

## China Antitrust Update (Nov-Dec, 2022)

December 31, 2022

From November to December 2022<sup>1</sup>, in the legislation and policy-making area, the State Administration for Market Regulation (the “SAMR”) and the Supreme People’s Court (the “Supreme Court”) released respectively *the Anti-Unfair Competition Law (Revised Draft for Public Comments)* and *the Provisions on Several Issues Concerning the Application of Laws in the Trial of Civil Monopoly Dispute Cases (Draft for Public Comments)*, soliciting public comments on the amendments to the aforementioned law and judicial interpretation. In the law enforcement area, the SAMR conditionally approved the proposed acquisition of Asiana Airlines by Korean Air Lines. Zhejiang Civil Explosive Materials Trade Association and four civil blasting equipment companies were penalized for cartel agreements; a medical devices corporate was penalized for resale price maintenance, and the operators of cnki.net, two API enterprises and two water supply enterprises received administrative penalty notices from law enforcement authorities for abuse of market dominance. In the judicial area, the Supreme Court clarified the principles of adjudication in two cases: the arbitration clauses shall not be the obvious and absolute basis for excluding courts’ jurisdiction over monopoly agreements disputes; when determining “exclusive dealing” under the Anti-monopoly Law, the behaviors can be both explicit and direct, and implicit and indirect. The Supreme People’s Procuratorate (the “Supreme Procuratorate”) filed a protest against the case of Shell’s abuse of market dominance, and the Supreme Court will retry this case.

### Legislation and Policy Area

- On November 22, 2022, the SAMR released *the Anti-Unfair Competition Law (Revised Draft for Public Comments)* (“*Revised Draft for Comments*”),<sup>2</sup> soliciting comments publicly. With regard to the enforcement trends reflected in the Revised Draft for Comments, embedded with observations in practice, the key points are summarized as follows.
  - *Revised Draft for Comments* mainly focuses on the new types of unfair competition in the digital economy: on the basis of the Article 12 (Internet-specific Article) of the current *Anti-Unfair Competition Law*, which regulates traffic hijacking, improper interference and malicious incompatibility, five types of unfair competition are added, namely, malicious trading, traffic hijacking, platform blocking, and illegal data capture through keyword association, setting false operation options, etc., as well as the “big data discriminatory pricing”.

<sup>1</sup> Relevant information is as of December 31, 2022 and is calculated on the date when the case was closed. The “December” hereafter shall mean “as of December 31, 2022”.

<sup>2</sup> For more details of the SAMR’s Announcement on *the Anti-Unfair Competition Law (Revised Draft for Public Comments)*, please see: [https://www.samr.gov.cn/hd/zjdc/202211/t20221121\\_351812.html](https://www.samr.gov.cn/hd/zjdc/202211/t20221121_351812.html)

### 海问律师事务所 HAIWEN & PARTNERS

北京市海问律师事务所

地址：北京市朝阳区东三环中路5号财富金融中心20层（邮编100020）  
Address: 20/F, Fortune Financial Center, 5 Dong San Huan Central Road, Chaoyang District, Beijing 100020, China  
电话(Tel): (+86 10) 8560 6888 传真(Fax): (+86 10) 8560 6999 [www.haiwen-law.com](http://www.haiwen-law.com)

