# 外商投资要闻简讯

JUNHE

2016 年 4 月 26 日

国家发展和改革委员会及商务部发布《国家发展改革委、商务部关于印发市场准入负面清单草案(试点版)的通知》，将在天津、上海、福建、广东等四省（市）试点对内资及外资企业的市场准入实施负面清单制。

财政部、海关总署、国家税务总局发布《财政部、海关总署、国家税务总局关于跨境电子商务零售进口税收政策的通知》及其配套规定。

《反不正当竞争法》实施 23 年后将迎来首次修订。

## 一、 国家发改委及商务部发布《负面清单草案》

2016 年 3 月 2 日，国家发展和改革委员会（以下简称“**国家发改委**”）及商务部在汇总、审查有关部门意见的基础上发布了《国家发展改革委、商务部关于印发市场准入负面清单草案(试点版)的通知》（以下简称“**《负面清单草案》**”），初步列明了在中华人民共和国境内禁止和限制投资经营的行业、领域、业务等。《负面清单草案》共 328 项，包含禁止准入类 96 项，限制准入类 232 项，将先行在天津、上海、福建、广东四个省（市）进行试点。

《负面清单草案》的发布标志着我国朝向市场准入及外商投资准入全面实施负面清单制又向前迈进一步，准入管制将更加明确、透明，大大降低了企业遵循法律的成本。《负面清单草案》试点将提供全面论证各项市场准入限制之必要性的机会，也为进一步放宽准入限制建立了定期检讨的基础。

### （一） 背景

2015 年 10 月 2 日，国务院发布了《国务院关于实行市场准入负面清单制度的意见》（以下简称“**《准入意见》**”）、以及《关于开展市场准入负面清单制度改革试点的工作方案》（以下简称“**《试点方案》**”），决定选择部分地区开展市场准入负面清单制度试点。

2016 年 3 月 2 日，国家发改委及商务部根据《准入意见》的部署发布了《负面清单草案》，将由试点地区省级人民政府根据《准入意见》及《负面清单草案》，提出拟试行市场准入负面清单制度的方案报国务院审批，自批准之日起实施。

### （二） 法律点评

1、 《负面清单草案》同时适用于境外投资者与境内投资者

《负面清单草案》项下的市场准入负面清单同时针对境内、外投资者，是对境内、外投资者普遍适用的市场准入管理措施，体现的是内外资一致性的管理，符合“准入前国民待遇”的要求，即在准入环节，除经我国政府经对外谈判保留的限制以外，外资和内资一视同仁。

同时，国家发改委在答记者问中表示，选择天津、上海、福建、广东 4 个自贸试验区所在省级行政区率先开展这项改革试点，主要考虑是可以使市场准入负面清单与自贸试验区负面清单两者一起构成完整的市场准入管理体系，以探索路径、积累

经验、形成示范。鉴此，《负面清单草案》在试点地区实施后，自贸试验区内的管理将基本实现由两种负面清单构成的准入规范体系，外国投资者既须遵守依据《负面清单草案》项下负面清单建立普通适用的市场准入规定，也须遵守《自由贸易试验区外商投资准入特别管理措施（负面清单）》项下专门针对外商投资的特别规定。

2、 三类准入事项

《负面清单草案》所列出的经营活动分为禁止准入事项和限制准入事项。根据《准入意见》的规定，对禁止准入事项，市场主体不得进入；对限制准入事项，由市场主体申请后行政机关决定是否予以准入，或者由市场主体依照政府规定的条件和方式进入。未列入《负面清单草案》的经营活动，各类市场主体皆可依法平等进入。

3、 法治原则及必要原则

根据《准入意见》的规定，市场准入管理措施应当以法律、行政法规或国务院决定为依据。目前仍依据部门规章或规范性文件设定的市场准入管理措施，如果确需维持，应当提请制定或修订法律、行政法规或国务院决定。《负面清单草案》特别标注了涉及这种情况的项目，共有 11 项。

