

China's Anti-Monopoly Law – A New Level Playing Field? Or an Uphill Battle for Foreign Business?

Gerry O'Brien

Senior Associate

JSM

+852 2843 4355

gerry.obrien@mayerbrownjms.com

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Agenda

- Introduction
- Foreign reaction to the introduction of the Anti-Monopoly Law
- Understanding foreign unease about China antitrust
- The main AML-related 'level playing field' concerns
- Are the concerns justified?
- Prospects for a "level playing field"

Introduction

- Potential impact of a new competition law on the business sector:

Welcome:

- A mechanism to challenge monopolistic acts of competitors, trading partners and government bodies
- Potential for some reduced trade costs

Unwelcome:

- Additional compliance, training and business review costs
 - Transaction delays
 - An end to some existing business practices
- However, these apply equally to foreign & domestic PRC firms
 - The threat to a 'level playing field' is the prospect of enforcement of the AML in a manner that is protectionist or favours domestic PRC firms

Foreign reaction to the introduction of the AML

From optimism ...

- "AML should create a level playing field" (Financial Times - 11/09/07)

To caution ...

- "West cautious on Anti-Monopoly Law" (Reuters, 30/08.07)

To alarm ...

- "Anti-Monopoly Law could turn China protectionist" (IFLR, 30/01/08)
- "China's new AML is Anti-competitive" (Asia Economic Institute Exclusives, 21/09/07)
- "Chinese Antitrust: The New Face of Protectionism"? (Huffington Post, 28/11/08)
- "Foreign business: The dreaded AML" (China Watch Weekly Briefing - 25 July, 2008)

Understanding foreign unease about China antitrust

- Perspectives on the role of antitrust law in a socialist market economy
 - Significant state ownership and state control of economic actors
 - Promotion of "national champions" and monopolies
- Perceived focus of foreign firms
 - Public perception of foreign firm dominance
 - Concerns expressed by key Ministries
- Limited application of antitrust provisions that existed prior to the AML, & spotlight on deals involving foreign firms
- Judiciary - Expertise & experience in the field of antitrust
- How committed is China to familiar antitrust norms?
 - The perceived problem of "excessive competition"

The main AML-related 'level playing field' concerns

Purpose

- Development of the socialist market economy

Merger review

- Extraterritorial application & role of industrial policy
- Impact of national security review

Conduct rules

- Defences and exemptions favouring Chinese firms

IP rights

- Compulsory licensing orders, and use of the AML by Chinese firms as a shield to IP-infringement claims

Regional blockage

- Ineffective mechanisms to curb administrative monopolies?

Unknown unknowns

- Other

Are the concerns justified?

Purpose of the AML

- What is the role and significance of Article 1?
- Are the stated purposes inconsistent with international antitrust norms?

Merger review

- Scope of extraterritorial application
- Consideration of national economic development issues
- Precedent and international parallels for 'national security review'
- The InBev / Anheuser-Busch conditional clearance decision

Are the concerns justified? (cont'd)

Conduct rules

- Article 15 - An opening for export cartels?
- Article 7 - Application of the AML to State Owned Enterprises
- Is China paying the price for adopting international 'best practice' principles from Day 1?
- Significance of the forthcoming implementation rules

Are the concerns justified? (cont'd)

IP Rights

- Alignment of the AML with international antitrust laws on IP
- Are there legitimate grounds for foreign anxiety?
- Impact of Articles 55, 13(iv)

Administrative Monopoly

- How significant an issue is administrative monopoly for foreign firms?
- Will Chapter V prove effective?

Prospects for a level playing field

- Foreign firms will face difficulties and "uphill battles", but most difficulties will be shared with domestic PRC firms
- AML text is largely neutral in terms of application of the key prohibitions to both domestic PRC & foreign firms
- Some present concerns may be allayed by forthcoming implementation rules & guidelines
- Despite domestic pressures, there is evidence of a strong commitment by AMEAs to balanced enforcement & heeding constructive foreign input
- There is a need for sensitivity to the impact of undue pessimism, combined with vigilance & guidance by influential international bodies

Q & A



Thank you

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