Paul|Weiss

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China's Draft Anti-Monopoly Law

Paul, Weiss has recently obtained a draft of the Anti-Monopoly Law (the "AML") of the People's Republic of China ("PRC" or "China") dated February 26, 2002. We attach for your information the Paul, Weiss translation of the draft AML, and provide in this memorandum an initial analysis of the draft AML and other PRC statutes related to anti-monopoly review and regulation. The current draft is apparently not the final version, but as the AML has been in the drafting process since 1994, we believe it represents something close to the principles that will be reflected in the legislation if and when it is finally adopted.

I. Outline of the AML

A. General

The AML governs three types of activities: (a) "activities restricting competition in market transactions" within China, (b) the "abuse of administrative powers to restrict competition" within China, and (c) activities outside China that violate the AML and that restrict or affect competition within China.[1] In general, it regulates the activities of "operators," defined in Article 4 to mean legal persons and other organizations and individuals engaged in the production and operation of commodities or services. Article 4 further states that the term "commodities" under the AML includes services. Finally, "market" for purposes of the AML means a geographical area within which operators compete with respect to a given commodity over a certain period of time.[2]

A key element of the AML is its provision in Chapter 6 for the establishment of a new government agency charged with enforcement. The AML does not specifically identify this anti-monopoly authority (the "AMA") by name, but states that it will be established under the State Council. This seems to indicate that it will be a new body and not, for example, the Fair Trade Bureau of the State Administration of Industry and Commerce (the "SAIC"), the body currently responsible for enforcing existing laws and regulations that deal with the prevention of monopolistic behavior. This is because of the importance in Chinese anti-monopoly policy of challenging anti-competitive practices of government departments (such as the Ministry of Information Industry and the General Administration of Civil Aviation) that are both business operators and regulators. A mere bureau within the SAIC would simply not have the political clout to perform its task; only a body directly under the State Council has any hope of doing so.

The substantive provisions of the AML are set forth in Chapters 2 through 5. As discussed in more detail below, these chapters cover respectively (a) the prohibition of agreements to restrict competition, (b) the prohibition of abuse of market dominance, (c) the requirement of

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1 Article 2.

2 Article 3.

approval for business combinations that could have an anti-competitive effect, and (d) the prohibition of administrative monopolies. The term "monopoly" is defined in Article 3 to mean the following activities that eliminate or restrict competition, damage other operators' or customers' rights and interests and jeopardize social and public interests: (a) monopoly agreements between operators, (b) market domination, (c) large-scale combinations and (d) administrative monopolies. Remarkably, however, the AML does *not* put this defined term to any use except in Article 49 (an article of uncertain significance relating to private litigation). Instead, every type of prohibited or regulated activity is described in specific language.

Chapter 7 sets forth liability for violations, and Chapter 8 spells out a few miscellaneous matters, such as a limited exemption for the exercise of intellectual property rights.

As will be discussed further below,[3] the AML does not exist in a legislative vacuum. As we have discussed, it is one of several items of legislation, both current and proposed, that deal with competition and unfair trade practices generally. First, China's Law Against Unfair Competition (the "LAUC"), while not prohibiting the formation of monopolies or the attainment of a particular market share, does restrict certain kinds of anti-competitive behavior. Second, the Price Law of the PRC ("Price Law") restricts certain anti-competitive acts such as manipulating market prices, dumping and engaging in discriminatory pricing practices. Third, the Rules Regarding the Merger and Division of Foreign-Invested Enterprises (the "FIE Merger and Division Rules") provide that the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") may convene a hearing to review, and ultimately to approve or prohibit, a merger involving a foreign-invested enterprise ("FIE") that could have anti-competitive effects. Finally, a set of draft Interim Measures on Equity Participation in or Purchase of Assets of Domestic Enterprises by Foreign Investors (the "Draft Foreign Purchase Measures") provides that an approval authority must convene a hearing to review proposed acquisitions by *foreign investors* (FIEs are not mentioned) that could have an anti-competitive effect. It is important to bear in mind that what is permissible under any one of these regulations may well be forbidden under another.

B. Prohibition of Agreements to Restrict Competition

The AML prohibits operators from conspiring, by contract or any other means, to conduct the following activities: (a) fixing, maintaining or changing commodity prices, (b) rigging bids, (c) restricting production or sales quantities of commodities, (d) dividing up sales or raw material procurement markets, (e) restricting the purchase of new technology or new equipment, (f) jointly undertaking boycotts, and (g) engaging in other activities that restrict competition.[4] Operators who violate this prohibition are subject to penalties of up to RMB 5 million *yuan* (US$600,000) and damage claims from operators or consumers damaged by the violation.

Upon application, the AMA may grant a limited-term waiver with respect to certain prohibited agreements if the applicants can prove that such agreements fall into one of the following four categories: (a) joint activities by operators to upgrade technology, improve product quality, enhance efficiency, reduce costs, unify commodity specifications or models or jointly research and develop commodities or markets; (b) joint activities by operators to enhance operational efficiency and competitiveness; (c) joint activities by operators to prevent significant decline of sales or obvious overproduction in order to adapt to market changes; or (d) joint

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[3] See Section II below.

[4] Article 8.

activities by operators such as dividing work or coordinating development in order to promote the rationalization of production and operations.

In general, agreements not to compete are acceptable in China where two or more investors that are going to invest jointly in a project agree not to compete with the project.

