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Five Supporting Rules for Anti-monopoly Law

On December 29, 2010, the National Development and Reform Commission of People's Republic of China (the "PRC") (the "NDRC") released the Provisions for Anti-price Monopoly (the "APM Provision") and the Provisions on the Administrative Procedures for the Enforcement of the Provisions of Anti-price Monopoly (the "APM Procedures Provision"). Two days later, on December 31, 2010, the State Administration for Industry and Commerce of PRC (the "SAIC") promulgated the Rules for Prohibiting Monopoly Agreements (the "Monopoly Agreements Rule"), the Rules for Prohibiting Activities through Abuse of Dominant Market Positions (the "Dominant Market Positions Rule") and the Rules for Prohibiting Activities Eliminating or Restricting Market Competition through Authority Abuse (the "Authority Abuse Rule").

The APM Provision, APM Procedures Provision, Monopoly Agreements Rule, Dominant Market Position Rule, and Authority Abuse Rule are recognized as the Five Supporting Rules to the Anti-monopoly Law of the PRC (the "AM Law") and aim at supplying competent administrative authorities with specific implementation measures to follow in practical operation. The Five Supporting Rules entered into force on February 1, 2011.

This issue of China Legal Report intends to provide a comprehensive introduction of the key provisions and main functions of the Five Supporting Rules.

I. Two Rules Released by NDRC

Pursuant to Section 3 Article 2 of the Notice of the General Office of the State Council on Issuing the Provisions on the Main Functions, Internal Bodies and Staffing of the National Development and Reform Commission issued on July 15, 2008, investigating in and dealing with price monopoly conducts are within the main responsibilities of NDRC.

i. Provisions for Anti-price Monopoly

The APM Provision shall apply to price monopolistic conducts in economic activities within the territory of PRC, and the price monopolistic conducts outside the territory of PRC that have the effect of eliminating or restricting competition on the domestic market of China.

A. Definition to Conducts of Price Monopoly

Pursuant to Article 3 of the APM Provision, conducts of price monopoly includes:

- 1) Price monopoly agreements concluded by business operators;
- 2) Business operators with dominant market positions eliminate or restrict competition by means of price; and

3) Administrative organ or organization empowered by a law or administrative regulation to administer public affairs abuses its administrative powers to eliminate or restrict competition.

In other words, this provision applies to agreements, or activities of abuse of dominant market positions, and abuse of administrative powers relating to price monopoly.

B. Price Monopoly Agreement

In accordance with Article 5 of this APM Provision, price monopoly agreement refers to an agreement, decision, or other concerted behavior¹ that may eliminate or restrict price competition.

i) Horizontal price monopoly agreements:

Article 7 details the provision with regard to price monopoly between operators in a competitive relationship² as:

- 1) Agreement for fixing or changing the price level of commodities and services (the “commodities”);
- 2) Agreement for fixing or changing the variation range of prices;
- 3) Agreement for fixing or changing prices of process fees, discounts, or other fees alike, which have an impact on price;
- 4) Transaction with any third party on the basis of agreed price;
- 5) Agreement on a standard formula employed in calculating prices;
- 6) Agreement which provides that without the consent from other operators who enter the price monopoly agreement, no price changes shall be allowed;
- 7) Employment of other means to fix or change prices; and
- 8) Any other price monopoly agreements as determined by the price regulatory authority of the State Council.

ii) Vertical price monopoly agreements:

According to Article 8, a business operator shall be prohibited from reaching any of the following price fixing agreements with its transaction counterparty:

¹ According to Article 6 of APM Law: In identification “Concerted Behavior”, following elements shall be taken into account: i) whether operators’ price-related activities are consistent; ii) whether operators have communicated with each other. Moreover, determining a concerted action, shall base on the market structure, market variation, and other conditions alike.

² Relevant principle provision is provided in Section 1 Article 13 of AM Law.

