INTRODUCTION AND OVERVIEW

China was one of the last major world’s economies to introduce a general competition law.

After over a decade of protracted debate, China’s Anti-Monopoly Law (the “AML”) was enacted by the National People’s Congress on 30 August 2007 and came into force on 1 August 2008. It was the country’s first comprehensive competition law and marked a significant step towards China’s full participation in the global economy.

GLOBALISATION

China was in fact one of the last major world market economy to acquire a general competition regime. Apart from the established systems in place for many years in Europe or the US, the vast majority of countries in Asia have now enacted or are in the process of drafting their own general competition legislation.

Consequently, competition law is no longer a local consideration only relevant when doing business in certain jurisdictions, but has become a matter of global concern to be taken into account by companies operating or doing deals around the world. The AML has, like a number of other legal systems, extraterritorial implications which may catch agreements and transactions concluded or implemented outside China which have an effect in China.

The AML includes similar elements to those covered in many other systems of competition law:

- Merger Control;
- Prohibition of anticompetitive agreements defined as “monopoly agreements”; and,
- Prohibition of abusive conduct by companies holding a dominant market position.

For more details on Merger Control in China, please also refer to our Practical Guide to Merger Control in China or our regular Client Alerts.

For more details on monopoly agreements and abuse of dominance, please also refer to our regular Client Alerts.

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1Before the AML, China had enacted several laws which covered some economic aspects such as the 1993 Anti-Unfair Commercial Practices Law, the 1997 Price Law or the 1999 Bidding Law. The first cases involving anticompetitive practices were decided under the Price law rather than the AML. This could be explained by the fact that the Chinese agencies (especially at local level) were more familiar with the older legislation. It is worth noting however that in January 2011, the NDRC has, for the first time, imposed a fine on a price cartel in the paper manufacturing sector exclusively on the basis of the AML. It is expected that enforcement based on the AML will increase in the future.
**WHAT IS A “CONCENTRATION”?**

A concentration of undertakings occurs in any one of the following circumstances:

- A merger of two or more previously independent undertakings;
- Acquisition of control of other undertakings through an acquisition of shares or assets;
- Acquisition of control or acquiring the ability of exercising decisive influence over other undertakings by contract or other means;
- Creation of joint-ventures also falls within the definition of a “concentration”.

Concentrations of undertakings taking place outside China (i.e. “foreign to foreign” transactions) require a merger filing if the parties to the transaction meet the thresholds set out below, in particular, the turnover thresholds in China. This is important when considering “offshore” joint-ventures.

**THE THRESHOLDS**

If either of the two alternative thresholds below is met, a merger notification must be filed with the Anti-Monopoly Bureau of Ministry of Commerce (usually referred to as “MOFCOM”) before the transaction is implemented otherwise parties can incur financial penalties:

- The total worldwide turnover in the previous accounting year of all undertakings involved in the concentration exceeds **RMB 10 billion** (approx. US$1.4 billion or €1 billion or £877 million), and at least two of such undertakings each has a turnover of more than **RMB 400 million** (approx. US$59 million or €41.2 million or £35 million) within China in the previous accounting year; or
- The total turnover in China in the previous accounting year of all undertakings involved in the concentration exceeds **RMB 2 billion** (approx. US$ 293 million or €206 million or £175 million), and at least two of such undertakings each has a turnover of more than **RMB 400 million** (approx. US$ 59 million or €41.2 million or £35 million) within China in the previous accounting year.
THE PROCEDURE

MOFCOM will have 30 days to conduct a preliminary review of the transaction. At the end of the 30 day period, MOFCOM can decide whether to conduct a further review or decide that no further review is required. If MOFCOM makes no decision within the 30 days, the transaction is deemed to be tacitly approved.

Where MOFCOM decides to conduct a further review, it shall have 90 days to complete such review. In certain circumstances, it may notify the parties that the review period will be extended and in such case, the 90 day period may be extended by up to an additional 60 days. At the end of the period of further review, MOFCOM may prohibit the transaction or may attach conditions to the implementation of the transaction. If it makes no decision at the expiry of the period of further review, the transaction is deemed to be tacitly approved.

GENERAL POWERS OF REVIEW

Even where the turnover thresholds are not met, if MOFCOM considers that a concentration may result in the elimination or restriction of competition in the Chinese domestic market, it has the power to investigate the concentration on its own initiative. It is to be anticipated that MOFCOM will be closely monitoring concentrations that do not hit the thresholds but could nevertheless have an adverse effect on competition in China. However, MOFCOM has not used these discretionary powers to date.

FILING REQUIREMENTS

Parties are encouraged to have pre-notification discussions with MOFCOM before any filing is made to identify relevant jurisdictional and legal issues, such as market definition or the scope of required documents. In our experience, MOFCOM tends to ask many questions on the parties’ initial filing and requires the parties to supply further information. In consequence, the lead time required for obtaining a clearance is in practice much longer than the statutory period provided for in the text of the AML.

