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After more than a decade of discussions, debates, and drafting, China adopted its Antimonopoly Law ("AML" or "Law") on August 30, 2007, and the law took effect on August 1, 2008. Like other antirust regimes, the Chinese AML essentially provides the prohibition of monopoly agreements, the prohibition of abuse of a dominant position, and merger control. Additionally, there is also a prohibition of administrative monopoly in chapter 5, since the most serious restrictions to competition in China come from governments themselves. From the perspective of substantive law, in this article I give a brief overview of only the three pillars. In the last section, I discuss the challenges of enforcing the Law.

I. THE THREE PILLARS OF CHINA'S ANTIMONOPOLY LAW

A. The Prohibition of Monopoly Agreements

The first task of the Chinese Antimonopoly Law is to prevent monopoly agreements. Based on the experience of German law, the Chinese AML separates horizontal agreements from vertical agreements. Article 13 lists the following monopoly agreements between competitors as prohibited:

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(i) fixing or setting minimums for product prices;
(ii) restricting the output or sales volumes of products;
(iii) allocating markets;
(iv) restricting the purchase of new technology or new facilities or the development of new technology or new products;
(v) jointly boycotting transactions; and
(vi) other monopoly agreements determined by the Antimonopoly Law Enforcement Authority.

According to the second paragraph of Article 13, monopoly agreements in this Law refer to agreements, decisions, or other concerted behavior that eliminate or restrict competition. With respect to vertical agreements, Article 14 prohibits only:

(i) fixing the resale price;
(ii) restricting minimum resale prices; and
(iii) other monopoly agreements determined by the Antimonopoly Authority.

Like Article 81(3) of the EC Treaty, Article 15 of the Chinese AML contains a series of exceptions from the prohibitions for both horizontal and vertical agreements. The exempted agreements are those that involve:

(i) technology improvement, or research and development of new products;
(ii) upgrading product quality, reducing costs, and improving efficiency, unifying product specifications or standards, or carrying out professional labor distribution;
(iii) improving operational efficiency and enhancing the competitiveness of small- and medium-sized enterprises;
(iv) achieving such public interests as energy saving, environmental protection, disaster relief, and so forth;

(v) mitigating the severe decrease of sales volume or excessive overstock during economic recessions;

(vi) safeguarding the legitimate interests of in foreign trade and economic cooperation; or

(vii) other circumstances as stipulated by the Law or the State Council.

According to paragraph 2 of Article 15, in the case of **(i)** to **(v)** mentioned above, the respondents must prove that the agreement will not substantially restrict competition, and that consumers will share the benefits derived from such agreements.

Surely there are some problems with the exemptions above. For example, Chinese exporting companies have been the target of at least two antitrust suits in the United States, and thus the exemption for exporting cartels may not provide Chinese exporting companies any real legal protection.

B. Prohibition of the Abuse of a Dominant Position

Chapter 3 prohibits the abuse of a dominant position. According to Article 17, business operators holding a dominant market position are prohibited from engaging in the following activities:

(i) selling or buying products at unfairly high or low prices;

(ii) selling products at prices below cost without any justification;

(iii) refusal to supply without any justification;

(iv) exclusive dealing without any justification;

(v) tie-in sale or imposing other unreasonable trading conditions without justification;

(vi) discriminatory pricing or terms without justification; and

(vii) other abuse of a dominant market position as determined by the Antimonopoly Law Enforcement Authority.

According to paragraph 2 of Article 17, a dominant market position refers to a market position held by a business operator that can control the price or quantity of products or other transaction conditions on the relevant market, or that can keep other business operators from entering the relevant market. This definition is similar to the concept of a dominant position in EC competition law,[1] and the concept of market power in U.S. antitrust law.[2]

Article 18 provides a non-exhaustive list of six factors to be considered when verifying the existence of a dominant market position:

(i) the market share of the business operators and their competitive status in the relevant market;
(ii) the ability to control the upstream or downstream market;
(iii) the financial status or technical resources of the business operators;
(iv) the extent of other business operators' dependence on the dominant business operator;
(v) the ability of other business operators to enter the relevant market; and
(vi) other factors relating to the dominant market position of the business operator.

