

China to Enforce Anti-Monopoly Law Vigorously

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Several new regulations implementing China's Anti-Monopoly Law (AML) will be implemented 1 February 2011. Increased investigation and enforcement of the AML seems inevitable.

On 1 February 2011 a number of new regulations implementing China's Anti-Monopoly Law (*i.e.*, antitrust or competition law) will come into force. They are:

- Regulations for Prohibiting Price Monopoly (Price Monopoly Regulations) issued by the National Development & Reform Commission (NDRC)
- Regulations on Administrative Enforcement Procedures for Prohibiting Price Monopoly (Price Monopoly Enforcement Procedures) issued by NDRC
- Regulations of Administration for Industry and Commerce for Prohibiting Monopoly Agreements (Monopoly Agreement Regulations) issued by the State Administration for Industry and Commerce (SAIC)
- Regulations of Administrations for Industry and Commerce for Prohibiting Abuses of Dominant Market Position (DMP Regulations) issued by SAIC
- Regulations of the Administrations for Industry and Commerce for Prohibiting the Acts of Abusing Administrative Powers to Eliminate or Restrict Competition (Administrative Power Regulations) issued by SAIC

(Translations of the new regulations are available upon request.)

The new regulations are likely to result in more widespread and rigorous enforcement of the Anti-Monopoly Law (AML). The prospect of thousands of additional officials exercising new powers under these regulations and clearer grounds for complaints as set out in the new regulations, together with a potent new incentive of full immunity from fines for the first whistle-blower of a cartel, means that now is an opportune time for companies active in China to take a closer look at their business practices. Companies should actively consider measures to limit the risk of significant AML fines that can be up to 10 per cent of annual revenue, as well as follow-on actions by aggrieved parties in the courts. A properly

constructed antitrust audit and compliance program for China operations are concrete measures that can significantly reduce the risks.

The measures introduced by the new regulations in China are similar to those introduced by the European Union (EU) over the last 10 to 15 years, which have led to billions of euros in fines and hundreds (if not thousands) of new investigations into cartels, abuses of dominance and other conduct-restricting competition. Clearly the new regulations in China have the same purpose as those introduced by the EU.

Through these new AML regulations, not only are central government authorities responsible for enforcement against conduct and agreements that restrict competition (*i.e.*, SAIC and NDRC), but now provincial and local government authorities with thousands more officials are also empowered to enforce the AML. The newly empowered provincial and local enforcement authorities can investigate complaints, declare that a company dominant in the market is abusing that dominance and grant immunity from fines to a whistle-blower involved in, for example, a price fixing or market sharing cartel.

Additionally, the new regulations provide the basis for an authority to conduct unannounced searches of business premises (dawn raids) to take copies of emails and files, to seize documents and to question executives and employees.

Over the last few years central government authorities in Beijing, SAIC and NDRC, sometimes in cooperation with the European Commission, have been conducting training and information sessions with provincial and local authorities in preparation for their new enforcement role. With these new regulations in place, some provincial and local government authorities will be seeking to test their new powers so complaints are likely to be welcome. Increased investigation and enforcement of the AML therefore seems inevitable.

Equally, just as happened in the EU when a new leniency program was introduced, it also seems likely there will be whistle-blowers wanting immunity from significant fines by being the first to notify a cartel to the regulator, rather than wait for their competitors to do so and be exposed to the full extent of fines—the race to the regulator has begun!

Given the rather vague wording of the AML, the new regulations bring welcome clarification of how the AML should be interpreted. The regulations cover common business practices concerning pricing, distribution, intellectual property licenses and purchase and supply agreements. It will be noted that much of China's AML and the new regulations approach is that an agreement or conduct that potentially restricts or eliminates competition will be *presumed* to be in breach of the AML unless it is shown the agreement or conduct is justified. EU competition law uses a somewhat similar approach of treating

anticompetitive conduct and agreements as a breach of the law unless it can be shown that the benefits to consumers (the justifications) outweigh the detriment arising from the anticompetitive agreement or conduct.

The new China AML regulations provide much clearer indications for enforcement authorities as to what conduct can be a breach of the AML and what may be acceptable justification for conduct apparently in breach of the AML. They cover such things as price fixing and other price manipulation, below cost (predatory) pricing, discriminatory treatment of customers, exclusive dealing, unfair and excessive pricing, requiring the purchase of two products when one is unrelated to the other (bundling or tying) and collusion between competitors.

The new regulations list various types of conduct which are presumed to be evidence of illegal conduct contrary to the AML, unless justified. An analysis of the most significant parts of the regulations are provided in [Table 1](#) and [Table 2](#), others are discussed below.

