

## **Regulations Prohibiting Abuses of Dominant Market Position (Draft for Comments)**

*The following is an unofficial translation prepared by [MWE China Law Offices](#).*

Article 1 These Regulations are formulated in accordance with the relevant provisions of the Anti-Monopoly Law of the People's Republic of China for the purpose of prohibiting abuses of dominant market position.

Article 2 Any business operator having a dominant market position must not abuse its dominant market position to eliminate or restrict competition.

Article 3 For the purpose of these Regulations, "dominant market position" means a market position held by business operators that have the ability to control the prices or quantities of commodities or other trading conditions in the relevant market or to block or affect the entry of other business operators into the relevant market.

"Other trading conditions" means the factors, other than commodity prices and quantities, which can substantially affect market transactions, including commodity grades, terms of payment, methods of delivery, after-sale services, *etc.*

"To block or affect the entry of other business operators into the relevant market" means excluding or delaying the entry of other business operators into the relevant market within a reasonable time period, or the cost for other business operators to enter into the relevant market being significantly increased, so that they cannot effectively compete with existing enterprises, *etc.*

Article 4 The determination and presumption of dominant market position shall be based on the definition of relevant market.

Article 5 Determining whether a business operator has a dominant market position shall be based on the following factors:

- (1) The market share of such business operator in the relevant market, and the competition condition of the relevant market. "Market share" means the sales volume for a specific commodity or percentage of the sales amount of the business operator in the relevant market. "Competition condition" of the relevant market includes the development of the relevant market, number of existing competitors, whether there are any potential competitors and entry obstacles, the market shares of other business operators in the relevant market, the degree of commodity diversity, market transparency, *etc.*
- (2) The ability of the business operator to control the sales market or the raw material supply market. The ability to control the sales market or the raw material supply market includes the ability to control the supply or

sales market channels, the ability to affect or decide the price, quantity, terms of contract or other trading conditions, or the ability to obtain raw materials with priority, *etc.* Raw materials include the materials, semi-finished products, parts and components, and relevant equipment that are indispensable for the production and operation of the enterprises.

- (3) The financial strength and technical conditions of the business operator. The financial strength and technical conditions include assets scale, financial capability, profitability, financing capability, R&D capability, technical equipment, technical renovation and application capability, intellectual property owned, *etc.* When analysing the financial strength and technical conditions of the business operator, the financial strength and technical conditions of its affiliates and its influence on the entry into the relevant market and the expansion of production capability, *etc.*, shall also be taken into account.
- (4) Dependency of other business operators on such business operator in respect to transactions. The factors affecting dependency include transaction volumes with such business operator, the duration of the transaction relationship with such business operator, and the difficulty for the trading counter parties to switch to other business operators.
- (5) Difficulty for other business operators to enter the relevant market. The factors affecting the entry of business operators into the relevant market include the market access system, possession of essential facilities such as networks, sales channels, capitals and technologies, and other conditions for economy of scale, cost advantage, *etc.*
- (6) Other factors relating to the determination of the dominant market position of the business operator.

Article 6 Under any of the following circumstances, a business operator may be presumed to have a dominant market position:

- (1) The market share of one business operator accounts for one-half or more of the relevant market;
- (2) The total market share of two business operators accounts for two-thirds or more in the relevant market; or
- (3) The total market share of three business operators accounts for three-fourths or more in the relevant market.

Under the circumstances prescribed in Item 2 or 3 of the preceding paragraph, if any of the business operators has a market share of less than one-tenth, that business operator shall not be considered to have a dominant market position.

Article 7 A business operator that has been presumed to have a dominant market position shall not be considered as having a dominant market position if it can provide the following evidences to prove that it has no dominant market position:

- (1) It is relatively easy for other business operators to enter the relevant market.
- (2) The competition in the relevant market is relatively sufficient.
- (3) According to the factors as listed in Article 5, the business operator has no ability to control the prices and quantities of the commodities in the relevant market or other trading conditions, or to obstruct or affect the entry of other business operators into the relevant market.

If the conditions as listed in Items 2 and 3 of Article 6 are satisfied, the business operators shall also prove that there is substantive competition between or among them, and a single competitor has no outstanding market position as compared with other business operators.

