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Hong Kong's competition law landscape – present and future

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Although Hong Kong is highly developed, its competition law is not.

Hong Kong is one of the world's few developed, capitalist economies that does not have a general competition law. Instead, it has a broadly-worded competition policy that has not been given the force of law, and statutory competition rules that apply only to the telecommunications and broadcasting sectors.

This may change in the near future. In a policy speech in November 2007, Hong Kong Chief Executive Donald Tsang announced that the government intended to submit a cross-sector competition bill to the Legislative Council in the 2008-2009 legislative session. The Chief Executive gave a commitment that details of the bill would first be released for public review, and it is anticipated that this will occur via the release of a consultation paper in the first half of 2008.

Promulgation of a competition bill would be the culmination of a lengthy period of consultation and debate on competition regulation in Hong Kong. As far back as 1996, Hong Kong's Consumer Council published a report recommending the adoption of a general competition law. However, it is only in recent years that the introduction of such a law has become a key item on the government's agenda.

This article examines the development of the present regulatory regime relating to competition matters in Hong Kong, and considers its achievements and shortcomings. It then briefly considers the prospects for the proposed cross-sector competition law.

Key cross-sector institutions and policy

In order to explain the structure and scope of Hong Kong's current competition regime, it is useful to trace the development of the key institutions, policies and legislation within it.

The Consumer Council

Established in 1974, the Consumer Council is the oldest of the government bodies tasked with key competition-related duties in Hong Kong. The Trade Practices Division of the Council is charged with promoting responsible trade practices, and examining issues and complaints with competition implications.

However, the Council is not an investigative body, and it has no authority to request information and no enforcement powers. This has limited the Council's impact in relation to

competition matters.

Nevertheless, the Council has carried out some important competition-related investigations in Hong Kong. It has identified and documented competition-related concerns in relation to many key areas of the Hong Kong economy, including the motor gasoline, diesel and liquefied petroleum gas markets, the lift maintenance industry, supermarkets, the private residential property market, and various segments of the banking and financial sectors.

In 1996, the Council published a report entitled *Competition Policy – the Key to Hong Kong's Future Success*, recommending the adoption of a general competition law. Although the government formally rejected that recommendation, some significant competition-related initiatives were subsequently announced.

COMPAG and Hong Kong's competition policy

One of the government's key responses to the report was the establishment of the Competition Policy Advisory Group (COMPAG) in 1998.

COMPAG is tasked with promoting competition in Hong Kong, and providing a forum for the review of significant competition-related issues. As part of these functions, COMPAG considers proposals and submissions from various government agencies, and investigates alleged anti-competitive behaviour.

The number of complaints reviewed by COMPAG since its establishment is relatively small, but many are related to those areas of the Hong Kong economy most commonly cited by competition law advocates as evidencing significant anti-competitive structures and/or behaviours. This includes the supermarket sector, the oil industry, the electricity supply market and residential property development.

However, as with the Consumer Council, COMPAG has not been granted any significant investigation or enforcement powers in relation to alleged anti-competitive behaviour. Usually, COMPAG will simply refer complaints to a relevant policy bureau or government department, and liaise with the concerned parties to seek some form of cooperative outcome.

Through COMPAG, the government published a *Statement on Competition Policy* in May 1998.

The Statement articulates the objectives of the government's competition policy, which include the promotion of "economic efficiency and free flow of trade", and notes the government's preference for a "sector specific approach" to competition matters.

A number of types of business practices "which may warrant more thorough examination" are referenced in the Statement, including price-fixing, market allocation and abuse of dominance. However, the Statement merely "encourages" adherence to certain pro-competition principles by the public and private sectors; no mechanisms have been introduced to substantively penalize businesses who engage in practices contrary to those principles.

In 2003, COMPAG published a set of Guidelines in relation to the Statement. Although the Guidelines expand on the anti-competitive practices referenced in the government's *Statement on Competition Policy*, they do not provide clarity on the mechanisms by which such practices can be addressed. The Guidelines state that: "where justified, the Government will take administrative or legal steps as appropriate to remove anti-competitive practices if necessary". However, as the competition principles in the Statement have not been given the force of law, the government's power to do anything beyond publicly censuring non-compliant businesses appears to be extremely limited.

More recently, COMPAG has been pivotal in examining the extent to which more competition – and competition regulation – should be introduced in the public and private sectors in Hong Kong.

