connectivity, and Motorola's refusal to open the API is a legitimate exercise of intellectual property rights, which is a reasonable reason. Motorola itself does not have the ability to limit the transaction, and there is no objective fact that the transaction is limited by Motorola. Furthermore, there is no evidence showed that Hytera had suffered any damage as a result of any of Motorola's actions. The claims of Hytera have neither factual basis nor legal basis.

7 https://www.thepaper.cn/newsDetail_forward_5568294.

Beijing Intellectual Property Court heard this case in chamber at the end of 2019. The court held the opinion that, in the bidding market, the requirements of bidding documents determine the scope of operators to participate in the competition. Since each bidding event will have corresponding bidding requirements, each single bidding event constitutes a separate relevant market. In the plaintiff's claim of Chengdu Metro line 2, 3, 4 in the tender documents, the new line switches interconnected with each line is mandatory, because of the switch between interconnected applies only to the same manufacturer of the equipment, and Motorola won the previous bids. Consequently, Motorola has a dominant market position.

However, market dominance is not illegal per se. The AML only prohibits abuse of market dominance, for instance, designating specific trading counterparty without reasonable ground. Thus, in this case, if Motorola's restriction could be deemed as unreasonable conduct, it would have been liable for Hytera's loss. More specifically, one of the preconditions for judging whether it constituted a restricted transaction was whether Motorola had the intention to require the Chengdu Metro party to trade only with it. But none of the limited trading behaviour claimed by the plaintiff can be deemed as Motorola intending to restrict trading between the Chengdu Metro and Motorola. Therefore, the defendant's behaviour does not constitute limited trading behaviour.

Huang Wende v. DiDi[8]

On 4 May 2018, a natural person Huang Wende (Huang) was temporarily charged 6 yuan by DiDi. Huang argued that DiDi's temporary price violated the 'unfairly high price' in Article 17 of the AML and filed a lawsuit to Zhengzhou Intermediate Court. Huang had lost in first instance trial in Zhengzhou and appealed to a higher court. On 24 September 2019, the IP Tribunal of the Supreme Court as the appeal court heard this case publicly, and the final judgment is still pending.

One controversial issue is whether cruise taxis are part of the relevant market. Huang claimed that cruise taxis are not part of the market. First, cruise taxis and ride-hailing are subject to different laws and regulations and legal permissions. Second, the two types of cars are different in terms of convenience, safety and market demand. Third, the online ride-hailing cars use online payment, but cruise cars usually use offline payment.

Didi argued that cruise cars and ride-hailing constitute a close alternative relationship and should be included in one relevant market. Ride-hailing and cruise cars belong to the same industry category, with the same nature and functions, and both provide convenient and personalised services for the majority of passengers. And the difference between cruise taxis and ride-hailing is getting smaller, and they are becoming integrated with each other.

As regards the issue of whether DiDi has a dominant market position, Huang pointed out that the official website of DiDi claimed that it had a '99% market share', therefore, it could be presumed to have a dominant market position. DiDi argued that, the statistical calibre of online ride-hailing service industries has changed from 2015 to 2018; the evidence of 99 per cent of the market came from a third party company's data in 2015. This data cannot be construed as actual market situation in 2018. Furthermore, Zhengzhou has 46 taxi companies and 18 online ride-hailing companies, and DiDi is facing fierce competition in

8 (2019) Zui Gao Fa Zhi Min Zhong No. 207, https://www.sohu.com/a/342351749_742371.

the local market. In addition, the taxi market is always under dynamic competition, and, due to the low market entry threshold, DiDi has been subject to strong competition constraints and does not have a dominant market position.

As regards the issue whether the temporary price increase of DiDi could be deemed as the abuse of market dominance by charging higher price, Didi argued that the temporary price increase was for the purpose of regulating supply and demand, and it has economically reasonable and does not constitute a monopolistic high price. This action also complied with local government regulations. Moreover, the fees are paid to drivers, and DiDi has no intention of earning monopoly profits.

