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After 13 years of preparation and debate, the final adoption of the Antimonopoly Law (the "AML") of the People's Republic of China (the "PRC" or "China") marks an important move by China toward an effective competition regime, and also a significant moment in China's legislative history.

The implementation of China's AML, which became effective on August 1, 2008, will have significant implications on the investment and business operations of foreign companies in China. On the one hand, the AML may assist foreign investors by providing uniform and comprehensive guidelines on competition in the Chinese market. On the other hand, the AML may also restrict the existing business practices of multinational companies or even subject them to harsh penalties.[1] In general, the main outline of the AML is similar to that of antimonopoly laws in other countries, as the AML Drafting Committee conducted extensive studies of foreign antimonopoly laws and undertook numerous discussions with foreign experts.[2] Despite its foreign influence, China's new

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[1] STATE ADMINISTRATION OF INDUSTRY AND COMMERCE, REPORT ON THE STATUS AND COUNTERMEASURES FOR COMPETITION-INHIBITING ACTS BY MULTINATIONAL ENTERPRISES (May 2004).

[2] Press Release, Ministry of Commerce, Anti-Monopoly Law Guarantees Free and Fair Market Competition (Nov. 17, 2004), *available at* http://tfs.mofcom.gov.cn/aarticle/dzgg/f/200411/20041100306449.html.

AML maintains some "Chinese-specific" provisions in accordance with the current Chinese economic and social environment. Minding the AML, investors interested in the Chinese market should pay special attention to the competitive impact of their proposed deals, even for transactions outside of China given the AML's extraterritorial application.

This article will discuss certain challenges in implementing the AML given ambiguities and uncertainties that call for special attention.

## I. REGULATORY AND ENFORCEMENT POWERS

The AML establishes that the Antimonopoly Commission under China's State Council and the antimonopoly enforcement authorities designated by the State Council (the "Antimonopoly Enforcement Authorities" or "AMEA") will govern monopolistic conduct. The Antimonopoly Commission will be in charge of general policy, organization, and regulatory and coordination tasks, while the AMEA will deal with day-to-day enforcement concerning antimonopoly activities.

The AML does not define which specific government authorities will be designated as the Antimonopoly Enforcement Authorities; however, China's State Council finally decided on a three-pronged structure for the AMEA. The structure for the AMEA involves a three-way split of authority functions among the Ministry of Commerce ("MOFCOM"), National Development and Reform Commission ("NDRC"), and State Administration of Industry and Commerce ("SAIC"). MOFCOM will be solely in charge of pre-concentration review. SAIC will have the authority to investigate antimonopoly agreements, abuses of market dominance by undertakings, and abuses of

administrative power that restrict or eliminate competition (excluding pricing-related agreements or abuses). NDRC will handle investigations on pricing-related agreements or abuses. The deputies of the Antimonopoly Commission will be officials from MOFCOM, SAIC, and NDRC. The Antimonopoly Commission will supervise the AMEA, and the Commission will operate from a separate working office that will be located within MOFCOM. The Antimonopoly Commission will be an ad hoc organization of the three separate ministries' specific departments, rather than a separate entity.

Effective enforcement of the AML may be just as important as the law itself. Therefore, the selection of a competent antimonopoly enforcement authority is critical. MOFCOM, SAIC, and NDRC were already involved in antimonopoly activities before the AML was passed on August 30, 2007. Unsurprisingly, these agencies are keenly interested in the delegation of powers involved in the formation and composition of the AMEA. To many observers, the decision that MOFCOM, SAIC, and NDRC will jointly form the AMEA sounds like a recipe for trouble. Indeed, it is preferable not to follow such an approach, considering the conflicts, inefficiencies, and other problems which may arise from such a multi-authority regime without powerful court supervision.

Criticisms aside, if from a realistic perspective the abovementioned structure is unavoidable, then, at least for a certain period of time, it is strongly advised that the government clearly classify the respective power, scope, and relationship among such Antimonopoly Enforcement Authorities. It is a positive development that MOFCOM will be solely in charge of concentration control. In other words, SAIC, which was previously

involved in antimonopoly reviews, will no longer be involved in this process. It is notable that it still might be difficult to establish a clear-cut division between "pricing-related" and "non-pricing-related" forms of anticompetitive activities and avoid overlapping or conflicting regulatory authorities (i.e., SAIC and NDRC).

## II. ADMINISTRATIVE MONOPOLY

Chapter 5 of the AML focuses on dealing with "administrative monopoly," and in doing so indicates that the Chinese government will limit its own power and create a more level playing ground for businesses in the market economy. According to the AML, administrative agencies and organizations empowered to manage public affairs (known as "public organizations") are prohibited from abusing their administrative power by limiting or restricting competition via requiring consumers to purchase or use products from certain designated enterprises, imposing discriminatory measures that unfairly favor local or small businesses.

