

## China Publishes Revised Draft Rules Explaining Key Anti-Monopoly Law Provisions

China's antitrust regulators have published revised drafts of three implementation rules explaining aspects of the enforcement approach that will be applied to key Anti-Monopoly Law ("AML") 'conduct rule' prohibitions.

Public consultation is continuing in relation to these drafts, and while this process continues it is expected that regulatory enforcement of the conduct rules will remain limited. However, the drafts may impact the approach China's courts take to AML private action cases (which are progressing, notwithstanding the lack of regulatory enforcement) and the latest changes to the drafts reveal new insights into the enforcement approach and methodology that may eventually be adopted by China's Anti-Monopoly Enforcement Authorities.

On 25 May 2010, the Anti-Monopoly and Anti-Unfair Competition Bureau of the State Administration for Industry and Commerce ("SAIC"), published on its website several revised draft rules relating to the AML. Specifically, the revised drafts were:

- Draft Rules of Administrative Authority for Industry and Commerce on Prohibition of Monopoly Agreements ("Draft Monopoly Agreement Rules"); and
- Draft Rules of Administrative Authority for Industry and Commerce on Prohibition of Abuse of Dominant Market Position ("Draft Dominance Rules"); and

- Draft Rules of Administration Authority for Industry and Commerce on Prohibition of Abuse of Administrative Powers to Eliminate and Restrict Competition ("Draft Administrative Monopoly Rules")

Each of the revised draft rules expand on general prohibitions in the AML, and provide some detail about the methodology the Chinese authorities will apply when determining if a business operator (or, in the case of the Draft Administrative Monopoly Rules, a governmental authority) is in breach of those prohibitions. Additionally, the revised Draft Monopoly Agreement Rules and Draft Dominance Rules elaborate on the brief non-exhaustive list of examples of relevant unlawful agreements or activities that is contained in each of the AML Articles establishing the prohibitions, and provide further guidance on the circumstances in which business operators may be able to justify or raise defences for agreements or conduct that would otherwise fall foul of the prohibitions.

A number of the latest refinements to the rules bring them more into line with the enforcement approach taken to analogous prohibitions in mature jurisdictions such as the EU and US. However, the rules (like the AML prohibitions they correspond to) remain open-ended and will be capable of wide interpretation by the Chinese regulators, and thus it remains to be seen how closely the actual enforcement approach taken by the Anti-Monopoly Enforcement Authorities will align with international best practice.

In this legal update, we summarise the key changes the Chinese authorities have made in revising the Draft Monopoly Agreement Rules and Draft Dominance Rules, and provide thoughts on what impact these latest developments may have on the application of China's antitrust regime in the months ahead.

## Draft Monopoly Agreement Rules

Our legal update summarising the prior version of the Draft Monopoly Agreement Rules can be found [here](#).

<http://www.mayerbrown.com/publications/article.asp?id=6749&nid=10353>

Many of the changes in the latest draft are general refinements and do not appear to signal significant modifications to the enforcement methodology that the Chinese authorities will apply regarding the AML's prohibition of horizontal (i.e. between competitors) and vertical (i.e. between trading partners) monopoly agreements.

However, there are several noteworthy developments.

Firstly, the authorities have removed text that appeared in the previous draft of the rules and which indicated that the prohibition of vertical monopoly agreements could render unlawful certain agreements in which one business operator (i.e. a manufacturer) restricted another business operator (i.e. a distributor) from operating outside a designated geographic market, or from trading with certain other businesses. This is significant, as it suggests China's competition authorities may be reluctant to examine such restraints in vertical arrangements (such as distribution and supply contracts) unless the party imposing the restraint holds a dominant market position - in which case the AML prohibition regarding that matter will apply. Indeed, the Draft Dominance Rules now have more to say on this issue, as explained in the next section of

this update. Secondly, there are significant changes to the leniency provisions in the draft rules. Specifically, text in the previous draft which applied tiered penalty discounting to business operators that report participation in a cartel (and provide relevant information to the Chinese authorities about it) has been modified. Now, while the draft rules still provide that a successful and 'first in time' leniency applicant will avoid regulatory penalty under the AML, the extent of penalty discount available to successful 'second in time' and 'third in time' leniency applicants will be at the discretion of the regulators rather than automatically set at 50% and 30% respectively.

