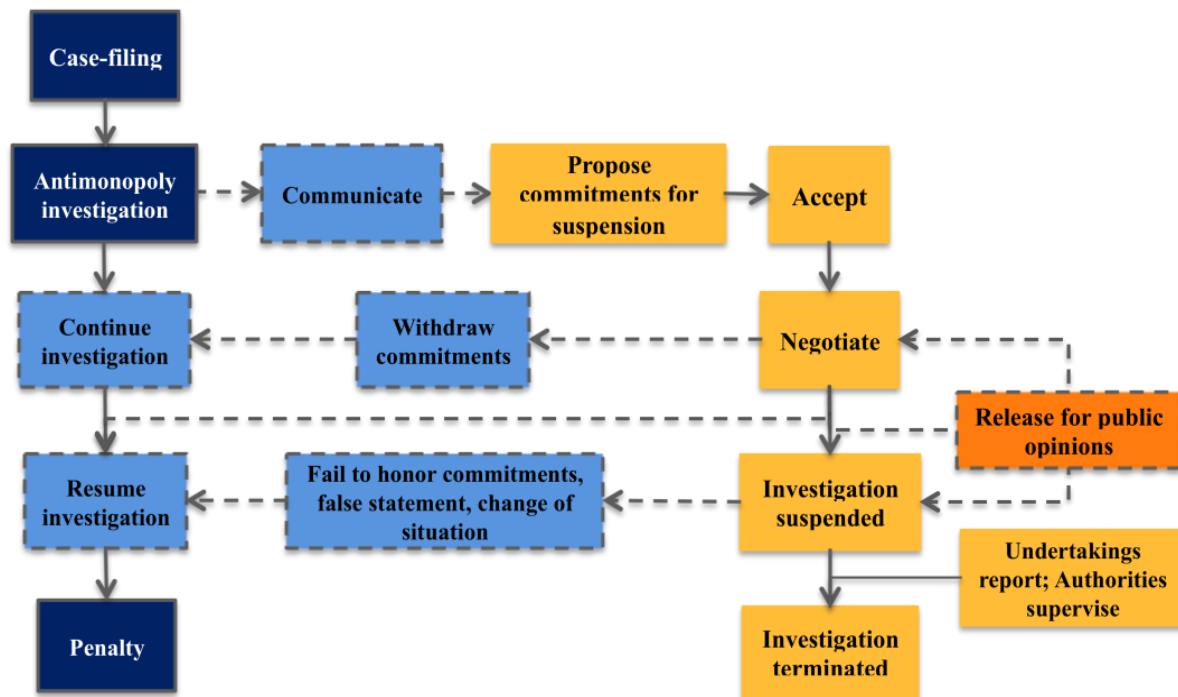


What you can learn from the NDRC Draft Guidelines on Commitment by the Antitrust Investigation Target

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On February 2, 2016, the National Development and Reform Commission (“**NDRC**”) released the *Draft Guidelines on Commitments by Undertakings in Antitrust Investigation* (“**Draft Guidelines**”) on its official website, seeking public comments. The commitment scheme originates from Article 45 of the Anti-monopoly Law of China (“**AML**”), which provides, “with respect to the suspected monopolistic conduct of an undertaking under investigation by the Anti-monopoly Law enforcement Agencies (“**AMEAs**”), if an undertaking commits to adopt specific measures to eliminate the consequences of its conduct within a certain period of time, which is accepted by the said authorities, the said authorities may decide to suspend the investigation.”

The nature of the commitment scheme under the AML is a settlement reached between undertakings under investigation and AMEAs based on commitments. Considering the fact that this scheme may save law enforcement resources, encourage undertakings under investigation to cooperate, and introduce measures to eliminate anti-competitive affects, the formal process set out in the Draft Guidelines could be widely used in antitrust investigations in China. Since the result of the commitment scheme is to suspend the investigation rather than levy potentially significant fines, it is necessary for undertakings to understand how the commitment scheme works in China.



1 The Scope of the Commitment Scheme

The commitment scheme is not applied to all monopolistic conducts. According to the Draft Guidelines, the application of the commitment scheme is dependent upon factors such as the type of monopolistic conducts, phase of investigation, etc.