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- Re-introducing the concept of “[comparatively advantageous position](#)”, stipulating that operators with the comparatively advantageous market position shall not, without justifiable reasons, implement certain behaviors that unreasonably restrict the business operations of the counterparties or impose unreasonable conditions on them. The “comparatively advantageous position” refers to the operator’s advantages in technology, capital, number of users, industry influence, etc. and other undertakings’ reliance on the operator in the transaction.
- Introducing a brand-new concept of “[commercial data](#)” to regulate operators’ specific behaviors of improper access to or use of other undertakings’ commercial data, attempting to typify illegal actions of commercial data access and utilization (particularly, using unlawful/inappropriate/malicious access, and to a degree sufficient for substantial substitution as evaluation factors and criteria) in order to facilitate the flow and utilization of data.
- Clarifying that [platform operators should strengthen competition compliance managements and establish fair competition rules within the platform](#).
- [Improving the criteria for determining commercial bribery](#): clarifying that bribery includes instructing others to bribe, adding “transaction counterparties” to the targets of bribe (instead of limiting it to the counterparties’ staff), and increasing the legal liability for accepting bribes.
- [Improving the criteria for identifying counterfeit confusion, false advertising, prize-giving sales, and commercial defamation](#).
- Promoting the establishment and improvement of trade secret protection system, which integrates trade secret self-protection, administrative protection and judicial protection.
- [Explicitly regulating unfair competition by instructing or assisting others](#): explicitly stipulating that operators shall not instruct others to provide commercial bribery; not provide planning, production and distribution services for false advertising; not instruct others to fabricate, disseminate false or misleading information or damage other undertakings’ reputation, and providing for the corresponding legal liabilities.
- [Adjusting administrative investigation procedures and refining legal liabilities](#).

For more comments over the above, please see *Haiwen Alert: the Anti-Unfair Competition Law (Revised Draft for Public Comments)*.<sup>3</sup>

- On November 18, 2022, the Supreme Court issued *the Provisions on Several Issues Concerning the Application of Laws in the Trial of Civil Monopoly Dispute Cases (Draft for Public Comments)* (the “**Judicial Interpretation of Antitrust Civil Litigation**”) to seek public comments.<sup>4</sup> The *Judicial Interpretation of Antitrust Civil Litigation* provides comprehensive and detailed stipulations on antitrust civil litigation for both procedure and substantive issues, on the basis of *the Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Laws*

<sup>3</sup> For more specific comments on *the Anti-Unfair Competition Law (Revised Draft for Public Comments)*, please see *Haiwen Observations: the Anti-Unfair Competition Law (Revised Draft for Public Comments)*, <https://mp.weixin.qq.com/s/TPMliCpb44t-5WETTPgeUg>

<sup>4</sup> The Supreme Court’s notice of *the Provisions on Several Issues Concerning the Application of Laws in the Trial of Civil Monopoly Dispute Cases (Draft for Public Comments)* and its specific contents, please see: <https://www.court.gov.cn/xinshidai-xiangqing-380101.html>

in *Hearing Civil Dispute Cases Arising from Monopolistic behaviors*, released in 2012. In particular, it [adds the judicial judgment standards regarding antitrust substantive reviewing and the regulations on internet platforms behaviors](#). It is expected that a new upsurge of antitrust civil litigation will arise following the official promulgation of *the Judicial Interpretation of Antitrust Civil Litigation*. Specifically:

