



CPI Antitrust Chronicle

February 2013 (2)

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Ying Huang
Steptoe & Johnson LLP

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I. INTRODUCTION

On November 14, 2012, the 18th National Congress of the Communist Party of China came to a close at the Great Hall of the People in Beijing. The 18th Party Congress unveiled China's new central collective leadership headed by General Secretary Xi Jinping, and featured an important keynote political report by the incumbent president Hu Jintao, which set out the national development strategy for the next decade and beyond. In line with the policy orientation defined by the 18th Party Congress and the status quo of China's Anti-Monopoly Law ("AML") enforcement, this article tries to predict what will happen to antitrust enforcement in China after the 18th Party Congress following a brief review of the current situation.

Hu's political report at the 18th Party Congress is deemed as the consensus document endorsed by the Chinese leadership. It upholds, as much as ever, the rule of law as a fundamental principle. It also puts forward new requirements for China's reform and opening-up policy, which has been implemented for over three decades. The report calls for "deepening reform in key sectors with greater political courage and vision." Economic reform is highlighted in the report, aiming to balance the relationship between government power and market freedom.

In a subsequent speech marking the 30th anniversary of the current edition of the Constitution, Xi said, "we must firmly establish, throughout society, the authority of the Constitution and law so that our people will have faith in law." The role of the AML, which is informally referred to as the "economic constitution," has been brought into public attention in an air of heightened expectations after the 18th Party Congress. In order to predict what will happen with respect to antitrust enforcement in China, let us first review its present situation.

II. DISTINCTIVE CHINESE CHARACTERISTICS AND THE SPECIAL FEATURE OF THE TIMES

Since the AML came into force on August 1, 2008, China's antitrust enforcement has been branded with distinctive Chinese characteristics and the special feature of the times. According to the law, China's three antitrust enforcement authorities—the Ministry of Commerce ("MOFCOM"), the National Development and Reform Commission ("NDRC"), and the State Administration for Industry and Commerce ("SAIC")—perform their own respective duties under the unified organization, coordination, and instruction of the Anti-Monopoly Commission of the State Council.² This "1+3" institutional framework was established to take

¹ Ying Huang is China Counsel and International Government Affairs Senior Director in Steptoe's Washington office. Special thanks to Kevin Cheng, Legal Intern with Steptoe & Johnson LLP, who provided legal research and assistance in the writing of this article.

² MOFCOM is responsible for merger control. NDRC enforces the price related rules of the AML, and SAIC enforces the rules against non-price monopoly agreements, abuse of dominance, and administrative monopoly. The

care of the division of labor and the preexisting functions of the different ministries and commissions. It also takes into consideration that a concerted mechanism of coordination and balancing is necessary when conflicts arise among the three antitrust enforcement authorities. However, viewing from what has happened so far, this two-leveled system cannot fully meet the need for AML enforcement at present, especially the need for coordination among the enforcement authorities.

Despite the fact that China has largely drawn upon the experience of developed countries with respect to the antitrust legislation, when reviewing notifications of concentrations between business operators, China—at its “primary stage of socialism”—has often given conditional approval for transactions that were unconditionally cleared in other jurisdictions. Google’s acquisition of Motorola Mobility and Seagate’s acquisition of Samsung’s Hard Disk Drive Business are cases in point.

III. LIMITED POWER OF LAW ENFORCEMENT WHEN FACED WITH SOE OLIGOPOLY AND ADMINISTRATIVE MONOPOLY

Conceived in an environment of an immature market economy, the AML has been confronted with vested interests entrenched in different ministries, commissions, and state-owned enterprises (“SOEs”) since the very first day it was in force. Since the AML became effective over four years ago, investigations against SOEs have been rare. AML’s enforcement efforts have long been criticized for their selective enforcement.³ As far back as the legislative phase of the AML, some scholars argued that, without changes to the system, the AML would be doomed to be a toothless tiger given China’s immature market economy, massive administrative monopoly, and prevailing monopolies or oligopolies of SOEs. Not surprisingly, the investigation against China Telecom and China Unicom launched by NDRC in November 2011 was eventually criticized as selective enforcement and “downplaying the problem till it is reduced to nothing at all.”⁴ This investigation has yet to be closed.

