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Suggestions Regarding
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I. INTRODUCTION

High profile cases, such as the *LCD Panel Case*² and the *Maotai Case*³ announced in January 2013, have cast more limelight on China's anti-monopoly enforcement. China's Anti-Monopoly Law ("AML") is entering its fifth year since taking effect on August 1, 2008.⁴ While regulations, rules, and actual cases are still in development, it is expected that these cases and others will further shape antitrust law not only in China, but also in antitrust practices around the world. Given this activity and importance, China's growing anti-monopoly enforcement poses a serious challenge to companies doing business in China, i.e., how to design an efficient antitrust compliance program that minimizes the legal risks?

II. KEY FEATURES OF ANTI-MONOPOLY AGREEMENT ENFORCEMENT IN CHINA

Cartelization has long been recognized as classic monopolistic behavior. China acknowledges the problem in Chapter II in the AML. According to the AML, "monopoly agreement" covers both horizontal monopoly agreements (cartels) and vertical monopoly agreements (such as resale price maintenance ("RPM")). Article 13 prohibits horizontal monopoly agreements, while Article 14 prohibits vertical monopoly agreements.

The two administrative agencies that handle public enforcement against cartels and RPMs, the National Development and Reform Commission ("NDRC") and the State Administration for Industry and Commerce ("SAIC"), have investigated cartel and RPM cases since 2008. They picked up speed in 2012, although not all of the results have been disclosed to the public.⁵

Therefore, China's antitrust enforcement, as evidenced by the 2012 anti-cartel enforcement activity, is booming. The NDRC is leading the way. In the annual meeting of National Price Supervision and Anti-price Monopoly Enforcement organized by NDRC on January 5, 2013, the authority said that one of its key missions in 2013 is "making greater efforts on anti-price monopoly enforcement."⁶ The declaration indicates that NDRC is going to be

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² See NDRC's announcement at http://www.ndrc.gov.cn/xwfb/t20130104_521958.htm.

³ See <http://money.163.com/13/0116/02/8LABV79300253B0H.html>.

⁴ The AML was enacted by the National People's Congress, China's top legislative body, on August 30, 2007.

⁵ In the Chinese governing system, a San Ding (三定, meaning "three points" or "three decisions") is a document approved by the State Council that sets out the duties of the administrative organization, its departments, and the staffing. According to the San Ding, there are three ministries that serve as AML enforcement authorities: the Ministry of Commerce ("MOFCOM") reviews mergers, while the NDRC and SAIC handle cartels and investigations into abuse of dominance. The NDRC reviews cases involving pricing issues and SAIC handles those without pricing issues.

⁶ See http://www.sdpc.gov.cn/jggj/zhd/t20130109_522664.htm.

aggressively fighting against price monopolies. The *Maotai case*, which was disclosed on January 15, 2013, and the hugely influential *LCD Panel*, announced on January 4, 2013, are examples.⁷ To date, NDRC has investigated a total of 49 cases; 35 were cartel and RPM cases.⁸ NDRC has disclosed a total of 10 cases to the public. It is worthwhile to also note that NDRC conducted a dawn raid procedure in one of the undisclosed cartel investigations.

By contrast, SAIC had investigated only 18 cases by the end of 2012, 17 of which were cartel cases and the other being a dominance abuse case.⁹ SAIC has never disclosed any case to the public, except for one administrative monopoly case that is not included in the aforementioned 18 cases.¹⁰

Thus, NDRC has become more aggressive in antitrust law enforcement in China, especially since 2011, when the authority announced it would expand to more than 20 officials, while SAIC has only eight officials handling antitrust cases. With limited human resources and a relatively low profile public image, SAIC has been less active.

