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September 17, 2007

ANTITRUST ALERT

FIRST ANTI-MONOPOLY LAW ENACTED IN CHINA

After approximately two decades of drafting, the Chinese legislature enacted the first nationwide anti-monopoly law on August 30, 2007. The Anti-Monopoly Law (the Law) goes into effect on August 1, 2008.

The Law applies to monopoly activities that take place in the economic arena within the territory of China. The Law also has extraterritorial reach – it applies to any monopoly activities taking place outside of China that have the effect of eliminating or restricting competition in the Chinese domestic market.

There are three types of monopoly activities that are regulated by the Law: (1) monopoly agreements between business operators, (2) a business operator's abuse of its dominant market position and (3) concentration between business operators that has or may have the effect of eliminating or restricting competition.

The Law prohibits vertical as well as horizontal monopoly agreements. Business operators shall not enter into monopoly agreements that (a) fix or alter the prices of a product, (b) restrict the production or sales quantity of a product, (c) segregate the sales market, or the purchase market for raw materials, (d) restrict the purchases of new technology or new equipment, or restrict the development of new technology or new products, and (e) boycott trades in a collaborative manner. Additionally, the anti-monopoly enforcement authority is empowered to determine if other types of monopoly agreements are prohibited. When supplying any products to other business operators, a business operator shall not fix the prices or set forth the minimum price for resale of the products to a third party.

With regard to abuse of dominant market position by a business operator, the Law specifically refers to six types of activities: (i) selling products at unfairly high prices or purchasing products at unfairly low prices, (ii) selling products at prices that are lower than cost with no proper reasons, (iii) refusing to carry out any transaction with other business operators with no proper reasons, (iv) imposing restrictions on any business operator that such business operator can only carry out transactions with it or with the party designated by it, (v) tying in products without proper reasons or imposing other unreasonable conditions on the transaction, and (vi) implementing differential treatment for transaction counterparties with identical conditions in relation to the terms (such as prices) of the transaction with no proper reasons.

The concentration activities regulated by the Law include (1) merging of business operators, (2) obtaining control of other business operators by means of acquisition of equity or assets, and (3) obtaining control of or imposing determining influence on other business operators by contracts.

While the Law does not set forth the threshold requirements triggering an anti-monopoly filing, it states that the threshold filing requirements will be set forth by the State Council, and as long as a contemplated concentration hits the threshold filing requirements, an anti-monopoly filing is required to be made with the anti-monopoly enforcement authority. Upon the filing, the anti-monopoly enforcement authority will carry out the review in two phases: a preliminary review that may last 30 days and a final review that may last 90 days. The review could be extended to an additional 60 days if it is necessary and decided by the anti-monopoly enforcement authority.

With regard to concentrations by foreign investors, the Law explicitly states that they are additionally subject to national security scrutiny, which is stipulated in other regulations.

The Law also regulates administrative monopoly by restricting government agencies or organizations having public functions from abusing their administrative powers, where abuse is defined as actions that hinder the free movement of products between territorial areas or impose requirements to purchase products they designated.

The Law attempts to regulate monopolies in IP areas as well. Pursuant to the Law, abuse of IP rights by business operators to eliminate or restrict competition is regulated by the Law, while the exercise of IP rights in accordance with the relevant IP laws and regulations shall fall outside of the scope of the law.

With the promulgation of the Law, China will eventually have a relatively complete legal regime regulating monopoly activities by all types of market players. Before the Law, the Chinese legislature enacted the Anti-unfair Competition Law in 1993 and the Price Law in 1997. Under these two laws, certain types of monopolies are regulated (e.g., manipulating price by collusion is prohibited, and public utility companies cannot prevent consumers from purchasing from others than those designated by such public utility companies). However, monopoly activities by private parties and administrative monopoly are not regulated at all (segmenting markets and tie-in products are popular in the Chinese market). Since 2003 the Chinese government has begun to impose a merger control antitrust review regime on mergers and acquisitions by foreign investors of Chinese domestic target companies (see the Regulations of Merger with and Acquisition of Domestic Enterprises by Foreign Investors, issued by the Ministry of Commerce, the State-owned Assets Supervision and Administration Committee, the State Taxation Bureau, the State Administration for Industry and Commerce, the China Securities Regulatory Committee and the State Administration for Foreign Exchange on August 8, 2006). Under these regulations, when a foreign investor contemplates merging with or acquiring a Chinese enterprise, the foreign investor is subject to a pre-merger antitrust filing with the Ministry of Commerce and the State Administration for Industry and Commerce in the case of any of the following situations:

- either party has China annual sales of more than RMB1.5 billion (approximately US$181 million) for the current year
- a foreign investor has acquired more than 10 enterprises in China in the past year in the same trade
- either party has a 20 percent China market share for the current year
- either party will have a 25 percent China market share upon completion of the contemplated acquisition.

In the case of an offshore acquisition, as long as one of the following triggering events arises, the parties to the contemplated merger or acquisition must file a pre-merger antitrust filing with the two Chinese authorities:

- either party owns assets worth more than RMB3 billion (approximately US$362 million) in China
- either party has China annual sales more than RMB1.5 billion (approximately US$181 million) for the current year
- either party (including their affiliates) has a 20 percent China market share for the current year
- either party (including their affiliates) will have a 25 percent China market share upon completion of the contemplated acquisition
- either party will directly or indirectly hold equity in more than 15 “foreign invested enterprises” in China in the same or similar trade.

The Anti-Monopoly Law leaves open certain important issues such as which government agency will be the anti-monopoly law enforcement authority and what are the triggering events of pre-merger antitrust review. In the coming months, these issues will be clarified.

Every foreign investor must now ask whether there is any anti-monopoly issue that it must be aware of before entering into the Chinese market.

CONTACT INFORMATION

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