1.1 The Commitment scheme is not applicable to the horizontal monopolistic agreement

Pursuant to Article 2 of the Draft Guidelines, for horizontal monopoly agreements such as maintaining and modifying the commodity price, limiting the production and sales volume, and dividing the sales market or the raw material procuring market, the AMEAs shall not accept commitments in lieu of investigation. This indicates that the commitment scheme under the AML is not applicable to the horizontal monopolistic agreement.

That the commitment scheme does not apply to the horizontal monopolistic agreement may be due to the following considerations:

- 1) Horizontal agreements cause material damage to competition;
- 2) Horizontal agreements involve multi parties, making a single undertaking unable to eliminate the affects unilaterally;
- 3) Accepting the commitments and suspending the investigation for horizontal monopoly agreements may harm the sanctity and deterrence of the AML;

- 4) Horizontal agreement cases are comparatively simple for AMEAs, and the commitment scheme may increase the complexity.

1.2 Time to propose commitments

1.2.1 The commitment scheme only applies to cases being investigated

According to Article 45 of the AML, the commitment scheme only applies to suspected monopolistic conducts under investigation. Before the investigation is initiated, since the case is not established, the AMEA is unable to accept commitments or suspend the investigation.

If, before the investigation is initiated, an undertaking volunteers to commit itself, we understand that these commitments would only bind this undertaking, but not necessarily cause the suspension of investigation as prescribed by Article 45 of the AML. Where applicable, a pre-investigation commitment may more appropriately be considered as an element of a leniency application.

1.2.2 Commitments should be proposed before the suspected monopolistic conduct is confirmed

The advantage of commitment scheme is to save administrative enforcement resources, and promote efficiency. If the AMEAs have found sufficient evidence to determine undertakings' monopolistic conducts, it would be impractical to apply the commitment scheme for the purpose of saving administrative enforcement resources. Article 2 of the Draft Guidelines provides, "if the AMEA has confirmed that the suspected conduct constitutes monopolistic conduct after its investigation, it shall make a decision according to the laws and decide not to accept the commitments from the undertakings".

We understand that the time when "the AMEA has confirmed that the suspected conduct constitutes monopolistic conduct after its investigation" should be interpreted as the time when the AMEAs deliver preliminary notification of administrative penalty, since at this time, the AMEAs have confirmed and determined the suspected monopolistic conduct, and completed preliminary analysis of the case.

2 The Content of Commitments

2.1 The content of commitments is negotiable

Article 8 of the Draft Guidelines stipulates that after the AMEAs receive any commitments submitted by the undertakings, the undertakings may negotiate with the AMEAs regarding the content of commitments. During the negotiation, with the consent of both the AMEAs and the undertakings, third-party undertakings, trade associations, experts and scholars may also be invited to attend the discussion.

Based on the above rules, we understand that:

- 1) initial commitments shall be issued by undertakings to establish the foundation of the negotiation between undertakings and the AMEAs;
- 2) the content of the commitments is negotiable, since the commitment is a balance of the interest of the undertaking under the investigation and the broader public interest;
- 3) given the importance of the public interest and the principle of bilateral consent of the AMEAs and undertakings, third parties may be involved in the negotiation of commitments.

2.2 The content of commitments and application for suspension

According to Article 6 of the Draft Guidelines, an undertaking shall submit the commitments and apply for the suspension in writing. The written application shall include the following items: (1) suspected monopolistic conducts and possible influence; (2) commitments to take specific measures to eliminate the effects; (3) terms and methods of honoring the commitments; (4) other contents of the commitments.

2.2.1 Suspected monopolistic conducts and possible influence

We understand that when submitting the written commitments and applying for suspension of investigation, the undertaking under investigation shall state the alleged fact of the conduct. But it is not necessary for the undertaking under the investigation to accept it violates the AML. The undertaking only needs to use the term “suspected monopoly conduct” and “possible influence” in the written commitments.

In addition, the “possible influence” is not necessarily anticompetitive effect. It could be effect to harm public interest. The relevant analysis of the “possible influence” shall correspond with the proposed commitments. If suspected monopolistic conducts may cause anticompetitive effects, undertakings should provide specific description and evaluation to prove the sufficiency of certain commitments can eliminate such anticompetitive effects.

