Competition Law and Policy Developments in China: The New Antimonopoly Law

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Enforcement of China’s Antimonopoly Law

China’s Antimonopoly Law, or AML, came into effect on August 1 of this year. The passage of the law has been hailed as a major milestone in China’s transition from a state-planned economy to a more market-oriented economy, or “socialist market economy,” as stated in Article 1 of the AML. The law itself is a simple document, consisting of 57 relatively terse articles, with many concepts taken from European or US legislation. Transplanting these concepts into China leaves a number of questions concerning how the AML will be enforced, from co-ordination of the enforcement bodies to how significant terms will be defined. There will be greater clarity once final further implementing regulations are issued, and certainly as China builds up an enforcement history. There are some partial answers, however, in respect of:

- the parties involved (who will have a major impact on how the legislation is implemented),
- the provisions on enforcement in the AML itself, and
- how evolving Chinese policy towards foreign investment and “national champions” may impact enforcement.

Background

Preparation of the AML began in 1994. At that time, foreign investment in China was warmly welcomed, subject to certain constraints. Production by the state and collectively-owned sectors constituted about 75 percent of Chinese industrial output and foreign investment was seen as a means to obtain foreign technology, foreign exchange and foreign management expertise. At least initially, the AML probably was directed towards making the state-owned sector more efficient and market driven rather than towards regulating foreign investors, whose entry into the market was and still is regulated through a government approval process.

A few things have changed since 1994. First, China joined the WTO in December 2001. This impacted how China could regulate foreign investment, especially in the service sector and in terms of conditioning government approval of foreign investment on technology transfer or export quotas, which is not allowed under WTO rules. Second, foreign investment has grown, and with it, concern within some circles in China that this trend has injured Chinese companies.

This concern became evident in 2004, when news of a report by the State Administration of Industry and Commerce hit the press, criticizing the monopolistic behavior of the large multinationals in China. Around this time, there were calls to move the AML forward to protect Chinese domestic industry from foreign investors. However, it appeared that questions as to who would be the regulator and what industries and companies would be subject to exemptions were delaying the AML. These questions were not entirely resolved in the final version of the law.

As to the treatment of foreign-invested companies, the version of the AML which passed is largely neutral on its face (with the exception of certain exemptions for state-owned enterprises, or SOEs, and the provision on national security).

Government Players

There are three main government players whose former roles overlapped with areas the AML is intended to cover: the Ministry of Commerce (MOFCOM), the State Administration of Industry and Commerce (SAIC) and the National Development and Reform Commission (NDRC). Each of these government bodies now houses an AML enforcement department.

SAIC

SAIC is an administration rather than a ministry level organization, which places it lower in the government pecking order than MOFCOM or NDRC. SAIC serves several roles, including as the companies registry, trademark office, and regulator of market order. Given its responsibility for maintaining market order, the SAIC administers the Anti-unfair Competition Law and the Consumer Protection Law, both of which came out in 1993, shortly before work began on the AML. The SAIC has branches, or AICs, down to the lowest local level. Under the AML, SAIC’s Fair Trade Bureau will
be renamed the “Antimonopoly Law and Anti-Unfair Competition Law Enforcement Bureau” and will be responsible for handling abuse of dominance and monopoly agreement matters, in each case not involving pricing, for which NDRC is responsible.

MOFCOM

MOFCOM is a ministry, and has responsibility for domestic and international commerce. Its responsibility includes the approval of foreign investment in China and it generally is perceived to be supportive of foreign investment. Together with SAIC, MOFCOM was responsible for handling antimonopoly filings under the 2006 Provisions on the Acquisition of Domestic Enterprises by Foreign Investors. MOFCOM had established a Bureau of Anti-monopoly Investigation, which will handle merger reviews under the AML as well as assisting Chinese companies with cases in other jurisdictions and international co-operation.

NDRC

NDRC sometimes is referred to as a “super ministry,” with greater power than other government departments. It evolved from the State Planning Commission and, as the name suggests, has primary responsibility for state economic planning, including industrial policy. NDRC administers the pricing law, which includes provisions on price fixing, price discrimination, false or misleading pricing, etc., and NDRC’s Department of Price Supervision is responsible for dealing with monopoly agreements in abuse of dominance matters which involve pricing.

Other Departments

There are other Chinese government bodies which may play a role in administering and enforcing the AML, including the ministries that cover particular industries, such as the newly formed Ministry of Industry and Informatization, with regulatory authority over the IT and communications industries. Further, the State-owned Assets and Supervision Administration Commission, or SASAC, which holds the state’s interests in the SOEs, will also play a role, at least behind the scenes, in regulating the SOEs and organizing their mergers into large “national champions.”

