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The Antimonopoly Law in China: Where Do We Stand?

Xinzhu Zhang and Vanessa Yanhua Zhang

The recent development of China's Antimonopoly Law has caught the attention of governments, academia, and businesses. Although China has laws that address anticompetitive conduct and institutions to enforce them, they are disparate and do not constitute a comprehensive competition regime. Recent antitrust cases in China have stressed the need for a competition law that can be applied consistently across sectors. In this paper, the authors explain China's legislative process, the relationships among its relevant institutions, and explore the problems and challenges facing lawmakers. Although the 2007 passage of the Antimonopoly Law was an important step towards a comprehensive competition regime, it remains to be seen how it will operate in practice when it goes into effect on August 1, 2008. The authors argue that two key issues remain unresolved: 1) how the Antimonopoly Law will be backed by an effective enforcement process; and 2) how the Antimonopoly Law will effectively deal with administrative monopolies.

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I. Introduction

Since the late 1970's, China has been undergoing a successful transition from a centralized to a market-oriented economy. A series of reforms has increased the privatization of farmlands, which in turn has increased the responsibility of local industry managers and the number of small-enterprises. Over the course of the last twenty-five years, China's gross domestic product (GDP) has grown at an average annual rate of 9.4 percent and, as of 2006, was the fourth largest in the world behind the United States, Japan, and Germany.[1] Foreign direct investment has also increased, and is currently estimated at over US$70 billion in 2006.[2]

Despite its increasingly prominent role in the global economy, China has never had a comprehensive competition law to protect the fruits of its market-driven economic reform. Initial steps towards a comprehensive competition law were taken in 1993 when a board of experts was elected to develop a preliminary version of an antimonopoly law. Various other laws to address competition issues followed. However, the real impetus for establishing a comprehensive competition law struck in 2001 when China joined the World Trade Organization (WTO) and the National People's Congress (NPC) Standing Committee agreed that China would adopt a comprehensive competition law to comply with WTO requirements.

Since then, developing an antimonopoly law has remained one of the Chinese government's top priorities. Several iterations of a draft antimonopoly law have been released, reviewed, and scrutinized, and have kindled ardent disputes in academia. The NPC, Ministry of Commerce (MOFCOM), the State Administration of Industry and Commerce (SAIC), and China's State Council have hosted numerous conferences and meetings with domestic and international experts and officials to encourage input and gather feedback on the law. The revisions continued until August 30, 2007, when a final version of the Antimonopoly Law [hereinafter "AML"][3] was passed by the twenty-ninth session of the tenth NPC. The AML will become effective on August 1, 2008.

Throughout the deliberation process, particularly during the final stages between 2004 and 2007, two key issues emerged. The first issue was with regards to enforcement structure. Prior to the AML, a number of institutions bore responsibility for upholding aspects of China's existing competition laws. Deciding how, and especially, by whom, the AML should be enforced going forward posed a challenge. The second issue concerned administrative monopoly and how to regulate certain government agencies and local governments that restrict competition.

1 World Bank, World Development Indicators Database (release as of Jul. 1, 2007).

2 Press Release, United Nations, Foreign Direct Investment Roes by 34% in 2006 (Sep. 1, 2007), *available at* http://www.unctad.org/Templates/Webflyer.asp?docID=7993&intItemID=2068&lang=1.

3 Several drafts of the AML were issued throughout the review process. In this article, AML refers to the final Antimonopoly Law that was passed on August 30, 2007 and will be effective August 1, 2008. The People's Republic of China, Antimonopoly Law (Aug. 30, 2007) (in Chinese) [hereinafter AML].

The final AML still does not clearly address either issue and the State Council is expected to provide further clarifications this year before the AML takes effect.

In this paper, we focus on these two remaining elements of the AML. The paper is structured as follows: Section II explains the current institutions and litigation process of the AML; Section III cites recent antitrust cases in China which have attracted considerable interest from commentators; Section IV explores the Law's most significant potential weaknesses; and Section V concludes.

II. Current Institutions and Litigation Process

The existing rules and institutions that govern anticompetitive behavior are haphazard and form neither a consistent nor comprehensive system of competition law, as demonstrated by recent cases. Despite this, the existing framework has played a key role in the development of the AML. China has always adopted a gradual approach to reform, which means that the current rules and institutions have greatly impacted the AML's structure and enforcement.

THE EXISTING FRAMEWORK HAS PLAYED A KEY ROLE IN THE DEVELOPMENT OF THE AML. CHINA HAS ALWAYS ADOPTED A GRADUAL APPROACH TO REFORM, WHICH MEANS THAT THE CURRENT RULES AND INSTITUTIONS HAVE GREATLY IMPACTED THE AML'S STRUCTURE AND ENFORCEMENT.

