Anti-Competitive Conduct

The PRC Anti-Monopoly Law – Time to Get Ready!

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On 30 August 2007, the PRC Anti-Monopoly Law (AML) was enacted. The law enters into force on 1 August 2008. Until then, the competent authorities are scheduled to adopt a series of implementing regulations and/or guidelines. A first draft regulation in the field of mergers and acquisitions has already been circulated by the State Council. The AML is the first comprehensive code of competition law in China's history. The AML is meant to replace prior laws (such as the PRC Anti-Unfair Competition Law or the PRC Price Law) which contain a limited number of competition law provisions, although it is possible that some of those laws will remain in force, at least for a transitional period.

The AML attempts to prevent and penalize four types of anti-competitive conduct: (1) monopoly agreements, (2) abuses of dominant market positions, (3) anti-competitive mergers and acquisitions (the AML uses the term "concentration" of companies instead of mergers and acquisitions), and (4) abuses of administrative power that eliminate or restrict competition.

As for the last type of conduct, the responsibility for the anti-competitive behavior lies with government officials, not companies. In reality the prohibition will likely be of limited benefit to market players, because only the superior organ of the official committing the illegality has the power to stop the infringement and punish the official. By contrast, for the first three types of conduct, any company or individual that suffers damage can bring an action before a court or ask the competent authorities to intervene.

The AML states that the competent authorities follow a two-level structure. At the top is the Anti-Monopoly Commission, which is likely to consist of high-level officials from a number of key ministries. It has the general responsibility to guide the implementation of the AML. At the lower level, the Anti-Monopoly Enforcement Authority (AMEA) will be in charge of the actual enforcement of the AML. At present, it is not yet settled whether the competences of the AMEA will be allocated to one or several bodies (such as MOFCOM, SAIC and NDRC).

Monopoly agreements

Certain agreements (whether written or oral) between competitors are deemed anti-competitive. Price-fixing, limiting output or allocating markets or customers are generally illegal regardless of the size of the companies involved. Article 15 of

the AML provides a possibility for exempting potentially anti-competitive agreements, but the before-mentioned examples are unlikely to qualify for an exemption.

By contrast, it may be possible to exempt other types of agreements between competitors such as agreements on R&D cooperation, standardization or even information exchanges (if the exchanged information does not provide too much detail on sensitive topics such as price, output, customer names, etc.).

For agreements between non-competitors, the AML is more permissive – only agreements fixing the resale price (or the minimum resale price) are in principle prohibited. If, and under which circumstances, such resale price maintenance can be exempted will be determined by forthcoming implementing measures and the AMEA's enforcement practice.

The examination of whether an agreement can be exempted depends on a number of factors–whether the agreement improves technology, leads to efficiencies, reduces costs, etc.– and must be made by the companies themselves. But, the AMEA or the courts will be the final decision-makers.

Suspected monopoly agreements can be denounced to the AMEA on an anonymous basis. If the AMEA starts an investigation, it can take a series of measures including searching business premises and sending requests for information. If it finds that the agreement is illegal, the AMEA can impose very high fines – between 1% and 10% of a company's annual turnover. The fine can be lower, or no fine may be imposed, if the agreement is not implemented or if the company has filed for leniency or otherwise offered commitments to stop the illegal conduct. If an action is brought before a civil court, the judge can order the payment of compensation for damages if he or she finds that the agreement at issue is illegal.

Abuse of a dominant market position

A company in a dominant market position is prohibited from engaging in certain, otherwise entirely legitimate, means of competition such as setting "unfairly high" prices or, without justification, prices below cost, refusing to deal with, or discriminating between, trading partners, forcing customers to deal only with it or other designated companies, or tying different products together.

Whether a company is in a dominant market position does not depend on its size or turnover but must be established in a complex legal and economic analysis. Simplifying somewhat, the analysis focuses on the company's market share in a so-called "relevant market". (The AML contains a number of presumptions of dominance based on market shares – for example if a company has a market share over 50% – although the company can rebut the presumption.)

The "relevant market" is determined by the product scope and by its geographical extent. The analysis focuses on whether consumers (and, to a lesser degree, producers) consider two products or two geographic areas as substitutable. The analysis must be made on a case-by-case basis for each product and each area. Where a company is found to have abused its dominant market position, the same procedure as that for monopoly agreements applies (see above) –the AMEA can impose the same fines, and the courts can award damages.

