China’s New Anti-Monopoly Law
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A. Introduction


- AML prohibits monopolistic arrangements, such as cartels and other forms of collusion and prohibits the abuse of dominant market positions and concentration of undertakings that result in the elimination or restriction of competition.

- China’s new AML is specifically targeted at potential violations by multinationals
B. Monopolistic Agreements Prohibited between Competing Undertakings (Horizontal Monopoly Agreements)

AML (Art. 13) specifically prohibits vertical monopoly agreements between/among competing undertakings. The following Monopoly Agreements i.e., any agreements, decision or other concerted practice that eliminates or restricts competition, among competing undertakings, are prohibited, viz., agreements that:

1. Fix or change prices of products;
2. Limit the output or sales of products;
3. Allocate the sales markets or the raw material purchasing markets;
4. Limit the purchase of new technologies or new facilities, or limit the development of new products or new technologies;
5. Jointly boycott transactions; or
6. Other monopoly agreements determined by the Enforcement Authority.
C. Monopolistic Agreements Prohibited between Trading Partners (Vertical Monopoly Agreements)

The following Monopoly Agreements between undertakings and their trading partners are prohibited (Art. 14 AML):

(1) fixing the resale prices of products to third persons;
(2) limiting the lowest resale price of products to third persons;
(3) other monopoly agreements determined by the Enforcement Authority
D. Exemptions to Prohibition on Monopolistic Agreements between Competing Undertakings and between Trading Partners

Exemptions to both Horizontal and Vertical Monopolistic Agreements (Art. 15 AML) apply if the agreements produce certain beneficial impacts, including:

(1) technology improvement or the research and development of new products;

(2) upgrading of product quality, cost reduction, efficiency improvement, the unification of product specifications and standards, or the realization of division of work based upon specialization;

(3) the improvement of operational efficiency and the enhancement of the competitiveness of small and medium-sized undertakings;
D. Exemptions to Prohibition on Monopolistic Agreements between Competing Undertakings and between Trading Partners

(4) the serving of public welfare such as energy conservation, environmental protection, and the provision of disaster relief;

(5) the mitigation of economic recession such as alleviating severe decreases in sales volume or excessive overstocking;

(6) the safeguarding of legitimate interests in foreign trade and economic cooperation; or

(7) other circumstances specified by laws and the State Council.
E. Abuse of Dominant Market Position

AML (Ch. 3) prohibits undertakings that occupy a dominant market position from following activities:

1. selling products at unfairly high prices or purchasing products at unfairly low prices;
2. below cost selling in the absence of valid reasons;
3. refusing to trade with trading partners without valid reasons;
4. restricting the trading activity of ist trading partners without valid reasons;
5. tying products or imposing unreasonable trading conditions without valid reasons;
6. applying differentiated treatment with regard to transaction conditions such as trading prices to equivalent trading partners.
E. Abuse of Dominant Market Position

Other factors used in determining the dominant market position of an undertaking include:

(1) market share and the competition status of the undertaking in the relevant markets;

(2) the ability of the undertaking to control the sales market or the purchase market of raw materials;

(3) the financial and technical conditions of the undertaking;

(4) the degree of the reliance on the undertaking by other undertakings in transactions;

(5) the difficulties for other undertakings to enter relevant markets; and

(6) other factors relating to the determination of dominant market position of the undertaking:
F. Assessing Market Share

Market share deemed as prima facie evidence in assessing whether a business holds a dominant market position in a relevant market.

- undertaking occupying at least 50% of the market is considered to be in a dominant position;
- undertakings occupying at least 66% of the dominant market position;
- undertakings occupying at least 75% - dominant market position.
G. Concentration of Undertakings

AML (Art. 20) provides that a ‘concentration of undertakings’ arises where there is a:

1. consolidation of undertakings; or
2. an acquisition of control of other undertakings through acquisition of equity or assets; or
3. an acquisition of control of other undertakings or
4. the capability of imposing decisive effects on other undertakings by contract or other means.
G. Concentration of Undertakings

- Prior notification where concentration of undertakings reaches a certain threshold, as yet unspecified.

- Criteria for notification will comprise ‘market size’, ‘total sales’ and ‘assets value’ or similar concepts.

- Criteria will be finally clarified when the implementing regulations ultimately issue.
H. Preparing for the new AML

- AML, antitrust liability become a serious concern for MNCs in China.
- To mitigate the potential liability, essential that businesses should deal evenly with their distributors and customers, and avoid such contracts or agreements that unreasonably favor specific groups or restrict/restrain their market behavior.
- MNCs should take measures to ensure commercial agreements are designed to achieve for reasonable commercial purposes and do not (save for statutory exceptions) eliminate or restrict market competition.
- MNCs should be in a position to defend commercial agreements and market behavior through the presentation of supporting evidential materials.
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