

Legal Updates & News

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People's Republic of China Passes Comprehensive Anti-Monopoly Law

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Nearly 14 years after the People's Republic of China (PRC) began efforts to enact a comprehensive competition law, the Standing Committee of the PRC National People's Congress passed the Anti-Monopoly Law ("AML") on August 30, 2007. The AML will become effective on August 1, 2008, and has several key implications:

- The AML is similar in many ways to the laws of other jurisdictions that prohibit anticompetitive agreements (e.g., price fixing, group boycott and market allocation arrangements) and monopolistic conduct by dominant firms (e.g., tying, predatory pricing). Thus, companies doing business in China will likely have little difficulty understanding how to comply with these familiar restrictions on competitive activity.
- On the other hand, there are also some aspects to the AML that address unique issues that China faces as it transforms from a centrally planned to a market-oriented economy. For instance, the AML places restrictions on the conduct of state-owned enterprises (SOEs) and prohibits administrative agencies from using governmental power to restrict or eliminate competition.
- Furthermore, the AML clearly departs from international norms of competition policy in some areas. For example, the AML prohibits a dominant firm from selling products at "unfairly" high or low prices, and outlaws unilateral refusals to deal and discriminatory trading practices that are not justified by a valid cause. Any future enforcement actions in these areas are likely to be controversial and generate concerns that the AML is being used to protect individual competitors rather than competition or consumer welfare.
- Firms doing business in China will continue to face uncertainty in the near future about the AML's scope and potential application. The law does not clearly define the precise meaning of certain prohibited practices. In addition, the AML calls for the creation of a new enforcement agency, but it is unclear what steps that agency will take to promulgate regulations or enforce the law. There are, however, steps companies can take now to evaluate their compliance with the AML's restrictions.

The following is a summary of the AML's key provisions.

Scope of Application

Overall scope:

- Applicable to monopolistic conduct in China; and
- Applicable to monopolistic conduct outside China that has the effect of eliminating or restricting competition on the domestic market of China.

Exceptions

- Not applicable to concerted actions of agricultural producers and rural economic organizations in the economic activities such as production, processing, sales, transportation and storage of agricultural products;

- Special protection awarded to (i) industries controlled by the state-owned economy and concerning the lifeline of national economy and national security; or (ii) industries implementing exclusive operation and sales according to law;
- Not applicable the exercise of intellectual property (IP) rights in accordance with relevant IP laws and regulations, however, the law will apply to firm that eliminate or restrict competition by abusing their IP rights.

Monopoly Agreements

The AML prohibits agreements, decisions or other concerted behaviors that eliminate or restrict competition, but allows for limited exceptions.

Prohibited Agreements include agreements:

1. fixing price (including certain vertical agreements fixing or maintaining minimum resale price);
2. restricting the production quantity or sales volume of commodities;
3. dividing markets;
4. restricting the purchase or development of new technology or new facilities;
5. jointly boycotting transactions; or
6. determined by AEA as monopoly agreements.

An exemption to these prohibitions is available if the undertakings can prove such agreements are:

1. for improving technologies, researching and developing new products;
2. for upgrading product quality, reducing costs, improving efficiency, unifying product specifications or standards, or carrying out professional labor division;
3. for enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators;
4. for the purpose of realizing public interests such as conserving energy, protecting the environment and providing disaster relief;
5. for mitigating the severe decrease of sales volume or obviously excessive production during economic recessions;
6. for protecting legitimate interests in the foreign trade or foreign economic cooperation; or
7. under other circumstances prescribed by the law or the State Council.

Regarding the foregoing circumstances (1) to (5), the undertakings have additional burden of proof that the agreements will not substantially restrict competition and will enable consumers to share the benefits.

Abuse of Dominant Market Position

Dominant Position

When determining dominant market position, the following factors must be considered:

- market share,
- the ability of the business operator to control the sales market or raw material procurement market,
- the financial status and technical conditions of the business operator, and
- any barriers to entry.

In particular, a business operator or several business operators may be deemed to have a dominant market position if the market share of one business operator reaches 50% or more, the combined market share of two business operators reaches 2/3 or more, or the combined market share of three business operators as a whole reaches 75% or more in the relevant market. However, any business operator with a market share below 10% is not deemed to have a dominant market position. In addition, business operators will not be considered to have a dominant market position if evidence proves otherwise.

Abusive Conduct

Business operators having market dominant position are prohibited from the following acts of abuse its dominant market position:

- selling commodities at an unreasonably high price or purchasing commodities at an unreasonably low price;
- selling products at prices below cost without any justifiable cause;
- refusing to conduct business with a trading partner without due cause;
- certain coercive conduct and tying, and differential pricing; or
- other acts determined by AEC as abusing dominant market position.

