

China

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Legislative Developments

China's new Anti-Monopoly Law (the "AML") came into force on August 1, 2008.¹ The AML is administered and enforced by several authorities: the Anti-Monopoly Law Enforcement Authority (the "AMEA"), which is responsible for day-to-day enforcement, and the Anti-Monopoly Commission (the "AMC"), which formulates competition policy and coordinates the enforcement activities of the AMEA. The functions of the AMEA are in turn shared by three government agencies: the Ministry of Commerce (the "MOFCOM"), responsible for merger review and the day-to-day work of the AMC; the State Administration for Industry and Commerce (the "SAIC"), responsible for non-price related monopoly agreements, abuses of dominance and administrative abuses; and the National Development and Reform Commission (the "NDRC"), responsible for price-related conduct, including price-fixing cartels.

During the AML's first year in force, the AMC and the AMEA have made significant progress in both implementing and enforcing the law. Several implementation regulations and guidelines under the AML have been issued, including: (i) the State Council Regulation on Notification Thresholds for Concentrations of Undertakings (the "Notification Thresholds Regulation");² (ii) the SAIC Procedural Rules

regarding Investigation and Handling of Cases relating to Monopoly Agreement and Abuse of Dominant Market Position (the "SAIC Procedural Rules");³ (iii) the SAIC Procedural Rules regarding Prohibition of Abuse of Administrative Power to Eliminate or Restrict Competition;⁴ (iv) Rules on Turnover Calculation for Notification of Concentration of Financial Undertakings;⁵ (v) the AMC's Guidelines on the Definition of the Relevant Market;⁶ (vi) the MOFCOM Rules on the Notification of Concentration between Undertakings;⁷ and (vii) the MOFCOM Rules on the Review of Concentration between Undertakings.⁸ In addition, a wide variety of substantive and procedural draft rules have been published for public comments and are expected to become law in the near future, including: (i) the Draft NDRC Anti-Price Monopoly Rules;⁹ (ii) the Draft SAIC Rules on Prohibition of Monopoly Agreement;¹⁰ (iii) the Draft SAIC Rules on Prohibition of Abuse of Dominant Market Position;¹¹ (iv) the Draft MOFCOM Provisional Measures on the Investigation and Handling of Concentrations between Undertakings not Notified in Accordance with the Law;¹² (v) the Draft MOFCOM Provisional Measures on the Collection of Evidence for Suspected Monopolistic Concentrations between Undertakings not Reaching the Notification Threshold;¹³ and (vi) the Draft MOFCOM Provisional Measures on the Investigation and Handling of Concentrations between

- 1 Anti-Monopoly Law of China, enacted on August 30, 2007, Order of the President of the People's Republic of China (No.68), available at http://www.lawinfochina.com/law/display.asp?db=1&id=6351&keyword=anti_monopoly
- 2 Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings promulgated by the State Council and effective August 3, 2008, available at <http://fldj.mofcom.gov.cn/aarticle/c/200903/20090306071501.html>
- 3 Procedure Rules regarding Investigation and Handling of Cases relating to Monopoly Agreement and Abuse of Dominant Market Position, promulgated by the SAIC, June 5, 2009, effective July 1, 2009, available in Chinese at http://www.saic.gov.cn/zwgk/zyfb/qt/fl/200906/t20090605_61123.html
- 4 Procedural Rules regarding Prohibition of Abuse of Administrative Power for the Purpose of Eliminating or Restricting Competition, promulgated by the SAIC, June 5, 2009, effective July 1, 2009, available at http://www.globalcompetitionforum.org/regions/asia/China/SAIC_PR_11.pdf
- 5 Turnover Calculation Method for Financial Undertakings' Concentration promulgated by the MOFCOM, PBC, CBRC, CSRC and CIRC on July 15, 2009, effective August 15, 2009, available in Chinese at <http://fldj.mofcom.gov.cn/aarticle/c/200907/20090706411691.html>
- 6 Guidelines to the Definition of the Relevant Market promulgated by the State Council AMC, May 24, 2009, effective May 24, 2009, available in Chinese at http://www.gov.cn/zwhd/2009-07/07/content_1355288.htm
- 7 MOFCOM Rules on the Notification of Concentration between Undertakings, November 21, 2009, effective January 1, 2010, available in Chinese at <http://fldj.mofcom.gov.cn/aarticle/c/200911/20091106639149.html>
- 8 MOFCOM Rules on the Review of Concentration between Undertakings ("MOFCOM Review Rules"), November 24, 2009, effective January 1, 2010, available in Chinese at <http://fldj.mofcom.gov.cn/aarticle/c/200911/20091106639145.html>
- 9 NDRC Rules on Anti-Price Monopoly (draft for commentary) released by NDRC, August 12, 2009, available in Chinese at http://www.ndrc.gov.cn/fjbak/t20090812_296055.htm
- 10 SAIC Rules on Prohibition of Monopoly Agreement (draft for comments) released by the SAIC, April 27, 2009, available in Chinese at <http://www.saic.gov.cn/zwgk/zyfb/qt/fl/200904/P020090427545000463689.doc>
- 11 SAIC Rules on Prohibition of Abuse of Dominant Market Position (draft for comments) released by the SAIC, April 27, 2009, available in Chinese at <http://www.saic.gov.cn/zwgk/zyfb/qt/fl/200904/P020090427545000629082.doc>
- 12 Draft Provisional Measures on the Investigation and Handling of Concentrations between Undertakings not Notified in Accordance with the Law released by MOFCOM, January 19, 2009, available in Chinese at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106010073.html>
- 13 Draft Provisional Measures on the Collection of Evidence for Suspected Monopolistic Concentrations between Undertakings not Reaching the Notification Thresholds released by MOFCOM, January 19, 2009, available in Chinese at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106010097.html>