The Ministry of Transportation (MOC) mentioned that it had held several interviews with relevant online ride-hailing companies and requested them to conduct rectification to the dynamic pricing mechanism. On 12 July 2019, the MOC released the Opinions on Deepening Reform of Road Transport Prices (draft for comments), which states that online ride-hailing companies should disclose the pricing mechanism and dynamic pricing mechanism at least seven days in advance to the public. This draft has not come into force so far. The Supreme People's Court's judgment on this case is expected to be released in this year. That will notably bring demonstration effects to the online ride-hailing market.

2019 is a milestone for the China private antitrust enforcement, because the IP Tribunal of the Supreme Court was set up in this year. The IP Tribunal hears antitrust civil and administrative appeals, and that means it could unify the ruling standards and improve the quality of private litigations. The IP Tribunal has made a series of rulings on hot issues, such as arbitrability of monopoly disputes and regional jurisdiction of anti-monopoly cases in *Huili v. Shell* and *JD.com v. Tmall*. It has accepted *Huang Wende v. DiDi*, and has started the trial.

In addition, the competition concerns raised in Internet industry had drawn great attention of the whole society. Private litigations against internet companies are on the rise; for instance, JD.com, Tencent, Tmall and DiDi gained wide attention and heated discussion in the market. As these cases enter the substantive trial stage, it is expected they will be great precedents in maintaining the order of market competition and protecting the impetus of innovation.

Summary

In summary, the most high-profile private enforcement actions on abuse of market dominance between 2018 and 2019 (both completed and pending cases) are listed below.

Plaintiff	Defendant	Sector	Courts	Conduct	Case opened	Status of proceedings
Tiyu Culture Co Ltd (OSports Media)	China Super League Co Ltd and Shanghai Yingmai Culture Co Ltd (Imagine China)	Media	Shanghai Higher Court, Shanghai IP Court,	Abuse of dominance	2018	Pending
Huang Wende (an individual)	DiDi Chuxing Co Ltd	Transportation/ Internet	Supreme People's Court	Abuse of dominance by charging unfairly high prices	2018	Pending

Plaintiff	Defendant	Sector	Courts	Conduct	Case opened	Status of proceedings
Song Xin (an individual)	China State Railway Group Co Ltd	Transportation	Changsha Intermediate Court, Hunan Higher Court	Refusal to deal and designating specific trading counterparty	2016	Plaintiff lost in first and second-instance trials
JD.com	Tmall	Internet	Beijing Higher Court	Abuse of dominance	2018	Pending
Wu Zongli (an individual)	Yongfu County Water Supply Company	Public service	Nanning Intermediate Court	Tying	2018	Plaintiff win the first instance trial
Hytera	Motorola	Telecommunications	Beijing IP Court	Refusal to deal and designating specific trading counterparty	2017	Plaintiff lost in first instance trial and Pending
Zhang Zhengxin (an individual)	Tencent	Internet	Beijing IP Court	Abuse of dominance	2019	Pending
Galanz	Tmall	Internet	Guangzhou IP Court	Abuse of dominance	2019	Pending
Luckin Coffee	Starbucks	Coffee	Shenzhen Intermediate Court	Abuse of dominance	2018	Plaintiff withdrew the claims

III MARKET DEFINITION AND MARKET POWER

The approaches for defining the relevant market and assessing market power presented in the black letter law of China are consistent with other major antitrust regimes.

i Relevant market definition

The basic principles related to abuse of market dominance in the AML are similar to those of Article 102 of the Treaty on the Functioning of the European Union and Section 2 of the Sherman Act. The specification of market definition is stipulated in the Guidelines on the Definition of Relevant Market (Guidelines). In accordance with the Guidelines, the basic approaches for defining the relevant market are analysis of demand-side substitutability and supply-side substitutability.

Article 8 of the Guidelines provides that the following factors may be considered when defining the relevant market.

Factors from the demand-side:

a evidence of demanders switching to other products when the price or other factors of the product concerned are changed;

b the appearance, characteristics, quality, technical features and functionality of the product;

c price variance between products;

d the distribution channel; and

e other factors.