《准入意见》同时要求全面清理涉及市场准入的规范，确保仅保留必要的市场准入管理措施；对未纳入负面清单的事项，要求及时废止或修改设定依据；要求适时修订《政府核准的投资项目目录》，最大限度地缩小需要核准的范围。

4、 与现行市场准入相关目录的衔接

根据《负面清单草案》的规定，现行《产业结构调整指导目录》中的淘汰类项目，以及限制类项目的新建，均属于《负面清单草案》中的禁止准入类。而《政府核准的投资项目目录》中明确实行核准制的项目，除了仅针对外商投资和境外投资的核准项目外，均属于《负面清单草案》中的限制准入类。

5、 加强准入后的监管机制

放宽准入限制的同时，《准入意见》要求加强准入后的监管，以确保公共利益的保障不因此而削弱；对违反信息公示要求或者失信的主体应当在投融资、土地供应、招投标、财政性资金安排等方面依法予以限制，严重违法失信者应当依法实行市场禁入。

6、 试点实施时程

《负面清单草案》自国务院批准试点地区市场准入负面清单制度改革试点方案之日起实施。试点期间至 2017 年 12 月 31 日为止，预计在 2018 年内开始实行全国统一的市场准入负面清单制度。

（三） 关注要点

根据《工作方案》的规定，试点地区的政府在试点期间要提出调整负面清单的建议，报国务院批准后实施。各试点地区经国务院批准的试点方案具体将包括哪些内容，四个试点地区的制度是否会有不同的发展，值得持续关注。

此外，对于《负面清单草案》在试点地区的自贸试验区外如何与现行《外商投资产业指导目录》进行衔接，以确保境外投资者在接受例外管理措施的同时，也能够尽可能享受准入前国民待遇原则所带来的简政放权的便利，也值得我们持续关注。

## 二、 财政部、海关总署、国家税务总局发布《跨境电商进口税收政策》及其配套规定

2016 年 3 月 24 日，财政部、海关总署、国家

税务总局发布《财政部、海关总署、国家税务总局关于跨境电子商务零售进口税收政策的通知》（以下简称“**《跨境电商进口税收政策》**”）。《跨境电商进口税收政策》的出台标志着跨境电商进口商品享受参照“行邮税”征税优惠政策的终结。

伴随着《财政部等 11 个部门关于公布跨境电子商务零售进口商品清单的公告》（以下简称“**《跨境电商进口商品清单》**”）和《关于跨境电子商务零售进出口商品有关监管事宜的公告》（以下简称“**《跨境电商监管事宜》**”）等配套规定的陆续出台，跨境电商的征税和监管标准将逐步统一完善。

（一） 背景

在《跨境电商进口税收政策》施行前，在跨境电商试点城市（上海、重庆、杭州、宁波、郑州、广州、深圳、天津、福州和平潭），通过跨境电子商务贸易方式进口的商品适用行邮税，并且应征税额在人民币 50 元（包括 50 元）以下的予以免征。

根据《中华人民共和国关于入境旅客行李物品和个人邮递物品征收进口税办法》、《关于调整进出境个人邮递物品管理措施有关事宜》等相关规定，行邮税原仅适用于应税旅客行李物品、个人邮递物品和运输工具服务人员携带进口的应税自用物品以及用其他方式进口的个人自用物品，关税和进口环节增值税、消费税三税合并征收，税率普遍低于同类一般贸易进口货物的综合税率。新政出台后，跨境电商适用“行邮税”的政策红利正式终结。

（二） 法律点评

相较于原有模式，《跨境电商进口税收政策》及其配套规定主要在以下几个方面进行了改革：

1、跨境电商零售进口商品按照货物征税

《跨境电商进口税收政策》规定跨境电商零售进口商品按照货物征收关税和进口环节增值税、消费税，购买跨境电子商务零售进口商品的个人作为纳税义务人，以实际交易价格（包括货物零售价格、运费和保险费）作为完税价格，电子商务企业、电子商务交易平台企业或物流企业可作为代收代缴义务人。