A. THE EXISTING ANTITRUST RULES

China's competition policy is governed by a number of specific laws, administrative rules, and regulations in addition to the recently passed AML. The first law that deals with competition policy is the Anti-Unfair Competition Law enacted in 1993.[4] While this law mainly functions as a consumer protection law, it also contains some antitrust rules such as Article 12, which prohibits tie-in sales, and Article 15, which prohibits price-fixing and bid-rigging.[5] The second antitrust law is the

4 PEOPLE'S REPUBLIC OF CHINA, ANTI-UNFAIR COMPETITION LAW (Dec. 1, 1993) (in English), *available at* http://en.chinacourt.org/public/detail.php?id=3306. The structuring of competition laws into the Anti-Unfair Competition Law and the Antimonopoly Law created some confusion over the principle goals of the laws. The title "Antimonopoly" has lead to debates that concentrate on the monopoly status or market power itself, rather than the anticompetitive conduct of the monopoly (or dominant firm). Antitrust law is concerned with the latter.

5 *See* ANTI-UNFAIR COMPETITION LAW, *supra* note 4, at art. 12:

> Manager shall not sell commodity attached with unreasonable condition or force the consumers to unwillingly purchase any additional commodity that come together with the product that the consumer buys.

Also see, *ibid.* at art. 15:

> Bidder shall not act in collusion for bidding, not raise or reduce the price for bidding.
>
> Bidder shall not collude with the company that is offering to bid in order to put the other bidders out of the competition.

Price Law enacted in 1997, which contains provisions against improper pricing behaviors including price-fixing, predatory pricing, and price discrimination.[6]

In addition to these two laws dealing with antitrust issues, there are some important administrative rules and regulations that deal with antitrust policy. For instance, the rule, Prohibiting Public Utility Companies from Restricting Competition, was issued by the SAIC in 1993 and contains antitrust rules for public utility sectors.[7] The regulation policy, Rules on Prohibiting Regional Blockade in Market Economic Activities, was issued by the State Council in 2001 and deals with administrative monopoly.[8] One important rule which deals mainly with abuse of market power is the 2003 Provisional Rules on Prevention of Monopoly Pricing (the Provisional Rules) issued by the National Development and Reform Commission (NDRC).[9] It prohibits market dominance (inferring dominance from market shares of relevant markets), promotes substitutability of relevant goods and services, and encourages free entry. It also prohibits price coordination, supply restriction, bid-rigging, vertical price restraint, and below-cost pricing as an abuse of dominance.

With regards to merger and acquisition control, an important rule is the 2003 Provisional Rules on Acquisitions of Domestic Enterprises by Foreign Investors (the Merger and Acquisition Rules) issued by MOFCOM and revised in 2006 based on the Provisional Rules.[10] On March 8, 2007, MOFCOM issued the *Guidelines for the Antitrust Filing for Merger and Acquisition of Domestic Enterprises by Foreign Investors* (the Filing Guidelines),[11] which replaces an earlier version from April 20, 2006 (the Original Guidelines). In fact, the Filing Guidelines summarize several provisional rules and regulatory policies. The purpose of the

6 People's Republic of China, The Price Law (Dec. 29, 1997) (in English), at art. 14, *available at* http://en.chinacourt.org/public/detail.php?id=99.

7 People's Republic of China, Prohibiting Public Utility Companies from Restricting Competition (Dec. 24, 1993) (in Chinese), *available at* http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027927.html.

8 People's Republic of China, Rules on Prohibiting Regional Blockade in Market Economic Activities (Apr. 21, 2001) (in Chinese), *available at* http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027985.html and http://www.lawinfochina.com/law/display.asp?db=1&id=1820 (in English).

9 People's Republic of China, Provisional Rules on Prevention of Monopoly Pricing (Jun. 18, 2003) (in Chinese), *available at* http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300028008.html.

10 People's Republic of China, Provisional Rules on Acquisitions of Domestic Enterprises by Foreign Investors (Mar. 13, 2003) (in Chinese), *available at* http://tfs.mofcom.gov.cn/aarticle/date/i/s/200509/20050900366385.html (revised Aug. 10, 2006, *available at* http://www.xasmw.com/rule/content.asp?id=254 (in Chinese)).

11 People's Republic of China, Guidelines for the Antitrust Filing for Merger and Acquisition of Domestic Enterprises by Foreign Investors (Apr. 2007) (in Chinese), *available at* http://tfs.mofcom.gov.cn/aarticle/bb/200704/20070404597464.html.

Filing Guidelines is to present a roadmap for parties to understand when and what to file when they need a merger or acquisition approved by MOFCOM.

B. CURRENT ENFORCEMENT

According to the Constitution of the People's Republic of China, the State Council is the highest organ of state power and state administration in the executive branch. In the legislative branch, the National People's Congress (NPC) is considered to be at the head of the hierarchy. The NPC is partially composed of a permanent body called the Standing Committee of the National People's Congress. The NPC and its Standing Committee have enacted a huge amount of legislation on topics of all description. These laws have been supplemented by myriad regulations of the State Council, and the central ministries and commissions under it, as well as provincial and local people's congresses and governments.