Anti-competitive concentrations

The AML replaces the pre-existing system under the Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors. Under the AML, the control of concentrations applies both to foreign and domestic companies. A concentration arises where two previously independent companies merge, or one company acquires a controlling right in another company through the purchase of shares or assets or otherwise obtains a decisive influence over the latter. Although the AML does not explicitly mention it, the formation of a joint venture may also be deemed a concentration.

Concentrations above certain thresholds must be notified to the AMEA. The thresholds are not directly fixed in the AML. According to the latest draft of a State Council regulation, a concentration must be notified if (1) the total worldwide turnover of all parties to the concentration exceeds RMB 9 billion and the turnover in China of at least two parties exceeds RMB 300 million, or if (2) the total turnover in China of all parties is above RMB 1.7 billion and the turnover in China of at least two parties is above RMB 300 million, or if (3) the concentration leads to a share greater than 25% in a relevant market in China. All numbers refer to the turnover generated during the fiscal year preceding the moment of notification.

After receiving the notification of a concentration, the AMEA starts its assessment. The AMEA examines whether the concentration is likely to have the effect of eliminating or restricting competition. The procedure is a two-phase process of 30 and 90 days respectively, although most concentrations are likely to be cleared in the first phase. A concentration cannot be implemented before obtaining the AMEA's clearance decision. If the AMEA finds that a concentration raises serious problems, it can prohibit the concentration or authorize it subject to conditions –for example, the divestment of part of the acquired business.

The way ahead

Given its stretched resources, the AMEA will likely set enforcement priorities and may be inclined to impose significant fines in early cases in order to send a clear signal. Furthermore, the whistle-blowing system can be used by companies as a competitive tool in the marketplace by exposing competitors to fines while gaining immunity for themselves. Therefore, companies should prepare in advance for the entry into force of the AML. The review of their contracts and the training of key staff seem particularly important for companies to bring their conduct in line with the AMI's rules.

如何面对中国反垄断法

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2007年8月30日，中国颁布了《中华人民共和国反垄断法》，该法将于2008年8月1日生效。目前，中国的反垄断相关部门正在制定相应的实施条例和/或指南。国务院已经公布了有关并购规定的草案。

反垄断法是中国历史上第一部全面的竞争法。此法的目的是取代以往涉及有限的竞争法条款的其他各种法律(如《中华人民共和国反不正当竞争法》和《中华人民共和国物价法》)，但其中某些法律可能在一段过渡时期内仍然有效。

反垄断法的目的在于防止和制裁四种反竞争的行为：一、垄断协议；二、滥用市场支配地位；三、反竞争的并购(并购在反垄断法中称为公司的“集中”)；四、滥用行政权排除或者限制竞争。

至于最后一种反竞争行为，其责任在于政府官员，而非公司。在实际操作中，对于这种行为的禁止很可能不会给市场参与者带来太多的利益，这是因为只有违规官员的上级机关才有权制止该等行为并进行处罚。

与此相反，对于前三种反竞争行为，任何蒙受损失的公司或者个人都可以在法院起诉，并且要求反垄断机关进行调查。

反垄断法规定，反垄断机关实行双层构架。在上层的是反垄断委员会，其主要职能是指导反垄断法的实施，其成员很可能是来自主要部委的高级官员。在下层的是反垄断执法机构，负责反垄断法的具体执法工作。目前尚不知晓该执法机构的职权是否会分配给其他一个或多个机构，如商务部、国家工商总局和国家发改委。

垄断协议

某些竞争者之间的协议(不论是口头还是书面)可能会被认为具有反竞争性质。不论公司大小，只要进行固定商品价格，限制产量或分割市场和客户的行为都很有可能是非法的。虽然反垄断法第十五条规定，某些可能存在反竞争的协议可以豁免，但是以上几种行为基本上不会满足这一条款的规定。

相反，对竞争者之间的某些其他种类的协议可以不受上述禁止，例如：改进技术和新产品研发方面的协议、统一产品规格和标准的协议或者交换信息(这种信息交换不应涉及价格、产量、客户姓名等敏感细节)。

