Charltons - China Law Newsletter - 05 October 2007

[online version](http://www.charltonslaw.com/landmark-prc-anti-monopoly-law-passed/)

# Landmark PRC Anti-Monopoly Law Passed

The Standing Committee of the National People's Congress passed the Anti-Monopoly Law ("AML") on 30 August 2007. After 13 years of legislative efforts, China has formally adopted its first comprehensive competition law. The new AML covers a range of anti-competitive practices including monopoly agreements and the abuse of dominant market positions and administrative powers. It also introduces new merger control provisions. It will come into effect from 1 August 2008. The purpose of this note is provide a summary of the key provisions.

## Monopoly Agreements

The new AML prohibits horizontal monopoly agreements between competitors. The list of prohibited horizontal monopoly agreements includes agreements between competitors to fix prices, limit production or sales volumes, divide the sales or raw materials procurement markets, or conduct boycott transactions. In addition, agreements restricting the purchase or development of new technology are prohibited under the AML.

Vertical monopoly agreements that fix resale prices or set minimum resale prices are also prohibited. For both horizontal and vertical monopoly agreements, the AML also contains a "catch all" category prohibiting any other monopoly agreements as determined by the Anti-monopoly Law Enforcement Agency.

A number of exemptions are available under Article 15 of the AML. These include exemptions for agreements to improve technology or research and development, raise product quality, reduce costs, improve efficiency, unify product specifications or standards, or enhance the competitiveness of small or medium-sized businesses. Exemptions are also available for agreements that benefit the public interest (such as agreements providing for energy conservation, environmental protection or disaster relief), agreements designed to mitigate the effects of economic recession and agreements to safeguard the interests of foreign trade or foreign economic cooperation.

## Abuse of Dominant Market Position

The AML prohibits the abuse of dominant market positions. Under Article 17, a business operator has a "dominant market position" if it can control the price or quantity of products or other trading conditions in the relevant market or hinder the entry of other operators to that market. The AML sets out a list of factors for determining a dominant market position including the market share of the business operator and the competitive situation in the market, the ability to control the sales or raw materials market, and the degree of difficulty for other businesses to enter the relevant market.

There are also rebuttable presumptions that a business has a dominant market position based on market share. Under Article 19, a business with a market share of 50 per cent. or more is presumed to be dominant on its own. Two businesses with a joint market share of two thirds or more, or three businesses with a joint market share of three quarters or more, are presumed to be collectively dominant. However, a business with a market share of less than one tenth will not be presumed to be collectively dominant.

The AML sets out a non-exhaustive list of prohibited abusive conduct which includes the sale of products at an unfairly high price or below cost, tie-in sales, refusing to trade and other discriminatory treatment with respect to price or other trading conditions. The abuse of administrative powers by government departments and authorised organisations to curb competition is also prohibited.

## Merger Control

Merger and acquisition ("M&A") control provisions are contained in the AML under the heading "Concentration of Undertakings". The new provisions apply to a "concentration of business operators" which is defined in Article 20 to include (a) mergers of business operators; (b) a business operator's acquisition of control of other business operators by means of an acquisition of equity or assets; or (c) a business operator's acquisition of control of, or its ability to exert a "decisive influence" over, other business operators by way of a contract or any other means.

Article 21 of the AML requires a concentration reaching the threshold of declaration prescribed by the State Council to be notified in advance to the Anti-Monopoly Enforcement Agency. The transaction may not be completed until clearance has been given. The agency can either prohibit the concentration or approve it subject to conditions if it considers that the concentration will or may eliminate or restrict competition.

The relevant notification threshold is not set in the AML. It will instead be set by the State Council at a later stage. It should also be noted that the new provisions apply to acquisitions by domestic companies as well as to acquisitions by foreign investors.

The review process may be carried out in two phases. The Anti-monopoly Law Enforcement Agency must complete a preliminary review within 30 days of receipt of the relevant documents. At the end of that review, the agency will determine whether to conduct further examination. The time limit for a further examination is 90 days, but this may be extended by up to 60 days in certain circumstances.

## National Security Review

Article 31 requires an additional "national security review" to be conducted where "a foreign investor participates in the concentration of business operations by merging or acquiring a domestic enterprise or by any other means" where "national security" is involved. It is as yet unclear whether this will effectively broaden the checks put in place by the Regulations Concerning the Merger and Acquisition of Domestic Enterprises by Foreign Investors ("M&A Regulations") introduced last year. Under the M&A Regulations, foreign investors are required to obtain regulatory approval if their investment in a domestic company is likely to affect national economic security, involves a "key industry" or may result in the transfer of operating rights of a famous domestic brand.

## Penalties

In the event of infringement of the provisions relating to monopoly agreements and abuse of a dominant market position, the Anti-Monopoly Enforcement Authority can impose a stop order, confiscate illegal gains and impose a fine of up to 10% of the previous year's sales revenue. Where the monopoly agreement has not been implemented, a fine of up to RMB500,000 may be imposed. In the case of a breach of the merger control provisions, the Anti-Monopoly Enforcement Authority can order the relevant parties not to proceed with the relevant transaction or to unwind it. A fine of up to RMB500,000 may also be imposed. If a business voluntarily reports its involvement in a monopoly agreement and cooperates with investigations, the law allows for leniency.

*This note contains a summary only of the principal provisions of the new Anti-Monopoly Law. It does not constitute legal advice and specific advice should be sought in any particular situation.*

**This newsletter is for information purposes only.**

Its contents do not constitute legal advice and it should not be regarded as a substitute for detailed advice in individual cases.

Transmission of this information is not intended to create and receipt does not constitute a lawyer-client relationship between Charltons and the user or browser.

Charltons is not responsible for any third party content which can be accessed through the website.

If you do not wish to receive this newsletter please let us know by emailing us at unsubscribe@charltonslaw.com

**Charltons - China Law Newsletter - Issue 4 - 05 October 2007**