

BY EMAIL xueq@ndrc.gov.cn AND FEDEX

Department of Price Supervision
National Development and Reform Commission
No. 38 Yuetan Nanjie
Beijing 100824
China

Re: Draft Anti-Pricing Monopoly Regulation

Dear Sir/Madam:

The Section of International Law (the “Section”) of the American Bar Association (“ABA”) writes regarding the Anti-Pricing Monopoly Regulation (Comment Draft) (“Draft Anti-Pricing Monopoly Regulation” or “Draft Regulation”) of China’s National Development & Reform Commission (“NDRC”) published for comment on August 12, 2009.¹ *The views stated in this submission are presented on behalf of the Section of International Law only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.*²

The Section appreciates the thought and effort of NDRC reflected in the Draft Regulation to implement the Anti-Monopoly Law (“AML”) and would like to offer its assistance in the completion of the final regulation. The Section has expertise and experience with U.S. antitrust law and familiarity with competition law internationally, as well as expertise in the economics underlying the analysis of antitrust issues such as anti-competitive pricing.

However, due to the very short time available for submission of comments, the Section has not been able to provide a comprehensive set of comments, as it would normally do. Instead, the Section has limited its input to noting concerns regarding the Draft Anti-Pricing Monopoly Regulation that are similar to those raised by the Section in

¹ The Draft Regulations were published for public consultation on NDRC’s website at http://www.ndrc.gov.cn/fjbak/t20090812_296055.htm. This letter on the Draft Regulation is based on an unofficial translation.

² The American Bar Association Section of Antitrust Law (“Antitrust Section”), with which the Section of International Law frequently collaborates on international antitrust issues, has asked us to note that it does not join in this letter because the comment period allowed by NDRC provides insufficient time to prepare meaningful comments and recommendations commensurate with the importance of the Draft Guidelines and reflecting all the concerns the Antitrust Section has with the subject matter. In submitting these comments, the Section of International Law notes our agreement with the Antitrust Section that the list of issues raised in this letter is by no means comprehensive, and that if we had more time to prepare a full set of comments, we would likely raise many other concerns that NDRC might find of assistance, and would seek to do so in a joint submission with the Antitrust Section. We therefore request that additional time be provided to both Sections for further comments, and suggest that in soliciting comments regarding future guidelines, regulations or other proposals, that the Sections be given at least two months to comment. Such a period is necessary because of the extensive internal review processes that the ABA and its various Sections mandate for comments of this kind and would be consistent with the time periods provided by other jurisdictions.

September __, 2009

Page -2-

recent submissions to the State Administration for Industry and Commerce (“SAIC”), earlier comments when the Anti-Monopoly Law was under consideration, and most recently to the Japan Fair Trade Commission. The Section would welcome the opportunity to provide a full set of comments on the Draft Anti-Pricing Monopoly Regulation, if there were an extension of the deadline, as other competition authorities in China and many other jurisdictions around the world have granted to the Section on appropriate occasions.

In particular, based on the limited review undertaken to date, the Section has concerns similar to those raised in the attached comments regarding the Regulation on the Prohibition of Acts of Monopoly Agreements (Comment Draft) (“Draft Monopoly Agreements Regulation”) and the Regulation on the Prohibition of Acts of Abuse of Dominant Market Position (Comment Draft) (“Draft Abuse of Dominance Regulation”) of SAIC (published for comment on April 27, 2009), as well as in the Draft of the “Guidelines on Exclusionary Private Monopolization under the Antimonopoly Act” published for comment by Japan’s Fair Trade Commission. The Section respectfully refers NDRC to the comments it submitted regarding those drafts to SAIC,³ on the Anti-Monopoly Law⁴ and to the JFTC,⁵ and encloses those comments with this letter.