Competition Policy Review Committee

In June 2005, COMPAG appointed the Competition Policy Review Committee (CPRC) to review various competition-related matters and to make recommendations on the future direction of Hong Kong's competition policy.

The review committee submitted its findings to COMPAG in its June 2006 *Report on the Review of Hong Kong's Competition Policy*. In that report, the CPRC advocated the adoption of a cross-sector competition law that would, at least initially, run in parallel with the existing sector-specific regime.

The CPRC recommended that the law prohibit seven types of anti-competitive conduct relating to the practices of price fixing, bid rigging, market allocation, sales and production quotas, joint boycotts, unfair or discriminatory standards and abuse of a dominant position. Such conduct would be prohibited only where it was carried out with the intent to distort the market, or had the effect of distorting normal market operation. The CPRC also recommended that a new regulatory authority, the Competition Commission, be established to enforce the law.

Notably, the CPRC suggested that the law should exempt natural monopolies and should not include a merger control regime. The CPRC appeared to adopt the view that high levels of concentration in various industry sectors in Hong

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Kong were a direct consequence of "normal free market forces", and did not raise substantive competition concerns.

After the CPRC's report was submitted to COMPAG, the government launched a three-month public consultation exercise on the way forward for Hong Kong's competition policy. After that process gathered significant support for the introduction of a cross-sector competition law, the government began work on the preparation of appropriate legislation.

The sector-specific competition provisions

Consistent with the "sector specific" approach outlined in its *Statement on Competition Policy*, the government introduced statutory competition rules in 2000 for the telecommunications and broadcasting sectors. No official explanation was provided as to why the government considered that only these specific sectors required such rules.

A brief summary of the key competition provisions applying to each sector is set out below.

Telecommunications

Competition terms were introduced into the licence conditions of Fixed Telecommunications Network Services Licences during the 1990s, as the sector was guided from private-sector monopoly towards a liberalized and competitive state.

Companies vie for position in Hong Kong's crowded market.

Then, in 2000, the *Telecommunications Ordinance* was amended to include competition provisions in sections 7K, 7L, and 7N. (Note that the Ordinance also includes consumer protection measures such as section 7N, which prohibits misleading or deceptive conduct by a licensee in a telecommunications market.) These sections, which appear to be largely based on Articles 81 and 82 of the European Community Treaty, apply only to the activities of a telecommunications licensee (or conduct between telecommunications licensees), and are enforced by the Telecommunications Authority.

The relevant sections are structured as follows:

- *Anti-competitive conduct prohibitions*

  Section 7K prohibits conduct by a licensee that has the "purpose or effect of preventing or substantially restricting competition in a telecommunications market". Examples of conduct that may result in a breach of the prohibition are included in section 7K, and include agreements between competitors involving price-fixing and market-sharing, and unilateral conduct such as preventing or restricting the supply of goods or services to competitors.

  Section 7L prohibits "abuse" by a licensee of a "dominant position" in a telecommunications market. The section includes broad definitions of "dominance" and "abuse", as well as a non-exhaustive list of examples of abusive conduct (such as predatory pricing and unreasonable price discrimination).

  Section 7N overlaps with section 7L, and prohibits conduct by a dominant licensee that involves "discrimination" in charges or the conditions of supply between persons who acquire services in a telecommunications market.

- *Merger control*

  Amendments to the Ordinance were introduced in July 2003 to allow for the ex post regulation of mergers and acquisitions in the telecommunications market. The amendments came into effect in July 2004. Under section 7P, the Telecommunications Authority may investigate whether a "change" in control of a licensee is likely to "substantially lessen competition" in a telecommunications market, and if this is the case, it may order divestiture or modification of ownership or control to "eliminate or avoid" the anti-competitive effect. Where a licensee fails to comply, the Telecommunications Authority may, amongst other things, impose a fine or suspend or cancel the relevant licence.

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Events constituting a relevant "change" are specified in section 7P(16) of the Ordinance, and include where a person acquires a 30% interest in a carrier licensee, acquires the power to control a licensee, or acquires a 15% interest in a licensee where the person already holds a 5% interest or a controlling interest in another carrier licensee.

The section also provides for a voluntary notification process, with the Telecommunications Authority able to grant prior approval to transactions. If necessary, the approval may be granted on conditions.

Where the Telecommunications Authority considers that a relevant change is likely to substantially lessen competition, approval may still be given if it can be discerned that a net "public benefit" may result from the change. "Public benefit" is not defined in the Ordinance.