1. Government Agencies

Until recently, China's competition policy relied mainly on administrative government enforcement. This is understandable given that China is still in a transition from a centrally planned economy to a market-driven economy and that the administrative system is more established than the court system.

The main feature of the current antitrust enforcement regime is a multi-principal structure, under which three agencies share responsibility for enforcing China's current antitrust rules. The first agency responsible for enforcing China's current antitrust rules is SAIC, as authorized by the Anti-Unfair Competition Law. SAIC is primarily in charge of the micromanagement of market activities, ranging from business and trademark registration to street market regulation. SAIC has branches in virtually every major city in China. At the central government level, SAIC has a Fair Trade Bureau that contains an antimonopoly division. SAIC used to be a deputy-level administration, but it was promoted to ministry-level in 2005 in an attempt to enhance its enforcement authority. The change of administrative hierarchy was very important in China where administrative power is traditionally considered more important than the power of the legal authorities.

The second main antitrust enforcement agency is NDRC, which has specific authority to enforce the Provision Rules, but also has general authority to enforce the Price Law. In some sectors, NDRC serves both as the regulator and as the competition policy enforcement agency.

The third antitrust enforcement agency in China is MOFCOM as authorized by the Merger and Acquisition Rules. In 1998, MOFCOM was restructured by combining the former Ministry of Foreign Economic and Trade, the Ministry of Domestic Commerce, and some departments of the State Economic and Trade Commission. The State Economic and Trade Commission was the first institution commissioned to draft an antimonopoly law, so MOFCOM, together with

SAIC, was naturally authorized by the State Council to draft the AML. MOFCOM is also responsible for antitrust review of merger and acquisitions, in particular foreign acquisitions of domestic companies.

Government agencies are not the only ones enforcing competition law in China. In many sectors, the regulator is also the de facto antitrust enforcement agency. For instance, according to the 2000 Regulations on Telecommunications of People's Republic of China, the Ministry of Information Industry (MII) also has the authority to deal with competition policy issues in the telecom sector.[12]

Until recently, SAIC and MOFCOM were the two most active and prominent government agencies enforcing antitrust rules.[13] SAIC released the influential 2004 report, *Multinational Companies' Competition Restricting Behavior and Counter Measures*,[14] while MOFCOM's achievements included creating the Antimonopoly Investigation Office. Many speculated that these two institutions saw themselves as the leading candidates to house the new antimonopoly enforcement agency when the law was enacted. While the State Council commissioned them to jointly draft an antimonopoly law, both ended up submitting their own version when they were unable to reach an agreement regarding enforcement agencies.

2. The Court System

In China, the courts are divided into Courts of General Jurisdiction and Courts of Special Jurisdiction.[15] Under the Courts of General Jurisdiction is the Supreme People's Court and the Local People's Courts. The latter includes three courts responsible for issues at the provincial level:

1. the basic people's court which is the lowest local courts and court of first instance;
2. the intermediate people's court which acts as the court of first instance for important local cases and appeals court for cases from the basic people's court); and
3. the high people's court which is the highest local court and reports to the people's congresses at provincial level.

12 People's Republic of China, Regulations on Telecommunications of People's Republic of China (Sep. 25, 2000) (in Chinese and English), *available at* http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=chl&gid=31476.

13 As a government agency, NDRC is special in that it is an administrative superpower.

14 The State Administration of Industry and Commerce, Report on Multinational Companies' Competition Restricting Behavior and Counter Measures (Mar. 2004).

15 In accordance with the Constitution of the People's Republic of China and the Organic Law of the People's Courts.

The Supreme People's Court handles national matters and is the highest court in the judicial system in China. The Courts of Special Jurisdiction comprise the Military Court of China, Railway Transport Court of China and Maritime Court of China.

The court system is paralleled by a hierarchy of prosecuting organs called People's Procuratorates. The Supreme People's Procuratorate resides at the highest level of this structure. The Supreme People's Court and the Supreme People's Procuracy are both very active, although they are subordinate to the NPC. They also have issued large numbers of "interpretations" (the substantive equivalent of supplementary legislation) and other documents, either separately, with each other, or with other agencies.

The trial process is an important part of adjudication and is greatly influenced by the civil law jurisdiction in which the judge is the dominant party in trial procedures. According to law, each case shall have at most two trials, which means that litigants to a case and their legal representatives who challenge the judgments made by a local court in the trial of first instance have the right to appeal the case to the next higher level court only once. Once the appeal is filed, the next higher court must try the case again. Normally, the judgment of the second trial is final and cannot be appealed. However, the parties to litigation may challenge the final decision or the effective decision through the trial supervision procedure. They may appeal to the appellate court or the higher court. After reviewing the complaint, the president of the court may ask the judicial committee to make a decision to accept or reject the appeal. Under no circumstances does the re-trial initiated by trial supervision procedure suspend the enforcement of the effective judgment that is challenged.

