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Agenda

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From Brussels to Beijing: a comparison of EC and Chinese competition law

August has seen not only the Olympic Games come to China, but also a different form of competition—the Anti-monopoly Law. Kirstie Nicholson, Of Counsel, Lovells, Shanghai, explains the scope of the new legislation, and considers it in the context of competition law in other jurisdictions, most notably EC competition law

The Anti-monopoly Law (AML), which came into force on August 1st, represents China's first comprehensive competition law, and introduces similar competition law principles to those found in the other major jurisdictions.

The AML provides only the legislative skeleton of China's new competition law; it is intended that, as in the EU, detail will be added by means of further regulations and, ultimately, case law to be adopted by the Chinese authorities. Guidance about the potential application of the AML may also be drawn from the practices of other competition authorities—in particular, that of the European Commission.

This article provides a comparison of the main provisions of the AML with EC competition law.[1]

Scope (Articles 1–2)

Purpose

The aims of the AML include the prevention and deterrence of monopolistic practices in order to safeguard 'fair market competition', increase economic efficiency, and protect public and consumers' interests.

The specific cultural, economic and political characteristics of China may have a significant impact on the way in which the competition law is applied in practice. EC competition law, for example, is influenced by the desire to protect the single market, with the result that territorial restrictions are generally considered problematic unless they fall within an exemption. By contrast, in the USA, territorial restrictions do not tend to raise competition issues unless a specific concern can be shown. It is perhaps significant that it has recently been reported that China intends to join the International Competition Network (ICN), a body that aims for convergence of competition law policy by different competition authorities worldwide.[2]

Application

The AML applies to all 'business operators', including natural and legal persons and any other entities that either produce goods or supply services.[3] EC competition law applies to 'undertakings', and this has also been interpreted as including individuals to the extent that they engage in economic or commercial activities—for example, sole traders.

Geographic scope

The AML applies to any monopolistic practice relating to either an economic activity within China, or outside of China, but which has the effect of excluding or restricting competition within China. This latter provision has the effect of making the AML extra-territorial in scope, but this is by no means a new concept in competition policy. For example, both the EU and the USA have applied their competition rules outside of their immediate geographic territories.[4] Indeed, EC competition law expressly covers any agreement or activity that has an effect on competition within the common market (Article 81(1) of the EC Treaty).

It remains to be seen how widely the scope of the AML is defined in practice, and how willing the Chinese authorities will be to exercise its potential extra-territorial application.

Monopolistic agreements (Articles 13–16)

'Monopolistic agreements' are defined in the AML as any agreements, decisions or actions that 'exclude or restrict competition'. As for EC competition law, 'agreement' is widely defined in order to prevent businesses circumventing the law by entering into an arrangement other than by formal agreement. Furthermore, Article 81 of the EC Treaty expressly provides that there must be 'an appreciable effect' on competition, and this has been

supplemented by the development of the de minimis principle by the judgments of the European courts and the European Commission Notice.[5] The de minimis principle applies to both object and effect cases, and provides that proceedings will not be brought in certain cases that fall below specified thresholds. Interestingly, no such minimum level of object and/or effect is provided for in the AML, so it appears that any exclusionary or restrictive effect on competition may be caught, no matter how insignificant.

The AML differentiates between agreements between competitors and other types of agreement (ie, vertical agreements), and provides examples of the types of agreement that will fall within the prohibition. Such examples broadly reflect the provisions that are well established as being prohibited as anti-competitive under Article 81 of the EC Treaty—in particular, price fixing and supply restrictions. For non-horizontal agreements the examples focus only on pricing provisions, which contrasts with EC competition law, where Article 81 has been applied to a much wider range of vertical agreements.

Finally, there is a general catch-all provision covering 'other forms of monopolistic agreements'. This is in line with the EU where there is no comprehensive list of prohibited activities, thus giving the authorities flexibility to develop the application of competition law in line with relevant changes in the markets.