C. Prohibition of Abuse of Dominant Market Position

Market domination *per se* is not prohibited under the AML; instead, the AML seeks, in Chapter 3, to prevent *abuse* of a dominant market position. Market domination is deemed to exist with respect to one or more operators under any one of the following circumstances: (a) sole operation in a given market such that it is difficult for other operators to enter such market, (b) occupation of an advantageous position in a given market such that it is difficult for other operators to enter, or (c) lack of meaningful competition between two or more operators in a given market.

The AML further states that market domination may (but apparently need not) be inferred when one of the following circumstances exists such that it is difficult for other operators to enter the market or for existing operators to expand their market share: (a) one operator's market share in a given market has reached one-half or more, (b) two operators' combined market share in a given market has reached two-thirds or more, or (c) three operators' combined market share in a designated market has reached three-fourths or more.[5] This provision would appear to offer a safe harbor where an operator's market share was less than the stipulated fraction. Furthermore, the wording appears to require the existence of *both* one of the listed circumstances *and* difficulty thereby caused to other operators, although it is not clear that the Chinese AMA would parse the language so closely. The AML does not provide guidance, however, as to how the finding of difficulty would be made. This and other critical issues on which the AML is silent (*i.e.*, how a specific market will be defined and isolated) will presumably be addressed by regulations promulgated by the State Council or the AMA once it is established.

Once market domination is found to exist, the substantive prohibitions of Chapter 3 come into play.

- Market dominators may not sell their products[6] at prices that are "higher than normal". This simple sentence carries with it the potential for very complex proceedings. The AML does not define "normal" or provide standards for the determination of normal prices; clearly, this is a technical issue that will have to be addressed by AMA regulation.

- Market dominators may not sell commodities at prices lower than normal in order to exclude competitors. Here again, it will be necessary for the AMA to conduct proceedings to determine what constitutes a normal price; note the additional element of intent that is required here.

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[5] The Chinese text is ambiguous as to whether the relevant fractions mean "X or more" or "more than X". Obviously, the difference is very slight.

[6] In Chinese, *chanpin* ( ). Probably the defined term "commodity" (*shangpin*), which includes services, was intended, and this is simply a drafting error. There seems no reason not to use the defined term here.

- Market dominators may not treat similarly situated trading counterparties differently. This prohibition is worded as a broad ban on price discrimination. Needless to say, the issue of what constitutes "similarly situated" leaves much room for debate.

- Market dominators may not, without sound reasons, refuse to sell commodities to willing purchasers.

- Market dominators may not, with the aim of eliminating fair competition from other operators, force a transaction "by resorting to threats or other unjustified means."

- Market dominators may not require the sale of commodities or impose unreasonable trading conditions on counterparties in a transaction.

- Market dominators may not require distributors to sell their own commodities and not to sell the commodities of other operators.

- Market dominators may not, in supplying commodities to wholesalers and retailers, impose resale price restrictions.

As can be seen, the fact of market domination makes unlawful a number of acts that could be lawful if undertaken by operators without a dominant market position. Operators who violate the prohibitions of Chapter 3 are subject to penalties of up to RMB 10 million *yuan* (US$1.2 million) and damage claims from operators or consumers damaged by the violation. The AML further states that criminal liability shall be sought where the act in question constitutes a crime, but this appears to be nothing more than a tautology; the AML does not appear to amend China's existing criminal statutes in any way, and therefore criminal liability for any act would appear to be remain a matter determinable without reference to the AML.

D. Requirement of Approval for Large-Scale Combinations

The AML provides in Chapter 4 that certain types of combinations ("Large-Scale Combinations") require the approval of the AMA. A "combination" ( ) is deemed to occur when (a) two or more enterprises merge, whether or not a third enterprise results; (b) an enterprise gains control of another through a share acquisition; or (c) two or more enterprises form a relationship of controlling and controlled enterprise through agreements or a joint venture. Please note that in a previous draft version of the Anti-Monopoly Law, the term "combination" also included the acceptance or lease of all or a significant portion of another company's assets or business. The scope of the term "combination" has been narrowed in the latest version to remove such activity.

If the business enterprises involved in a combination have a combined annual sales turnover that exceeds the threshold determined by the AMA, then the combination is deemed a Large-Scale Combination requiring AMA approval to proceed. The current draft of the AML does not specify the threshold and leaves it to the AMA to fix through subsequent regulation. Please note that the previous drafts defined Large-Scale Combinations requiring approval as any of the following: (a) combinations that result in an entity the market share of which is one-third or more, (b) combinations in which the market share of one of the parties to the merger is one-fourth or more, or (c) combinations in which the annual sales volume of one of the parties to the

merger is above the threshold set by the AMA. In the latest draft, both categories (a) and (b) have been eliminated, while category (c) has been retained.

The AMA has 90 working days from the date of receipt of an application with regard to a Large-Scale Combination to decide whether to grant approval. It can prohibit a Large-Scale Combination if the combination will (a) result in or intensify market domination, (b) restrict or exclude market competition, (c) hinder the healthy development of the national economy or (d) damage social and public interests. It is impossible to say how the latter two standards might be applied in practice. They seem to be wild cards that would permit the AMA to reject any combination to which it objects.

The penalty for unapproved combinations ranges from an order to restore the status quo ante to a fine of between RMB 100,000 *yuan* (US$12,000) and RMB 10 million *yuan* (US$600,000). It is not clear whether civil liability to consumers and operators under Article 50 would apply.

E. Prohibition on Administrative Monopolies

One of the most important sections of the AML is Chapter 5, which covers anti-competitive acts engaged in by governmental authorities. It is probably fair to say that it is concern over this phenomenon, not over monopolies obtained simply through economic power, that has been the driving force behind the formulation of the AML, while at the same time it is precisely the AML's intent to regulate such behavior that has engendered the intense political opposition that has kept it on the drawing board for so many years.

