

Legal Commentary

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Anti-monopoly Law Amendment Analysis Series (I) – Concentrations of Undertakings: Enhanced Penalties and Transitional Issues

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Introduction

On June 24, 2022, the 13th NPC Standing Committee adopted an amendment to the Anti-monopoly Law at its 35th meeting, following the submission of a second deliberation draft on June 21, 2022. The amendment will enter into force on August 1, 2022. This is the first time the Anti-monopoly Law has been amended since its promulgation 15 years ago and is the legislative outcome of a four-year endeavor by China's lawmakers since the revision work was formally planned in 2018 by the Anti-monopoly Commission of the State Council. The amendment improves existing rules and systems related to antitrust matters by considering previous law enforcement practices, international practices, and new realities in domestic markets. It epitomizes China's stance on formulating and implementing competition rules compatible with a socialist market economy and the government's determination to foster a unified, open, competitive, and orderly market system.

This commentary is the first of a special series that will provide timely and granular analysis of the main changes in the amended Anti-monopoly Law based on all draft amendments and relevant media reports. This commentary addresses a critical aspect in practice regarding the amended Anti-monopoly Law: enhanced penalties for illegal concentrations of undertakings and related transitional issues.

Enhanced penalties for illegal concentrations of undertakings

Based on the draft amendments successively released during the legislative process, it was highly likely that the amended Anti-monopoly Law would impose significantly enhanced penalties against illegal concentrations of undertakings. Specifically, as amended, the Anti-monopoly Law will impose penalties on undertakings that implement illegal concentrations based on whether the illegal concentration has the effect of eliminating or restricting competition. For illegal concentrations that do not have the effect of eliminating or restricting competition, the upper limit of fines will be raised from the current RMB 500,000 to RMB 5 million; for illegal concentrations that may eliminate or restrict competition, the amended law will impose fines of no more than 10% of the violator's sales amount in the preceding year, in addition to existing measures such as ordering violators to cease their concentrations and to return to the status quo ante.

In addition, the amended Anti-monopoly Law will enable antitrust regulators to impose fines between two and five times the upper limits mentioned above in extreme cases of violations, i.e., where the circumstances are particularly serious, the impact is particularly adverse, and the consequences are particularly serious. That is, an undertaking that engages in an especially serious illegal concentration may be subject to a fine of up to 50% of its prior year turnover (with the effect of eliminating or restricting competition) or RMB 25 million (without the effect of eliminating or restricting competition). It is notable, however, that strict conditions must be met for this rule to apply that have yet to be clarified with more detailed criteria, namely particularly serious circumstances, particularly adverse impact, and particularly serious consequences.

Enhanced penalties in the amended law should not be a surprise. A fine capped at RMB 500,000 is widely regarded as too powerless to deter violations in commercial transactions that can easily involve hundreds of millions of RMB. The introduction of enhanced penalties this time will greatly increase the cost of violations and spur undertakings to attach more importance to compliance issues regarding concentrations to fend off high penalties.

Relevant transitional issues

While a month remains before the amended Anti-monopoly Law takes effect on August 1, undertakings have expressed concern about the transition between the current law and the forthcoming amended version. Particularly, after August 1, which set of rules should be followed when penalizing undeclared transactions completed before the amendment enters into force?

Penalties imposed on concentrations of undertakings are essentially a type of administrative penalty. According to Article 36 of the Law on Administrative Penalty:

“An administrative penalty shall not be imposed for a violation of law that has not been discovered within two years of its commission; where such violation involves the security of a citizen’s life or health, or financial security, and has harmful consequences, the aforesaid period shall be extended to five years, except as otherwise prescribed by law.

The time period prescribed in the preceding paragraph shall be counted from the date on which the violation of law was committed; and if the violation is of a continual or continuous nature, it shall be counted from the date on which the violation is terminated.”

In applying the above provisions to transactions suspected of implementing an illegal concentration, the following questions arise:

First, from which point should the two-year period be counted? For transactions that are suspected of implementing an illegal concentration, if the legal standing and control structure of the entities involved remain unchanged after the transaction is completed, it is likely, at least theoretically, that the illegal concentration would be deemed continuous. Thus, a question exists as to whether illegal concentrations of undertakings are subject to Article 36, paragraph 2, which provides that “if the violation is of a continual or continuous nature, [the time period] shall be counted from the date on which the violation is terminated.”

Second, how should “a violation of law that has not been discovered within two years of its commission”

be understood? Transactions suspected of implementing an illegal concentration of undertakings are typically large in scale and normally warrant numerous press releases for promotional purposes. Thus, a question arises as to whether law enforcement discovered the violative circumstances within the two-year time period.

Given the above concerns and questions, except for transactions that occur after the amended Anti-monopoly Law enters into force and transactions that have been issued penalty decisions before it enters into force, other types of transactions suspected of implementing illegal concentrations still face uncertain legal consequences. Penalty rules for these transactions still need to be clarified by subsequent implementing rules and law enforcement practice. We also expect antitrust regulators to give full consideration to the derogation principle set out in Article 37 of the Law on Administrative Penalty when implementing the amended Anti-monopoly Law, formulating relevant implementation rules, and construing and enforcing relevant statutory provisions.

Conclusion

Fourteen years after the promulgation of the Anti-monopoly Law, the 2022 amendment is a result of China's unremitting efforts to address constantly emerging concerns along its fruitful journey toward making and implementing competition rules compatible with a socialist economy and fostering a unified, open, competitive, and orderly market system. The amended Anti-monopoly Law is bound to exert significant influence on all facets of China's market economy such as corporate compliance and antitrust law enforcement. This commentary will be followed by a special series of articles to give in-depth analysis of the amended Anti-monopoly Law by considering concerns and pain points market players face in their compliance with the country's antitrust laws.

Important Announcement

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