

PRIVATE EQUITY FOCUS

A Revival of Force-the-Vote Provisions?

Fed Eases Restrictions on Private Equity Investments in Banks

Delaware Court Holds that 'Blowout' Price Does Not Relieve Directors of Their Fiduciary Duties

EU Funding Program for Small and Medium-Sized Enterprises

China's New Antitrust Law

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May The Force Be With You: Force-The-Vote Provisions, Largely Out-Of-Favor Since *Omnicare*, May Be Making A comeback

Christopher J. Bellini¹

In the controversial 2003 *Omnicare v. NCS* decision, the Delaware Supreme Court held that an agreement which fully locks up a proposed merger vote and contains no fiduciary out will be unenforceable under Delaware law. Ever since that decision, advisors have cautioned the boards of directors of selling corporations against agreeing to deal protective measures that, individually or in the aggregate, amount to a violation of the board's fiduciary duties by making the deal a mathematical certainty. Similarly, buyers have been advised against being too aggressive in their efforts to lock up their hard-fought deals, for fear that the deals will either be blocked pre-closing, or unwound post-closing. And, this fear is well-placed, as deal protection devices, similar to takeover defenses, require the enhanced scrutiny of *Unocal*, even in transactions not governed by *Revlon*. Moreover, in the private equity context, these deal protection devices are viewed with an additional measure of suspicion. Accordingly, buyers in general, and sponsors in particular, need to tread carefully in their quest to lock up a deal.

Perhaps the protective measure that has most fallen out of favor since *Omnicare*, particularly in sponsor-backed transactions, is the "force-the-vote" provision. This deal protection device requires a target board to submit the buyer's fully negotiated deal to a shareholder vote, notwithstanding any change or withdrawal of the target board's recommendation as a result of a

topping bid or other rationale. Despite the perceived "preclusive and coercive" nature of this deal protection device, a target board can still meet its required fiduciary duty by changing or withdrawing its recommendation in response to a competing proposal and giving the power to the target's shareholders to determine which offer is superior. In fact, Section 146 of the Delaware General Corporation Law expressly permits this "force-the-vote" mechanism. This certainly makes sense on its own, as the shareholders are then able to decide for themselves whether to approve or reject the buyer's deal. However, these provisions may be deemed preclusive and coercive under a *Unocal* analysis if utilized in connection with voting agreements that lock up a significant percentage of the shareholder vote, which would run afoul of *Omnicare*. And, if faced with the choice between a force-the-vote provision and shareholder voting agreements, most buyers will choose the latter. Thus, the use of force-the-vote provisions have largely faded.

A review of recent LBO transactions, however, indicates that force-the-vote provisions may be making a comeback, albeit in a modified fashion. Under a "full" force-the-vote provision, a target board is required to submit the deal to a vote of the shareholders regardless of any events or circumstances that transpire post-signing, including the emergence of any topping bids. In contrast, a modified, or "limited", force-the-vote provision provides certain exceptions to the target board's requirement to submit the deal to a vote. These exceptions are generally designed to allow the target board to comply with its fiduciary duties in response to future events.

Of the eleven domestic, going-private transactions so far this year (accomplished by means of a long-form merger), six contain some form of a limited force-the-

¹ The author would like to thank Robert A. Rosenbaum for his assistance with the preparation of this article.

vote provision. These limited force-the-vote provisions generally provide that, if the target board negotiates a superior proposal with an interloper, the board may terminate the transaction before it holds the shareholder meeting and enter into the alternative transaction. Additionally, these agreements generally require that the target board determine in good faith that the alternative transaction is a “superior proposal,” after making such determination based on the advice of its outside financial and legal advisors that its fiduciary duties require it to terminate the transaction. Moreover, they require that notice be given to the buyer in advance of the target board’s ability to terminate the transaction, so that the buyer can exercise any match right that it may have.

