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NDRC's Antitrust Practice

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I. INTRODUCTION

Over two years have passed since the Anti-Monopoly Law (“AML”) entered into effect on August 1, 2008. According to the AML and related provisions issued by the State Council, the National Development and Reform Commission (“NDRC”), the Ministry of Commerce (“MOFCOM”), and the State Administration for Industry and Commerce (“SAIC”) were all appointed as antitrust enforcement authorities in China. Among those authorities, NDRC is responsible for investigating and sanctioning price monopoly conduct in accordance with the law, including price monopoly agreements and abuses of a dominant market position by companies, or abuses of administrative powers to eliminate or restrict competition.

Within NDRC, the Department of Price Supervision has assumed responsibilities for antitrust policy and enforcement. At the same time, in accordance with the related provisions of the AML, NDRC has already delegated powers to the price authorities at the provincial level throughout the country. This delegation allows the provincial authorities to carry out the anti-price monopoly enforcement work within their respective administrative jurisdictions in accordance with the provisions of the AML, and to cooperate with NDRC in their anti-price monopoly investigations. Thus, a two-level anti-price monopoly enforcement system has been established at the national and provincial level.

In addition, NDRC and the provincial departments may further delegate powers within their respective fields of authority to the price departments at a lower level of government to carry out investigations in relation to specific cases of suspected price monopoly conduct.

II. NDRC'S ANTITRUST ENFORCEMENT

Price competition is the most important and most effective form of competition in the market. As a result, price monopoly behavior is one of the most important types of anticompetitive conduct.

When faced with strong competition, companies at times are inclined to enter into price monopoly agreements (for example, in the form of a pricing alliance) in order to strengthen their own positions and reduce operational risks. Other firms abuse their dominant market position by way of excessive pricing, predatory pricing, forcing transactions, tying, and the imposition of unreasonable transactional terms. These types of conduct directly injure market competition and harm the legitimate rights and interests of consumers and other companies.

Following the AML's entry into force, we have received a large number of complaints from consumers, companies, and lawyers concerning cement, book, paper manufacturing,

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insurance, courier service, as well as other industries. In accordance with the relevant AML provisions, we will carry out the necessary investigations into those cases where complaints are submitted in writing and corresponding evidence and factual descriptions are provided.

At present, the cases which NDRC is currently investigating and handling can be categorized into the following types of anticompetitive conduct:

- monopoly agreements organized by an industry association which fix or change product prices, or set a floor price at which products can be resold to third parties;
- monopoly agreements fixing or changing product prices directly entered into by competing firms; and
- abuses by companies with a dominant market position by way of tying products, thereby disrupting the market order.

NDRC has imposed administrative penalties according to the law in several cases where its investigation confirmed the existence of anticompetitive conduct, and some of these cases have been published on the website (www.ndrc.gov.cn).

During the enforcement process, we adhere to the following principles:

- Active enforcement. In cases of suspected price monopoly, we will actively conduct investigations to firmly prohibit price monopoly conduct, in order to protect fair competition in the market and safeguard the interests of consumers and the public.
- Non-discrimination. We treat all business operators equally, regardless of whether the investigation target is a state-owned enterprise, private company, or a multinational corporation. We follow identical enforcement standards without any bias, and our examination in antitrust enforcement is fair and objective.
- Openness in accordance with the law. Upon our own initiative, we actively publish cases involving price monopolies that have been investigated and handled in accordance with the law. For those cases that we have already made public, we not only disclosed details on the facts underlying the law-breaking conduct of the company under investigation and the final outcome of the investigation, but we also disclosed the relevant evidence and the rationale for imposing an administrative sanction. This allows companies to obtain additional legal certainty, anticipate the legality of their actions, and thus adjust their conduct accordingly.

III. NDRC'S NORMATIVE EFFORTS IN THE ANTITRUST FIELD

As a result of the diverse, changing and complex nature of business activities, the AML has set out the basic principles and fundamentals of the antitrust system. On December 29, 2010, NDRC adopted two implementing regulations—the Anti-Price Monopoly Regulation and the Regulation on the Anti-Price Monopoly Administrative Enforcement Procedure (“NDRC Procedural Regulation”). In effect since February 1, 2011, these regulations aim to provide comprehensive legal guidance and enable companies and organizations to increase compliance with the law. At the same time, they grant the price authorities a mandate for implementation in accordance with the law, and increase the authorities’ operational effectiveness.

The Anti-Price Monopoly Regulation contains detailed provisions on three types of monopolistic conduct—*i.e.*, price monopoly agreements, abuses of a dominant market position,

and abuses of administrative powers to eliminate or restrict competition. For example, the regulation stipulates that the prohibition of price monopoly agreements between competitors to fix or change prices covers the following specific types of conduct:

- fixing or changing the price level;
- fixing or changing the range of price fluctuations;
- fixing or changing service charges, discounts, or other fees affecting prices;
- using an agreed price as the basis for transactions with third parties;
- agreeing to calculate prices based on a standard formula;
- providing that companies not participating in the agreement must agree not to change prices; and
- fixing or changing prices by way of other implicit means.

The NDRC Procedural Regulation mainly provides clarifications on the acceptance of leniency applications, investigative measures, case-handling in accordance with the law, suspension of investigations, immunity from liability, and the responsibilities of the price departments. These clarifications regulate how the price departments are to fulfil their anti-price monopoly duties in accordance with the law.

With regard to leniency programs, we encourage companies to voluntarily report illegal conduct. If a company reports the circumstances relating to the conclusion of a price monopoly agreement and provides important evidence to a price department, the fine imposed on it will be waived or reduced, depending on the specifics of the circumstances. In particular, the first to voluntarily report the conclusion of a price monopoly agreement and provide important evidence to the price department may receive immunity from fines. The second may receive a reduction in the amount of the fine of no less than 50 percent. Other companies that voluntarily report the conclusion of a price monopoly agreement and provide important evidence to the price department may receive a reduction in the amount of the fine of up to 50 percent.

IV. NDRC'S INTERNATIONAL ANTITRUST COOPERATION AND COMMUNICATION

With economic globalization, markets of different countries and regions have become increasingly interrelated. In addition, in antitrust cases involving multinational companies, the impact of anticompetitive conduct may go beyond a single country or region, and affect various countries and regions. Therefore, it is necessary to strengthen antitrust law enforcement cooperation across countries and regions.

At the same time, the AML has been in effect for only two and a half years and the experience in antitrust law enforcement is still relatively limited. We hope to learn from the successful practice and experience of countries with developed market economies in order to improve our antitrust law enforcement capacities and standards.

NDRC puts a strong emphasis on, and actively engages in, international cooperation and communication in antitrust matters. Since entry into force of the AML, we have gradually established close relationships with antitrust authorities in other countries and regions, including the U.S. Department of Justice, the Federal Trade Commission, the Directorate-General of

Competition at the European Commission, the Office of Fair Trading in the United Kingdom (“OFT”), the Korean and Japanese Fair Trading Commissions, and so on.

In January 2011, we entered into a Memorandum of Understanding (“MoU”) with the OFT to develop antitrust cooperation. The MoU lays down the basic framework for bilateral cooperation. We have already reached a preliminary understanding with the United States and European Union antitrust authorities regarding similar cooperation MoUs, for which the relevant preparations are underway. We are willing to work jointly with antitrust authorities around the world to maintain fair competition in the market and to promote the dynamism and development of the global economy.