Factors from the supply-side:

a evidence that other undertakings respond to the change of price or other competitive factors; and

b other undertakings' manufacturing process and techniques, their difficulties, time to be consumed, extra costs and risks in changing the line of production, the competitiveness and marketing channels of the products provided after changing the line of production, etc.

Article 9 of the Guidelines provides the following factors to be considered when defining the relevant geographical market:

Factors from the demand-side:

a evidence of demanders turning to other regional products when the price or other factors of the product concerned are changed;
b the cost and characteristics of transportation;
c the region in which the majority of customers purchase the product in practice, and the regional distribution of major business operators' products;
d trade barriers, such as tariffs, regulations and environmental and technical factors; and
e other factors.

Factors from the supply-side:

a evidence that undertakings in other geographic areas respond to the change of price or other competitive factors; and
b instantaneity and feasibility of the supply from other geographic areas, for example, the cost for costumers to turn to undertakings in other geographic areas.

The Guidelines also mention the 'small but significant and non-transitory increase in price' method, a tool frequently used by both EU and US antitrust regulators.

ii Market dominance

Market dominance under the Chinese antitrust regime is defined in Article 18 of the AML and further elaborated by Article 5 of the Interim Provisions on Prohibition of Abuse of Market Dominance (The Abuse of Dominance Provisions).[9] It refers to a position held by one or more undertakings that enables the undertakings to:

a control the price, volume or other trading terms[10] in the relevant market; and
b block or affect the ability of other undertakings to enter the relevant market by impeding or delaying other undertakings' entry into the market, or substantially increasing other undertakings' entry costs, so that the competitors cannot compete effectively post entry.

Article 18 of AML further elaborates the following factors by which market dominance should be assessed:

a market share in the relevant market;
b the competition situation in the relevant market;
c the ability to control sales markets or raw material purchasing markets;
d the financial status and technical conditions of undertakings;
e the degree of dependence on the undertakings of other undertakings;

9 This new regulation was released by SAMR on 26 June 2019 and entered into force on 1 September 2019.

10 According to Article 5 of the Interim Provisions on Prohibition of Abuse of Market Dominance, 'other trading terms' include the factors that can have substantial impact on a market, such as grade of commodity, payment terms, method of delivery, after-sales service, trading options or technical constraints.

f entry into the relevant market by other undertakings; and
g other factors.

Article 11 of the Abuse of Dominance Provisions elaborates the following factors should be assessed additionally when the relevant market relates to the new economic-form area, such as the internet sector:

a competitive characteristic of related industries;
b business model, number of users, network effects, lock-in effects, technical characteristics, market innovation, ability to control and process relevant data;
c market power of undertakings in connected markets.

Article 12 of the Abuse of Dominance Provisions also elaborates the following factors should be assessed additionally when the relevant market relates to intellectual property:

a the substitution of its intellectual property;
b the dependence of the downstream market on the commodities provided by the use of intellectual property;
c the counterbalance ability of the counterparties to the undertakings.

iii Market dominance presumption

As illustrated in the table below, Article 19 of the AML specifies the market-share thresholds that are regarded as preliminary evidence of market dominance.

Number of undertakings	Aggregated market share in the relevant market
One	One-half
Two	Two-thirds
Three	Three-quarters

However, the preliminary evidence of market dominance can be rebutted by showing lack of sufficient market power despite high market share.[11]

Also, it is important to point out that according to Article 13 of the Abuse of Dominance Provisions, market structure, related market transparency, related commodity homogeneity degree and consistency of undertaking's behaviour are the factors that should be considered when identifying two or more undertakings as having a dominant market position together. But under the preliminary evidence, if one of the undertaking in the aforementioned two or three undertakings has a market share of less than 10 per cent, this undertaking shall not be deemed to have a dominant position.[12]

IV ABUSE

i Overview

Article 17 of the AML sets out a non-exhaustive list of seven types of behaviour that may be regarded as abuse of market dominance:

a excessive pricing or selling at an unfairly low price;

11 See Article 19 of the AML.
12 ibid.

b selling below cost;
c refusal to deal;
d requiring a party to trade exclusively with the undertaking or other designated undertakings;
e tie-ins or the imposition of other unreasonable trading terms;
f price discrimination or the imposition of other discriminatory trading terms; and
g other behaviours defined as abuse of dominance by the antitrust regulators.