While the limitations that have been worked into these provisions certainly make them more palatable from an *Omnicare* perspective, they need to be viewed in combination with other deal protection devices, particularly any voting agreements the buyer has signed with the seller’s shareholders. If the buyer can force a target shareholder vote, the buyer will not want the shareholders who have signed voting agreements to be able to terminate those agreements if the target board withdraws or modifies its recommendation of the transaction. Even if the buyer cannot force a shareholder vote, it may want to protect its offer by including provisions in the voting agreement that prevent the shareholder parties from voting for alternative proposals for some period of time following termination of the merger agreement.

The obvious question is: “what is the value of this limited force-the-vote provision, if it does not apply to the most likely cause of the buyer’s deal failing?” While in the abstract, it may provide little value, these limited force-the-vote provisions perhaps provide a psychological advantage; any competing bid needs to result in a termination of the existing transaction before the provision falls away, which is usually a high threshold to meet. In addition, they protect the buyer from the so-called “gold under the headquarters” scenario, in which the target board realizes, post-signing, that their company is worth more than they agreed to in the transaction.

Despite any benefits that a force-the-vote provision offers, its use certainly is not warranted in all circumstances. For example, while permitted under Delaware law, force-the-vote provisions are not enforceable in all jurisdictions. Moreover, even if the target board has conducted an exhaustive market check, as noted above, these provisions may be deemed preclusive and coercive under a *Unocal* analysis if utilized in connection with a quantum of other deal protection devices. Nonetheless, in an effort to ward off topping bids, buyers should consider including a force-the-vote provision, particularly where a topping bid is similar in value but the buyer’s deal offers other important advantages, such as speed and certainty of closing, all cash consideration and low regulatory risk.❖

Announcement Date	Target	Private Equity Sponsor	Limited Force-the-Vote
June 19, 2008	Apria Healthcare Group Inc.	The Blackstone Group	✓
June 16, 2008	Greenfield Online Inc.*	Quadrangle Group LLC	✓
June 10, 2008	CAM Commerce Solutions Inc.	Great Hill Partners LLC	
June 9, 2008	HireRight, Inc.	Providence Equity Partners (USIS)	✓
April 11, 2008	The Trizetto Group, Inc.	Apax Partners	✓
February 25, 2008	Getty Images, Inc.	Hellman & Friedman LLC	✓
February 20, 2008	Industrial Distribution Group, Inc. 2	Platinum Equity Advisors, LLC	
January 28, 2008	NuCO2 Inc.	Aurora Capital Group	
January 18, 2008	Performance Food Group Company	Blackstone Group, Wellspring Capital Management	✓
January 15, 2008	Manatron, Inc.	Thoma Cressey Bravo	
January 14, 2008	Bright Horizons Family Solutions	Bain Capital Partners, LLC	

* Quadrangle’s deal with Greenfield was terminated as the result of a topping bid from Microsoft.



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The Fed Eases Restrictions on Private Equity Investments in Banks

by Rebecca Molloy

In the flurry of efforts to stem the global financial crisis, one move by the Federal Reserve Board may have been somewhat overlooked: in a statement issued September 22, 2008 (the "Policy Statement"), the Fed loosened long-standing policies to make it easier for private equity funds and other investors to acquire minority stakes in banks and other financial institutions. The Fed's new policy increases limits on overall equity holdings, permits director representation and relaxes certain restrictions on dealings with management, among other things. These changes could make banks and their parent companies more attractive investment targets for private equity.

The primary obstacle to private equity investments in financial institutions has been the risk that the investor will be deemed a "bank holding company" under the Bank Holding Company Act ("BHC Act"). Bank holding companies are subject to regulation and supervision by the Federal Reserve Board. There are strict limits on a bank holding company's nonfinancial activities and investments that would preclude the kind of diversification most private equity funds seek. Bank holding companies may be called upon to serve as a "source of strength" for their subsidiary banks, creating financial exposure for the investor beyond its equity investment.

The BHC Act provides that a company controls a bank,¹ and is therefore a bank holding company if (i) it owns or controls

25% or more of the shares in any class of the bank's voting stock,² (ii) it controls the election of a majority of the bank's directors or (iii) the Federal Reserve Board determines that the company otherwise controls the bank's management or policies.³ These statutory requirements have not changed. What has changed is the Fed's interpretation of the third prong in the control test: the Policy Statement addresses the factors that might cause an investor who holds less than 25% of a bank's voting shares and does not control the bank's board to be deemed a bank holding company and therefore subject to regulation and supervision.

