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I. INTRODUCTION

The Anti-Monopoly Law (“AML”), in force since August 1, 2008, is often considered the “economic constitution,” safeguarding fair competition and China’s sound market economy.² The AML established an administrative and judicial framework that is conceptually similar to that of other jurisdictions’ competition law systems. Since its entry into force, the AML has been used to prevent undue concentrations of market power, combat cartels and abuse of market dominance, and pursue other goals that enhance the overall competitive environment in China. However, China’s recent antitrust investigations have triggered widespread backlash among western business circles by involving some world-famous multi-national companies (“MNCs”), including Microsoft, Qualcomm, BMW, etc. Some have accused China of using the AML as a weapon to target foreign companies, while others have condemned the AML for the lack of clarity in its provisions and transparency and certainty in enforcement.³

To better interpret the AML and the trends in its enforcement, MNCs that have business operations in China should acquire better knowledge on China’s unique socialist market economy and take into consideration procedural issues as to antitrust enforcement in China.

II. THE AML AND THE SOCIALIST MARKET ECONOMY

Antitrust law has long been an international practice. Compared with other Chinese laws, the AML enjoys more common characteristics and principles with international norms. Meanwhile, a number of features in the AML differ in small or large ways from typical competition laws in other countries, in particular those shaped by the important socialist heritage of China’s market economy.

As the world’s second largest economy, China distinguishes itself from other major world economic powers by featuring its Chinese socialist characteristics, the so-called “socialist market economy with Chinese characteristics.” As a mixed economic system, it has confused the international business community by presenting the features of both a socialist planned economy and the market economy.

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² Xiaoye Wang, *The Reform of Economic System and Anti-Monopoly Law In China*, 79(3) ORIENTAL L. (2009).

³ Xinhua News, *The bulletin of the third of the 18th congress of the Chinese Communist Party* (Nov.12, 2013), http://news.xinhuanet.com/politics/2013-11/12/c_118113455.htm.

The socialist market economy embodies the common features of market economy. In a market economy, it is the market that plays *the overarching role in allocating resources*,² encouraging competition and stimulating productivity. China hailed the socialist market economy as the fundamental national economic system and would spare no effort to make it more efficient, fair, and sustainable in the years to come. On the other hand, China's market economy is shaped by the political system. As a socialist country, China has put public ownership in the dominant position, though ownerships of other kinds are allowed to coexist.

Mirroring these features of China's economic system, the purposes of the AML are to prevent and prohibit monopolistic conduct, to protect fair market competition, to promote economic efficiency, to safeguard the interests of consumers, and to promote the healthy development of the socialist market economy (see Article 1 of the AML). Article 4 further provides that "the State shall establish and implement competition rules appropriate for the socialist market economy, shall improve macroeconomic regulation and control, and shall establish a unified, open, competitive and well-ordered market system."

Although with the progress of the economic reforms in China a dynamic private sector has emerged in many parts of the economy, a number of key sectors remain dominated by state-owned enterprises ("SOEs"), and administrative authorities are still extensively involved in regulating competition in a number of industries, e.g. telecommunications, electricity, tobacco, etc. The AML makes reference to these government-administered industries, but the extent to which the AML will be fully applied to them is uncertain. Article 7 provides that:

the State shall protect the lawful operations of the business operators in industries vital to the national economy and national security and controlled by the state-owned economy, as well as in industries subject to exclusive operations and sales according to the law, and shall supervise, adjust and control the operations of such business operators and the prices of their products or services, in order to protect the interests of consumers and promote technological progress.

This provision blurs the lines of oversight, although it clearly stipulates that SOEs are not fully immune to the law. Indeed, the second paragraph of Article 7 prohibits SOEs from abusing their dominant positions or legal monopolies to the detriment of consumers.

The ambiguity in the AML as to the treatment of SOEs increases the discretion of the enforcement agencies, which may have close connections with some SOEs. As a result, some observers have expressed concern that the SOE-dominated sectors will be subject to more lenient treatment under the AML compared to those sectors in which foreign enterprises play a more important role.⁴

The enforcement practices appear to indicate so. In recent years, especially in 2014, China's antitrust enforcement has come into the limelight. From the biggest fine ever issued since the enactment of the AML to the largest number of enforcement lists being made; from the automobile and auto spare parts industry to smartphone industry; from well-known domestic firms to MNCs, the world has witnessed all these achievements in China's antitrust enforcement.

⁴ South Weekend, *Five years for Chinese anti-monopoly: how to handle the strong state-owned enterprises is the biggest challenge* (Sep.27, 2013), <http://www.infzm.com/content/94649>.