- With respect to procedures: (1) Regarding jurisdiction, clarifying that [the arbitration agreements between the parties cannot interfere the court's exercise of jurisdiction](#); for offshore monopoly conducts, it is stipulated that the jurisdictional court is determined by the place where the results of the direct and substantial impact on competition in the domestic market occur, the place where other appropriate connections with the dispute exist or the place of the plaintiff's domicile; (2) In relation to the burden of proof, clarifying and refining the rules on the burden of proof concerning various types of monopolistic conducts for both the plaintiff and the defendant, and on the whole, [reducing the burden of proof on the plaintiff](#).
- In the substantive aspect: Introducing and explicating concepts of [“single economic entity”](#), [“agency”](#), etc., which is helpful for the determination of monopolistic conducts; responding to hot topics, such as [“pay-for-delay agreements”](#), [“most-favored-nation treatment”](#) and [“platform blocking”](#), providing detailed guidelines for identification.
- On December 27, 2022, the SAMR released the feedback on the public consultation of the Provisions on the Review of Concentration of Undertakings (Draft for Public Comments) (the **“Review Provisions”**) and the Provisions of the State Council on the Thresholds for Prior Notification of Concentrations of Undertakings (Revised Draft for Public Comments) (the **“Thresholds Provisions”**). Among them, a total of 326 comments were received on the Review Provisions, mainly related to the definition of relevant concepts and determination factors, stop-clock system, the application conditions for investigations to concentration of undertakings, etc.; a total of 53 comments were received on the Thresholds Provisions, mainly related to the definition of relevant concepts, calculation method, application conditions, etc. Moving forward, the SAMR would amend and improve the corresponding provisions based on the comments received and advance the relevant work according to the procedures of amendments to administrative regulations.
- On November 14, 2022, Shanghai Administration for Market Regulation issued six guidelines in the areas of antitrust, including *the Guidelines on the Notification of Concentration of Undertakings in Shanghai*, *the Guidelines on Cooperation with Antitrust Investigations*, *the Guidelines on Leniency for Horizontal Monopoly Agreements*, *the Guidelines on Simplified Procedures for the Notification of Concentration of Undertakings*, *the Guidelines on Name of the Notification of Concentration of Undertakings*, and *the Guidelines on the Calculation of Turnover in the Notification of Concentration of Undertakings for Financial Industry*.<sup>5</sup>
- On November 17, 2022, Jiangxi Administration for Market Regulation released *the Anti-monopoly Compliance Guidelines on the Digital Economy Field of Jiangxi Province*, hierarchically describing [the manifestations of monopoly conducts in the digital economy](#) in three aspects: monopoly agreements, abuse of dominance, and concentration of undertakings, combined with the characteristics of the digital economy and application scenarios in the digital economy; [listing the typical high-risk monopoly behaviors with the characteristics of the digital economy](#); and sorting out [the anti-monopoly compliance priorities of undertakings in the digital](#)

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<sup>5</sup> For the notice and more details of the six guidelines issued by the Shanghai AMR, please see: <http://scjgj.sh.gov.cn/919/20221114/2c984ad68467834501847411f2ca0d25.html>

economy in terms of commitment to compliance, cooperation with investigations, applying and withdrawing commitments, active proof, exemptions and exemptions of application, application of simplified procedures, complaints and reports, etc.<sup>6</sup>

- On November 22, 2022, Shandong Administration for Market Regulation, the High People’s Court of Shandong Province and the People’s Procuratorate of Shandong Province jointly issued *the Implementation Opinions on Strengthening the Collaboration Between Anti-Monopoly Administrative Enforcement and Judicial Adjudication (the “Opinions”)*, which is [the first implementation opinion in China jointly issued by the provincial market regulation department, the provincial court and the provincial procuratorate in respect of the convergence and collaboration of trial, public interest litigation prosecution and administrative law enforcement for monopoly cases](#). The *Opinions* make specific provisions for the three aforementioned departments in connection with the anti-monopoly administrative enforcement standards and judicial adjudication standards, rules and application of laws of administrative enforcement and public interest litigation, the extent and quantification criteria of illegal enterprises infringing on the public interest of society, and the collaboration and cooperation in relevant important areas; and establish an information communication mechanism involving multiple parties for handling case leads and an information research and judgment mechanism for key industries and fields.<sup>7</sup>

