

# MISSION IMPOSSIBLE? PROMOTING SUSTAINABLE DEVELOPMENT THROUGH CHINA'S ANTI-MONOPOLY LAW



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## Mission Impossible? Promoting Sustainable Development Through China's Anti-Monopoly Law

By Wei Han, Hazel Yin & Tracy Lu

This paper submits that China's Anti-monopoly Law ("AML") should play a more active role in promoting sustainable development goals ("SDGs"), especially those goals related to environmental protection and social development. In terms of institutional design, the indirect model, i.e. applying exemptions to anti-competitive conducts that serve public interest remains the more suitable approach to promoting SDGs through the AML. We suggest that the direct model, i.e. including non-economic SDGs as legal objectives of the antitrust law should only be considered in exceptional cases, so that the antitrust law could avoid bearing "unbearable weight."

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# I. BACKGROUND

In March 1994, the State Council of China adopted the *Agenda of the 21<sup>st</sup> Century for China — White Paper on Population, Environment and Development* in which sustainable development was pinned down as an overarching strategy of the Chinese government. In 2016, the Chinese government announced the *National Plan on Implementation of the 2030 Agenda for Sustainable Development*<sup>2</sup> which addressed each of the seventeen Sustainable Development Goals (“SDGs”)<sup>3</sup> set by the United Nations in 2015. In particular, the implementation plan for SDG 10 (i.e. reduce inequality within and among countries)<sup>4</sup> emphasizes that “creating and improving the institutional environment for fair and healthy competition and equal access to capital and market opportunities.” As pointed out in a report of the United Nations Conference on Trade and Development (“UNCTAD”) in 2015, competition policy may play a significant role in achieving sustainable and inclusive growth and development.<sup>4</sup> In recent years, OECD has organized a series of events to discuss competition policy issues which are related to key SDGs including, among others, poverty reduction,<sup>5</sup> gender equality,<sup>6</sup> and fairness.<sup>7</sup> In addition, the relationship between environmental policy and competition policy has been on the radar of the competition authorities in some jurisdictions for over 10 years.<sup>8</sup>

It is worth noting that the antitrust law enforcement does not necessarily promote sustainable development. On the contrary, it may even have a negative impact on specific SDGs. For example, there are views that the rules related to anti-competitive agreements may have an over-deterrent “chilling effect” on the cooperation among competitors in the areas of raising workers’ wages and promoting environmental protection. As some experts in Europe said, “climate change is an existential threat. Competition law must be part of the solution and not part of the problem. Competition law need not stand in the way of urgent action and co-operation by the private sector to fight climate change.”<sup>9</sup>

Economic growth, social inclusion and environmental protection are the three cornerstones of sustainable development. The outbreak of COVID-19 and its long-lasting impact on the economy, environment and society further highlights the importance of sustainable development of the human society. On the other hand, the antitrust law typically focuses mainly on addressing economic issues and there has been no consensus on whether it can effectively handle social and environmental issues. This paper discusses sustainable development from the antitrust perspective with a focus on the role of the antitrust law in promotion of the non-economic SDGs and the areas where the antitrust law may play a more prominent role, which are still controversial at the moment. Against the background of China’s strategic transformation from “high-speed growth” to “high-quality growth,” the reflection on the question as to whether post-pandemic, China’s Anti-monopoly Law (“AML”) is able to play a more active role in promoting SDGs, especially those goals related to environmental protection and social development, is of even greater significance.<sup>10</sup>

In this context, Part II of this paper briefly sets out China’s antitrust rules and cases that are relevant to the non-economic SDGs. Part III analyses the options and major challenges when applying the AML for promotion of the non-economic SDGs. In Part IV, we put forward a few concrete suggestions. Part V is the conclusion.

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2 [http://www.gov.cn/xinwen/2016-10/13/content\\_5118514.htm](http://www.gov.cn/xinwen/2016-10/13/content_5118514.htm).

3 The 17 SDGs include No Poverty, Zero Hunger, Good Health and Well-Being, Quality Education, Gender Equality, Clean Water and Sanitation, Affordable and Clean Energy, Decent Work and Economic Growth, Industrial Innovation and Infrastructure, Reduced Inequalities, Sustainable Cities and Communities, Responsible Consumption and Production, Climate Action, Life Below Water, Life on Land, Peace, Justice and Strong Institutions, Partnerships for the Goals.