2、推出跨境电商零售进口商品清单

2016 年 4 月 6 日，财政部、国家发改委、工业和信息化部、农业部、商务部、海关总署、国家税务总局、质检总局、食品药品监管总局、濒管办、密码局联合发布《跨境电商进口商品清单》，只有列入清单范围内的进口商品才能适用跨境电商零售进口税收政策。

3、提高跨境电商零售进口商品的交易限值

《跨境电商进口税收政策》将单次交易限值由参照行邮税征税时的 1000 元人民币（寄自或寄往港、澳、台地区的物品，每次限值为 800 元人民币）提升至 2000 元人民币，同时增加个人年度交易限值 20000 元人民币的规定。在限值内进口的跨境电子商务零售进口商品的关税税率为 0%，进口环节增值税、消费税按法定应纳税额的 70%征收。超出限值的则按照一般贸易方式全额征税。

4、允许跨境电商进口商品退货

《跨境电商监管事宜》规定在跨境电商零售进口模式下，允许电子商务企业或其代理人申请退货，退回的商品应当在海关放行之日起 30 日内原状运抵原监管场所，相应税款不予征收，并调整个人年度交易累计金额。

《跨境电商进口税收政策》及其配套措施取消了新政施行前的“50 元”免征额，这也就意味着对于

食品、保健品、奶粉、纸尿裤等单票低价商品税率将明显提高，跨境电商未来在这些品类上的价格优势将被极大削弱。

（三） 关注要点

《跨境电商进口税收政策》及其配套规定的出台，统一和规范了跨境电商税收及监管模式，但其会不会影响新政施行前存在的跨境电商模式的合法性，如海关是否会继续允许境外网站与其联网等具体监管要求值得我们持续关注。

## 三、 《反不正当竞争法（修订草案送审稿）》引起广泛关注

《反不正当竞争法(修订草案送审稿)》于 2016 年 3 月 25 日结束征求意见，将根据反馈意见进行进一步修订。

（一） 背景

2016 年 2 月 25 日，国务院法制办公室公布《反不正当竞争法（修订草案送审稿）》并公开征求意见。《反不正当竞争法（修订草案送审稿）》的主要修订是删除现行法律与《反垄断法》、《商标法》、《广告法》相重复的规定；新增对具有相对优势地位经营者的不公平交易行为的规范，以及对互联网领域企业不正当竞争行为的规范；明确商业贿赂的定义及行为；加重违法行为的法律责任等。

《反不正当竞争法（修订草案送审稿）》公布后引起国内外的广泛关注并收到大量的意见，征求意见已于 2016 年 3 月 25 日结束。

（二） 法律点评

我们查阅了大量网上公开发表的意见，注意到对于《反不正当竞争法（修订草案送审稿）》最突出的意见包括建议删除或缩小对具有相对优势地位经营者的不公平交易行为的规范。

《反不正当竞争法（修订草案送审稿）》采用概念加列举的方式明确相对优势地位的概念，以及列举经营者利用相对优势地位实施不公平交易的五种行为。相对优势地位，是指在具体交易过程中，交易一方在资金、技术、市场准入、销售渠道、原材料采购等方面处于优势地位，交易相对方对该经营者具有依赖性，难以转向其他经营者。经营者利用相对优势地位实施不公平交易的行为包括：没有正当理由，限定交易相对方的交易对象；没有正当理由，限定交易相对方购买其指定的商品；没有正当理由，限定交易相对方与其他经营者的交易条件；滥收费用或者不合理地要求交易相对方提供其他经济利益；附加其他不合理的交易条件。