Practices including refusal to deal, exclusive dealing and imposing unreasonable trading terms have frequently come under antitrust scrutiny in 2019. Particularly, the enforcement agencies continue to monitor the pharmaceutical and other public utility sectors.

ii Exclusionary abuses

In China, according to the AML, abuse of dominance is not segmented into exclusionary abuse, discrimination and exploitative abuses. 'Exclusionary abuses' generally includes the dominant undertaking abuses its market dominance by excluding its competitors; for example, by exclusive dealing, refusing to deal, or tying or bundling.

The Abuse of Dominance Provisions, promulgated by the SAMR and effective on 1 September 2019, further elaborate on exclusive dealing, refusing to deal, or tying or bundling.

For refusing to deal, Article 16 of the Abuse of Dominance Provisions provides that without legitimate reasons, business operators with market dominance are prohibited from refusing to deal with the trading partners through the following methods:

a substantially reducing the existing number of transactions with their trading partners;
b delaying or interrupting existing transactions with their trading partners;
c refusing to engage in new transactions with their trading partners;
d setting restrictive conditions, making it difficult for their trading partners to trade with them; and
e refusing to let their trading partners in the production and business activities to use their necessary facilities with reasonable conditions.

For exclusive dealing, Article 17 of the Abuse of Dominance Provisions provides that without legitimate reasons, business operators with market dominance are prohibited from carrying out the following acts to limit transaction:

a limiting their trading partners to engage in transactions only with them;
b limiting their trading partners to engage in transactions with business operators specified thereby; and
c forbidding their trading partners from transacting with specified business operators.

The aforesaid restrictive transaction behaviours may take the form of direct restrictions or indirect restrictions through setting transaction conditions.

On 16 April 2019, the Shanghai AMR imposed a fine on Eastman (China) Investment Management Co, Ltd for abuse of market dominance in relation to the mainland China ester alcohol film-forming agent Market. The company was accused of limiting the trade parties to exclusively trade with it without any justifiable causes through the following methods: (1) signing and implementing exclusive agreements with relevant domestic coatings

companies that include provisions on minimum purchase quantities and take-or-pay clause; and (2) signing and implementing exclusive agreements with MFN clause subject to the effective conditions of minimum purchase quantity.

For tying or bundling, or imposing unreasonable transaction conditions, Article 18 of the Abuse of Dominance Provisions provides that without legitimate reasons, business operators with market dominance are prohibited from bundling their products or adding other unreasonable transaction conditions for their transactions as follows:

a breaching trading practices or consumption habits or disregarding the functions of commodities, and mandatory bundling different products or combine sales;
b adding unreasonable restrictions on contract duration, payment mode, transport and delivery of goods or the methods of service provision;
c adding unreasonable restrictions on sales regions, sales targets, after-sale service and others;
d adding unreasonable expenses in addition to the price; and
e adding transaction conditions unrelated to the subject of the transactions.

iii Discrimination

There is no precedent penalty regarding the type of discrimination (such as discriminatory pricing) under the abuse of market dominance in 2019 in China.

Article 19 of the Abuse of Dominance Provisions provides that without legitimate reasons, business operators with market dominance are prohibited from implementing the following preferential treatment regarding the transaction conditions for trading partners with identical conditions:

a different number of transactions, variety and quality grades;
b varying quantity discounts and other preferential terms;
c different payment conditions and delivery methods; and
d different contents and durations of the warranty, contents and timing of maintenance, technical assistance and other after-sale service conditions.