Unlike the economies of the former Soviet Union and Eastern European countries, China's pre-reform socialist economy did not, by and large, feature large, monopolistic state-owned enterprises that needed to be dismantled upon the demise of socialism. Instead, Maoist policies of self-reliance, as well as the difficulties of running a truly centralized economy in an economically backward nation, led to what has been described as a cellular economy, in which each province or even sub-provincial region strove to have its own relatively complete set of industries. The result is that China at present arguably has too little, not too much, concentration of industry. The central government is currently promoting industrial consolidation and enterprise mergers to address this perceived problem and to avoid bankruptcies and job losses.

Thus, monopolies stemming from economic power are rare in China and are not of prime concern to those promoting the AML. They are concerned instead with the common phenomenon of government departments acting both as regulators and as market participants, with the predictable result that they regulate in their own favor and use their administrative power to suppress competition. The key issue for the future is whether the AMA will have sufficient political clout and political will to deal with administrative monopolies. If so, it may be inclined to devote relatively little time to economic monopolies, since political monopolies, including local trade barriers, are at least at present a far more serious problem for the Chinese economy. If the AMA does not have sufficient power to address administrative monopolies, then it may naturally be expected to justify its existence by paying close attention to actual and potential economic monopolies. The AMA as well as domestic interests may also seek to use the AML to restrict competition by foreign enterprises and FIEs).

Chapter 5 specifically prohibits several types of governmental actions by local governments and line ministries:

- Requiring persons to buy or sell the commodities of designated operators;
- Establishing regional trade blockades by restricting the inflow or outflow of commodities (Article 33);
- Restricting market entry in the industrial or service sector controlled by the government department in question;
- Compelling local or departmental (*i.e.*, administratively subordinate) operators to combine to commit the acts of monopolistic conspiracy prohibited in Article 8; and
- Formulating regulations that restrict fair competition.

Unlike the other prohibitions in the AML, violations of Article 33 respecting regional trade blockades are *not* subject to action by the AMA.[7] Instead, the government department superior to the one undertaking the prohibited action is supposed to take appropriate measures. Whether it will actually do so is doubtful; China's constitutional structure already allows such actions, and if superior authorities found regional trade barriers sufficiently objectionable as to want to remove them, they have at least the nominal power to do so. This toothless provision has all the hallmarks of a provisional compromise; it may change in subsequent drafts.

The AMA may take action in the event of other violations of Chapter 5, although only by an order to cease the offending action. It does not have the power itself to rescind, in law or in fact, the offending action or measure. The individual responsible for the violation is to be given an administrative sanction (*i.e.*, a professional punishment such as demotion), but this is something over which the AMA has no control. Whether aggrieved individuals may sue for damages caused by violations of Chapter 5 is not clear. Article 49 provides in general terms for a remedy for operators and consumers injured by "monopolistic acts", and Article 3 defines "monopoly" to include the acts described in Chapter 5. Given the historical reluctance of the courts to take on difficult or controversial civil law cases, however, plaintiffs may find it difficult to vindicate any but the most clearly defined rights under the AML.

F. The AML and Intellectual Property

There is an obvious conflict between the monopoly rights granted pursuant to intellectual property law and the monopolistic behavior condemned by the AML. This conflict is addressed, although not really resolved, in Article 56, which states in full:

> The reasonable acts of an operator exercising rights in accordance with the laws protecting intellectual property rights such as the copyright law, the trademark law and the patent law shall not be restricted by this Law. However, if the abuse of intellectual property rights results or may result in material restriction or exclusion of competition, this Law shall apply.

The AML provides no guidance, however, on how the meaning of "reasonable" or "abuse" shall be determined.

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[7] See Article 47, which mentions Article 34 as the relevant article. This is probably an error for Article 33.

II. Related Regulations

This Section will discuss the other regulations listed at the end of Section I.A that bear on the regulation of monopolies and anti-competitive behavior.

A. Law Against Unfair Competition

The LAUC does not restrict the formation of monopolies or companies that have a certain market share, but rather restricts certain anti-competitive behavior. However, its reach in this respect is not broad. Public utilities and other operators *with a legally authorized monopoly position* may not require others to purchase the products of designated operators in order to squeeze out fair competition.[8] This rule would not seem to apply to such practices on the part of ordinary operators who may or may not have economic monopolies.

The LAUC also prohibits below-cost sales (dumping) with the intent of driving out competition, but excepts a few standard situations such as sales of perishables, liquidation sales, etc.[9]

Finally, the LAUC prohibits sellers from forcing buyers to buy products they do not want or otherwise attaching unreasonable conditions.[10] While this rule is not directed specifically at monopolies, in practice it is only in uncompetitive markets that it will ever be possible for a seller to make buyers accept "unreasonable" conditions; in a competitive market buyers could simply go elsewhere.

Enforcement of the LAUC is largely administrative. Other operators injured by violations do have a right to sue for damages; consumers, on the other hand, have no standing at all under the law.

B. Price Law

The Price Law restricts a number of anti-competitive acts such as colluding to manipulate market prices and selling below cost (other than in the standard excepted situations such as sales of perishables or liquidation sales) in order to drive out competition. As with the LAUC, enforcement is largely administrative. Consumers and operators have a right to sue for damages upon violation only where the damages are caused by paying *too much* for a product or service. Competing operators do not appear to have any right to sue for damages caused, for example, by below-cost sales (dumping).

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8 LAUC, Article 7.

