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An Overview of China's New Anti-Price Monopoly Rules and Procedures

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On Dec. 29, 2010, the National Development and Reform Commission (NDRC), one of the three authorities responsible for enforcing China's Anti-Monopoly Law ("AML"), issued the Anti-Price Monopoly Regulations ("Price Rules") and Regulations on Anti-Price Monopoly Administrative Enforcement Procedures ("Price Administrative Rules"). Both the Price Rules and the Price Administrative Rules took effect on Feb. 1, 2011.

Apart from the AML, the new Price Rules provide further guidance on price-related prohibitions. More specifically, the Price Rules set up several provisions to regulate monopolistic pricing activity such as price fixing agreements, the abuse of dominant market position, and the abuse of administrative power.

The Price Administrative Rules illuminate the competent authorities and the relevant procedures that apply to investigations and proceedings related to monopolistic pricing activity.

Overview of the Price Rules

Price fixing agreements

The Price Rules further clarify measures to determine whether pricing conduct amounts to "concerted conduct." Moreover, the Price Rules add eight additional price fixing agreements among competitors that are prohibited by law.

Under the AML and the Price Rules, "price-related monopoly agreements" refers to agreements, decisions, or other concerted conduct that excludes or limits price competition. In determining whether a particular pricing behavior is the result of concerted conduct, Article 6 of the Price Rules first clarifies that the NDRC will take into account the consistency of the business operators' pricing conduct, the communications between business operators, and the relevant conditions and structure of the market.

Article 13 of the AML prohibits price fixing agreements between competing business operators. Article 7 of the Price Rules specifies the eight additional price monopoly agreements among competitors that would violate the AML.

Violations include agreements to: (1) fix the price of commodities and services; (2) fix the range of price changes; (3) fix commissions, discounts, or other charges that affect prices; (4) adopt an agreed upon price as the basis for transactions with a third party; (5) adopt an agreed upon standard formula to calculate prices; (6) agree not to change a price without the consent of other business operators; and (7) fix prices through other means.

Article 7 also states that (8) any other price fixing agreements, as determined by the competent price regulatory authority, would also violate the AML.

Abuse of dominant market position

Both the AML and the Price Rules also prohibit companies with a dominant market share from engaging in monopolistic pricing such as selling at unfairly high prices, buying at unfairly low prices, applying discriminatory treatment on transaction prices, and imposing unreasonable charges. Compared with the AML, the Price Rules provide more detail and guidance in determining what may constitute an "unfairly high price," an "unfairly low price," and "justifiable reasons" for companies with dominant market shares to conduct monopolistic pricing acts.

For instance, Article 11 of the Price Rules lists several factors that the NDRC will consider when determining whether prices are "unfairly high" or "unfairly low." These factors include whether the sale price of a commodity is extraordinarily higher or lower than what is offered by other sellers of the same kind of commodity, whether the increase in sale price or decrease in purchasing price exceeds the normal range when costs are generally stable, and whether the increase in the price of a commodity remarkably exceeds the increase in costs.

Abuse of administrative power

The Price Rules also stipulate that administrative organs and organizations authorized by law and regulations to manage public affairs may not abuse their administrative power to compel business operators to engage in monopolistic pricing acts, formulate regulations that have the effect of eliminating or restricting price competition, or impose discriminatory charges or standards for nonlocal commodities.

Overview of the Price Administrative Rules

Right to report

According to Article 5 of the Price Administrative Rules, entities and individuals have the right to report suspected unlawful conduct to the proper authorities, and the authorities are obligated to treat such reports confidentially.

Interestingly, Article 14 of the Price Administrative Rules stipulates that if a company takes the initiative to report information about an unlawful price agreement to the price control authority and provides material evidence, the authority may, at its sole discretion, reduce or exempt the company from possible fines.

It is noteworthy that if the company is the first firm to report and provide material evidence, it is eligible for a total exemption of any fine or penalty; if the company is the second to report and provide material evidence, it may receive a reduction in its penalty of no less than 50 percent; and as to other companies that subsequently report and provide material evidence, they may also receive reduced penalties of no more than 50 percent.

Investigative power

Article 6 of the Price Administrative Rules provides that the relevant investigating authority may enter and investigate the business premises of a suspected monopolistic operator, demand that individuals and entities provide statements of relevant information, inspect and copy the relevant files and materials, seize and detain relevant evidence, and check the operator's bank account.

Suspension of investigation

According to Articles 15 and 16 of the Price Administrative Rules, violating companies may ask for suspension of investigations if they promise to take measures to eliminate the consequences of their violations within a period agreed upon by the price control authority. The authority may, at its sole discretion, decide whether to suspend the investigation. If that decision is made, the authority will supervise the operator's performance of the commitment.

Conclusion

While these two new rules provide more detailed guidance than the AML on price monopoly issues, enforcement efforts have yet to be seen.

For instance, the Price Rules state that the rules will apply to overseas monopolistic conduct that results in the exclusion or a limitation of price competition in the domestic market. However, it remains unclear how the effect of monopolistic pricing on the domestic market in China would trigger enforcement action by the price control authority.

Another example is the "unfairly high price" concept. As noted above in the "abuse of dominant market position" section, although the new Price Rules provide several factors that the NDRC will take into account when determining whether prices are "unfairly high," in practice, discerning a monopoly high price will be problematic.

In theory, it may appear easy to enforce the "unfairly high price" formula as provided in the Price Rules; in practice, it may be much more difficult.

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