

The New China Anti-Monopoly Law

August 27, 2008

After more than a decade of discussions and draft legislation, the Chinese Anti-Monopoly Law (the "AML") became effective on August 1, 2008. The scope of the AML is similar to that of most antitrust/competition law systems around the world, covering anticompetitive agreements and abuse of market dominance, and setting out a merger control regime.

This Client Alert summarises the main provisions of the AML and considers the AML's likely impact upon international companies doing business in China or with Chinese companies. In summary, although the basic framework is now finally in place, many important questions remain unanswered as to the how the provisions will be applied in practice.

Key Provisions of the AML

Monopoly Agreements

"*Monopoly agreements*" are dealt with in Chapter 2 of the AML, which contains – broadly speaking – the equivalent of Article 81 of the EC Treaty and Section 1 of the U.S. Sherman Act. Chapter 2 applies to both horizontal agreements (i.e. agreements between competitors) and vertical agreements (i.e. agreements between customers, distributors and suppliers). Examples of horizontal agreements caught by Article 13 of the AML include fixing prices or output, allocating markets, restrictions in respect of new technology and collective boycotts. Article 14 catches vertical agreements which fix prices or set a minimum resale price. In addition, there is a "sweeper" provision that allows the enforcement authority to prohibit a horizontal or vertical agreement that does not fall within one of the examples given in Articles 13 and 14, if the relevant agreement appears anticompetitive.

Agreements caught by Articles 13 or 14 may however be exempt if they have positive effects, for example by promoting efficiency, generating research and development or technology benefits, improving product standards, or increasing the competitiveness of small and medium-sized companies. Such exemptions are available provided that the agreement as a whole does not substantially restrict competition in the relevant market and that customers share in the benefits of the agreements. Notably, agreements for the "protection of the legitimate interest in foreign trade and foreign economic cooperation" may be also exempt, providing for an ongoing possibility of export cartels. Moreover, export cartels do not need to satisfy the general conditions for exemption described above.

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Abuse of Dominance

Article 6 of the AML contains a prohibition on dominant companies abusing their market position to eliminate or restrict competition, borrowing heavily from the abuse of dominance prohibition contained in Article 82 of the EC Treaty. According to Article 17 of the AML, a company will be "dominant" where the company is able to control the price, quantity or other trading terms of goods. Evidence of such ability will be derived from a range of factors, including market shares (a presumption of dominance arises at a 50 percent market share), competitive conditions on the relevant market, financial and technical strengths of the company, as well as barriers to entry. As is the case under Article 82 EC, the abuse of a collective dominant position is caught by the AML. A presumption of collective dominance arises when two companies have a market share in excess of 66 percent, while at the other end of the scale a presumption exists that companies having a market share of less than 10 percent are not collectively dominant.

The question of what amounts to an "abuse" of a dominant position is not dealt with exhaustively in the AML. Examples of abuse are however listed in Article 17 and include excessive pricing, predatory pricing, price discrimination, refusals to deal, exclusive dealing and tying. These types of conduct are familiar to competition law regimes elsewhere around the world, although as the examples of the EU and US demonstrate, how they are treated in practice can differ markedly. In the absence of guidance on these concepts, it will fall to the first cases to provide an insight as to how these concepts are to be interpreted in China.

Merger Control

The AML also introduces a system of merger control review in China. In common with many other jurisdictions, the question of whether a transaction has to be notified to the authorities turns upon the satisfaction of relevant jurisdictional criteria, rather than upon an assessment of whether substantive competition issues may arise from the proposed transaction.

A "Concentration"

For the purposes of the AML, a "concentration" may arise by way of: (i) a merger among undertakings, (b) the acquisition of control through acquiring shares or assets, or (c) the acquisition of "control" by contract or other means or the acquisition of the ability to exercise "decisive influence." Under the M&A Regulations, notification was required only where a transaction involved a foreign investor.

Jurisdictional Thresholds

For the AML to apply, the revenues achieved by the parties to the "concentration" must exceed certain thresholds. The applicable thresholds were published and became

effective on August 3, 2008 (Regulation on Notification Thresholds for Concentrations of Undertakings (the "Regulation")).