9 LAUC, Article 11.

10 LAUC, Article 12.

C. FIE Merger and Division Rules

1. Applicability

The FIE Merger and Division Rules are the most comprehensive legislation in the area of merger transactions in China. In the context of mergers, the FIE Merger and Division Rules provide that in certain instances in which the merger may have anti-competitive effects, MOFTEC may convene a hearing to review this issue. In the FIE Merger and Division Provisions, the term "merger" ( ) is narrowly defined as the merger of two or more companies into one company.

2. The General Approval Process and Relevant Authority

The FIE Merger and Division Provisions stipulate a complex and time-consuming approval process. The original approval authority is responsible for approval of any merger involving an FIE. If there are two or more original approval authorities involved, the approval authority where the post-merger surviving or newly-established company is located is responsible for approval. If the total investment of the merged company exceeds the jurisdictional limit of that approval authority, it shall submit the case to its superior approval authority or to MOFTEC if necessary. In addition, before submitting the application for merger, the company to be liquidated after the merger shall seek pre-approval of its proposed liquidation from its original approval authority.

After the proper approval authority receives a complete application for the merger, it shall issue a preliminary written opinion within 45 days either permitting or prohibiting a proposed merger. The final decision by the approval authority will be issued only after all companies involved in the merger obtain clearance from their respective creditors pursuant to the prescribed procedures. The FIE Merger or Division Rules do not specify the basis on which such approval authority shall approve or deny the merger application.

3. Anti-Monopoly Related Principles and Procedures

Article 5(a) of the FIE Merger and Division Rules provides that mergers and divisions shall comply with Chinese laws and regulations, shall follow the principles of voluntariness, equality and fair competition and shall not jeopardize social and public interests and the legitimate interests of creditors. The principle of fair competition is not defined in the FIE Merger and Division Rules, but we believe the language set forth in Article 26(b) (see below) elaborates this principle. We believe further that significant meaning may be imparted to it through its use in the LAUC and the AML.

Article 26(b) of the FIE Merger and Division Rules specifically states that if the examination and approval authority with respect to a merger is MOFTEC, and MOFTEC determines that the merger tends towards monopolization of the industry or that the merged company might control the market for particular merchandise or a particular service and thus obstruct fair competition, it may convene a hearing of relevant authorities and organizations to hear evidence from the companies to be merged and to investigate those companies and the market concerned. In that case, the time limit for approval may be extended from 45 days to 180 days.

Please note the following points with respect to these review provisions:

First, *only MOFTEC*, not any local approval authority, is granted investigative power. This distinction is made, we believe, because only mergers resulting in companies of a large size that would require approvals from MOFTEC are likely to be able to monopolize the market.

Second, the standard threshold is not the "actual" monopoly or market control. Although the provision stops short of stating what MOFTEC may do after its investigation and hearing, it may reasonably be inferred that as long as MOFTEC determines that the merger might lead to industry monopolization or market control and will obstruct fair competition, MOFTEC may require the parties to revise the proposed merger scheme, impose certain restrictions on the scope of business of the merged company, or simply deny approval for the merger. We believe that the basic principles set forth in the AML will be used by MOFTEC as guidelines for its investigation.

Third, in making its final determination, we believe that MOFTEC will solicit the opinions and comments of various government departments, including the State Development Planning Commission, State Economic and Trade Commission (the "SETC"), Fair Trade Bureau of SAIC, ministries in charge of the industry concerned, and the relevant industrial association. The latter is of a quasi-government nature.

D. Draft Foreign Purchase Measures

The Draft Foreign Purchase Measures provide for yet another procedure designed to prevent anti-competitive behavior. Unlike the AML, however, the Draft Foreign Purchase Measures apply only to transactions undertaken by foreign investors (understood to include, in the case of asset purchases, FIEs). The Draft Foreign Purchase Measures provide that when foreign investors purchase shares or assets of Chinese domestic enterprises (*i.e.*, Chinese entities that are not FIEs), they must not create monopolies or tendencies toward monopolies, impair fair competition or harm the interests of consumers. Although the Measures do not define "monopoly," we believe it is reasonable to assume that a definition similar to that of the AML would apply.

Where a foreign investor purchases shares or assets of a Chinese domestic company and (a) the amount of the single transaction in question is more than US$30 million, (b) the aggregate amount of such purchases within one year is more than US$100 million, (c) the number of domestic projects affecting the same industry within one year is more than ten, (d) as a result of the purchase the foreign investor or its affiliates has a market share of one-third or more in China, or (e) one of the parties to the purchase has a market share of one-fourth or more in China, the examination and approval authority (*i.e.*, MOFTEC or its local counterpart, depending upon the size of the transaction in question) is authorized to convene hearings with relevant government departments, institutions and interested parties. It is to issue a ruling within 60 working days after the commencement of the investigation. The ruling may approve the transaction, approve it subject to revision of the terms, or prohibit it.

Furthermore, similar hearings may be held even when none of the above conditions is met if the examination and approval authority so decides, in its discretion, upon the request of domestic competitors, government departments or industrial associations, or because it deems that a significant market share or "other important factors that affect market competition" are involved.

In contrast to the above discretionary hearings, the Measures call for mandatory review of a merger or acquisition plan, to be submitted to MOFTEC by the parties, under any of the following conditions: (a) a party has assets of at least RMB 300 million *yuan* in the PRC, (b) a party has annual sales of at least RMB 500 million *yuan* in the PRC market, (c) the market share of the foreign investor and its affiliates in the PRC will reach at least one-third as a result of the merger or acquisition, or (d) the merger or acquisition will cause the foreign company to participate, directly or indirectly, in the equity of more than 15 FIEs in the same domestic industry.