'Identical conditions' shall mean that there is no difference between the trading partners, which will have a substantial impact on aspects such as transaction security, transaction costs, scale and capabilities, creditworthiness status, transaction phase and duration of trading relationship.

iv Exploitative abuses

There is no precedent penalty regarding the type of exploitative practice (such as excessive pricing) under the abuse of market dominance in 2019 in China.

Article 14 of the Abuse of Dominance Provisions provides that business operators with market dominance are prohibited from selling goods at unfairly high prices or buying goods at unfairly low prices.

For determination of 'unfairly high prices' or 'unfairly low prices', the following factors may be considered:

a whether the selling price or purchase price is evidently highly or evidently lower than the price paid by other business operators for sale or purchase of the same type of goods or comparable goods under identical or similar market conditions;

b whether the selling price or purchase price is evidently higher or evidently lower than the price paid by the same business operator for sale or purchase of goods in other regions with identical or similar market conditions;

c subject to basically stable costs, whether the selling price is raised beyond normal range or the purchase price is reduced beyond the normal range; and

d whether the price increase for sale of goods is evidently higher than the cost increase range, or if the price drop range for purchase of goods is evidently higher than the cost reduction range of the trading partner; and

e other relevant factors to be considered.

For determination of identical or similar market conditions, the factors such as sales channel, sales model, supply and demand situation, regulatory environment, transaction phases, cost structure and transaction situation shall be considered.

Article 15 regulates that without legitimate reasons, business operators with market dominance are prohibited from selling goods at a price below cost.

For determination of selling goods at a price below cost, it should be considered whether the price is lower than the average variable cost. Average variable cost shall mean each unit cost that varies in accordance with the changes in the quantity of goods produced. Where a free of charge model in new economic forms, such as the internet is involved, the circumstances such as, inter alia, the free goods provided by the business operator and the relevant chargeable goods shall be considered in a holistic manner.

V REMEDIES AND SANCTIONS

i Sanctions

In accordance with Article 47 of the AML, an undertaking that has abused its dominant position may be fined between 1 and 10 per cent of its turnover in the preceding year. Notably, since the establishment of SAMR, the authority adopted the overall turnover of a company in the preceding year as denominator for imposing fines on abuse of market dominance, rather than turnover of relevant products involved in the antitrust investigation. Additionally, the regulator may confiscate the illegal gains. Article 49 of the AML further states that when calculating the amount of the fine, the regulator shall consider factors such as the nature, gravity and duration of the illegal conduct. Effective in September 2019, SAMR released the Interim Rules of Prohibition on Abuse of Market Dominance, which further explain the key points regarding imposing fines and confiscation of illegal gains.

ii Behavioural remedies

Along with sanctions, Article 47 of the AML provides that the regulator may impose cease-and-desist orders to stop illegal abusive conduct, although there is no explicit legal basis regarding whether and how the regulator may impose such interim measures for abusive conduct. Previous cases provide little clarification in this regard, owing to their lack of transparency.

iii Structural remedies

To date, there are no effective antitrust-related laws, regulations or rules in China explicitly authorising the SAMR to impose structural remedies on undertakings for violation of Article 17 of the AML. Accordingly, all previous cases suggest that the regulators do not adopt structural remedies for abuse of dominance.

However, Article 45 of the AML does not delineate the scope of the commitment that the undertakings under investigation may make, so it remains to be seen whether a dominance investigation can be closed on the basis of structural commitments.

VI PROCEDURE

As mentioned above, on 1 September 2019, the Abuse of Dominance Provisions promulgated by the SAMR went into force and replaced previous regulations of the former SAIC and NDRC with regards to dominance.

The Abuse of Dominance Provisions relating to substantive provisions, such as how to define the market dominance power and the behaviours of abuse, are mainly integrated with provisions of the SAIC's Rules on the Prohibition of the Abuse of Market Dominance, the SAIC Regulation on Prohibition of Abuses of Intellectual Property Rights, the SAIC Provisions and Procedures on Investigation of Monopoly Agreements and Abuse of Dominant Market Position and the NDRC Regulations on Anti-Price Monopolies.