Under the new policy, with the Fed's prior approval,⁴ an investor may acquire a minority interest in a bank without becoming a bank holding company, on the following terms:

- The investor may hold up to 15% of the bank's voting securities and up to 32.9% of the bank's total (voting and nonvoting) equity. Under prior interpretations, an investor was presumed to control a bank if it held 10% of the voting stock and total holdings were capped at 25%. An investment in more than 15% but less than 25% of a bank's voting stock will not necessarily make the investor a bank holding company, but it may be difficult to overcome the presumption of control at that level.
- For purposes of the limits on equity holdings, nonvoting shares are counted as voting stock if they may

² Shares held by an investor's affiliates, its shareholders and their immediate family members may also count for purposes of this threshold.

³ 12 U.S.C. § 1841(a)(2).

⁴ Prior approval of the Federal Reserve Board is required for any acquisition that results in an investor holding more than 5% of a bank's voting shares; below 5% no approval is required and the investor is presumed not to control the bank.

¹ In this context, the term "bank" means nearly any FDIC-insured depository institution, whether it is called a bank, savings & loan, industrial loan company or something else.

be converted at the option of the holder or if they mandatorily convert to voting stock on a future date. However, convertible shares do not count toward the limit on voting stock if they are only convertible upon transfer (i) to an affiliate of the investor or the bank, (ii) in a widespread public distribution, (iii) in transfers in which no transferee would receive 2% or more of the bank's voting stock or (iv) to a transferee that already controls more than 50% of the bank's voting stock.

- An investor may have at least one and up to two representatives on the bank's board of directors, if the representation is proportional to the investor's total equity holdings and does not exceed 25% of the board membership.⁵ However, a representative of a minority investor may not serve as chairman of the board or of any board committee. Under prior interpretations, no director representation was permitted.
- An investor may communicate with management about, and advocate

for changes in, bank policy and operations, provided that the investor does not threaten to dispose of its shares or to initiate a proxy solicitation to force management action. The investor's participation must be limited to exercising voting rights as a shareholder or director. Under prior Fed guidelines, minority investors were generally required to commit not to attempt to influence bank operations and management.

- An investor may have a limited number of nonmaterial business relationships with the bank. The Fed will, however, continue to closely scrutinize such relationships so that they do not become a method of controlling bank management.
- An investor cannot impose contractual obligations on the bank that have the same effect as a controlling ownership interest (e.g., covenants that restrict the bank's ability to hire, fire or set compensation for executives, enter new lines of business, raise capital, undertake mergers or make other structural changes). An investor can, however, have limited veto rights over such matters as limitations on the bank's ability to issue senior debt or senior securities.

While the financial services industry continues to evolve rapidly (for example, as this article was being written, the Treasury Department announced plans for direct government investment in major financial institutions), the new policy will have benefits for private equity firms that want to acquire stakes in banks or bank holding companies. Perhaps more importantly, though, the new policy may help to introduce much-needed capital to the banking sector.♣

⁵ For example, an investor holding 15% of a bank's voting stock and 30% of the bank's total equity could have two representatives on an 8-person board but only one representative on a 7-person board.


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"Blowout" Price Does Not Relieve Target Board of Revlon Duties

By Bryn Vaaler and Robert A. Rosenbaum

The Delaware Court of Chancery has fired yet another shot across the bow of Corporate America by refusing to dismiss damage claims against the individual members of the board of directors of a company that agreed to be sold at a 45% market premium. ***Ryan v. Lyondell Chemical Company (Del. Ch. July 29, 2008)***. The Court held that even a "blowout" price does not justify a board's failure to pursue a proactive process aimed at ensuring "the best price reasonably available" in a *Revlon* sale of control. Vice Chancellor Noble also held Lyondell's standard DGCL §102(b)(7) charter provision (exculpating directors from damage liability for breach of their duty of care) did not provide grounds for dismissal on summary judgment because it might be proven at trial that the board's *Revlon* violation went beyond a duty-of-care breach and constituted a non-exculpable breach of the good faith element of duty of loyalty. If such a breach were found at trial, individual directors could face significant personal and non-indemnifiable liability.