It's worthwhile to note here that reports from competitors and consumers have played a substantial role in anti-monopoly enforcement efforts. According to SAIC, all of its 17 anti-cartel investigations were based on reports from consumers or companies.¹¹ The situation is similar with NDRC. Along with the promulgation of the AML in 2008, and the increased enforcement activity in recent years, more and more companies have started to notice if any competitors are conducting anti-competitive behaviors, especially since a report to the antitrust authority would be a strike against competitors and provide benefits to their own businesses. China's consumers are receiving more education about the illegality of cartels and RPMs, and by using internet social media such as Twitter-like Weibo, disclosures and complaints of antitrust violations are convenient and easier to make.

Another important aspect to note regarding this increased activity is that Chinese antitrust authorities are beginning to successfully use their leniency program as a weapon to crack down on cartels. To date, NDRC has applied the leniency system in three cases while SAIC has applied the system in only one case.

NDRC introduced the leniency program for the first time in the *Hydros Case* in 2012. NDRC gave an exemption to three companies; one company received a 100 percent exemption, while two other companies received 50 percent exemptions, respectively. In the *Sea Sand Case*, which NDRC announced to the public in October 2012, one of the cartel members voluntarily submitted to the authority "partial" evidences of the cartel and was exempted from 50 percent of the fine. In the *LCD Panel Case*, AU Optronics was the first among six companies that voluntarily went to NDRC to plead guilty and report relevant information, after which NDRC

⁷ For LCD Panel case, please see http://xwzx.ndrc.gov.cn/zcjd/t20130104_521995.htm, for Maotai Case, please see http://news.xinhuanet.com/yzyd/fortune/20130115/c_114378947.htm.

⁸ See http://www.ceh.com.cn:8080/epaper/uniflows/html/2013/01/22/B01/B01_43.htm.

⁹ See speech delivered by Mr. Teng Jiakai, vice minister of SAIC, at the China Competition Policy and Law Annual Conference, December 18, 2012.

¹⁰ See <http://www.chinanews.com/fz/2011/12-29/3568753.shtml>.

¹¹ See speech delivered by Vice Minister Teng Jiakai of SAIC on December 18, 2012, at <http://www.antimonopolylaw.org/Article/default.asp?id=4041>

officially initiated investigation procedures. That's why AU Optronics was exempted from the fines even though it was still subject to refunding excessive charges and forfeiture of illegal gains. SAIC, in a case concluded in the first half of 2012, relied on the voluntary report of one member company to crack down on a cement output limit cartel in Northeast China.

As for vertical monopoly agreements, since article 14 of the AML only mentions price monopoly agreements, and the promulgated implementation rules for NDRC and SAIC do not extend the definition to non-price monopoly agreements, the article refers to Resale Price Maintenance ("RPM") in China. In the most recent *Maotai case*, NDRC ordered Maotai to stop the RPM (in this case, the practice of setting minimum resale prices for its distributors) and revoked the punishment on distributors who did not follow the RPM. NDRC's enforcement is particularly noteworthy because on May 18, 2012, the Shanghai No. 1 Intermediate Court held in the *Johnson & Johnson Case* that RPM is subject to a rule of reason review, rather than the *per se* rule.¹² The *Maotai case* indicates that NDRC may apply a stricter review against RPM than the Court stipulated, including the possible application of the *per se* rule.

In summary, China's anti-monopoly agreement enforcement in 2012 reveals the following key features:

1. As China's antitrust enforcement is experiencing a booming trend, and dawn raid procedures may increase, companies doing business in China must pay strong attention to antitrust compliance and make all necessary efforts to cooperate with the antitrust authorities;
2. Anti-cartel investigations are the focus of antitrust enforcement. Chinese authorities now devote most of their attention and resources on anti-monopoly agreement enforcement, especially on cartel investigations; also, leniency policies can be successfully applied for;
3. NDRC will likely play a much more important role in China's future AML enforcement, which will change the current situation as MOFCOM (Ministry of Commerce)'s merger control had taken the lead in antitrust practice during the past four years; and
4. RPM is subject to strict review by Chinese authority; NDRC is acting more aggressively against RPM than its counterparts in western jurisdictions.

