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subject **China's Anti-monopoly Law: the Starting Line, not the Finishing Line**

Introduction

In most market economies, anti-monopoly laws are usually regarded as the economic constitutions and set fundamental rules for competitions. However, owing to the heavy protectionism for the state-owned sectors, China's legislator hesitated to give birth to such crucial legislation for long and only adopted its first Anti-monopoly Law very recently after more than a decade of deliberations1. This obviously represents a rare case in the light of the fast speed of China's lawmaking practices. Moreover, as a result of compromising with various domestic objections, this Anti-monopoly Law is kept extraordinarily brief compared with anti-monopoly laws of other countries and will probably be remembered as one of the "world's shortest anti-monopoly law".

Nevertheless, it is beyond any doubt that this Anti-monopoly Law, coupled with competition policies and guidelines to be enacted by the National Anti-monopoly Commission and certain leading cases that would be decided upon by the anti-monopoly enforcement authority in future time, will reshape the regulatory environment for competition in China. Therefore, it is advised that foreign investors in China should start to check the compliance of their Chinese establishments and operative contracts in the light of the provisions of this coming Anti-monopoly Law.

This Anti-monopoly Law outlaws three forms of behaviors (Chapters 2, 3 and 4) according to their "monopolistic nature" and intends to safeguard consumers' welfares and public interests. This new legislation also puts an emphasis on combating administrative monopolies (Chapter 5), which shows the legislator's awareness that the most damaging monopolistic behavior in China comes from government abuse of administrative power in restricting or excluding competitions in the economy. While it is yet to be seen to which extent these legal provisions can be enforced in practice, the determination of the legislator is overshadowed by the law's emphasis on the safeguarding of certain state-dominated industry sectors (Article 7). Some commentators also pointed out that China does not have the required capacity in terms of trained personnel to implement this statute at the moment. However, other than the reality in connection with the strong resistance from the state-owned monopolies, foreign investors would fear more of the likelihood that the government uses the law as grounds for protectionism. The anti-monopoly law could lend support to the policy agenda of protecting China's economic and national security and could be used to lock out unpopular foreign investments. The law allows the authorities to conduct "national security reviews" over foreign acquisitions of domestic enterprises. Such provision is not new to foreign investors. In fact, the same requirement was once put forward under the regulations issued last year by the Ministry of Commerce. However, given that "national security" or "public interests" is not defined anywhere in the law, it would be convenient for

1 This Anti-monopoly Law was passed at the 29th Meeting of the Standing Committee of the 10th National Peoples's Congress on 30th August 2007, and will become effective on 1st August 2008.

the authorities to hold up the transaction through lengthy procedures (no time limit is provided for such national security scrutiny process).

In the following parts of this report, we will elaborate the important provisions of this Anti-monopoly Law and explain their relevance to foreign investors and their business activities in China.

1. Scope of Application

1.1. Extraterritorial Application

According to Article 2, this Anti-monopoly Law applies to monopolistic behaviors in the economic activities within the territory of P. R. China, and may also apply to monopolistic behaviors outside the territory of P. R. China in the event that such monopolistic behaviors have the effect of restricting or excluding competitions on China's domestic market.

It is important for us to understand that not only the seat of the legal relationship but also the influence of behaviors can become the basis for the jurisdiction of Chinese anti-monopoly authorities according to this Anti-monopoly Law. For instance, it will be subject to the review under this Anti-monopoly Law if the association of foreign suppliers instructs its members to only sell products to a specific Chinese company and to reject any transaction with other Chinese buyers.

1.2. Prohibited Forms of Monopolies

Three forms of behaviors are defined as monopolistic behaviors and prohibited under this Anti-monopoly Law (Article 3), including:

1. monopolistic agreement concluded between undertakings;
2. abuse of dominant position;
3. concentration among undertakings that has or may have the effect of restricting or excluding competition

In fact, these three forms of monopolistic behaviors are commonly prohibited in countries that have passed their anti-monopoly laws. This Anti-monopoly Law differentiates itself from laws of other jurisdictions by dedicating one entire chapter (Chapter 5) to declare unlawfulness of the abuse of administrative power in restricting or excluding competitions in the economy. Such provision has its significance in China, since many local authorities (at provincial level or municipal level) are keen on protecting local companies against the competitors coming from other provinces or cities by maintaining discriminating rules or hindering the free movement of products or capitals. Foreign investors and their own Chinese subsidiaries are also among the likely victims of such protectionism and will benefit from the abandonment of such restrictive policies.

2. Two-Tier Structure of the Anti-monopoly Authorities

It is an established fact in most western countries that anti-monopoly law cannot be effectively enforced without establishing a government agency enjoying high independence and authority. In the particular case of China, where the combat against the powerful state-owned monopolies and administrative monopolies represents quite a challenging task, it is even more necessary for the legislator to afford exceptional independence and authority to the enforcement body. This was one of the reasons why this Anti-monopoly Law experienced repeated delays before it was enacted.