### Enforcement Area

- Merger Control Review
  - **Non-conditional Clearance:** From November to December 2022, 141 cases were cleared without conditions by the SAMR, involving industrial sectors of Internet, energy, chemistry, transportation, optical products, real estate, food, private equity investment fund management, etc.
  - **Conditional Clearance:** On December 26, 2022, the equity acquisition of Asiana Airlines by Korean Air Lines was conditionally approved by the SAMR. The review of this case lasted for nearly two years, and the parties had withdrawn and then refiled the case twice. Both Asiana Airlines and Korean Air Lines are engaged in air passenger and cargo transport services. After the transaction, Korean Air Lines will obtain sole control over Asiana Airlines. The SAMR found that the proposed transaction will or is likely to eliminate and restrict competition to the services markets of scheduled air passenger transport involving 15 routes between Seoul and Zhangjiajie / Xi’an / Shenzhen / Hangzhou / Nanjing / Guangzhou / Beijing / Changsha / Shanghai / Dalian / Tianjin / Yanji, and between Busan and Qingdao / Beijing / Shanghai. In this regard, the SAMR has cleared the transaction with conditions imposed as below:
    - (1) [Returning certain flight slots](#). Upon the request of the new entrants, whereas certain conditions are met, both parties to the transaction and the undertaking post transaction will return a certain number of flight slots of specific airports on the corresponding routes to the flight slots coordinator of the relevant airports.
    - (2) [Returning traffic rights](#). Upon the request of new Korean entrants, both parties to the transaction and the undertaking post transaction shall cooperate with the Ministry of Land, Infrastructure and Transport of South

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<sup>6</sup> For more specific details of *the Anti-monopoly Compliance Guidelines on the Digital Economy Field of Jiangxi Province*, please see: [http://amr.jiangxi.gov.cn/art/2022/11/17/art\\_22493\\_4225088.html](http://amr.jiangxi.gov.cn/art/2022/11/17/art_22493_4225088.html)

<sup>7</sup> The information about the *Opinions* is from the China Market Regulation News, please see: [http://www.cmrrn.com.cn/content/2022-11/24/content\\_223788.html](http://www.cmrrn.com.cn/content/2022-11/24/content_223788.html)

Korea to return part of the traffic right on four specific routes held by both parties to the transaction and the undertaking post transaction. After the returning of traffic right, the market share of the undertaking post transaction on the relevant routes can be reduced to less than 50%.

- (3) **Ensuring a stable supply.** The annual supply (measured by flight frequency and number of seats) of both parties to the transaction and the undertaking post transaction on routes between Seoul - Guangzhou and Seoul - Dalian shall remain the same as in 2019, except for adjustments approved by the SAMR due to market changes or other reasonable causes.
- (4) **Renewing air passenger transportation agreements.** On the 15 specific routes, both parties to the transaction and the undertaking post transaction shall not refuse the new entrant's request to sign the coordinated transport agreement, special prorate agreement and code sharing agreement on the relevant routes without justified reasons; for the existed relevant agreements between the parties and Chinese airlines, shall not refuse the request for renewal proposed by Chinese airlines and the request for resigning when the content of the relevant agreement must be changed due to this transaction.
- (5) **Ensuring auxiliary services for air passenger transport.** Both parties to the transaction and the undertaking post transaction shall, in accordance with the FRAND principle and as resources and capabilities permitted, provide relevant air passenger ground services in airports in South Korea to new Chinese entrants to the 15 specific routes; shall ensure reasonable pricing when the contract is renewed for the existing air passenger ground service agreements; shall not refuse the request by new entrants to sign frequent flyer plans on the 15 specific routes, nor refuse the request to renew the existing frequent flyer plans on relevant routes without justified reasons.
- (6) **Making compliance promises.** Both parties to the transaction and the undertaking post transaction shall not increase the price of air tickets of relevant routes and air passenger ground services without proper reasons beyond the range of normal cost and reasonable profit; shall not implement pricing behaviors that eliminate or restrict competition for the purpose of increasing market share. In the process of Asiana Airlines' withdrawal from and change of relevant aviation alliance, both parties to the transaction and the undertaking post transaction shall take reasonable and necessary data protection measures in accordance with relevant laws and regulations, and build data protection systems to avoid customer data leakage.

