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Antitrust & Competition Practice

## China's Anti-Monopoly Law — New Merger Filing Thresholds Anticipated as We Count Down to Commencement

China's new Anti-Monopoly Law (AML) takes effect on August 1, 2008. For those that conduct business in, sell into, purchase from, or have strategic investments in China, or foresee doing so in the future, it is essential to understand the effects of this new law. The AML will ban and penalize many practices that have previously been common in China. In addition, there are important differences between the AML and the antitrust/competition law regimes in the United States and the European Union. Businesses based outside of China need to discern these differences if they are to avoid liability.

The AML is China's first comprehensive competition law, and includes prohibitions relating to:

- Monopoly agreements (that is, agreements between competing businesses or trading partners containing certain restrictions on competition);
- The abuse by a business of a dominant market position; and
- Certain M&A activity (referred to as "concentrations") considered to eliminate or restrict competition in a market in China.

As the AML is broadly worded, China's State Council is expected to publish a number of detailed implementation rules to explain how relevant sections of the law will be interpreted and applied. However, to date only one set of draft implementing regulations has surfaced, relating to the concentration provisions. These draft regulations were published for public consultation purposes in March of 2008.

### Concentration Provisions – Changes to Draft Regulations

The AML prohibits participation in a "concentration" that has the effect, or the likely effect, of eliminating or restricting competition. A "concentration" is defined as a transaction involving: (i) merger activity; (ii) the acquisition of control through the purchase of shares or assets; or (iii) the acquisition of *de facto* control through contractual rights or otherwise.

The draft implementing regulations treated some non-majority share acquisitions and other minority investments as "concentrations" subject to the prohibition and notification requirements. They also included a market share-based threshold test (as well as, arguably, low two-party turnover threshold tests) for determining when concentrations need to be notified to China's antitrust authorities. These provisions attracted considerable attention and criticism.

However, it is now believed that these controversial provisions will be removed in the revised and finalized

regulations likely to be published in the coming days. If this does occur, then it may reduce the likelihood that the concept of “acquisition of control” will be interpreted so broadly as to include minority acquisitions. Nonetheless, the approval of the Chinese authorities on this issue will need to be monitored closely. Although no official announcement has been made on this matter to date, we now understand that the regulations will specify that notification of a concentration is required if either of the following thresholds is met:

- Where worldwide turnover over the last accounting year of all parties to the concentration exceeds **RMB 10 billion** (approx. US\$1.46 billion), and turnover within China of each of at least two of those parties exceeds **RMB 400 million** (approx. US\$58.6 million) over the last accounting year.
- Where turnover within China over the last accounting year of all parties to the concentration exceeds **RMB 2 billion** (approx. US\$293 million), and turnover in China of each of at least two of those parties exceeds **RMB 400 million** (approx. US\$58.6 million) over the last accounting year.

We note that, based on our past experience and consultation with the Ministry of Commerce under China's existing merger control regime, normally the turnover of each party's entire corporate group is to be considered and not just, in the case of the sale of only a subsidiary or business unit, the turnover of that subsidiary or business unit.

***It is stressed that the above information about the final form of the implementation regulations under the AML has not yet been officially announced or confirmed, and therefore may still be subject to change by the Chinese authorities.***

### **The Countdown to Commencement of the AML**

It is hoped that the finalized implementation regulations relating to the AML's concentration provisions will be published shortly, to ensure a level of certainty regarding the scope of AML's merger control regime. However, M&A is just one of several key areas of business activity regulated under the AML. Given the slow pace of development thus far, it seems unlikely that implementation regulations will be published soon to clarify important issues in relation to the other aspects of the AML, and to further explain the scope of the existing broad prohibitions relating to monopoly agreements and abuse of market dominance.

Nonetheless, once the AML commences on August 1, 2008, companies with operations or sales in China will need to proceed with compliance endeavors even in the absence of such guidance. To do so, they will need to engage in many of the same considerations and assessments regarding market power, and the impact of their conduct on market competition, that they currently undertake in respect of activities in more mature antitrust jurisdictions like Europe and the US. However, they will need to realize that the AML will prohibit many practices that have previously been common in China or are considered legal in Europe and/or the US. In some cases, consultation with the relevant Chinese authorities may be appropriate to determine whether planned conduct would create an unacceptable risk of liability.

To assist in understanding the new law's scope and to keep you updated on the compliance and

enforcement impacts arising from the law's enactment, Mayer Brown has developed a resource site that will be continuously updated with articles and other information as the issues around China's Anti-Monopoly Law evolve. You can view our "China's Anti-Monopoly Law" Resource Page at: <http://www.mayerbrown.com/chinaantimonopolylaw/index.asp>.

For information about the firm, please visit [www.mayerbrown.com](http://www.mayerbrown.com).

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