

LEGAL UPDATE

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New Anti-Monopoly Rules Take Effect in Early 2011

On January 4, 2011, the National Development and Reform Commission (the “NDRC”), the government body in charge of price-related monopoly agreements, abuse of dominance in the market place and of administrative monopoly, published additional anti-monopoly rules - the *Rules on Anti-Pricing Monopoly* and the *Rules on Execution Procedures of Anti-pricing Monopoly*. Only three days later, the State Administration for Industry and Commerce (the “SAIC”), the body in charge of all non-price monopoly activities, published the *Rules of Administration for Industry and Commerce on Prohibition against Monopoly Agreements*, the *Rules of Administration for Industry and Commerce on Prohibition against Abuse of Dominant Market Position* and the *Rules of Industrial and Commercial Administration for Banning the Abuse of Administrative Power to Eliminate or Restrict Competitive Activities*.

These rules further implement and clarify the Anti-Monopoly Law of 2008 (the “AML”) and are aimed at cracking down on companies who price-fix, abuse their status as market-dominators and seek to exclude competition. The new rules will come into effect on February 1, 2011 and this article will provide a brief overview of some of their key provisions.

(A) Monopoly Agreements

The AML states that certain “*fixing or changing of commodity prices*” and other non-price related monopoly agreements are prohibited. Monopoly agreements are defined under the AML as agreements, decisions or other concerted conduct between companies with a competitive relationship which are designed to eliminate or restrict competition.

The NDRC’s *Rules on Anti-Pricing Monopoly* provides further clarity on the interpretation of the AML by detailing eight types of commercial behavior among competitors that will be construed as horizontal price-monopoly agreements and these include:

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- fixing or changing the price level, price range, fees, discounts or other expenses of a commodity;
- using an agreed price as the basis of a transaction with a third party;
- reaching agreements with regard to the standard formula upon which prices are calculated;
- reaching agreements that provide that without the consent of other parties of the agreements, the price cannot be changed;
- disguisedly fixing or changing the price by other means; and
- any other business behavior, which is judged by the NDRC as being a price monopoly agreement. This acts as a “catch-all” provision which could be perceived as placing too much discretion in the hands of the regulators.

The SAIC’s *Rules on Prohibition against Monopoly Agreements* specify that a monopolistic agreement may be an agreement or decision, in written or oral form, or other concerted acts. In assessing “*other concerted acts*”, elements which may be considered include: (i) whether there was consistent market behaviors between business operators; (ii) whether business operators engaged in intentional liaison or information exchange; and (iii) whether business operators can provide a reasonable explanation for any consistent behavior.

The SAIC’s new rules specifically prohibit the following horizontal monopolistic agreements:

- restricting the production quantity via means such as limiting production output, fixing the output, or stopping production, or restricting the production quantity of a particular type or model of a commodity;
- restricting the sales quantity of a commodity via means such as refusing to supply such goods or limiting the volume of commodities for sale, or restricting the sales quantity for a particular type or model of a commodity;
- splitting the sales or procurement market into territories, categories or specified suppliers;

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- restricting the purchase or development of new technologies or new equipment by limiting the purchase, use, rental, investment, development or rejecting the use of such new technologies, processes or equipment;
 - boycotting transactions by jointly rejecting to supply, sell or purchase a commodity to or from a specific business operator or by restricting the transactions between a company and their competitor;
 - any other non-price related monopolistic agreements as are identified by the SAIC.

The SAIC's new rules also prohibit an industry association from organising, calling upon or pushing forward business operators, within the industry, to carry out prohibited monopolistic agreements.

(B) Abuse of Dominant Market Position

The AML defines a “*dominant market position*” as being a “*market position held by a business operator having the capacity to control the price, quantity or other trading conditions of commodities in the relevant market, or to hinder or affect any other business operator entering the relevant market.*”

The NDRC's *Anti-Price Monopoly Rules* provide more clarification as to the interpretation of the prohibited acts of abuse as listed in the AML:-

- When reviewing whether a dominant operator is selling at an “*unfairly high price*” or an “*unfairly low price*”, factors to be considered may include a review of the peer commodity price, normal price increase or decree margin based on the production cost, and some other factors.
- When reviewing whether a dominant operator is selling below costs, “*justifiable reasons*” for sales below costs include new product promotions, sale of a seasonal commodity or lapse of product validity term.
- When reviewing whether a dominant operator is disguisedly refusing to trade by setting the sale price too high or the purchase price too low, “*justifiable reasons*” for such actions include situations where a counterpart has bad credit records, or where the same category or a substitute commodity are available.

- When reviewing whether a dominant operator is restricting a counterpart so it can only transact with itself or with designated operators, through price discounts or any other means, “*justifiable reasons*” for such actions may include ensuring the product quality, maintaining a brand image, improving service quality, materially reducing cost, enhancing efficiency and benefiting the consumers.

The SAIC’s *Rules on Prohibition against Abuse of Dominant Market Position* provide some detailed provisions regarding non-price related abuse of market dominance. For instance, decreasing, delaying or suspending dealings, refusing new dealings and setting conditions which make deals impossible are all deemed to be acts which could constitute a refusal to trade with a counterpart without justifiable reason. In addition, the term “*tying products and imposing unreasonable trading conditions*” has been expanded to include acts such as disobeying transaction practice and consumer habits, unreasonably restricting the means of payment and delivery, and restricting selling territories, objects and after-services.

The SAIC’s new abuse of dominance rules also set out some detailed factors to be considered in assessing whether a business operator has a market dominant position.

These five rules, published by the NDRC and the SAIC, assist in making the vague articles of the AML practical and enforceable and will be significant in the implementation of the AML. It appears that both the NDRC and the SAIC are more prepared to enforce the AML in a meaningful manner in relation to monopolistic agreements and abuses of market dominance.

For any company undertaking substantial business activities in mainland China and wishing to be compliant with the Chinese anti-monopoly law, a comprehensive review of their company policies and business practices is recommended to reduce the regulatory and legal risks of being caught entering into agreements or conducting concerted behaviors that are monopolistic, or carrying out business activities that may be treated as an abuse of (if applicable) its market dominant position.

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