Powers of the Telecommunications Authority

The Ordinance provides the Telecommunications Authority with reasonably substantial powers to investigate breaches of the various competition provisions, including the power to require licensees to provide relevant information, and the power to enter the premises of a licensee to inspect and copy documents.

Penalties

Licensees who breach the competition provisions in the Ordinance are liable for fines up to a maximum of 10 % of their turnover in the relevant telecommunications market or HK$1 million (US$128,000), whichever is the higher. These are the maximum fines which the High Court could impose on an application by the Telecommunications Authority.

The Ordinance also specifies less substantial maximum fines which may be imposed by the Telecommunications Authority for first occasion, second occasion and third and subsequent occasion breaches.

As regards to the merger control provisions, these fines may be imposed in addition to the Telecommunications Authority's broader powers that require abatement of the anti-competitive effect of a change in control of a licensee.

Appeals

Persons aggrieved by the Telecommunications Authority's decisions relating to the competition provisions may appeal to a specially constituted Telecommunications (Competition Provisions) Appeal Board. The appeal is a fully merits-based review.

Private rights of action

Under section 39A of the Ordinance, a person who sustains loss or damage from a breach of the competition provisions except the merger control provisions, may bring an action for damages, an injunction or another appropriate remedy. This includes consumers and competitors of the licensee who is in breach.

The Telecommunications Authority has issued various guidelines in relation to the competition provisions in the Ordinance, such as the *Guidelines on Mergers and Acquisitions in Hong Kong Telecommunications Markets* published on May 3 2004, and the draft *Competition Guidelines* on sections 7K, 7L and 7N of the Ordinance issued in 2007.They provide guidance on the interpretation and enforcement of various forms of prohibited conduct, and elaborate on aspects of the market definition, merger review and voluntary notification processes.

Broadcasting

The principal competition provisions applicable to broadcasting licensees are found in sections 13-16, 25, 26 and 28 of the *Broadcasting Ordinance* (BO). These competition provisions are enforced by Hong Kong's Broadcasting Authority.

The key provisions are as follows:

Anti-competitive conduct prohibitions

Section 13 of the Broadcasting Ordinance is similar to section 7K of the Telecommunications Ordinance. In addition to prohibiting conduct that has the purpose or effect of preventing or substantially restricting competition in a television programme service market, the BO also prohibits the mere "distortion" of competition. Therefore, the BO's provision may be wider than that in the Telecommunications Ordinance.

Section 13 contains a non-exhaustive list of examples of conduct that may result in a breach of the prohibition. These are analogous to the examples set out in section 7K of the Telecommunications Ordinance.

Unlike the Telecommunications Authority, the Broadcasting Authority may, on application by a licensee, grant individual exemption to agreements that would otherwise contravene the prohibitions in section 13 of the BO.

Section 14 of the BO prohibits abuse of a dominant

position, and is framed in essentially the same manner as section 7L of the Telecommunications Ordinance. However, as with section 13 of the BO, the conduct that is prohibited includes "abuse" of a dominant position that is constituted by a mere "distortion" of competition.

There is no equivalent of section 7N of the Telecommunications Ordinance in the BO.

- *Powers of the Broadcasting Authority*

  The Broadcasting Authority has similar investigatory powers to those of the Telecommunications Authority, including the power to compel licensees to provide information relevant to an investigation, and the power to enter a licensee's premises to inspect and copy documents. Additionally, some of the Broadcasting Authority's powers extend beyond applying to licensees to include any other person "employed or engaged in connection with the relevant business" or any "associate" who has relevant information relating to an investigation.

- *Penalties*

  Section 28 of the BO provides for penalties that may be imposed for breach of the competition provisions. These are generally equivalent to those summarized above in relation to the Telecommunications Ordinance.

- *Appeals*

  No specialized and independent competition appeals board has been established in relation to the Broadcasting Authority's decisions. Instead, under section 35 of the BO, appeals may be made to the Chief Executive in Council.

- *Private rights of action*

  Under section 15(2) of the BO, a person who suffers loss or damage as a result of a breach of the anti-competitive conduct prohibitions may bring an action for damages, an injunction or other appropriate remedy, order or relief against the licensee in breach.

There are no competition-related merger control provisions in the BO.

On May 11 2007, the Broadcasting Authority published the *Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance*.

Impact of the existing regulatory regime

During the public consultation exercise that followed the publication of the Competition Policy Review Committee's *Report on the Review of Hong Kong's Competition Policy*, the government invited submissions on the proposal for a new cross-sector competition law.

