

Update on Antitrust Legislative Development in China

In the nearly 10 years since the introduction of the Anti-Monopoly Law (AML) in 2008, China's antitrust regime has developed and matured and is now one of the most important regulatory frameworks alongside the US and EU regimes. In this legal update, we highlight a number of anticipated changes to the key antitrust legislative instruments and rules that are expected to come in the near future.

Anti-Monopoly Law

The AML, being the main piece of antitrust legislation in China, is set to be amended for the first time in a decade. In September 2017, a number of seminars and workshops have been held by the antitrust enforcement agencies to discuss revisions to the AML and although the structure of the AML is not expected to change, there are likely to be some important amendments to supplement the current law and to clarify certain areas that have caused confusion in enforcement.

It is contemplated that the amendments will seek to establish a pre-review mechanism for monopolistic conduct (akin to an application for exemption available in certain jurisdictions) and to formally legalise the Fair Competition Review System, which is designed to regulate the potential abuse of administrative power by government agencies that could result in anti-competitive effect and will hold local level government officials accountable for such abuse. A definition of the concept of "control", which is particularly important in the context of merger control (see below), is also expected to be included in the amended legislation. In addition, it has been proposed that the statutory penalty for failure to notify a notifiable concentration, currently capped at RMB 500,000, would be increased.

These suggested amendments are still subject to changes and a research report on the amendments is set to be produced by the Anti-Monopoly Commission by the end of this year.

Merger Control

On 8 September 2017, MOFCOM (Ministry of Commerce) released revised draft merger review measures ("Draft Measures") for public comments. As compared with the first draft circulated in July this year, the revised draft contains fewer changes (the number of clauses reduced from 70 to 54). The Draft Measures seek to consolidate the various rules and regulations relating to the review of concentration of undertakings in China and introduce a number of important changes to the existing rules and regulations, which are summarised as follows.

CONTROL

The Draft Measures provide that voting rights and the ability to influence the appointment of senior management, as well as the approval of budget and strategic planning should be taken into consideration in the determination of control or decisive influence. The list of factors relevant to the analysis of control as currently stated in the guiding opinion on the notification of concentrations between business operators published by MOFCOM in 2014 has been incorporated into the Draft Measures (such as the purpose of the transaction, the change in shareholding structure, and historical voting pattern at shareholders meeting, etc). These would be welcome changes as they provide clarity and additional guidance in analysing whether a transaction involves an acquisition or change of control.

INTER-DEPENDENT TRANSACTIONS

The Draft Measures also clarify an uncertainty regarding the treatment of inter-dependent transactions, which currently the rules are silent on. It is now provided that where an undertaking acquires control or imposes decisive influence over the other undertaking through several consecutive or parallel transactions that are linked in law (*de jure*)

or in fact (*de facto*), these transactions will be treated as one concentration. It is, however, not specified in the Draft Measures the time limit within which the transactions have to take place in order to be considered as one concentration.

TURNOVER CALCULATION

There are two noticeable changes in the Draft Measures as compared to the current rules regarding turnover calculation. Firstly, the relevant turnover of an undertaking will now comprises the turnover of entities it controls or exercises decisive influence *at the time of filing*, and exclude the turnover of entities that it no longer controls or exercises decisive influence over *at the time of filing*. Hence, undertakings may have to make adjustment to figures contained in their audited financial statements when calculating turnover in the threshold analysis. Secondly, it is stipulated that the turnover of an entity jointly controlled by the undertakings concerned in a concentration shall be apportioned equally among themselves, though it is silent as to whether adjustment should be made with reference to the respective shareholding held by each party. Unfortunately, the Draft Measures do not distinguish between control for turnover calculation purpose and the concept of control to determine whether a transaction qualifies as a concentration under the AML.