Although it is disputed whether the administrative monopoly provisions in Chapter 5 should be discussed under the AML, such provisions are still regarded as one of the unique and progressive features of the AML. The "administrative monopoly" has been regarded as a more serious obstacle for competition than other monopolies in the Chinese market due to China's history of a planned economy and significant influence over its social structure. The administrative monopoly is an anticompetitive administrative entity deeply rooted in China's numerous administrative agencies and public organizations, and it is still uncertain how effectively the AML by itself can

control the excessive interference of administrative agencies and public organizations in the marketplace.

## III. INDUSTRY ASSOCIATIONS' ENGAGEMENT IN MONOPOLY AGREEMENTS

The AML introduces an article (Article 11) to prohibit industry associations from organizing their members into monopolies. The liabilities for violation could be a fine up to RMB 500,000 and deregistration of the industry association. This article was created in response to the fact that many industry associations in China are rooted in administrative agencies that maintain strong influence and power over the associations' members, as well as the fact that many industry associations led or collectively organized several price increasing activities for various types of commodities.

Industry associations, many of which are remnants of administrative agencies from the planned-economy era, will be affected by the abovementioned article. It is still common for their member companies to jointly make decisions about certain prices and business practices. For example, in 2007, industry associations of instant-noodle makers coordinated a price increase after their input costs for grain and oil shot up, though they endured a wave of negative publicity and were later sanctioned by regulators. Although the actions of industry associations are often clearly anticompetitive, it is uncertain if Antimonopoly Enforcement Authorities will be willing or able to rein in most industry associations, which continue to have good government relationships and a strong voice in policymaking.

## IV. SPECIAL INDUSTRY PROTECTION

The AML provides protection to special industries dominated by State-owned enterprises ("SOEs") involving interests vital to the national economy and national security, and industries implementing exclusive dealings and operations in accordance with the law. However, the law also states that all such enterprises shall not abuse their controlling or exclusive dealing position to harm the interests of consumers. It is still very unclear how the two aspects of this provision will be interpreted and implemented, which causes deep concern that the AML will not "have real teeth" to enforce its provisions over certain industries in which SOEs are dominant and keep unreasonably high profits.

## V. ANTIMONOPOLY ISSUES INVOLVING INTELLECTUAL PROPERTY

Article 55 of the AML sets out general principles to deal with the relationship between intellectual property rights ("IPR") and the AML, and in failing to provide more comprehensive guidance, introduces ambiguities and uncertainties in the AML's implementation. Article 55 does not apply to conduct by undertakings that protect their legitimate IPR in accordance with IPR laws and regulations, though Article 55 does apply if such conduct constitutes abuses of IPR to eliminate or restrict competition.

However, the AML does not provide specific rules to determine what types of conduct are considered "abuse(s) of IPR." One reasonable interpretation of Article 55 would be that an undertaking's abuse of IPR should be deemed as its abuse of its dominant market position. It is widely accepted that IPR should be regarded as essentially comparable to any other form of property for the purpose of antimonopoly analysis.

Accordingly, the AML should more clearly apply the same general antimonopoly principles to conduct involving IPR that it applies to conduct involving any other form of tangible or intangible property.[3]

In applying these principles, the precondition to determine whether an undertaking "abuses IPR" should be whether it holds a dominant market position in the undertaking's relevant market. Still, the AML should not presume that since an undertaking owns IPR, it necessarily also has a dominant market position. Also, if ownership of IPR does confer a dominant market position, that dominant market position does not by itself offend the AML.

Whether an undertaking "abuses IPR" is, to a large extent, subject to the antimonopoly analysis conducted by the AML enforcement authorities on a case-by-case basis. In addition, it is difficult to determine the definition of "relevant market" for any IPR due to the general characteristics of IPR. The U.S. *Antitrust Guidelines for the Licensing of Intellectual Property* define "relevant technology markets" and "relevant innovation markets" in addition to relevant product markets in an effort to address this issue.[4] The AML, however, lacks such detailed guidelines.

Another issue related to IPR regulation within the AML is the compulsory license of patents: an important issue for many international companies. The existence of a dominant market position of an undertaking that owns a patent does not by itself mean that such an undertaking has an obligation to license the use of that patent to others.

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[3] U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995).