4 UNCTAD, *The role of competition policy in promoting sustainable and inclusive growth*, 2015.

5 <http://www.oecd.org/daf/competition/competition-and-poverty-reduction.htm>.

6 <http://www.oecd.org/daf/competition/gender-and-competition.htm>.

7 <http://www.oecd.org/daf/competition/how-can-competition-contribute-to-fairer-societies.htm>.

8 Nordic competition authorities, *Competition Policy and Green Growth: Interactions and challenges*, 2010.

9 Simon Holmes, *Climate Change, Sustainability, and Competition Law* (Journal of Antitrust Enforcement, 2020), Volume 8, Issue 2, 354–405.

10 <http://theory.people.com.cn/n1/2018/0131/c40531-29797885.html>.

## II. THE AML RULES AND CASES THAT PERTAINING TO NON-ECONOMIC SDGS

### A. Relevant Provisions of the AML

Consideration of non-economic SDGs has been reflected in various provisions of China's AML which came into force in 2008. Article 1 of the AML provides that "this Law is enacted for the purposes of guarding against and prohibiting anti-competitive conducts, safeguarding fair market competition, improving economic efficiency, protecting the interests of consumers and the public interest, and promoting the healthy development of the socialist market economy." This article identifies multiple legislative goals of the AML including "protecting the public interest" and lays the foundation for China's AML to play a role in promoting non-economic SDGs.

Article 15 of the AML which provides exemptions for anti-competitive agreements specifically provides that an anticompetitive agreement "for the purpose of achieving the public interest such as energy conservation, environmental protection, disaster relief and rescue" may be exempted. Article 28 which concerns merger control review provides that "the Anti-Monopoly Enforcement Authority under the State Council may make a decision not to prohibit the concentration of undertakings where the undertakings can prove that the positive effects of the concentration on competition significantly outweighs its adverse effects, or that the concentration of undertakings is in the public interest." Here "public interest" may also be interpreted to capture non-economic SDGs in individual cases. In contrast, there is no explicit reference to social public interest in provisions addressing abuse of a dominant market position. Even so, while Article 17 sets out the abusive conducts which are prohibited in principle, it also provides that such conducts can have "justifications," leaving certain room for the non-economic SDGs to come into play.

In addition, it is worth noting that China's fair competition review system has also taken sustainable development into consideration. *The Opinions on Establishment of a Fair Competition Review System in the Development of the Market System* (the Opinions)<sup>11</sup> issued by the Chinese government in 2016 provide for "exceptions" in the fair competition review regime. Similar to exemptions of anti-competitive agreements, in exceptional cases, policies and measures having the effects of eliminating and restricting competition can still be implemented under given conditions. These exceptions include those concerning sustainable development such as "(measures) in order to achieve poverty alleviation and promotion of development, disaster relief and rescue, and other social security purposes" and "(measures) in order to achieve energy and resource conservation, ecological environmental protection and other public interest."

### B. Relevant Antitrust Enforcement

There are very limited precedents in China's antitrust enforcement where non-economic SDGs have been directly taken into consideration. One example may be the conditional approval of the merger between Dow Chemical Company (Dow) and DuPont de Nemours, Inc. (DuPont) in 2017 (*Dow/DuPont*), where the antitrust authority alluded to the consideration of environmental protection in its competition analysis.<sup>12</sup> In its decision, the Ministry of Commerce ("MOFCOM"), the then merger control authority, concluded that the transaction may have the effect of eliminating or restricting competition in several markets, including the rice insecticides market. The decision noted that sulfoxaflor, Dow's rice insecticides already released to the market, was particularly effective in killing rice planthopper, one of the major pests of rice in China. On the other hand, DuPont's trifluoro pyrazine, which targeted rice planthopper as well, had been registered in China and was about to launch. Experiments showed that DuPont's product was "highly efficient, responsive and *environmentally friendly with low dosage required.*"

MOFCOM was concerned that the transaction may have potential adverse impact on the technological development in the rice insecticides market because Dow and DuPont were major innovation forces in the rice insecticides market prior to the transaction and were competing with each other in the field of R&D, with large R&D investment and abundant product stock. Post-transaction, the two parties may lack impetus for further R&D, reduce investment in areas with parallel innovation, and delay the launch of new products, which may adversely affect the technological development in the product market. It appears that the concern over potential adverse impact of the transaction on technological development is likely to be related to the impact on R&D and introduction of more environmentally friendly new products. In other words, MOFCOM may have considered the possible adverse impact of the transaction on environmental protection in its competition assessment.