Ryan v. Lyondell Chemical does not make new law. It is, however, a vivid reminder that passively accepting a "premium" offer (and locking it in with deal-protection measures) without some combination of pre-signing market check, post-signing "go-shop" or other reasonable value-confirmation process is extremely hazardous, even if the board obtains a fairness opinion and stockholders overwhelmingly approve the acquisition.

Unsolicited "Blowout" Offer

Basell AF first expressed interest in Lyondell in April 2006, but Lyondell indicated it was not for sale and that

Basell's price range (\$26.50 to \$28.50 per share) was inadequate. In May 2007, Basell filed a Schedule 13D disclosing its acquisition of a right to acquire more than 8% of Lyondell's outstanding shares and Basell's intention to explore a business combination. Although the 13D filing fueled a sharp increase in Lyondell's trading price (from \$33 to \$37 per share in one day) and signaled Lyondell was "in play," its board decided simply to wait and see if the 13D generated other suitors. They took no affirmative steps to assess market interest or valuation in anticipation of an actual offer from Basell.

In the meantime, Lyondell's CEO, Dan Smith, met repeatedly with Basell's senior management to discuss acquisition terms, largely without the active supervision (or even the awareness) of the Lyondell board. On July 9, 2007, in response to Smith's request, Basell's CEO informed Smith that Basell's "best" offer for Lyondell was \$48 per share in cash, conditioned on a merger agreement being signed no later than seven days later, with a \$400 million break-up fee.

CEO Smith hastily convened special meetings of the Lyondell board to present and discuss the Basell offer. After two very brief meetings (each lasting less than an hour) the board authorized Smith to finalize negotiations based on the Basell proposal and decided to reconvene on July 16, 2007 to consider what Smith had negotiated. Lyondell engaged Deutsche Bank to prepare a fairness opinion, but not to solicit competing offers.

Based on concerns regarding the board's *Revlon* duties, Smith requested four concessions from Basell: (1) an increase in price; (2) a go-shop provision permitting the board to seek other potential buyers for 45 days after signing; (3) a reduced (1%) break-up fee during the go-shop; and (4) a reduction in the \$400 million

break-up fee after the go-shop. Basell agreed to reduce the break-up fee to \$385 million (approximately 3% of transaction equity value), but otherwise rejected these requests.

The final merger agreement presented to Lyondell's board on July 16, 2007 contained a number of deal-protection measures in addition to the \$385 million break-up fee, including a no-shop clause (with typical "fiduciary out" language) and a matching right for Basell. In addition, Lyondell maintained its stockholder rights ("poison pill") plan in place, other than for Basell.

Board and Stockholder Approval

Deutsche Bank presented its financial analyses and conclusions regarding financial fairness to the board at the July 16, 2007 meeting. Based on both "management-case" and more conservative "street-case" projections, Deutsche Bank concluded the \$48 price was financially fair to Lyondell stockholders. Deutsche Bank also identified 20 other companies that might have an interest in acquiring Lyondell and presented reasons why no other bidder had materialized or was likely to top Basell's bid. After listening to Deutsche Bank and a presentation on legal issues, the board unanimously approved the proposed transaction.

The merger was announced the next day. On November 20, 2007, stockholders overwhelmingly approved the transaction. The merger closed on December 20, 2007.

Revlon and Unocal-Omnicare Claims

Stockholders brought a class action claiming, among other things, that (1) the Lyondell board's passive acceptance of Basell's proposal without a proactive market check before or after signing breached its duty to seek the "best price reasonably available" under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,

506 A.2d 173 (Del. 1986); and (2) the deal-protection measures were preclusive, coercive and unreasonable in light of the circumstances under *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), and *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003).

