

**A New Frontier in Antitrust Enforcement:
China's Anti-Monopoly Law Effective August 1, 2008**

August 6, 2008

China's new Anti-Monopoly Law (AML) has elements of sophisticated competition regimes around the world, particularly the European Community, but vague provisions and uncertain implementation may cause some legal uncertainty for corporations doing business in China. The AML took effect on August 1, 2008 and scaled-back implementing regulations became effective August 3.

The AML creates a commission to organize, coordinate, and guide anti-monopoly activities, and grants anti-monopoly enforcement authorities (AMEAs) enforcement and investigative powers to outlaw various types of monopolistic conduct and to impose penalties in some cases. The law is not clear about which government agency will be in charge of enforcement, but many practitioners expect enforcement powers to be divided among several existing ministries, each of which will be authorized to enforce certain aspects of the law.

Substantively, the AML addresses the gamut of competition law issues—from concerted action and abuse of dominant market position to merger control and enforcement. Most notably, the AML extends its jurisdiction to any conduct outside the Republic of China that has the effect of eliminating or restricting competition in China.

Monopoly Agreements

The AML prohibits "Monopoly Agreements," i.e., any agreement, decision, or concerted action that eliminates or restricts competition. The law specifically bars certain "horizontal" agreements among competitors, such as fixing prices or allocating markets, and "vertical" agreements among parties in a distribution relationship that fix, or set minimum, resale prices.

On its face, the definition of Monopoly Agreement could capture concerted action or agreements (collaboration agreements, for example) that are benign in many cases but nominally restrict or eliminate competition. Certain prohibitions, however, are tempered in that they are limited to commodities—not services or any products.

Moreover, there are seven exemptions to the ban on such concerted action, for example agreements intended to improve technology, improve the operational efficiency of small and medium-sized firms, or for achieving an aim that is in the public interest. However, these require proof of consumer benefit.

There are two exemptions that could have a protectionist slant: the first provides an exemption for agreements used to mitigate sales declines or over-production in a depression, and the other protects agreements intended to pursue legitimate interests in foreign trade and foreign economic cooperation.

Again, how the exemptions are implemented will determine whether Chinese startups and foreign-export interests are generously exempted from AML prohibitions while foreign multi-nationals face difficulties in proving that consumers will benefit from their otherwise prohibited concerted action.

Abuse of Dominant Market Position

Companies that have a dominant market position cannot engage in certain conduct deemed abusive. Unless justified (which raises the question of what is sufficient justification), abusive conduct includes selling commodities at an unfairly high price or below cost, certain refusals to deal and exclusive dealing, tying arrangements, and price discrimination.

Under the AML, a dominant market position means that a company has the ability to control prices, quantity of products, or other transaction terms in a relevant market, or the ability to block or affect the entry of others into the market. The law specifies several factors in a determination of dominance, including market share, financial and technical resources, and the level of difficulty for others to enter the market. There is a rebuttable presumption that a company has a dominant market position if it has a 50% market share.

M&A Filing Requirements

A merger, acquisition, or acquisition of control of, or decisive influence over, another company will require a pre-closing filing if the transaction exceeds certain thresholds. The key features are described below.

1. Filing Thresholds

A reportable transaction will require a filing if certain thresholds are met. Under the implementing regulation, these thresholds are as follows:

Draft Merger-Control Filing Thresholds
<ul style="list-style-type: none">• The combined worldwide revenues of the parties exceed RMB 10 billion (approx. \$1.5 billion) and each of at least two parties has revenues in China exceeding RMB 400 million (approx. \$58.5 million) in the last fiscal year; or
<ul style="list-style-type: none">• The parties' combined Chinese revenues exceed RMB 2 billion (approx. \$292.7 million) and each of at least two parties has Chinese revenues of RMB 400 million (approx. \$58.5 million) in the last fiscal year.

2. Exemptions

The AML exempts transactions from the filing requirements if one party already holds more than 50% of the voting securities or assets of the other, or if the two participating firms have a common parent that holds 50% of the voting securities or assets of each.

3. Waiting Period

Parties to a notifiable transaction cannot close without observing a waiting period. The initial waiting period is 30 days. The AML is silent as to whether these are calendar or business days, but the prior merger regime observed, and specified, business days. The waiting period could be extended by another 90 days if further review is required and still another 60 days if (a) the parties agree, (b) the filed documents are inaccurate or require verification, or (c) if the relevant circumstances changed after notification.