<sup>11</sup> [http://gkml.samr.gov.cn/nsjg/fldj/202006/t20200603\\_316209.html](http://gkml.samr.gov.cn/nsjg/fldj/202006/t20200603_316209.html).

<sup>12</sup> MOFCOM, *Announcement of the Anti-Monopoly Review Decision to Conditionally Approve merger between Dow Chemical Company and DuPont de Nemours, Inc.*, Order No. 25, April 29, 2017.

In addition, in some rare situations, non-economic SDGs are indirectly considered by applying the exemption rule for anti-competitive agreements under the AML. For example, in *Shenzhen Hui'erxun Technology v. Shenzhen Pest Control Society*, the Higher People's Court of Guangdong Province in the appeal affirmed the judgment by the intermediate people's court and ruled in favor of the defendant, a local pest control association. In the dispute involving a horizontal price-fixing agreement, the court supported the defendant's exemption claim based on the public interest considerations including environment protection and public health under Article 15. In the ruling, the court held that the agreement concluded by the association members under the organization of the defendant constituted an anti-competitive agreement prohibited by Article 13 of the AML because it fixed the minimum price for disinfection and pest control services provided by the association members. However, the court found that the disinfection and pest control services were critical to the public health, environmental protection and epidemic prevention and the agreement was for the purpose of preventing below-cost pricing and malicious competition so as to protect the social public interest. In addition, the defendant successfully proved that there were no anti-competitive effects, and the consumers shared the benefits. On such basis, the court concluded that the public interest exemption should apply to the agreement.<sup>13</sup>

### III. OPTIONS AND CHALLENGES IN THE INSTITUTIONAL DESIGN OF THE AML FOR PROMOTION OF THE NON-ECONOMIC SDGS

There are in general two approaches to promoting sustainable development by antitrust law: (1) indirect model, i.e. applying exemptions to the specific anti-competitive conducts that generate positive benefits such as environmental protection and social development, subject to certain legal requirements. This model reflects the compromise of competition policy to address environmental protection and social development policies; and (2) direct model, i.e. including non-economic SDGs such as environmental protection and social policies as legal objectives of the antitrust law and factoring them into competition assessment and the theory of harm of anti-competitive conducts as non-price effects on competition. The direct model, to some extent, can be considered as integration of environmental protection and social policies by the competition policy.

#### ***A. Indirect Model: Applying Exemptions to Anti-Competitive Conducts based on Environmental and Social Development Considerations***

##### 1. How to Achieve This

Exemption rules, in particular those applicable to anti-competitive agreements, are the main tools of antitrust law to promote sustainable development. By design and adoption of exemption rules, the SDGs could be endorsed in the regulation of each type of anti-competitive conducts, including anti-competitive agreements, abuse of market dominance and concentrations of undertakings that harm competition. In general, SDGs are addressed in China's AML mainly via the indirect model. As discussed above, the exemption rules for anti-competitive agreements under the AML shows the most consideration for sustainable development, as embodied in Article 15 which has a public interest exemption including exemption on the ground of environmental protection and disaster relief. In addition, the fair competition review system in China also shows the coordination of competition policy, environmental protection policy and social policy through exception provisions, which contributes to the promotion of the non-economic SDGs.

##### 2. What are the Challenges?

The biggest challenge of adopting the indirect model is the clarity of exemption rules, i.e. how to design the exemption rules related to the non-economic SDGs to be clear enough to give sufficient clarity to both the antitrust authority and the business community when applying such rules. Only when the relevant exemption rules are sufficiently clear and specific, can the market players' concerns over violating the antitrust law for engaging in potentially anti-competitive conducts which are otherwise beneficial to the non-economic SDGs be alleviated. The current exemption rules under the AML are still very generic in terms of substance and there is limited procedural guidance, which leads to the existing rules playing a limited role in promoting sustainable development.