The 18th Party Congress marked China’s entry into a new phase, politically speaking. There is no direct mentioning of such specific areas as the AML enforcement in Hu’s report, but as a legal means that directly serves the market economy, ensuring “equal access” and “fair competition,” AML enforcement is bound to experience a host of progress and changes with the deepening of economic reform and the start of political reform.

Anti-Monopoly Commission is a forum for deliberation and coordination agencies of the State Council, and as such is responsible for coordinating the competition administrative enforcement work.

³ See Zixun Zhou, *The Selective Enforcement of Anti-monopoly Investigations* (“反□断□□的□□性□法” in Chinese), CHINA ECON. TIMES (《中国□□□□》), (November 23, 2011); See also Zhen Yue, *Jinglian Wu: How to Conduct an Anti-monopoly Investigation?* (吴敬□: “反□断□□□如何开展?”), CAIXIN.COM (□新网), November 14, 2011, available at <http://opinion.caixin.com/2011-11-14/100325848.html>.

⁴ See *Conflicts among Government Authorities and among Different Interest Groups Prevail in AML Enforcement, SOEs not Spared* (“反□断□法充斥部□和利益之争, 国企无豁免” in Chinese), CAIXIN MAG. (《□新□志》) (November 21, 2011).

IV. THE LEGAL STATUS OF ANTITRUST ENFORCEMENT WILL BE REINFORCED AND THE SUPPORTING LEGISLATION WILL BE FURTHER STRENGTHENED

The antitrust law serves the market economy, especially a full-fledged market economy with free competition. At the moment, China's three authorities enforcing the AML, due to the low legal level of their departmental rules supporting the AML, have limited enforcement power. But, with further advancement of reform and a more dynamic marketplace, the status of the AML as the "economic constitution" will come to a sharper focus and break free from its current limitation in terms of enforcement power. How fast this will happen depends on the speed of reform in China.

After the 18th Party Congress, the antitrust authorities will adopt a number of supporting rules that have long been waiting in the pipeline, some of which are already drafted. For instance, SAIC has released the fifth draft of the *Guidelines on Anti-Monopoly Enforcement in the Field of Intellectual Property Rights*, and MOFCOM has completed the drafting of the *Regulation on the Imposition of Restrictive Conditions in Concentrations between Business Operators* and is preparing the *Interim Provisions on Simplified Procedures for Reviewing Cases of Concentrations between Business Operators*. At the December 2012 China Competition Policy and Law Annual Conference, some scholars advocated that the AML be taken into account when formulating national industrial policies and that more antitrust laws and regulations be enacted in the form of legislation passed by the National People's Congress.

V. THERE WILL BE MORE COORDINATION AND COOPERATION WITHIN THE "1+3" INSTITUTIONAL FRAMEWORK

Some academics are of the opinion that, given all the problems caused by the current situation in which there are separated AML enforcement authorities, the existing enforcement authorities should be merged into an independent national antitrust body.⁵ But based on the current situation in China, I think that this idea is only an idealized design whose feasibility is yet to be tested. What is evident is that, as the economic reform deepens, the breadth and depth of law enforcement will increase, and the antitrust enforcement authorities will enhance their coordination and cooperation, either upon their own initiatives or be forced to do so.

