

China Legal Briefing*

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I. China Issues Regulation on Abuses of Administration Power to Eliminate or Restrict Competition

On June 26, 2019 the State Administration for Market Regulation (SAMR) published the Tentative Regulation on Prohibiting the Acts of Eliminating or Restricting Competition by Abuse of Administration Power (Regulation). The purpose of the Regulation is to prevent and curb the acts of eliminating and restricting competition by abuse of administration power. The Regulation will be effective from September 1, 2019.

During the past years, foreign-invested companies in China were easily targeted by anti-monopoly bureaus when making investments in China. To create a better investment environment, the Regulation supposedly should regulate administrative power and provide a clear investigation procedure of such anti-monopoly cases.

Prohibitions on Administration Bureaus and Organizations

To protect the legal rights of entities, the Regulation stipulates a detailed list of prohibitions directed to administration bureaus. Such prohibitions are:

- (1) Prohibition of directly or by implication requesting entities or individuals to operate, purchase or use the commodities or services provided by administration bureaus;
- (2) Prohibition of obstructing free circulation of goods between regions by abuse of administrative power;
- (3) Prohibition of excluding or restricting operators in other places from participating in local bidding activities;
- (4) Prohibition of excluding or restricting operators from making investment or establishing branches in local regions.

Apart from administration bureaus, administrative organizations which are authorized by law and regulations to manage public affairs are also included in

the Regulation. According to article 8 and 9 of the Regulation, administrative organizations are prohibited from openly or in a disguised manner, forcing operators to conduct monopoly acts as prescribed in the Anti-Monopoly Law by abuse of administrative power.

These above-said prohibitions originated and developed from Chapter 5 of the Anti-Monopoly Law (AML), which focuses on the abuse of administrative power by empowered authorities or organizations to eliminate or restrict competition.

Investigation Procedure of Anti-Monopoly Cases

Article 42 of AML provides that business operators, related parties and other relevant entities or individuals who are subject to an anti-monopoly investigation have no right to refuse or obstruct the investigation conducted by the Anti-monopoly Law Enforcement Agency. The Anti-Monopoly Law Enforcement Agency may take measure to investigate and punish the enterprises which act in violation of the AML. However, the AML provides no procedure for such investigation and punishment. Hence, the current legal ground provides for not remedies at all. Enterprises involved in proceedings have no chance to file an objection to unlawful investigation and punishment.

To further prevent unlawful behavior of administration bureaus, article 11 and 13 of the Regulation stipulate that any entity or individual may tip off the Anti-Monopoly Law Enforcement Agencies on acts of eliminating and restricting competition by abuse of administration power. The market regulation departments receiving suspicious tip off material or finding clues themselves should, within 7 working days, submit the relevant materials to the market regulation departments at the provincial level.

Comments

Obliviously, the Regulation will in some degree decrease the abuse of administration power. But unfortunately, the Regulation doesn't provide the Anti-Monopoly Law Enforcement Agencies the power to punish the bureaus or organizations which make abuse of administration power. Under this condition, the enforcement of the Regulation might be weak.

II. Tentative Provisions on Non-Monopoly Agreement

On June 26, 2019 the State Administration for Market Regulation published Tentative Regulation on Non-Monopoly Agreements (Provisions) for the purpose of preventing and curbing monopoly agreements. The Provisions contains 36 articles. Compared to the Anti-Monopoly Law, the Provisions include substantive and procedural provisions of Non-Monopoly Agreements and punishments for unlawful actions. The Provisions will be effective on September 1, 2019.

Definition of Non-Monopoly Agreement

Article 5 of the Provisions stipulates that a Monopoly Agreement means any agreement, a decision, or any other act aiming to exclude or restrict competition. An agreement or a decision may be either in writing or verbal form.

In article 7 et seq. the Provisions further describe several types of Monopoly Agreements of business operators and industry associations. According to the Provisions, operators are prohibited from reaching monopoly agreements:

- (1) On restricting the production volume or sales volume of goods.
- (2) On division of the sales markets or the raw materials procurement markets:
- (3) On restricting the purchase of new technologies and new equipment or restricting the development of new technologies and new products:
- (4) On boycott of trading:
- (5) With trading counterparties on the price of goods.

Besides, an industry association is prohibited from carrying out the following activities: Developing and issuing bylaws, rules, decisions, notices, and standards, among others, of an industry association that include contents of excluding and restricting competition. Convening, organizing or urging operators in the industry to reach agreements, resolutions, minutes, and memoranda, among others, that include the contents of excluding and restricting competition;
Other acts that organize the operators in the industry to reach or implement monopoly agreements.

Investigation Procedure and Punishment

The regulation not only covers the issue of the monopoly of the entity between enterprises, but also covers a series of procedural issues including law enforcement authority, immunity, commitment and punishment.