Let us take Article 15 of China's AML, which specifies the requirements for exemptions for anti-competitive agreements, as an example. Under Article 15, for an exemption to apply, undertakings shall also prove that "the agreements concluded will not substantially restrict competition in the relevant market, and consumers are able to share the benefits derived from such agreements." Due to the lack of detailed guidance, where the parties in a particular case intend to invoke public interest exemptions, there is a great deal of uncertainty on how to prove these agree-

<sup>13</sup> <http://ip.pkulaw.cn/ipjournal/1510121712.html>.

ments do not substantially harm competition and that consumers are able to share the benefits. For example, it is not clear whether in addition to end customers, the term “consumers” in this article also includes direct customers as business counterparties. If “consumers” only include end customers, then the situations where exemptions for anti-competitive agreements that are conducive to SDGs could apply under existing rules will be further reduced and, accordingly, the contribution of Article 15 to promotion of sustainable development will be even more limited.

What hopefully could resolve the issue is that according to the *Action Plan for Building a High-Standard Market System* published by the General Offices of the Central Communist Party and State Council in January 2021, the Chinese antitrust authority will formulate the highly anticipated guidelines on antitrust exemptions to shed more clarity on the application of the exemption rules so that the AML may play a more prominent role for the promotion of non-SDGs.<sup>14</sup>

## **B. Direct Model: Integration of Environmental and Social Objectives in the Legislative Goals of Competition Policy**

### 1. How to Achieve This

Under the direct model, environmental protection, social development and other SDGs will be explicitly identified as the direct objectives of the antitrust law. Consequently, THE non-economic SDGs can be evaluated in individual cases as another dimension of competition. For illustration, someone takes the view that “the impact on sustainability of certain types of conduct or transactions can be considered in the analysis of their price or non-price effects on quality, choice and innovation. This approach has the advantage of bringing sustainability considerations within the traditional competitive assessment framework, as opposed to characterizing them as public policy considerations that are outside the realm of competition law.”<sup>15</sup>

The direct model can be regarded as an expansion of the application scope of antitrust law and this model faces the great challenge of the “unbearable weight” of antitrust law. An example is the controversy in recent years over whether data privacy issues should be left with data privacy law or be addressed by competition law as well.<sup>16</sup> In our opinion, whether the direct model is reasonable or not depends largely on the feasibility of establishing a clear and convincing theory of harm that can integrate the non-economic SDGs in the competition assessment, which seems to be a challenging mission. As mentioned above, the indirect model can work particular well for anti-competitive agreements in the form of exemption rules. Therefore, we will explore if there is any space for application of the direct model under the AML to address abuse of dominance and concentration of undertakings.

When taking into account the non-economic SDGs during application of the rules on abuse of market dominance, it will be necessary to distinguish the application of the exploitative abuse rules from the exclusionary abuse rules. If the exploitative abuse rules are applied, the assessment of the anti-competitive effects of a specific conduct in a given market may not be necessarily required in a particular case. Instead, the specific conduct that harms the non-economic SDGs can be considered directly as an exploitative abuse. As the exploitative abuse rules can largely be independent from the assessment of the effects of eliminating and restricting competition, this type of rules is theoretically more suitable to be applied to address the non-economic SDGs. However, it should be noted that Article 6 of the AML provides that “undertakings with a dominant market position shall not abuse their market dominance to eliminate or restrict competition.” Given this general provision, one may argue that to constitute an abusive conduct regulated by the AML, the conduct has to have anti-competitive effects, which leaves no room for regulation of exploitative abuses under China’s AML. Therefore, if the non-economic SDGs were to be addressed directly in the rules regulating abuse of market dominance, the Chinese antitrust authority would have to consider how to integrate the relevant goals within the analytical framework for the anti-competitive effects of an abusive conduct. For example, Article 17 prohibits, among others “selling goods at an unfairly high price or purchasing goods at an unfairly low price.” Such conducts may occur in circumstances where the counterparty to the transaction is the disadvantaged group in a society. Therefore, it is worth considering SDGs such as poverty alleviation and reduction of unfairness in the analysis of the theory of harm in a particular case.

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14 [http://www.gov.cn/zhengce/2021-02/01/content\\_5584030.htm](http://www.gov.cn/zhengce/2021-02/01/content_5584030.htm).

15 Cristina A. Volpin, *Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)*, (CPI Antitrust Chronicle, July 2020).

16 Wei Han, Cunzhen Huang, *Collingridge Dilemma? — The Interaction of Antitrust Law and Privacy in China* (Antitrust, Fall 2020), Vol. 35, No. 1.