Concentration Control - Mergers & Acquisitions

Anti-Monopoly Review

Concentrations include mergers, the acquisition of voting shares or assets, and obtaining controlling power by contract or otherwise. Certain limited exceptions apply, for example, concentrations involving related companies.

Concentrations that meet certain thresholds are subject to anti-monopoly review by the State Council. However such thresholds are not provided in the AML, consequently:

- Foreign related acquisitions: subject to the review requirement if any of the thresholds in the 2006 Provisions on Take-over of Domestic Enterprises by Foreign Investors is met, until the State Council publishes detailed concentration notification requirements at a later stage, which shall prevail;
- Pure domestic mergers: notification threshold to be published by the State Council.

The AML establishes a two-step review process for all concentration reviews. The AEA will conduct a preliminary review within 30 days after receipt of full submission of application documents. For concentrations that need additional review after the preliminary review, the AEA will take another 90 days to finish its second-step review.

National Security Review

Pursuant to the AML, where national security is involved when a foreign investor participates in the concentration of business operators by merging or acquiring a domestic enterprise or by any other means, the transaction will be subject to national security examination, in addition to the anti-monopoly review.

This is not a new requirement, as national security review has already been mentioned in the 2006 Provisions on Take-over of Domestic Enterprises by Foreign Investors and in the 2006 Plan for Utilizing Foreign Investment during the Eleventh Five-year Plan Period (a policy statement from the National Development and Reform Commission). However, the national security review requirement aroused intense media attention upon the passing of the AML, due to concern over the uncertainty regarding how the national security review will be implemented, whether it will be restricted to several key industries or not, and what would be the criteria and procedures applicable.

Abuse of Administrative Power

Perhaps the most significant aspects of the AML (and an area with great potential for reform) are the limitations imposed on the conduct of administrative agencies and other organizations empowered by law or regulation. Specifically, the AML prohibits these administrative entities from abusing their public affairs or administrative power to do any of the following:

- formulate provisions to eliminate or restrict competition
- compel businesses to engage in monopolistic activities prohibited by the AML
- requiring companies to purchase from or deal with favored businesses
- discriminating against non-local business entities through a variety of practices, including the imposition of discriminatory technical or license requirements and the use of unequal rules to reject or restrict investments

Likewise, in industries controlled by the state-owned economy or relevant to the national security, the AML requires SOEs to supervise and control the business operations in a manner that protects consumers and facilitates technological progress. These SOEs must also not harm consumer interests by taking advantage of their controlling or exclusive status.

Enforcement Authorities and Powers

The AML provides for two enforcement authorities under the State Council:

Structure

- A supervisory body, the Anti-Monopoly Commission ('AMC'), will be established by the State Council, to 'organize, coordinate and guide the anti-monopoly work'.
- An enforcement agency, the Anti-Monopoly Enforcement Agency ('AEA'), designated by the State Council, will be responsible for the anti-monopoly law enforcement work, including investigation and regulation of monopolistic behavior.

Investigatory Powers

The AEA has the authority, after obtaining written approval from the head of the AEA, to investigate suspected monopolistic conduct through inspections; questioning of business entities, individuals and third parties; examination and duplication of business documents and records; and the seizure of evidence. The AEA is required to keep confidential any business or trade secrets it receives as part of its enforcement activities.

Uncertainty

- The AMC's composition and working rules will be prescribed by the State Council in the future.
- The State Council will also determine later whether one or more of the existing governmental authorities, such as the Ministry of Commerce and the Stated Administration for Industry and Commerce will be designated to be AEA.
- The interaction and responsibility delineation between AMC and AEA are also to be further clarified.

Penalties

The AEA has the authority to impose the following penalties:

- Fines for monopoly agreements and abuses of dominant position may range as high as 1% to 10% percent of the violator's total sales during the previous year.
- The fine will not exceed 500,000 RMB (about \$66,000 USD) if the parties have not yet fulfilled or implemented a monopoly agreement.
- If firms undertake a merger or acquisition in violation of the law's notification requirement, the AEA can prohibit the transaction and require the parties to unwind a consummated transaction by disposing or transferring of shares or assets. Parties can also be fined up to 500,000 RMB.
- Individuals and entities may also be fined for refusing to submit materials and information; submit fraudulent materials or information; concealing, destroying or removing evidence, or obstructing an investigation in other ways. Maximum fines for ordinary violations are 20,000 RMB for individuals and 200,000 RMB for business entities. For serious violations, fines for individuals may go up to 100,000 RMG and fines for entities may be up to 1,000,0000 RMB.

In addition, civil remedies are available to injured private parties.