

**CHINA UPDATES ITS ANTI-MONOPOLY LAW:
NATIONAL AND FOREIGN BUSINESSES, BEWARE.**

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I – Introduction

When thinking about China, the words ‘fair competition’ and ‘tight antitrust enforcement’ do not necessarily come to mind. Yet, in August 2008, and after “14 years of consultation, deliberation and delays,” China’s Anti-Monopoly Laws (“AML”) came into effect.¹ The AML, based in both the European and US law models, brought China into the world of antitrust law, and showed its determination to belong with the modern world.² The People’s Republic of China has three major antitrust agencies carrying out and enforcing the AML: the National Development and Reform Commission (“NDRC”), responsible for price-related and non-merger monopolistic conduct; the State Administration of Industry and Commerce (“SAIC”), responsible for non-price and non-merger enforcement; and finally the Anti-Monopoly Bureau of the Ministry of Commerce (“MOFCOM”), responsible for merger control.³

On January 4, 2011, the NDRC announced that it had published two new sets of rules that would come into effect on February 1, 2011.⁴ The rules, encompassing both substantive and procedural matters, detail and give guidance on how to interpret the broad framework of the AML.⁵ This article will first outline the targeted substantive areas, followed by the targeted procedural ones, and will conclude with the expected impact that the rules may have on companies doing business in or with China, such as a stricter application of anti-monopoly laws for all companies impacting China, and some fear, a great deal of discretion on the part of the regulating agencies as to whom to enforce the rules against.

II – The Substantive Changes

The NDRC first published the Anti-Price Monopoly Regulations (“Monopoly Regulations”), which provide substantive changes related to price agreements and dominant market positions, by either expanding or detailing the extent of these concepts.

A) Price Agreements – AML Article 13

¹ H. S. Harris Jr. & P. J. Wang, *The China Anti-Monopoly Law Becomes Effective*, Jones Day Antitrust Alert (Aug. 2008), http://www.jonesday.com/the_china_anti-monopoly_law-becomes_effective/. For more comments and analyses on the 2008 AML, see Anu Bradford, *Chinese Antitrust Law: The new face of Protectionism?*, THE HUFFINGTON POST (Aug. 2008), available at http://www.huffingtonpost.com/anu-bradford/chinese-antitrust-law-the_b_116422.html; See also S. Mehra & Y. Meng, *Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law*, 49 VA. J. INT’L L. 379 (Winter 2008); See also H. Zahn, *Achievement to date and challenges ahead: China’s antitrust law and its implications*, 36 SYRACUSE J. INT’L L. & COM. 229 (Spring 2009); See also B. Davis, *China’s Anti-monopoly law: Protectionism or great leap forward?*, 33 B.C. INT’L & COMP. L. REV. 305 (Spring 2010).

² See Harris & Wang, *supra* note 1.

³ *Id.*

⁴ See English version of NDRC website, <http://en.ndrc.gov.cn/>.

⁵ See T. Cai, M. Huckerby & S. Wong, *China’s competition regulators launch new year reforms: Part 1 – Pricing*, Malleons Stephen Jacques Publications (Jan. 2011), <http://www.malleons.com/publications/2011/Jan/10596919W.htm>.

Article 13 of the AML prohibits price monopoly agreements both horizontally between competitors, and vertically with counterparties.⁶ Price monopoly agreements are defined as “agreements with the effect of eliminating or restricting competition with regard to price”⁷ or “any other business behaviors that are judged by the State’s Council’s price-regulating agency as price monopoly agreements,”⁸ leaving room for further interpretation and, some worry, too much freedom and discretion on the part of the NDRC.⁹

Article 13 lists specific prohibited conduct – akin to *per se* illegal under the US Sherman Act – such as price fixing, output restriction, market division, and joint boycotts.¹⁰ The Regulations however only affect horizontal price agreements, and more specifically expand on the definition of “price fixing” to include a wide range of actions: (1) fixing or changing the prices of products and services, the range of price changes, and fees, discounts or other charges that affect price; (2) setting an agreed price as the basis for negotiating with third parties, (3) adopting a formula for calculating price; (4) changing price without consent; and (5) fixing or changing price in disguised form by other means.¹¹

B) *Dominant Market Position – AML Article 17*

The most significant update, however, is in the area of “dominant market position,” known in European Competition law as “abuse of dominant position”¹² and in US antitrust law as “monopolization.”¹³ Article 17 of the AML defines “abuse of dominant market position” as meaning “one in which an undertaking is able to control the price, output, or other transaction conditions of a product in the relevant market, or to impede or prevent entry into the relevant market by other undertakings.”¹⁴ While the Regulations do not change the actual definition, they provide specific examples of what is meant by “other transaction conditions”: product grade, payment conditions, delivery method, after-sale service, transaction options, and technical constraints.¹⁵ Some commentators worry that this interpretation, especially when read in conjunction with the “impede or prevent entry” phrase, may affect “companies with unique

⁶ AML, Art. 13; *See also* Huckerby, *supra* note 5.

