

# Guideline on Undertakings' Commitments in Anti-Monopoly Cases

(Exposure Draft)

## Article 1 Basis and Significance of this Guideline

This guideline is formulated in accordance with the Anti-Monopoly Law of People's Republic of China (the "AML") for the purpose of guiding the application of undertakings' commitments, investigation's suspension and termination procedures (hereinafter referred to as "**mechanism of undertakings' commitments**") during the investigation process of anti-monopoly cases, improving the transparency of enforcement practice of the anti-monopoly enforcement authorities ("**the enforcement authorities**"), and protecting legitimate interests of undertakings and consumers.

In the investigation of anti-monopoly cases, in accordance with the provisions of Article 45 of the AML, the investigated undertakings may propose commitments, take specific measures to eliminate the consequences of the relevant behaviors, and the enforcement authorities may accept the undertaking's commitments and decide to suspend or terminate the investigation. This contributes to the improvement of enforcement efficiency, saving administrative enforcement resources, and achieving the goals of protecting fair competition in the market as well as consumers' and social public interests.

## Article 2 Application Scope of the Undertakings' Commitments' Rule

After the enforcement authorities investigated and verified the alleged monopoly behaviors, if the monopoly behaviors are identified, the enforcement authorities shall make the decision and no longer accept the undertakings' commitments. With respect to cases involved horizontal monopoly agreements including fixing or modifying commodity price, restricting production or sales volume, segment sales market or raw material procurement market, the enforcement authorities shall not accept undertakings' commitments and suspend the investigation.

With regard to other anti-monopoly cases, if undertakings propose commitments on their own initiative, the enforcement authorities may decide to apply investigation's suspension and termination procedures.

## Article 3 Legal Consequences of the Decision of Suspension and Terminate of a Investigation

The enforcement authorities' decisions of suspending or terminating investigation are not to identify whether the undertakings' behaviors constitute

monopoly behaviors. The enforcement authorities may still investigate other similar behaviors and impose administrative punishment in accordance with the law. In addition, the enforcement authorities' decisions of suspending or terminating investigation do not affect other undertakings or consumers from bringing lawsuits to people's court regarding the alleged monopoly behaviors. Also, the decisions of suspending or terminating investigation shall not be considered as evidences for identifying whether the behaviors constitute monopoly behaviors.

#### Article 4 Proposing and Revoking Commitments by Undertakings

Undertakings may propose commitments and apply for suspending the investigations at any time after the enforcement authorities start to investigate the alleged behaviors and before the preliminary notice of issuance of administrative penalty.

Before the enforcement authorities making the decision of suspending investigation, the undertakings may revoke the commitments. Regarding the undertakings that decide to revoke commitments, the enforcement authorities shall immediately terminate the review of the commitments and continue the investigation against the alleged monopoly behaviors, and shall no longer accept any commitment proposed by the undertakings.

#### Article 5 Undertakings' Communication with Enforcement Authorities Before Proposing the Commitments

The enforcement authorities encourage undertakings to propose the commitments as soon as possible. Prior to putting forward the commitments, undertakings could make necessary communication with enforcement authorities.

If the enforcement authorities consider the case can apply to the suspension procedure of investigation, they may inform the undertakings of the preliminary facts and the possible effects of the alleged monopoly behaviors conducted by the undertakings, and may communicate with the undertakings. On the basis of communication, the undertakings may put forward an application on its own initiative.

#### Article 6 The Preliminary Review on Undertakings' Commitments

The undertakings shall propose commitments and apply for suspending investigation in written. The written application shall list the following items:

- (1) The alleged monopoly behaviors under review and its possible effects;
- (2) The specific measures in the commitments to eliminate consequences of the behaviors;
- (3) The duration and method of implementing the commitments;

(4) Other contents needed in the commitments.

Generally, in one month after receiving the applications, the enforcement authorities shall conduct preliminary review on whether the case is applicable for the suspension procedure, the undertakings' applying time and methods etc., and shall inform undertakings of the review result in writing.

Article 7 The Committed Measures of Undertakings

The committed measures proposed by undertakings may be behavioral, structural, or the combination of both. Committed measures shall be explicit, feasible and applicable independently. If the committed measures cannot be implemented without the consents of the third parties, the undertakings shall submit the written consent opinions of the third parties.

The behavioral measures mentioned above include opening the basic facilities such as networks or platforms, licensing patents, know-how or other IPRs, terminating exclusive agreements, etc.; the structural measures include divesting tangible assets, intangible assets such as IPRs or other related equities, etc.

Article 8 Negotiation Between Enforcement Authorities and Undertakings

After received the commitments proposed by the undertakings, the enforcement authorities may negotiate with undertakings for the content of commitments, including specific statement of the case facts, whether the committed measures can eliminate the effects caused by monopoly behaviors and whether the committed measures are limited to solving the competition concerns focused by enforcement authorities, etc.