Many of the submissions expressed two primary concerns about the government's existing competition policy and regime, being:

- the existing regime fails to allow for sufficient regulatory investigation, exposure, prevention or adequate punishment of anti-competitive practices in Hong Kong; and
- in a number of sectors where COMPAG and/or the Consumer Council had identified and documented anti-competitive practices or market structures, little had been done by the government or the businesses in that sector to address this issue.

These concerns now appear to be shared by government officials, who appear increasingly frustrated by a continuing and often blatant disregard of the government's competition policy by elements of the commercial sector. For example, in January 2008, the government strong criticized a local food manufacturing association for publishing a newspaper advertisement calling on businesses to increase wholesale prices. The government accused the association of price fixing conduct in breach of the competition policy.

By contrast, there is a prevailing view that the sector-specific legislative competition provisions have helped to increase competition in the telecommunications and broadcasting industries, resulting in substantial pricing and related benefits to consumers.

This support comes notwithstanding some clear problems with the two regimes, including differences in the scope and wording of otherwise analogous competition provisions that are difficult to justify, and allegations of substandard investigatory procedures by the relevant regulators.

The telecommunications sector, in particular, is commonly cited as presenting a compelling case for the benefits of statutory competition rules. While there is debate on just how much of the progress made in this once-monopolized sector can be attributed to the competition provisions, they have clearly played a role in expediting the onset of competitive conditions in the industry.

Although there have been few cases in which the competition provisions in the Telecommunications Ordinance and the Broadcasting Ordinance have been enforced to impose a sanction on a licensee, it can be argued that this is as much

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a result of licensee compliance in the face of potentially significant penalties as evidencing problems with the prevailing enforcement regimes. Additionally, there have been some high profile cases where the beneficial consumer impact of competition rules has been highly visible and widely applauded.

An example is the Telecommunications Authority's inquiry into simultaneous price rises by six mobile telephone operators in Hong Kong on January 2 2000. After the Authority presented its preliminary findings to the licensees, they agreed to rescind the increases or allow customers to vary their service contracts without charge. At the time, the Authority had only the licence conditions (which were substantially similar to section 7K of the Telecommunications Ordinance) to rely upon.

Analysis of the sector-specific regimes may also help allay some of the business sector's concerns about a cross-sector law.

On the whole, for example, it is generally considered that licensees have not had to devote unreasonable resources and expenditure to ensure compliance with the sector-specific competition provisions, and that those provisions have not unduly disrupted the course of competitive business in the industry. Specific competition complaints have been relatively few, and small- to medium-sized enterprises (SMEs), who have expressed concern about how a general competition law might impact them, have rarely been the subject of investigations under the relevant provisions. Additionally, the Telecommunications Authority's merger review processes have not resulted in any proposed acquisitions being blocked or subjected to conditions.

Looking forward

The push for the introduction of a general competition law in Hong Kong has gained significant momentum in recent years, and senior government officials have indicated that the government is likely to adopt many of the Competition Policy Review Committee's recommendations in its June 2006 *Report on the Review of Hong Kong's Competition Policy*. There have also been suggestions that merger control provisions may be included in the law for commencement at a later point in time.

Notwithstanding these developments, some commentators believe it is unlikely that significant progress in the proposed law will be made in the near future. The government has already failed to meet an earlier pronounced timetable for development of the law, and it continues to be strongly resisted by leading business figures in Hong Kong. The government has attributed recent delays in development of the law to ongoing efforts to allay the concerns expressed by SMEs. However, it is widely believed that a more significant source of opposition to the law, and a primary focus of government appeasement efforts, are the owners of conglomerate businesses in Hong Kong whose activities have so far been unchecked by a cross-sector competition regime. Some commentators have expressed concern that their influence may further delay the law and could result in watered-down legislation.

For now, the promised public consultation document outlining details of the proposed competition bill remains keenly awaited, as it will doubtless provide some indication of the prospects for a comprehensive and effective statutory competition regime in Hong Kong. ■

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China's Anti-Monopoly Law – A great leap forward?

By Hannah Ha and Gerry O'Brien, Mayer Brown JSM

Photo: Brandon Kirk

The *Anti-Monopoly Law* is China's first comprehensive competition law. While there are a number of existing Chinese laws incorporating antitrust provisions and prohibitions on anti-competitive conduct (such as the 1993 *Anti-Unfair Competition Law* and the 1997 *Pricing Law*), those laws are fragmented, confined in scope, and rarely enforced. Accordingly, many commentators have expressed a hope that the Anti-Monopoly Law will provide a framework for more consistent and rigorous regulatory action against anti-competitive conduct in China.