- Cartel Agreements

- On December 16, 2022, the SAMR published an administrative penalty imposed by Zhejiang Administration for Market Regulation (the “**Zhejiang AMR**”) on Zhejiang Civil Explosive Equipment Association (“**Explosive Equipment Association**”) and four civil explosive equipment companies including Zhejiang Wuchan Civil Explosive Equipment Co., Ltd., Zhejiang Xinlian Civil Explosive Equipment Co., Ltd., etc. for their conducts of cartel agreements. In the case, Explosive Equipment Association organized the four civil explosive equipment companies involved to engage in the following behaviors: adoption of an **exclusive distribution system** of civil explosive materials in Zhejiang Province through a number of meetings, communications, etc.; **uniformly increasing the sales price** of civil explosive equipment manufacturers and **fixing the resale price** of the general distributor of civil explosive equipment; **limiting the amount of production and sales** of civil explosive materials through management of purchase and sale contracts; and **prohibiting the relevant operators from purchasing** civil explosive materials from outside. The Zhejiang AMR accordingly ordered the parties to stop their

illegal acts, imposed a fine of RMB400,000 on Explosive Equipment Association and a fine of 2.5% of their respective sales in 2020 on the four civil explosive equipment companies (approximately RMB34.2 million in total), and at the same time, confiscated RMB18.32 million of illegal gains of Zhejiang Wuchan Civil Explosive Equipment Co., Ltd. (the general distributor).

- On December 30, 2022, the SAMR released an administrative penalty imposed by Beijing Administration for Market Regulation (the “**Beijing AMR**”) on Straumann (Beijing) Medical Devices Trading Co Ltd. (“**Straumann**”) for resale price maintenance. In this case, for Straumann’s dental implants involved in the case, Straumann [reached monopoly agreements fixing resale prices](#) with its large-scale private dental chains or dental support organization (“**DSO**”) customers and distributors through direct negotiations, emails and telephone calls, etc; and [set the minimum resale price](#) for products sold to public hospitals, DSO customers (excluding large ones), and ordinary private dental institutions by setting minimum resale guidance prices, face-to-face notifications, phone calls, WeChat, emails and so on. The above mentioned monopoly agreements were effectively implemented. Straumann also [bolstered the implementation by monitoring distributors’ resale prices, formulating a price management system, and punishing distributors that sold at lower prices](#). Straumann’s dental implants have a relatively large share in the market, and users are dependent on its products, the Beijing AMR noted, and the monopoly agreements conducted by Straumann excluded and restricted market competition, and harmed the interests of consumers and public interests. Accordingly, the Beijing AMR ordered Straumann to discontinue the unlawful behaviors and imposed a fine of 3% of its 2020 annual sales, amounting to approximately RMB34.38 million.

- Abuse of Market Dominance

- On December 26, 2022, SAMR published a penalty imposed on Tongfang Knowledge Network (Beijing) Technology Co., Ltd., Tongfang Knowledge Network Digital Publishing Technology Co., Ltd. and China Academic Journals (CD Edition) Electronic Magazine Co., Ltd (collectively, the “**Parties**”), the [operators of cnki.net](#), for abuse of market dominance.
  - The relevant market in this case is the “[Chinese academic literature online database services in China](#)”. Based on the reasons that the share of the Parties [in the relevant market exceeds 50%](#), users are highly dependent on the Parties’ services, and the relevant market is highly concentrated, etc., SAMR determined that the Parties have a dominant position in the relevant market. SAMR believed that since 2014, the Parties have, through exclusive cooperation, [limited academic journal publishers and universities to only provide academic literature data to them, sold Chinese academic literature network database services at an unfairly high price](#) through continuous and significant increase of service price, splitting the database to raise prices in disguised form, etc., which is violation of the *Anti-Monopoly Law* and constitutes abuse of market dominance.
  - In response to SAMR’s investigation, the Parties raised the following defenses: they have not forced their partners to sign the exclusive cooperation agreements, and [the implementation of the exclusive cooperation agreements was not for the purpose of abusing market dominance](#). And in light of the situations of relevant market and industry, [the exclusive cooperation was reasonable to a certain extent, and had no significant negative impact on academic development](#). Academic journal publishers could publish the journals on their own websites and the effective dissemination, communication and use of the journals was not affected. The aforesaid reasons were not accepted by SAMR.