Given the present reality in China, a two-tier structure is designed by the anti-monopoly legislator.

Firstly, according to Article 9 of this Anti-monopoly Law, an Anti-monopoly Commission (ministry level) will be established under the roof of State Council. This Anti-monopoly Commission will be responsible for the organization, coordination and steering of anti-monopoly activities, and, in particular, is expected to carry out the following duties (Article 9):

1. formulation of competition policies;
2. organizing the investigation and evaluation of the overall competition status of the market and the publication of its assessment reports;
3. formulation and publication of anti-monopoly guidelines;
4. coordination for the enforcement of anti-monopoly laws; and
5. other duties defined by State Council;

This Anti-monopoly Commission is obviously not in charge of the investigation and decision over specific monopoly cases. It is expected to concentrate on the law-making activities in anti-monopoly areas, and meanwhile to coordinate with other relevant ministries or seek the support the State Council where the enforcement of the anti-monopoly law requires so.

Secondly, State Council will appoint one government agency to act as the anti-monopoly enforcement body which will be directly dealing with the review and ruling over specific cases. It is widely believed that Ministry of Commerce (MOFCOM) will take on the role as such anti-monopoly enforcement body.

The foregoing separation between the rule-making body and enforcement body has its rationale in that this is probably most realistic and effective way to prevent the aims of Anti-monopoly Law from being compromised in the process of the practical enforcement. The legislator obviously wants the Anti-monopoly Commission, which is expected to be more or less aloof and distant from other ministries, to check the anti-monopoly enforcement body and to prevent the latter from being captured by powerful monopolies.

The Anti-monopoly Commission is not afforded with any enforcement powers under the Anti-monopoly Law. However, such definition of its rule does not abate the importance of this Anti-monopoly Commission at all. It is note-worthy that this Anti-monopoly Commission is not only defined as a rule-maker for anti-monopoly affairs, but also the forum where inter-

ministry coordination can take place. Such design will probably prove its value in the process of the enforcement of the Anti-monopoly Law against giant state-owned monopolies such as railway companies, airlines, electricity providers and telecommunication companies which are usually ministry-level institutions. The respective enforcement bodies of the Ministry of Commerce can hardly enforce the law by themselves against the abuse of dominant positions of these monopolies, given the hierarchical mentality in China. However, the presently contemplated Anti-monopoly Commission directly will report to State Council and its Chairman is very likely to be assumed by a vice premier. It will be much easier than before to reach consensus among the involved ministries and ministry-level companies through the coordination initiated by such a supra-ministry authority.

This Anti-monopoly Commission also provides a solution for the inter-ministry fight for the jurisdiction over anti-monopoly issues. It is believed that, even if the Ministry of Commerce is appointed as the enforcement body for anti-monopoly laws, NDRC (National Development and Reform Commission) will be reluctant to completely give away its traditional jurisdiction over monopolistic pricings. The Anti-monopoly Commission therefore can offer a common roof to accommodate the claims of different authorities (NDRC, MOFCOM, AIC, etc.) on decision-making powers.

It also has to be pointed out that, prior to the promulgation of Anti-monopoly Law, it is mainly the Anti-monopoly Investigation Office of MOFCOM and the Fair Transaction Bureau of SAIC which were in charge of the investigation over monopoly behaviors, and the Anti-monopoly Investigation Office of MOFCOM took the lead in most cases. However, according to the duties of the Anti-monopoly Commission as defined in Article 9 of the Anti-monopoly Law, the Anti-monopoly Commission will probably share a large part of the present powers of the Anti-monopoly Investigation Office. It is very likely that in future time some significant foreign acquisitions will not only have to be reported to MOFCOM (Its Anti-monopoly Investigation Office has a very effective “prior-submission consultation mechanism”), but also subject to the prior consensus among different ministries at the level of the Anti-monopoly Commission, which will obviously add to the uncertainties and reduce the transparency of the approval procedures. Therefore, it will be quite essential for foreign investors to know how State Council will stipulate the composition as well as the procedural rules for the deliberations of the Anti-monopoly Commission in future.

3. Forms of Prohibited Monopolistic Behaviors

3.1. Monopolistic Agreement

3.1.1. Prohibitions

The Anti-monopoly Law prohibits the conclusion of monopolistic agreements between competing undertakings with any of the following content (Article 13):

1. price fixing or manipulation;
2. restriction over the quantities of the production or sale of products;
3. split of the market for the sale of products or supply of raw materials;
4. restriction over the purchase of new technologies or new equipments, or restriction over the development of new technologies or new equipments;
5. collaboration in obstructing transactions;
6. other forms of "trust agreement" identified by the anti trust authority of State Council from time to time.