III. THE CURRENT STATUS OF ANTITRUST COMPLIANCE IN CHINA

As shown by NDRC's cartel and RPM investigations, Chinese authorities have investigated both foreign and domestic companies; cases in point are the China Telecom/China Netcom investigation and the *LCD Panel Case*. It has been published that NDRC had only acted

¹² In the Johnson & Johnson Case, one distributor alleged Johnson & Johnson's setting of resale prices violated the AML and requested for damages of CNY 14.4 million before the court. The judge emphasized that the mere existence of a RPM arrangement is not sufficient for a finding of a monopoly agreement prohibited under Article 14 of the AML. Article 13, Paragraph 2 of the AML should be observed, which defines "monopoly agreements" as "agreements, decisions or other concerted practices that eliminate or restrict competition." Thus whether the RPM arrangement has caused a restrictive or eliminative effect on competition must be assessed. For the decision of this case, please see

<http://www.hshfy.sh.cn:8081/flws/text.jsp?pa=ad3N4aD0xJnRhaD2jqDIwMTCjqbum0rvW0MPxzuUo1qops/XX1rXaMTY5usUmd3o9z>.

in 48 domestic cases prior to the *LCD Panel Case*, but this is not correct. There have been at least two previous investigations against foreign companies. However, this does not mean there is no difference between domestic and foreign entities: the biggest fine to date was imposed on a foreign company (*LCD Panel Case*), and state-owned enterprises have never been seriously punished.

This pattern of enforcement is not consistent with the status of antitrust compliance in China. Few Chinese companies have come to lawyers for antitrust advice; legal assistance regarding antitrust compliance has largely been provided for multinationals doing business in China. This is true not only for international legal firms, but also for local law firms with antitrust teams. And, in 2012, while there were dozens of antitrust seminars held in mainland China, representatives from local Chinese companies were rarely seen.

Among Chinese companies, private sector companies are more active regarding antitrust compliance than state-owned enterprises, even if the latter are much bigger in terms of size or revenue. Article 7 of the AML is widely recognized as a backdoor exit for state-owned enterprises.¹³ As early as August 2008, Mr. Li Rongrong, the then head of the State-owned Assets Supervision and Administration Commission of the State Council (“SASAC”), cited article 7 of the AML as protection for state-owned enterprises against potential antitrust investigations.¹⁴

An additional factor protecting state-owned enterprises is that antitrust enforcement authorities such as NDRC and SAIC are only ministry level agencies under the State Council, while many of the state-owned enterprises are at the same level as NDRC and SAIC in the government (some bosses of the state-owned enterprises are at higher ranks in the communist party system than ministers of NDRC and SAIC). This means that antitrust enforcement authorities are hardly likely to conduct serious investigations or impose significant fines against these state-owned tycoons.

It’s interesting to note that most requests regarding advice on antitrust compliance are from companies in the information, communication, and technology sectors. This is partially because most of the active companies in these sectors are private companies, rather than state-owned enterprises. Compared with traditional industries, there are less government controls and/or regulations in the information, communication, and technology sectors. Fierce competition in these sectors, as shown by the disputes between Tencent and Qihoo, also contributes to an active antitrust compliance effort. Indeed, representatives from the legal

¹³ Article 7 of the AML provides that:

The State shall protect the legitimate business activities of undertakings in the industries controlled by the State-owned economy and vital to national economy or involving national security or industries implementing exclusive operation and sales in accordance with the law. The State shall also supervise and control the price of commodities and services provided by these undertakings and the operation of these undertakings so as to protect the interests of the consumers and facilitate technology progress.

The undertakings in the industries prescribed by the preceding paragraph shall operate, in good faith, in accordance with the law and in a self-disciplined manner, accepting public supervision and shall not harm the interests of the consumers by exploiting their controlling or exclusive dealing position.

¹⁴ See <http://www.infzm.com/content/15783>.

departments of these companies are participating more and more in antitrust seminars/symposiums in Beijing or Shanghai.