The AML’s Provisions on Enforcement Bodies

The AML provides for two organizations with complementary roles to handle AML work: the Antimonopoly Commission and the Antimonopoly Law Enforcement Authorities.

Antimonopoly Commission

Scope of Authority. Article 9 provides for the State Council, a body roughly equivalent to the Cabinet in the US, to establish an Antimonopoly Commission, with responsibility for:

- developing competition policies and guidelines,
- investigating and reporting on market competition,
- coordinating antimonopoly enforcement work, and
- such other roles as the State Council may assign.

An earlier draft of the AML provided that the Commission would have authority to handle important antimonopoly cases as well, though this was deleted in the final draft. Having the Commission decide important cases could have led to the politicization of cases involving sensitive IP issues, or the protection of important SOEs, so the deletion of this provision can be seen as a positive development.

Composition. The Commission is chaired by Vice Premier Wang Qishan, and its co-chairs are the heads of the major government departments involved in enforcing the AML, namely SAIC, MOFCOM, NDRC and the deputy secretary-general of the State Council. The Commission also includes 14 commissioners representing important government departments, including SAIC and departments in charge of important industries, such as the Electricity Regulatory Commission. The role of the Commission will be central in determining how the AML will be enforced, as it can facilitate more consistent enforcement and may serve to bring relevant stakeholders into the AML process.
We do not have details on the frequency with which the Commission will meet or the method of appointment of its members, though it probably will be a non-permanent body.

**Antimonopoly Enforcement Authorities**

**General.** Article 10 of the AML provides that the State Council will designate Antimonopoly Enforcement Authorities with responsibility for enforcement of the AML. It was clear from the language of Article 10 that there would be more than one Enforcement Authority. As expected, the State Council has provided that MOFCOM will continue to be responsible for merger clearances, SAIC for handling abuse of dominance and monopoly agreements not related to pricing, and NDRC will be responsible for pricing and cartels. Given the open-ended language of Article 10, it is possible that ministries with responsibility for particular industries will play a role in enforcement in their sectors. For example, reportedly a think tank under the Ministry of Industry and Information, or MII, is working on antimonopoly measures, which may spell out MII’s role in enforcement.

**Delegation to local level bodies.** The AML provides that Enforcement Authorities may delegate their responsibilities to provincial level authorities, (including autonomous regions and municipalities directly under the central government, such as Beijing). This could lead to some lack of consistency, depending on what functions are delegated and how reporting is handled. The AML does not provide for delegation to local governments below the provincial level, which are more likely to lack the expertise to deal with complex competition issues, and to use the law to protect local companies. However, in draft rules on pricing, NDRC has provided for delegation to the local municipal and county levels.

Hopefully, implementing legislation will spell out the scope of delegation to the provincial level authorities and will provide for a review at, or at least reporting to, the central level government authorities, to ensure consistent enforcement.

**Industry Associations**

Industry associations, which play a distinct role in China, will have some responsibility in regulating their own industries. Article 11 of the AML provides, “Industry associations shall strengthen industry self-regulation, guide business operators in their industries in competing in accordance with the law and safeguard the competitive order of the market.” Article 11 reflects a document the State Council issued last summer concerning the role of industry associations in the Chinese economy, including market supervision and maintaining a market environment for fair competition.

In many cases, the industry associations evolved out of former government departments in charge of particular industries, and the associations tend to maintain very close relationships with government regulators and of course with their member companies. The involvement of foreign invested companies in China’s industry associations has in some cases been problematic. Thus, there is concern about the role of industry associations in market regulation.

In addition, some industry associations have openly or overtly played a role in pricing cartels. A recent public outcry over the attempt by the Instant Noodle Association to orchestrate a national price hike for instant noodles raised questions as to whether these associations can be trusted to conduct self-regulation on competition matters at this stage in China’s economic development.

**Investigations under the AML**

Chapter Six of the AML covers the investigation of monopolistic acts.

**Initiating an investigation**

While the AML does not spell out which government bodies can initiate an investigation of monopolistic conduct, presumably the Enforcement Authorities can initiate investigations on their own initiative, or on the recommendation of the Commission or other government departments. Further, the AML provides that business entities and individuals can report suspected monopolistic acts to the Enforcement Authorities, which will keep the identity of the reporting person confidential. The AML does
not state at what government level such a report could be made, i.e., central government in Beijing, provincial level or local level, or whether more senior government levels must be notified of a report where there is a subsequent investigation. Such a notification procedure would help decrease the likelihood of spurious reports.