As with the discretionary hearings, MOFTEC is to issue a ruling within 60 working days after the receipt of complete documentation regarding the transaction. The ruling may approve the transaction, approve it subject to revision, or disapprove it. An exemption for an otherwise prohibited combination may be obtained where the foreign investor can show lack of anti-competitive effect or countervailing social benefits.

III. Differential Application Issues

As the above discussion has shown, in general China's regulations regarding anti-competitive practices apply equally to wholly Chinese-invested domestic enterprises, FIEs and foreign companies. The FIE Merger and Division Rules and the Draft Foreign Purchase Measures are, of course, exceptions, and apply respectively to FIEs and foreign investors.

Contrary to what is commonly assumed by both Chinese and foreign analysts, China's WTO membership does *not* carry with it a general obligation to provide national treatment to foreign investors and FIEs. Thus, China is generally free to apply different rules to purely domestic enterprises, FIEs and foreign companies in any area except where it would constitute a violation of national treatment with respect to trade in goods or with respect to specific commitments that China has made with respect to services. While China may not treat *imported* automobiles, once they have lawfully crossed the border, less favorably than domestically-manufactured automobiles, there is no reason why it may not have one set of rules about anti-competitive practices by purely domestic automobile manufacturers and another set of rules about anti-competitive practices by FIE automobile manufacturers.

IV. Conclusion

As noted above, the text of the AML discussed in this memorandum is a draft that is unlikely to be enacted within the next several months. While we believe that the general principles are likely to remain largely intact in any legislation, specific provisions may well change. We anticipate, however, that most of the controversy will lie in the provisions regarding administrative monopolies, and not in those governing economic monopolies. In particular, we would note that while the shape of United States antitrust law bears the unmistakable stamp of populist suspicions of large corporations *per se*, there is simply no such cultural background to Chinese anti-monopoly law. Indeed, articles have appeared in the press striving to explain that the AML does *not* set out to banish large size *per se*. Moreover, China's current top leadership – engineers almost to a man – have made it virtually a national priority for China to have several giant corporations of international scale, because they believe that size is the key to international competitiveness. On the whole, therefore, China's anti-monopoly policy may be expected to be significantly less suspicious of large size *per se* than that of other countries, particularly the United States, although any such tolerance of large size will not necessarily extend to FIEs.

Anti-Monopoly Law of the People's Republic of China
(Discussion Draft)

February 26, 2002

Chapter 1 General Principles

Article 1. (Purposes of Legislation)

This Law is formulated in order to stop monopolies, safeguard fair competition, protect the legitimate rights and interests of consumers and operators and social and public interests and promote the healthy development of a socialist market economy.

Article 2. (Scope of Application)

Unless otherwise specifically provided by law, activities restricting competition in market transactions in the territory of the People's Republic of China (the "PRC") shall be governed by this Law.

The abuse of administrative powers to restrict competition in the territory of the PRC shall be governed by this Law.

Activities outside the PRC that violate this Law and restrict or affect market competition in the territory of the PRC shall be governed by this Law.

Article 3. (Monopoly)

The term "monopoly" as referred to in this Law shall mean the following activities that eliminate or restrict competition, damage the rights and interests of other operators or consumers and jeopardize social and public interests:

(1) agreements, decisions or other coordinated activities among operators;

(2) abuse of market domination status by operators;

(3) enterprise combinations resulting in over-consolidation (or over-consolidation of enterprises); or

(4) abuse of administrative powers by governments and their departments.

Article 4. (Relevant Definitions)

The term "operators" as referred to in this Law shall mean legal persons and other organizations and individuals engaged in the production and operations of commodities or services (the term "commodities" as referred to hereinafter shall include services).

The term "given market" as referred to in this Law shall mean a geographic area where operators compete over a certain commodity during a certain period of time.

Article 5. (Government Duties)

The people's governments at all levels and their departments shall take measures to create a good environment and conditions for fair competition.

Article 6. (Enforcement Authority)

The competent anti-monopoly authority under the State Council shall exercise its functions and powers, stop monopolies and safeguard fair competition.

Article 7. (State Encouragement and Supervision by Society)

The State encourages, supports and protects the social supervision by all organizations and individuals of monopolies.

Civil servants of the State must not support or provide cover for monopolies.

Chapter 2 Prohibition of Monopoly Agreements

Article 8. (Prohibition of Monopoly Agreements)

No operators shall conspire, by contract or any other form, to undertake any of the following activities that restrict competition:

(1) fixing, maintaining or changing commodity prices;

(2) rigging bids;

(3) restricting the production or sales quantities of commodities;

(4) dividing up sales markets or raw material procurement markets;

(5) restricting the purchase of new technologies or new equipment;

(6) jointly undertaking boycotts; or

(7) other agreements that restrict competition.

Article 9. (Exemption for Agreements)

Operators may apply to the competent anti-monopoly authority under the State Council for an exemption in connection with the following agreements among themselves if they are beneficial to the development of the national economy and the social and public interests:

(1) joint activities by operators to upgrade technologies, improve product quality, enhance efficiency, reduce cost, unify commodity specifications or models or jointly research and develop commodities or markets;

(2) joint activities by small and medium-sized enterprises to enhance operational efficiency and competitiveness;

(3) joint activities by operators to prevent significant decline of sales or obvious overproduction in order to adapt themselves to market changes; or

(4) joint activities by operators such as dividing work and coordinating development in order to promote rationalization or specialization of production and operations.

Article 10. (Filing of Agreements)

Operators entering into an agreement contemplated in Article 9 hereof shall submit the following documents within 15 days from the date of execution of the agreement:

(1) the agreement;

(2) the application; and

(3) the basic information of the operators that are parties to the agreement.