INVESTIGATION OF CONCENTRATIONS FALLING BELOW NOTIFICATION THRESHOLD

The Draft Measures set out a new procedure for MOFCOM to investigate concentrations that do not meet the filing threshold. With this clarification of the procedure MOFCOM may be prepared to initiate more investigations, such as the September 2016 MOFCOM investigation into the deal between Uber and Didi Chuxing, which the parties claimed it fell outside of the notification thresholds.

WITHDRAWAL AND REILING OF SIMPLE CASE

Under the latest draft, MOFCOM may revoke a simple case status under the following circumstances: (i) the filing parties withhold important information or provide false and misleading information; (ii) third parties contest with supporting evidence that the concentration has or may have the effect of eliminating or restricting

competition; or (iii) MOFCOM discovers there are major changes in the condition of the concentration or competition in the relevant market. It also clarifies for the first time the procedure for the transfer from simple case to normal case: under the Draft Measures revoked simple cases are to be withdrawn and refiled with MOFCOM as a normal case.

The public consultation period for the Draft Measures has ended and it is expected that the new measures will take effect by the end of this year.

Anti-Unfair Competition Law

On 4 September 2017, the Law Committee of the National People's Congress (NPC) released a second draft of the amendments to the Anti-Unfair Competition Law (AUCL) for public consultation. Once finalised, this will represent the first amendments ever made to the AUCL since it entered into force in 1993. As compared to the first draft amendments submitted by the State Council to the NPC in early 2017 and the several earlier versions circulated for public comments prior to legislative readings, the current draft contains much less changes to the current AUCL. We set out below in summary some of the major changes to the AUCL as reflected in the latest draft.

COMMERCIAL BRIBERY

The current AUCL prohibits business operators from practicing bribery by using money, property or other means to sell or buy commodities. The implementation of such provision by the different local Administration for Industry and Commerce (AIC) has reportedly caused significant confusion in the business community. The latest draft amendments seek to clarify the scope by restricting the prohibition of commercial bribery through money, property or other benefits in order to obtain business transaction opportunities or other competitive advantage to 4 categories of entities or individuals. These categories can be summarised as individual employees, entrusted agents, government authorities, state-owned enterprises, government officials and other entities or individuals with power to influence a transaction. It is noteworthy that the latest draft amendments do not prohibit bribery of a business counterparty, which was expressed to be prohibited under the earlier draft. This may reflect a change from the current enforcement practice,

where, for example, the payment of a “display fee” or sponsorships to a business counterparty may not be considered to fall within the scope of prohibition under the revised AUCL.

ONLINE UNFAIR COMPETITIVE BEHAVIOUR

The amended AUCL will include new provisions regulating online anticompetitive conduct. Business operators are prohibited from using technical measures to impact user choice or other measures to hinder or hamper other business operators’ provision of network products or services.

TIE-IN SALES

In the earlier draft amendments it was proposed that business operators should be prohibited from forcing consumers to unwillingly purchase bundled products or imposing other unfair terms in the course of selling products. This has raised some concerns as such behaviour when practiced by an entity with a dominant market position is already regulated by the AML. It is also reflected that business operators who do not have a dominant market position should be entitled to decide on their terms of transaction. This provision has eventually been removed from the latest draft.

INVESTIGATIVE POWER

The AUCL is enforced by local AICs and the latest draft amendments have expanded their investigative power. It is now provided that AICs will be able to seal and seize money or property involved in the conduct of unfair competition, and access the bank accounts of business operators who are suspected of committing unfair competitive behaviour. As a balance to these expanded investigation powers, local AICs are required to submit a written report and obtain approval from the head of the particular local AIC before commencing any investigation and exercising their powers in evidence collection. Where seizure of property and inspection of bank accounts are involved, a written report will have to be submitted and approval has to be obtained from the person-in-charge of an AIC at the municipal level.

Concluding Remarks

The antitrust regime in China will be undergoing a number of major changes in the near future. It is important for companies doing business in China to keep abreast of the latest legislative developments since these changes are likely to have significant impacts on business operations. If you wish to know more about any aspect of this update, please feel free to contact us.

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