The AML does not address how antitrust cases, specifically, should be dealt with under the existing court system. One question that remains is whether private litigation can serve as a deterrent of antitrust offenses given the current structure of the judicial system.

III. Recent Antitrust Cases in China

Although the existing laws and institutions have provided some protection against anticompetitive behavior, recent cases involving antitrust issues illustrate the need for further reform to ensure that competition law is applied in a consistent and comprehensive manner.

A. CASE 1: SICHUAN TSUM POWER COMPANY V. SONY[16]

In November 2004, Sichuan TSUM Power Company (Sichuan TSUM) filed a landmark antitrust case against Sony and Shanghai Suoguang Electronics (Sony)

16 Sichuan TSUM Power Company v. Sony Corp. (filed in the People's No. 1 Intermediate Court, Shanghai) (Nov. 2004) (not yet reported).

in response to Sony's decision to manufacture its digital video products entirely in China. Sichuan TSUM was a local high-tech company that provided research and development, production, and sale and after-sale service of various batteries for digital cameras and video cameras. Sichuan TSUM batteries could be used in several brand's digital products, such as Panasonic and JVC, but could not be used in Sony's digital camcorders and cameras. When Sony made its manufacturing announcement in March 2004, market experts forecasted a rapid increase in Sony's share of the digital camera market as a result. Sichuan TSUM alleged that Sony was engaging in monopolization and abusing its dominant market position. It also claimed that Sony's use of an electronic coding feature in its digital cameras and video cameras violated China's competition laws since only Sony batteries could be used in these devices, qualifying as a bundle or tie-in sale.

WHETHER THE AML WILL LESSEN THE CHALLENGE OF DECIDING CASES LIKE THESE GREATLY DEPENDS ON HOW THE STATE COUNCIL DECIDES TO ENFORCE THE LAW IN PRACTICE AND WHAT IT DETERMINES THE ROLE OF THE COURTS TO BE.

The Shanghai People's No. 1 Intermediate Court heard the case. During the proceedings, even attorneys for the plaintiff noted that this case would be challenging to decide given that there was no formal antimonopoly law at that time. When this paper went to press, no verdict has been decided. Whether the AML will lessen the challenge of deciding cases like these greatly depends on how the State Council decides to enforce the Law in practice and what it determines the role of the courts to be.

B. CASE 2: US CARLYLE GROUP'S PURCHASE OF XUZHOU CONSTRUCTION MACHINERY[17]

In October 2005, US Carlyle Group became the first foreign firm to purchase a Chinese firm with its buyout of of Xuzhou Construction Machinery (XCM), China's biggest machinery engineering manufacturer. According to signed stock purchase and joint-venture agreements, the Carlyle Group would pay RMB 3 billion (US$375 million) to purchase an 85 percent stake in XCM, a subsidiary company of Xuzhou Construction Group (XCMG).

XCMG was a state-owned enterprise (SOE) under the supervision of the state-owned Assets Supervision and Administration Commission of the Xuzhou, Jiangsu province. It was also listed as one of the main SOEs that needed further reform or restructuring. XCMG, needing the gains that would result from restructuring which could serve to repay bank loans and restructure other poorly-performing subsidiaries, searched for a buyer for over two years. After several rounds of bidding, XCMG chose Carlyle, a highly profitable U.S.-based private

17 For details on the purchase, *see* Andrew Batson, *Carlyle to Buy Less of Chinese Firm*, WALL ST. J., Mar. 19, 2007.

equity firm with strong political connections in Washington, DC.[18] The local government supervised the entire negotiation, from the restructuring plan to the sale price, to keep its state-owned capital from being undervalued.

Since Carlyle's total investment exceeded US$100 million, the project needed approval from NDRC and, given it involved a foreign stake, it also needed to undergo MOFCOM's approval process. MOFCOM was concerned about antitrust issues. It asked for an antitrust report from both XCMG and Carlyle to prove that the buyout would not create a monopoly and harm domestic firms. In October 2006, the plan was revised and Carlyle's stake was reduced to 50 percent. When the buyout was finally approved by MOFCOM in March 2007, Carlyle's stake had fallen to 45 percent or RMB 1.8 billion (US$225 million).

By limiting Carlyle's investment in XCMG, MOFCOM kept the state's holdings in XCMG above the 50 percent required for the enterprise to be classified as "state-owned". While MOFCOM may have expressed concerns about the antitrust issues the merger would create, it seems MOFCOM was also interested in maintaining the state's position as a majority stakeholder. Despite its role as an antitrust enforcer, MOFCOM acted more out of concern for state control than for competition. How such actions by administrative agencies should be addressed is one of the key issues undergoing review this year prior to the AML's implementation in August 1, 2008.