This article reviews the Anti-Monopoly Law in detail, and highlights a number of key unresolved issues relating to its administration and application.

Overview of the key provisions

The Anti-Monopoly Law targets four main types of monopolistic conduct: anti-competitive monopoly agreements, abuses of a dominant market position, anti-competitive concentrations, and the anti-competitive misuse of government power.

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Many Articles in the Anti-Monopoly Law, and particularly those relating to the first two types of monopolistic conduct referenced above, appear to derive from European antecedents. However, it remains to be seen whether the Chinese authorities will apply familiar foreign interpretation and analytical techniques to the competition law concepts embedded in those Articles.

General issues

Purpose

Article 1 of the Anti-Monopoly Law states that the law's purpose includes the protection of market competition and consumer and public interests, and "ensuring the healthy development of the socialist market economy".

A number of commentators have raised concerns about the potential for the Anti-Monopoly Law to be used to shield inefficient Chinese enterprises from rivals. Accordingly, it will be interesting to see if the reference to China's "socialist market economy" in the law's stated objectives are interpreted as justifying a different application of the law between domestic and foreign companies.

Market definition

The Anti-Monopoly Law defines a "relevant market" as the "commodity scope or regional area within which the undertakings compete against each other during a certain period of time for specific commodities services".

A number of commentators have raised concerns about the potential for the Anti-Monopoly Law to be used to shield inefficient Chinese enterprises from rivals.

This definition addresses the product and geographic dimensions of market definition that apply in most mature competition law regimes. However, it remains to be seen whether commonly used market definition methodologies such as the 'hypothetical monopolist' test will be adopted by regulatory authorities in China.

Extraterritoriality

According to Article 2, the Anti-Monopoly Law applies to "monopolistic conduct" in China as well as such conduct outside of China if it "eliminates or has restrictive effects on competition" in a market in China.

It is notable that the law does not at this stage require that relevant conduct has a "substantial" or "appreciable" effect on a market in China, or that such impact be foreseeable, in order for extraterritorial jurisdiction to apply.

Prohibited 'monopoly agreements' and abuse of dominance

The Anti-Monopoly Law contains provisions prohibiting companies from entering into 'monopoly agreements' or abusing a 'dominant market position'.

Monopoly agreements

The second chapter of the Anti-monopoly Law prohibits horizontal and vertical monopoly agreements "among undertakings with competing relationships", and includes a non-exhaustive list of examples of both types of such agreements (as well as a catch-all category of "other monopoly agreements" as recognised by the relevant enforcement authorities).

These monopoly agreements are deemed to unlawfully restrict competition unless relevant exceptions set out in the law apply. As it is currently worded, the law does not require any specific level of restrictive competitive effect before a relevant agreement is deemed unlawful. A relevant threshold may be introduced via subsequent implementation rules.

Horizontal monopoly agreements

Article 13 of the Anti-Monopoly Law provides that 'horizontal' monopoly agreements will include agreements between competitors to fix prices, limit production or sales volumes, share markets, jointly boycott competitors or customers, as well as agreements "restricting the purchase of new technology or new facilities or the development of new technology or new products".

The broad wording of this last example of a horizontal monopoly agreement raises some concerns, as it could potentially be applied to a wide array of arrangements not typically deemed anticompetitive in other jurisdictions. An example is technology and intellectual property licence agreements, which often include field-of-use restrictions.

The situation is not helped by the ambiguous wording in Article 52 of the Anti-Monopoly Law, which provides that the law does not apply to businesses "exercising their intellectual property rights in accordance with the provisions of relevant laws and administrative regulations relating to intellectual property", but then also states that the law is applicable where a business "abuses its intellectual property rights in order to prevent or restrict competition".

The precise meaning of Article 52 is unclear, and commentators have speculated whether it may be used as a basis

for limiting the extent to which foreign intellectual property rights holders can enforce their rights in China. It is to be hoped that the Article will only have application where the holders of intellectual property rights seek to leverage those rights in a manner exceeding their proper scope, consistent with the approach taken in more mature competition law regimes.

Vertical monopoly agreements

Article 14 lists two examples of prohibited 'vertical' monopoly agreements, being agreements between a company and its trading partner to fix resale prices or to restrict minimum resale prices to third parties.

