ANTITRUST AND COMPETITION LAWS

Legal framework

The basic law governing antitrust and competition issues in the PRC is the Anti-Monopoly Law ("AML"), which entered force on August 1, 2008. The AML is China's first comprehensive competition law, applying to almost all sectors of the economy. The main features of the AML are:

- a merger filing system, requiring mergers and acquisitions, meeting specific financial thresholds, to be notified to the Ministry of Commerce Anti-Monopoly Bureau ("MOFCOM") and approved prior to closing;
- a prohibition on monopoly agreements; and
- a prohibition on the abuse of a dominant market position.

As the AML remains relatively new, its enforcement is rapidly evolving and the information contained in this section is therefore especially vulnerable to change.

Extraterritorial application

The AML applies to both (a) agreements and conduct within China; and (b) agreements and conduct outside China, where these have the effect of restricting competition in the Chinese market.

Enforcement agencies

The Anti-Monopoly Enforcement Agency ("AEA") is responsible for coordinating enforcement, delegated in turn to three agencies:

- MOFCOM is responsible for merger control filings and investigations;
- the Department of Price Supervision of the National Development and Reform Commission ("NDRC") is responsible for pricing-related infringements; and
- the Law Enforcement Bureau for Anti-Monopoly and Unfair Competition of the State Administration of Industry and Commerce ("SAIC") is in charge of enforcing non-price-related infringements.

Among the three authorities within the AEA, both SAIC and NDRC have provincial level counterparts who are permitted to investigate infringements and enforce the AML.

In recent years, Chinese enforcement authorities have been actively enforcing the AML. According to the public reports, as of September 2014, NDRC and its local counterparts had investigated more than 11 high-profile cases with the total fine exceeding RMB3.25 billion (USD530 million), and SAIC and its local counterparts had investigated 39 cases and closed 16 cases with total fines exceeding RMB32 million (USD5.2 million).

Merger filings – when are they required?

Filing thresholds

The AML requires transactions qualifying as "concentrations" to be notified to MOFCOM where, in their last completed accounting year:

- each of at least two "relevant business operators" generated at least RMB400 million (US$65 million) in revenues from sales in or into China (excluding Hong Kong and Macao); **and**

- all the "relevant business operators" have aggregate revenues exceeding **either** RMB10 billion (US$1.63 billion) globally **or** RMB2 billion (US$325.2 million) generated from sales in or into China (excluding Hong Kong and Macao).

Higher specific thresholds exist for banks, insurance companies and other financial institutions.

Transactions between related parties, such as reorganizations taking place entirely within a corporate group, are expressly exempted from the AML filing obligation.

It is worth noting that:

- the thresholds can be met through imports into China alone – no Chinese assets or presence are needed;
- an AML filing will be required regardless of whether a transaction takes place in China or offshore;
- transactions that are closed without filing in China, despite meeting the thresholds above, expose both the acquirer and the seller to substantial penalties (see "Penalties" below); and
- even if the thresholds set out above are not met, MOFCOM has the ability to require a filing to be made, either before or after closing. MOFCOM has stated that this will only occur where a substantial negative impact on competition.

"Relevant business operators"

The "relevant business operators" will typically be (1) the acquiring entity and its entire corporate group; and (2) the businesses or companies being acquired, including any affiliates or subsidiaries they control. The seller will not, in most cases, be regarded as relevant. Where there are two or more acquirers, the revenues of each acquirer will usually be relevant.

"Concentration"

"Concentration" is a wide term, covering not just acquisitions of complete or majority control, but also acquisitions of substantial minority stakes, as well as assets-based acquisitions, where the acquirer gains rights amounting to "decisive influence" over a business for the purposes of the AML.

"Decisive influence" is also a wide concept, usually including the right to appoint one or more directors or core management personnel, and obtaining veto rights over matters such as the budget, sales and operations decisions.

Joint ventures

Formations of joint ventures and substantial changes to their ownership will usually give rise to a "concentration", with the "relevant business operators" being the parents to the joint venture and their corporate groups, as well as the joint venture itself. The position in relation to entirely new, "green field" joint ventures is less clear, and guidance should be sought before proceeding.

Merger filings – procedure

Filings are detailed, and transactions may not be closed until MOFCOM has completed its review and issued a clearance decision. It is therefore important to address this issue early.

Once a filing is received, MOFCOM will review the filing and either declare it complete or request further information or clarification. The formal review timetable does not commence until the filing has been declared complete.

The formal process begins with a 30 day "Phase 1" review. Others are referred for a more detailed, 90 day "Phase 2" review. At the end of Phase 2, transactions are either cleared (with or without conditions) or prohibited. Where the parties ask for more time, or there are significant changes to the transaction during the course of MOFCOM's review, there may be a further 60 day "Phase 3" review period.

During the review process, MOFCOM will consult with competitors, suppliers, customers and relevant industry associations. Where objections are raised, parties may need to make additional submissions to MOFCOM, either in writing or in person.

In 2014, MOFCOM introduced the fast track review process, which intends to expedite the review process for the cases raising no major competition issues. Two rules, namely the Tentative Provisions on the Applicable Standards for Cases of Concentration of Operators Subject to Summary Procedure and the Guiding Opinions on the Declaration for Concentration of Operators Subject to Summary Procedure, were issued by MOFCOM in February and April 2014 respectively. The standards for cases qualified for summary procedure are as follows:

- horizontal mergers when the parties' combined market share in the overlap market is less than 15%;
- vertical mergers when the parties' market share in the relevant upstream and downstream market is less than 25%;
- conglomerate mergers when the parties' market share in their respective markets is less than 25%;
- offshore joint ventures which do not engage in any economic activities in China;

- the acquisition of equity or assets of an offshore target which does not engage in any economic activities in China; or
- the reduction of the number of controlling shareholders in a joint venture which results in the joint venture being controlled by one or more of the remaining shareholders.

