

# Conduct Rules Under China's Anti-Monopoly Law Throw Out Your Old Rulebook...

The final in a three-part webinar series designed to help clients understand & comply with China's new Anti-Monopoly Law (AML)

John Hickin  
*Partner*

+852 2843 2576

[john.hickin@mayerbrownjms.com](mailto:john.hickin@mayerbrownjms.com)

Andres Font-Galarza  
*Partner*

+32 2 502 5517

[afontgalarza@mayerbrown.com](mailto:afontgalarza@mayerbrown.com)

Gerry O'Brien  
*Senior Associate*

+852 2843 4355

[gerry.obrien@mayerbrownjms.com](mailto:gerry.obrien@mayerbrownjms.com)

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# Agenda

- Key Messages
- General Update - The AML One Year On
- The Conduct Rules
  - Background
  - How the Monopoly Agreement Prohibition Will Be Applied
  - China's Unique Take on 'Abuse of Dominance'
- How To Minimise Risks in a Climate of Uncertainty
- Latest Information & Insights on the PRC Merger Regime

# Key Messages

- This is a unique regime
  - Can't wholly rely on foreign compliance tools
  - Need to be alive to particular PRC sensitivities
- Enforcement of the conduct rules is looming
  - Enforcement likely to proceed notwithstanding unfinished guidance
- Private actions likely to play a significant role in enforcement
  - PRC firms increasingly seeking to bring suits - negotiation leverage tool
  - Handling of cases by the courts will need close monitoring
- Regulators have 'best practice' aspirations
  - But AML text & political climate = a role for industrial policy/protectionism
  - Key is to be able to recognise the deals where sensitivities may arise, and to be proactive in dealings with regulator, potential complainants, etc.

# The Anti-Monopoly Law 1 year On

- The AML commenced 1 August 2008
- Policy debates slowed enforcement in areas other than merger control
  - Division of enforcement responsibilities
  - Application of the law to State Owned Enterprises
  - Role of existing sectoral regulators
- SAIC and NDRC readying enforcement mechanisms
  - Developing implementation regulations & guidelines for the conduct rules
  - Ongoing training of officials
  - Delegation of enforcement responsibilities to provincial levels

# Conduct Rules - Background

- EC model has clearly been influential
  - Familiar broadly worded prohibitions dealing with horizontal and vertical restraints, and abuse of dominance
  - BUT: we're a long way away from getting the kind of detailed guidance or enforcement policies that supplement analogous prohibitions in the US & EU
- Major concerns:
  - While key officials are striving to adhere to international norms, a role for industrial policy and ideological considerations is hardwired into the AML:
    - purpose of "promoting healthy development of the socialist market economy"
    - M&A review requires assessment of "national economic development" impacts
    - Export cartels permitted, SOEs partially-exempt, etc.
  - Impact: Majority of cases should bear some resemblance to 'best practice', but a case-by-case risk of other factors coming in to play
  - More generally, risks due to regulatory inexperience & reliance on 'superficial' analysis vs the economic rigour now guiding enforcement in mature regimes

# How the Monopoly Agreement Prohibition will be Applied

- Cartels and competitor co-operation ("horizontal monopoly agreements")
  - Cartels a significant problem; domestic firms now 'guided' to reform
  - Lingering reluctance to impose fines due to corruption & perception that real problem is 'excessive competition' (no comfort for foreign firms)
  - Treatment under the AML?
    - Clearly prohibited: bid/price-fixing, market partitioning, output restrictions
    - Main unresolved issues:
      - *Per se* unlawful?
      - Prohibition on competitors 'limiting development of new technology'
      - How will parallel conduct be treated?

# How the Monopoly Agreement Prohibition will be Applied

- Vertical restraints ("vertical monopoly agreements")
  - Minimum or specific resale price maintenance
  - Application to exclusive territories & exclusive dealing?
- Joint ventures?
  - The possible impact of the BHPB/Rio Tinto JV:
    - Proposed alignment between EU approach to full & partial function JVs?
    - Will the case trigger enforcement in respect of monopoly agreements?

# China's Unique Take on 'Abuse of Dominance'

- Historical context
  - The treatment of dominance has developed compared to previous laws
- New prohibition more closely aligned with EU competition model
  - Assessment of 'dominance' reflects international norms – but some 'legacy' anomalies
  - Rebuttable dominance presumptions based on market share
  - Other key assessment issues:
    - International concerns about treatment of IP under the prohibition recognised by the officials
    - (Note that pre-existing laws in China catalogue the kinds of conduct that the Chinese authorities have indicated they will focus on re IP abuses)

# China's Unique Take on 'Abuse of Dominance' (cont'd)

- Exploitative abuses
  - Unfair high or low pricing
    - Initial proposals to apply a formula to identify unfair high or low pricing
    - Risk of misapplication by the authorities, and misuse by private litigants?
- Exclusionary abuses Note 'valid reasons' defence
  - Predatory pricing
    - Applies to below-cost prices, but no guidance on concepts such as cost measures
    - Currently no focus on recoupment, and no defence of 'matching competitor prices'
  - Refusal to deal
    - A form of the 'essential facilities' doctrine to be applied - a concern re IP?
    - Includes a Supplier offering a Purchaser (P) prices that prevent P trading profitably
  - Tying/bundling
    - Mixed bundling now targeted
  - Discriminatory pricing & terms
    - Justifications explained in draft rules - ambiguous & scope for misapplication

# How to Minimise Risks in a Climate of Uncertainty

- Risks
  - Investigations based on complaints, regulator initiatives (dawn raids)
  - Financial penalties (minimum fines?), confiscation of illegal gains
  - Private actions
- Identifying where proactive adjustments are required
  - Risk management vs wholesale changes to contracts/arrangements
- Recognise the likely enforcement priorities
  - Cartels / bid-rigging
  - Conduct impeding 'national economic development'
    - Dominant foreign firms
    - IP-reliant and state-controlled/guided sectors
    - Competing with emerging PRC firms / SOEs / time-honoured brands
  - Sectors with sophisticated PRC competitors & trade associations

# Latest Information & Insights on China's Merger Regime

- Lingering uncertainties/ambiguities: an avenue for avoiding the regime?
- Clearance rates promising, but concerns re transparency & info requests
- Three key decisions and their implications
  - MOFCOM will set its own timetables for review (despite AML formalities)
  - Focus on portfolio effects/leveraging (more in common with EU than US)
  - Consultation (MOFCOM & industry) is crucial, as is planning for remedies
- Prospects for the coming months
  - Special rules for the banking and financial sector?
  - IP-specific guidelines

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