



THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

# Enforcement Challenges of China's Antimonopoly Law

---

Lester Ross

Wilmer Cutler Pickering Hale and Dorr LLP

## **Enforcement Challenges of China's Antimonopoly Law**

Lester Ross\*

China's new Antimonopoly Law ("AML") should generally be welcomed as an important milestone on the path of China's transition from a centrally planned, largely state-owned economy to a market-based, predominantly privately owned economy. China is following the path of more mature market economies which have established competition law regimes to regulate, however imperfectly, certain excesses of a market-based economy. China's transition also has important political implications as the reduction in the role of the state creates more space for interests at a greater remove from state control to develop.

The AML presents major challenges with respect to enforcement, however. China's ability to enforce the AML in a fair, comprehensive, and transparent manner will affect the development of China's economy including, but not limited to, foreign investment.

### **I. STRUCTURAL CHALLENGES**

The most immediate and continuing challenge is structural. Early hopes that enforcement would be centered in a new, unified enforcement authority foundered on the shoals of bureaucratic rivalries. Instead of announcing the composition of a single

---

\* The author is a partner in WilmerHale's Asia Corporate Practice Group and is the co-partner-in-charge of the firm's Beijing office.

authority, on virtually the eve of the AML's effective date of August 1, the State Council declared that enforcement would be divided among three government departments along the lines of their existing responsibilities. The Ministry of Commerce ("MOFCOM") would be responsible for regulating concentrations, the State Administration for Industry & Commerce ("SAIC") would be responsible for regulating abuse of market dominance, and the National Development and Reform Commission (NDRC") would be responsible for regulating monopoly agreements.

MOFCOM has built some expertise in handling concentrations over the past five years in the course of enforcing regulations on foreign-related mergers and acquisitions. While these regulations lacked teeth in the sense that there were no sanctions for a failure to file, MOFCOM has in fact handled hundreds of notifications which provides a base of experience in which to implement the AML. Initial regulations on concentrations, including notification thresholds, were promulgated within days of the effective date of the AML, and earlier MOFCOM guidelines on submitting notifications remain in force.

Neither SAIC nor NDRC have demonstrated comparable expertise or experience in handling their new enforcement responsibilities. Although both departments, particularly SAIC, have expended considerable effort to prepare for such responsibilities, neither has had the experience of actually doing so. SAIC is a large bureaucracy which enforces the Anti-Unfair Competition Law and consumer protection regulations, among other responsibilities, but enforcement has generally focused on micro-regulation of markets, advertising, and other conduct. That is a far cry from the sophisticated

understanding of markets required to address alleged abuses of market dominance.

Moreover, implementing regulations have yet to be promulgated, leaving SAIC with both excessive discretion and a lack of guidance on how to implement the AML.

NDRC is in the somewhat paradoxical role of regulating monopoly agreements given its historical role as manager of the planned economy and in particular with respect to setting fixed prices and so-called guidance prices. NDRC stepped into the fray last year when it rolled back a price increase for inexpensive instant noodles orchestrated by the industry association. NDRC can be expected to take a hard line on price-fixing by industry, particularly when sanctioned by industry associations whose conduct is specifically addressed by the AML. It is far less clear whether the NDRC will relinquish its own authority to set prices, particularly as it has continued this year to weigh in on prices for energy and other products and services critical to the economy.

## **II. AREAS OF UNCERTAINTY**

A second major challenge concerns fairness and transparency. Private businesses in particular have chafed at the so-called administrative monopolies enjoyed by businesses protected by local governments as well as state-owned enterprises (“SOEs”) under China’s socialist economy. The AML addresses the excesses of administrative monopolies but does not go so far as some had urged. In particular, those which are established under law and regulation are generally to be protected.

Multinationals for their part are concerned that the AML may be subject to unduly aggressive enforcement. Companies which enjoy large market shares are concerned that

they may be targeted as the AML presumes market dominance if an undertaking has a market share of at least 50 percent, or two competitors have a combined market share of 67 percent. Although the AML allows for a rebuttal of such presumption, it leaves the enforcement authority with substantial latitude for discretion regardless if whether such market share enhances consumer welfare or was obtained through lawful competitive means, such as the development and exercise of intellectual property rights. This concern has been amplified by comments in the Chinese press and on the Internet reporting that multinationals with large Chinese market shares rooted in intellectual property rights will be targeted first because royalty payment obligations are excessive or unfair. This concern is augmented by SAIC's relative lack of familiarity and comfort with foreign business relative to that of MOCOM.

### **III. THE COURT SYSTEM**

China's courts are vested with two kinds of responsibility under the AML. The courts are charged with the responsibility of handling appeals of administrative actions by the enforcement authorities. The courts are separately charged with responsibility to adjudicate private actions for damages caused by monopoly conduct, a major innovation which allows competitors and consumers alike to seek judicial relief. While China's courts are becoming more professional and are exhibiting a better reputation for impartiality, in practice they do not enjoy independence from the relevant Communist Party organization and it is unclear how quickly they will be able to accumulate the experience and expertise to handle the complexities of competition litigation. They are

likely to be tested soon as some Chinese undertakings as well as lawyers have exhibited a decidedly entrepreneurial approach to the courts for relief under other bodies of legislation.

Such litigation is not necessarily of an anticompetitive nature. For example, promptly after the effective date of the AML, several businesses filed suit against the State Administration of Quality Supervision, Inspection, and Quarantine for fostering the development of an administrative monopoly through designation of a preferred provider for anti-counterfeiting testing. It is unclear if the courts will decide such an action. Indeed, like the enforcement authorities, the courts have yet to promulgate regulations governing the handling of their responsibilities under the AML.

#### **IV. IN SUMMARY**

The AML separately authorized the creation of an antimonopoly commission with vague policymaking and research responsibilities. If enforcement responsibility had been centered in a single enforcement authority, the role of the commission might have been very limited. With authority now dispersed among three government departments, the role of the commission with respect to coordination becomes more important. With the composition of the commission yet to be announced, it is unclear whether the commission can function as strong coordinator and policymaker or merely as a forum for the three departments to discuss their respective performance and defend their territory from encroachment by the others. If the latter, responsibility for coordination will by default pass to the State Council.

While much remains unclear, the positive aspects of the AML should be noted. The AML recognizes consumer welfare as a purpose of the legislation, reducing the likelihood that the AML will be used to protect undertakings from competition. For the first time, concentrations between domestic parties will be subject to antimonopoly notification obligations to the same extent as their multinational counterparts. Notification thresholds have been simplified and the business day waiting period rule has been replaced by a calendar day period, which brings China into closer harmony with competition law regimes in other jurisdictions. China has also joined the International Competition Network, enabling it to network and benefit from the experiences of counterparts elsewhere in the world.