As regards concentrations of undertakings, the factors for consideration set out in Article 27 of the AML include the impact of a concentration of undertakings on technological development, which may also include technologies related to environmental protection. As noted earlier, in *Dow/DuPont* (2017),<sup>17</sup> we understand that the Chinese antitrust authority's concern around the potential adverse impact of the transaction on technological development is likely to involve consideration of the adverse impact on environmental protection. In addition, Article 27 includes a catch-all clause, i.e. "other factors that have an impact on market competition," which leaves certain room for direct consideration of the non-economic SDGs.

## 2. What are the Challenges?

Adoption of the direct model is prone to trigger debates about the improper expansion of the legislative objectives of the antitrust law. Even disregarding the divergence over the legislative objectives of the antitrust law, this model faces great challenges in its implementation. When the non-economic SDGs are part of the analytical framework of competitive assessment, the key challenge confronted by the antitrust authority is how to identify a specific anti-competitive conduct (including how to quantify the non-economic SDGs in a particular case) and what remedies could be imposed subsequently.

Due to the ambiguity of the non-economic SDGs, especially the goals related to the social development, the antitrust authority is faced with technical challenges as to how to reflect these goals in the competition analysis. Even in the case of the environmental protection goal, which is relatively easy to understand, it is not a simple task to quantify the achievements of environmental protection in individual cases. While a few environmental indexes have been developed in e.g. environmental economics, the outlook for application of such indexes in specific antitrust cases remains uncertain. In addition, even if the competitive assessment in a particular case mainly relies on the qualitative analysis, such qualitative analysis typically needs to be broken down into more specific considerations. Compared to the traditional analysis of economic indicators such as price, it remains difficult to identify the specific considerations for environmental and social goals. Moreover, it is an unavoidable question for the antitrust authority as to how to provide effective remedies from antitrust perspective for harm to the non-economic SDGs such as poverty alleviation, fairness and so on. It is likely beyond the competence of the antitrust authority to handle issues concerning environmental protection and social problems in a particular case.

Given the challenges in implementation of the direct model, the direct model is likely to significantly reduce the certainty of antitrust law enforcement and create issues for the business community. The other obstacle that cannot be ignored is that, if environmental protection and social development are also included as the legislative goals of the antitrust law, it is likely to significantly increase the costs of communication and coordination between the antitrust authority and the other administrative law enforcement authorities considering the institutional setting of the government.

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<sup>17</sup> MOFCOM, Announcement of the Anti-Monopoly Review Decision to Conditionally Approve merger between Dow Chemical Company and DuPont de Nemours, Inc., Order No. 25, April 29, 2017.

## IV. OUR PRELIMINARY PROPOSALS

### A. The Role of China's AML in Promoting Sustainable Development

At the Fifth Plenary Session of the 18th Central Committee of the Communist Party of China (“CPC”), the principles of innovative, coordinated, green, open, and shared development were proposed.<sup>18</sup> The Report of the 19<sup>th</sup> National Congress of the CPC noted that “China’s economy has shifted from a high growth stage to a high quality development stage.”<sup>19</sup> Some people hold the view that to promote the high-quality development of China’s economy is to push forward the comprehensive and deepened reform so as to provide institutional security for the achievement of higher quality, more efficient, fairer, more sustainable and safer development.<sup>20</sup> Meanwhile, the role of competition policy in the economic development in China has been increasingly strengthened in recent years. In the *Opinions of the Central Committee of the CPC and the State Council on Building an Improved Institutional Mechanism for Market-based Allocation of Resources*<sup>21</sup> which were issued on March 30, 2020, the Chinese government placed further emphasis on strengthening the fundamental position of competition policy, combatting administrative monopolies and preventing market monopolies, which reflected China’s determination to further develop its market economy. The AML, which is the embodiment of China’s competition policy, should play an essential role in sustainable development under the new development pattern of China’s economy.