VI. THERE WILL BE MORE INVESTIGATIONS AGAINST SOES

The deepening of reform of the economic system will inevitably undermine the monopoly of SOEs and put in place a better environment for fair competition. Currently, many SOEs are seeking training for antitrust compliance, and MOFCOM has adopted *the Provisional Measures on the Investigation and Handling of Concentration between Business Operators Not Notified in Accordance with the Law*, partly in response to SOEs' failure to notify their M&A activities. All these imply that there will be more antitrust investigations in the future as a result

⁵ See the newsletter of China Competition Policy and Law Annual Conference (2012), available at http://www.chinadaily.com.cn/hqj/zxqxb/2012-12-19/content_7805260.html (in Chinese). And see Yunqiu Yan (颜运秋) & Xiaoming Zhou (周小明), *Analysis of Complexities in AML Enforcement* (反垄断法实施中的疑点分析), (12) RULE OF LAW STUDY (《法治研究》) p. 3 (2010); also see Xiaoye Wang (王小叶), *Economic System Reform and China's AML* (经济体制改革与我国反垄断法), (3) ORIENTAL JURISPRUDENCE (《东方法学》) p. 74 (2009).

of political and economic reform. In the meantime, legislation and law enforcement related to administrative monopoly will be stepped up as well.

VII. THERE WILL BE MORE TRANSPARENCY AND IN-DEPTH DEVELOPMENT IN TERMS OF LAW ENFORCEMENT

As calls for more and better information disclosure grow louder, the AML enforcement authorities are bound to release more information on their law enforcement activities in the foreseeable future. MOFCOM took the lead to start this process by releasing certain basic information on 474 notifications it had finished reviewing.⁶

In addition, law enforcement will also deepen as experience accumulates. Despite its late start in terms of effective antitrust enforcement, China has the advantage of studying the latest theories and methods developed by other countries. For instance, China is in the process of applying the "relevant market" definition framework and the economic models developed by some foreign countries to some highly complex cases. Moreover, NDRC and SAIC are employing some methods previously unknown in China to intensify their law enforcement, such as dawn raids and leniency programs. A good example of this trend toward deeper and more transparent enforcement is the NDRC-prosecuted and very high profile *LCD panels* case, which concluded immediately after the 18th Party Congress and received significant media coverage.

VIII. INTERNATIONAL COOPERATION ON ANTITRUST ENFORCEMENT WILL BE STRENGTHENED

China has long attached great importance to cooperation related to competition law enforcement with the rest of the world. The three AML enforcement bodies have entered into multiple Memorandums of Understanding ("MOUs") with their international counterparts over the past few years. For example, in July 2011, they signed a MOU with the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), which is expected to establish a long-term cooperation framework in competition law and policies for the US and Chinese antitrust agencies. In November of the same year, MOFCOM, the DOJ, and the FTC developed the *Cooperation Guidance on Cases of Concentration of Business Operators*, thus establishing a cooperation mechanism for the investigation of individual merger control cases between the two countries.

After the 18th Party Congress, the Chinese antitrust authorities will continue to strengthen their international cooperation in antitrust enforcement. With the accumulation of experience, and as the practices become more professional and standardized, the international reputation of China's authorities will also improve accordingly.

IX. CHINA'S COURTS WILL PLAY A MORE IMPORTANT ROLE IN AML ENFORCEMENT

As the Supreme People's Court promulgates its judicial interpretation governing private actions filed under the AML, antitrust litigation will become another hotspot issue after the 18th

⁶ The official statistics, as of September 30, 2012, are available at MOFCOM's website: <http://fldj.mofcom.gov.cn/article/zcfb/201211/20121108437868.shtml> (in Chinese). Among the 474 reviews, 458 transactions were cleared unconditionally, while 15 transactions were approved on conditions and one prohibited.

Party Congress. To a certain degree, this judicial interpretation indicates that the Supreme People's Court will attempt to encourage private antitrust actions in China. The judicial interpretation is innovative in its design as it tries to reduce the burden of proof, though it still tries to avoid some critical issues.

X. CONCLUSION

The 18th Party Congress was held in 2012, a year that also marked the fourth anniversary of the AML's entry into effect. Though there is still ample room for improvement, China's antitrust enforcement agencies have completed the most important initial phase.

With the gradual implementation of decisions made at the 18th Party Congress, I am quite sure that China's antitrust enforcement will further develop and improve.