Article 11. (Approval of Agreement)

The competent anti-monopoly authority under the State Council shall, within 30 working days from its receipt of the required documents, decide whether to approve or not to approve the agreement submitted by operators. If no reply is given within the 30 working days, it shall be deemed as having approved the agreement.

When the competent anti-monopoly authority under the State Council approves an agreement, it may attach restrictive conditions.

The approval granted by the competent anti-monopoly authority under the State Council shall provide for a valid term.

Article 12. (Cancellation of or Amendment to Approval of Agreement)

If any of the following circumstances occurs after an agreement is approved, the competent anti-monopoly authority under the State Council may cancel or amend the approval, or order a cessation or correction of the relevant activities:

(1) there is a significant change in the economic situation;

(2) the grounds upon on which the approval was granted no longer exist;

(3) an operator violates its obligations under the conditions attached to approval;

(4) the approval has been granted based on false information provided by an operator; or

(5) the power to grant the exemption was misused.

Under the circumstances listed in (3), (4) and (5), the cancellation shall have a retrospective effect.

Article 13. (Announcement of the Approval)

Decisions made by the competent anti-monopoly authority under the State Council in accordance with Articles 10 and 12 shall be published in the designated periodicals.

Chapter 3 Prohibition of Abuse of Market Domination Status

Article 14. (Prohibition of Abuse of Market Domination Status)

No operator shall abuse its market domination status and obstruct the operations of other operators so as to remove or restrict competition, or take any action that will harm the rights and interests of the consumers.

Article 15. (Market Domination Status)

The term "market domination status" as referred to in this Law refers to one or more operators controlling a given market. Under any one of the following circumstances, an operator may be deemed to have market domination status:

(1) sole operation in a given market making it difficult for other operators to enter such market;

(2) advantageous position in a given market [making it] difficult for other operators to enter such market; or

(3) although two or more operators subsist in a given market, there is no competition between them of any practical significance.

Article 16. (Inference of Market Domination Status)

Market domination status may be inferred if the market share of an operator in a given market falls under one of the following circumstances, making it difficult for other operators to enter the market or making it difficult for other existing operators to expand the market:

(1) an operator whose market share reaches half or more;

(2) two operators whose combined market share reaches two-thirds or more; or

(3) three operators whose combined market share reaches three-fourths or more.

Article 17. (Prohibition on Monopolistic High Prices)

No operator having market domination status shall sell its products at prices higher than normal prices in a given period.

Article 18. (Prohibition on Predatory Pricing)

No operator having market domination status shall sell its commodities at a price lower than production costs in order to exclude its competitors.

Article 19. (Prohibition on Different Treatment)

No operator having market domination status shall treat trading parties under the same conditions differently in respect of the prices or other trading conditions of any commodity supplied so as to constitute price discrimination or other differential treatment.

Article 20. (Prohibition on Refusal to trade)

No operator having market domination status shall, without sound reasons, refuse to sell commodities to purchasers, particularly to retailers or wholesalers.

Article 21. (Prohibition on Forced Transactions)

No operator having market domination status shall force a transaction by resorting to threats or other unjustified means in order to eliminate fair competition from other operators.

Article 22. (Prohibition on Compulsory Sale of Commodities or Imposition of Additional Unreasonable Trading Conditions)

No operator having market domination status shall conduct compulsory sale of commodities or impose additional unreasonable trading conditions against the will of the counterparties in transactions.

Article 23. (Prohibition on Exclusive Trading)

No operator having market domination status shall demand distributors to sell the commodities of such operator and not to sell commodities of other operators in a given market.

Article 24. (Prohibition on Restriction on Reselling Price)

No operator having market domination status shall, in supplying commodities to wholesalers and retailers, restrict the reselling price of such commodities.

Chapter 4 Control of Enterprise Combinations (Control of Enterprise Consolidations)

Article 25. (Meaning of Enterprise Combination (Consolidation)

The term "combination" ("consolidation") of enterprises as referred to in this Law refers to:

(1) one or more enterprises merging with an existing enterprise, or two or more enterprises forming a new enterprise by combination;

(2) an enterprise gaining control over another enterprise by the acquisition of the latter's shares; or

(3) two or more enterprises forming a relationship of control and being subject to control by entering into an agreement or joint venture or by other means.

Article 26. (Filing a Report on Enterprise Combinations (Consolidations))

When an operator enters into a combination (consolidation), it shall apply to the competent anti-monopoly authority under the State Council for approval if the annual sales volume of the operators participating in such combination (consolidation) exceeds the ceiling stipulated by the competent anti-monopoly authority under the State Council.

The standard for the annual sales volume of the operator participating in such combination (consolidation) as provided for in the previous clause shall otherwise be stipulated by the competent anti-monopoly authority under the State Council.

Article 27. (Content of the Report)

When an operator enters into an enterprise combination (consolidation) as stipulated in Article 26 hereof, it shall submit the following documents to the competent anti-monopoly authority under the State Council:

(1) the particulars of the operator, including the name, manufactured or distributed products, number of the staff and workers, total assets, net assets, and sales volume, profits and income tax in the preceding operating year of the enterprise;

(2) the financial statements and operating report of the operator for the preceding accounting year;

(3) information regarding the production or operating costs, sales price and output of the relevant commodities of the operator;

(4) the impact of the implementation of the enterprise combination (consolidation) on the national economy and social interest;

(5) the reasons for the enterprise combination (consolidation); and

(6) other documents stipulated by the competent anti-monopoly authority under the State Council.

