

China in focus

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Contact

For further information,
please contact:

Andrew Halper
Head of China Business Group
+44 20 7919 0764
andrewhalper@eversheds.com

Peter Corne
Managing Director, Shanghai
+86 21 6137 1001
petercorne@eversheds.com

Steve Yu
Partner
+86 21 6137 1002
steveyu@eversheds.com

ANTI-TRUST ALERT

China publishes its first procedural rules on anti-trust investigations

Businesses should prepare themselves for the first wave of anti-trust investigations following the publication of China's first anti-trust procedural rules.

Steve Yu and Charlie Markillie, Eversheds LLP

Last month saw the Chinese State Administration of Industry and Commerce ("SAIC") publish its first guidance on how to establish the existence of monopoly agreements or an abuse of market dominance. Now equipped with its first set of procedural investigation rules SAIC is ready to start taking action against companies that breach China's emerging anti-trust law.

Background

On 5 June 2009, without making a draft consultation document available for public comment first, SAIC published the "Procedural Rules on Investigation and Sanctions by the Administration for Industry and Commerce on Monopoly Agreements and Abuse of Market Dominance" (the "Monopoly and Dominant Position Rules"). As the first procedural rules published by China following the promulgation of the PRC Anti Monopoly Law ("AML"), these new rules focus on the investigative powers that SAIC may use when examining possible monopoly agreements and the sanctions that they may impose under the AML.

The rules will take effect from 1 July 2009 and signal that companies will need to be ready for SAIC investigations into whether they have entered into monopoly agreements or abused a dominant position and will face fines if they have done so.

Jurisdiction

The AML prohibits monopoly agreements and abuse of a dominant market position, and the Monopoly and Dominant Position Rules make it clear that any individual or company can report suspected monopolistic acts to either SAIC or its local branches (“AICs”). However, formal investigations into such behaviour can only be made by SAIC or a Provincial-level AIC that is authorised by SAIC on a case by case basis.

SAIC is responsible for the investigation of monopoly acts that have a significant nationwide impact, and any others cases that it considers appropriate. The Provincial-level AICs will investigate cases that solely or principally take place within their administrative jurisdictions. No further delegation of investigation power can be made by the Provincial-level AICs.

Investigative powers

Following written approval by the chief official of the SAIC or a Provincial-level AIC, investigators may take the following action:

- enter business premises or other places relevant to the suspected business;
- question the management or other interested parties or related individuals;
- read and make copies of any relevant documents, agreements, account books, correspondence and electronic data;
- seal and seize relevant evidence; and
- investigate company bank accounts.

At least two AIC officials must be present during any investigation and they must be able to present their certificates to show their authority to carry out the investigation.

In addition to the on-site investigations, investigators may request a suspected company to supply in writing a broad range of information on its business activities, including accounts for the last three years and also respond to any questions raised by the investigators.

A fine of up to RMB 100,000 or criminal liabilities may be imposed if the investigated company rejects or resists the investigation, refuses to provide information, provides false information or documents, or conceals or destroys evidence.

Suspension of an investigation

A company facing investigation by SAIC or a Provincial AIC may lodge an application to apply for the suspension of the investigation. The application must specify the following:

- a statement of the facts and possible effects of the suspected violation;
- measures for eliminating the effects of the suspected violation; and
- a schedule for fulfilling its commitments and an undertaking to comply with this schedule.

When deciding whether to accept any application the AIC involved will consider the nature, duration, aftermath and social effects of the suspected act. If the application is accepted and the investigation is suspended then the investigated company must report to AICs on its progress in implementing its commitment within the prescribed time limit.

The SAIC or AICs will supervise implementation of the commitments and when it is complete the SAIC or AICs will prepare a written decision to terminate the investigation. A Provincial-level AIC must report to the SAIC before making a decision to cease or terminate an investigation.

If a company fails to honour the undertaking it gave, or if there is a material change to the basis for suspending the investigation, or it is found to have provided incomplete, untrue or misleading information in its application, then the SAIC or Provincial-level AICs may resume the investigation.

Leniency

The SAIC or a Provincial-level AIC may, at its discretion, exempt any company from a sanction or reduce the sanction applied if the company actively reports a monopoly agreement or provides significant evidence of the existence of a monopoly agreement. "Significant Evidence" is defined as being evidence that is enough to initiate an investigation or determines the existence of a monopoly agreement. However, this exemption is not available to the organisers of a monopoly agreement.

As detailed in our May 2009 Issue of this Anti-trust Alert, the draft SAIC Rules on Prohibiting Monopoly Agreements contain provisions on the relief available to companies that provide "significant evidence" of a monopoly agreement. The exercise of any leniency by SAIC is dependant on the timing of any report by a business operator and the importance of any information it provides.

SAIC will use the following tariff for applying discounts to the penalties imposed on businesses who report monopoly agreements:

When informant reports to SAIC	Discount of penalty imposed
First to report a monopoly agreement on its own initiative	100 per cent
Second to report a monopoly agreement on its own initiative	50 per cent
Third to report a monopoly agreement on its own initiative	30 per cent

Penalties

If the SAIC determines that the business operator has engaged in a monopoly agreement then it may impose an administrative penalty. Under the AML the administrative penalties available are between one and ten (10) per cent of a company's turnover in the previous year.

SAIC must report cases of great significance to the Anti-Monopoly Commission of the State Council before making a decision regarding the punishment. A Provincial-level AIC must always report to SAIC before imposing any penalty. Companies who are not satisfied with the administrative penalty may apply for an administrative review or bring an administrative lawsuit.

The Monopoly and Dominant Position Rules do not apply to investigations of price-related monopoly agreements or abuse of dominance, which will be regulated by procedural rules to be published by the National Development and Reform Commission.

Comment

Since the publication of the AML in August 2008, there has been a number of high-profile cases filed with the Chinese anti-trust authorities. The parties that were accused of breaching the law include both giant State owned companies and well known multinational companies. However, none of these cases have been investigated due to the delay in preparing the procedural investigation rules. This had caused China's emerging anti-trust law to be seen as a "paper tiger" and lead many to doubt the credibility and competence of the Chinese anti-trust authorities.

Now with the promulgation of these investigation procedures, businesses will soon begin to see the first wave of anti-trust investigations in China. On site investigations and substantial fines are now a real possibility; it could be a costly oversight for a business not to take China's anti-trust law seriously.

To ensure compliance with the new anti-trust law, it is advisable for multinational companies to take a pro-active and preventive approach in identifying and managing the anti-trust risks of its business operations in China. Such steps could include carrying out training with its local management and internal anti-trust audits on its Chinese subsidiaries. This will allow senior management and in-house counsels to examine the existing business activities, contracts and practices of the company, identify the areas greatest at risk under the new anti-trust regime, and prioritise further work to remove or reduce these risks.

Steve Yu is a partner in the Shanghai office of Eversheds LLP. Charlie Markillie is a trainee solicitor of Eversheds LLP and is presently working in the Shanghai office. Eversheds LLP was named Anti-trust Firm of the Year – PRC Region in 2008 by leading regional legal publication Pacific Business Press.

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