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As the pillar of Chinese competition law and policy, the Antimonopoly Law (“AML”) of the People’s Republic of China (“PRC”) has been on the legislative agenda since 1994. The AML was eventually enacted on August 30, 2007 and entered into force on August 1, 2008. A range of explicit and implicit legal and socio-political factors in the context of China’s transition from a planning economy to a market economy have contributed to the AML’s conception and promulgation. The role of state monopolists in the Chinese economy, the abuse of administrative power by government agencies to restrict competition, and the restrictive and abusive behavior of multinational companies doing business in China (whether actual or perceived) have been at the heart of public debates on the necessity and suitability of the AML over the past fourteen years. While many welcome the AML, some have expressed concerns over the potential for the law to harm businesses, especially foreign companies, and whether it will stunt innovation.

The AML contains the objectives, principles, and general legal framework of the new Chinese competition law regime, but the delineation and interpretation of its

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provisions have been left to implementing regulations, decisions of the enforcement agencies, and the judicial interpretations. By the time it came into force, other than some rules on the new merger notification thresholds, most of the much-expected AML implementing regulations and the detailed AML enforcement mechanism had yet to be published or announced. This article first examines how the AML deviates from international competition law norms and then discusses the potential effectiveness of the law as well as the challenges to its enforcement mechanism.

I. THE AML'S DEVIATIONS FROM COMMONLY ACCEPTED COMPETITION LAW NORMS

The AML, like other major competition law regimes, addresses three main areas: anticompetitive agreements, abusive behavior by dominant undertakings, and merger control. The AML also covers a fourth area, abuse of administrative powers to eliminate or restrict competition, widely referred to as “administrative monopolies”. Most AML provisions broadly conform to international norms and are comparable to competition laws in the European Community, the United States, and elsewhere, although some of the provisions have distinctly “Chinese characteristics”.

A. Extraterritorial Application

The extraterritorial application of competition law is perplex as it tends to trigger politically charged tensions. U.S. and EC competition law theory and experience make it clear that the “effects doctrine” must be applied cautiously, and extraterritorial

jurisdiction in competition cases may not be asserted without the presence of direct, substantial, and foreseeable anticompetitive effects.

Article 2 of the AML appears to rely on the effects doctrine as a basis to assert jurisdiction over anticompetitive conduct occurring outside the territory of the PRC. Conduct that “has eliminative or restrictive effects” on competition in the Chinese domestic market will trigger the application of the AML. A strict textual reading of the AML does not require directness, substantiality, or foreseeability as a condition to extend its application extraterritorially. This characteristic of the AML has raised concerns over how wide and intrusive the AML’s implementation will be, and how it will affect anticompetitive conduct that does not have a substantial connection with the PRC.

B. The Concept of Monopoly Agreements (“*Longduan Xieyi*”)

The AML applies to “monopolistic conduct”, which, according to Article 3 of the AML, refers to monopoly agreements, abuse of a dominant market position, and concentrations between undertakings that have or may have the effect of eliminating or restricting competition.

Notably, the PRC is the only jurisdiction to use the term “monopoly agreements”. Although the definition of “monopoly agreements” under Article 13 of the AML accords with the EC model in relation to restrictive agreements, it is conceptually problematic as a monopoly or dominant market position is not a threshold requirement for the application of the AML on an anticompetitive agreement. The term “monopoly agreements” also seems inappropriate in the context of the AML’s exemption provisions.

Article 15 of the AML exempts agreements aimed at improving the efficiency and enhancing the competitiveness of small- and medium-sized undertakings subject to certain conditions, yet it is conceptually difficult to categorize agreements between small- or medium-sized undertakings as “monopoly agreements”. Hopefully future developments of the AML will therefore replace the term “monopoly agreements” with “restrictive agreements” (or “*xianzhi jingzheng xieyi*”) in accordance with accepted international practice.

C. The “Export Cartel” Exemption

Under Article 15, exemption can be granted to agreements entered into for the purpose of “safeguarding the legitimate interests in foreign trade and economic cooperation.” This seems to be the so-called “export cartel” exemption. Such an exemption is problematic for a number of reasons:

- it promotes (by way of exemption), or at least tolerates, what amounts to an export cartel that could be inherently incompatible with the PRC’s international trade obligations;
- export cartels that lead to a lessening of competition, by Chinese firms, on foreign markets, are likely to be captured by competition laws of the target country. It may even lead to Chinese companies involved in such anticompetitive “export promotion” schemes being subject to fines or other penalties by foreign competition authorities or damages claims by their customers. Moreover, it is likely to lead to frictions on the level of competition law; and
- the experience of other countries has shown that a coordination of competitive behavior in the context of export promotion schemes tends not to be confined to behavior on such foreign markets.

Companies colluding with regard to foreign trade are also very likely to collude with regard to behavior in their home jurisdictions. They may easily use the occasion of meeting to discuss their export business to also talk about domestic activities. Thus, this exemption should rarely be granted in practice.