C. CASE 3: THE SUPOR (ZHEJIANG, CHINA) AND SEB (FRANCE) MERGER CASE[19]

The recent merger of Supor, the largest cookware manufacturer in China, with SEB, a France-based producer of small domestic appliances, raised more questions about how to define monopolization.

Supor, founded in 1988, is one of China's largest manufacturers of electrical kitchen appliances, with an annual production capacity that exceeds 3.5 million units. SEB, a global leader in domestic appliances, and the world's largest manufacturer of small appliances, sells its products in more than 120 countries. The company is famous for its Krups, Moulinex, Rowenta, and Tefal brands.

In August 2006, Supor agreed to sell a 61 percent stake in its operations to SEB in a three-stage transaction. As part of the deal, SEB would transfer technologies, management expertise, and more original equipment manufacturing and original design manufacturing projects to Supor. Both firms would share their sales and after-sales networks.

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18 *See* Dan Briody, The Iron Triangle: Inside the Secret World of the Carlyle Group (2003).

19 For background on the merger, *see SEB given green light to acquire majority stake in China's Supor*, People's Daily Online, Apr. 12, 2007, *available at* http://english.peopledaily.com.cn/200704/12/eng20070412_365898.html.

Given Supor's leading position in China's cookware market (at the time it held a 47 percent market share), domestic competitors strongly objected to the transaction. In August 2006, soon after Supor announced the takeover agreement, six large cookware producers, including the second and third biggest cookware manufacturers, ASD and Double Happiness Co., respectively, urged MOFCOM to ban the merger, concerned that SEB would monopolize the Chinese market after taking control of Supor. MOFCOM carried out antitrust investigation in October 2006 and eventually approved the merger on April 11, 2007. MOFCOM did not explain why it approved the merger, and the combination provides another example that would have benefited from more clarity on the goals of merger regulation. We are hopeful that the newly enacted AML will provide an official and explicit guideline with regards to merger cases.

D. CASE 4: INTEL V. DONGJIN CO.[20]

Touted by the media as the leading intellectual property (IP) case in 2005, the *Intel* case evolved into China's leading antimonopoly case in 2006.

Dongjin Co. was founded in 1993 and was the first domestic company to conduct its own research and development of the core technology behind its computer technology integration (CTI). Dongjin was a large CTI provider in China, and at one point ranked third worldwide. In 2000, Intel acquired Dialogic (the largest CTI provider in China) for US$800 million and Dongjin and Intel became direct rivals.

In December 2004, Intel's headquarters in the United States filed a petition against Dongjin with the Middle People's Court in the Shenzhen province, claiming that Dongjin had infringed its software copyright. Intel estimated it was owed damages of US$7.96 million (RMB 65.78 million). Intel was quite confident that it would win its case given its supporting evidence and the current condition of IP protection in China. It also hoped that this case would send a message to other companies in China that might be infringing on its IP.

However, Dongjin did not respond directly to Intel's claims. Instead, in March 2005, Dougin's Beijing branch filed its own petition against Intel, claiming that Intel was exercising monopoly power by building technological barriers to block its competitors.

The case quickly attracted the attention of the media and public. Experts, scholars, and the public press, lacking an understanding of the details of the technology and litigation process, accused Intel of "entrapment" and criticized it for protecting of its technology monopoly.[21] Frustrated by the public pressure and

20 *See* Intel Corp. v. Dongjin Co. (filed in Middle People's Court, Shenzhen) (Dec. 2004) and Dongjin Co. v. Intel Corp (filed in the People's No. 1 Intermediate Court, Beijing) (Mar. 2005).

21 *See Dongjin and Intel: the Leverage Threat*, Competition Power, Jun. 2007 (in Chinese).

urged by the Court, Intel negotiated an out-of-court settlement with Dongjin. On May 14, 2007, Intel and Dongjin held a joint news briefing and announced their out-of-court settlement.[22] Given their lack of experience to deal with private litigation, courts in China prefer out-of-court settlement in most cases. The recent passage of the AML will likely put more pressure on China's court system to observe and learn from international experience.

The cases discussed in this paper reinforce the need for an effective antimonopoly law that is intent on protecting competition (rather than protecting SOEs) and that encourages foreign investment. The volume of mergers and acquisitions by foreign enterprises grew from US$1 billion in 1999 to US$31 billion in 2006.[23] As foreign interest in China grows, so does the need for clarity around China's competition laws. However, the State Council still has a number of issues left to address before the AML goes into effect.

IV. Challenges Facing the AML

Although the newly implemented AML could potentially provide a more effective and consistent competition law regime, it has left several questions unresolved. In this section, we will explore two main issues: enforcement and administrative monopoly.

A. ENFORCEMENT

Under the AML, a new enforcement authority (or "Antimonopoly Commission") is to be established to uphold it. There is concern, however, about whether the Commission will be able to effectively enforce the law given its structure and limited powers. According to the AML, the enforcement authority:

1) is independent and authoritative; and

2) has the power to take certain coercive measures and to impose punishments.