Where the report is in writing and provides sufficient information and evidence, the authorities shall conduct an investigation.

**Conducting the investigation**

The AML gives the Enforcement Authorities broad powers in conducting investigations of suspected monopolistic conduct, but builds in some procedural safeguards.

Under Article 39, the authorities can -

- enter the suspect's place of business or other relevant premises,
- interview the business operator, materially interested parties, or others, and require them to explain relevant circumstances,
- review and take copies of documents and information, including relevant certificates, agreements, accounts, correspondence and electronic data of the party under investigation, materially interested parties and others,
- place under seal or impound evidence, and
- make inquiries with the bank of the party under investigation.

Articles 39 and 40 build certain safeguards into the process -

- When the authorities have taken these measures, they must submit a written report to the person in charge of the relevant Enforcement Authority for approval.
- When conducting an investigation, there must be at least two enforcement agents present and they must present their credentials.
- The agents must keep a written record, which must be signed by the person being interviewed.
- The agents and the Enforcement Authority must maintain the confidentiality of business secrets learned during the investigation.

If after this investigation the Enforcement Authority believes there were monopolistic acts, it will render a decision to handle the case, which it can publicly announce.

The business operator may have the option to correct the consequences of its monopolistic acts. If it agrees to take specific action within a set period of time, the Authority may suspend the investigation, though it must monitor the business operator’s performance. If the operator fulfils its obligations; the Authority may decide to terminate the investigation. There is a provision for the Authority to resume the investigation if –

1. the operator fails to perform its corrective actions,
2. there is a material change in the facts on which the decision to terminate was based, or
3. the information the operator provided was false or incomplete.

**Penalties**

Penalties for violations of the AML are severe.

**Monopoly agreements.** Liability for monopoly agreements is covered under Article 46, which provides that Enforcement Authorities can order business operators which reach and implement monopoly agreements to cease their acts, turn over their illegal income and pay a fine of 1 to 10 percent of their sales turnover for the preceding year. The scope of “turnover” is unclear, including whether it covers turnover outside China, though such an interpretation could lead to overlapping penalties and would be more burdensome for multinationals than for domestic companies with sales primarily in China. If the agreement has not yet been implemented, the operator is subject to a fine of up to Rmb500,000, or about $70,870.

**Leniency.** There is some leniency for self-reporting. Where an operator voluntarily provides information
on a monopoly agreement and important evidence, the Enforcement Authority may reduce the penalty or grant an exemption from penalties altogether. However, given the lack of clarity or precedent, it is unlikely that many violators will self-report.

Article 46 includes a penalty provision for industry associations which organize companies in their sector to reach monopoly agreements, providing that they may be subject to fines of up to Rmb500,000 and, in serious cases, may lose their registration licenses. While the fine is not huge, it may be significant, especially for smaller industry associations. Deregistration of course would be very serious. The inclusion of this provision is encouraging, both for controlling the actions of industry associations within China and for helping to keep industry associations out of trouble overseas. Further, the associations generally have very close relationships with the Chinese government, often employing former officials and in some cases playing regulatory roles, yet the participation of foreign invested companies in the associations has, in some cases, been limited. Enforcement of the AML against the associations could help level the playing field for foreign investors.

**Abuse of market dominance**. The penalties for abuse of market dominance in Article 47 are similar to those for monopoly agreements. The Authorities can order the operator to cease its unlawful acts, and can confiscate the operator’s illegal income and fine it between 1 to 10 percent of its sales turnover for the preceding year. As in the case of monopoly agreements, the scope of “turnover” is not clear.

**Concentrations**. Where business operators create a market concentration in violation of the law, Article 48 provides that the Enforcement Authority can impose a fine of up to Rmb500,000 and order the operators to cease implementation of the concentration, dispose of the shares or assets, or take other measures to return to the status quo ante. While the fine is not huge, the requirement that the operators undo the concentration could be quite onerous.

**Civil liability**. Article 50 specifically provides for civil liability where monopolistic acts cause third parties to suffer losses. However, there is still some disagreement in China as to what third parties will have standing to bring an action. While there seems to be some agreement amongst legal scholars that injured individuals should be able to file suit, some scholars have argued giving competitors standing could lead to the filing of frivolous lawsuits to harass competitors. There has been some question as well concerning whether industry associations should have standing to bring lawsuits on behalf of their members.