4. Substantive Review

The AML prohibits transactions that have or may have the effect of eliminating or restricting competition in the relevant market. This standard could have broad application, as every consolidation among competitors eliminates competition, strictly speaking, regardless of any actual harm to competition.

In applying this standard, the AMEAs must consider, most notably, the effect on market access, other organizations, and economic development. This means that the effect of the transaction on actual and potential competitors—not just the effect on *competition*—will be considered. Moreover, these provisions arguably empower the AMEAs to advantage state-owned enterprises in support of national economic development and to block transactions on non-antitrust grounds.

Even if a transaction eliminates or restricts competition, however, the AMEAs could approve it if the positive effects outweigh the negative, or if the transaction is in the public interest.

5. National Security Review

In addition to a competition filing, foreign investors in Chinese companies that operate in industries touching on national security interests may face a national security review process, broadly analogous to the national security review system in the United States overseen by Committee on Foreign Investment in the U.S. (or CFIUS). The AML does not indicate the scope of this review or how it will be conducted.

Investigations of Monopolistic Conduct

The AML gives the AMEAs the power to investigate suspected monopolistic conduct. If a written “complaint” is lodged with the AMEAs and approval to investigate is obtained, the AMEAs may enter onto business property; interview individuals at the targeted firm, interested parties, or other relevant entities and individuals; inspect and copy documents of the targeted firm, interested parties, or other relevant entities and individuals; and seize relevant evidence.

Targeted firms, interested parties, and relevant entities and individuals must cooperate with the AMEAs and not refuse or hinder their investigation. The AMEAs must, however, keep confidential any commercial secrets they obtain.

The investigation may be suspended if the target company agrees to take concrete steps to stop the harm from such conduct. Subsequently, the AMEAs will monitor the target's conduct and then may either cease or resume its investigation.

Penalties for AML Violations

The AML authorizes various penalties for violations of the law:

- For illegal concerted action (i.e., monopoly agreements), the AMEAs can order an injunction, confiscate illegal gains, impose fines in an amount equal to more than 1% but less than 10% of annual revenues, and, in the case of incipient concerted action, impose fines up to RMB 500,000 (approx. \$70,000). Parties are also subject to civil liability for losses caused to others.
- For abuses of dominant market position, the AMEAs can order an injunction, confiscate illegal gains, and impose fines in an amount equal to more than 1% but less than 10% of annual revenues.
- For acquisitions that violate the AML, due to either a substantive competition concern or because the parties fail to file, the AMEAs can enjoin the closing, issue a divestiture order, take any other measures to restore the status quo, and impose fines up to RMB 500,000 (approx. \$70,000).

For companies that report illegal concerted action (monopoly agreements), the AMEAs may reduce or eliminate the fine. On the other hand, if an individual or organization takes any action to hinder an investigation, the AMEAs may issue an injunction, levy a fine, or prosecute criminal violations.

Intellectual Property Rights

The AML prohibits the abuse of intellectual property rights to eliminate or restrict competition. It does not, however, distinguish legitimate use from abuse. Comments by Ministry of Commerce officials suggest the AMEAs could target practices such as tying essential and nonessential patents together in one license.

A Final Note

The AML is based in no small part on the European competition law model. Until additional, detailed regulations are published and enforcement policy is revealed, however, the law's undefined and vague terms, together with broad catchall provisions, give the AMEAs broad powers and may create uncertainty for companies doing business in China. Consequently, for quite some time, China will be a new frontier in antitrust enforcement requiring careful exploration.

If you would like further information regarding the issues raised in this Morgan Lewis LawFlash, please contact any of the following Morgan Lewis attorneys:

Brussels

Izzet M. Sinan

+32 02 507 7522

isinan@morganlewis.com

New York

Harry T. Robins

212.309.6728

hrobins@morganlewis.com**Washington, D.C.**

Alexis J. Gilman

202.739.5128

agilman@morganlewis.com

Jonathan M. Rich

202.739.5433

jrich@morganlewis.com

Scott A. Stempel

202.739.5211

sstempel@morganlewis.com

Willard K. Tom

202.739.5389

wtom@morganlewis.com**About Morgan, Lewis & Bockius LLP**

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