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China eliminates antitrust overlaps in Anti-Unfair Competition Law

Adrian Emch (Hogan Lovells, China) · Thursday, November 30th, 2017

On 4 November 2017, the Standing Committee of the National People's Congress passed the amendments to China's Anti-Unfair Competition Law (AUCL). The amendments will take effect from 1 January 2018.

This is the first time that the AUCL has been revised since its entry into force in 1993. As part of the amendments, the AUCL's antitrust provisions were deleted.

Antitrust overlaps undone

The AUCL is a complex statute with rules pertaining to various legal fields, including antitrust, intellectual property and commercial bribery.

In the antitrust field, the AUCL prohibited certain types of conduct:

- predatory pricing, tying, and the imposition of unreasonable conditions on trading partners;
- exclusive dealing and similar conduct by public utilities;
- certain types of anti-competitive government conduct; and
- bid-rigging.

Over the past years, these provisions added significant complexity to Chinese antitrust assessments, since the above-mentioned types of conduct are also subject to prohibitions in the Anti-Monopoly Law (AML), China's main competition law in force since 2008. For example, predatory pricing and tying are outlawed by the AML if the company involved has a dominant position, while the AUCL did not require a showing of dominance.

With the amendment, the relevant AML provisions have now been deleted and the AML has become the sole standard for assessing the legality of these types of conduct.

Relative dominance clause not enacted

During the process of revising the AUCL, several drafts were circulated, including in the public

domain. One early draft proposed to include a brand-new prohibition on companies in a “relatively advantageous position” from engaging in certain conduct deemed abusive, such as exclusive dealing or charging excessive fees. This new clause seemed to have been inspired by the “relative dominance”/“superior bargaining power”-type of provisions in German, Japanese and Korean competition laws.

However, in response to the invitation for comments on the draft AUCL amendments, many stakeholders in China spoke out very critically against the new draft clause. In the end, the clause did not make it into the AUCL amendment.

New Internet unfair competition clause

While abuses of relative dominance did not make it into the final AUCL amendment, another new clause did: the Internet unfair competition clause.

Article 12 of the amended AUCL prohibits certain types of conduct by Internet players which are deemed to constitute “unfair competition.” The key idea behind the conduct listed is that an Internet company is prohibited from obstructing legitimate activities of competitors. By way of example, an ad block company may not be allowed to interfere technically in the broadcast of another company’s online videos, skipping the ads before or during the videos.

That said, to a large extent, Article 12 only codifies existing case practice by courts throughout China, and hence is not a novelty as such.

Conclusions

The AUCL amendment has an overall positive impact on Chinese antitrust law and practice. With the elimination of the overlaps between the AUCL and the AML, the benchmarks for antitrust compliance assessment will be more coherent and easier to follow. The fact that the “relative dominance” clause was not enacted avoids a (perhaps excessive) compliance burden on companies.

With the successful amendment of the AUCL, the focus of the Chinese antitrust community is now shifting back to the enforcement of the AML – and the legislative process of amending the AML itself, a process which was launched a few months ago.

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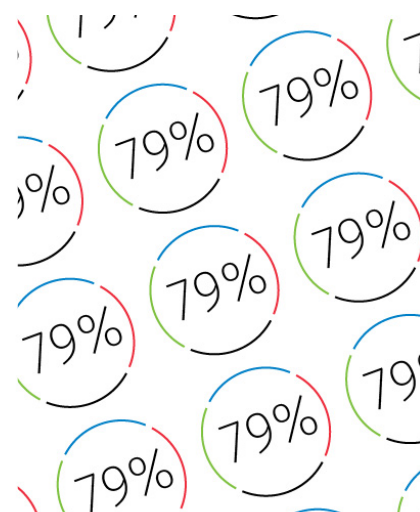
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