建议删除或缩小该行为规范的理由主要集中在如下方面：

1. 具有优势地位的判断标准过于模糊，缺乏类似认定及推定经营者具有市场支配地位的量化判断标准，给予执法机关过大的自由裁量权。

2. 未规定对于经营者利用相对优势地位实施不公平交易的行为系采取本身违法原则还是合理分析原则。

3. 未规定豁免情形，不利于平衡该类行为对经营者的好处以及竞争造成的不利影响。

4. 在签订及履行合同的过程中，处于商业谈判强势地位的经营者将有可能会被认定为经营者利用相对优势地位实施不公平交易而被处罚。

5. 对于经营者利用相对优势地位实施不公平交易的行为的罚款可能重于具有市场支配地位的经营者滥用市场支配地位的行为的罚款。在前种情形下，经营者将面临最高三百万的罚款；在后种情形

营者将面临最高上一年度销售额百分之十的罚款。

6. 除了滥收费用或者不合理地要求交易相对方提供其他经济利益外，其他四项不公平交易行为与《反垄断法》规定的具有市场支配地位的经营者滥用市场支配地位的行为相重合，这将会削弱《反垄断法》的适用。

（三） 关注要点

国务院已将《反不正当竞争法》的修订列入 2016 年立法工作计划，《反不正当竞争法》的修订进程值得关注。

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The National Development and Reform Commission ("NDRC") and the Ministry of Commerce ("MOC") issued the Notice of National Development and Reform Commission and Ministry of Commerce on the Trial Negative List for Market Access (Pilot Version) ("Trial Negative List") stipulating that Tianjin, Shanghai, Fujian and Guangdong are the pilot regions to adopt the negative list system for market access of all foreign-invested enterprises.

The Ministry of Finance ("MOF"), the General Administration of Customs ("GAC") and the State Administration of Taxation ("SAT") issued the Notice of the Ministry of Finance, the General Administration of Customs and the State Administration of Taxation on Tax Policies for Cross-border E-commerce Retail Imports ("CBERI Tax Policies") and its supporting regulations.

The Anti-Unfair Competition Law will soon be revised for the first time in 23 years since its first implementation.

## 1. NDRC and MOC's Release of the Trial Negative List

On March 2, 2016, the NDRC and MOC, after collecting and reviewing opinions from relevant state departments, issued the Trial Negative List, specifying industries, areas and businesses prohibited and restricted from investment and operation within China. The Trial Negative List specifies 328 matters in total, including 96 prohibited-entry matters and 232 restricted-entry matters. Tianjin, Shanghai, Fujian and Guangdong will be the pilot regions for the Trial Negative List.

The release of the Trial Negative List marks a further step taken by China toward the full implementation of negative lists regarding market access and the entry of foreign investment. Administration of market access will be further clarified, more transparent and costs for enterprises to comply with the law will materially decrease. The pilot program for the Trial Negative List will provide an opportunity for a comprehensive review of the necessity of market access restrictions and provide a regular monitoring mechanism for further relaxing the market access restrictions.

### 1.1 Background

On October 2, 2015, the State Council issued the Opinion of the State Council on Implementation of the Negative List System for Market Access ("Access Opinion") and the Working Plan on the Pilot Reform Program of the Negative List System for Market Access ("Pilot Plan"), to select areas for the pilot program of the negative list system for market

access.

On March 2, 2016, according to the Access Opinion, the NDRC and MOC issued the Trial Negative List where provincial-level governments of the pilot areas will put forward plans to implement the negative list system for market access according to the Access Opinion and the Trial Negative List and such plans will be examined and approved by the State Council and implemented on the date of such approval.

1.2 Legal Review

a. Adoption of the Trial Negative List for Both Foreign and Domestic Investors

The negative list for market access under the Trial Negative List applies to both foreign and domestic investors and includes administrative measures for general application by both foreign and domestic investors, representing consistent administration for both foreign and domestic investments and in compliance with the requirement for equal treatment pre-entry into the market, where foreign and domestic investments will be treated equally during the stage of market entry except for certain reserved restrictions made by the Chinese government in foreign negotiations.