- The Parties have abused market dominance by selling services at unfairly high prices and limiting trades with obvious subjective intention and actual harm of excluding and restricting competition. The circumstance is relatively serious and has lasted for a long time and caused strong social concern. However, considering that the Parties could carry out in-depth self-inspection and actively make rectifications<sup>8</sup>, SAMR ordered the Parties to stop the illegal acts, and imposed a fine of 5% of the Parties’ annual revenue in China in 2021, amounting to RMB87.6 million.
- On December 29, 2022, SAMR released a notice of administrative penalty issued by Guangxi Zhuang Autonomous Region Administration for Market Regulation (the “**Guangxi AMR**”), which is imposed on Yongfu County Water Supply Company for abuse of market dominance. In this case, Yongfu County Water Supply Company [abused its dominance in the city tap water supply service market of Yongfu County, Guilin City by exclusive dealing without justifiable grounds](#). The Guangxi AMR determined that the aforementioned behaviors were violation of the Anti-Monopoly Law, accordingly ordered Yongfu County Water Supply Company to stop the illegal acts, and imposed a fine of 3% of its annual revenue in China in 2020, amounting to RMB0.31 million.
- On November 18, 2022, Jinyao Pharmaceutical Co., Ltd. (600488.SH) announced that its subsidiary Tianjin Jinyao Pharmaceutical Co., Ltd. (the “**Jinyao Pharmaceutical**”) received a Notice of Administrative Penalty issued by Tianjin Administration for Market Regulation (the “**Tianjin AMR**”) on November 17, 2022, stipulating that the Tianjin AMR believed Jinyao Pharmaceutical abused its dominance in the China market of carmustine injection by [selling carmustine injection at unfairly high prices](#). The Tianjin AMR intends to order Jinyao Pharmaceutical to stop the illegal acts and impose a fine of 2% of its annual sales in 2019, which is approximately RMB27 million.
- On December 13, 2022, Northeast Pharmaceutical Group Co., Ltd. (000597.SZ) (“**Northeast Pharm**”) published an announcement that on December 9, 2022, it received a Notice of Administrative Penalty issued by the Liaoning Administration for Market Regulation (the “**Liaoning AMR**”), stipulating that Northeast Pharm abused its dominant position in the L-carnitine API market in China from November 2018 to June 2019 by [selling L-carnitine API at unfairly high prices](#), which constituted [abuse of market dominance to sell commodities at unfairly high prices](#). The Liaoning AMR intends to impose a fine of 2% of Northeast Pharm’s annual sales in China in 2018, which is approximately RMB133 million.
- On December 21, 2022, the Shandong Administration for Market Regulation published an administrative penalty, stipulating that Rizhao Water Group Supply Co., Ltd. [abused its market dominance by charging customers fees that should have been borne by itself](#), thus was imposed a fine of 1% of its annual sales in 2020, which is approximately RMB2.18 million.

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<sup>8</sup> On December 26, 2022, the operators of cnki.net released 15 rectification measures, which include: promoting non-exclusive cooperation mode within the industry, terminating exclusive cooperation agreements, reducing sales price, improving pricing mechanism, correcting unreasonable sales mode, establishing price communication mechanism, expanding scope of free services, strengthening the public welfare attribute of the platform, legally obtaining the authorization of the copyright owner, improving royalty payment methods, improving service mechanism for authors, opening up plagiarism check service to individuals, improving technology level of academic misconduct detection, improving the compliance management system and strengthening the compliance risk management.