The AML provides for an exception to the prohibition for certain types of agreement, the benefits of which may be considered to outweigh any anti-competitive effects; unlike the EU, there is no general exemption provision.[6] One particularly interesting exception is that relating to agreements whose purpose is 'to protect legitimate interests in relation to foreign trade and foreign-related economic cooperation activities'. The scope of this provision is unclear, but it clearly has the potential to be a wide-ranging exception to the general prohibition. In addition, there is an exception for 'other circumstances prescribed by law or by the State Council'. This leaves open the possibility of further exceptions in the future, including perhaps the introduction of 'block exemptions', similar to those found in EC competition law.

In order to benefit from an exception a business must prove both that the agreement will 'not materially restrict competition in the Relevant Market', and also that consumers will 'enjoy the benefits' arising from the agreement, thus imposing a significant burden on the parties to such agreements. The relevant analysis may reflect that required for exemption under Article 81(3) of the EC Treaty. However, the requirements of the AML may be considered less onerous as there is no express requirement of 'indispensability' that must be fulfilled: to benefit from the exception contained in Article 81(3), it is necessary to show that, among other things, the restriction:

> must be reasonably necessary in order to achieve the efficiencies … [and] … the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.[7]

Abuses of a dominant market position (Articles 6, 17–19)

The AML provides that businesses occupying a dominant market position must not abuse this position to exclude or restrict competition. This reflects Article 82 of the EC Treaty.

Dominance

As for EU competition law, it must first be established that the business occupies a dominant position in a relevant market.

The AML provides for a rebuttable presumption of dominance where:

i) the business operator has a market share of 50%;
ii) two business operators have an aggregate market share of 66%;
iii) three business operators have an aggregate market share of 75%.

This provision is similar to German national competition law.[8] However, the practical consequences of the presumption are limited since the German competition authorities must still carry out a full investigation in order to establish dominance, and market share is only one of the relevant factors taken into account. It is unclear whether a similar approach will be adopted under the AML.

Presumptions ii) and iii) above concern 'collective' dominance rather than single firm dominance.[9] However, no guidance is provided on when it will be appropriate to consider the market shares of two or more businesses together for the purposes of the AML. German competition law, for example, provides little additional guidance, namely that there must be no 'substantial competition' existing between the relevant businesses, and that they must either have no competitors or not be subject to any substantial competition (Article 19(3)(2) of the 1998 Act Against Restraints of Competition). Under EC competition law, in order for undertakings to be reviewed collectively, there must be a number of factors linking them such that they may be considered a single entity.[10] It is relatively rare for such circumstances to be found to exist.

It remains possible for a business to be considered dominant outside of the presumptions listed above, and also to rebut any presumption of dominance. The AML contains guidance on the factors that the Chinese authorities will take into account when considering whether a business holds a dominant position, including financial strength, technological capability and barriers to entry. Given that the authorities will consider more than market share, it appears that they are concerned with whether a business has 'market power'. This represents a more realistic economic analysis of a business's position in the market, and is similar to the analysis undertaken in the EU.

Abuse

In common with Article 82 of the EC Treaty, the AML prohibits the abuse of a dominant position. It contains a non-exhaustive list of acts which will constitute such an abuse, and these are broadly in line with those activities that are generally also considered abusive under Article 82 of the EC Treaty.

The AML provides that certain abusive activities may be permitted where there is 'valid reason'. While Article 82 of the EC Treaty contains no express provision for any exception, the case law of both the European Commission and the European courts indicates that the behaviour of the dominant business may not be prohibited where it can be 'objectively justified'.[11] However, it remains unclear as to what exactly may constitute such an objective justification.