The board moved to dismiss these claims on summary judgment, arguing essentially that (1) it had fulfilled its *Revlon* duties by obtaining a "blowout" price that had cleared the market of other suitors (as evidenced by the absence of any serious competing bids) and (2) the deal-protection measures were neither preclusive nor coercive and were clearly justified by the superior price. In addition, the board argued that, even if it had breached its duties under *Revlon* or *Unocal-Omnicare*, directors had, at worst, breached their duty of care, and Lyondell's charter exculpation protected them from damage claims by stockholders.

Noting that the board had approved the transaction in less than seven days based on only six or seven hours of meetings, no proactive pre-signing market check and little hope of a meaningful post-signing check due to deal protections, Vice Chancellor Noble refused to dismiss the claims on summary judgment. He reasoned that the board's pattern of passivity raised serious questions: "It is difficult for the Court to conclude on this record, after giving Ryan the benefit of all reasonable inferences, that the process employed by the Board was a 'reasonable' effort to create value for the Lyondell stockholders."

The Court concluded that the deal protections were not coercive because there were no voting agreements or management threats pre-ordaining stockholder approval. Stockholders could have rejected the proposal. Conceding that the protections in question were

typical of deals of this magnitude, the Court nevertheless could not conclude on summary judgment that such measures were not, in the aggregate, preclusive and unreasonable in the specific context of this transaction – given the board's lack of proactive market check prior to signing.

The Court also concluded there were material facts in dispute regarding whether the board had "failed to act in the face of a known duty to act" under *Revlon* and *Unocal-Omnicare*, thereby "demonstrating a conscious disregard for their responsibilities" and a "breach of duty of loyalty by failing to discharge that fiduciary obligation in good faith." Consequently, the Lyondell charter exculpation provision could not serve as a basis for granting summary judgment dismissal because trial could reveal non-exculpable duty-of-loyalty breaches.

Warning to Directors

The Court clearly left open the possibility that the Lyondell directors could ultimately prevail at trial in proving that they had met their duties under *Revlon* and *Unocal-Omnicare* or, if they had not, that their failure did not involve conscious disregard of a known duty and a non-exculpable duty-of-loyalty breach. The case is, however, an important reminder of clear rules for the board:

- The board must actively supervise the process of negotiating a sale of control, not leave such process to an unsupervised CEO. Board supervision must begin up front, not after key decisions have already been made.
- Unless the board already possesses extraordinary knowledge of how the market currently values the company, *Revlon* duties require a proactive pre-signing or post-signing market check or other value-confirmation process. Vice Chancellor Noble made

it very clear: a “premium to market alone does not satisfy *Revlon* – or necessarily warrant concession to any form of deal protection.”

- The board must ensure it has the time necessary to perform its *Revlon* duties and not be rushed to meet a timetable imposed by the buyer.
- Even garden-variety deal protections can be preclusive and unreasonable in a context in which a board has approved a sale without adequately informing itself regarding market valuation before signing.
- A fairness opinion may be a pre-requisite to satisfying *Revlon* duties, but it does not satisfy them by itself.
- The board cannot avoid its *Revlon* duties simply by “acting as a passive conduit” and passing transaction approval on to the stockholders. Stockholder ratification afforded the Lyondell board no relief on summary judgment because of material questions relating to defects in proxy disclosure.

These rules have been relatively clear under Delaware case law for over 20 years. *Ryan v. Lyondell Chemical* is just the latest reminder from the Delaware courts of the significant risks to directors who fail to take seriously their fiduciary duties, particularly in sale-of-control scenarios. Wholesale failure to heed these rules can raise the issue of “conscious disregard” of known duties, a failure of “good faith” and the resulting specter of non-exculpable, personal liability for directors in potentially crushing amounts.✚



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EU Incentives for Risk Investments in SMEs

by Bernd U. Graf

Where your competitors in Europe may be getting their funding:

A recent EU initiative provides funding for European VC funds investing in, and guarantee facilities to banks making loans to, SMEs in Europe. Pending future harmonization and integration, the current fragmentation of the European VC market may create interesting business opportunities as EU Member States compete to get their fair share of VC investments.