Undertakings not reaching the Notification Thresholds.¹⁴ The extent of these implementation regulations and draft rules suggest that the new law will be aggressively enforced.

Mergers

In 2009, MOFCOM formally accepted 87 antitrust filings and took decisions relating to 67.¹⁵ In addition, there is an unknown number of filings that MOFCOM has not acknowledged as “complete”.

MOFCOM blocked one transaction, Coca-Cola’s proposed acquisition of Huiyuan,¹⁶ and conditionally approved five other transactions: InBev-Anheuser-Busch,¹⁷ Mitsubishi-Lucite,¹⁸ GM-Delphi¹⁹ and Pfizer-Wyeth²⁰ and Panasonic-Sanyo.²¹ These six cases comprise the complete set of published merger decisions issued by MOFCOM, because only decisions prohibiting transactions or attaching conditions must be published under the AML. Prohibitions and conditional clearances thus appear to represent around 10% of MOFCOM’s merger decisions. The percentage of merger cases going into the second-phase review is not publicly available, but generally can be expected to be above 10%, because although some cases enter into a second phase they are ultimately approved without conditions being attached.

Except for the Coca-Cola transaction, where the proposed target was a Hong Kong-listed company with substantial business activities in mainland China, the other five conditionally approved transactions were all offshore transactions not focused on China. These decisions demonstrate MOFCOM’s openness to broader theories of anticompetitive effects and its somewhat more interventionist approach when compared to other more established antitrust jurisdictions. They also provide insights into MOFCOM’s developing merger review practices and procedures.

MOFCOM’s review procedures remain relatively non-transparent and unpredictable. For example, the AML provides that the initial (first-phase) review period will take up to 30 days, but parties must plan for additional time for MOFCOM to review and “accept” the filing as complete before the 30-day clock begins to run. However, in practice this pre-acceptance process may take weeks or even months, depending on the availability of MOFCOM antimonopoly staff, the complexity of the issues involved, and other factors. During this time, MOFCOM may make multiple requests for additional information. For example, MOFCOM’s merger decisions revealed that the pre-filing process took one and a half months in InBev-Anheuser-Busch, two months (i.e. double the official 30-day initial review period) in Coca-Cola-Huiyuan and nearly four months in Panasonic/Sanyo. In addition, a potential second-phase review may take up to 90 additional days (extendable by a further 60 days), if MOFCOM has concerns about the competitive effects of the proposed transaction. All in all, the review may take up to 180 days in addition to the pre-filing process. In total, the Panasonic/Sanyo case took over nine months, including the pre-acceptance process.

The six MOFCOM merger decisions published to date do shed considerable light on MOFCOM’s review processes and analysis. First, they show MOFCOM’s growing willingness to become more transparent. The first decision - Inbev - contained only a conclusion and a statement of the conditions imposed, but over time MOFCOM has gradually started to include in its decisions explanations of its views on market definition, the parties’ market shares, and its theories of competitive harm. Second, they evidence MOFCOM’s increasing sophistication. For example, MOFCOM analyzed foreclosure effects in the downstream market in Mitsubishi/Lucite and discussed the increase of HHI and difficulties of market entry in Pfizer/Wyeth. Third, they suggest that concerns unrelated to traditional competition analysis,

14 Draft Provisional Measures on the Investigation and Handling of Concentrations between Undertakings not reaching the Notification Thresholds released by MOFCOM, February 6, 2009, available in Chinese at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200902/20090206031314.html>.