As China has a civil law system, the discussion on the role of the AML in promoting sustainable development must take into account the functions of other laws in China’s legal system in promotion of sustainable development. Compared to the AML, many existing Chinese laws may contribute to the promotion of the non-economic SDGs in a more direct way, such as the *Environmental Protection Law*, the *Law on Promotion of Cleaner Production*, the *Law on the Protection of Wildlife*, the *Labor Law*, the *Employment Promotion Law*, the *Law on Promotion of Small and Medium-sized Enterprises*, the *Law on Protection of Rights and Interests of Women*, and the *Law on Promoting the Transformation of Scientific and Technological Achievements*. The AML of China follows the “negative list” approach and focuses on specific practices that eliminate or restrict competition. One can tell from the legislative objectives of the AML that, generally speaking, the AML is mainly applied to address economic issues although it has a broad range of objectives including the public interest which may include non-economic goals. In light of the above, SDGs in relation to environmental protection and social policy may not be the priority among the legislative objectives of the AML. In addition, it has just been 12 years since the AML came into force and the Chinese antitrust authority still faces the constraints caused by lack of enforcement resources including human resources. These factors will limit the role of the AML in promotion of sustainable development. As discussed earlier, the AML faces certain challenges in facilitating the achievement of SDGs, regardless of direct or indirect models adopted. Therefore, we are of the view that in either direct or indirect model, the AML in general should play a supporting role in promotion of sustainable development. In terms of the choice between the direct and indirect models, we consider that the indirect model should play the leading role in the institutional design of the AML of China.

### B. Specific Areas Where the AML May Promote SDGs

Given the increasingly important role of the AML in the Chinese economy, the AML can give the competition mechanism full play via primarily the indirect model so as to facilitate achievement of the economic SDGs out of the 17 SDGs. It is worth noting that “development driven by innovation” is getting increasingly important in the current economic development in China.<sup>22</sup> How the AML could further promote “innovation” in SDG 9 deserves greater attention from the Chinese antitrust authority.<sup>23</sup>

In terms of the goals related to environmental protection and social development out of the 17 SDGs, the scope of application of the antitrust law largely depends on the choice of the welfare standards, i.e. whether the consumer welfare standard or the total welfare standard is followed. The antitrust law which adopts the consumer welfare standard, in general contributes less to sustainable development compared to those that opt for the total welfare standard. It should be noted that there is no consensus in the academia or the legal professions in China as to which welfare standard is adopted by China’s AML. While the impact of the anti-competitive conducts on consumers is emphasized in many

18 [http://theory.people.com.cn/n1/2016/0429/c40531-28313643.html?tdsourcetag=s\\_pctim\\_aiomsg](http://theory.people.com.cn/n1/2016/0429/c40531-28313643.html?tdsourcetag=s_pctim_aiomsg).

19 <http://theory.people.com.cn/n1/2018/0131/c40531-29797885.html>.

20 <http://theory.people.com.cn/n1/2020/0818/c40531-31825674.html>.

21 [http://www.gov.cn/zhengce/2020-04/09/content\\_5500622.htm](http://www.gov.cn/zhengce/2020-04/09/content_5500622.htm).

22 [http://www.qstheory.cn/wp/2019-10/23/c\\_1125139717.htm](http://www.qstheory.cn/wp/2019-10/23/c_1125139717.htm).

23 Wei Han, Yajie Gao, *Challenges and Prospects for Merger Control in China in the Digital Economy* (CPI Antitrust Chronicle, March 2019).



cases, it can hardly be concluded that the AML adopts the consumer welfare standard. This is mainly because Article 1 of the AML refers to the public interest in addition to consumer interests, which leaves room for adoption of the total welfare standard in individual cases. Therefore, the extent to which the AML can contribute to environmental protection and social development goals out of the 17 SDGs is largely decided by how the antitrust authority deals with the relationship between consumer interests and the public interest in a particular case.

As a whole, in the event that emphasis is placed on consumer interests in specific cases, only those non-economic goals that are directly related to consumers can be easily covered by the AML. In contrast, if emphasis is placed on the public interest, then all of the non-economic goals out of the 17 SDGs can be considered in the enforcement of the AML as different manifestations of the public interest. In terms of enforcement model, as noted earlier, we suggest that the indirect model should play the leading role at this stage, through which the antitrust authority can treat environmental protection and social development goals as various dimensions of “public interest” for consideration in a particular case based on the exemption rules. This will enable the AML to play a greater role in promoting sustainable development. As far as the direct model is concerned, compared to environmental protection policy, social policies such as no poverty, zero hunger, quality education, gender equality are even more difficult to be assessed and quantified. Therefore, it is more challenging for social policies to be directly considered under the antitrust law. Given the challenges of incorporating social policies in the antitrust law and the limitations on the antitrust enforcement capabilities and resources, we suggest that the AML should apply the direct model only in exceptional cases and for the SDGs related to environmental protection.

### **C. Improvement of the AML for Promotion of SDGs**

As discussed earlier, we are of the view that the AML should mainly apply the indirect model to the non-economic SDGs, and only in exceptional cases the direct model is applied and mainly to achieve environmental protection goals.