The concerns that the Section has regarding the Draft Anti-Pricing Monopoly Regulation that are addressed in the SAIC Comments, the AML Comments and the JFTC Comments include:

- (1) *Potential inconsistencies between NDRC and the other Anti-Monopoly Enforcement Authorities (“AMEAs”) regarding the implementation of the AML.* The Section respectfully refers NDRC to the SAIC Comments at pages 8, 30, and 31 that discuss the need for consistency among the AMEAs. The Section notes, for example, that Article 6(7) of the Draft Regulation prohibits “fixing or changing product price by limiting output or sales volume, or by dividing sales or purchase markets.” Restrictive agreements to limit output or partition markets in

³ Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the SAIC Draft Regulations on the Prohibition of Acts of Monopoly Agreements and of Abuse of Dominant Market Position, May 29, 2009 (“SAIC Comments”), available at <http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/abaprcamlsaicdraftregs5-09finalcombo%282%29.pdf>

⁴ Joint Submission of the American Bar Association Section of Antitrust Law, Section of International Law and Section of Intellectual Property Law on the Proposed Anti-Monopoly Law of the People’s Republic of China, May 19, 2005 (“AML Comments”), available at <http://meetings.abanet.org/webupload/commupload/IC990000/newsletterpubs/abaprc2005fin.pdf>

⁵ Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Japan Fair Trade Commission’s Draft Guidelines on Exclusionary Private Monopolization under the Antimonopoly Act, August 19, 2009 (“JFTC Comments”), available at <http://www.abanet.org/antitrust/at-comments/2009/08-09/comments-JFTC.pdf>

September __, 2009

Page -3-

principle fall under the jurisdiction of SAIC. Such agreements, like any antitrust violation, may ultimately affect prices. Similarly, “refusals to deal” are within the jurisdiction of SAIC.

- (2) *Inconsistencies between NDRC and authorized pricing authorities regarding the treatment of pricing monopoly conduct.* Article 24 of the Draft Regulation provides for enforcement of the AML by “authorized pricing authorities of a province, an autonomous region, or a municipality” against pricing monopoly conduct. The Section respectfully refers to pages 6, 11, 26, 27, and 39 of the SAIC Comments which discuss concerns that there will be inconsistency and/or incoherence in the enforcement of the AML nationwide unless SAIC retains jurisdiction or at least exercises oversight over investigations and sanctions by local authorities, particularly where conduct may have significant nationwide impact even if it occurs principally within one geographic region. The same concerns exist with regard to NDRC and provincial pricing authorities.
- (3) *The methods for determining the existence of a pricing monopoly.* Article 4 of the Draft Regulation includes “other coordinated practices between two or more business operators...which have the effect of excluding or restricting competition with regard to price.” Article 5 specifies that “coordinated practices” may be found where there is “uniformity in pricing conduct” and “communications between business operators”. In the SAIC Comments, the Section noted (at pages 4-5): (1) “Sound competition policy distinguishes agreements among rivals – which prohibitions on anticompetitive agreements may reach – from mere oligopoly – which the law cannot practically remedy and is the natural consequence of unilateral decision-making” and (2) “Inferring a ‘tacit’ agreement when the conduct may merely reflect unilateral oligopoly behavior accordingly can chill a business’s ability to respond to market conditions according to its business incentives.”⁶ The Section therefore suggested (at page 5) of the SAIC Comments that “The best evidence that business operators reached a prohibited agreement or decision is direct evidence that the business operators communicated explicitly and, through that communication, reached such an agreement. In the absence of such direct evidence, an agreement might be inferred if (1) the business operators exhibited substantially parallel behavior, (2) at least one of the business operators does not have legitimate business reasons that rationally would lead it to engage independently in the challenged conduct, and (3) there is additional circumstantial evidence

⁶ The Sections discuss this concern more fully in pages 17 through 20 of the SAIC Comments.

September __, 2009
Page -4-

supporting the existence of an agreement as distinguished from mere interdependence.”