Concentrations (Articles 5, 20–31)

The AML confirms the general principle that businesses are permitted to enter into concentrations, but provides that concentrations meeting the relevant thresholds must be filed with the authorities in advance and must not be implemented prior to clearance. These obligations are similar to those found in the EC Merger Regulation (ECMR).[12]

The AML provides that, as under EC competition law, intra-group reorganisations will generally not be notifiable.[13]

The relevant jurisdictional thresholds are not set out in the AML itself but are contained in the State Council implementing regulation on the notification of concentrations (the Regulation) published at the beginning of August 2008. The Regulation is extremely short and does little more than confirm the thresholds for notification, namely that:

i) the aggregate global turnover of all business operators to the concentration for the preceding financial year are in excess of RMB10 billion, and that there are at least two business operators, each with turnover in China for the preceding financial year in excess of RMB400m; or

ii) the aggregate turnover in China of all business operators to the concentration for the preceding financial year is in excess of RMB2 billion, and that there are at least two business operators each with turnover in China for the preceding financial year in excess of RMB400m (Article 3).

Outside of i) and ii) above, the authorities may still investigate where the concentration has or may have the effect of eliminating or restricting competition (Article 4).

While the turnover thresholds are similar in style to those found in the ECMR, actual levels of turnover are much lower, and there remains a concern that too many relatively insignificant transactions will be caught by the notification obligations.

The draft version of the Regulation, published at the end of March 2008, was longer and contained more detailed guidance on, for example, the notification process itself. It is somewhat disappointing that the Chinese authorities did not take the opportunity to provide further guidance in the Regulation as there remain a number of outstanding issues, not least in relation to the thresholds themselves. For example, it is unclear how turnover should be calculated (is it the turnover of the whole group? Should the seller be included in the calculation?), and whether the notification obligation also applies to joint ventures. Accordingly, the Regulation fails to provide the levels of legal certainty that it could have done.

In common with the ECMR, the notification process commences with an informal pre-notification stage of indefinite duration, and the statutory deadlines will not start to run until the authorities have declared the notification complete.[14] Thereafter, in summary, the authority has 30 days within which to conduct its preliminary examination, and a further 90 days within which to carry out further investigations; the timetable may be extended by up to a further 60 days in certain circumstances.

Investigations (Articles 38–45)

Article 10 of the AML provides for the establishment of the Anti-monopoly Enforcement Agency (AMEA). The AMEA is responsible for enforcement actions and has powers to enter business premises to conduct investigations, question businesses, inspect/copy relevant documents, seal/seize evidence and make enquiries into bank accounts. The AMEA can also impose significant financial penalties on businesses found to have infringed the AML (Articles 46, 47, 48 and 52).

While the introduction of such wide-ranging powers of investigation may be considered somewhat draconian, they broadly reflect the powers that the European Commission has had, and exercised regularly, for many years. However, there are a number of areas of ambiguity in the AMEA's powers, which, depending on how they are exercised in practice, may widen their scope. For example, the AMEA may enter 'other relevant premises'—and this may clearly include private homes. By way of comparison, the European Commission also has the power to enter 'other premises' (including private homes), but only where 'a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection' are kept there.[15]

From the wording of the AML, it appeared that a new, AML-specific enforcement agency would be established. However, it now seems that this is not the case and that, instead:

– the Ministry of Commerce will continue to be responsible for merger control filings and, according to some reports, the Anti-monopoly Commission (AMC);

– the National Development and Reform Commission will be responsible for price-monopoly-related cases;

– the State Administration of Industry and Commerce will be responsible for issues relating to abuses of a dominant market position, non-price-related monopolistic agreements and abuses of administrative powers to prevent or restrict competition.

The system of shared responsibility for the enforcement of the AML between three existing government agencies has all the hallmarks of an unsatisfactory compromise solution and raises a number of concerns—particularly in relation to the coordination and consistency of enforcement of the AML. The benefits of having a specialised competition enforcement agency have been seen in jurisdictions such as the EU; in particular, it aids the consistency and sophistication of investigation and enforcement, thus increasing legal certainty for those businesses that must ensure compliance with competition law. While individual EU Member States also have their own national competition authorities, clear procedures are in place to ensure consistency and to deal with conflicts between these and the European Commission. There is no indication that such procedures have also been established for the AMEA.