The "CIP" and the European Investment Fund:

With a view to stimulating economic growth and innovation in Europe, the European Union ("EU") adopted its Competitiveness and Innovation Framework Programme ("CIP") for the years 2007-2013. As part of this Programme, the EU provides funds for risk investments facilitating the start-up and growth of European SMEs (small or medium-sized enterprises), a cornerstone of European economic activity and policy. With a budget of over €1 billion, EU policy makers expect that the CIP financial instruments will leverage around €30 billion of new SME finance. About half of these EU funds are to be allocated to support venture and risk capital investments, with the other half being allocated to bank loan guarantee facilities.

The CIP financial instruments are managed by the European Investment Fund ("EIF"), a "fund of funds" type financial institution set up by the European Investment Bank ("EIB"), the European Union, and a number of European banks and financial institutions from the public and private sector. There are 3 distinct CIP financing schemes:

- the **High Growth and Innovative SME Facility ("GIF")**: the EIF uses GIF funds to make investments in European specialized venture and risk capital funds ("VC funds") that in turn invest in eligible European SMEs undertaking R&D and other innovation in their early stages ("GIF 1") and/or in their expansion stages ("GIF 2"); the duration of GIF investments typically consist of 5 to 12-year positions, and the size of any individual GIF investment by the EIF shall not exceed €30 million;
- the **Seed Capital Action**: the EIF provides capacity building grants to European venture capital and incubator companies to recruit expert staff enabling them to pursue investments in seed capital (grants are € 100,000 per staff member recruited, with an overall maximum per beneficiary of up to € 300,000 (3 staff members); these grants are only available to companies in which the EIF is also making an equity investment;
- the **SME Guarantee Facility**: the EIF provides loan guarantees or co-guarantees to European banks to reduce banks' risk exposure in mezzanine and other finance operations supporting eligible SME development.

GIF Process and Eligibility:

GIF funds would be granted in the form of EIF equity or quasi-equity investments in VC funds, which in turn would have to invest in SMEs established in the European Economic Area (EU plus Norway, Iceland, Liechtenstein) and certain candidate countries for future accession to the EU. Eligible SME activities should relate to technological innovation/development, technology transfer, and cross-border expansion. Investments in SMEs in the

area of ecological technologies may attract higher GIF funding ratios than those available for other sectors. An SME is defined as a company with less than 250 employees, a turnover of less than €50 million, and a balance sheet total of less than €43 million. Participating VC funds must undertake to comply with detailed reporting, auditing (including access by EU officials), and visibility obligations (reference to EU funding sources).

Applications for funds from the CIP GIF program must be lodged by the applicant VC fund with the EIF, which submits suitable requests for approval by the EU Commission. Applications are informal but must include a detailed investment proposal providing information relating to the relevant assessment criteria. Those include, among other things: catalytic effects, balanced geographical distribution of grants in EU, quality of the VC fund's management team, growth potential of SMEs in the target market, deal flow aspects, investment strategy, geographical focus, exit routes, size of the fund, proposed investment terms and expected returns (market conditions for GIF funds returns), and investor base details. GIF funds are intended to complement majority

investments by private sector investors in the applicant VC fund, and not more than 50% of the capital of the VC fund may be held by a single investor.

Other EFI Funds:

The EFI has €2 - 3 billion of other funds from the EIB group which are not subject to all of the restrictive specific rules applying to the CIP funds, but eligible VC funds still must target European early-stage SMEs in advanced technologies sectors, focus their investments mainly in the EU and accession countries, and as a rule be majority funded by private sector investors. The EIF would generally take a minority position of between 10 and 35% of the VC fund's total capital. Applications to the EIF need not specify whether assistance is sought under the CIP or more general EIF funds, as the EIF will allocate the application according to its merits.

In addition to the aforementioned measures at EU level, EU Member States may establish varying national incentive or funding schemes, which frequently have a more general application. Such incentive schemes would need to be examined on a country-by-country basis.