In the meantime, during a news conference with reporters, the NDRC stated that the main consideration in selecting the four free trade zones of Tianjin, Shanghai, Fujian and Guangdong to carry out the pilot program was that the system of negative lists for market access and negative lists for free trade zones form a comprehensive management system of market access in order to explore methods of reform, accumulate experiences and set examples. Accordingly, after implementation of the Trial Negative List, the pilot free trade zones will primarily form a regulatory system for market access consisting of two negative lists and foreign investors should comply with both the negative list generally applied for market access requirements under the Trial Negative List, as well as the negative list targeting foreign investments under the Special Management Measures for the Market Access of Foreign Investment in Pilot Free Trade Zones (Negative List).

b. Three Categories of Access

Operation activities listed in the Trial Negative List consist of prohibited and restricted items. According to the Access Opinion, for prohibited-access matters market entities which are prohibited from entering the market; for restricted-access matters, market entities which can only conduct such operations if approved by the relevant authority or having complied with the conditions and entry methods stipulated by the government. For operation activities not listed in the Trial Negative List, all market entities can carry out relevant operations equally.

c. Rule of Law and Necessity Rule

According to the Access Opinion, the administrative measures for market access shall be conducted in accordance with the laws, regulations and State Council's decisions. In order to continue the implementation of

administrative measures for market access based on current department regulations and normative documents, relevant government authorities shall submit requests for the release or amendment of laws, regulations and State Council's decisions. The Trial Negative List specifies 11 items relevant to this situation.

The Access Opinion also demands full clearance of market-access related regulations to make sure that what remains are only those regulations necessary for implementation of market access administration; for matters not included in the negative list, it requires in time abolishment or amendment of their establishing rules; and it also requires timely amendment of the Catalogue of Investment Projects Subject to the Approval of the Government, to narrow the scope of approval to the minimum extent.

d. Connecting with Current Lists Related Market Access

According the Trial Negative List, both the eliminated category under the Catalogue for Industrial Structure Adjustments and the new establishment of projects under the restricted category of the same catalogue fall into the prohibited-entry matters under the Trial Negative List. Projects clearly subject to government examination and approval in the Catalogue for Investment Projects Examined and Approved by the Government fall into the restricted-entry matters under the Trial Negative List.

e. Strengthening Post-Access Surveillance Mechanism

When relaxing the restrictions on market access requirements, the Access Opinion also requires strengthening the post-access surveillance mechanisms to make sure that the protection over public interests will not be weakened. The Access Opinion sets restrictions for discredited entities or entities violating the requirements for information disclosure in aspects including investment and financing, land supply, fiscal funding management; and materially discredited entities shall be prohibited from entering into the market according to the law.

f. Pilot Period

The Trial Negative List is implemented on the date of the State Council's approval of the pilot reform plan of pilot areas' negative list system for market access. The pilot period ends on December 31, 2017. A nationally unified negative list system for market access will be implemented in 2018.

1.3 Next Step

According to the Pilot Plan, governments of the pilot areas may put forward recommendations for adjustments of the negative list during the pilot period, which will be submitted to the State Council and implemented after its approval. Therefore it is worth noting that the specific pilot plans approved by the State Council for each of the four pilot areas and whether the systems of these areas will have develop differently.

In addition, it is also worth noting how the Trial Negative List will be connected with the current

effective Catalogue for Guidance of Foreign Investment Industries in pilot areas which are not pilot free trade zones to make sure that foreign investors regulated under particular rules will enjoin the convenience of national rules under the Trial Negative List.

## 2. MOF, GAC and SAT Jointly Issued the CBERI Tax Policies and Its Supporting Regulations

On March 24, 2016, the MOF, the GAC and the SAT issued CBERI Tax Policies. The release of the CBERI Tax Policies marks the end of an era where cross-border e-commerce products have enjoyed the same favoring tax policy as "personal postal articles."