Earlier drafts of this Article prohibited all agreements restricting resale prices, including where the restriction involved only the setting of a maximum resale price. As references to the setting of a "maximum resale price" were removed from the final promulgated version of the law, it is now assumed that such activities will not constitute an unlawful monopoly agreement.

Exceptions

Article 15 of the Anti-Monopoly Law specifies a broad and non-exhaustive range of exceptions to the prohibition on monopoly agreements, which include where it can be shown that a relevant agreement can:

- improve technology;
- raise the quality of a product and production efficiency;
- enhance the competitiveness of small- or medium-sized companies;
- release the pressure of serious decreases in sales or distinct over-supply during economic downturns;
- ensure legitimate interests are protected in relation to foreign trade and economic cooperation; or
- achieve "social public interests" (the term is not defined, however examples like 'energy saving' and 'environmental protection' are referenced).

Except for the exception relating to the protection of legitimate interests in relation to "foreign trade and economic cooperation", businesses will be required to prove that their agreements will not "substantially restrict competition in the relevant market" and that consumers will be able to "share the benefit of the agreements" before they qualify for the Article 15 exceptions. It is anticipated that the Chinese government will establish a notification system under which it can be confirmed that relevant agreements fall within one of the exceptions. It is notable that the exception relating to the release of pressure in relation to "economic downturns" might leave the door open to 'crisis cartels', which are generally not permitted in other competition law jurisdictions.

Abuse of a dominant market position

Article 17 of the law prohibits an undertaking with a dominant position in a market from abusing that position.

Abuse of a 'dominant market position' is defined to include "selling products at unfair high or buying at unfair low prices" and (where this occurs "without valid reasons") the act of selling below cost, refusing to trade with partners, compelling trading partners to enter into exclusive trading arrangements, imposing unreasonable trading conditions or 'tie-ins' to sales, or applying differentiated trading conditions to equivalent trading partners.

Several of the characterizations of abuse of dominance conduct raise interesting questions.

For example, determining when a dominant firm's pricing is "unfairly high" could prove difficult for Chinese antitrust authorities, notwithstanding the development of sound economics-based methods for approaching such issues in foreign jurisdictions.

Additionally, concerns have been expressed about the prospect of an "unfair pricing" prohibition being used as a basis for interventionist price regulation in China – although it must be noted that such fears have generally not been realised in relation to the enforcement of 'illicit pricing' prohibitions in China's 1997 Pricing Law.

The Anti-Monopoly Law will bring about some significant changes in relation to merger control.

The allowance of relevant conduct engaged in for "valid reasons" also raises uncertainties. For example, it remains to be seen whether it will be 'valid' for a dominant business in China to offer supply discounts to related companies but not to other trading partners (who may be deemed to be "equivalent trading partners"), or whether a business may refuse to sell a product to a reseller whose activities may be seen to "devalue" the relevant brand.

The law denotes that a company has a 'dominant market position' where it is able to control the price or quantity of products or other trading conditions or to engage in conduct restricting or affecting entry of other companies into a

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relevant market. Factors relevant to identifying a 'dominant' business are listed in the law, which generally reflect the prevailing treatment of this issue in most mature competition law regimes.

However, Article 19 of the law (which appears to derive from Germany's Act against Restraints on Competition) raises a presumption of dominance based solely on market share where a business:

- has a market share of 50% or more; or
- has a market share of between 10% and 50%, and:
  - (i) when that is combined with the market share of another entity in the same market, their combined market share equals 66% or more; or
  - (ii) when that is combined with the market share of two other entities in the same market, their combined market share equals 75% or more.

Commentators have criticized this aspect of the law on the basis that market share data is commonly not indicative of whether a business is able to control the price or quantity of products or other trading conditions in a market. However, Article 19 indicates that a presumption based on the relevant thresholds can be rebutted by "opposite evidence".

Merger control

A merger control regime has existed in China since 2003, under the *Provisions on the Acquisition of Domestic Enterprises by Foreign Investors* (M&A Provisions). The M&A Provisions prohibit merger and acquisition activities that cause "excessive concentration" or "impede fair competition" in a market in China. Notifications are required to be filed with Chinese government bodies regarding certain acquisitions of Chinese targets by foreign investors as well as certain 'offshore' acquisitions having a China nexus.

However, the M&A Provisions do not specify any penalties that may be imposed for non-compliance with the merger control regime, and no follow-up activity appears to be taken in relation to the vast majority of notified transactions.

