

Regulation of Business, Trade and Competition in China

July 2010

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Welcome to this month's bulletin of updates on the regulation of business, trade and competition in China.

Antitrust and Competition

SAIC Publishes Draft Anti-Monopoly Law (AML) Regulations

On May 25, 2010, the State Administration of Industry and Commerce (**SAIC**) issued for public comments three sets of draft AML regulations relating to: (1) abuses of dominance; (2) monopoly agreements; and (3) administrative abuses.

Two sets of the draft regulations – Regulation on the Prohibition on Acts of Abuse of a Dominant Position (the “**Draft Abuse Regulations**”) and Regulations on the Prohibition on Acts of Monopoly Agreement (the “**Draft Monopoly Agreement Regulations**”) – are revised versions of earlier drafts that SAIC published more than a year ago in April 2009. We highlight some of the noteworthy provisions in the two sets of draft regulations below.

The Draft Abuse Regulations

The AML includes a non-exhaustive list of conduct that would be prohibited as abuses of a dominant market position unless such conduct can be justified. The Draft Abuse Regulations identify three factors to be considered in determining whether the conduct in a particular case can be so justified. These factors include: (1) whether the conduct committed by the dominant firm comports with commercial customs, the firm's normal operational activities and its normal interests; (2) whether the conduct has the effect of eliminating or restricting competition and harming the interest of consumers; and (3) the impacts of the conduct on economic efficiency, public interest and economic development. If this provision is adopted as drafted, non-competition factors such as the public interest and economic development could be cited to justify abusive conduct that would otherwise be prohibited.

The Draft Abuse Regulations also set out specific examples of behavior prohibited under the AML as abuses of dominance. As regards refusal to deal, the Draft Abuse Regulations arguably expand the prohibitions under the AML by defining as abusive not only terminating an existing transaction or refusing to enter into a new transaction with a counterparty without justification, but also “reducing the quantity” of products/services being offered or “setting such restrictive conditions that make it difficult for counterparties to continue to transact” with the dominant firm.

Moreover, under the Draft Abuse Regulations, dominant firms are prohibited from refusing counterparties access to its “essential facilities” under reasonable terms for them to conduct production or operational activities, a concept that is recognized under other competition law regimes. The Draft Abuse Regulations set forth several factors that should be considered in evaluating a claim of abuse involving an “essential” facility, including: the feasibility for the counterparty to replicate the facility; the counterparty’s extent of reliance on the facility to operate effectively, as well as the feasibility of and the impact on the dominant firm of providing access. While these factors help delineate the potential reach of the essential facility doctrine under the AML to some extent, they appear to set too low a threshold for what facility would qualify as “essential.” This could make it less attractive for dominant firms to invest in building efficiency-enhancing facilities, including the development of intellectual property, because the low threshold for finding a facility to be essential makes it easier and thus more likely for competitors to seek to free-ride on the fruits of such investments. The absence of more detailed guidance on how the factors are to be applied would also create uncertainty for firms seeking to comply with the rules.

The Draft Monopoly Agreement Regulations

The Draft Monopoly Agreement Regulations provide that prohibited “monopoly agreements” the AML can take the form of an agreement or decision among multiple business operators, whether oral or written, or “other concerted actions” even though there is no express written or oral agreement or decision among the parties.

Under the Draft Monopoly Agreement Regulation, to determine whether there are concerted actions among actors, the SAIC would consider the following factors: (1) whether there is uniformity in their behavior; (2) whether there have been communications of intent or exchange of information among them; and (3) whether they can provide reasonable explanations for their uniform actions. These factors appear to suggest that parallel behavior alone, without more, would not fall within the category of “other concerted actions” that may be deemed an unlawful monopoly agreement.

Elaborating on the AML’s general provision barring trade associations from organizing members to engage in anticompetitive conduct, the Draft Monopoly Agreement Regulations set out specific activities that are prohibited, e.g., preparing and distributing articles of association, rules decisions, notices or standards; convening, organizing or encouraging members to reach anticompetitive agreements, resolutions, summaries, memoranda.

Another area of interest to the business and legal communities relates to the availability of leniency to those firms that come forward to self-report violations relating to monopoly agreements and cooperate with the SAIC in its investigation. The Draft

Monopoly Agreement Regulations provide some details on how one may qualify for leniency. Specifically, the first party who proactively reports to the SAIC relevant information about a monopoly agreement, provides important evidence and fully cooperates with the SAIC in its investigation should be exempted from penalty (confiscation of illegal gains and imposition of fines). As compared to the April 2009 draft, which stated that the first self-reporter may receive penalty exemption, the Draft Monopoly Agreement Regulations provide welcomed clarity that the first self-reporter who meets the stated criteria would be entitled to full penalty exemption, provided the party is not an organizer of the monopoly agreement. However, the Draft Monopoly Agreement Regulations no longer provide for fixed percentage reduction in penalty for the second and third self-reporters, as was the case under the April 2009 draft. Instead, the Draft Monopoly Agreement Regulations allow the SAIC to impose lesser penalties against other self-reporters in its discretion. This latter revision to the leniency program could lessen the effectiveness of the program, since the lack of certainty and predictability in penalty reduction would likely reduce the incentive for parties to voluntarily come forward to self-report and cooperate with the SAIC in its investigation.