Various other substantive changes have been made to the Draft Monthly Agreement Rule, including the removal of provisions expressly prohibiting various acts of bid rigging or tender manipulation (although such conduct may still be covered by more general prohibitions in the AML and the associated draft rules). Additionally, a number of provisions appear to have been removed in order to avoid unnecessary overlap and duplication with other AML-related implementation rules that have been published in draft or final form.

## Draft Dominance Rules

Our legal update summarising the prior version of the Draft Dominance Rules can be found [here](#).

<http://www.mayerbrown.com/publications/article.asp?id=6687&nid=11164>

The changes made to the latest draft of these rules include expansion of a non-exhaustive list of factors that the AMEAs will consider when assessing whether a business operator enjoys a dominant market position, and inclusion of several new examples of the types of behaviour that may qualify as unlawful 'abuse' conduct by a dominant market player.

For example, Article 17 of the AML prohibits a dominant business operator from imposing unreasonable trading conditions, and previous drafts of the rules contained no indication of the kinds of trading conditions that may be considered “unreasonable” beyond imposition of certain ‘product tying’ terms.

The revised draft addresses this issue, noting that unreasonable trading conditions may include the imposition of unreasonable restrictions on payment terms, delivery terms, or the manner of service provision, as well as the imposition of terms that are “irrelevant” to the subject of the transaction (which language perhaps raises more questions than it answers). Additionally, the revised draft states that unreasonable trading conditions will include the imposition of unreasonable restrictions on trading partners (presumably, in this context, distributors or retailers) regarding their sales territory, sales targets, and after-sales service in relation to products.

Further, the draft provides new examples of the kinds of evidence that a business operator should submit to overturn the presumption of dominance that will be raised against them if they meet relevant market share thresholds referenced in the AML (such as where the business operator holds a market share exceeding 50%).

Perhaps the most significant improvement to the draft is the inclusion of more detailed guidance on the possible ‘defences’ to abuse of dominance allegations. Specifically, Article 8 of the Draft Dominance Rules makes references to the various provisions in the AML which specify examples of conduct which will constitute unlawful abuse behaviour if undertaken by dominant firms “without valid justification”, and states that the AIC Authority shall consider the following factors when determining if valid justifications do exist:

- whether relevant activities are engaged in by business operators based on their usual business practice;
- whether relevant conduct has the consequence of eliminating or restricting competition or impairing the interest of consumers; and
- the effect of relevant conduct on economic operation efficiency, public interests and economic development.

This is the first useful guidance that has been provided on the issue of valid justifications for relevant behaviour by dominant business operators, and the use of language referring to efficiencies and effect on consumers is encouraging in terms of alignment with the key aims of competition laws in most mature antitrust jurisdictions.

## Conclusion

Businesses operating in or selling into China will be grateful for the fact that greater guidance in relation to the AML conduct rules is slowly surfacing, permitting more developed compliance initiatives and staff training. Additionally, it is heartening to see clear improvements to the AML-related implementation rules through ongoing public consultation.

The latest public consultation period in relation to the revised draft rules ends on 7 June 2010.

It is hoped that the rules may then be swiftly finalised and adopted to allow for more certainty regarding the manner and methodology of AML enforcement - although to date rapid progress in finalising guidance documents has not been a notable feature of the AML conduct rule regime.

It is expected that regulatory enforcement of the AML conduct rules will remain limited until the rules are finalised, although sporadic enforcement of

the various China laws containing competition-related provisions may be expected to continue in this period (as occurred when the several rice noodle manufacturers in Guangxi province were punished for price-fixing activities in March, primarily under the *Price Law* and *Rules of Administrative Sanctions on Illegal Activities Relating to Price*).

Additionally, AML-related private action hearings which have proceeded over the past 18 months notwithstanding the lack of regulatory enforcement may continue, and the revised drafts may be taken into account by China's Intermediate Courts when they are applying the law in such cases.

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