Article 28. (Approval of the Report)

The competent anti-monopoly authority under the State Council shall make its decision within 90 working days after receiving the submitted materials stipulated in Article 27.

When the competent anti-monopoly authority under the State Council grants approval with respect to en enterprise combination (consolidation), it may attach additional conditions.

Article 29. (Conditions for the Approval)

The competent anti-monopoly authority under the State Council shall not grant its approval if in any one of the following circumstances an enterprise combination (consolidation) would:

(1) generate or strengthen the market domination status of an operator;

(2) remove or restrict the market competition;

(3) obstruct the healthy development of the national economy; or

(4) jeopardize the social interest.

Article 30. (Special Approval)

The competent anti-monopoly authority under the State Council may grant special approval if an enterprise combination (consolidation) benefits the national economy and the social and public interests.

Article 31. (Change or Cancellation Decision)

The competent anti-monopoly authority under the State Council may revoke its approval, change the content of its approval, or order the cessation of a combination (consolidation) of enterprises and a restoration of the original circumstances if any of the following occurs:

(1) there is a significant change in the economic situation;

(2) the grounds upon which the approval was granted no longer exist;

(3) an operator violates its obligations under the conditions attached to approval; or

(4) the approval has been granted based on false information provided by an operator.

Chapter 5 Prohibition on Administrative Monopoly

Article 32. (Compulsory Trading)

The government and its departments shall not abuse their administrative authority to compel other people to buy or sell commodities of designated operators, or to restrict other operators in carrying out proper business activities.

Article 33. (Regional Monopoly)

The local people's governments at various levels and their departments shall not abuse their administrative authority to restrict the inflow of commodities from other parts of the country for sale in the local market or restrict the outflow of local commodities to markets in other parts of the country by using the following means:

(1) compelling other people to do business in, purchase or use only local commodities or to accept the services only of local operators;

(2) setting up check points on roads or at stations, ports, airports or the borders of the administrative region to prevent the inflow of commodities from or outflow of the local commodities to other parts of the country;

(3) creating discriminatory fees on commodities from other parts of the country, stipulate discriminatory prices or implementing discriminatory fee standards;

(4) restricting the inflow of commodities from other parts of the country to the local market by imposing technical requirements and inspection standards for commodities from other parts of the country that are different from those applicable to the same kind of local commodities, or adopting discriminatory technical measures such as redundant inspections or certifications for commodities from other parts of the country;

(5) by using measures exclusively directed at non-local commodities such as exclusive operation, exclusive sale, examination and approval and permit [issuance];

(6) restricting or excluding operators from other parts of the country from participating in tenders in the locality by such means as setting discriminatory qualification requirements and review criteria or by releasing information in violation of the law;

(7) restricting operators from other parts of the country from investing in or establishing branch organizations in the locality or excluding them from doing so by subjecting them to unequal treatment which is different from what the local operators are entitled to, or imposing discriminatory treatment on operators from other parts of the country who invest in or establish branch organizations in the locality; and

(8) undertaking other acts of regional blockade.

Article 34. (Departmental and Sectoral Monopolies)

The government and its departments shall not abuse their administrative authority to restrict operators from entering into the markets of specific industries, and to exclude, restrict or impede market competition.

Article 35. (Compulsory Combination to Restrict Competition)

The government and its departments shall not abuse their administrative authority to compel the combination of local or departmental operators to engage in the acts set forth in Article 8 hereof.

Article 36. (The Provisions Stipulated by the Government and Its Departments Implementing Departmental Monopolies and Regional Blockades or Containing Content for Departmental Monopolies and Regional Blockades)

The government and its departments shall not abuse their administrative authority to prevent fair competition by formulating provisions containing content that restricts competition.

Chapter 6 Competent Anti-Monopoly Authority

Article 37. (Investigation and Handling of Cases)

The competent anti-monopoly authority under the State Council shall exercise its duties and powers independently and in accordance with the law and shall, in accordance

with the law, deal with monopolistic activities that jeopardize fair competition and social and public interests.

Article 38. (Functions)

The competent anti-monopoly authority under the State Council shall perform the following duties and responsibilities:

(1) stipulate anti-monopoly policies and rules;

(2) review matters in this Law that are anti-monopoly related;

(3) make decisions of approval or withholding approval in connection with matters submitted for its approval as set forth in this Law;

(4) carry out investigations on the activities of operators and the status of competition;

(5) carry out investigations on cases in breach of this Law and handle such cases; and

(6) other anti-monopoly matters.

Article 39. (Investigation Responsibility and Authority)

The competent anti-monopoly authority under the State Council in carrying out investigations in accordance with the law may perform the following responsibilities and exercise the following authority:

(1) notify parties and related persons to go to a designated location to state their opinions;

(2) notify the relevant organ, group, work unit or individual to provide accounting books, documents and other relevant materials;

(3) dispatch personnel to the domicile, business premises or other premises of the operator to carry out the investigation;

(4) seal up and seize items or evidence of violations of law and, with the permission of the court, exercise the right to conduct searches; and

(5) freeze bank accounts.

Article 40. (Performance of Duties in Accordance with the Law)

The investigators shall perform their duties in accordance with the law and shall present papers evidencing the performance of the duties. If they fail to do so, persons under investigation may refuse to be investigated.

Article 41. (Administrative Advice)

If the competent anti-monopoly authority under the State Council believes upon initial investigation that there is an act in breach of this Law, it may advise the party in breach of the Law to adopt appropriate measures to remedy the breach.

Article 42. (Announcement of Results of Handling the Case)

The competent anti-monopoly authority under the State Council shall announce the results of its handling of anti-monopoly cases, but it may not reveal information related to trade secrets that it acquired while performing its duties.