[4] *Id.*

However, even if the undertaking "abuses IPR" it is unclear if its competitors have the right to apply for a compulsory license for the abused IPR from the AMEA or the courts, as the legal consequences of "abuses of IPR" under the AML are ambiguous. In seeking to decrease the AML's ambiguity, one could consider adopting a provision similar to that in the 2004 *Standard-Spundfass* case in Germany that uses two preconditions when offering a compulsory license of a patent:

1. the license is absolutely necessary for the competitors to enter the relevant market; and
2. it is unreasonable for the undertaking to refuse to offer the license.

The AML's lack of similar guidance adds further uncertainties to its implementation.

## VI. NATIONAL SECURITY REVIEW

In recent years, the Chinese government has become more alert about the role certain industries play in China's social, economic, and political affairs. The national security review was previously provided in certain regulations and even conducted in certain cases in combination with the antimonopoly review of merger and acquisition ("M&A") transactions. The AML marks the first time the antimonopoly review of M&A transactions is set out in a statute. Furthermore, the AML clearly spells out that a national security review is separate from an antimonopoly review, and shall be conducted under relevant laws and regulations and therefore avoid repeating a previous history of incorrect application. However, many things are still unclear about this mechanism, namely what authority will be designated as the "competent agency" in charge of reviewing allegations

and cases, what would be the threshold to trigger a review, and how such a review would be conducted. Such uncertainty will increase the angst of the foreign investors. Further, due to such uncertainty, the national security review may still be conducted in certain cases in combination with the antimonopoly review.

## VII. PRE-CONCENTRATION ANTIMONOPOLY REVIEW

Many multinational companies are familiar with the Rules on Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors (the "M&A Rules") that took effect on September 8, 2006. Certain provisions in the PRC's M&A Rules that contradict the AML's implementation will be replaced by relevant provisions in the AML.

The most substantial of these changes is related to the thresholds for the pre-concentration filing. The thresholds for a pre-concentration filing under the M&A Rules are relatively low. As a result, a large number of global M&A transactions can trigger a filing even if the transactions have minimal impact on the Chinese market. The AML empowers the State Council to stipulate such thresholds in the future.

In an effort to clarify threshold standards, the State Council issued the *Provisions on Pre-Concentration Filing Criteria of Undertakings* (the "Filing Criteria Provisions"). The Filing Criteria Provisions adopts a turnover criterion that incorporates a "local nexus" requirement by addressing situations in which at least two of the undertakings involved in an antimonopoly review each had a minimum turnover within China during the previous fiscal year.[5] In addition, the Filing Criteria Provisions eliminate the "market

[5] According to the Filing Criteria Provisions, undertakings of a concentration shall file with the reviewing authority if (1) all undertakings together have a worldwide annual turnover exceeding RMB 10 billion in the previous fiscal year, and at least two of these undertakings each had a turnover of more than RMB 400 million in the previous fiscal year in China; or (2) all undertakings together have an annual

share" criterion contained in the M&A Rules, which would require a filing if the undertaking's concentration will cause the undertaking to possess more than a 25 percent share of the relevant market in China. The adoption of the turnover criterion that incorporates a "local nexus" requirement and the elimination of the "market share" criterion are positive developments and reflect international best practices that will be familiar to antimonopoly practitioners with international experience. These criteria ensure that the PRC authority reviewing the filing (MOFCOM) will consider the foreseeable effects on both competition in the Chinese market and the conditions of the undertakings in their review.

Despite the development of the Filing Criteria Provisions, uncertainties still exist under the concentration control regime. The Filing Criteria Provisions do not specify the method for calculating the "turnover" of undertakings participating in a concentration. It is unclear under the Filing Criteria Provisions whether sales rebates, value-added taxes, and other taxes that are directly related to turnover should be calculated in "turnover." Undertakings and MOFCOM might have different understandings of the composition of turnover, thus rendering it uncertain whether the undertakings participating in a concentration must notify MOFCOM about a particular concentration.

## VIII. CONCLUSION

China will implement a full-blooded antimonopoly regime, and foreign companies and investors interested in the Chinese market would be wise to accordingly adapt their own business operations. If foreign companies and investors raise concerns in

turnover exceeding RMB 2 billion in the previous fiscal year in China, and at least two of these undertakings each had a turnover of more than RMB 400 million in the previous fiscal year in China.

China, they will have to address these concerns with the same seriousness they would give to a similar situation in the United States or Europe. In general, the AML sets out a comprehensive competition law framework and establishes the principles of China's antimonopoly practice system. Since many provisions of the AML are currently rather vague or general in nature and need the PRC authorities' further interpretation and definition, complete evaluation of the AML may be difficult. Therefore, it is advisable that foreign companies and investors interested in Chinese market include the AML in their deal planning, and especially important that they closely monitor the future development of the AML and its implementation rules.