



# Antitrust Developments in China

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# Enactment of the Antimonopoly Law ("AML")

- AML took effect on August 1, 2008.
- More than 10 years in the making – supersedes previous patchwork of laws and regulations with antitrust provisions.
- Several implementing regulations have been issued after enactment; more to come.
- Starting to have some AML cases.
- Still many questions about interpretation and implementation.

# Scope of the AML

- Deals with "monopolistic acts" -- defined as economic acts carried out in or outside China which have the effect of eliminating or restricting competition in the domestic market in China -- which result or may result from:
  - monopoly agreements
  - abuse of dominant market position
  - concentrations ("mergers")
  - abuse of administrative powers

# Monopoly Agreements

- Implementing authority – State Administration for Industry and Commerce (“SAIC”) if not price-related; National Development and Reform Commission (“NDRC”) if price-related.
- Prohibited monopoly agreements include:
  - “horizontal” agreements to fix prices, limit production or sales, divide markets, restrict new technology, refuse to deal to third parties
  - “vertical” agreements to fix resale prices or set minimum resale prices

# Monopoly Agreements

- Certain exemptions from prohibition are available -- e.g., if objectives of such agreements are to improve technology, raise product quality, lower costs, increase efficiency, strengthen competitiveness of SMEs, protect the environment, alleviate serious drop in sales or overproduction resulting from a sluggish economy, "safeguard legitimate interests in foreign trade and foreign economic cooperation", etc.
- Recent and prospective cases
  - PetroChina and Sinopec may be sued for fixing prices for oil purchases in China.

# Abuses of Dominant Market Position

- Implementing authority – SAIC if not price-related; NDRC if price-related.
- "Dominant market position" is defined as the market position held by a business operator that is able to control the price or quantity of goods in a relevant market or prevent other business operators from entering a relevant market.
- Determination of dominant market position is done by an examination of various factors which include share of a market, state of competition in the market, ability to control sales or procurement in the market, difficulty of entrance into the market by new business operators, etc.

# Abuses of Dominant Market Position

- Dominant market position is generally deemed to exist where:
  - the market share of one business operator is at least half of the relevant market
  - the total market share of two business operators is at least  $\frac{2}{3}$  of the relevant market, or
  - the total market share of three business operators is at least  $\frac{3}{4}$  of the relevant market.

# Abuses of Dominant Market Position

- Prohibited abuses of dominant market position include selling goods at unfairly high prices or purchasing goods at unfairly low prices, selling goods at prices below cost, refusing to deal with potential transaction counterparties, insisting on exclusivity, imposing tying requirements, discriminating between equivalent counterparties in relation to price, etc.
- Recent and prospective cases
  - China's state-owned fixed-line telecommunication operator China Netcom was sued by lawyer Li Fangping in Beijing court for discrimination of customers.

# Abuses of Dominant Market Position

- Baidu was sued by a Tangshan company in Beijing court for forcing out and blocking competing websites.
- Microsoft is said to be under review by NDRC and SAIC in a case initiated by lawyer Dong Zhengwei concerning Microsoft's new Windows Genuine Advantage (WGA) anti-piracy software for Chinese language Windows, which detects whether software is genuine and turns screens to black if pirated.

# Abuses of Dominant Market Position

- Hyundai–Kia was investigated by the Ministry of Commerce (“MOFCOM”) for alleged breaches of abuse of dominant market position in relation to its PRC car dealers. It is speculated that abuses included forced tie-in sales and demands to purchase more vehicles than they could sell. MOFCOM imposed a one-month ban on importation of automobiles into China by Hyundai-Kia.
- CNPC (中石油) and CPCC (中石化) may soon be sued by several hundreds SMEs for unilateral suspensions of supply contracts.

# Concentrations ("Mergers")

- Implementing authority – MOFCOM.
- "Concentrations" are defined to include mergers between business operations and acquisitions of control by one business operator over another business operator through equity or asset acquisitions or contract or other means.
- Concentrations which meet certain thresholds are required to be notified in advance to the Antimonopoly Enforcement Agency and cannot be carried out (closed) if not notified.

# Concentrations ("Mergers")

- The following notification thresholds were adopted by the State Council on August 1, 2008:
  - combined global turnover of all parties to a concentration in excess of RMB 10 billion (USD 1.463 billion) in previous financial year and China turnover of at least two parties each in excess of RMB 400 million (USD 58.52 million) in previous financial year; or
  - combined China turnover of all parties to a concentration in excess of RMB 2 billion (USD 292.6 million) in previous financial year and China turnover of at least two parties each in excess of RMB 400 million (USD 58.52 million) in previous financial year.

# Concentrations ("Mergers")

- Notifications are subject to an initial review period of 30 days and a secondary review period of 90 days if deemed necessary. Early termination of a review may be possible in cases where it is obvious that a concentration will not have the effect of eliminating or restricting competition.
- Following a review, transactions may be prohibited or may have restrictive conditions imposed on them.

# Concentrations ("Mergers")

- Recent and prospective cases
  - InBev's acquisition of Anheuser-Busch. Approved with restrictions, including no increase from existing 27% shareholding in Tsingtao Brewery Co., Ltd., no increase from 28.6% shareholding in Zhujiang Brewery Co., Ltd. and no acquisitions of shares in China Resources Snow Brewery (China) Co., Ltd. or Beijing Yanjing Brewery Co., Ltd.
  - Coca-Cola's acquisition of China Huiyuan Juice Group (based in Hong Kong). Still under review; expected to be decided by March 23, 2009.
  - stayed tuned: upcoming acquisitions of China subsidiaries of GM, AIG and Citibank?

# Abuse of Administrative Powers

- Implementing authority – SAIC.
- Prohibits formulation of local regulations for the purpose of eliminating or restricting competition.
- Mainly targeted at local protectionism.
- Recent and prospective cases
  - Case concerning General Administration of Quality Supervision Inspection and Quarantine (“AQSIQ”) forcing companies to purchase services from entities selected by and related to AQSIQ. Case dismissed for exceeding statute of limitations.

# Enforcement

- New enforcement agency to be formed with powers to conduct investigations and levy penalties.
- Third parties have right to report monopolistic acts.
- Penalties up to 10% of total sales during previous year for certain violations.
- Civil liability for losses to third parties.

# Problems with the New Law

- New Antimonopoly Commission was formed on August 1, 2008 but it does not appear to be active. Antimonopoly Enforcement Agency is actually three agencies, as indicated above. Will this division result in inconsistent interpretation and enforcement?
- Certain activities important to the national economy or the national security which are controlled by the “state-owned economy” or are legally “monopolized” are largely exempted from the application of the new law.

# Problems with the New Law

- Application of the law to “the abuse of intellectual property rights by business operators to eliminate or restrict competition” is unclear.
- Most agricultural subsidies are exempted from the application of the new law.
- New law calls for special national security reviews for concentrations which have a bearing on the national security.