In the context of this Anti-monopoly Law, a monopolistic agreement does not necessarily take the form of a written contract, but refers to any agreement, decision or other coordinated action that serves to restrict or exclude competitions.

The Anti-monopoly Law also prohibits an undertaking from entering into any of the following monopolistic agreement with the other party of the transaction (Article 14):

1. price fixing for the resale of products to third parties;
2. specification on the minimum price for the resale of products to third parties;
3. other forms of "monopolistic agreement" construed by the anti trust authority of State Council from time to time.

3.1.2. Exemptions

According to Article 15 of this Anti-monopoly Law, however, where the involved undertakings can prove that the agreement they have concluded falls within any of the following situations, the prohibitions under Article 13 and Article 14 will not be applied:

1. where the agreement was reached for the purpose of technology improvement or R&D of new products;
2. where the agreement was reached with a view to improving product quality, controlling the costs, promoting efficiency, unifying product criteria, or as a result of specialization;
3. where the agreement was reached to improve the management efficiency of SMEs or reinforce the competitiveness of SMEs;
4. where the agreement was reached for the purpose of energy saving, environment protection, natural disaster aid or other public welfares;

5. where the agreement was reached to relieve the severe drop of sales figures or surplus of production in the event of economic recession;
6. where the agreement was reached with the view to protecting justified interest in foreign trade activities or economic cooperation;
7. other circumstances provided for by the law or the State Council.

It is furthermore required by the second paragraph of Article 15 that, in order to be exempted from the application of Article 13 according to the circumstances described in Article 15 i) to 15 v), the undertakings shall additionally prove that their agreement will not severely restrict the competition on the market and will allow the consumers to share the benefits arising out of such agreement.

Many foreign investors maintain certain agreements with their Chinese subsidiaries, partners, competitors or suppliers and try to avoid competition by splitting the market, entering into price cartel, ceiling the export quantities or specifying the resale conditions. Such forms of agreements nowadays would become vulnerable to the review by the authorities under Article 13 and Article 14 of the Anti-monopoly Law. Foreign investors shall examine whether such agreements they have entered into or are going to enter into can be harbored under the provisions of Article 15 (burden of proof is on the side of the contracting undertakings), and, if not, they will have to amend or abandon such agreements for the purpose of legal compliance.

3.2. Abuse of Dominant Position

The Anti-monopoly Law prohibits a dominant undertaking from abusing its dominant position in any of the following forms (Article 17):

1. selling products at unfair high price or purchasing products at unfair low price;
2. without sufficient reasons, selling products at a price lower than costs;
3. without sufficient reasons, refusing to deal with the other party of the transaction;
4. without sufficient reasons, requiring the other party of the transaction to only deal with it or with its specified undertakings;
5. without sufficient reasons, conducting tie-in sales or imposing other unreasonable conditions on the transaction;
6. without sufficient reasons, imposing discriminating conditions upon the other party of the transaction;
7. other forms of “abuse of dominant position” identified by the anti trust authority of State Council from time to time

However, the foregoing forms of behaviors will only be construed as punishable abuse under this Anti-monopoly Law if the involved undertaking has a dominant position on the market. Such dominant position is defined by the Anti-monopoly Law as the capability of the undertaking to control the price, quantity or other transaction conditions of the product

on the relevant market, or to obstruct or hinder other undertakings from entering the relevant market. (Paragraph 2 of Article 17)

In qualifying the dominant position of an undertaking, the following factors will be taken into account (Article 18):

1. the market share of the undertaking and the competition situation of the relevant market;
2. the capability of the undertaking to dominate the respective markets for the sale of products and purchase of raw materials;
3. the financial and technical strength of the undertaking;
4. the dependence of other undertakings upon this undertaking in completing the transaction;
5. the chance of other undertakings to enter the relevant market;
6. other factors that are considered to be relevant to the identification of the dominant position of the undertaking.

In addition, the dominant position of an undertaking can be inferred, unless the involved undertaking(s) can provide evidences to the contrary, under any of the following circumstances (Article 19):

1. where the market share of the undertaking has reached 1/2 on the relevant market;
2. where the collective market share of two undertakings has reached 2/3 on the relevant market;
3. where the collective market share of three undertakings has reached 3/4 on the relevant market;

While the foregoing provisions laid down many different approaches in identifying the dominant position of the undertaking(s), it is obvious that the concept of "relevant market" is essential for the authorities to tell whether the conditions in Article 18 or Article 19 have been met. This concept however has not been defined by the Anti-monopoly Law. As is common to western countries, the way of defining "relevant market" has to be pointed out through the leading cases to be announced by the anti-monopoly enforcement authority in future and subsequently in the anti-monopoly guidelines to be published by the Anti-monopoly Commission.