## Judicial Area

- The Supreme Court clarified in the judgment of *Disputes over Vertical Monopoly Agreement between Beijing Longsheng Xingye Technology Development Co., Ltd. (“Longsheng”) and Yushidu Intelligent Equipment (Tianjin) Co., Ltd. (“Yushidu”) and Others*<sup>9</sup>, that [the arbitration clause agreed by the parties in the agreement cannot be an obvious and absolute legal basis for excluding the jurisdiction of the court in monopoly agreement disputes.](#)
  - Facts: Honeywell Corporation and Longsheng established a distribution partnership in respect of the alarm business and signed a Distribution Agreement, which requires Longsheng to maintain its inventory and restricted Longsheng’s sales channels and resale prices. However, Honeywell Corporation failed to fulfill its commitment to assist Longsheng in eliminating its inventories. In 2018, due to a business spin-off, Yushidu took over Honeywell Corporation’s business involved in this case. The parties signed a Settlement Agreement in the following year, agreeing that Yushidu would repay Longsheng for the compensation for the price difference borne by Longsheng when it acted as a distributor of Honeywell Corporation and assist Longsheng in selling the inventory products. At the same time, Yushidu required that Longsheng must comply with its pricing system. Thus Longsheng filed a lawsuit, requesting to confirm that Yushidu and Honeywell Corporation had implemented a vertical monopoly agreement to exclude and restrict competition and the relevant agreements were invalid, and requiring the two companies to compensate its economic losses of RMB1 million. The court of first instance held that the Distribution Agreement and the Settlement Agreement signed by the parties both contained arbitration clauses, which should apply to follow the common intention of the parties regarding dispute settlement at the time of entering into the agreements. Longsheng appealed and argued that the case was a civil infringement dispute arising from monopolistic conducts and was not arbitrable.
  - Key points of the judgment: The Supreme Court held that, the case was a civil dispute arising from monopoly agreements, so it was a monopoly civil dispute case, where the *Anti-Monopoly Law* should be used as the basis for judgment. The action for confirming monopoly behaviors or simultaneously claiming for damages arising from the signing and performance of the contract is different from the action of contract or tort that the parties can choose for general contract relations. In the former situation, [the contract between the victim and the party engaging in monopolistic conduct is only a vehicle or tool for the party engaging in monopolistic conduct to implement the monopolistic conduct, and the part of the contract related to monopolistic conduct is the source of the infringement. The determination and treatment of the monopolistic conducts is beyond the rights and obligations relationship between the victim and the party engaging in monopolistic conduct.](#) Therefore, the contents and objects of the trial of such monopoly disputes are [beyond the scope covered by the arbitration clauses agreed between the victim and the party engaging in monopolistic conduct.](#) The arbitration clauses agreed by the parties in the agreement cannot be an obvious and absolute legal basis for excluding the jurisdiction of the court in disputes over monopoly agreements.
- The Supreme Court clarified in the judgment of *Dispute over Abuse of Market Dominance between Weihai Hongfu Real Estate Co., Ltd. (“Hongfu”) and Weihai Water Group Co., Ltd. (“Water Group”)*<sup>10</sup>, that [exclusive dealing can be carried out in an implicit way.](#)

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<sup>9</sup> For more details, please see SPC (2022) Zui Gao Fa Zhi Min Zhong No.1276 Civil Ruling.

<sup>10</sup> For more details, please see SPC (2022) Zui Gao Fa Zhi Min Zhong No.395 Civil Judgment.



- Facts: Water Group is the only urban public water supply enterprise in Weihai City. The *Service Guideline for Water Supply and Drainage Business of the Water Group* (the “**Service Guideline**”) involved was published on the website of the Housing and Urban-Rural Development Bureau of Weihai City on January 17, 2018, specifying the business process for new projects and specific information on the materials to be submitted and fees involved in each step. The contact information listed in the *Service Guideline* only includes the information of the Water Group and its subordinate Design Institute, and does not include the information of other water supply and drainage design and construction enterprises. The *Service Guideline* has not specified that the design or construction can be carried out by other enterprises. With respect to a water supply facility designed and constructed by Hongfu, Water Group required this facility to be demolished and a subsidiary of Water Group to be the design and construction enterprise of the project. Accordingly, Hongfu requested the court to confirm that Water Group’s behaviors constituted monopolistic behavior of abusing market dominance such as restriction of dealings, etc. and it requested Water Group to bear the losses of about RMB2.3 million caused to the company arising from the monopolistic behaviors, as well as the reasonable expenses and litigation fees for investigating and preventing the monopolistic behaviors. Water Group argued that the *Service Guideline* was prepared by the Weihai Municipal Government for the convenience of the public, and its purpose was providing convenient services to the public rather than restricting the transaction parties.
  