Looking forward this may change. As NDRC is pursuing more anti-cartel investigations against domestic violations, even against some state-owned tycoons such as China Telecom/China Netcom, and these companies are becoming the target of increasing criticism from the public, some state-owned enterprises have started to introduce antitrust compliance programs. Also, some state-owned enterprises have launched cooperation projects with research institutes in universities, while others are seeking advice from international and domestic law firms.

As for companies in the private sectors, attention to antitrust compliance is also growing, especially for those private companies with international competition experience. Some small/medium-sized companies have also started to use antitrust law as a weapon against their dominant competitors, either through initiating a private lawsuit in the courts or complaining to NDRC/SAIC about antitrust violations.

However, generally speaking, antitrust compliance for Chinese companies is still at the beginning stage, even for those Chinese multinationals with substantial experience outside China. While China's anti-monopoly agreement regulators were very active in 2012, during the previous period, (2008-2011), real cases were rare, and most of the public's attention was paid to MOFCOM's merger control. Many observers criticized China's AML as a tiger without teeth. Even after the announcement of the record fine in the *LCD Panel* case, some press in China was still critical of the slow progress, with one newspaper headlining the story as the NDRC hitting six foreign tigers that were already dead.¹⁵

Basically, the current status of antitrust compliance in China can be summarized as follows:

1. Multinationals pay more attention to and make more efforts regarding antitrust compliance than domestic companies, and among the domestic companies, the majority of compliance work is done by private companies in the information, communication, and technology sectors;
2. Antitrust compliance programs conducted in China are still at an early stage due to the immature competition culture and the still insufficient antitrust enforcement;
3. Most compliance programs focus on hard-core cartels, especially price-fixing issues with competitors, with the leniency program receiving attention from managements;
4. More people in China have started to recognize the importance of complying with AML's regulation of RPM; and
5. Corporate antitrust compliance programs usually include compliance manuals, antitrust training, and pre-review of important contracts/agreements by outside counsels; however, comprehensive compliance programs are rarely observed.

¹⁵ See *Economics Observer's* comments, at <http://business.sohu.com/20130104/n362392924.shtml>.

IV. WHAT IS AN EFFICIENT ANTITRUST COMPLIANCE PROGRAM IN CHINA?

The most important task of an antitrust compliance program is, of course, to reduce the risk of antitrust violations, especially against this background of growing Chinese antitrust enforcement. Chinese competition law is borrowed from overseas, modeled for the most part from U.S. and EU antitrust law. This reflects the lack of a competition law compliance culture in Chinese business and society. Chinese employees are usually not aware of the dangers of talking about sensitive information with their friends or acquaintances from their competitors. It's not rare, in meetings of trade associations, to hear people publicly talk about pricing issues or coordinated business behaviors. Indeed, most of the cartel cases investigated by NDRC and SAIC refer to involvement of trade associations.¹⁶ Therefore, an effective antitrust compliance program must educate employees about how to significantly reduce legal risk from cartel violations.

Another benefit from corporate compliance programs is that their existence could help argue against or reduce fines before the antitrust authorities in potential antitrust investigations. To date, no information released regarding the NDRC's or SAIC's investigations shows that Chinese antitrust authorities have applied such benefits; however, this is because all of these cases were obvious antitrust violations with inescapable proofs. However, NDRC officials have agreed that if the companies under investigation show the authority all of the records of their communication with competitors, and there are recorded objections regarding any anticompetitive proposals, the investigations against them could be terminated.

And looking forward, officials have said that if the companies establish comprehensive antitrust compliance programs, this fact would not only possibly reduce possible antitrust violations, but also help to argue against any suspicion of cartels which were reached through concerted behaviors as provided in the second paragraph of article 13 of the AML.¹⁷ Even though there are no specific provisions in the AML or in the implementing rules regarding such relief, this action would not be without legal basis. Article 49 of the AML provides that, "[A]nti-monopoly Enforcement Authority shall take factors such as the nature, extent and duration of the illegal conducts into consideration in determining the specific amount of the fines." This provides a statutory basis for the authority to reduce fines for companies with comprehensive antitrust compliance programs.

