
Beijing Olympics, “New Economic Constitution” Focus the Eyes of the World on China

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The world is watching. With the Beijing Olympics underway, all eyes are on China. But this month, economists, entrepreneurs and lawyers have another reason to focus on the People's Republic. On August 1, China took a giant step toward joining the United States and Europe as a leading center for the regulation of anticompetitive conduct, with the long-awaited Anti-Monopoly Law, which went into effect after nearly 15 years of deliberations. The Anti-Monopoly Law has been referred to by some as “China's economic constitution,” and its arrival creates new compliance obligations for both multinational and domestic companies.

Lester Ross, WilmerHale's co-partner-in-charge of the Beijing office and member of the firm's Asia Corporate Practice Group, says the landmark legislation constitutes a positive step in the larger process of development in China. It moves China further toward a market economy and away from a centrally planned economy in which state-owned enterprises operated vast, unchallenged monopolies. The tradeoff, says Ross, is that China's new regulatory regime is now much more complex.

“There is no doubt that the regulatory hurdles are trickier,” says Ross. “That is particularly true for big foreign companies and those with proprietary technology that enhances their ability to compete with domestic companies. Because of this law, we are getting a lot of questions—and more work—from clients.”

Ross says many of those questions pertain to two significant changes introduced by the Anti-Monopoly Law, one unexpected, the other not.

China's government has divided the task of enforcing the Law among three bureaucracies. Earlier expectations and advice geared to the centralization of enforcement in one agency have not resulted in consolidation of authority. Enforcement will be handled by the Ministry of Commerce (mergers and acquisitions), the National Development and Reform Commission (price-fixing), and the State Administration for Industry & Commerce (abuse of market dominance).

The other major change is that the statute applies to both foreign and domestic companies, as opposed to only the former, promising a more even playing field, although major questions remain

about whether enforcement against foreign companies will be more intense.

Before the Anti-Monopoly Law, foreign companies, while having to meet strict competition rules on mergers and acquisitions elsewhere—often in Washington and Brussels, but also in other jurisdictions—had fewer enforceable filing requirements in China. And Chinese companies had none at all. In 2003 and 2006, regulations were put in place for foreign companies. Acquisitions by domestic companies were not subject to the same scrutiny, allowing them to expand without much impediment. Now China, with the second largest and fastest-growing economy in the world, has moved to catch up with Europe and the United States on the regulatory front.

To meet international standards, the Anti-Monopoly Law covers traditional antitrust issues, including mergers and acquisitions, cartels and abuse of monopoly power. It also addresses administrative monopolies, a legacy of the planning era, albeit with caution. The law received input from antitrust experts in the United States, Europe, South Korea and Japan, as well as the American Bar Association and the International Bar Association. The result reflects acceptance of some of these suggestions.

But the Law as yet lacks specificity, leaving regulators with broad discretion. Ross says that companies doing business in China or making an acquisition that impacts China must tread carefully.

Some of the new rules are emerging: Days after the Law went into effect, the government specified turnover thresholds that will trigger a government review of proposed mergers and acquisitions. All business combinations resulting in a change of control by merger, acquisition, contract or other means must be cleared by the Ministry of Commerce if global turnover exceeds 10 billion yuan (\$1.4 billion) and at least two of the parties have China turnover of more than 400 million yuan; or if their China turnover is more than 2 billion yuan and at least two of the parties have China turnover of more than 400 million yuan. These thresholds for now are based on the corporate entity, not the assets at stake. Moreover, the definition of "control" remains unclear. (Notably, the final Law eliminates a provision from an earlier draft that would have required notifications based on market thresholds, which have created significant interpretive issues in some other jurisdictions.)

WilmerHale lawyers have had considerable experience representing our clients under the previous Chinese competition regime, and look forward to serving existing and new clients as the Chinese regulators continue to refine the new Anti-Monopoly Law. For WilmerHale lawyers in Beijing it is an exciting moment; a summer of duality, when sports and business attention converge on China and the country welcomes the world.