- 1) a price fixing agreement which fixes the price of commodities resold to a third party;
- 2) a price fixing agreement which restricts the minimum price of commodities resold to a third party; or
- 3) any other price fixing agreement as determined by the competent price department of the State Council.

iii) Activities by industry association:

Article 9 of the APM Provision elaborates three types of activities by industry association:

- 1) Stipulating rules, decisions, notices to eliminate or restrict price competition;
- 2) Organizing operators to reach any price monopoly agreements prohibited by the APM Provision; and
- 3) Other activities in relation with organizing operators to reach or execute price monopoly agreements.

C. Abuse of Market Dominant Positions

Article 11 to 16 of the APM Provision specify the six categories of activities that will be identified as abuse of market dominant positions as provided in the AM Law³. More significantly, several terms are first clarified, which are essential in determining conducts through abuse of dominant position:

According to Article 114 of the AMP Provision, “Unfairly high price” and “unfairly low price” means:

- 1) The selling price or purchasing price is obviously higher or lower than the price at which other business operators sell or buy the same commodities;
- 2) On the basis of basically stabilized costs, the increase of the selling price or decrease of the purchasing price is out of the normal range;
- 3) the mark-up rate of the sold commodities is obviously higher than the growth rate of cost or whether the reduction rate of the bought commodities is obviously higher than the decrease rate of cost of transaction counterparty; or
- 4) Other relevant factors that need to be taken into account.

³ Provided from Article 17 (1) to (6) of AM Law.

⁴ Article 11: A business operator with a dominant market status shall not sell commodities at an unfairly high price or buy commodities at an unfairly low price.

“Justifiable reasons” mentioned in Article 125 of the APM Provision are:

- 1) To decrease price for selling fresh, live, or seasonal commodities, commodities with upcoming expiration of shelf life, or other overstock commodities;
- 2) To decrease prices for selling commodity resulted from cleaning debts, changing or closing business;
- 3) To decrease prices for promoting new products; and
- 4) Other reasons that can justify the conducts.

“Justifiable reasons” in Article 136 of the AMP Provision are:

- 1) The transaction counterparty has seriously bad credit record, or continuously deteriorating business operating condition, which may risk the safety of the transaction;
- 2) The transaction counterparty is able to purchase from other business operators the same type of commodities, or alternatives at a reasonable price, or sell commodities to other operators at a reasonable price; and
- 3) Other reasons that can justify the conducts.

“Justifiable reasons” in Article 147 of the AMP Provision:

- 1) For the purpose of securing the quality and safety of the products;
- 2) For the purpose of maintaining a good brand image or improving the service level;
- 3) Significantly reducing the costs, improving efficiency, and enabling consumers to share the benefits accrued; and
- 4) Other reasons that can justify the conducts.

D. Abuse of Administrative Powers

Activities of abuse of administrative powers are stipulated in Article 20, 21, and 22 of the APM Provision. They are more like the paraphrase of Article 33(1), 36, and 37 in AM Law, and therefore, they will not be repeated hereof.

⁵ Article 12: A business operator with a dominant market status shall not sell commodities at a price below cost without any justifiable reason.

⁶ Article 13: Without any justifiable reason, a business operator with a dominant market status shall not refuse to trade with a transaction counterparty in a disguise form by setting a too high selling price or a too low buying price.

⁷ Article 14: Without any justifiable reason, a business operator with a dominant market status shall not limit its transaction counterparty by price discount or other means to transactions only with it or the business operators designated by it.

ii. Provisions on Administrative Procedures for the Enforcement of the Provisions of Anti-price Monopoly

This APM Procedures Provision targets at regulating the conducts by relevant price regulatory authorities in following aspects: case report and acceptance, measures of investigation, legal procedures on how to handle the cases, suspension of investigation, and lenient policy. Among all those aspects, the lenient policy deserves mentioning here, which is not included in the AM Law.

As stipulated in Article 14 of the APM Procedures Provision, a business operator who voluntarily reports to the price regulatory authorities the information with respect to its conclusion of price monopoly agreement and provides essential evidence⁸ shall be given a mitigated punishment or exempted from punishment. The first operator to report shall be exempted from punishment. The second one shall be given punishment no more than 50% of the standard punishment. Other operators who report will be given punishment no less than 50% of the standard one.

