

Antitrust Law Blog

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[China Releases New Draft Monopoly Rules](#)

On May 25, 2010, the Chinese State Administration of Industry and Commerce (“SAIC”) released new draft *Rules On Monopoly Agreements* (the “Rules”) for public comment. SAIC also released draft *Rules Prohibiting Abuse Of Dominant Market Position and draft Rules On Administrative Monopoly* for public comment on the same day.

Concerted Monopoly

The Rules define “monopoly agreements” as written or oral agreements between undertakings, or arranged for undertakings by industry associations, that impair or restrict competition and are in violation of Article 13, Article 14 and Article 15 of Antimonopoly Law. According to the Rules, even if a written or oral monopoly agreement does not exist, concerted action by undertakings may still be regarded as a de facto “monopoly agreement”.

The following are the proposed tests under the Rules for SAIC to determine whether a de facto monopoly agreement exists:

- (1) Whether the action is concerted, and
- (2) Whether there is connection or communication among the undertakings, and
- (3) Whether the undertakings can provide reasonable explanation for the concerted action.

The Rules also emphasize the necessity to consider the structure, competition status and possible changes to the market in finding a de facto monopoly agreement.

Technology Related Monopoly

Echoing the trend of tightening the restrictions on abusing intellectual property rights, SAIC further defines details on prohibiting competitive undertakings from restricting new technology in the Rules, including by: (1) restricting purchase and use of new technology and new process; (2) restricting purchase, lease and use of new equipment; (3) restricting investment and research on new technology, new process and new products; (4) refusing to use new technology, new process and new products; and (3) refusing to adopt new standards.

Vertical Agreement

The Rules also discuss enforcement against vertical monopoly agreements in Article 14 of the Antimonopoly Law. According to the Rules, vertical agreements between undertakings and their counterparts are prohibited only if they negatively impact competition and harm consumers. This standard is consistent with the current international standard regarding vertical agreements.

Leniency

It is worth noting that the Rules provide detailed provisions on China's antitrust leniency program. Since discovery of cartels has been difficult for most antitrust authorities, leniency programs have been an important tool to help authorities efficiently investigate cartels. According to the Rules, except for the core-organizer of any monopoly agreement, the participant to a monopoly agreement who first turns in any evidence helping the authority to find infringement and helps the authority in its investigation should receive “immunity” and all penalties should be waived. Except for the core-organizer of such monopoly agreement, participants to a monopoly agreement who turn in important evidence after the first participant is awarded leniency should receive deductions of the penalties based on the time they provide evidence and the value of such evidence. The Rules allow the antitrust authority to award leniency to companies who provide evidence before and in the process of an investigation.

Conclusion

Together with the *Rules Prohibiting Abuse Of Dominant Market Position* and the *Rules On Administrative Monopoly*, the Rules, after being adopted, will provide guidance to SAIC in its enforcement of the Antimonopoly Law and to the undertakings in their market behavior.

The Rules are guidelines only for SAIC. Therefore, the other antitrust authorities – Ministry of Commerce and the State Development and Reform Commission – may have their own Antimonopoly Law enforcement guidelines in the future.

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