However, along with achievements comes criticism. The Chinese antitrust authorities have been criticized for being selective in the companies they have investigated, since many of them involved MNCs. Some media claim that China's efforts have been aimed not so much to strengthen the AML but to increase its leverage on bilateral trade negotiations; others even concluded that foreign companies have been targeted in the recent round of the AML investigations in China.⁵

As a response, the Chinese Premier Li Keqiang provided clarification during the 2014 Summer Davos meetings: "only 10% of the enterprises involved in the antitrust investigations are foreign ones, which clearly indicates that the AML did not and will not target specific kinds of business entities."⁶ Some experts agreed.⁷

The situation may result more from coincidence rather than intent when many MNCs are involved in recent antitrust investigations. As the Chinese antitrust authorities are still in the process of fully establishing themselves as well-recognized enforcers, they may be inclined to investigate industries that have a major impact on everyday lives of consumers. In some of these sectors, many of the big players are foreign companies.⁴

As to the reason of the perceived sudden increase of enforcement against foreign companies, instead of taking the phenomenon as selective or discriminatory in nature, it may be more reasonable to interpret it as a sign of the enforcers' growing confidence. After a few years of accumulating enforcement experience from investigations of small domestic companies and internal training of their staff, the Chinese antitrust authorities are now becoming more confident in launching investigations against foreign companies.⁵ However, comparatively, the confidence and strong position have been less reflected in the regulators' enforcement against SOEs, although Chinese officials have given extensive assurances to the effect that the AML is not aimed at foreign companies.

From a judicial perspective, the *Opinions on Protecting Privately-owned Businesses and Ensuring their Sound Development*, the latest guideline issued by China's Supreme People's Court, once again makes it clear that the legitimate rights of foreign companies are equally protected and their business operations are free from interference from administrative powers, on the condition that they conduct their business in compliance with the law. This is also in response to *Opinions of the State Council on Promoting Fair Market Competition and Maintaining the Normal Market Order*, which upholds the idea of promoting an open market

⁵ Global News, *The European Chamber criticized that foreign enterprises have been targeted in the recent round of the AML investigations in China* (Aug.15, 2014), <http://finance.huanqiu.com/view/2014-08/5106840.html> and China News, *there are only 33 foreign undertakings in the total 339 institutions investigated by NDRC* (Dec.7, 2014), <http://www.chinanews.com/gn/2014/12-07/6852345.shtml>.

⁶ Ifeng News, *Li Keqiang: "only 10% of the enterprises involved in the anti-monopoly investigations are foreign ones"* (Sep.9, 2014), http://finance.ifeng.com/a/20140909/13084535_0.shtml.

⁷ China Daily News, *If the antitrust enforcement in China scares off foreign enterprises?* (Oct.21, 2014), http://www.chinadaily.com.cn/hqcj/gjcj/2014-10-21/content_12561068.html; Competition Law News, *Experts clear the suspects of antitrust enforcement: the foreign undertakings are not targeted* (Aug.11, 2014), <http://www.competitionlaw.cn/info/1041/21627.htm>; and Sohu News, *Experts claim that the foreign and domestic undertakings will be treated equally in the antitrust enforcement* (Sep.4, 2014), <http://news.sohu.com/20140904/n404042156.shtml>.

environment with more transparency and fair competition. As for the antitrust enforcement, it will be interesting to see how antitrust investigations launched against Chinese and foreign companies will resemble each other in the future.

III. CHALLENGES AND ACHIEVEMENTS IN RELATION TO DUE PROCESS AND TRANSPARENCY

Recent antitrust investigations into MNCs have raised concerns in relation to due process during investigations. For example, in the investigations against foreign companies in industries such as soaps and detergents, infant formula, and automobiles, due process shortcomings were reported by lawyers on the ground, chambers of commerce, and the press. It was also reported that NDRC has repeatedly resorted to heavy-handed tactics to enforce the AML, such as threatening higher penalties for companies that seek to offer arguments in their defense and demanding changes in company pricing and other behavior before the investigation has concluded.

For example, the European Union Chamber of Commerce in China released a statement, expressing concern over China's antitrust investigations. It said:

[t]he European Chamber has received numerous alarming anecdotal accounts from a number of sectors that administrative intimidation tactics are being used to impel companies to accept punishments and remedies without full hearings. Practices such as informing companies not to challenge the investigations, bring lawyers to hearings or involve their respective governments or chambers of commerce are contrary to best practices.⁸

In addition, there were complaints about perceived lack of transparency on the part of some antitrust authorities in China, as the public decisions or press releases rarely contain detailed explanations on the rationale of the investigations, penalties, or other determinations in the context of the antitrust enforcement.

Perhaps as a reaction to these complaints and statements, China—through the Chinese Vice Premier Wang Yang—made various historic commitments during the recent meeting at the U.S.-China bilateral forum, the Joint Commission for Commerce and Trade (“JCCT”). China reaffirmed the principles underlying its antitrust enforcement to include fairness, transparency, objectiveness, and non-discrimination and further reassured that companies under investigation should be well informed and ensured with due process to present evidence and defend themselves during antitrust investigations. More specifically, the antitrust administrative actions should strictly follow statutory procedures and requirements laid out in law. To ensure transparency, all administrative decisions under the AML will be provided in writing in a timely manner, subject to considerations of protection of commercial secrets.