Please note that even if a transaction satisfies one of the above-mentioned conditions, MOFCOM reserves the right not to apply the summary procedures for exceptional cases (e.g., it is difficult to define the relevant market, or the concentration may have adverse impact on consumers or relevant business operators).

The new procedure will substantially accelerate the currently lengthy merger review process in China for transactions that do not have a significant impact on competition. It is expected that a majority of the notified transactions subject to the simplified procedure will be cleared within 30 days. In addition, the content requirements of the simplified form are substantially less, thereby reducing preparation time.

As of September 17, 2014, around 3% of filings have resulted in a conditional clearance or a prohibition of concentration. The conditions imposed can be wide-ranging, requiring the disposal of businesses both within and outside China. Behavioral conditions can also be imposed, for example requiring parties to refrain from further acquisitions in a particular sector, or to maintain separation between the acquirer and the businesses being acquired.

Prohibition on monopoly agreements

The AML prohibits "monopoly agreements". These are defined as agreements, decisions or other concerted practices between business operators that have the purpose or effect of eliminating or restricting competition.

The following monopoly agreements between competing business operators are prohibited:

- agreements to fix or change the price of goods;
- agreements to restrict the quantity of goods produced or sold;
- agreements to divide a sales market or a raw materials procurement market;
- agreements to restrict the purchase of new technology or new equipment, or to restrict the development of new technology or new products; and
- concerted refusals to deal.

The AML also expressly prohibits direct or indirect attempts by a supplier to impose fixed or minimum resale prices on customers. In fact, the resale price maintenance issue has become a top priority in NDRC's recent enforcement actions starting from early 2013.

Both NDRC and SAIC have issued implementing rules to define further types of monopoly agreement, which can be between competitors or non-competitors. In late December 2010, NDRC issued the Regulations on Price Monopoly and SAIC issued the Regulations on Prohibition of Monopoly Agreement. The NDRC rule clarifies that among others, agreement to fix or change commissions or discounts that affect prices, or use an agreed price as base for negotiation with the third party will be viewed as monopoly agreement. The SAIC rule clarifies agreements allocating product sales by territory, by customer or by category or volume, restricting the purchase, lease or use of new equipment or jointly refusing to supply or sell products to a business operator among competitors, will be viewed as monopoly agreements.

Exemption from the prohibition

The prohibitions on horizontal and vertical monopoly agreements are not applicable if the parties are able to prove that:

- the agreements would not seriously restrict competition in the relevant market; and
- consumers can share the benefits resulting from these agreements; and
- one of a list of specified goals are met. These include technological advancement and/or product development, improvements in overall product quality, increases in efficiency, and reduction in costs.

There is no mechanism under the AML which would allow parties to apply in advance for a formal ruling that a given case falls within an exemption. Parties to agreements are therefore expected to self-assess whether an agreement, if later investigated by SAIC or NDRC, would qualify for an exemption.

Prohibition on abuse of dominant market position

The AML defines a “dominant market position” as the ability of one or more business operators to control the price or quantity of goods in a relevant market or to otherwise affect conditions of a transaction, so as to hinder or influence the ability of other business operators to enter into the market.

When is a business operator dominant?

This is often a complex analysis based on a number of criteria, including market share, control over the market, financial and technical resources and barriers to market entry.

Under the AML, a dominant market position is presumed to exist where one, two, or three business operators achieve combined market shares of 50%, 66%, or 75% respectively. However, if any of the operators has a market share of less than 10%, or can produce evidence to rebut the presumptions, then that operator will not be assumed to have a dominant market position.

Types of conduct prohibited

A dominant market position is not, in itself, unlawful. It is only the abuse of such a dominant market position that raises issues. The AML prohibits the following types of conduct by business operators occupying a dominant market position:

- selling goods at prices that are unfairly high or purchasing goods at prices that are unfairly low;
- without a legitimate reason, selling goods at below cost price;
- without a legitimate reason, refusing to deal with a business operator;
- without a legitimate reason, restricting a trading partner by requiring it to deal only with the dominant operator(s) or with other designated operators;

- without a legitimate reason, tying goods or attaching other unreasonable conditions to a transaction; and
- without a legitimate reason, treating equivalent trading partners in a discriminatory manner with respect to price or other trading conditions.

This list is not exhaustive, and the AEA is empowered to define further abuses. As with monopoly agreements, both NDRC and SAIC have issued detailed rules to further define the abuse of dominant market position.

Penalties

For anti-competitive agreements and conduct, fines of up to 10% of the total turnover in the preceding year can be levied, plus confiscation of illegal income resulting from the agreement or conduct. In addition, agreements that violate the AML are automatically invalid. Cease and desist orders can also be issued in respect of anti-competitive behaviour.

For failure to make a merger filing, or closing a transaction before clearance is granted, fines of up to RMB500,000 (US$81,300) are available, plus the ability for MOFCOM to order the annulment or unwinding of the transaction.

Procedure

Rules have been published setting out how investigations are conducted. These include basic details of a “leniency” program, which rewards those confessing illegal conduct or agreements with either full or partial immunity from fines.

Litigation

In addition to administrative enforcement, the AML allows customers, competitors and third parties to bring civil damages claims against any business that has caused them to suffer loss by engaging in a monopoly agreement or abusing its dominant market position.