Article 43. (Obligations)

Current and former staff members of the competent anti-monopoly authority under the State Council shall not disclose to other persons or illegally use the trade secrets of the operators acquired while performing their duties.

Chapter 7 Legal Liabilities

Article 44. (Penalty for Execution of Agreements Restricting Competitions)

If [an operator] violates the provisions of Article 8 of this Law, the competent anti-monopoly authority shall order it to stop its illegal acts and may impose a fine of up to 5,000,000 yuan.

Article 45. (Penalty for Violation of the Prohibition against Abuse of Market Domination Status)

If [an operator] violates the provisions of Article 17 to Article 24 of this Law, the competent anti-monopoly authority under the State Council shall order it to stop its illegal acts and may impose a fine of up to 10,000,000 yuan. If the acts constitute criminal acts, criminal liabilities shall be pursued in accordance with the law.

Article 46. (Penalty for Unapproved Enterprise Combinations (Consolidations))

If [an operator] violates the provisions of Article 26 of this Law by entering into a combination (consolidation) of enterprises without making an application as required or without obtaining approval after it makes an application therefor, the competent anti-monopoly authority under the State Council may prohibit such enterprise combination (consolidation), order the restoration of the original status within a prescribed time limit, or impose a fine of between 100,000 yuan and 10,000,000 yuan.

Article 47. (Penalties for Violation of the Provisions on Regional Blockade)

If [the government or its affiliated department] violates the provisions of Article 34 of this Law, the higher level authority shall change or revoke [the relevant act], and the person in charge who is directly responsible [for the violation] shall be given administrative sanctions of demotion or removal from office in accordance with legal procedures and according to the seriousness of the circumstances. If the acts constitute criminal acts, legal liabilities shall be pursued in accordance with the law.

Article 48. (Penalties for Violation of the Provisions on Restricting Competition such as Compulsory Purchase, Regional Monopoly, Departmental Monopoly and Compulsory Consolidation)

If [the government or its affiliated department] violates the provisions of Articles 32, 33, 35 or 36 of this Law, the competent anti-monopoly authority under the State Council shall order it to stop its illegal acts, and the person in charge who is directly responsible [for such violation] shall be given administrative sanctions of demotion or removal from office in accordance with legal procedures and according to the seriousness of

circumstances. If the acts constitute criminal acts, legal liabilities shall be pursued in accordance with law.

Article 49. (Right of Action of Injured Parties)

If the legal rights and interests of an operator or a consumer are damaged by monopolistic acts, such operator or consumer may initiate legal proceedings in the people's court.

Article 50. (Compensatory Damages)

If an operator, in violation of the provisions of this Law, damages the rights and interests of other persons, such injured persons may request the people's court to order the operator to pay compensatory damages. The amount of compensation shall be the actual losses incurred and the foreseeable profits of the injured person. If the losses of the injured person are difficult to calculate, the amount of compensation shall be the profit gained by the infringer from its infringing acts during the infringement period. The infringer shall at the same time bear the reasonable expenses paid by the injured person for the investigation and litigation.

Article 51. (Penalty for the Acts of the Investigated)

If, when the competent anti-monopoly authority under the State Council makes investigations in accordance with the provisions of Article 39, the investigated, without reasonable cause, refuses to be investigated or go to the designated location to state his opinions, or refuses to provide the relevant materials or evidence such as account books and documents, or transfers the relevant illegal articles or evidence sealed or seized, such authority shall order a rectification, and may impose a fine of between 100,000 yuan and 1,000,000 yuan according to the circumstances.

Article 52. (Enforcement)

If [the punished persons] refuse to implement the penalty decision made by the competent anti-monopoly authority under the State Council, the case may be referred to the people's court for enforcement.

Article 53. (Rights of the Parties)

If a party rejects the penalty decision made by the competent anti-monopoly authority under the State Council, it may apply to the competent anti-monopoly authority under the State Council for reconsideration within 60 days from the date of receipt of the penalty decision. If such party rejects the reconsidered decision, it may initiate legal proceedings in the people's court within 15 days from the date of receipt of the reconsidered decision, or directly institute legal proceedings in the people's court.

Article 54. (Liabilities for Violation of Obligations of Confidentiality)

If the current or previous working personnel of the competent anti-monopoly authority under the State Council violates their obligations of confidentiality as provided in Articles 42 and 43 of this Law, they shall be given administrative sanctions. If the circumstances are serious and sufficient to constitute a crime, legal liabilities shall be pursued in accordance with the law. If losses are incurred, the liabilities for compensation shall be borne.

Article 55. (Liabilities of Public Servants)

If any working personnel of the competent anti-monopoly authority under the State Council abuses his power, is derelict in performance of his duties or practices favoritism, he shall be given administrative sanctions. If the circumstances are serious and sufficient to constitute a crime, legal liabilities shall be pursued in accordance with the law. If losses are incurred, the liabilities for compensation shall be borne.

Chapter 8 Supplemental Provisions

Article 56. (Acts of Exercising Intellectual Property Rights)

The reasonable acts of an operator of exercising rights in accordance with the laws protecting intellectual property rights such as the copyright law, the trademark law and the patent law shall not be restricted by this Law. However, if the abuse of intellectual property rights results or may result in material restriction or exclusion of competition, this Law shall apply.

Article 57. (Formulation of Rules)

The competent anti-monopoly authority under the State Council shall formulate the implementing rules of this Law, which shall be implemented after being submitted to and approved by the State Council.

Article 58. (Date of Implementation)

This Law shall be implemented as of _____.