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A Set of Five Regulations to Effectively Implement the Anti- Monopoly Law

Anti-Monopoly and Anti-Unfair
Competition Enforcement Bureau

State Administration for Industry and
Commerce, P.R.C.

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I. INTRODUCTION

Antitrust laws are essential to a market economy. The effective implementation of China's Anti-Monopoly Law ("AML") is of immense significance for safeguarding fair competition, strengthening market dynamics and competition, protecting the interests of consumers and the public, and promoting the healthy development of the socialist market economy.

The State Administration for Industry and Commerce ("SAIC")—one of the antitrust agencies designated by the State Council—has enacted a set of five antitrust regulations in order to guarantee the smooth implementation of the AML.

On December 31, 2010, SAIC published a set of three substantive regulations implementing the AML: the Regulation on the Industry and Commerce Authorities Prohibiting Conduct Involving Monopoly Agreements ("SAIC Monopoly Agreements Regulation"), the Regulation on the Industry and Commerce Authorities Prohibiting Conduct Abusing a Dominant Market Position ("SAIC Abuse of Dominance Regulation"), and the Regulation on the Industry and Commerce Authorities Prohibiting Conduct Abusing Administrative Powers to Eliminate or Restrict Competition ("SAIC Abuse of Administrative Powers Regulation"). These three substantive regulations formally entered into force on February 1, 2011.

Prior to this, on May 26, 2009, SAIC published two regulations implementing the AML's procedural aspects—*i.e.*, the SAIC Regulation on the Procedure for Preventing Conduct Abusing Administrative Powers to Eliminate or Restrict Competition ("SAIC Administrative Powers Procedural Regulation") and the SAIC Regulation on the Procedure for Investigation and Handling of Cases of Monopoly Agreements and Abuses of a Dominant Market Position ("SAIC Agreements and Abuses Procedural Regulation"). These two regulations became formally effective on July 1, 2009.

II. SAIC'S PROCEDURAL REGULATIONS

In line with the AML, the SAIC Administrative Powers Procedural Regulation and the SAIC Agreements and Abuses Procedural Regulation set out clear and detailed provisions on a range of issues including:

- the delegation of powers—from SAIC at the national level to the administrative authorities for industry and commerce ("AICs") at the provincial level—and AICs' jurisdiction to investigate cases of monopolistic conduct and prevent abuses of administrative powers;
- acceptance and handling of complaints;

- case registration and investigation procedure;
- reporting and filing process for key cases; and
- the system whereby business operators can enter commitments, and the leniency program.

For the delegation of powers to investigate a monopoly agreement or abuse of dominance case, for example, the SAIC Agreements and Abuses Procedural Regulation specifies that the delegation shall be made on a case-by-case basis, except for the matters that affect the entire national territory or deal with important cases. These matters will be handled directly by SAIC. At the same time, the regulation stipulates that an AIC at the provincial level, to which enforcement powers were delegated, may not further sub-delegate powers to a lower-level AIC. This provision is a requirement of the AML and is necessary for the effective implementation of the AML, because the handling of an antitrust case is relatively complex and requires a relatively high degree of specialization. When delegating powers to the provincial-level AICs for case registration and handling in accordance with the law, SAIC needs to strengthen the guidance and supervision of the work of the provincial-level AICs on aspects such as case registration, investigation, sanctions, etc.

Moreover, the SAIC Agreements and Abuses Procedural Regulation clarifies how the leniency program—a special system under the AML—and the system for companies to enter commitments are to be used. Other rules provide further details on the relevant AML's provisions, thereby effectively strengthening the law's operational effect.

III. THE NEW SUBSTANTIVE REGULATIONS

The three new regulations—the SAIC Monopoly Agreements Regulation, the SAIC Abuse of Dominance Regulation, and the SAIC Abuse of Administrative Powers Regulation—set out the AICs' competencies within the framework of the AML. They provide additional details and clarifications on the types of conduct that amount to a monopoly agreement, an abuse of a dominant market position, or an abuse of administrative powers with restrictive effects on competition. As a result, the new regulations increase the operational effectiveness of AICs' antitrust enforcement.

For example, the SAIC Monopoly Agreements Regulation clarifies the concept of a “monopoly agreement” and the various forms such an agreement can take in practice. Indeed, a monopoly agreement can be a written agreement or decision, as well as an oral agreement or decision. In addition, tacit conduct, which is neither written down nor orally expressed, can be considered as “other concerted practices.” The regulation provides detailed guidance on how to determine such other concerted practices.

Furthermore, the SAIC Monopoly Agreements Regulation gives guidance on the methods through which industry associations organize members to reach monopoly agreements, including:

- formulating and publishing constitutions, rules, decisions, notices, and standards of the industry associations which have the effect of eliminating or restricting competition; or
- convening, organizing or pushing members to conclude agreements, decisions, minutes of meetings, or memoranda that eliminate or restrict competition.

The SAIC Monopoly Agreements Regulation also expressly stipulates that, in accordance with the law, SAIC is responsible for determining horizontal and vertical monopoly agreements other than monopoly agreements related to pricing.

The regulation provides clarification and guidance on SAIC's administrative margin of discretion with regard to the leniency program, drawing upon the experience and current practice in international antitrust enforcement and taking the AML's provisions as its basis. AICs will grant immunity from fines to the first company that voluntarily reports the circumstances relating to the conclusion of a monopoly agreement, provides important evidence, and actively and fully cooperates during the investigation. The relevant rules provide AICs with an important basis to effectively investigate and sanction behavior that amounts to conduct involving monopoly agreements.

In turn, the SAIC Abuse of Dominance Regulation provides details on the concept of a "dominant market position," including its determination, dominance presumption, and the latter's rebuttal. The regulation also specifies the different forms that an abuse of a dominant market position can take and the factors to be considered in determining whether valid reasons exist that can justify the conduct. Market activities are complex and variable, and cases involving abuses of a dominant market position display special characteristics. Hence, the SAIC Abuse of Dominance Regulation expressly provides that—when determining and analyzing the justifications—AICs should not only examine whether the conduct in question is based on normal business conduct and profitability. They should also sufficiently take into account whether the conduct creates efficiencies and has a positive impact on the public interest and economic development.

Finally, according to the AML, administrative authorities and organizations that are authorized by laws and regulations to perform public functions must not abuse their administrative powers to eliminate or restrict competition.

At the same time, businesses engaging in monopolistic conduct should be investigated and sanctioned in accordance with the AML, irrespective of their motives. As a result, the SAIC Abuse of Administrative Powers Regulation not only prohibits conduct that amounts to an abuse of administrative powers by administrative authorities and public service organizations with anticompetitive effects, but also prohibits business operators from implementing anticompetitive conduct by way of relying on such abuse of administrative powers.

The SAIC Abuse of Administrative Powers Regulation further stipulates that SAIC and AICs in any province, autonomous region, or municipality directly governed by the State Council are entitled to make proposals to the relevant authority superior to the violating authority on case handling in accordance with the law, in respect with the form of the abuse of administrative powers and its consequences.

IV. CONCLUSION

The set of five regulations implementing the AML, together with the AML itself, constitutes the fundament for AICs' antitrust enforcement. AICs will make use of the opportunity to actively and orderly step up its antitrust enforcement work.