ASSESSMENT CRITERIA

When reviewing whether a transaction will eliminate or restrict competition, MOFCOM considers not only competition issues, such as market shares, market concentration, or barriers to entry, but also industrial and political issues relating to the development of Chinese economy and
national security. This could give rise to unexpected hurdles, particularly when a well known Chinese company or brand is being acquired.

Under exceptional circumstances, MOFCOM may, in theory, take a decision not to prohibit a concentration that may have the effect of eliminating or restricting competition if it is satisfied that the economic efficiencies resulting from the concentration outweigh the negative effects or if the transaction is considered to be in the public interest.
MONOPOLY AGREEMENTS

The AML prohibits undertakings from entering into “monopoly agreements”.

The AML defines “monopoly agreements” in general terms as any agreements, decisions or other concerted behaviour that eliminate or restrict competition in China. The AML therefore explicitly provides that it could apply to monopoly agreements concluded outside China which have an adverse effect on competition in the Chinese domestic market. For example, price-fixing agreements or market sharing agreements concluded between foreign companies, in Europe or the US, could fall foul of the AML and be subject to the jurisdiction of Chinese competition authorities if they have an effect on markets in China.

MONOPOLY AGREEMENTS BETWEEN COMPETITORS

Hard core monopoly agreements between competitors (“horizontal agreements”) are expressly prohibited under the AML, this includes:

- Price fixing;
- Output restrictions;
- Market sharing and customer allocation;
- Agreements aiming at restricting the purchase or the development of new technologies, facilities or products;
- Boycotts
- Bid rigging².

OTHER TYPES OF MONOPOLY AGREEMENTS

In the case of agreements between non-competitors (“vertical agreements”) such as distribution agreements, fixing resale prices and restricting minimum resale prices are both prohibited.

Industry associations are expressly prohibited from setting up rules that would restrict competition or encourage their members, to enter into monopoly agreements.

Lastly, a “catch all” clause allows the authorities to investigate any type of agreements which have anticompetitive effects.

EXEMPTIONS

Monopoly agreements may however be exempted on any of the following grounds:

- If they improve technology or research and development;
- If they enhance product quality, reduce costs, improve product efficiency or unify product specifications or standards;

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²Bid rigging is explicitly prohibited under the 1999 Bidding Law.
If they enhance overall competitiveness of small and medium sized enterprises;

- If they aim at achieving public interests such as environmental protection or energy conservation;

- If they mitigate a severe sales decrease or overproduction during economic recession; or

- If they protect the legitimate interests of foreign trade and foreign economic cooperation (“export cartel exemption”).

In all cases with the exception of “export cartels”, the company seeking an exemption will also have to provide evidence that the agreement will not substantially restrict competition in the relevant market and that consumers will be able to share the benefits derived from the agreement.
ABUSE OF DOMINANT POSITION

The AML prohibits dominant companies from abusing their market power to restrict competition.

Mere dominance is not a violation of the AML. It is, however, an infringement when a company with a dominant market position abuses such position, by taking certain actions to eliminate or restrict competition.

The AML defines “dominant market position” as the market position that is held by undertakings in the relevant market which enables those undertakings to control the price and quantity of goods or other trading conditions, or to restrict or affect the entry of other undertakings into the relevant market.

The AML provides that a rebuttable presumption of dominance will arise where:
- One company holds 50% or more of the relevant market;
- Two companies jointly account for two-thirds or more of the relevant market; or
- Three companies jointly account for three-quarters or more of the relevant market.

However, where a company has less than a 10% market share, it is presumed not to hold a dominant position.

Despite the rebuttable presumptions that are included in the AML, the existence of dominance remains a very complex subject which goes well beyond the assessment of the company’s and competitors’ market shares including factors such as the company’s financial and technological resources or the existence of barriers to entry.

Examples of price and non-price related behaviour that may amount to an “abuse” include:
- Selling goods at unfairly high prices or buying at unfairly low prices;
- Selling goods at prices below the cost without justified reasons;
- Refusing to deal with another party without justified reasons;
- Requiring another party to trade exclusively without justified reasons;
- Tying products or imposing other supplementary unreasonable trading conditions without justified reasons; and
- Using discriminatory pricing and other discriminatory trading conditions without justified reasons.

From the wording of the law, most of the practices considered as potentially abusive could be justified on grounds of efficiency or other legitimate business reasons, for example, sales promotion, maintaining brand image, credit control, technical/safety requirements or possibly even defence of valid intellectual property rights.
INTELLECTUAL PROPERTY RIGHTS

The AML provides that the mere exercise of intellectual property rights (“IPR”) shall not be considered as an abusive conduct which would be subject to the AML. However, the AML will apply in cases where the holder of the IPR abuses his rights “to eliminate or restrict competition”. This provision seems to envisage that a refusal to licence an IPR may, in certain circumstances, amount to an abuse where it can be shown that such refusal is made for the purpose of eliminating or restricting competition rather than exploiting the IPR by collecting reasonable royalties.