D. The National Security Review Provision

Article 31 of the AML provides for a national security review regime under which mergers and acquisitions of domestic enterprises by foreign investors that raise national security concerns will be subject to both antimonopoly and national security reviews “in accordance with relevant provisions of the State.” Actually, the AML is not the first legislation to introduce the concept of national security review. The *Rules on Mergers and Acquisitions of Domestic Enterprises* issued by China’s Ministry of Commerce and various other in 2006 (the “M&A Rules 2006”) already contained a national security review. Some acquisitions by foreign investors of major Chinese companies in key sectors have attracted scrutiny on national security grounds. A recent example is Carlyle’s proposed acquisition of Xuzhou Machinery, which failed to get through the national security review process.

With AML’s re-introduction of the national security review regime, multinational companies are concerned that China may use the AML to block non-domestic competitors’ access to the Chinese market as well as to justify government intervention in the market under the shield of “national security”. The fact that the Ministry of Commerce is probably responsible for both merger control and national security review

gives rise to further concerns that it might confuse merger control review (which should focus on competition analysis) with national security review.

E. Special Treatment to State-Owned Enterprises

Article 7 of the AML provides that the state shall protect the legitimate operating activities of industries dominated by the “state-owned economy” and which are vital to the Chinese national economy or national security or both. This article has led some to believe that special treatment under the AML will be given to large state-owned enterprises (“SOEs”) that operate effectively as monopolies in industries such as telecommunications and energy.

II. THE EFFECTIVENESS OF THE AML AND CHALLENGES TO THE AML ENFORCEMENT MECHANISM

A. Leniency Programme

In many jurisdictions, leniency programmes are beginning to play a key role in the fight against cartels. Article 46 of the AML provides that if undertakings involved in monopoly agreements, on their own initiative, report information relating to the conclusion of monopoly agreements and provide important evidence to the enforcement agencies, they may be given a mitigated punishment or even exempted from punishment. This provision acts as a leniency mechanism to detect and combat cartels. Nevertheless, the effectiveness of a leniency programme depends on a series of factors, such as the seriousness of the penalty to act as an incentive to cartel members to report their activity

(i.e., the incentive to “whistle-blow”), the legal certainty of a reduced penalty to those which report, and simple and straightforward programme guidelines.

Establishing an effective AML leniency programme therefore requires substantial follow-up work. Additionally, as cartels are increasingly global, the effective adoption and enforcement of a leniency mechanism calls for cooperation with other jurisdictions on cartel enforcement know-how.

B. Merger Notification Thresholds

Under the *Rules on Notification Thresholds for Concentrations of Undertakings* issued by the State Council (the “Notification Thresholds Rules”), transactions which meet either of the following two alternative turnover thresholds are subject to a filing obligation under the AML:

- (i) the total worldwide turnover of all parties to the transaction in the previous financial year exceeded RMB 10 billion (approx. EUR 960 million or USD 1.32 billion) and the PRC turnover of each of at least two parties to the transaction in the previous financial year exceeded RMB 400 million (approx. EUR 38.4 million or USD 52.6 million); or
- (ii) the combined PRC turnover of all parties to the transaction in the previous financial year exceeded RMB 2 billion (approx. EUR 192 million or USD 263 million) 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 (approx. EUR 38.4 million or USD 52.6 million).

In addition, the authority has the discretion to review a transaction that does not meet the turnover thresholds set out above where the authority considers that the transaction is likely to result in the “elimination or restriction of competition.” Unless

used in exceptional circumstances only, the authority's reserve power could potentially create unwelcome uncertainty.

The fact that the new thresholds require at least two parties to a transaction to have a local nexus to the PRC is a considerable improvement over the previous regime, where a filing could be triggered by one party's PRC activities (e.g., turnover, assets, market share, or previous acquisitions) alone.

However, a number of important procedural and substantive issues remain open. For example, the AML and the Notification Thresholds Rules provide that any of the following scenarios can give rise to a notifiable "concentration":

- (i) a merger among undertakings;
- (ii) the acquisition of control through acquiring shares or assets; or
- (iii) the acquisition of control by contract or other means or the acquisition of the ability to exercise decisive influence.

Neither of the two defines what level of influence or shareholding would be regarded as conferring "control" or "decisive influence".

C. The AML Enforcement Mechanism

Designing an adequate enforcement procedure has been one of the most significant challenges to China's establishment of an effective competition law regime. Before the enactment of the AML, China, as the only major jurisdiction without a comprehensive competition code, dealt with competition-related issues through a series of laws, regulations, rules, and policies. The State Administration of Industry and Commerce ("SAIC"), the National Development and Reform Commission ("NDRC"),

and the Ministry of Commerce (“MOFCOM”) have played separate, but sometimes overlapping, roles in regulating competition-related matters. The three agencies’ authority was established by the Anti-Unfair Competition Law 1993, the Price Law 1997, the Bidding Law 1999, and, most recently, the M&A Rules 2006.