**Abuse of Administrative Authority**. The AML’s chapter on abuse of administrative authority has piqued the interest of the foreign community in China. Almost any economic activity in China entails some sort of administrative approval and certainly for the foreign business community in China, the approval process has been an issue. Sales of goods from one province or region of China into another can be difficult where there is a competing producer within that province or region. Similarly, investing or establishing branches in another region may be difficult where there is a local competitor. The chapter on abuse of administrative authority to eliminate or restrict competition targets these types of behaviors.

It is not clear how this chapter will be enforced. While there is a list of prohibited actions, there are no procedures under which an aggrieved party can seek relief, and no penalties are specified. Rather, the AML provides that the authority at the next level up shall order the relevant administrative authority to rectify the matter, and the Enforcement Authority may “submit its recommendations” on handling the matter to the relevant higher level authority. While this may make sense in China’s vertical government structure, there is some question as to whether a higher level authority will rule against its own regulatory interests as represented by its subordinates. Hopefully implementing legislation will provide greater detail.

**Refusing to cooperate with an investigation**. Article 52 spells out penalties for refusal to cooperate in an investigation, or destruction or concealing of evidence, ranging form Rmb20,000 to Rmb100,000 for an individual and Rmb200,000 to Rmb1,000,000 for a business entity, depending on the seriousness of the case. Article 52 states there may be criminal liability in some cases.
Appeal

The AML provides for appeal of determinations by the Enforcement Authority. Article 53 requires that a party which disagrees with the Enforcement Authority’s determination under Articles 28 or 29 concerning a concentration first seek administrative reconsideration, under which the Enforcement Authority will reconsider its earlier decision. Procedures for this are set out in the PRC Administrative Reconsideration Law and its implementing regulations. If the party is dissatisfied with the administrative reconsideration, it then may file suit. Procedures for this are set out in the PRC Administrative Litigation Law.

For decisions other than those concerning concentrations, namely abuse of dominance or monopoly agreements, the business operator can either apply for administrative reconsideration or file a suit.

Exemptions and Chinese Government Industrial Policy

Though the AML is mostly neutral on its face, it would appear to create exemptions for certain types of SOEs and exceptions for monopoly agreements that meet certain state objectives, such as improving technology or saving energy. These exemptions, together with certain other provisions of the AML, especially those dealing with abuse of dominance, raise concerns that there could be two enforcement standards, one for foreign invested companies and one for domestic companies, especially “national champions.”

Article 7 provides an exemption for state-owned enterprises in sectors that “affect the national economic lifeline and state security” or “sectors in which exclusive operation and exclusive sale are implemented.” This could exempt a number of sectors, including, for example, telecommunications, energy, electricity, financial services, mining and metals and machinery manufacturing, from the scope of the AML. This could make it more difficult for foreign invested companies to compete in China, as SOEs in these sectors could form cartels or engage in otherwise prohibited behavior.

Further, under Article 15, certain monopoly agreements may be exempt, namely, agreements to:

(i) improve technology or develop new products,
(ii) improve product quality, reduce costs, increase efficiency, unify product specifications and standards or implement a specialized division of labor,
(iii) improve the efficiency or competitiveness of small to medium enterprises,
(iv) serve public interest causes such as saving energy, protecting the environment, providing disaster relief,
(v) mitigate a serious decline in sales or marked overproduction in an economic downturn,
(vi) secure legitimate interests in foreign trade or economic cooperation, and
(vii) other reasons as specified by the State Council.

Article 56 provides exemptions for agricultural producers and rural economic organizations from the AML, though this has not been particularly contentious.

Policy Trends

As in other jurisdictions, the enforcement of the AML will reflect the current government policies. However, in China, the emphasis may be on foreign investors and reorganization of the state-owned sector, and the relationship between the two. On March 6, MOFCOM issued “Guiding Opinions on Attracting Foreign Investment Nationwide in 2008,” which provides for the encouragement of foreign investment in the reorganization and reform of the SOEs by way of mergers and acquisitions. The Opinions, however, also provide for maintaining national industrial security and supervision of mergers and acquisitions involving foreign investment. Thus, foreign investment will continue to be welcome, subject to certain constraints. Reports out of the 2008 session of the National People’s Congress also give some indication of policy trends. Goals announced at the NPC included the encouragement of mergers and acquisitions in high pollution and high energy consumption industries and promotion of...
indigenous innovation and encouragement of internationally competitive high tech companies. These and future policies, including industrial policies, will impact the enforcement of the AML and shape its implementation in the critical early stages.

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