Article 8 The business operators having dominant market position are prohibited from reducing, restricting or interrupting the existing transactions with the trading counter parties or refusing to engage in new transactions with the trading counter parties without justifiable causes. Refusing, reducing, restricting or interrupting transactions with the transaction counter parties under the same trading conditions may be deemed as without justifiable cause.

If other business operators cannot conduct business without entering the network or other essential facilities owned by the business operator having a dominant market position, such business operator having a dominant market position may not refuse other business operators to use the network or other essential facilities on reasonable conditions.

Article 9 The business operators having dominant market position are prohibited from limiting trading counter parties to conduct deals exclusively with the business operators or the parties designated by the business operators without any justifiable cause.

Article 10 The business operators having dominant market positions are prohibited from implementing tie-in sales or imposing other unreasonable trading conditions when trading without any justifiable cause:

- (1) The purchase of a specific commodity is conditional upon the purchase of a different commodity or commodities or a promise not to purchase such commodity from any other business operator. Different commodity or commodities means the commodity or commodities that the purchaser can separately purchase if there is no tie-in sale;

- (2) Compulsorily bundling or combining two or more kinds of commodities that can be individually sold; or
- (3) Combining two or more kinds of commodities for sale, and meanwhile separately selling any of such commodities, but the price for individually purchasing any of such commodities is relatively higher, and causing or potentially causing competitors in the relevant market to be excluded or compelled to quit from the market, or causing or potentially causing other business operators to be obstructed from entering such market.

Article 11 The business operators having dominant market positions are prohibited from applying discriminatory treatments on trading quantity, quality grade, condition of payment, condition of delivery, after-sale service or other trading conditions to their trading counter parties with same status in equivalent transactions without any justifiable cause.

Equivalent transactions means, during the same or similar time period, transactions are conducted with respect to the same or similar commodities under the same or similar trading conditions such as trading quantity.

Article 12 The State Administration for Industry and Commerce (SAIC) shall be responsible according to laws for determining the activities of abuses of dominant market position except for the price monopoly.

Article 13 A business operator suspected of abusing its dominant market position may state its reason on the legality of its activity to the Anti-Monopoly Enforcement Agency under the SAIC and provide relevant evidence.

Article 14 The SAIC shall be responsible for investigating the following abuses of dominant market position (except for price monopoly):

- (1) Having a substantial influence throughout the country; and
- (2) The SAIC considers that it has jurisdiction over them.

Article 15 If necessary, the SAIC may authorise the Administrative Organisations for Industry and Commerce of the provinces, autonomous regions and municipalities directly under the Central Government to investigate the following abuses of dominant market position:

- (1) Occurring within the administrative region of the province;
- (2) An abuse occurs across provinces, autonomous regions or municipalities directly under the Central Government, but the abuse mainly occurs within the administrative region; and

- (3) Any abuse that the SAIC believes can be delegated to an Administration for Industry and Commerce of the provinces for jurisdiction.

Article 16 Where the business operators abuse their dominant market position in violation of Articles 8 to 12 of these Regulations, the Administrative Organisations for Industry and Commerce shall order them to stop the illegal behaviors, confiscate the illegal gains, and impose a fine of 1 per cent to 10 per cent of the total sales revenue made in the previous year.

When determining the specific amount of fines, the Administrative Organisations for Industry and Commerce shall consider such factors as nature, extent and duration of the violations.

Article 17 The parties who object to the decision, such as administrative punishment, made by an Administrative Organisation for Industry and Commerce pursuant to these Regulations may apply for administrative reconsideration or file an administrative lawsuit according to law.

Article 18 The anti-monopoly enforcement personnel of the Administrative Organisations for Industry and Commerce shall strictly perform their administrative duties according to law, pursuant to the Procedural Provisions on the Investigation by the Administrations for Industry and Commerce of the Cases of Monopoly Agreement and Abuse of Dominant Market Position. Where any such personnel abuse their authority, neglect their duty, commit malpractice, or disclose trade secrets known when enforcing the law, and no crime is constituted, they may be given a disciplinary sanction, and if a crime is constituted, they shall be prosecuted for criminal liability.

Article 19 The Commodities as mentioned herein shall include services.

Article 20 The State Administration for Industry and Commerce shall be responsible for interpreting these Regulations.

Article 21 These Regulations shall become effective as of \_\_\_\_\_ 2009.