During the negotiation, with the consent s of enforcement authorities and undertakings, the third party undertakings, industry associations, experts and scholars etc. may be invited to the negotiation.

Article 9 Solicitation of Public Opinions on and Modification of the Committed Measures

If the enforcement authorities consider that the alleged monopoly behaviors of undertakings have already influenced the lawful interests of other undertakings, the consumers or social public interests, on the premise that the business secrets of the undertakings concerned are protected, the enforcement authorities may solicit opinions from the social public on the committed measures proposed by the undertakings. Normally, the term of public solicitation shall be no less than one month.

For the opinions raised by the social public within the speculated time frame, if the enforcement authorities deem it appropriate to accept them, it can suggest the undertakings to modify the committed measures or re-submit the committed measures. If the undertakings are not willing to modify the committed measures, the enforcement authorities may terminate the review and consultation procedure of undertakings ' commitments and restart the investigation of the alleged monopoly behaviors.

If the nature or scope of the committed measures changed after modification, the enforcement authorities may solicit opinions from the social public again.

#### Article 10 Term of the Commitments of Undertakings

The term of implementation of the commitments made by undertakings shall be determined by the enforcement authorities on a case-by-case basis. It shall normally be no shorter than 6 months and no longer than 3 years. If the case is significant and complex, and the undertakings cannot fully implement the commitments to eliminate the consequences of the alleged monopoly behaviors, the term may be extended appropriately by application. However, in any case, the period of implementation of the commitments made by undertakings shall be no longer than 5 years.

#### Article 11 Analysis and Review of the Committed Measures

After the enforcement authorities negotiated sufficiently with the undertakings and complete the analysis and review of the committed measures proposed by the undertakings, if the enforcement authorities deem that the basic facts of the case is clear and the committed measures can help eliminating the consequences of the alleged monopoly behaviors, the enforcement authorities may decide to suspend the investigation.

#### Article 12 Decision of Suspending Investigation

If the enforcement authorities decide to suspend an investigation, it shall prepare the written decision to suspend the investigation, which shall specify the below contents:

- (1) Facts of the alleged monopoly behaviors and the consequences to competition that have been or may be caused by the alleged monopoly behaviors;
- (2) Specific contents of the commitments made by the undertakings and the measures to eliminate the consequences of the behaviors;
- (3) Term and methods of the implementation of the commitments by the undertakings;
- (4) Duty of the undertakings to make regular reports;
- (5) Measures to monitor the implementation of the commitments by the undertakings;

- (6) Legal consequences of failing to implement or implement the commitments incompletely, etc.

**Article 13** Report and Supervision of Undertakings' Compliance with Commitments

The undertakings shall report the compliance with the commitments to enforcement authorities pursuant to the Decision to suspend investigation.

The enforcement authorities shall supervise the undertakings' compliance with the commitments and may entrust professional institutes of the independent third parties to carry out the supervision if necessary.

**Article 14** Decision of Terminating Investigation

When the undertakings have fulfilled the commitments and eliminated the consequences, the enforcement authorities shall terminate the investigation and issue the decision to terminate investigation.

The decision to terminate investigation shall include the following contents:

- (1) The undertakings' alleged monopoly behaviors investigated by the enforcement authorities;
- (2) The specific contents of the undertakings' commitments and the measures to eliminated the consequences;
- (3) The undertakings' status of implementing the commitments;
- (4) The supervision of the undertakings' implementation of the commitments; and,
- (5) Terminating the investigation of the alleged monopoly behaviors.

**Article 15** Report, File and Publication of the Decision of Suspending Investigation and Decision of Terminating Investigation

Provincial enforcement authorities shall fulfill the report and file procedure based on the relevant provisions before issuing the decision to suspend investigation and decision to terminate investigation.

Under the premise of protecting the undertakings' business secrets, the enforcement authorities shall publish the decision of suspending investigation and decision of terminating investigation to the society after 20 working days of issuing them pursuant to the law.

**Article 16** Decision of Restoring Investigation

The enforcement authorities shall restore the investigation of the alleged monopoly behaviors if the situations stipulated in Paragraph 3 of Article 45 of the AML occurs.

Consumers or other undertakings who deem that the above situations have occurred, they may submit the application of restoring the investigation to the enforcement authorities and the enforcement authorities shall decide whether to restore the investigation after review.

#### Article 17 Suspension of the Investigation and Punishment after the Restore of Investigation

After the investigation has been restored, the enforcement authorities shall no longer accept the commitment application from the undertakings. However, the enforcement authorities may accept the undertakings' application based on the new facts when the investigation is restored in accordance with the provision of Item 2 of Article 45(3) of the AML. The enforcement authorities may impose heavier punishment on the undertakings pursuant to the law when the investigation is restored and the monopoly behaviors is identified, pursuant to Item 1 and Item3 of Article 45(3) of the AML.

#### Article 18 Dates of Implementation

This Guideline shall be implemented from XX (date) XX (month) XX (year).