Although the old framework caused inter-agency conflicts, unaccountability, and uncertainty, the AML does not seem to improve the situation much. Articles 9 and 10 of the AML envisage the establishment of a two-tier enforcement structure. Under this structure, the State Council will establish an Antimonopoly Commission (“AMC”) to formulate competition policies and guidelines, assess the state of overall market competition, and coordinate enforcement. The AMC will be headed by one of China’s vice premiers, with senior officials from various ministries and industry sector regulators responsible for enforcing the AML. The AMC will establish a working office within the Ministry of Commerce. Under the AMC, the actual enforcement of the AML is assigned to the Antimonopoly Enforcement Authority (“AMEA”).

The State Council has not created an independent, centralized AMEA as many had hoped. Instead, it has designated the three existing agencies to enforce the new law under the overall guidance of the new AMC:

1. Ministry of Commerce: MOFCOM will be responsible for merger control. MOFCOM will establish a new department called the Antimonopoly Investigation Bureau in charge of this task.
2. State Administration of Industry and Commerce: SAIC will be in charge of investigation of non-price-related monopoly agreements, non-price-related abusive conduct by dominant firms, and abuse of administrative power by

government authorities that restricts or eliminates competition. To carry out this new job, SAIC will establish a new department, the Antimonopoly and Anti-Unfair Competition Enforcement Bureau, replacing the Fair Trade Bureau, which is currently in charge of enforcing the Anti-Unfair Competition Law.

- 3. National Development and Reform Commission:** NDRC will be responsible for prohibition of price-related monopoly agreements and price-related abusive conduct by dominant firms. No new agency will be established within NDRC. The Price Supervision Department of NDRC, which is currently responsible for the enforcement of the Price Law, is expected to undertake these new responsibilities of NDRC in respect of the enforcement of the AML.

Coordination is one of the key challenges to China's successful enforcement of the AML. Achieving effective inter-government agency coordination has proved to be relatively difficult in the past, and attempts have often been hampered by excessive bureaucracy. The new division of enforcement responsibilities among the three agencies with respect to the AML may have already created a scope for friction or conflict between the three agencies, which have different degrees of experience in handling competition-related cases and vary in their access to resources. What is more problematic is the division of jurisdiction between NDRC and SAIC along the line of price-related or non-price-related violations. What happens when a case involves both of these elements? For instance, an output restriction cartel on the one hand can be characterized as a so-called "non-price-related" violation, as it does not directly fix the price, while on the

other hand, it can be well argued as a “price-related” violation, given its impact on the price. In such a case, it is unclear which agency, NDRC or SAIC will have jurisdiction.

In addition, observers have commented that in order for the AMEA to carry out its statutory functions effectively, it is necessary for the AMEA to have sufficient independence and authority. However, in addition to the role of AMEA, all three agencies have other responsibilities and accordingly different policy agenda and political constitutions. For instance, as MOFCOM is in charge of foreign investment approvals in addition to merger review, there could be cases where industrial policy considerations override competition policy.

The law also provides for the possibility of delegation of the enforcement power of the AMEA to provincial agencies. Although aimed at efficiency, this provision is potentially a double-edged sword that could serve to complicate, rather than streamline, the enforcement process. As compared with the central agencies, local agencies are even less familiar with competition law, but more susceptible to the influence of the local interests. People are hopeful that the AMEA will not delegate their authorities to local agencies at the outset and, before they make any delegation, that they will make sure the supervision and checking mechanism have been put in place.

C. The Role of the Courts

Articles 53 and 50 of the AML empower the people’s courts to review the legality of the decisions of the AMEA and to adjudicate antimonopoly compensation claims brought by injured parties. To ensure that the enforcement of the AML is consistent and

conforms to internationally accepted competition law norms, commentators have suggested that China establish a special competition law court, or assign competition law divisions to a few existing courts, in major cities throughout China.

China's Supreme Court issued a notice to local courts on the eve the AML took effect. In this notice, the Supreme Court designated specialized intellectual property tribunals as the courts responsible for hearing actions for damages brought under the AML. Unsatisfied parties who wish to contest MOFCOM's merger review decisions must seek "administrative reconsideration" by MOFCOM in the first instance. If the parties are still not satisfied with the outcome of their case after administrative reconsideration by MOFCOM, they can then bring an action to challenge the decisions before a People's Court. Regarding the authority's decisions on restrictive agreements and abuse of a dominant market position, parties may apply for administrative reconsideration or bring an action to challenge the decisions directly.

III. CONCLUSION

The PRC is in the process of shaping the AML to suit its indigenous needs. Given that the task of drafting the AML took thirteen years, it may be that the full establishment and optimal enforcement of the AML will take much longer to achieve. The legislative history of the AML reflects the challenges transitional countries face today in establishing a comprehensive competition law regime. The effective implementation of competition law, which engages legal, economic, and political issues, takes time in any jurisdiction. Taking into account the PRC's administrative and judicial stage of

development, Chinese competition law and policy is still in its infancy. Concerns over transparency, predictability, consistency, procedural equity, and compliance will continue to be the focus of discourse on Chinese competition law and policy. The evolution of the AML is the outcome of a fusion between indigenous conditions and the Western experience. Even though the AML is only its early stages of development, its promulgation was an important step in the process of establishing a modern market economy, the rule of law, and good governance in the PRC.