International Trade

China Eliminates Export Rebates on Certain Products, Effective July 15

China’s Ministry of Finance and State Taxation Administration announced on June 22 a joint decision¹ to revoke export rebates ranging from 5 to 17 percent covering over 400 exported items. These items include a variety of (i) steel products; (ii) non-ferrous processing materials; (iii) aluminum powder products; (iv) alcohol and cornstarch; (v) pesticides, pharmaceutical and chemical products; and (vi) plastic, rubber and glass products. The revocation of the export rebates will take effect July 15.

Although the material impact of the export rebate revocation is small and, based on 2009 export values, involves only 1 percent of total Chinese exports, the Chinese government is hopeful the decision indirectly will push energy- and natural resource-dependent industries to reduce energy consumption and pollution while increasing exports of environmentally friendly goods. The Chinese government has framed its decision to revoke these export rebates as consistent with the energy conservation and pollution reduction goals set forth in the 11th Five Year Plan.

For more information please visit http://szs.mof.gov.cn/zhengwuxinxi/zhengcefabu/201006/t20100622_323730.html

Please note this link is to a Chinese language website.

¹ Notice Caishui [2010] No. 57

China and Taiwan Sign Landmark Trade Agreement

On June 29, 2010, China and Taiwan signed an Economic Cooperation Framework Agreement (ECFA) in Chongqing, China. First proposed by Taiwanese President Ma Ying-jeou in February 2009, the ECFA is comprehensive in scope and includes an early harvest program (EHP) that covers key sectors of interest for both sides. The ECFA will be implemented as soon as both sides complete their internal ratification procedures, expected by September 2010.

Under the EHP for trade in goods, both sides agree to reduce tariffs gradually to zero percent in three phases within two years from its entry into force, which is widely expected on January 1, 2011. This tariff reduction modality will apply to 539 types of goods originating from Taiwan and 267 types of goods from China. The EHP does not cover many of Taiwan's plastics and hi-tech exports, which many analysts opine signals China's interest to protect its less competitive manufacturers of such products. These areas will likely be discussed in subsequent negotiating rounds. On the services front, China will grant increased market access to 11 Taiwanese services sectors, while Taiwan will open 9 services sectors to China.

Since the full implementation of the ASEAN-China Free Trade Area (ACFTA) Agreement in January 2010, Taiwan has become increasingly concerned over potential marginalization in the region. The ECFA, which covers nearly all economic activities between China and Taiwan, aims to counter this and level the playing field for Taiwan in the region. The Agreement may also provide a safeguard mechanism for the normalization, institutionalization and liberalization of cross-straits economic relations.

For more information please visit <http://tga.mofcom.gov.cn/aarticle/e/201006/20100606995238.html?564979752=3291833038>

Please note this link is to a Chinese language website.

China Eliminates Import Tariffs for 33 Least Developed Countries

China's Ministry of Finance on June 23 announced its decision² to eliminate tariffs covering over 4,000 products imported from 33 least developed countries (LDCs). The decision supports the Chinese government's effort to (i) honor its commitments made during the recent high-level meeting of the United Nations' Millennium Development Goals conference; (ii) support open, fair and just trade with LDC trading partners; (iii) push other developing countries to follow China's lead in providing better market access for LDCs; (iv) remove one impasse to the Doha

Round negotiations by influencing other developed countries to fully honor commitments to eliminate tariffs for 97 percent of products from LDCs; and (v) promote the global economic recovery. The tariff revocation decision went into effect July 1.

The tariff revocation decision names 26 African countries and 7 LDCs in South Asia and the Pacific. The African nations include Benin, Burundi, Chad, Central African Republic, Comoros, Congo (DRC), Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Rwanda, Sierra Leone, Sudan, Tanzania, Togo, Uganda and Zambia. The seven countries in South Asia and the Pacific include Afghanistan, Bangladesh, East Timor, Nepal, Samoa, Vanuatu and Yemen.

Based on 2008 data, the thousands of goods covered under the tariff revocation decision account for 60 percent of Chinese imports in total and more than 98 percent of Chinese imports from LDCs. The affected goods include livestock and poultry; aquatic products; unprocessed or semi-processed agricultural products; minerals; medicinal materials; household commodities; plastics; leather; wood; textiles; apparel; glass; steel; machinery and electronic products; and furniture, among others.