(1) Enforcement Authority

According to the Provisions, the Anti-Monopoly Law Enforcement Agencies execute investigations.

(2) Immunity and Commitment

To encourage enterprises to commit their illegal acts, the Provisions provide immunity policies for enterprises.

During an investigation, a business operator suspected of a monopoly agreement may file an application for suspension of investigation and make a commitment of correcting illegal conduct. If the business operator has fulfilled its commitments, the investigation may be terminated.

Other than that, article 33 of the Provisions stipulates that an operator who voluntarily reports and provides important evidence may apply for mitigated penalties or exemption from penalties.

(3) Punishment

An operator concluding and implementing a monopoly agreement in violation of these Provisions will be ordered by an Anti-Monopoly Law Enforcement Agency to cease the illegal act and will be subject to confiscation of illegal gains. Further, a fine of not less than 1% and not more than 10% of its sales volume in the previous year may be imposed and an operator that has not yet implemented a monopoly agreement may be subject to a fine of not more than 500'000 Yuan Renminbi.

An industry association organizing operators in this industry to reach a monopoly agreement in violation of these Provisions may be subject to a fine of not more than 500'000 Yuan Renminbi.

Conclusion

The Regulations help improve the predictable of AML enforcement. However, these Regulations still need to be detailed and give enterprise more guidance on company compliance.

III. Tentative Regulation on Non-abusing the Dominant Market Position to Exclude or Restrict Competition

On June 26, 2019 the State Administration for Market Regulation published Interim Provisions on Prohibiting Abuse of Dominant Market Positions (Provisions). The Provisions will be effective on September 1, 2019.

Prohibitions on Business Operators

According to the Provisions, dominant market position means a market position that an operator can control the prices, volumes or other transaction conditions of goods or services in a relevant market, or can obstruct or affect other operators from entering into the relevant markets. Business operators with dominant market positions are prohibited from:

- (1) Selling goods at unfairly high price or buying goods at unfairly low price;
- (2) Selling goods at prices lower than the costs without justified reasons;
- (3) Refusing to conduct transactions with transaction counterparts by the following means without justified reasons;
- (4) Carrying out restricted transaction acts without justified reasons;
- (5) Conducting tie-in sale of goods without justified reasons or restricting other unreasonable transaction conditions in transactions;
- (6) Offering differentiated treatments in terms of transaction conditions to transaction counterparts with the same conditions without justified reasons.

Investigation and Punishment

Similarly to the Tentative Provisions on Non-Monopoly Agreement, the provisions also provide business operators under investigation a chance to admit their illegal conduct and make commitment to correct. However, after investigating into and verifying suspected abuse of dominant market positions,

an Anti-Monopoly Law Enforcement Agency deeming that abuse of dominant market positions is constituted will make a decision and no longer accept any application of the operator for suspension of investigation.

Article 37 of the Provisions provides that an operator that abuses dominant market positions should be ordered by an Anti-Monopoly Law Enforcement Agency to cease the illegal action and be subject to confiscation of illegal gains, and a fine of not less than 1 % and not more than 10 % of its sales volume in the previous year.

IV. Interim Measures in Aid of Arbitration: Mutual Assistance Between the PRC and Hong Kong

On April 2, 2019, the Supreme Court of PRC issued the Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitration Proceedings by the Courts of Mainland China and of the Hong Kong Special Administrative Region (Arrangement). The effective date of this Arrangement is still uncertain. Once effective, the Arrangement will allow parties to seek interim Court assistance in Mainland China in aid of Hong Kong arbitration and vice versa.

What Measures?

According to article 1 of the Arrangement, in the case of China Mainland interim measures include, property preservation, evidence preservation and act preservation. In the case of the Hong Kong Special Administrative Region (HKSAR) injunction and other interim measure for the purpose of maintaining or restoring an original status, taking action, preserving assets or preserving evidence that may be relevant and material to the resolution of the dispute.

How to Apply?

A party in Hong Kong may, before the arbitration award is made, by reference to Civil Procedure Law, Arbitration Law and/or relevant judicial interpretations, make an application for interim measure to the Intermediate People's Court of the place of residence of the party in China, against whom the application is made (respondent) or the place where a Chinese property is situated.

A party in Mainland China may, before the arbitration award is made, apply for interim measures at the High Court of the HKSAR.

Comments

The Arrangement is certainly helpful to provide cooperation in the arbitration proceedings involving Hong Kong and Mainland China. Based on the Arrangement, arbitration institutions will have to offer appropriate assistance to the parties who need interim relief. However, the scope for such interim court assistance in Hong Kong by definition remains broader than in China Mainland. Furthermore, the enactment of the Agreement remains unclear. We will keep track of the implementation of this Arrangement and keep you updated.

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