- (4) *The standards for judging pricing conduct in different contexts.* The Draft Regulation, in Articles 6 through 9, prohibits price fixing agreements involving competitors, sellers and buyers, auctions and trade associations. Similarly, Articles 11 through 15 of the Draft Regulation prohibit various types of “unfair” and/or “without valid justification” pricing conduct by enterprises with dominant market positions. Particularly with regard to conduct that is not generally treated as a *per se* offense under many competition law regimes, the Section suggests in pages 4, and 11 through 17 of the SAIC Comments that two basic tenets be applied: (1) “Substantive assessment of agreements and other business conduct should be guided by the basic policy objective of maintaining competitive markets to promote economic progress and consumer welfare” and (2) “Economic analysis should be used to assess the tendency of particular agreements and conduct to promote or inhibit such basic policy objectives.” These comments, as well as those on pages 21 and 22 of the AML Comments, suggest that terms such as “unfairly” and “without valid justification” in the Draft Regulation should be clarified to require a finding that challenged conduct has an anti-competitive purpose or effect.
- (5) *The methods for determining the existence of a dominant market position.* Articles 18 and 20 of the Draft Regulation identify the factors to be considered in determining the existence of a dominant market position. As the Section urged in pages 9, 10 and 33 through 35 of the SAIC Comments, it is important to avoid conflating the definition of a dominant market position with the substantive prohibitions against abusing that position to exclude or restrict competition. Article 18(4) suggests that the extent to which Company A relies on Company B in doing business is a valid indicator of dominance held by Company B. As the Section noted on pages 9 and 33 of the SAIC Comments, there are often legitimate business justifications for such situations, and there are more factors that need to be considered to support or refute any conclusion of dominance. In any event, to rebut a presumption of dominance under Article 20, businesses should not be required to show that no individual competitor has a prominent market position because, as was noted on pages 9 and 35 of the SAIC Comments, if one business had a prominent market position, that fact would undermine the rationale for the presumption of dominance under Article 19(2) and (3) of the AML in the first place. As the Section also suggests on pages 9, 10 and 35 of the attached SAIC Comments, demonstrating any of

September __, 2009
Page -5-

Article 20(1), 20(2) or 20(3) should be sufficient to rebut any presumption of dominant market position, and based on this comment, Article 20 should make that clear. The Section further urges on pages 8, 9 and 32 of the SAIC Comments that dominant-firm conduct not be regarded as abusive unless at a minimum such conduct threatens to harm competition more than it benefits consumers, and that dominant-firm conduct – even if it carries the potential for some material exclusionary effect – should be permitted if and to the extent justified by demonstrable reasons of efficiency.

- (6) *The treatment of refusals to deal and “essential facilities”*. Articles 11(3) and 14 address refusals to deal and the related “essential facilities” doctrine. As the Section points out on page 10 of the SAIC Comments, a functioning market economy necessarily entails the ability of undertakings to decide whom to do business with and whom not to do business with, as well as to seek to do business on whatever terms they believe are advantageous for them, and not have a government agency or court specify the terms on which enterprises should do business. With respect to the “essential facilities” doctrine, the Section states on pages 10, 35 and 36 of the SAIC Comments that it would be counterproductive to encourage entrepreneurial activity but then strip the successful undertaking of the benefit of that activity, and this doctrine should be applied with the utmost caution, and under clearly expressed and carefully developed conditions. The Section also points out on page 8 of the attached JFTC Comments that where there is a legal compulsion for one competitor to deal with other competitors over time, there is an increased risk that such cooperation may weaken the independence and competitive vigor that would otherwise exist between such competitors, and this risk must be balanced against the anticipated gains from compulsory dealings. Similarly, as the Section notes at page 8 of the attached JFTC comments, where competitors are afforded mandatory access to the superior products of another firm, there is a heightened risk that the incentive of the former to innovate or take initiative in order to become more effective competitors in their own right will be diminished, and this threat to innovation and dynamic efficiency must also be balanced against the perceived gains from challenging unilateral refusal to supply.
- (7) *The methods for determining the existence of prices that are excessively high, excessively low or discriminatory*. Articles 12, 13 and 14 of the Draft Regulation identify the factors that determine the presence of

September __, 2009
Page -6-

excessively high or excessively low prices.⁷ As stated on page 10 of the JFTC Comments, the Section believes that vague guidelines threatening liability for prices that are “too low” can cause businesses to avoid healthy price competition beneficial to consumers. At least as importantly, and as noted on pages 11 and 12 of the Section’s JFTC Comments, “below cost” pricing by a seller should be prohibited only where the seller is likely to recoup its losses, since in those circumstances, the price-setting business more likely presents, by its below-cost pricing, a significant threat, over the long run, to *competition* in the market where its pricing occurs, not simply a threat to individual competitors – and the low pricing thus would be likely to achieve or to maintain monopoly power by deterring or excluding competition. Conversely, and as the Section notes on page 13 of the JFTC Comments, if there is little likelihood of recoupment, below cost pricing would be economically irrational and likely unsuccessful. In all events, and as urged on page 12 of the JFTC Comments, the costs in question should be the seller’s *own* costs, because regulating pricing below general average market cost, or below some other measure different from a seller’s own costs, would make it extremely difficult for businesses to determine the boundaries of lawful prices, as most businesses do not have access to their competitors’ costs. On pages 11 through 13 of the JFTC Comments, the Section discusses the particular measure of the seller’s costs that should be applied to determine excessively low prices. As for “excessive prices” that are too high, the Section notes on pages 2 and 16-18 of the AML Comments: (1) allowing a business to charge whatever price it desires (as long as it is unilateral and not the result of exclusionary behavior) encourages entry and thus encourages the self-correcting character of markets; (2) it is important to allow enterprises that have engaged in risky investments in innovation to recover these investments; and (3) “Punishing” success by limiting the prices that successful businesses can charge will substantially reduce the incentives to innovate. Finally, with regard to Articles 11(4) and 15 prohibiting “discriminating in price between transaction counterparties that are operating under the same conditions” “without valid justification” by a holder of a dominant market position, if it will have a “material adverse impact” on counterparties and counterparties have no good substitutes, the Section respectfully refers NDRC to the SAIC Comments at pages 37 through 39 that discuss concerns regarding a prohibition against discriminatory terms. As the