Despite these admirable principles, it is not clear that they will apply in practice. First, the structure of the reporting line is not made clear in the AML, which brings into question whether the enforcement authority will truly be independent. In the AML draft of June 2006, there was a clause that said that the Commission should be established "under the State Council [and] composed of the principals of relevant departments and organs of the State Council and cer-

22 *See Dongjin Settled IP Litigation, Intel Denied Competition Restriction*, Sina News, May 14, 2007 (in Chinese), *available at* http://tech.sina.com.cn/it/2007-05-14/12041505334.shtml.

23 *See Foreign Investment Status 2006 and 2007 Forecast*, Foreign Investment in China, May 2007 (in Chinese), *available at* http://www.ficmagazine.com/article.php?FicID=1264&Colum=%E4%B8%93%E5%AE%B6%E8%AE%BA%E5%9D%9B.

tain experts."[24] Under this arrangement, the inherent relationship between the assigned commissioners and the departments of the State Council they previously headed would have been maintained. But this clause was later deleted and in the final AML, the precise arrangement is not explained except to say that the State Council is responsible for developing the structure and protocol of the Commission and for ensuring that the commissioners remain fair and impartial in dealing with conflicts that with the relevant government departments in administrative monopoly cases. The State Council is also identified as the final decision maker, which automatically reduces the independence of the enforcement authority. Antitrust enforcement regularly conflicts with other government goals (e.g., merger control may be affected by government trade policies and industrial policies or control of monopolistic agreements may be affected by macroeconomic policies). This lack of complete independence represents an inherent weakness of the system.

In the final AML, the precise arrangement is not explained except to say that the State Council is responsible for developing the structure and protocol of the Commission and for ensuring that the commissioners remain fair and impartial in dealing with conflicts that with the relevant government departments in administrative monopoly cases.

Second, the AML dilutes the absolute authority of the Commission. As discussed earlier in this paper, MOFCOM, NDRC, SAIC and other regulators have all played a role in regulating anticompetitive conduct in the past. In their respective drafts of the AML submitted to the State Council, SAIC and MOFCOM each designated themselves as the future antitrust enforcement agency of the AML. The State Council conceded some of the power to the agencies by proposing a dual-layer enforcement structure. In the first draft of the AML submitted to the People's Congress in June 2006, the Council proposed the establishment of an Antimonopoly Commission consisting of high-level officials from different government agencies and reporting directly to the State Council. At the lower level, the draft also proposed that an antimonopoly enforcement agency (or agencies) be created to carry out the day-to-day enforcement activities. The final AML dropped this arrangement, however, and it is not clear how the agencies will be organized.

The AML also received complaints from other government agencies resistant to change. Establishing a new antimonopoly enforcement agency meant reducing the role of the agencies that up until then had been responsible for antitrust

24 *See* The People's Republic of China, Antimonopoly Law (draft of Jun. 2006) (in Chinese), at art. 32 ("Composition of the Anti-Monopoly Commission under the State Council"):

> The Anti-Monopoly Commission under the State Council is composed of the principals of relevant departments and organs of the State Council and certain experts. Its rules of procedures and work are stipulated by the State Council.

enforcement and regulatory supervision. In response, the State Council made further concessions. Under the AML, monopolistic activities, which are within the scope of regulatory agencies' investigative power according to other laws and administrative regulations, are still to be investigated by those regulatory agencies.[25] While the agencies are required to report their enforcement results to the Commission, the Commission itself investigates monopolistic activities only when they are not being investigated by the regulatory agencies.

From a political standpoint, these concessions did facilitate early passage of the AML, but they are likely to lead to disagreements. Provisions in several industry laws and regulations, such as the Natural Gas Law, the Telecommunication Rules, and the Anti-Unfair Competition Law, grant overlapping enforcement power and increase conflict among the different law enforcement authorities. According to the litigation process of the AML, the three possible enforcement authorities are MOFCOM, NDRC, and SAIC. The AML does not provide clear guidance on how to allocate responsibilities among the enforcement authorities. Nor does it specify how the Commission should work with these other enforcement authorities. These concessions have resulted in a failure of the AML to address one of the major reasons for replacing China's fragmented antitrust laws in the first place: The need for a uniform enforcement agency that would enforce the law in a consistent and predictable manner.