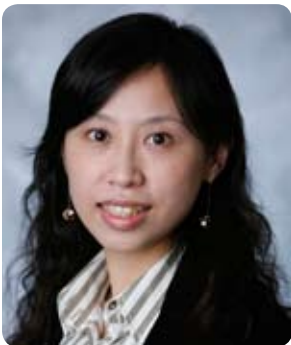
Fragmented VC Market / Opportunities:

The general venture capital environment in Europe continues to suffer from fragmentation and varying regulatory requirements and registration processes in European countries. Policy makers are aware of these problems and continue to work towards a solution, which might involve a future mutual recognition of venture capital fund structures, eventually permitting them more easily to do business across the European Economic Area. But new regulations move slowly and for now one must continue to deal with different local risk capital frameworks. In the meantime, however, the lack of uniformity may serve to create competitive opportunities as various EU countries design their local regimes so as to attract as much investment as possible.✿


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Overview of China's New Antitrust Law

By Cedric Lam and Janet Wong

After nearly 13 years of drafting, China finally promulgated its first antitrust legislation, the PRC *Anti-Monopoly Law* ("AML"), which will come into force on August 1, 2008.

The AML promotes fair market competition by prohibiting three major types of monopolistic acts, namely:

I. Monopolistic agreements – The AML prohibits two categories of monopolistic agreements, specifically, agreements among competitors (horizontal agreements), and agreements with trading partners (vertical agreements). The term "monopolistic agreements" is broadly defined to include agreements, decisions, or other concerted behaviors between parties that eliminate or restrict competition. An agreement to fix prices, restrict outputs or allocate markets will generally be regarded as monopolistic.

Exemptions may apply where the purpose of a monopolistic agreement is to improve technologies, enhance efficiency or quality, serve public welfare, or deal with oversupply issues in severe recessionary conditions etc.

For violations, illegal gains may be confiscated and fines between 1% and 10% of prior year's sales turnover can be imposed. A business operator may also be ordered to stop the violations.

II. Abuse of dominant market position

– A company is in a "dominant market position" where it has the ability to control prices (or other relevant factors) or to impede or affect entry of other business operators into the market. Examples include: selling or buying products at unfair prices, selling products below cost, unreasonably refusing to deal, tying products, or discriminating between trading partners.

The AML contains a number of presumptions of dominance based on

market share in a relevant market. For example, a company is presumed to have a dominant market position if it holds a majority (at least 50%) market share or where two operators jointly account for 2/3 of the market share. For the purpose of the AML, "relevant market" means the spectrum of goods or territorial scope within which the companies compete against each other during a certain period of time for specific goods or services.

For violations, illegal gains may be confiscated and the same fines as provided for entering into monopolistic agreements may be imposed.

III. Anti-competitive concentration – The AML outlines a new pre-merger notification procedure that applies to both foreign and domestic parties. A "concentration" arises in the event of a merger, acquisition of control, or acquisition of an indicia of control such as (re)arrangement of management positions, ownership, and agreements, among others.

Any concentration that reaches certain thresholds must be notified for review, and cannot be implemented until the review process has been completed. Concentrations that are likely to have the effect of eliminating or restricting competition can be prohibited or approved under certain restrictive condition.

The adoption of the AML is an important milestone for China's socialist market economy. The provisions in the AML are generally in line with international norms. However, many vital details, such as specific concentration review thresholds, remain to be filled in by detailed implementing regulations or guidelines.

Given the continued importance of China as an emerging market, all multinationals doing businesses in China should closely follow the developments relating to the AML and consider reviewing and revising their business practice accordingly.

If you would like to receive any further information about the new AML, please contact a member of our International Antitrust practice group.❖

Dorsey Forms Financial Crisis Working Group

With businesses and financial institutions facing increasing challenges as the financial crisis deepens, Dorsey has created a Financial Crisis Working Group which brings together the firm's expertise and strategic problem solving capabilities to advise clients coping with the rapidly changing financial landscape in the U.S. and around the globe.

On October 14 the [Working Group](#) hosted a webinar, "How to Navigate the Evolving Financial Crisis." This lively, 75-minute presentation featured insights from experts at leading financial services companies, plus analysis and recommendations from Dorsey attorneys.

Visit www.dorsey.com/financialcrisis/overview to listen to the webinar and view presentation materials.

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