1. Pricing Practices

The China Regulations enable the regulator to find an agreement to fix prices (*e.g.*, a cartel) on the basis of consistency of pricing conduct or the mere communication of an intention amongst business operators (information exchange). The European Commission has taken a similar approach in its new Guidelines on Horizontal Agreements. One potential concern with the China Regulations is the “most favoured price” clause, as it is unclear whether this would be seen as an agreement to “apply a standard formula as the basis of calculating prices”, and so prohibited.

Resale price maintenance (fixing or requiring a minimum resale price to third parties) is prohibited unless justification is provided. The EU provides extremely limited exceptions to its ban on resale price maintenance, such as a few weeks of promotional pricing for new products, but it remains to be seen whether or not the exceptions would be acceptable in China.

A company dominant on the China market cannot, without sufficient justification, use discounts to make it completely unattractive for traders to deal with its competitors. It will be noted that a company can be jointly dominant on the China market with two other companies, when the three have a total market share of 75 per cent or more. This remains the case even if one operator has only a 10 per cent market share with the other two having a combined 65 per cent of the market (*e.g.*, 30 and 35 per cent each respectively). Such a dominant company also cannot impose additional unreasonable fees in trading. This last provision may be aimed at the financial services industry.

A company dominant on the China market selling at ‘unfairly’ high prices or buying at “unfairly” low prices is deemed to be abusing its dominance unless sufficient justification is provided. The cost (and changes in cost) of a product is a major consideration in determining whether the sale or purchase is at an “unfair” price. Below cost (predatory) pricing by a company dominant on the market is generally also prohibited unless good justification is provided, such as when promoting new products, a “fire sale” or liquidation, or sale of fresh and live products or overstocked products.

A refusal to trade by a dominant company charging excessive prices or by purchasing at an excessively low price is prohibited, unless justified by reasons such as “extremely bad credit history” or if the product can be obtained from other sources at “reasonable” prices. Discriminatory treatment of other trading parties under the same conditions by a dominant supplier/buyer is prohibited without justification, but no examples of potentially acceptable justifications for discriminatory treatment are provided by the new regulations.

2. Restrictions on production or sales

Agreements or concerted practices (as shown by information exchange and/or consistent practices) between competitors that limit production or sales are prohibited. Agreements that divide up sales, purchasing or supply areas or the type or quantity of goods for sale, are prohibited.

Competitors are prohibited from engaging in collective boycotts of a specific business operator concerning the supply or purchase of products.

A company dominant on the China market cannot require, without justification, exclusive dealing or to only deal with designated trading parties, or to prevent dealings with competitors of the dominant company without justification. Dominant companies in China will have to be careful with exclusive distribution and selective distribution arrangements as well as with franchising agreements. Without justification, the bundling or tying of unrelated transactions and discriminating between trading parties is prohibited by a dominant company, as are the imposition of “unreasonable” contract periods, conditions of payment or conditions of delivery.

Territorial and customer restrictions on distributors or licensees are also prohibited if imposed by a dominant company without justification. When determining whether such conduct is justified, the new regulations require the regulator to take into account normal business practices based on ordinary operating activities and ordinary interests *or* how the relevant practices will affect economic efficiency,

the public interest and the development of the economy. These last provisions can mean a multitude of things so it is hoped the regulators will provide more detail in the near future.

3. Restrictions on Technology and Industry Standards

Particular emphasis is placed on ensuring the market for new technologies is free of restrictive practices. Any agreement or concerted practice between competitors to restrict the purchase, lease or use of new technology or equipment, or restrict investment in research and development for new technology and products, is prohibited. Following recent cases in the EU and United States on technical standards in the computer industry, the new China regulations specifically prohibit agreements between competitors that prevent (or refuse) the use of new technology, or prevent (or refuse) the adoption of new technology standards. The new EU Guidelines on Horizontal Agreements seem to go further by requiring that the holder of a patent needed to use an industry technical standard must licence the patent on fair, reasonable and non-discriminatory terms.

The new regulations recognise that the holder of intellectual property rights may exercise those rights, but in their exercise, the holder may not abuse those rights so as to eliminate or restrict competition.

4. Abuse of Administrative Power

Many Chinese public bodies are also engaged in and/or closely regulate commercial activities. The new regulations under the AML set out a number of provisions that limit how public bodies exercise their powers. In particular, an administrative body is prohibited from misusing its powers to restrict products coming from other regions of China, for example, by imposing discriminatory charges or by applying discriminatory prices on such products. An administrative body also may not force a business operator to conduct itself so as to be in breach of the new regulations, or to eliminate or restrict competition.

The new regulations also prohibit a business operator from entering into agreements contrary to the AML or, if dominant on the China market, to abuse its dominance under the guise of an order, approval, authorisation or application of a regulation issued by an administrative body.

Because the provisions concerning misuse of administrative powers are largely self-enforcing in that the administrative agency is responsible for policing its own conduct, it remains to be seen whether these new regulations under the AML will result in an effective application of the AML to curb the misuse of administrative power.

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