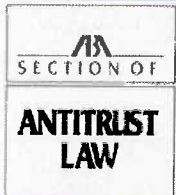


INFORMATION EXCHANGE



THE TRADE, SPORTS AND PROFESSIONAL ASSOCIATIONS COMMITTEE NEWSLETTER

American Bar Association Section of Antitrust Law

TRADE ASSOCIATIONS UNDER CHINA'S ANTI-MONOPOLY LAW

YEE WAH CHIN
INGRAM, YUZEK, GAINEN, CARROLL
& BERTOLOTTI, LLP

After 13 years of drafting, the enactment in 2007 of China's Anti-Monopoly Law (AML), its first comprehensive antitrust law was a major event in the antitrust world.¹ Since it became effective in August 2008, every AML development has been studied with great interest and with many prognostications being made. While in many ways the AML is within the mainstream of international antitrust development, it does have some distinctive characteristics. One in particular is the treatment of trade associations. This article summarizes the AML, and then reviews it as it relates to trade associations.

Overview of AML

The AML includes the three pillars of most modern antitrust laws: a chapter devoted to monopoly agreements that addresses

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recent judicial decisions, oral arguments, and Congressional hearings of interest to our members.

We hope you enjoy this issue, and we encourage you to make your own contributions to this Newsletter in the future.

All the best,

David Meyer
Chair
Trade, Sports, and Professional
Associations Committee
Antitrust Section
American Bar Association
Morrison & Foerster LLP
202-887-1519
dmeyer@mofa.com

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“cartels and other multi-party anti-competitive conduct,” which presumably should apply to trade associations;² a chapter focused on “abuse of dominant market position” dealing with unilateral conduct;³ and a chapter focused on “concentrations,”⁴ which covers mergers and acquisitions and joint ventures. It also includes some distinctive provisions: a chapter on abuse of administrative power that is directed toward rampant local protectionism;⁵ and articles on state-owned enterprises in sectors that are economically vital or implicate national security,⁶ businesses that have exclusive distribution rights pursuant to law,⁷ and on trade associations.⁸

The law establishes a multi-level and multi-faceted enforcement structure, all under the State Council, the chief executive body. A new entity, the Anti-Monopoly Commission (AMC), is created to: (1) research and draft competition policy; (2) organize and publish studies on the state of competition; (3) develop guidelines under the AML; (4) coordinate the enforcement of the AML; and (5) fulfill assignments from the State Council.⁹

The AML also specifies that the State Council will designate anti-monopoly enforcement authorities (AMEAs) that will be actually responsible for enforcement. The State Council designated three existing agencies to share enforcement responsibilities: (1) the Ministry of Commerce (MOFCOM); (2) the State Administration for Industry & Commerce (SAIC); and (3) the National Development & Reform Commission (NDRC). MOFCOM is the secre-

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tariat for the AMC, as well as the AMEA responsible for merger control, and for enforcing the AML against anti-competitive conduct in international trade. The SAIC is assigned to enforce the AML with respect to all other violations, except for pricing conduct. The NDRC is responsible for prosecuting pricing-related violations of the AML. The statute specifies the investigatory authority of the AMEAs, including requirements such as mandating at least two officials on each investigation and written records of interrogations.¹⁰ The confidentiality of trade secrets is expressly protected.¹¹

The AML also provides for a range of remedies.¹² Investigations may be suspended and eventually terminated upon targets taking action to address the AMEA's concerns.¹³ In the case of "monopoly agreements," leniency is available to a participant who discloses the violation and cooperates with the investigation.¹⁴ Otherwise, and also in the case of the abuse of dominant market position, "illegal gains" may be confiscated and fines may be imposed of between one and 10 percent of the previous year's turnover.¹⁵ Consummation of a transaction in violation of the AML may result in an order to divest, a fine of up to RMB500,000 or other orders to restore the status quo ante.¹⁶ Fines and criminal sanctions are authorized for obstructing investigations.¹⁷ The law is notably lacking in significant remedies for violations of the prohibitions against competitive abuse of administrative powers.

The AML expressly provides for administrative review and review under the administrative law of AMEA decisions.¹⁸ The AML

also provides for administrative and criminal penalties for AMEA staff members who abuse their powers.¹⁹

The AML also expressly provides that violators may be civilly liable for damages caused to others, which creates a private right of action.²⁰ The Supreme People's Court has designated the intellectual property (IP) tribunals of the People's Courts to handle cases arising under the AML, apparently because the tribunals may be the sections of the People's Courts most experienced in handling complex matters. Otherwise, intermediate level courts will adjudicate AML cases.

The AML itself does not distinguish between foreign and domestic businesses. However, until July 2009, foreign investors were also subject to the pre-merger competition notification and review provisions of the Provisions on M&A of a Domestic Enterprise by Foreign Investors ("Foreign M&A Provisions"). In July 2009, the Foreign M&A Provisions was amended²¹ to conform its provisions on premerger notification and review to the AML, so that foreign buyers would be subject to only one notification and review requirement, namely the one under the AML. Yet, significantly, the July 2009 amendments retained the requirement of a notification to MOFCOM of "transfers of the actual controlling right of the domestic enterprise owning any famous trademarks or traditional Chinese brands."²² This clause, though not overtly cited, may implicitly underlie the difficulties experienced by foreign companies in several of the merger investigations under the AML that have been publicized.