A notable procedural change is that the Abuse of Dominance Provisions provide a blanket authorisation for provincial AMRs to investigate and penalise abusive conduct within their respective administrative regions. Previously, investigations by provincial agencies into price-related abuses were authorised on a blanket scale by the NDRC, while investigations into non-price-related abuses were authorized on a case-by-case basis by the SAIC. The new Abuse of Dominance Provisions ended the fragmented regime of authorisation and will likely increase the efficiency in handling abuse of dominance cases.

Meanwhile, the Interim Provisions on Administrative Penalty Procedures for Market Administration (the Penalty Procedural Provisions) came into effect on 1 April 2019, and these cover the common procedural provisions regarding administrative penalties issued by the SAMR. By contrast, the Abuse of Dominance Provisions provide special provisions on investigating abuse of market dominance.

Considering these two sets of regulations, the stages of SAMR investigations are as follows:

a An antitrust investigation can be triggered largely from four possible sources:
- *ex officio* discovery;
- reports by undertakings;
- case transfer from other government agencies; and
- case assignment from higher-level agencies.

b The Abuse of Dominance Provisions provide that the SAMR shall be responsible for, or authorise the relevant provincial market regulatory authorities to be responsible for, investigation and punishment of the following monopoly acts:
- that have occurred across provinces, autonomous regions and centrally administered municipalities;
- that are complicated or have a significant impact nationwide; and
- that are deemed by the SAMR to be under its own jurisdiction. The provincial branches shall be responsible for enforcement against cases that have occurred within their administrative region. Further, commissioned by the SAMR, the provincial branches can conduct investigations in the name of the SAMR.

c It falls within the regulators' discretion to determine whether to open a formal investigation after receiving a lead.

d Investigative measures include:

- conducting an inspection by entering business premises or another relevant place;
- interviewing business operators under investigation, interested parties or other relevant entities or individuals;
- checking and duplicating, inter alia, relevant documents, agreements, account books, business correspondence and electronic data for the business operators under investigation, interested parties or other relevant entities or individuals;
- registering the evidence for preservation in advance where there is a likelihood that the evidence may be destroyed or lost, or difficult to obtain later;
- seizing and detaining relevant evidence; and
- checking the bank accounts of the business operators under investigation.

e Undertakings under investigation can offer commitments at any stage of an investigation. The regulators are entitled to decide whether to accept the commitments. If the antitrust agency determines that the conduct at issue is likely to constitute an abuse of market dominance, the regulator will not accept commitments offered by the undertaking but will issue an administrative decision.

f The authorities may issue punishment decisions when they consider that the undertaking concerned has violated Article 17 of the AML. The regulators should publish the decisions.

g If unsatisfied with a decision, the undertakings under investigation may apply for an administrative review or file an administrative lawsuit with a court for judicial review.

The Abuse of Dominance Provisions do not specify the statutory deadlines of investigation; therefore, some procedures may last either for a relatively long time or short timeframe, depending on specific situations in individual cases.

VII PRIVATE ENFORCEMENT

The AML creates a private right of action against monopolistic conduct under Article 50, which provides that '[w]here the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liabilities according to law'. The Supreme People's Court further clarifies that '[w]here a plaintiff directly files a civil lawsuit with the people's court or files a civil lawsuit with the people's court after a decision of the anti-monopoly law enforcement authority affirming the existence of monopolistic conduct comes into force, if the lawsuit satisfies other conditions for lawsuit acceptance as prescribed by law, the people's court shall accept the lawsuit'.

Among private actions, collective actions are available in China in the form of representative actions under Articles 53 and 54 of the Civil Procedure Law, which are similar to class actions in the United States. However, collective actions are not common either in antitrust disputes or in other causes of action. This is because the law has not provided clear guidance as to some key issues in representative action, such as the elements of representative action, the type of applicable cases, the division of damages awarded and the appeals mechanism. Hence, no antitrust collective action has been brought in China yet.