2.2.2 Specific measures to eliminate effects

According to Article 7 of the Draft Guidelines, there are 3 forms of measures to commit:

- 1) behavioral measures, including opening facilities such as network or platform, licensing patent, technology or other intellectual properties, terminating exclusive agreement, etc.;
- 2) structural measures, including divestiture of properties;
- 3) measures combining behavioral and structural measures.

Measures in the commitments should be clear, feasible and practical unilaterally. If the committed measures cannot be implemented without the consent of a third party, the undertaking shall submit the written consent from such third party.

2.2.3 Term of commitments

According to Article 10 of the Draft Guidelines, commitments should be performed within a period that will be determined by the AMEAs according to the details of the case:

- 1) for general cases: 6 months to 3 years;
- 2) for complicated cases: may apply to extend to 3~5 years.

The said terms are pre-estimated for the fulfillment of committed measures. Once the committed measures are completed within such terms, undertakings may apply to terminate the investigation.

3 Review, Public Comments, and Decision

3.1 Seeking public comments on commitments

According to Article 9 of the Draft Guidelines, “if the AMEAs consider that the suspected monopolistic conducts have influenced the legitimate rights of other undertakings and consumers or the public interests, the AMEAs may seek public opinions regarding the committed measures taking due account of the need to protect trade secrets. The time for seeking such opinions shall normally not be less than one month.”

The purpose of publicizing the committed measure to the public is to enable interested parties to raise their dissents regarding the sufficiency and rationality, and facilitate the public to impose constraint and supervision over the administrative enforcement of the AMEAs.

If, during the process of public comments, other undertakings allege the deficiency of the commitments, the AMEAs may:

- 1) confirm the commitments and suspend investigation at their discretion;
- 2) re-negotiate and re-confirm the content of the commitments, and re-publicize the new commitment for public comments; or
- 3) abandon the commitments and resume investigation.

Please see the flow chart of commitment process above.

3.2 Decision to suspend the investigation

According to Article 11 of the Draft Guidelines, after the AMEAs negotiate with the undertakings and complete the analysis regarding the commitments proposed by the undertakings, if the AMEAs hold that the facts are clear and the committed measures are sufficient to eliminate the effects caused by the suspected monopolistic conducts, the AMEAs may decide to suspend the investigation. According to this provision, the premises for a suspension decision are:

- 1) the facts are clear; and

- 2) the committed measures are sufficient to eliminate the effects caused by the suspected monopolistic conducts.

The said premises should be determined on a case-by-case basis. Once the AMEAs decide to suspend the investigation, they should release relevant decisions to the public within 20 business days.

3.3 Resuming investigation

According to Article 45(3) of the AML, there are two types of reason that could cause the resuming of an investigation:

- 1) reasons attributable to undertakings, including failure to honor commitments, or incomplete or false statement that caused suspension;
- 2) reasons not attributable to undertakings, e.g. due to change of situation, the commitments have become inappropriate.

Article 17 of the Draft Guidelines specifies that if the resumption of an investigation is due to undertaking's failure to honor commitments, or incomplete or false statement that caused suspension, then, after the AMEAs confirmed the existence of monopolistic conducts, the AMEAs may decide to aggravate the penalty.

3.4 Terminating investigation

According to Article 14 of the Draft Guidelines, if undertakings have honored the commitments and eliminated the affects, the AMEAs shall terminate the investigation and issue a termination decision. The AMEAs shall release the termination decision to the public within 20 business days after the date of such decision.

Please note that neither the suspension decision nor the termination decision made by the AMEAs shall be regarded as the conclusion that certain conducts constitute or do not constitute the monopolistic conducts. The AMEAs may still investigate and impose fines on other similar conducts. Besides, the suspension decision or the termination decision shall not affect any civil litigation filed by other undertakings or consumers against such suspected monopolistic conducts, and the suspension decision or the termination decision shall not be deemed as evidence to determine the constitution of monopolistic conducts.

NDRC is seeking public comments on the Draft Guidelines. If there is no big change, the official *Guidelines on Commitments by Undertakings in Antitrust Investigation* could be issued in 2016. Since the result of the commitment scheme is to suspend the investigation rather than levy potentially significant fines, we will keep close attention to the legislation and the practice of this area.