- Key points of the judgment: The Supreme Court held that, in determining whether the an undertaking restricts the transaction counterparties to only trade with it or with an undertaking designated by it, the key is whether the undertaking has substantially restricted the counterparty’s right of free choice. **Exclusive dealing can be explicit and direct, as well as implicit and indirect.** If undertakings with market dominance are operators of public utilities (such as water supply, power supply, gas supply, etc.), or other operators with an exclusive position according to laws and regulations, who have the characteristics of both market operation and industry management, they can exert greater influence on market competition. When they only recommend specific undertakings in the relevant transactions or only disclose information about specific undertakings, it is difficult for the counterparty, based on the above situation, to freely choose other undertakings to trade with. Generally, it can be preliminarily determined that the undertaking has conducted exclusive dealing. At the same time, Water Group is the exclusive operator of the urban public water supply service market in Weihai City, and it also undertakes the responsibility of water supply and drainage municipal business management such as the review and acceptance of water supply facilities in Weihai City. When Water Group and its subordinate enterprises participate in the competition of the construction of water supply facilities market in Weihai City, **it has a higher obligation to avoid excluding and restricting competition.**
  
- The Supreme Court disclosed in the ruling of *Disputes over Abuse of Market Dominance between Shanxi Changlin Industrial Co., Ltd. and Shell (China) Co., Ltd.*<sup>11</sup> that Shanxi Changlin Industrial Co., Ltd. filed a complaint to the Supreme Procuratorate against the Beijing High People’s Court (2019) Jing Min Xia Zhong No.44 Civil Ruling. Upon review, the Supreme Procuratorate filed a protest with the Supreme Court in accordance with the law, and the Supreme Court will rehear the case.
  
- On November 17, 2022, the Supreme Court held a press conference to introduce the

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<sup>11</sup> For more details, please see the SPC (2022) Zui Gao Fa Min Kang No.12 Civil Ruling.

information on strengthening the judiciary work of anti-monopoly and anti-unfair competition by the courts and 10 typical cases respectively<sup>12</sup>, which generally reflects the strengthening of the anti-monopoly and anti-unfair competition adjudication and judicial position of maintaining the order of fair competition in the market. Specifically,

- 10 typical anti-monopoly cases involved: basic principles for the determining invalidity of civil conducts involving horizontal monopoly agreements; methods for determining “other concerted conduct” in monopoly agreements; standards for calculation of damages in horizontal monopoly agreement and identification standards for losses arising from exclusive dealing; necessity of antitrust review of “drug patent reverse payment agreement” in non-monopoly cases, ways of review and the limits thereof, etc.
- The 10 typical anti-unfair competition cases broadly involved both online and offline fields, covering various types of cases such as market confusion, commercial defamation, Internet unfair competition, etc. including the unfair competition of lucky draw on WeChat, live streaming of Olympic Games by streamers, dispute over the infringement on technological secrets of “Guanidineacetic acid”, and preservation measures against infringement on technological secrets of “mass production testing system of the chips”, etc.

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For more detailed questions regarding the antitrust and competition in China , please feel free to contact Haiwen partners Qian Xiaoqiang ([qianxiaoqiang@haiwen-law.com](mailto:qianxiaoqiang@haiwen-law.com)), LIN Xixiang ([linxixiang@haiwen-law.com](mailto:linxixiang@haiwen-law.com)), or your usual Haiwen & Partners contact.

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<sup>12</sup> For more details, please see: <https://www.court.gov.cn/zixun-xiangqing-324511.html>