15 Speech by Madam Ma Xiuhong at the first National Commerce Department Meeting on the Enforcement of the AML, January 6-7, 2010, available in Chinese at <http://maxiuhong.mofcom.gov.cn/aarticle/activities/201001/20100106730289.html>

16 Ministry of Commerce Announcement [2009] No. 22, “Coca-cola Decision”, March 18, 2009, available in Chinese at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html>

17 Ministry of Commerce Announcement [2008] No. 95, “Inbev Decision”, November 18, 2008, available in Chinese at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html>

18 Ministry of Commerce Announcement [2009] No. 28, “Mitsubishi/Lucite Decision”, April 24, 2009, available in Chinese at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html>

19 Ministry of Commerce Announcement [2009] No. 76, “GM/Delphi Decision”, September 28, 2009, available in Chinese at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906540211.html>

20 Ministry of Commerce Announcement [2009] No. 77, “Pfizer/Wyeth Decision”, September 29, 2009, available in Chinese at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html>

21 Ministry of Commerce Announcement [2009] No. 82 “Panasonic-Sanyo Decision”, October 30, 2009, available in Chinese at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200910/20091006593175.html>

such as the protection of domestic competitors, may play an important role in the review process and even in MOFCOM's decisions. For example, the Coca-Cola Decision found that "the transaction would squeeze out small and medium sized juice producers in China, and restrain local producers from participating in the juice beverage market or their ability for proprietary innovation." The GM/Delphi decision was reported to be prompted by complaints from local car manufacturers and trade associations.²²

Finally, in line with international practice, MOFCOM generally appears to be more interested in structural remedies, involving divestiture of capacity or Chinese businesses, than behavioral remedies because of the difficulty of monitoring compliance with the latter. In particular, MOFCOM's Decision in Pfizer/Wyeth shows that it intends to follow international practice in ordering remedies, such as the appointment of a trustee, the preservation of the viability and competitiveness of the divested business, and the sale of the divested business to a third party approved by MOFCOM. In Panasonic/Sanyo, MOFCOM ordered extraterritorial divestitures as remedies. However, it is unknown whether it has established any rules on monitoring compliance with conditions.

MOFCOM also ordered the divestiture of related IP rights in Pfizer/Wyeth and required the licensing of related intellectual property ("IP") rights at the request of the buyer in Panasonic/Sanyo. This is consistent with both the MOFCOM Review Rules, which include granting access to infrastructure and licensing of key IP as available remedies²³, and with MOFCOM's existing review process, during which questions about IP and IP-related barriers are frequently raised.

Cartels and other Anticompetitive Practices

According to the new SAIC Procedural Rules,²⁴ the national-level SAIC is responsible for investigating and handling cases with a nationwide impact, along with other

cases in which it may want to exercise discretionary jurisdiction. Provincial Administrations of Industry and Commerce ("Provincial AICs", the comparable provincial-level departments under the SAIC's supervisory authority) may be authorized to investigate and handle alleged monopolistic conduct occurring solely or principally in their administrative regions. Compared to the blanket authorization given to Provincial AICs in earlier drafts of the Procedural Rules, the SAIC appears to have moved towards centralizing its authority: the new rules provide for delegation to Provincial AICs only on a case-by-case basis. The Rules also specify that before Provincial AICs may make final decisions regarding suspensions or terminations of investigations or the imposing of administrative penalties, they must first report such decisions to the SAIC.

To date, no formal government enforcement actions against anticompetitive practices have been formally confirmed, although an SAIC official disclosed at an international AML seminar that over 50 complaints had been received by the SAIC.²⁵ Further, no formal investigations have been initiated by the NDRC despite rumors of investigations into an airfare price cartel.²⁶

Court Decisions

Intermediate level courts have jurisdiction over antitrust litigation. Administrative litigation matters will be tried by the Administrative Court within the applicable people's courts and civil litigation will be tried by the IP Court within the people's courts.²⁷ On December 22, 2008, the Shanghai No. 2 Intermediate Court announced the establishment of a new "Specialist AML Panel" comprising a specialist combined panel of judges dedicated to hearing AML lawsuits and related actions.²⁸ It is also reported that the Supreme People's Court of China is drafting judicial guidelines on civil litigation under the AML.²⁹

22 Antitrust Investigation into the Acquisition of Delphi by General Motors, September 22, 2009, available in Chinese at http://www.21cbh.com/HTML/2009-9-23/HTML_UVV2RWP3AKAV_3.html

23 MOFCOM Rules on the Review of Concentrations between Undertakings supra note 8, art. 11

24 Supra footnote 2.

25 See Speech by Mr. Sang Lin, director of the AML Enforcement Bureau of SAIC, at the 6th International Symposium on Competition Law and Policy on July 4 2009, Beijing. See also Press Release, SAIC Refines the Anti-Monopoly Enforcement Rules, available in Chinese at <http://www.caijing.com.cn/2009-04-28/110155612.html>

26 See Press Release, Travelsky Being Investigated by NDRC and Facing Huge Fines for Price Cartel, available in Chinese at http://www.legaldaily.com.cn/2007fycj/2009-05/18/content_1092589.htm