⁷ AML, Art. 13; *See* S. J. Evrard, H. S. Harris Jr., P. J. Wang & Y. Zhang, *China Issues Rules for Price-Related Antitrust Enforcement*, Jones Day Antitrust Alert (Jan. 2011), <http://www.jonesday.com/antitrust-alert--china-issues-rules-for-price-related-antitrust-enforcement-01-01-2011/>.

⁸ AML, Art. 13; *See* C. Man-non, *China’s Newest Anti-Price Fixing Laws Come into Force on Feb. 1*, WantChinaTimes.com “Knowing China Through Taiwan”, <http://www.wantchinatimes.com/news-subclass-cnt.aspx?cid=1102&MainCatID=11&id=20110105000071>.

⁹ *Id.*

¹⁰ D. Liang, S. Lining, A. Ng & S. Ning, *Rules on Anti-Price Monopoly effective 1 February 2011*, China Law Insight published by King & Wood PRC Lawyers, <http://www.chinalawinsight.com/2010/12/articles/corporate/antitrust-competition/rules-on-antiprice-monopoly-effective-1-february-2011/>.

¹¹ Monopoly Regulations; *See* Evrard, *supra* note 7.

¹² *See* EC Treaty, Art. 102.

¹³ *See* Sherman Act, 28 USC §2.

¹⁴ *See* Evrard, *supra* note 7.

¹⁵ *Id.*

products or technology” that could be found to have a dominant position despite their low market share under standard market definition analysis.¹⁶

The definition must also be read together with the dominance thresholds: a single company will be considered dominant if it controls at least 50% of the relevant market; two companies, if they control at least 2/3 of the relevant market; and finally three companies, if they control at least 3/4 of the relevant market.¹⁷ As is the case under both the EC Treaty and the Sherman Act, the trick for the companies accused of an alleged violation will be to define their market share under the above-mentioned thresholds, and/or to provide a valid justification for their specific conduct.

The Regulations list specific behavior which amount to an abuse of dominance: (1) selling at unfairly high prices or buying at unfairly low prices; (2) selling at a price below cost *without valid justification*; (3) refusing to deal with a third party in a disguised form *without valid justification*; (4) requiring exclusive dealing through price discount *without valid justification*; (5) imposing unreasonable fees in addition to price; and (6) price discrimination between similarly situated trading partners *without valid justification*.¹⁸

While these conduct are all strictly prohibited, the phrase “without valid justification” seems to introduce the concept of what is known as the “rule of reason” or “quick look” under US antitrust law. If businesses can provide a legitimate commercial reason for their conduct, they will be deemed not liable under the AML. Indeed, the Regulations provide for legitimate commercial reasons for most forms of abuse of dominance, such as: protection of product quality and safety, protection of brand image, benefits from cost savings, or improvement of efficiencies shared by customers.¹⁹

III – The Procedural Changes

In addition to the Monopoly Regulations, the NDRC also published its first procedural rules with respect to the AML,²⁰ the Anti-Price Monopoly Enforcement Rules (“Enforcement Rules”), which in relevant parts relate to investigation of alleged price monopoly activities.²¹ The NDRC also announced it would create a new agency responsible with enforcing the anti-price monopoly laws.²²

Pursuant to the AML and the Enforcement Rules, there are five procedural steps in any price monopoly investigation: (1) accepting and verifying the content of the reported documents, for example by checking whether the same facts have been reported to any other administrative authority; (2) the investigation itself which consists of interviewing individuals, inspecting business

¹⁶ *Id.*; The authors are likely referring to the market definition analysis performed under the Sherman Act or the FTC Act.

¹⁷ AML, Art. 17; See *China’s NDRC Introduces New Anti-Monopoly Regulations*, China Briefing (Jan. 2011), <http://www.china-briefing.com/news/2011/01/07/chinas-ndrc-introduces-new-anti-monopoly-regulations.html#more-10783>; See also L. Hui (ed.), *China unveils new rules against anticompetitive, monopolistic-type behavior*, EnglishNews.cn (Jan. 2011), http://news.xinhuanet.com/english2010/china/2011-01/04/c_13676361.htm.