In contrast, private actions brought by putative individual victims are commonly seen, although the prevailing rate for antitrust plaintiffs is still low relative to other types of civil actions. The reasons are either because the plaintiffs are not in a position to carry the burden

of proof or because the real issue in dispute is not an antitrust claim and does not cause any antitrust injury, but rather is a regular contract or tort dispute that is outside the scope of antitrust law.

VIII FUTURE DEVELOPMENTS

As China enters the 12th year of AML implementation, it is expected to step up legislative and enforcement efforts against abuse of market dominance.

On 2 January 2020, the SAMR initiated the process for revising the AML for the first time in 12 years by unveiling a draft amendment for public comment. The draft amendment added a specific provision for assessing market dominance of internet companies, which echoed the analytical framework already adopted in the Abuse of Dominance Provisions (see Section III for more details). These provisions signal an emphasis on the fast-growing internet economy and potential increased enforcement in the coming years. However, since China has not issued an administrative decision against abuses in the internet sector yet, how the provisions are to be interpreted in practice will be closely watched.

Aside from the internet sector, industries that concern daily livelihood will continue to be top enforcement priorities. As discussed in Section II, the five administrative decisions issued in 2019 all concerned daily livelihood (three in public utilities, one in pharmaceutical and one in construction materials). Companies in these sectors are reminded to assess their market positions and scrutinise potential abuses on a regular basis.

Enforcement efficiency is also expected to increase as provincial AMRs have been given blanket authorisation for investigation. In fact, all the five abuse decisions in 2019 were issued by provincial AMRs (three by Jiangsu AML, one by Shanghai AMR and one by Tianjin AMR). More familiar with local firms and market conditions, the provincial AMRs will play a more active role in antitrust enforcement and ease the burden on the SAMR so that the latter can focus on more significant and complicated cases.

Private enforcement is also expected to step up in the coming year. Starting in 2019, the Supreme People's Court began to hear all appeals from first-instance judgments and rulings from local courts. While having issued a few important decisions to resolve procedural issues, the Supreme Court has yet to make substantive rulings that may have lasting and precedential value for China's antitrust enforcement going forward.

Appendix 1

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Zhan Hao is the managing partner of AnJie Law Firm. He has obtained a PhD in law and conducted postdoctoral research on microeconomics. He is an arbitrator for the China International Economic and Trade Arbitration Commission and the vice president of the Competition Commission of the ICC China .

Dr Zhan has successfully defended clients in antitrust litigations before Chinese courts, and also has an abundance of experience in representing clients in antitrust investigations. For instance, he represented respondents in China's first antitrust investigation into price cartels, obtaining suspension of the investigation. Dr Zhan has assisted many multinational and SOEs in concentration antitrust filings in China, such as the ChemChina/Syngenta deal, and to date he has secured approvals for all the transactions he has represented. He has served in multiple fields, including pharmaceuticals, automobile, energy, finance, machinery, electronics, textiles, aviation, high-tech and consumer goods.

He has been extensively involved in the drafting, advising, discussion and formulation of the Chinese Anti-Monopoly Law and its supporting regulations.

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Song Ying is a partner at AnJie Law Firm. She graduated from the University of Bonn in Germany with a master's degree in competition law. Ms Song has extensive experience in representing multinational and domestic clients in antitrust investigations, and has advised clients across a broad range of sectors, such as the internet, aviation, automobile, pharmaceuticals, electronics, telecommunications, chemicals, energy, household electrical appliance, infant formula, food and semiconductor sectors. She has represented clients in several high-profile antitrust litigation cases in China, such as the *Panasonic* case, and filed many concentration antitrust notifications with SAMR and MOFCOM of China, such as the *ChemChina/Syngenta* deal. With an in-depth experience of Chinese antitrust enforcement, Ms Song has also assisted companies in antitrust compliance.

She has also been involved in the drafting, advising, discussion and formulation of the supporting regulations of the Chinese Anti-Monopoly Law. Ms Song has been named as a recommended antitrust lawyer of the PRC by *Chambers and Partners* and *The Legal 500* from 2017 to 2020.

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