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Trade Associations in China

Trade associations in the United States are private, voluntary groups, without government participation. In fact, many are often in adversarial positions to the government. In contrast, trade associations in China historically are creatures of government. They are generally successors to government departments assigned to oversee specific industries. When China moved away from a command economy and towards increasingly privatized industry, the supervisory agencies were transformed into trade associations, with close ties to their former governmental affiliations. Thus, most industries of any size in China have a trade association, typically “sponsored” by some governmental body, in which membership is essentially mandatory. The associations often act as agents of the government in implementing industrial policy, including setting members’ prices and coordinating their competitive activities.

Therefore, many of the historical activities of trade associations in China would be considered cartels if conducted by purely private entities. In fact, it was not uncommon for trade associations in China to organize and then announce industry price changes,²³ even though such actions would have appeared to violate the 1997 Price Law that prohibits businesses from “manipulation of market price in collusion to the detriment of the lawful rights and interests of other operators or consumers.”²⁴ But, enforcement of the Price Law was light.

AML Provisions Relating to Trade Associations

Nonetheless, the view in China on the role of trade associations may be evolving. Shortly before the AML was enacted in August 2007, the NDRC announced an investigation under the Price Law of China’s branch of the International Ramen Manufacturers Association, following price increases of up to 40%.²⁵ This followed an announcement in July 2007 by the Association that its members had met and decided to raise prices, and a request by a representative of the China Consumers’ Association to the NDRC to investigate the increases.²⁶

At the same time, provisions relating expressly to trade associations were added to drafts of the AML for the first time. Ultimately, the final AML has three provisions that expressly relate to trade associations, Articles 11, 16 and 46. Article 11 states: “Industry associations shall strengthen industry self-discipline, guide undertakings in the industry to conduct competition in accordance with law, and safeguard market competition order.” Article 16 provides: “Industry associations may not organize undertakings in the industry to engage in monopoly conduct prohibited under this Chapter [II].” Under Article 46, trade associations that organize monopoly agreements are subject to fines of up to RMB500,000, and cancellation of their registration. How the interplay between Articles 11 and 16 develops should be interesting.

Other articles of Chapter 2 on “monopoly agreements” that relate to horizontal arrangements are generally relevant to trade associations. In particular, Article 13 prohibits agreements among competitors that fix or change prices, limit output or sales, allocate markets for products or raw mate-

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rials, limit the purchase of new technology or equipment or the development of new technology or products, or set up joint boycotts. Article 15 provides exemptions for agreements that would be violations, if they are shown to be for the purposes of upgrading technology, research and development of new products, improving product quality, reducing costs and enhancing efficiency, standardizing product specifications, engaging in a specialized division of work, promoting goals such as energy conservation, environmental protection or disaster relief, coping with economic depression that results in surplus supplies, or protecting trade and foreign economic cooperation. Moreover, reflecting concerns about small and medium sized businesses, Article 15 also exempts agreements that are demonstrated to have the purpose of improving the efficiency of small and medium sized businesses.

Implementation of the AML Relating to Trade Associations

At least two sets of draft regulations that have been issued for public comment are relevant to trade associations.

The SAIC issued for comments a draft Regulation Prohibiting Monopoly Agreements under the AML.²⁷ This draft prohibits trade associations from organizing industry participants to violate the AML by issuing industry rules and notices that exclude or restrict competition, convening industry meetings to discuss and form agreements or resolutions that violate the AML, or facilitating monopoly agreements among industry participants.²⁸ The Draft Monopoly Agreement Regulation

also tracks the AML in specifying that the SAIC may impose penalties of up to RMB 500,000 upon the association and request that the association's registration be cancelled.²⁹ More generally, the draft regulation prohibits competitors from agreeing to restrict output or sales, divide markets for supplies or output, restrict purchase or development of new technology or equipment, boycott customers or suppliers, or rig bids.³⁰ However, the draft regulation further provides that, if the agreements are shown to satisfy the requirements of Article 15 of the AML, then they will not be violations.³¹

The NDRC issued for comments a Draft Anti-Pricing Monopoly Regulation³² that prohibits trade associations from taking industry action to fix prices, holding meetings to fix prices or facilitating price fixing by members. The Draft Pricing Regulation generally prohibits pricing agreements among competitors, specifically agreements fixing prices, price ranges, fees or discounts, base prices, or price formulas, rigging bids or auctions, or not changing prices without competitors' consent.³³ In perhaps a harbinger of jurisdictional disputes with the SAIC, the Draft Pricing Regulation also prohibits agreements among competitors that fix prices by limiting output or dividing markets.³⁴ As in the Draft Monopoly Agreement Regulations, the Draft Pricing Regulation also exempts agreements that satisfy AML Article 15 and otherwise applies the penalties provided in the AML.³⁵

There is also an unpublished draft Judicial Interpretation of the Supreme People's Court that indicates that trade associations not only may be defendants in cases

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brought under the AML but also can bring actions under the AML on behalf of their members.³⁶ The Draft Judicial Interpretation also provides for joint and several liability among an association and those who are parties to illegal agreements that the association facilitated.³⁷

Finally, trade associations may have a greater and informal role in merger control under the AML than is common in the U.S. In its Measures on the Review of Concentrations between Undertakings, MOFCOM specifically provided that the views of industry associations may be sought during merger reviews.³⁸ It indicated that the views of trade associations were sought in the investigations into Coca-Cola's failed acquisition of Huiyuan and Panasonic's acquisition of Sanyo.