STATE-OWNED ENTERPRISES

The AML also prohibits state owned enterprises and their subsidiaries from using their dominant position or exclusive dealing positions to eliminate or restrict competition.
The enforcement of the AML is split between three agencies. The Antimonopoly Bureau of the Ministry of Commerce (“MOFCOM”) has exclusive jurisdiction over merger control, the National Development and Reform Commission (“NDRC”) is in charge of the price-related monopoly agreements and abuse of dominance, whereas the State Administration for Industry and Commerce (“SAIC”) is responsible for all other monopoly agreements and abuse of dominance that are not price-related.

In addition, the Anti-monopoly Commission which reports directly to the State Council is responsible for organising, coordinating and guiding anti-monopoly implementation and enforcement.

The three enforcement agencies are granted extensive investigation powers. They can collect documents and records, search premises and bank accounts, confiscate material which they determine as relevant evidence. To date, while merger control reviews are performed by MOFCOM in Beijing, enforcement of the prohibition of monopoly agreements and abuse of dominance is carried out at both national and provincial levels by the NDRC and the SAIC and their respective local branches.

FINES AND PENALTIES

Violation of the AML can lead to severe penalties. A company can be fined up to 10% of its annual turnover. At this early stage of the enforcement of AML’s behavioural rules there is still an uncertainty as to whether the Chinese or the global turnover has to be taken into consideration for the purpose of fine assessment.

The enforcement agencies’ approach is made on a case-by-case basis. In addition, the enforcement agencies are empowered to assess and confiscate any illegal gains realized as a result of the infringement.

Individuals and companies have the duty to supply the agencies with information and documents. Obstructing the agencies’ investigations may give rise to criminal sanctions.

It is also important to mention that a company’s reputation can be seriously damaged as a result of an adverse decision. This could lead some companies to cooperate with the authorities by applying for leniency.
LENIENCY

When a party to a monopoly agreement voluntarily reports relevant information on a possible infringement by providing important evidence, both the NDRC and the SAIC are empowered to mitigate or even exempt the party from any sanction. As far as price monopoly agreements are concerned, the NDRC may grant the first whistle-blower a full exemption, the second may obtain a reduction of over 50%, whereas the remaining companies may obtain a reduction of less than 50%. With respect to non-price related practices, the SAIC implementing rules remain silent on the level of fine reductions that the parties could obtain if they decide to come forward.

It is nevertheless strategically important for companies to implement and run an effective compliance program in order to detect potential infringements at the earliest possible moment.

For an explanation of what is involved in setting up and running a compliance program, please refer to the Annex.

PRIVATE ENFORCEMENT

In addition to the enforcement by regulators, the AML contains provisions which invite companies to initiate stand-alone or follow-on actions before the Chinese courts to seek damages. To date, there has been a dozen of cases reported since the AML came into effect, most of them based on unsuccessful abuse of dominant position claims.

The Supreme People’s Court of China is still expected to provide clarification on several key issues such as the burden of proof or the possibility to award double damages to plaintiffs.
A compliance program can be described as an internal system set up by any organisation for the purpose of ensuring compliance with a particular body of rules and for managing the risks that arise out of the application of those rules. In brief, it can be said to be a set of internal guidelines, but in fact, it is much more than a set of internal rules. It is also the way in which such rules are applied, monitored and enforced within the particular organisation and in that sense, it is also a system of management. This element is crucial, because it means that the entire management of the particular organisation, from the top down to the most junior manager, should be involved in and committed to such a program. Also, like most systems of management, compliance programs can be judged on only one criterion: results.

The consequence of this is that there is no perfect model for a compliance program. Each organisation should devise a program that will be effective for itself, in other words, taking into account its own culture, its scale and complexity, its individual businesses and its history.

However, while bearing this in mind, one can, nonetheless, say that compliance programs usually include the following elements:

- **A mission statement by top management:** setting out the reasons why the compliance program is essential to the whole organisation (no compliance program will be effective without the wholehearted and visible leadership of top management);

- **Education:** teaching managers and employees what the basic rules and procedures are and what the “do’s and don’ts” are of everyday business conduct; this can take the form of a brochure or an intranet site or an online website which sets out the basic rules and which is easily accessible; It is very important that new employees and new managers are quickly introduced to the basic rules and procedures.

- **Help and advice:** when managers and employees have questions or encounter difficulties, they should be able to turn to a qualified person (usually a compliance officer) for rapid help and advice;

- **Monitoring:** there should be a regular system of monitoring compliance by everyone. This can be done by requiring every senior employee and manager to certify in writing periodically (for example, once a year) that he or she is not aware of any breaches of the rules (and if they are aware of breaches, they should
In some cases, periodic compliance audits by senior managers or the compliance officer may be appropriate;

- **Updating**: there should be regular seminars to refresh the knowledge of managers and employees and to update them on new developments.

Further information and specific advice can be obtained from our Asia Competition group whose contact details are set out below.
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