So what alternatives are left to lawmakers? Private litigation is often discussed as an enforcement alternative to the regulatory agencies. Under the antitrust enforcement process in China, there are two channels by which a private party may pursue litigation. One is called administrative re-evaluation or administrative litigation.[26] This occurs when a party is not satisfied with the verdict of a

25 Article 7 of the AML is ambiguous about the authority of enforcement of antitrust rule in the concerned areas. As a legal matter, to get rid of the ambiguity and the tension between the AML and the existing division of authorities, the antimonopoly rules in other laws and regulations may have to be taken away and then the responsibilities re-authorized based on the AML. *See* AML, *supra* note 3, at art. 7:

> Industries controlled by the State-owned economy and relied upon by the national economy and national security or industries implementing exclusive operation and sales in accordance with the law shall be protected by the State to conduct lawful operation by the undertakings. The State shall supervise and control the price of commodities and services provided by these undertakings and the operation of these undertakings so as to protect the interests of the consumer and facilitate technical progress.
>
> The undertakings mentioned in the paragraph above shall operate, in good faith, in accordance with the law and in a self-disciplined manner, accepting public supervision and shall not harm the interests of the consumer from a controlling or exclusive dealing position.

26 *See, e.g.*, *id.* at art. 53:

> Where the undertakings and interested parties are dissatisfied with the decisions made by the Anti-Monopoly Law Enforcement Authority, they may apply for administrative reconsideration; if they do not agree with the result of the administrative review, can initiate administrative litigations in accordance with law.

public enforcement process. The private party can go to the court to sue the enforcement agency and ask for a reinvestigation of the case. This mechanism opens the possibility for private action. China's legal system, however, is well-known for the difficulties that face private parties that sue the government. Therefore, the effectiveness of this mechanism for private enforcement of antitrust rules is weak.

Another possibility for private litigation is for private parties to bring a civil suit to court directly. There are two instruments for private enforcement: stopping infringement and damage liabilities. The AML states that entities that exercise monopolistic conduct will be civilly liable if damages are incurred by other parties.[27] Article 50 of the AML provides the legal foundation for an entity to be civilly liable for its monopolistic conduct. But, it is too simple to clarify either the civil responsibilities that should be taken or the implications of AML on damage liabilities. This may result in damage liabilities in antitrust cases being imputed based on the principles and rules of damage liabilities under tort. However, damage liability rules under antitrust cannot be simply interpreted as civil damages. Rather, they are an important part of the private enforcement mechanism of antitrust. In the United States, for instance, private action civil suits are an important mechanism for enforcing antitrust rules. There is a treble-damage provision that provides a strong incentive for private parties, including group litigation, to sue and provides an effective deterrent to monopolistic conduct.[28] Without a proper incentive mechanism under the AML,[29] damage liabilities based solely on civil damages will not provide a sufficiently strong deterrent against infringement. Therefore, private litigation cannot play an important role in antitrust enforcement.

B. ADMINISTRATIVE MONOPOLY

Another key concern of the AML is the extent to which it addresses administrative monopoly. Administrative monopoly refers to the actions of government and its subordinate agencies that abuse administrative power in order to promote, manipulate, or impede economic activities that restrict competition. Administrative monopoly does not necessarily refer to SOEs, but certain SOEs do benefit from administrative monopoly given their fiscal contribution. Administrative monopoly is classified into two categories: local protection and

27 *See id.* at art. 50:

> Where the undertakings implement Monopolistic Conducts and cause loss to others, the undertakings shall be responsible for the civil liabilities in accordance with the laws.

28 The European Community used to rely mainly on public litigation. Recently, it has made some reforms to emphasize the role of private litigation.

29 Of course, it has been debated that the special damage liability requirement has provided incentives to initiate suits.

sectoral protection. The former is easy to understand literally, and the latter refers to the protection of certain, often public sector, industries (e.g. energy, transportation, and telecommunication). Administrative monopoly is also a natural consequence of China's years as a centrally planned economy.

There are several ways administrative monopolies can abuse their power:

1) Regional blockade. Local government may refuse to issue licenses to enterprises that trade commodities originating in other regions;

2) Restriction on market access. Local governments may discriminate against non-local undertakings by restricting or rejecting investment or the establishment of branches by undertakings in other regions;

3) Designated deals. Government and its subordinate agencies may require undertakings to purchase, use, or deal with the products supplied by designated undertakings;

4) Forced restrictions on competition. Administrative authorities may compel undertakings to pursue monopolistic conduct that is prohibited by antitrust laws; and

5) Prohibited conducts. Government and its subordinate agencies may set regulatory rules that eliminate or restrict competition.