⁷ The Sections assume that references in Article 12 to low prices relate to buyers with dominant market power as a buyer in the market of the goods being purchased, while Article 13 relates only to sellers with dominant market power in the sale of the goods.

September __, 2009
Page -7-

Section points out on pages 11 and 37 through 39 of the SAIC Comments: (1) transactional terms to different purchasers for the same or similar products could differ for many legitimate and pro-competitive reasons; (2) discrimination alone is not harmful to consumers; and (3) anti-discrimination laws have a tendency to protect competitors rather than consumers, as they limit forms of competition. Article 15 also prohibits differential pricing among counterparties operating under the same conditions and identical pricing to counterparties operating under different conditions. To avoid creating uncertainty as to the legality of pricing policies, the Section urges on pages 11 and 38 of the SAIC Comments that, at a minimum, such a prohibition be clearly limited to discriminatory terms with actual or likely harmful/anti-competitive effect to consumers, rather than discriminatory terms generally.

- (8) *The lack of clarity regarding how leniency may be obtained.* The AML contemplates leniency programs in Article 46 and SAIC included in the attached Draft Monopoly Agreements Regulation leniency provisions for cooperation. As the Section points out on pages 6 and 28 of the SAIC Comments, leniency programs are effective both in deterring monopoly agreements and providing incentives for business operators to voluntarily terminate their participation in these agreements and report to the enforcement authority. The Section suggested on pages 7 and 28 of the attached SAIC Comments four criteria for an effective leniency program. However, as pointed out on pages 8, 30, and 31 of the SAIC Comments, consistency among the AMEAs is particularly important in this area, since conduct may involve both pricing and non-pricing monopolistic conduct and inconsistency will negate much of the benefits of a leniency program. The Section respectfully refers to the SAIC Comments at pages 6 through 8 and 27 through 30 that discuss more fully leniency programs. Article 45 of the AML raises the possibility of a deferred prosecution program, which has also proven to be an effective enforcement tool in some circumstances in the U.S. As the Section pointed out on pages 8, 11, 30, 31, and 39 of the SAIC Comments, a commitments mechanism would be a means of resolving investigations involving conduct that is alleged to be abusive yet often ambiguous under the AML.

Conclusion

The Section would be pleased to offer any further assistance that may be helpful as NDRC finalizes the Regulation. With additional time, the Section would be better able to provide a full set of substantive comments.

September __, 2009
Page -8-

Sincerely,

Glenn P. Hendrix
Chair, Section of International Law

Enc.:

Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the SAIC Draft Regulations on the Prohibition of Acts of Monopoly Agreements and of Abuse of Dominant Market Position, May 29, 2009, available at <http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/abaprcamlsaicdraftregs5-09finalcombo%282%29.pdf>

Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Japan Fair Trade Commission's Draft Guidelines on Exclusionary Private Monopolization under the Antimonopoly Act, August 19, 2009, available at <http://www.abanet.org/antitrust/at-comments/2009/08-09/comments-JFTC.pdf>

Joint Submission of the American Bar Association Section of Antitrust Law, Section of International Law and Section of Intellectual Property Law on the Proposed Anti-Monopoly Law of the People's Republic of China, May 19, 2005, available at <http://meetings.abanet.org/webupload/commupload/IC990000/newsletterpubs/abaprc2005fin.pdf>