Complying with the Announcement of the Ministry of Finance and 10 Other State Departments on Announcing the List for Cross-border E-commerce Retail Imports ("CBERI List"), the Announcement on Regulatory Matters Regarding Cross-border E-commerce Retail Imports ("CBERI Regulatory Matters") and other successively issued supporting regulations, tax policies and regulatory standards on cross-border e-commerce will be further unified and consummated.

### 2.1 Background

Before the implementation of the CBERI Tax Policies, cross-border e-commerce trial cities (including Shanghai, Chongqing, Hangzhou, Ningbo, Zhengzhou, Guangzhou, Shenzhen, Tianjin, Fuzhou and Pingtan) adopted a tax on personal postal articles for cross-border e-commerce imports and exempted taxes for imports no more than RMB 50.

According to the Regulations on the Levying of Import Taxes on Travelers' Luggage Articles and Personally Mailed Articles of People's Republic of China, the Matters on the Adjustment of the Regulatory Measures of Imported and Exported Personally Mailed Articles and relevant regulations, the taxes on personal postal articles is only applied to levying collectable tax on travelers' luggage articles, personally mailed articles, articles for personal use brought by transportation services personnel and articles for personal use imported by other methods. Under such tax policy, customs duty, import value-added tax and exercise duty are jointly collected and therefore the tax rate is generally lower than the aggregated tax rate for imports of the same class. After the release of the new tax policies, favoring tax policies of personal postal articles tax enjoyed by the cross-border e-commerce have officially ended.

### 2.2 Legal Review

Compared with the original practice, the CBERI Tax Policies and its supporting regulations have majorly reformed in the following aspects:

(a) Tax on cross-border e-commerce imports levied according to classes of goods

The CBERI Tax Policies stipulate that taxes on cross-border e-commerce imports include customs duties, import value-added taxes and exercise duties levied according to class of goods; persons who have purchased

cross-border e-commerce imports are the responsible taxpayers; the actual traded price (including goods retail price, transportation fees and insurance fees) is the base for calculating taxes; and e-commerce enterprises, e-commerce trading platform enterprises or logistic enterprises can be the withholding obligors.

(b) List for Cross-border E-commerce Retail Imports

On April 6, 2016, the MOF, the NDRC, the Ministry of Industry and Information Technology, the Ministry of Agriculture, the MOC, the GAC, the SAT, the General Administration of Quality Supervision, Inspection and Quarantine, the China Food and Drug Administration, the Administration Office of Endangered Species Import and Export, and the Administration Office of Security Commercial C ode Administration jointly issued the CBERI List and only imports contained on the List will be required to adopt the tax policies for cross-border e-commerce retail imports.

(c) Raise of Trade Limits for Cross-border E-commerce Retail Imports

CBERI Tax Policies raises the single-trade limit to adopt personal postal articles tax at RMB 1,000 (for articles mailed to or from Hong Kong, Macau and Taiwan, RMB 800 for a single trade) to RMB 2,000 and increases annual upper limit of individual transactions to RMB 20,000. Customs duty for cross-border e-commerce retail imports within such limits is 0% and the amount exceeding such limits will be levied full tax according to generally trading methods.

(d) Acceptance of Return of Cross-border E-commerce Retail Imports

CBERI Regulatory Matters stipulates that under the model of cross-border e-commerce retail imports, e-commerce enterprises and their agents are allowed to apply for returning those imports. Returned goods shall be returned to their original regulatory site within 30 days after being released by customs and the relevant tax will be refunded, and the accumulated amount for personal annual trading will be adjusted accordingly.

CBERI Tax Policies and its supporting regulations cancelled the RMB 50-duty-free threshold before implementing the new tax policy, which indicates that tax rates are to be raised significantly for low-value single products including food, health products, milk powder and diapers, and therefore the price advantages of cross-border e-commerce merchants on these products will be severely affected.