In addition to the AMEA, the AML also provides for the creation of a second authority, the AMC, which will be responsible for studying/proposing competition policies, investigating/publishing market reports, preparing anti-monopoly guidelines, and coordinating enforcement work (Article 9). EC competition law provides for no such secondary body—the European Commission is responsible for both policy and enforcement.

Conclusions

While much of the AML clearly draws its inspiration from EC competition law, there are differences in the detail. Furthermore, we do not yet know how the AML will be applied in practice and how closely, if at all, it may reflect the application of EC competition law. We may have to wait for the first cases to be brought under the AML before any meaningful conclusions about its practical application, and any continued comparisons with EC law, can be drawn.

So, once the athletes have left China at the end of the Olympic Games, for many businesses it will be only the start of a new era of competition in China.

Kirstie Nicholson

[1] The AML also covers the abuse of administrative powers to prevent or restrict competition and the abuse of intellectual property rights. These provisions are not discussed in this article.
[2] Global Competition Review (2008), 'China to Join ICN', April 15th.
[3] It is unclear whether the AML will apply to state-owned enterprises. Article 7 may grant state-owned enterprises an exemption from the AML, but the provision is too ambiguously drafted to provide any firm conclusion on this issue.
[4] See, for example, the *Wood Pulp* case. Commission Decision IV/29.725 (OJ 1985 L85/1) and the subsequent judgment of the Court in Joined Cases 89, 104, 114, 116, 117 & 125–129/88 *A. Ahlström Osakeyhtiö & Others v Commission* [1988] ECR 5193; and US Department of Justice and Federal Trade Commission, 'Antitrust Enforcement Guidelines for International Operations', April 1995.
[5] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (De Minimis Notice), OJ 2001 C 368/13.
[6] See Article 15 of the AML. Interestingly, the content of this list is very similar to that contained in the Taiwan Fair Trade Act 2002, Article 14 of which provides for the following exceptions to the general prohibition on concerted actions:

1. unifying the specifications or models of goods for the purpose of reducing costs, improving quality, or increasing efficiency;
2. joint research and development on goods or markets for the purpose of upgrading technology, improving quality, reducing costs, or increasing efficiency;
3. each developing a separate and specialized area for the purpose of rationalizing operations;
4. entering into agreements concerning solely the competition in foreign markets for the purpose of securing or promoting exports;
5. joint acts in regards to the importation of foreign goods for the purpose of strengthening trade;
6. joint acts limiting the quantity of production and sales, equipment, or prices for the purpose of meeting the demand orderly, while in economic downturn, the market price of products is lower than the average production costs so that the enterprises in a particular industry have difficulty to maintain their business or encounter a situation of overproduction; or
7. joint acts for the purpose of improving operational efficiency or strengthening the competitiveness of small–medium enterprises.

[7] Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101/97, para 73.
[8] Article 19(3) of the 1998 Act Against Restraints of Competition.
[9] Note that Article 19 of the AML provides that, in circumstances where any of the relevant business operators has an individual share of less than 10%, it will not be presumed dominant.
[10] See, for example, joined cases C-395/96 P and C-396/96 *P Compagnie Maritime Belge Transports v Commission*, [2000] ECR I-1365.
[11] See, for example, joined cases T-191/98, T-212/98 – T-214/98 *Atlantic Container Line AB & Others v Commission*, para 1113, [2003] ECR II-3275.
[12] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.
[13] A similar exception is found in Article 11-1 of the Taiwan Fair Trade Act 2002, which provides, among other things, that no notification of a concentration is necessary where 'any of the enterprises participating in a merger already holds no less than 50% of the voting shares or capital contribution of another enterprise in the merger and merges such other enterprise' and 'where enterprises of which 50% of more of the voting shares or capital contribution are held by the same enterprise merge'.
[14] Article 5 of Commission Regulation (EC) 802/2004 on the control of concentrations between undertakings, OJ 2004 L 133/1.
[15] Council Regulation (EC) 1/2003, Article 21, OJ 2003 L 1/1.