Conclusion

The inclusion in the AML of provisions specific to trade associations reflects some acceptance in China that trade associations should be subject to scrutiny for cartel or other anti-competitive behavior. Nonetheless, as recently as January 2010, the China Publishers Association, the China Book Distribution Industry Association, and the China Xinhua Bookstore Association jointly published "Book Fair Trade Rules" that set a standard of maximum discounts of 15% of cover price during the first year after publication.³⁹ There has been no report of any action by the NDRC regarding this development. The application of the AML to trade associations is still very much an open question.

END NOTES:

1. A non-authoritative translation of the Anti-Monopoly Law may be found at a website of China's Ministry of Commerce, at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=85714. The original Chinese text may be found at the Ministry of Commerce's website at http://www.fdi.gov.cn/pub/FDI/zcfg/law_ch_info.jsp?docid=82500.
2. AML Chapter II (Monopoly Agreement).
3. AML Chapter III (Abuse of Market Dominance).
4. AML Chapter IV (Concentration of Business Operators).
5. AML Chapter V (Abuse of Administrative Power to Eliminate or Restrict Competition).
6. AML Article 7.
7. *Id.*
8. AML Articles 11, 16, 46.
9. *Id.* Article 9.
10. AML Article 40.
11. AML Articles 41, 54.
12. AML Chapter VIII (Legal Liabilities).
13. AML Article 45.
14. AML Article 46.
15. AML Articles 46, 47.
16. AML Article 48.
17. AML Article 52.
18. AML Article 53.
19. AML Article 54.
20. AML Article 50.
21. A non-authoritative translation of the No. 6 MOFCOM Decree revising the Provisions

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- on M&A of a Domestic Enterprise by Foreign Investors may be found at a website of China's Ministry of Commerce, at http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=108906 The original Chinese text may be found at the Ministry of Commerce's website at http://www.fdi.gov.cn/pub/FDI/zcfg/law_ch_info.jsp?docid=108857.
22. Foreign M&A Provisions, *supra*, Article 12.
 23. There were reports in 2006 and 2007, even as the drafting of the AML was in its final stages and widely debated, of agreements by trade groups such as the China Non-Ferrous Metals Industry Association and the Dairy Industry Association to maintain an "orderly market" by agreeing on price and output. A report in Chinese on the Dairy Industry Association action may be found at <http://finance1.jrj.com.cn/news/2007-07-20/000002447213.html> The 2006 Non-Ferrous Metals Industry Association announcement was removed from its website shortly after it was publicized.
 24. Price Law Article 14(1). A non-authoritative translation of the Price Law may be found at a website of China's Ministry of Commerce, at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020060620320511406803.pdf.
 25. *See, e.g.*, Chinese authorities accuse instant-noodle makers of price fixing, Taiwan Headlines, August 17, 2007, <http://www.taiwanheadlines.gov.tw/ct.asp?xItem=84745&CtNode=39>.
 26. *Lawyer Appeals over Instant Noodle Price Hike*, CRIEnglish.com, July 30, 2007, at <http://english.cri.cn/2946/2007/07/30/1221@255482.htm>.
 27. The Draft Monopoly Agreement Regulation was published for public consultation on SAIC's website at http://www.saic.gov.cn/zw_gk/z_yfb/qt/fl_d/200904/t20090427_37769.html. An unofficial translation is on file with the author.
 28. Draft Monopoly Agreement Regulation, *supra*, Art. 8.
 29. *Id.* at Art. 11.
 30. *Id.* at Art. 5.
 31. *Id.* at Art. 7.
 32. Draft Pricing Regulation Art. 9. The Draft Pricing Regulation was published for public consultation on NDRC's website at http://www.ndrc.gov.cn/fjbak/t20090812_296055.htm. An unofficial translation is on file with the author.
 33. *Id.* at Arts. 6, 7.
 34. *Id.* at Art. 6.
 35. *Id.* at Arts. 6, 10, 24.
 36. Draft Judicial Interpretation Arts. 5, 7. An unofficial translation of this Draft Judicial Interpretation is on file with the author.
 37. *Id.* at Art. 21.
 38. Measures on the Review of Concentrations between Undertakings Arts. 6-8. The Measures are available at <http://fldj.mofcom.gov.cn/aarticle/c/200911/20091106639145.html> An unofficial translation of the Measures is on file with the author.
 39. The Rules are available in the original Chinese at http://www.cbbr.com.cn/info_21366.htm See, "No more discount over 15% for new books, really?" People's Daily Online, January 12, 2010, <http://english.peopledaily.com.cn/90001/90778/90860/6866307.html>.