27 Notice on Study and Adjudication of the AML by the Supreme People's Court, promulgated by the Supreme People's Court, July 28, 2008, effective on the same day, available in Chinese at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=107282>; also Hierarchical Jurisdiction over Cases of the First Instance of IPR Civil Disputes, promulgated by Beijing High People's Court, June 3, 2008, effective on the same day, available at <http://www.lawinfochina.com/law/display.asp?ID=6900&DB=1>

28 The Shanghai No. 2 Intermediate Court announced the establishment of a new "Specialized AML Panel", December 22, 2008, available in Chinese at <http://rmfyz.chinacourt.org/public/detail.php?id=124713>

29 Seminar on Civil Litigation under the AML was held, July 11, 2009, available in Chinese at <http://rmfyz.chinacourt.org/public/detail.php?id=130059>.

Private litigants have seized the opportunity to bring lawsuits under the new AML. In some cases, the plaintiffs are competitors, although they are mostly academics or public interest advocates claiming to represent consumers. Several cases have been reported in the press, and include lawsuits against: (i) a state-owned telecom company in Beijing for abuse of dominance; (ii) an insurance association in Chongqing for price fixing; (iii) the General Administration of Quality Supervision, Inspection and Quarantine (“AQSIQ”, a department of the central government) for administrative monopoly; (iv) Baidu, an online search engine, for abuse of dominance and (v) Shengda, for abuse of a dominant position in the online literature market.

The case against AQSIQ was dismissed on the basis that it was time-barred, even though the cause of action did not exist before the AML became effective in August 2008,³⁰ while the case against the Chongqing Insurance Association was withdrawn by the plaintiff after the defendant immediately adopted revised Articles of Association addressing the issues under the AML raised by the claimant.³¹ As for the case against China Mobile, it started life in a Beijing district court before being transferred to an intermediate (higher-level) court and ultimately withdrawn by the plaintiff after the defendant agreed to pay the plaintiff a “bonus” of RMB 1000.³² Although these cases did not generate judgments providing insights into the courts’ interpretation of the AML’s substantive provisions, they can be seen as fulfilling the goals of the statute in the sense that the defendants voluntarily abandoned their allegedly anticompetitive conduct after being sued.

The judgment of the Shanghai No.1 Intermediate People’s Court in Shanda-Sursen,³³ the first under the AML, provides an indication of how Chinese courts will weigh evidence

to decide whether a defendant has a dominant market position, when considering allegations of abuse of a dominant position. The case suggests that Chinese courts will be cautious about relying on news reports and parties’ own statements about market dominance, especially when the latter can be considered to be marketing or puffery. The court found a lack of dominance partly because there was no proof that the defendants’ market share exceeded the applicable threshold and thus did not trigger the presumption of dominance under Article 19. Also, the court appeared open to possible justifications for such alleged abuses of dominance, such as protecting the defendants’ copyrights of novels published on its website.

The second judgment under the AML was given by the Beijing No.1 Intermediate People’s Court in Baidu.³⁴ As in Shanda, the Court (a) reiterated that the AML does not prohibit a dominant market position itself, only conduct that constitutes abuse of such position; (b) required a high level of proof of the existence of a dominant market position; and (c) appeared open to considering practical commercial justifications for the alleged abusive conduct.

On its face, the AML appears to focus on administrative enforcement, with only one provision, article 50, addressing potential civil litigation. However, the Chinese courts may be required to play a more active role in AML enforcement given the increasing popularity of private antitrust claims. Compared to MOFCOM’s fairly rigorous enforcement to date of the concentration provisions of the AML, thus far the Chinese courts have appeared to take a relatively conservative approach in their application of the AML, placing a high burden of proof on claimants and a relatively lower burden on defendants regarding issues such as the existence of a dominant position and valid justifications for allegedly abusive conduct.

30 See Press Release, The Court Decides not to Accept the AQSIQ Monopoly Case, available in Chinese at <http://npc.people.com.cn/GB/7808444.html>

31 See Press Release, The Insurance Company Amended the Rules, and the Plaintiff in Chongqing’s First Anti-Monopoly Case Withdrew the Lawsuit, available in Chinese at <http://www.chinacourt.org/html/article/200812/09/334699.shtml>

32 See Press Release, China Mobile Uses RMB 1000 to Reconcile with the Plaintiff, available in Chinese at <http://mobile.people.com.cn/GB/10267270.html>

33 Judgment of the Shanghai No. 1 Intermediate People’s Court, dated October 23, 2009 [not yet listed]

34 Online Broadcasting of Trial of the Baidu Case, transcripts available in Chinese at http://www.chinacourt.org/zhibo/zhibo.php?zhibo_id=1865.

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