The Anti-Monopoly Law will bring about some significant changes in relation to merger control. In particular, merger control will apply to purely domestic acquisitions in addition to offshore transactions, and significant penalties may be imposed in the event of non-compliance. Further, notifying parties will receive written confirmation of clearances, and prohibition or conditional clearance decisions will be published.

Key elements of the merger control regime under the Anti-Monopoly Law are summarized below.

Prohibited concentrations

The Anti-Monopoly Law prohibits participation in a 'concentration' that has the effect or likely effect of eliminating or restricting competition. A 'concentration' is defined as a transaction involving:

- merger activity;
- the acquisition of 'control' over companies through the purchase of shares or assets; or
- the acquisition of 'control' or the 'ability to exercise decisive influence' on companies by virtue of contractual rights or other means.

Although the concepts of 'control' and "ability to exercise decisive influence" are not defined, it seems clear that a broader range of transactions will be subject to anti-monopoly review under the Anti-Monopoly Law than under the existing M&A Provisions.

Notification

Under Article 21 of the Anti-Monopoly Law, businesses are required to make an antitrust notification if they participate in concentrations achieving thresholds stipulated by the State Council (with exemptions for certain intra-group transactions).

However, the relevant filing thresholds are not yet specified. It is expected they will be included in forthcoming implementation rules. Publication in this manner will allow adjustment of the thresholds from time to time to reflect the developing Chinese economy.

Under the existing M&A Provisions, the relevant notification thresholds are set out in that law. These thresholds (which relate to turnover, assets, and market presence in China) are quite low. For example, notification is required for any merger or acquisition transaction by a foreign company, if the China turnover of that company and its affiliates exceeds RMB1.5 billion (US$211 million) in one year. This has prompted criticism that notifications are required in cases where a transaction has no substantial nexus to China's economy.

It remains to be seen whether this concern will apply under the Anti-Monopoly Law. An earlier draft of the law contained thresholds based solely on the turnover of parties to the transaction; however this was removed from the final version. There have been reports that Chinese officials are concerned about the prospect of low thresholds hindering the government's policy of encouraging consolida-

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tion of domestic companies and the promotion of national champions.

Review of notified transactions

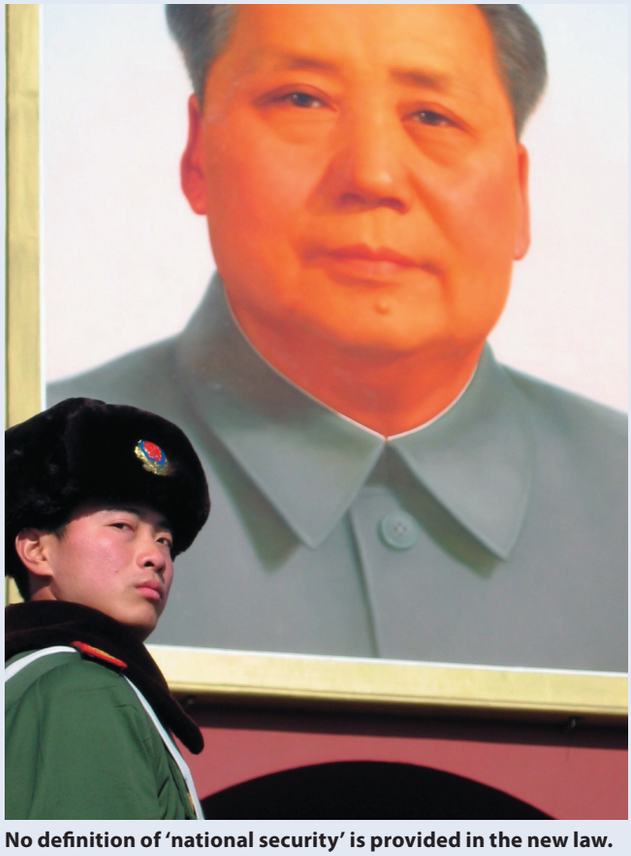
Similar to the EU and US merger review processes, the Anti-monopoly Law prescribes a two-phase review process.

Notified transactions will need to be approved before the relevant acquisition can take place, and a review period ranging from 30 to 180 days is possible under the procedures outlined in the law.

National security review

Another significant element of the Anti-Monopoly Law is the requirement for government review before foreign companies are permitted to engage in investments or acquisitions which "could affect national security". No definition of the term 'national security' is provided in the law, which has aroused concern about the prospect of foreign acquisitions of China companies being blocked on spurious grounds.