In view of the fact that the market structure plays a key role in influencing the market behaviors of business operators,[3] Article 19 contains three presumptions with regard to whether a business operator has a dominant position based entirely on market share thresholds:

[1] Case 6/72, Continental Can v. Commission, 1973 E.C.R. 215, at II.3.

[2] *See, e.g.*, Concord Boat Corp. v. Brunswick Corp., 207 F. 3d 1039, 1060 (8th Cir. 2000).

[3] Case 85/76, Hoffmann-La Roche v .Commission, 1979 E.C.R. 461.

(i) the market share of one business operator accounts for one-half or more of the market;

(ii) the combined market share of two business operators accounts for two-thirds or more; and

(iii) the combined market share of three business operators accounts for three-fourths or more.

Obviously, the source of these presumptions can be traced to the German Act against Restraints of Competition. As is the case under German law, these presumptions may be rebutted.

C. Mergers and Acquisitions

Article 20 defines concentrations as:

(i) mergers;

(ii) acquisitions of control over another business operator by acquiring their voting shares or assets to an adequate extent; or

(iii) acquisitions of control by means of contract or other means.

Article 21 provides that business operators shall notify the Antimonopoly Law Enforcement Authority regarding transactions that meet the thresholds of notification stipulated by the State Council. According to the Notification Criteria Provisions issued by the State Council on August 3, 2008, a pre-concentration notification must be filed with the Merger Reviewing Authority if the concentration meets any of the following criteria:

(i) during the previous fiscal year, the total global turnover of all business operators participating in the concentration exceeded RMB 10 billion, and at

least two of these business operators each had a turnover of more than RMB 400 million within China; or

(ii) during the previous fiscal year, the total turnover within China of all the business operators participating in the concentration was more than RMB 2 billion, and at least two of these business operators each had a turnover of more than RMB 400 million within China.

Additionally, the Provisions provide that even if a concentration does not fall under any of the above criteria, the Reviewing Authority may conduct investigation in accordance with the law if the concentration may eliminate or restrict competition.

Articles 25 and 26 provide a two-stage timetable for reviewing the transaction. According to Article 25, following notification and during "Phase I", the Antimonopoly Authority must decide within 30 days whether to initiate a further review. If the Antimonopoly Authority makes no decision during Phase I, then the transaction can be deemed to have been cleared. If the Antimonopoly Authority decides to carry out a further review proceeding, it must inform the parties to the transaction of this in writing. According to Article 26, the Antimonopoly Authority has 90 working days to carry out a further review proceeding, but "Phase II" can be extended by up to 60 workings days in special situations. If the Antimonopoly Authority makes no decision during Phase II, then the filed transaction can be deemed to have been cleared.

According to Article 28, a transaction is prohibited by the Antimonopoly Authority if it is apt to eliminate or significantly restrict market competition. The listed factors in Article 27 for assessment of proposed transaction are inclusive not only of:

(i) the market shares of the involved business operators and their ability to control the market;

(ii) the degree of the transaction in the relevant market;

(iii) the effect of the transaction on market access and technological progress; and

(iv) the effect of the transaction on consumers' and other relevant business operators' development;

but also of:

(v) the effect of the transaction on the development of the national economy; and

(vi) other factors considered by the Antimonopoly Authority.

Article 28 also contains exemptions if the parties can demonstrate either that the advantages of a transaction exceed its disadvantages, or that the transaction is beneficial to public interest. It is not yet clear how parties will do this in practice. In approving any transaction, the Antimonopoly Authority may require certain restrictions and obligations for the parties to ensure that the proposed transaction is not harmful to competition.[4]

Article 31 provides a special provision on national security. It stipulates that in the case of national security, the acquisition of domestic business operators by foreign capital or other kinds of transactions involving foreign capital shall be, in addition to the antimonopoly review according to the Law, examined according to the relevant provisions of the State for national security review. In my view, this provision demonstrates a concern that excessive mergers and acquisitions involving foreign investors may not only impede competition, but also may harm Chinese national security.