¹⁸ AML, Art. 17; See Evrard, *supra* note 7.

¹⁹ Monopoly Regulations, Arts. 11-14; AML, Art. 17; See Evrard, *supra* note 7; See also Liang, *supra* note 10.

²⁰ Cai, *supra* note 5.

²¹ AML, Art. 46; Enforcement Rules; See Dr. Z. Hao, *Newly-published Price Monopoly Regulations Promote the Market Economy More Exuberantly*, China Law Vision Grandall Legal Group (Jan. 2011), <http://www.chinalawvision.com/tags/the-regulation-of-antiprice-mo/>; See also Cai, *supra* note 5.

²² Man-non, *supra* note 8.

premises or ordering the production of certain information; (3) the leniency regime; (4) a potential commitment period; and (5) the determination by the National or Provincial level DRC.²³

Article 46 of the AML and Article 14 of the Enforcement Rules are the source for the leniency regime, which allows the National or Provincial level DRC to reduce or waive punishment for companies that have engaged in price fixing activities.²⁴ For the leniency regime to be applicable, the companies must (1) voluntarily report relevant facts, and (2) provide material evidence.²⁵ More specifically, the first company to meet the two requirements will have a *chance* to receive a full exemption; the second company may be given a punishment mitigated by at least 50%; and any other company thereafter may be given a punishment mitigated by less than 50%.²⁶ It is important to note that the leniency program is not guaranteed; companies simply *may* be able to receive an exemption, or a part thereof.²⁷ Moreover, while not expressly noted in the Enforcement Rules, “the regulatory authority is unlikely to grant relief to informants who acted as ringleaders of a monopoly agreement.”²⁸

Finally, under Article 45 of the AML and Articles 15-18 of the Enforcement Rules, a business under investigation that decides to voluntarily eliminate “the allegedly infringing conduct within a period approved by the NDRC” (the commitment period) can lead to the NDRC suspending or terminating the investigation altogether.²⁹ Companies should keep in mind that because there is no required procedure for the NDRC to officially or formally announce the initiation of an investigation, the NDRC could simply undertake to start an *unannounced* inspection of a business’ premises.³⁰

IV – Conclusion

China has spoken loud and clear. The Monopoly Regulations and Enforcement Rules unambiguously demonstrate its willingness to become stricter towards anticompetitive conduct by both Chinese companies and foreign companies that affect China. China’s AML introduced in 2008 were a broad framework that needed more explanation and tailoring, and the new regulations, at

²³ D. Liang & S. Ning, *Procedural Rules Re Administrative Enforcement of Anti-Price Monopoly effective February 1*, China Law Insight Published by King & Wood PRC Lawyers (Dec. 2010), <http://www.chinalawinsight.com/2010/12/articles/corporate/antitrust-competition/procedural-rules-re-administrative-enforcement-of-antiprice-monopoly-effective-1-february-2011/>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; Cai, *supra* note 5.

²⁷ Liang, *supra* note 23. This is different from how it works in the United States. (Corporate Leniency Policy of the Department of Justice, *available at* <http://www.justice.gov/atr/public/guidelines/0091.htm>). When a corporation meets all six of the DOJ requirements (must be the first entity to report the violation, must have taken steps towards stopping the violation, must cooperate fully with the authorities, the act was truly corporate, must make restitutions if possible, and must not have coerced another party to take part in the illegal activity or be the originator of it), then the DOJ *will* grant leniency to that corporation. The leniency will be offered to “all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession ..., in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.” (*Id.*).

²⁸ Cai, *supra* note 5.

²⁹ Liang, *supra* note 23.

³⁰ *Id.*

least, seem to provide some guidance in that respect. While China will not become, from one day to the next, the ideal pro-competitive market place that it seems to seek to become, these new rules are bringing the country in the right direction. It is in the way the rules are enforced that China will be able to genuinely show the world whether it, in fact, truly intends to “tackle”³¹ and “crack down”³² monopolistic business behavior and price fixing. Business located in China or abroad alike should keep a close eye on what attitude the NDRC, the SAIC and the MOFCOM will adopt once the new rules come into effect on February 1, 2011.

³¹ China Briefing, *supra* note 17.

³² Hui, *supra* note 17.