2.3 Next Step

The release of the CBERI Tax Policies and its supporting regulations unifies and regulates the tax policy and regulatory framework on cross-border ecommerce, but whether the implementation of this new tax policy will cast doubt on the legality of the business models of cross-border ecommerce imports, e.g. whether customs will allow foreign websites to operate within these guidelines, is still worth our attention.

## 3. The Anti-Unfair Competition Law (Revised Draft Submitted for Review) Draws Extensive Public Attention

The Anti-Unfair Competition Law (Revised Draft Submitted for Review) was released for public comment until March 25, 2016 and will be further revised based on feedback received from the public.

3.1 Background

On February 25, 2016, the Legislative Affairs Office of the State Council released the Anti-Unfair Competition Law (Revised Draft Submitted for Review) and submitted it for public comments. Major revisions include: (i) removing provisions overlapping with that of the Anti-Monopoly Law, the Trademark Law, and the Advertising Law; (ii) adding provisions regulating conduct of unfair trading of business operators with a comparative advantage position, and also provisions regulating conduct of unfair competition of enterprises engaging in internet business; (iii) clarifying definitions and conduct of commercial bribery; and (iv) increasing the legal liabilities for committing illegal acts, etc..

The announcement of the Anti-Unfair Competition Law (Revised Draft Submitted for Review) has drawn extensive public attention in China and abroad. Its consultation period ended on March 25, 2016.

3.2 Legal Review

We have reviewed a wide range of comments made on the internet, and noticed that the most predominant opinions include removing or narrowing down the provisions regulating conduct of unfair trading of business operators with comparative advantage position.

The Anti-Unfair Competition Law (Revised Draft Submitted for Review) clearly defines "comparative advantage position" and enumerates 5 types of conduct of unfair trading of business operators taking advantage of their comparative advantage position. "Comparative advantage position" is defined as "an advantageous position in a specific transaction held by a business operator in terms of capital, technology, market access, distribution channel and material procurement, etc. and its trading counterparty is reliant on such business operator and is difficult to switch to other business operators." Conduct of unfair trading of business operators taking advantage of their comparative advantage position include: (i) restricting counterparties' trading partners without justifiable cause; (ii) restricting counterparties to purchase designated goods without justifiable cause; (iii) restricting trading terms and conditions between counterparties and other business operators without justifiable cause; (iv) abusively overcharging or unreasonably demanding counterparties to offer other economic interests; and (v) attaching other unreasonable trading terms.

Grounds for suggestions to remove or narrow down such provisions mainly include the following:

a. Standards for ascertaining "advantage position" are vague in the sense that they lack quantitative criteria similar to those

used for ascertaining and presuming market predominant position of business operators, which leave excessive discretion to the law enforcement agencies.

b. Whether the "illegal per se rule" or "rule of reason" shall apply when determining conduct of unfair trading of business operators taking advantage of their comparative advantage position is not specified.

c. No exceptions are provided, affecting the balance between benefits brought to business operators by such conduct and disadvantages brought by competition.

d. Business operators with stronger bargaining power are likely to be deemed to carry out conduct of unfair trading taking advantage of their comparative advantage position in the process of entering into and performing contracts, and are therefore punished.

e. Fines imposed on business operators who are deemed to carry out conduct of unfair trading taking advantage of their comparative advantage position could be more serious than fines imposed on business operators who are deemed to carry out abusive use of their market predominant position. The former may lead to penalties up to RMB 3 million, while the later may result in fines up to 10% of business operators' turnover of the previous year.

f. Other than the conduct of abusively overcharging or unreasonably demanding counterparties to offer other economic interests, the remaining 4 types of unfair trading acts overlap with the abusive use of market predominant position of business operators as stipulated in the Anti-Monopoly Law, which could weaken the application of Anti-Monopoly Law.

3.3 Next Step

The State Council has included the revision of Anti-Unfair Competition Law in the working agenda of legislation in 2016. Future progress in respect to revisions of the Anti-Unfair Competition Law deserves close attention.


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