II. Three Rules Released by SAIC

Pursuant to Section 6 Article 2 of the Notice of the General Office of the State Council on Issuing the Provisions on the Main Functions, Internal Bodies and Staffing of the State Administration of Industry and Commerce issued on July 1, 2008, administration of monopoly agreements, and conducts with regard to eliminating or restricting competition through abuse of dominant market positions and authority (except price monopoly conducts) are within the main responsibilities of SAIC. Therefore, the three rules released by SAIC exclude the administration of price related monopoly activities.

i. Rules for Prohibiting Monopoly Agreements

This Monopoly Agreements Rule stipulates the detailed types of monopoly agreements as below:

A. Restricting the production quantity or sales volume of commodities⁹:

- 1) Restricting the production quantity of commodities, or certain type or model of commodities by means of restricting or fixing the production quantity, ceasing production, or any other means alike;

⁸ Essential evidence here means evidence which is key issue in identifying price monopoly agreement.

⁹ Provided in Article 4 of the Monopoly Agreements Rule.

2) Restricting the sales volume of commodities, or certain type or model of commodities by means of refusing or restricting commodity provisions.

B. Dividing the sales market or the raw material supply market¹⁰:

- 1) Dividing sales territory, targets, types, or quantities of commodities;
- 2) Dividing purchasing zones, types, or quantities of raw materials, semi-finished products, spare parts, relevant equipment, or other raw materials alike; and
- 3) Dividing suppliers of raw materials, semi-finished products, relevant equipment, or other raw materials alike.

C. Restricting the purchase of new technology, new facilities, or the development of new technology or products¹¹:

Restricting the purchase or use of new technology or techniques;
Restricting the purchase, lease, or use of new facilities;
Restricting the investment or research on new technology, techniques, or products;
Refusing to apply new technology, techniques, or facilities; and
Refusing to adopt new technology standards.

D. Jointly boycotting transactions¹²:

- 1) Jointly refusing to provide or sell commodities to specific business operators;
- 2) Jointly refusing to purchase or sell commodities supplied by specific business operators;
and
- 3) Jointly restricting specific operator to transact with operators who have competitive relationship with those who participate the joint boycotting.

Moreover, as provided in Article 9 monopoly conducts of industry association include:

- 1) Stipulating or releasing articles of association, rules, decisions, notices, standards containing contents of eliminating or restricting competition;
- 2) Calling, organizing or encouraging business operators who are members of the industry association to reach agreement, or issue resolutions, minutes, or memoranda with contents of eliminating or restricting competition.

¹⁰ Provided in Article 5 of the Monopoly Agreements Rule.

¹¹ Provided in Article 6 of the Monopoly Agreements Rule.

¹² Provided in Article 7 of the Monopoly Agreements Rule.

This Monopoly Agreements Rule also provides lenient policy, similar to that in APM Procedures Provision. The first business operator who voluntarily reports to SAIC relevant information of its conclusion of monopoly agreements and provides essential evidence¹³ shall be exempted from punishment, and the other ones who report will be given mitigated punishment based on the information provided.

ii. Rules for Prohibiting Activities through Abuse of Dominant Market Positions

In Article 3 of these Rules, “other transaction condition” refers to conditions, other than price and quantity of the commodities, which will bring substantial impact to the transaction, including quality of commodities, payment conditions, means of delivery, or after-sale service.

Article 4, 5, 6, and 7 of these Rules explain the detailed conducts of abuse of dominant market positions listed in Article 17 (3) to (6) of the AM Law:

A. Refusing transaction with transaction counterparty without justifiable reasons:

- 1) Reducing the current quantity of transaction with the transaction counterparty;
- 2) Delaying or suspending the current transaction with the transaction counterparty;
- 3) Refusing new transaction with the transaction counterparty;
- 4) Setting restrictive conditions causing the transaction counterparty can hardly continue transacting with such operators; and
- 5) Refusing the transaction counterparty to use facilities, which are a must in the activities of manufacturing and operating.¹⁴

B. Conducting following activities restrictive transaction without justifiable reasons:

- 1) Restricting their transaction counterparty so that it may conduct deals exclusively with themselves;
- 2) Restricting their transaction counterparty so that it may conduct deals exclusively with any operator instructed by them; and
- 3) Restricting their transaction counterparty so that it will not deal with any competitors to them.