[4] I understand that the attached conditions and obligations should be compatible with the commitments of the operators concerned according to Article 45 of the AML.

It does not mean that the Antimonopoly Authority implements both competition policy and national security policy.

II. THE MAIN CHALLENGES OF ENFORCING THE CHINESE ANTIMONOPOLY LAW

In light of the current Chinese competition climate and the existing legal system and environment, the enforcement of the Chinese Antimonopoly Law will face some challenges in its earlier years.

I think the first challenge for the enforcement is the lack of an independent enforcement authority. According to Article 10, the Antimonopoly Law Enforcement Agency under the State Council shall be responsible for the AML enforcement work. However, it is not clear which agency will serve as the Antimonopoly Authority responsible for enforcing the AML. As it currently stands, three enforcement agencies, the National Commission for Development and Reform ("NCDR"), the State Administration of Industry and Commerce ("SAIC"), and the Ministry of Commerce ("MOFCOM") have parallel authority to enforce the AML. But, in my view, having three parallel competition law enforcement agencies may not only be inefficient, it may also create conflict and friction between them. This potential conflict may become even more complex with the inclusion of such diverse authorities as the provincial, regional, and municipal enforcement agencies (Art. 10) as well as the government agencies responsible for governing administrative monopolies (Art. 51).

The second challenge comes from the relationship between the Antimonopoly Authority and the regulators in the regulated sectors. The prohibition of abusive conduct in the Antimonopoly Law is specifically directed at the business operator with a dominant or monopoly market position. In China, there are numerous incumbent monopolists in the sectors of telecommunication, post, railway, electricity, banking, and so forth. Moreover, in China, almost every State-owned monopolist is under the supervision and administration of an industrial regulator according to a law or regulation related to that specific industry. That means that where the Antimonopoly Authority has jurisdiction over anticompetitive conduct in a regulated sector, the antimonopoly enforcement might raise difficult political questions. According to the draft Law submitted by the State Council to the Standing Committee in 2006:

> If there are relevant laws and administrative regulations stipulating that the monopolistic conducts prohibited by this Law shall be investigated and handled by the relevant departments or supervisory organs, the laws and regulations are to be applied.[5]

This provision was deleted during the draft discussion in the Standing Committee of the National People's Congress, but the potential conflicts between the two kinds of regulations have not been definitely settled.

The third challenge in enforcing the Chinese Antimonopoly Law is how to address administrative monopoly. Under the AML, administrative monopoly refers to the acts of the governments and their subordinate agencies that abuse administrative power to restrict competition. For instance, local governments may refuse to issue business licenses to enterprises that engage in transactions of commodities originating in other

[5] *See* Article 44 of the draft Law submitted by the State Council to the Standing Committee of the National People's Congress in 2006.

regions, and even confiscate their products or impose fines. Obviously, eliminating administrative monopoly is the most important precondition for the realization of fair and free competition and equal treatment between different business ownership. Out of this consideration, the strongest appeal for breaking administrative monopolies comes from non-public enterprises. But unfortunately, Article 51 of the AML states only:

> Where any administrative agency or organization empowered by laws or regulations with responsibilities for public affairs administration engages in conducts that eliminate or restrict competition in abuse of their administrative powers, its superior agency shall order it to make correction.

In my opinion, there are at least two reasons why the governmental agencies at the highest level may find it difficult to supervise and inspect the administrative restrictions created by the governmental organizations at a lower level. First, any administrative restriction on competition usually reflects treatment in favor of local, government-owned businesses or large State-owned enterprises. This situation makes it difficult for a higher agency to keep a neutral attitude in a dispute with a lower agency and the non-State owned enterprises or competitors from another region. Second, the so-called "higher agency" could be any agency, and in this situation, it is not likely that the higher agency would have an experienced understanding of competition law or policy.

Of course, there are also the challenges facing any new Law that has just been adopted including the need for more detailed provision or guidelines in the areas of horizontal agreements, vertical agreements, abuse of a dominant position, licensing and intellectual property rights, and many more.