The supply of petrol provides a high-profile example of an administrative monopoly. In 1999, various State Council departments issued a document prohibiting any company except for SinoChem and PetroChina from selling wholesale petrol products. In 2001, they issued another document prohibiting the retail sale of petrol product by any company other than SinoChem and PetroChina.[30] Similar practices can be found in many other industries including the energy, infrastructure, utilities, and transportation sectors. The abuse of administrative power contributes greatly to the serious corruption problems in China.[31]

The potential for consumer harm is a strong argument for placing the conduct of administrative monopolies firmly within the ambit of the AML. Despite this, it is not clear that it would be in the interests of either the Chinese government or local governments to take a hard line against administrative monopolies. Local governments are financially dependent on tax income from local branches of SOEs such as infrastructure, energy, utilities, and transportation. Therefore, the prohibition of administrative monopoly has its inherent conflicts with local

30 Xia Ying, *Antimonopoly: Reality and Expectation*, South China Weekend, Jul. 29, 2004.

31 There is a lot of confusion regarding the definition and the scope of administrative monopoly. First, the object of administrative monopoly is government rather than corporations. Second, administrative monopoly is not the same as regulation of a natural monopoly or other government-championed industries. Indeed, the AML excludes legal franchising from antitrust review (see AML, *supra* note 3, at art. 7). However, undue government regulations are deemed administrative monopolistic conduct.

government interests. Using the AML to break-up administrative monopolies would, in effect, place restrictions on the regulatory power of certain arms of government. Consequently, some officials and governmental departments may oppose and try to impede implementation of the AML.

Furthermore, it is not clear that the enforcement bodies will have the power to apply the AML to administrative monopolies. According to the Chinese administrative law, only a government department that resides at a level higher in the bureaucratic system has the administrative authority to supervise the behavior of those at the lower levels. Since administrative monopolies are created by government departments, an antimonopoly agency would need the power to overrule these departments when dealing with administrative monopolies when they arise. But under the framework of the AML, the Commission lacks such authority. Indeed, according to Article 51 of the AML,[32] when dealing with government agencies at a higher level, the antimonopoly agencies can only suggest remedies. Therefore, the Commission's ability to deal effectively with administrative monopolies depends on how the State Council establishes its responsibilities in relation to the other enforcement authorities, and in particular, its relative rank, which will decide its influence on other government departments.

THE COMMISSION'S ABILITY TO DEAL EFFECTIVELY WITH ADMINISTRATIVE MONOPOLIES DEPENDS ON HOW THE STATE COUNCIL ESTABLISHES ITS RESPONSIBILITIES IN RELATION TO THE OTHER ENFORCEMENT AUTHORITIES, AND IN PARTICULAR, ITS RELATIVE RANK, WHICH WILL DECIDE ITS INFLUENCE ON OTHER GOVERNMENT DEPARTMENTS.

The limitations imposed by Article 51 inhibit the antimonopoly agency's ability to apply the AML to administrative monopolies. This contrasts with the trend in other jurisdictions, where competition authorities are increasingly given powers to overturn actions of the state which infringe competition rules. In the European Community, for instance, the European Commission can prohibit anticompetitive practices by SOEs. It can also prohibit anticompetitive state aid and take action against acts by the Member States that infringe on competition rules under Articles 86 and 87 of the EC Treaty. In Russia, any acts, actions, or agreements of the federal or state governments that harm competition are prohibited under their antimonopoly law while administrative monopoly is covered by the authority of the Russian

32 *See* AML, *supra* note 3, at art. 51:

> Where administrative organs and public organizations abuse administrative powers, performing activities which exclude and restrict competition, the superior entity shall order them to revoke and modify the act; where the circumstances are serious, the entity of the same level or in the superior level shall impose administrative penalty on the chief officer directly responsible for it in accordance with the laws. Where there is other stipulation in laws and administrative regulations concerning the disposal of activities excluding or restricting competition by administrative organs and public organizations' abusing administrative powers, the other stipulations shall apply.

antimonopoly agency.[33] In Hungary, the Competition Office also has jurisdiction over competition-restricting activities of the government.[34] The latter two examples show that economic transition from a centrally-planned to a market-orientated economy is no reason to allow administrative monopoly to escape the jurisdiction of the AML.

V. Conclusion

The development of a market-oriented economy in China has created a need for a modern antitrust law. Although over the past decade laws and institutions have developed to address competition issues, recent antitrust cases in China illustrate the urgent need for a consistent and comprehensive application of competition law. The final AML is a significant improvement on the disparate laws and institutions that went before it, and is poised to act as an economic constitution in the Chinese economy.

However, doubts still remain over the overall effectiveness of the AML. It is not clear how well the AML will be enforced. Furthermore, it is unclear how anticompetitive conduct by administrative monopolies will be dealt with under the AML. The current design may lead to disagreements among the designated agencies, and fail to ensure that competition policy is applied in a consistent and comprehensive manner. The possibility of deterrence through private litigation also appears weak.

The AML is a significant step forward for competition law in China. But it seems unlikely that this single step will, on its own, provide China with the effective and consistent competition law regime it is currently lacking. If China chooses not to address some of the key issues still facing the AML, then the uncertainty and ambiguity of the current regulatory environment may dampen the economic growth it has so far enjoyed.

33 Organisation for Economic Co-operation and Development, *Competition Law and Policy in Russia*, An OECD Peer Review (2004), at 35.

34 Organisation for Economic Co-operation and Development, Hungary: Report on Competition Law and Institutions (2004), at 16-17.