Pursuant to the Regulation, a filing will be required if a transaction meets either of the following thresholds:

(A) *Global revenue/PRC presence*

- The *aggregate* worldwide revenues of *all* the parties to the transaction in the previous financial year exceeded RMB 10 billion (approximately US\$1.46 billion¹); and
- The PRC turnover of *each* of at least *two* of the parties to the transaction in the previous financial year exceeded RMB 400 million (approximately US\$ 58.4 million).

(B) *PRC revenue/PRC presence*

- The *aggregate* PRC turnover of *all* the parties to the transaction in the last financial year exceeded RMB 2 billion (approximately US\$291.9 million); and
- The PRC turnover of *each* of at least *two* parties to the transaction in the previous financial year exceeded RMB 400 million (approximately US\$ 58.4 million).

A transaction that does not meet the thresholds may nonetheless be subject to review should the authorities consider that the transaction is likely to result in the "elimination or restriction of competition". The circumstances in which the authorities will utilise this discretion are not yet clear. However, the market share threshold proposed in an earlier draft of the AML, has not been adopted. The authorities are also permitted to review transactions involving issues of national security.

In the event of a failure to notify a transaction, the authorities are empowered to order restitution including termination of the concentration, divestiture of the acquired equity or assets and impose a fine of up to RMB 500,000 (approximately US\$ 73,000).

The Review Process

The basic structure of the merger control provisions is similar to the EC Merger Regulation. The period for initial assessment is 30 days, with a further phase of 90 days if the authorities determine that the transaction requires more detailed scrutiny.

A proposed transaction may be prohibited if it "has, or is likely to have, the impact of exclusion or restriction of competition". In making this assessment, the authorities will consider factors such as the parties' relative market power and market shares, the level of concentration in the relevant market, the impact of the transaction upon market access and the potential impact of the transaction upon the Chinese economy.

If the proposed transaction is prohibited, the decision may be challenged by the parties through the usual channel of administrative review.

¹ All US\$ amounts are based on the official exchange rate published by the People's Bank of China as at August 3, 2008 (US\$ 1:6.85 RMB).

Unanswered Questions

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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Clarification in relation to a number of important procedural and substantive issues remains outstanding. Guidance on the following issues is expected from the Ministry of Commerce ("MOFCOM") in due course:

- *The M&A Regulations*: There has been no official statement to indicate that the AML will replace the Regulations for Foreign Investors to Merge and Acquire Domestic Enterprises (the "M&A Regulations"). It is clear that the AML will take precedence over the M&A Regulations, but appears likely that the M&A Regulations will continue to apply outside of the scope of the AML.
- *Turnover calculation*: Neither the AML nor the Threshold Rules specify whether the revenues of the parties to the transaction will be aggregated with their affiliates; although we assume this will be the case, to determine the true economic weight of the parties.
- *Enforcement*: It appears likely that MOFCOM will continue to take responsibility for the implementation of the merger control regime in relation to foreign-related M&A, while the NDRC and possibly other authorities in charge of the relevant industries will also play a role in the decision-making process. This, however, has not been confirmed by the PRC State Council despite such arrangements being indicated in the MOFCOM personnel planning approved by the State Council.
- *Joint ventures*: At this stage it appears likely that "green-field" joint venture will fall within the definition of "concentration."
- *Decisive influence*: Neither the AML nor the Regulations define what level of influence or extent of shareholding will confer "control" or "decisive influence."
- *Procedure*: Guidance on the procedural aspects of notification under the regime has not yet been issued. In particular, the AML does not specify a procedure for appeal. In the meantime, parties may wish to consult the guidelines issued in conjunction with the M&A Regulations for guidance.

We will issue further commentary as these key aspects of the AML are clarified, whether through formal or informal guidelines, or the developing practice of the authorities.

Dewey & LeBoeuf has a Global Competition Law Practice, with an integrated approach to world-wide competition compliance, including merger clearance and cartel defense. For further questions please contact:

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