¹³ According to Article 11 essential evidence means evidence which is significant in initiating investigation or in identifying monopoly agreement by SAIC, including operators to such monopoly agreement, scope of the commodities related, contents of the agreements and way of conclusion, detailed performance of such agreement.

¹⁴ In identifying 5), following issues shall be taken into consideration: i) feasibility of construction in necessity, ii) the extent of dependence on the facility by the other party in manufacture and operation, iii) possibility in providing the facility by the operator and the possible impact to such operator in manufacture and operation.

C. Implementing tie-in sales or imposing other unreasonable trading conditions at the time of trading without any justifiable reasons or attaching unjustifiable conditions in transaction:

- 1) Tie-in or combining different commodities for sale while contrary to custom of transaction and consumption, or ignoring the functions of the commodities;
- 2) Imposing unjustifiable restriction to term of the contract terms of payment, transportation of the commodities, or ways of delivery or service;
- 3) Imposing unjustifiable restriction to area and target of sales, and after-sale services; and
- 4) Imposing conditions irrelevant to transaction.

D. Applying discriminatory treatments to their transaction counterparty with equal standing without any justifiable reasons:

- 1) Implementing trading on different quantity, type, and quality;
- 2) Implementing trading with different favourable conditions like discount on quantity;
- 3) Implementing trading with different payment condition or ways of delivery; and
- 4) Providing different after-sale services like offering different content and term of warranty, items and time of maintenance, provision of spare parts, and technical assistance.

In accordance with Article 8 of Dominant Market Positions Rule, in identifying “justifiable reasons”, following factors need to be taken into consideration:

- 1) Whether relevant activities are conducted by operators on the basis of normal operation and for the purpose of gaining normal benefits; and
- 2) The impact brought by relevant activities to the efficiency of economy, public interest, and development of economy.

iii. Rules for Prohibiting Activities Eliminating or Restricting Market Competition through Authority Abuse

The Authority Abuse Rules aim at stopping the acts of abusing administrative power for the purpose of excluding or limiting competition. Moreover, Chapter V¹⁵ of these rules explain activities in relation with authority abuse provided in the AM Law from Article 32 to Article 37.

¹⁵ Chapter V Abuse of Administrative Power to Eliminate or Restrict Competition

It is the first time provided that business operators may not engage in the following conducts:

- 1) Concluding and executing monopoly agreements or abusing the dominant market position on the ground of the administrative restriction of administrative organs or organizations empowered by law or administrative regulation to administer public affairs;
 - 2) Concluding and executing monopoly agreements or abusing the dominant market position on the ground of the administrative authorization of administrative organs or organizations empowered by law or administrative regulation to administer public affairs;
- or
- 3) Concluding and executing monopoly agreements or abusing the dominant market position on the ground of the administrative provisions formulated and promulgated by administrative organs or organizations empowered by law or administrative regulation to administer public affairs.

III Conclusion

Lack of clear and detailed grounds was a barrier in the administration of monopoly activities, while the release of those Five Supporting Rules supplies specific standards in determining the activities with respect to price monopoly, reaching monopoly agreement (except for price-related), abuse of dominant market position, and abuse of administrative authorities. Additionally, they also provide relevant authorities with the procedures for the investigation of monopoly-related cases. Spokesmen of SAIC and NDRC express that they will take the introduction of the Five Supporting Rules as an opportunity to enhance their work in the anti-monopoly field.

Before the release of these five supporting rules, apart from the merger control notification rules, the AM Law had a rather symbolic character in Chinese business. It has been announced by the Chinese competent authorities that this will materially change and the AM Law will become more practical.

As a result of the release of these five supporting rules, the AM Law will fully play its role in our daily business life.

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