However, it needs to be considered that a number of other mature competition law jurisdictions have broadly analogous legislation (such as the US *Defense Production Act*). Further, the M&A Provisions already contain a similar (and perhaps broader) review requirement in relation to proposed acquisitions by foreign companies which may affect 'national economic security', relate to an 'important industry' in the Chinese economy, or transfer the controlling power of a famous Chinese trademark or 'time-honoured' Chinese brand.



No definition of 'national security' is provided in the new law.

Enforcement, penalties and remedies

Key enforcement and administration bodies

According to the Anti-Monopoly Law, the State Council will set up an Anti-Monopoly Commission to organise, harmonize and lead anti-monopoly work. The Commission's functions will include policy development, legislative initiatives, analysis of competitive conditions in Chinese markets, and "supervising and harmonizing" the activities of government agencies involved in enforcing the law.

While the proposed Commission appears to be primarily a consultation and coordination body, it has been given the power to "organize investigations" and "decide the handling of major new anti-monopoly cases".

The Anti-Monopoly Law also provides for the State Council to entrust enforcement powers in relation to the law to certain authorities, which are likely to include the Ministry of Commerce (MOFCOM) the State Administration of Industry and Commerce (SAIC) and the National Development and Reform Commission (NDRC).

It is expected that each of these will perform different law enforcement functions. For example, it is widely considered that:

- the SAIC is likely to be in charge of enforcement efforts directed at monopoly agreements, abuse of dominant market position, and abuse of administrative powers;
- MOFCOM is likely to remain responsible for merger control; and
- the NDRC will continue to play a role in price control issues.

At this stage, it is not clear what role other authorities will play in the enforcement of the Anti-Monopoly Law. Under a previous draft of the law, industry-specific regulators were given responsibility for dealing with anti-monopoly violations within their own sectors, and reporting the outcomes of these cases to the Commission.

Investigations, penalties and remedies

The enforcement authorities are given broad powers under the Anti-Monopoly Law to investigate interested parties and other relevant entities or individuals, including powers to

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engage in on-site inspections, to conduct interviews, and to seize relevant electronic and printed materials.

In relation to monopoly agreements or the abuse of a dominant market position, the enforcement authorities have the power to make 'cease-and-desist' orders, to confiscate illegal gains, and to impose fines up to a percentage below 10% of total relevant turnover in the preceding year (or, where a monopoly agreement has not been implemented, to impose a fine up to an amount below RMB500,000).

In relation to 'concentrations' in violation of the Anti-Monopoly Law, the Enforcement Authorities can order the concerned parties not to proceed with the transaction, or to unwind it. It can also impose a fine up to an amount below RMB500,000.

The Anti-Monopoly Law allows for leniency to be exercised where companies 'own up' to participation in prohibited conduct and cooperate in investigations.

The law also contemplates that parties who suffer loss as a result of the monopolistic conduct of others can institute a civil action for recovery of loss.

Other key provisions

The Anti-Monopoly Law contains further sections of note, which may not be fully explored in the scope of this article. In particular:

- Chapter 5, which prohibits government departments and authorized organisations from abusing their administrative powers to curb competition. Offending agencies may be ordered to correct their abuses by superior authorities, and individuals directly responsible for such abuses may be given a disciplinary sanction. It has been noted that reliance on self-correction and review by 'parent' agencies may diminish the impact of this prohibition.

- Article 7, which appears to allow for differentiated treatment of State Owned Enterprises (SOEs) under the Anti-Monopoly Law. As SOEs control many key business sectors in China (such as military-related manufacturing, telecommunications, gas and electricity), and are often criticised for engaging in anti-competitive practices, the impact of the law may be substantially diluted if this is the case.

Looking ahead

As with all legislation, the effectiveness and value of the Anti-Monopoly Law will depend on how it is administered and interpreted over time. While a number of uncertainties surround the law, many are likely to be resolved by the detailed implementation rules expected to be published in the coming months.

Concerns about the prospect of discriminatory application of the law against foreign companies are mere speculation at this stage, and the apprehension of foreign businesses must be tempered by a recognition that China is currently demonstrating a significant commitment to combat anti-competitive practices by both domestic and foreign companies.

While China's track record in relation to the enforcement of competition laws is not greatly encouraging, it is clear that the Anti-Monopoly Law does have great potential as a tool for the protection and facilitation of market competition. It may yet prove a great leap forward in China's transition to a market economy. ■

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