But the real problem is how to introduce an efficient antitrust compliance program? We suggest the following:

1. A comprehensive antitrust compliance program is the best choice. If a comprehensive compliance program is difficult to introduce, at least an anti-monopoly agreement compliance program should be introduced. Given that most of China's antitrust regulations concern anti-monopoly agreements, especially those involving horizontal cartels, and that trade associations play a key role in a large number of the investigated

¹⁶ See comments by NDRC and SAIC officials made at the Annual Meeting of Experts Group of the Anti-Monopoly Committee under the State Council on December 18, 2012.

¹⁷ For example, in the International Symposium on Competition Compliance held in Shanghai by East China University of Political Science and Law on December 8, 2012, Ms. Li Qing, deputy director general expressed similar opinions. The second paragraph of article 13 of the AML provides that, "Monopoly agreements' in this Law, refer to agreements, decisions or other concerted behaviors that eliminate or restrict competition."

cartels,¹⁸ company employees should be taught to be very cautious regarding any communications with competitors and participations in trade association activities. Even for multinationals with abundant antitrust compliance experience overseas, education on anti-monopoly agreement compliance and how to appropriately handle relationships with competitors and trade associations still needs to be frequently conducted, because competition law compliance in commercial sectors is not an inherent part of China's traditional culture.

2. Given NDRC's strict reviews on RPM, especially their possible application of the *per se* rule, an efficient anti-monopoly agreement compliance program should cover the RPM issue. The compliance program should advise employees not to include explicit RPM in any written agreement, or to attach any punishment clauses for failing to follow resale prices.
3. An anti-monopoly agreement compliance program should also have an efficient emergency action plan in the case of finding any antitrust violations. Employees who discover a cartel should report to top management and the legal department as soon as possible, and every employee should be advised not to destroy any data. Speed is essential. The company management could then come to a decision regarding cooperating with cartel authorities or applying for a leniency application.
4. There is no marker system for leniency application in China. The antitrust authorities rely on both a "first come, first serve" rule and the substantial evidence rule. Based on Article 14 of NDRC's *Provisions on the Administrative Procedures for Law Enforcement against Price Monopoly* and the information we have on the three leniency cases which have conducted by NDRC,¹⁹ the leniency applicant should provide the authority very detailed information regarding the cartels.

V. CONCLUSION

As local practitioners focusing on China's antitrust law enforcement, the authors would like to emphasize that anti-monopoly agreement regulation enforcement will be more active in

¹⁸ See comments by NDRC and SAIC officials made at the Annual Meeting of Experts Group of the Anti-Monopoly Committee under the State Council on December 18, 2012.

¹⁹ Article 14 of NDRC's *Provisions on the Administrative Procedures for Law Enforcement against Price Monopoly* provides that:

Where a business operator voluntarily reports the relevant information on its conclusion of a price fixing agreement to the competent price department of the government and provides important evidence, the competent price department of the government may reduce the punishment on it or exempt it from punishment, as the case may be.

A business operator which is the first to voluntarily report the relevant information on its conclusion of a price fixing agreement and provides importance evidence may be exempted from punishment. A business operator which is the second to voluntarily report the relevant information on its conclusion of a price fixing agreement and provides important evidence may be given a punishment reduced by not less than 50%. Any other business operator which voluntarily reports the relevant information on its conclusion of a price fixing agreement and provides important evidence may be given a punishment reduced by not more than 50%.

Importance evidence refers to evidence which plays a key role in the determination of a price fixing agreement by the competent price department of the government.

China, with NDRC playing a leading role and SAIC strengthening its enforcement in the coming years. A prudently designed antitrust compliance program is in the best interests of any company doing business in China. Such a program should attach importance to certain key issues such as price-fixing, RPM, and an efficient antitrust review of any written agreement, as well as appropriate handling of potential leniency applications.