Since 2001, the Chinese government has granted zero tariff treatment for goods imported from more than 40 LDCs. In addition, the Chinese government has been working to expand this favorable treatment to cover eight additional countries, namely Angola, Niger, Senegal, Somalia, Cambodia, Laos, Maldives and Myanmar. In 2008, China absorbed 23 percent of total exports from LDCs and became the largest export market for LDCs. The Chinese government believes that the elimination of tariffs on goods from LDCs should help to improve the livelihood of the exporting nation's citizens, lower costs for Chinese importers, and improve bilateral trade relations between China and these LDCs.

For more information please visit http://gss.mof.gov.cn/zhengwuxinxi/zhengcefabu/201006/t20100624_324024.html and http://gss.mof.gov.cn/zhengwuxinxi/zhengcefabu/201006/t20100607_321570.html.

Please note this link is to a Chinese language website.

China Furthers Trade and Investment Facilitation with Hong Kong and Macau

The Chinese government on May 27 and 28 signed final enhancements (the Supplements VII) to the Closer Economic Partnership Arrangements (CEPAs) with Hong Kong and Macau. These final supplements to the CEPAs aim to improve the competitiveness of Hong Kong- and Macau-based companies in

² Shuiweihui [2010] No. 11 and No. 13

mainland China and to further improve economic activity between mainland China and the two Special Administrative Regions (SARs). New services sectors added include (i) technical testing, analysis and product testing and (ii) professional design. The supplements also address new areas, such as trade and investment facilitation for Hong Kong and Macau, and financial cooperation for Hong Kong. The supplements to the CEPAs spell

out dozens of liberalization measures covering 14 services sectors for Hong Kong and 13 services sectors for Macau. With these latest enhancements, China has opened to date a total of 44 services sectors to Hong Kong and 43 services sectors to Macau. The new measures go into effect January 1, 2011.

For more information please visit
<http://www.tid.gov.hk/english/cepa/index.html> and
http://www.cepa.gov.mo/cepaweb/front/eng/index_en.htm

Trade Remedy Cases Involving China

Product	Country of Origin	Petitioner Country	Announcement
Polyester thread	China, India, Indonesia, Taiwan	Argentina	AD final determination made on May 18, 2010
Certain open mesh fabrics of glass fibres	China	EU	AD investigation initiated on May 20, 2010
Glyphosate	China	Brazil	AD duty adjusted on May 25, 2010
Seamless steel tube	China	Mexico	AD provisional duty imposed on May 26, 2010
Certain potassium phosphate salts	China	US	AD and CVD final determinations made on June 1, 2010
High tenacity yarn of polyesters	China	EU	AD provisional duty imposed on June 1, 2010
Thermoelectric coolers and warmers	China	Canada	AD re-investigation initiated on June 8, 2010
Certain steel grating	China	US	AD and CVD final determinations made on June 8, 2010
Carbon steel pipe fittings	China	Canada	AD re-investigation initiated on June 9, 2010
Certain wire decking	China	US	AD & CVD final determinations made on June 10, 2010. The ITC announced its negative final decision on July 1, 2010
Drill pipe	China	US	CVD preliminary determination made on June 11, 2010
Cargo scanning systems	China	EU	AD final determination made on June 14, 2010
Certain molybdenum wires	China	EU	AD final determination made on June 14, 2010
Ceramic tiles	China	EU	AD investigation initiated on June 19, 2010
Woven electric blankets	China	US	AD final determination made on June 28, 2010
Preserved mushrooms	China	Australia	AD expiry review initiated on June 28, 2010
Wireless wide area networking (WWAN) modems	China	EU	Both AD investigation and safeguard investigations initiated on June 30, 2010
Spiral welded pipes	China	Mexico	Safeguard investigation initiated on July 2, 2010

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Our clients include a diverse roster of sovereign and private-sector entities, including national governments, manufacturers, exporters, importers and end users. Our insight into global business and trade laws is deepened by our immersion at the ground level. In China, we have lawyers and analysts in Beijing and Shanghai, working closely with our advisors in Brussels, Geneva, Miami, Monterrey, New Delhi, Singapore, Tokyo and Washington, DC.

Our Firm

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- Top Global Bankruptcy Law Firm 2009—*The Deal*
- Top Tier in Global Arbitration 2009—*Focus Europe*
- Global Elite in Antitrust/Competition 2009—*Global Competition Review*
- Corporate Finance Deal of the Year 2009—*Latin Lawyer*
- Ranked No. 1 in Bloomberg Americas and Global Capital Markets Legal Adviser League Tables Q1 2009—*Bloomberg*