China's JCCT commitments complement Chinese procedural law in this era. The procedures of the antitrust investigations are mainly governed by the Administrative Penalties

⁸ The European Chamber News, *The European Chamber releases a statement on China AML-related investigations* (Aug. 13, 2014), http://www.europeanchamber.com.cn/en/press-releases/2132/european_chamber_releases_statement_on_china_aml_related_investigations.

Law,⁹ the Administrative Reconsideration Law,¹⁰ the Administrative Litigation Law,¹¹ and judicial interpretations issued by the Supreme People's Court. Under these laws, before imposing certain penalties, an antitrust authority should inform the party of its right to a hearing. If the party requests a hearing, then the hearing should be conducted, and the antitrust authority will decide whether to impose the penalties based on the result of the hearing. If the authority imposes a penalty, the party may apply for an administrative review to the hierarchically higher or other designated administrative authority. If the authority sustains or changes (but does not withdraw) the decision, then the party may initiate an administrative action before a court against the original administrative authority (when the decision is affirmed) or the higher or designated authority (when the decision is changed but not withdrawn). Alternatively, the party may directly file an administrative lawsuit against the antitrust authority.

In practice, however, when an antitrust authority makes a penalty decision in an antitrust investigation, it will be difficult to overrule the decision. Well-established administrative procedures allow review bodies or courts to check on the exercise of discretion. However, in Chinese administrative laws, there are no clear principles of fairness, natural justice, or due process. This makes it very difficult for a review body or court to check on the exercise of discretion. Hence if the discretionary decision of an antitrust authority is unreasonable, there may be no adequate procedural safeguards used to overrule the decision.

Further, although the Administrative Litigation Law provides that an administrative decision—for example, a penalty decision issued by NDRC—should be quashed if statutory procedures have not been followed, in practice courts very rarely overrule the decision of an administrative body on the basis that the act was executed illegally for procedural reasons. This may be because the courts focus mainly on the substantive aspects of the administrative act.

Hence, given that the Chinese government will be keen to honor the commitments made in the JCCT, a proactive defense prior to the adoption of a penalty decision by the antitrust authorities may be the best course of action for a company subject to an antitrust investigation. In other words, it is normally better to influence the preparing of an administrative decision rather than trying to petition the relevant appeal authority in an attempt to overturn a decision already adopted.

Another point worth mentioning is that, apart from Chinese practicing lawyers allowed to attend meetings with antitrust authorities, counsel from foreign law firm representative offices established in China are also permitted to be present during investigations and advise on international law and practice. According to China's JCCT commitments, even foreign legal counsel practicing in other jurisdictions can provide their opinions based on their expertise in a Chinese antitrust procedure. MNCs should take advantage of this, since they usually work closely with their lawyers from international law firms or their home countries.

⁹ Administrative Penalties Law of the People's Republic of China, [1996] Presidential Order No.63, Mar. 17, 1996.

¹⁰ Administrative Reconsideration Law of the People's Republic of China, [1999] Presidential Order No. 16, Apr. 29, 1999.

¹¹ Administrative Litigation Law of the People's Republic of China, [2014] Presidential Order, No.15, November.1, 2014.

IV. PROACTIVE MEASURES TO MINIMIZE ANTITRUST RISKS

Since most MNCs have been subject to antitrust compliance and enforcement in other countries years before China's AML came into force, they should have sound compliance guidance to ensure their businesses' compliance with Chinese antitrust rules. However, to deal with the current situations in China, MNCs need to take their AML obligations seriously by reviewing their antitrust guidance and auditing their practices to ensure they are able to be compliant with the law to the fullest extent.

In addition, they should bear in mind that China's antitrust regime has unique characteristics. When it comes to the application of the AML, it would be unwise for foreign companies to only stick to their home antitrust laws and ignore Chinese practices and background. In this regard, experienced local lawyers and counsel, with practical experience in China, should play an indispensable role in advising MNCs on dealing with AML-related investigations.

From this point of view, providing local compliance training to employees is considered a precautionary measure aimed at reducing or eliminating any local AML violations. Given the fact that local MNC branches or offices are geographically and culturally far from their headquarters, it is necessary to provide local employees compliance trainings tailored to local needs, making sure they are vigilant on all aspects of their company's operations and keeping an eye on local compliance standards.

In order to better anticipate the AML risks in China, MNCs also need to closely follow development of the most recent AML implementing legislation and enforcement updates. Recent investigations and high-profile fines have already sent a strong signal to incentivize companies to do that.

V. CONCLUSION

Recently, China's Premier Li Keqiang said that "China intends to attract more foreign investments and products by means of providing a fair competitive environment for foreign firms," and that "foreign companies are still very welcome in China."¹² These remarks show that China is still in need of foreign investments and products to push forward its economic development and fulfill its domestic demand.

Since China has charted a new course towards better rule of law in its socialist market economy, antitrust enforcement will be a long-term and continuous endeavor. From this perspective, the recent antitrust investigations may be the signal of a comprehensive push towards the rule of law.

¹² Global News, *Li Keqiang: "foreign companies are very welcome in China"* (Jan.22, 2015), <http://world.huanqiu.com/article/2015-01/5475014.html>.