

## **China's Antimonopoly Law Takes Effect**

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The Standing Committee of the PRC National People's Congress enacted the Antimonopoly Law (AML) on 30 August 2007, and the Law took effect on 1 August 2008. Some of the more noteworthy features of the new law are outlined below.

- Three categories of monopolistic action

Article 3 of the AML defines three categories of monopolistic action: (1) monopolistic agreements between businesses; (2) businesses' abuse of dominant market position; and (3) business concentrations having or potentially having the effect of eliminating or restricting competition. The above three categories of monopolistic action correspond to the three major regulatory systems generally embodied in antimonopoly legislation internationally, i.e., prohibition of monopolistic agreements, prohibition of abuse of market power, and restrictions on business concentrations.

The AML defines a monopolistic agreement as an agreement, decision, or other concerted action that eliminates or restricts competition. Businesses that are in a competitive relationship with each other shall not make a monopolistic agreement with regard to price, quantity, market, technology, or joint actions against third parties, except for the following purposes: to improve technology or to research and develop new products; to improve product quality, reduce costs, improve efficiency, unify product specifications or standards, or implement specialized division of labor; to improve the efficiency or competitiveness of small and medium-sized enterprises; to advance the public interest, such as by conserving energy, protecting the environment, or providing disaster relief or social assistance; to address a serious decline in sales or significant overproduction caused by adverse economic conditions; or to assure legitimate interests in foreign trade or in economic cooperation with foreign partners. Businesses are also forbidden to make monopolistic agreements with trading counterparties regarding the resale prices of goods.

Businesses in a dominant market position are forbidden to abuse their market power by: (1) selling goods at an unfairly high price or purchasing goods at an unfairly low price; (2) selling

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goods below cost price without legitimate grounds; (3) refusing to trade with a counterparty without legitimate grounds; (4) requiring a trading counterparty to trade exclusively with the dominant business, or with businesses designated by the dominant business, without legitimate grounds; (5) bundling or tying goods, or attaching other unreasonable trading conditions to transactions, without legitimate grounds; (6) subjecting equivalent counterparties to differential treatment with regard to price or other transaction terms, without legitimate grounds; (7) other actions determined by the antimonopoly enforcement agencies of the State Council to be an abuse of dominant market position.

The AML defines "business concentration" as: (1) merger of businesses; (2) the acquisition by a business of control over another business, by the acquisition of shareholdings or assets; or (3) the acquisition by a business of control over another business, or of the ability to exert decisive influence on another business, by contract or other means. If an intended business concentration meets the notification criteria issued by the State Council, then the businesses involved must file advance notification with the antimonopoly enforcement agencies of the State Council, and prior to such filing they may not implement the business concentration. The State Council has not yet announced implementing regulations or other regulations under the AML.

- Powers divided between three agencies

After the AML's entry into force, powers of review are expected to initially be divided between three agencies under the State Council: the State Administration for Industry and Commerce (SAIC), the National Development and Reform Commission (NDRC), and the Ministry of Commerce (MOFCOM). Of these, the SAIC will be responsible for antimonopoly enforcement in the areas of monopolistic agreements (other than monopolistic price agreements), abuse of market power, and abuse of administrative power to eliminate or restrict competition; the NDRC will be responsible for investigating and ruling on monopolistic price agreements; and MOFCOM will be responsible for antimonopoly review of business concentrations.

- Dual review of M&A involving foreign interests

The AML provides for the state to conduct two types of review of mergers and acquisitions cases involving foreign capital that have implications for national security. Article 31 of the Law provides that if a foreign investor seeks to acquire an enterprise within China, or otherwise participate in its operation, and national security may be affected, then in addition to a business concentration review under the AML, a national security review should also be carried out in accordance with the relevant national provisions.