对于非竞争者之间的协议，反垄断法采取了比较宽容的态度。原则上只有限定商品转售价格或者制定最低转售价格的行为是被禁止的。在何种情况下这种行为可以得到豁免将由即将出台的实施条例或者反垄断执法机构的具体操作来决定。

一个协议是否可适用豁免由几个因素决定：该协议是否改进技术、是否提高效率、是否降低成本等等。公司应当自己做一个评估。当然，最终还需要由反垄断执法机构或者法院进行认定。

对可疑的垄断协议可以匿名检举。反垄断执法机构启动调查的时候，可以采取一系列措施，如搜查公司场所、要求公司提供

信息等。反垄断执法机构如果认定该协议违法，可对公司处以高额罚款(即公司年收入的1%到10%)。如果该协议并未履行或者该公司请求从轻处理并且承诺停止非法行为，则可减免罚款。

受害人如果向法院起诉并且法官判定协议违法，则可以根据法院判决要求公司赔偿损失。

滥用市场支配地位

对于具有市场支配地位的公司，反垄断法禁止其从事某些本来合法，但是会被认定为反竞争的行为。比如，以不公平的高价销售商品或者没有正当理由以低于成本的价格销售商品、歧视或者拒绝与交易相对人进行交易、限定交易相对人只能与该公司或该公司指定的另一个公司进行交易或者搭售商品。

一个公司是否具有市场支配地位并不取决于其规模或者营业额，而是由一个复杂的经济及法律分析来决定。简单地说，应关注该公司在“相关市场”上所占的份额(反垄断法规定了一系列关于市场支配地位的推定情形，比如，如果一个公司占有市场50%以上的份额，它就会被推定为具有市场支配地位，但该公司也可以举证推翻这一推定)。

“相关市场”的认定由产品范围以及地理范围决定，主要注重于消费者(以及在此情况下相对次要的生产者)是否认为两个产品或者两个地理区域可以互换。这一分析必须针对每一个产品和地理范围的具体情况具体对待。如果一个公司被认定为滥用市场支配地位，反垄断执法机构可以根据与垄断协议相同的程序对其进行罚款，法院则可以判决其赔偿损失。

具有反竞争性质的集中

反垄断法取代了以往在《关于外国投资者并购境内企业的规定》下的体系。反垄断法规定，对于集中的控制对境内和境外公司均适用。

集中是指两个独立公司的合并，一个公司通过得到股权或者资产的方式取得对另一个公司的控制权，或者能够对另一个公司施加决定性的影响。尽管反垄断法没有明确规定，但合资也可以被认定为集中。

达到特定申报标准的集中必须向反垄断执法机构申报。反垄断法并未规定具体申报数额标准。根据国务院规定的最新草案，在下列情况下公司必须向反垄断执法机构申报集中：(一)参与集中的所有公司在全球范围内的营业额超过90亿元人民币，并且其中至少两个公司在中国的营业额均超过3亿元人民币；(二)参与集中的所有公司在中国的营业额超过17亿元人民币，并且其中至少两个公司在中国的营业额均超过3亿元人民币；或者(三)集中将导致在境内相关市场的占有率超过25%。上述所有数字均为申报集中前一会计年度营业额。

反垄断执法机构在收到申报后将对集中进行审查。审查的重点在于集中是否会产生限制或者排除竞争的效果。这一程序分为两步，期限分别为30天和90天。多数的集中在第一阶段就会获得批准实施集中。

在没有得到政府的集中批准之前，公司不得实施集中。反垄断执法机构如果认为该集中可能造成严重后果，可以禁止集中，或附加相应的限制条件，比如将集中后的公司进行剥离等。

下一步会怎样?

由于政府的资源和经验有限，反垄断执法机构极有可能优先处理某些问题，并且会对初期的违法企业给与严格处罚，以表明其执法态度。此外，反垄断法中关于检举的条款可以作为一种竞争工具，使竞争对象面临巨额罚款的风险。所以，各公司应该为即将生效的反垄断法做好充分的准备。为了保证公司的行为符合反垄断法的要求，公司应该对相关合同进行审核，并安排对主要人员进行培训等。