3.3. Concentration of Undertakings

The Anti-monopoly Law requires the undertakings to report to the anti-monopoly enforcement authority where the concentration among these undertakings has reached the criteria stipulated by State Council (Such criteria however have not been published so far). The concentration in the context of this Anti-monopoly Law may refer to the result of any the following circumstances:

1. merger of undertakings;
2. acquisition of control by an undertaking to another undertaking by way of purchasing equity or assets;
3. acquisition of control by an undertaking to another undertaking or the ability to exert decisive influence over another undertaking through contractual relationship;

It is stipulated that, where the criteria stipulated by State Council have been met, the involved undertakings shall not implement the concentration before the transaction is reported to the anti-monopoly enforcement authority. (Article 21) And the anti-monopoly enforcement authority has 30 days (extension by another 150 days is possible in certain cases) upon receipt of the submission by the undertakings to decide whether to approve or block the transaction. (Article 25)

In addition to the foregoing reporting and approval procedures, it is remarkable that this Anti-monopoly Law requires an extra national security review in case the acquisition by a foreign investor or participation in the concentration in other forms by such foreign investor involves national security. (Article 31) In fact, MOFCOM's regulations for the acquisition of domestic companies by foreign investors have already put forward such requirements regarding national security review. However, what concerns foreign investors most is that, in the absence of clarifications or guidelines regarding the meaning of "national security", some foreign investors could easily become victims of the lengthy scrutiny process, especially where there is mounting nationalism sentiment. It is a known fact that, being faced with legal uncertainties and political insecurity, Chinese officials will choose to say no.

3.4. Abuse of Administrative Power

Chapter 5 of the Anti-monopoly Law is dedicated to the prohibition of restricting competition through the abuse of administrative powers – an endemic problem in this administrative country.

Articles 32 to Article 36 declare the following forms of behavior of government authorities as illegal administrative monopolies:

1. requiring companies or consumers to only purchase or use products supplied by specified undertakings;
2. obstructing the free movement of products between different regions (by imposing discriminating charges, technical barriers, inspection or certification requirements, licensing requirement, etc.);
3. imposing discriminating qualification requirements in order to excluding or restrict the participation of undertakings coming from other regions in public biddings; or
4. excluding or restricting the investments or establishment of branches by undertakings coming from other regions.

4. Relation with other Laws in the Areas of Consumers Protection and Competition

In fact, China already enacted a couple of laws in the areas of consumer protection and competition regulation. In the year 1993, when China first headed to market economy, the National People's Congress passed the Law on Combating Unfair Competition (2nd September, 1993) and the Consumer Protection Law (31st October, 1993).

The Law on Combating Unfair Competition has for many years served as the basis for the enforcement authority (AIC) to safeguard the orderly competition on the market. The law put emphasis on the fight against fraudulent marketing strategies, abuse of dominant position, sale of products at dumping price, tie-in sales, and other forms of behaviors that could harm the fair competition of the market. Obviously, this law in 1993 did not, or simply avoided to2, take cartel agreements or concentration into its realm. The present Anti-monopoly Law covers many of the punishable unfair competition behaviors under the law in 1993, and overrides the latter in case of any conflict.

The Consumer Protection Law in 1993 laid down that the consumers were afforded with the right of free choice, right to information, right to fair deal, and other general principles in this area. Such stipulations were expected to counter-weight the monopolistic positions of many products suppliers or service providers. However, the application of this law is limited to the transactions in the area of private consumption. An undertaking cannot seek protection under this law from its suppliers' monopolistic behaviors or abuse of dominant position.

5. Legal Consequences of Monopolistic Behaviors

Chapter 7 of this Anti-monopoly Law deals with the legal consequences of breaking the provisions of this law.

Article 46 provides that a fine amounting to 1% to 10% of the annual turnover of the involved undertakings can be imposed by the anti-monopoly enforcement authority, in the event a monopolistic agreement has been concluded and implemented. However, whistle-blowers of a monopolistic agreement can be partly or entirely exempted from the punishment.

Article 47 provides that, in addition to the confiscation of illegal revenues, a fine amounting to 1% to 10% of the annual turnover of the involved undertaking can be imposed, in the event of abuse of dominant position by this undertaking.

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2 For the past decade, concentration among undertakings has been highly supported by the central government in the wave to create national champions. Cartel agreements (especially, price cartel) were simply rampant over the past years, and both the legislator and the enforcement authorities were aware that they had to compromise to the allegation that free competition would put all state-owned enterprises into loss-making status

Article 48 provides that the anti-monopoly enforcement authority can order the concentration be cancelled and meanwhile impose a fine not more than RMB 500, 000, in the event the undertakings enter into a concentration in violation of this law.

Moreover, according to Article 50, the undertakings that have committed monopolistic behaviors will have to answer for the civil liabilities in case they have caused damages to others.

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