

REGIONAL FOCUS: ASIA PACIFIC

How the new Chinese Anti-Monopoly Law may affect M&A

BY DENNIS J. WHITE AND KEVIN QIAN

Those pursuing M&A transactions in or affecting China should be aware of China's new Anti-Monopoly Law (AML) and its potential to directly affect such transactions.

The AML, which took effect on 1 August 2008 after more than a decade of drafting, borrows from US and EU competition laws, but also has unique Chinese characteristics.

The AML prohibits monopolistic conduct that affects competition within China. Article 3 of the AML identifies three categories of 'monopolistic conduct': (i) monopoly agreements; (ii) abuse of dominant market positions; and (iii) mergers or acquisitions that would result in lessened competition. The AML also establishes a framework for securing pre-merger clearance, both in terms of competition and national security.

Many of AML's prohibitions are stated as broad principles (and exemptions). Such a legal framework allows for eventual clarification through regulations and enforcement policy. In the meantime, it remains to be seen how the AML will be applied in particular circumstances.

Enforcement of the AML is not centralised, but spreads over a number of governmental

agencies. At the top, the AML established a new Anti-Monopoly Committee (AMC) directly under the State Council. Its role includes formulation of competition policy, publication of antitrust guidelines and coordination of enforcement strategy. Beneath the AMC, it appears that three existing governmental agencies will continue to be involved with direct enforcement: the Ministry of Commerce (MOFCOM) will supervise merger control filings, the State Administration for Industry and Commerce (SAIC) will investigate monopoly agreements and abuse of dominant market position, and the National Development and Reform Commission (NDRC) will investigate monopoly pricing. Jurisdictional overlap may exist as enforcement policy evolves, and so companies may have to respond to multiple agencies in connection with a single matter.

With regard to M&A, the AML and merger regulations under the AML prohibit business combinations where their effect is to restrict competition in China, regardless of where in the world the business combination occurs. This provision may have a far-reaching impact on transactions involving global players, depending on how Chinese authorities enforce the new law.

Companies must notify the anti-monopoly enforcement authorities of all transactions that meet one of the following thresholds: (i) total global turnover for the previous fiscal year of all business operators participating in a business combination in excess of RMB 10bn (approximately \$1.5bn), and at least two of these business operators each had a turnover of more than RMB 400m (approximately \$60m) within China during the prior fiscal year; and (ii) the total turnover within China in the previous fiscal year of all the business operators participating in the concentration in excess of RMB 2bn (approximately \$300m), at least two of these business operations each had a turnover of more than RMB 400m (approximately \$60m) within China during the prior fiscal year.

These objective thresholds represent an important change in approach from the prior internal drafts of the law since they eliminate

triggers based upon a percentage of market share.

Historically, parties made pre-merger notification filings with both MOFCOM and SAIC. Now it appears that MOFCOM is preparing to establish an 'Anti-Monopoly Investigation Bureau' which would act as single, centralised filing authority.

Under the AML, parties to an M&A transaction must wait 30 days after filing of a pre-merger notice before closing. The reviewing authority may decide to conduct an extended review which must be completed within an additional 90 working days. An additional 60 working day extension is permitted if the parties consent, if the filing is inaccurate or if circumstances change. The AML also contemplates a national security review (akin to the US CFIUS review) for acquisitions of Chinese firms by foreign entities.

Apart from provisions expressly addressing M&A transactions, there are other provisions in the AML that may impact the operations of newly combined entities. For example, companies with a dominant market share (with dominance presumed at the 50 percent level) are prohibited from selling at unfairly high prices or buying at unfairly low prices.

Penalties for violation of the AML include fines, issuance of cease and desist orders, and confiscation of illegal gains. In addition, the AML appears to establish a civil right of action that allows private parties to bring claims for violation of the law.

The AML represents a huge step forward by China in its regulation of monopolistic and anti-competitive behaviour. The preceding provides only a summary of this complex new law whose enforcement will evolve. In the interim, no party seeking to pursue an acquisition or conduct operations in or affecting China can afford to ignore this new law. ■

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Dennis J. White is Vice Chairman of the Association for Corporate Growth and a partner at McDermott Will & Emery LLP in Boston. Kevin Qian is a managing partner at MWE China Law Offices in Shanghai.