In the indirect model, goals related to environmental protection and social development should be assessed primarily based on considerations for the public interest. At present, the rules under the AML are still over generic, and it is expected that the exemption rules could be improved by amendments to the AML or new supporting regulations or separate exemption guidelines, for example, the antitrust exemption guidelines which is already on the Chinese antitrust authority’s legislative agenda. In this regard, the latest progress in drafting the ‘Sustainability Agreements’ Guidelines<sup>24</sup> by the Netherlands Authority for Consumers and Markets (“ACM”) also merits the attention of the Chinese antitrust authority.

In terms of the regulation of anti-competitive agreements, taking Article 15 of the AML as an example, the application of public interest exemption requires further analysis on the impact of the agreement on consumer interests. This in fact limits the scope where the article could play a role in promoting non-economic SDGs as the burden of proving that consumers are able to share the benefits derived from the relevant conducts significantly reduces the chances of success in claiming exemption under this article. Our suggestion is to either delete the requirement that consumers shall also benefit, or to broadly interpret “consumers” in this article to include direct customers (i.e. business counterparties) to allow more space for application of the rules. In addition, for the exemption to apply, business undertakings shall also prove that the agreements will not *substantially restrict competition* in the relevant market. It may be worth applying a bit more tolerance to agreements for achieving the non-economic SDGs such that such agreements can be exempted as long as competition is not entirely eliminated. This would effectively lower the bar for exemption, thus enhancing the chances of successful application. To sum up, we consider it necessary to distinguish between exemptions related to facilitation of economic goals *vis-à-vis* non-economic goals under Article 15 and design differentiated requirements for application of exemptions.

With respect to abuse of a dominant market position, while the tolerance for “justifications” for abusive conducts specified in Article 17 of the AML leaves room for SDGs to come into play, the new *Interim Provisions on Prohibiting the Abuse of Dominant Market Position*<sup>25</sup> issued by the State Administration for Market Regulation in 2019 do not take into account the SDGs related to environmental protection and social development when substantiating “justifications.” The Chinese antitrust authority may further consider whether these goals could be included as justifications in the future. Imagine a situation where an undertaking with a dominant market position refuses to enter into transactions with a specific counterparty or treat it discriminatorily because the conduct of the specific counterparty seriously hinders sustainable development (e.g. damaging the environment). Could the consideration of sustainable development constitute a justification for the undertaking’s conduct?

<sup>24</sup> <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>.

<sup>25</sup> [http://gkml.samr.gov.cn/nsjg/fldj/201907/t20190725\\_305166.html](http://gkml.samr.gov.cn/nsjg/fldj/201907/t20190725_305166.html).

In terms of concentrations of undertakings, it is still being debated as to how to properly consider the public interest in the review.<sup>26</sup> Currently, the AML and its supporting rules are yet to develop a more comprehensive framework for undertakings to defend their concentrations. It may be advisable for the antitrust authority to attach greater importance to the design of defense rules based on the public interest including environmental protection and social development, and properly balance the public interest defense and efficiency defense, including differentiating the role of consumer interests in specific defense rules.

In addition, there is also scope for improving the fair competition review system of China. The exception rules under the *Implementing Rules for the Fair Competition Review System (for Provisional Implementation)* (the "Implementing Rules")<sup>27</sup> which were promulgated in 2017 provide that policies or measures fall in the exception when they are "for the purpose of safeguarding national economic security and cultural security, concerning construction of national defense, for the purpose of achieving poverty alleviation and development promotion, disaster relief and rescue, and other social security purposes and for the purpose of achieving energy and resource conservation, ecological environmental protection and other public interest, as well as other exceptions prescribed by laws and administrative regulations." It is further provided that these policies and measures can be implemented if all of the following conditions are met: "(1) the policy or measure is indispensable for achieving certain policy objectives, i.e. in order to achieve the relevant policy objective, such policy or measure must be implemented; (2) it will not significantly eliminate or restrict market competition; and (3) the implementation period is specified."

Compared to the EU's state aid rules, the Implementing Rules lack sufficient clarity on how to specifically assess SDGs related to social development and environmental protection in the fair competition review, causing uncertainty over their application in specific cases. Post-pandemic, the coordination of competition policy with industrial policy is confronted with greater challenges, especially at the local government level.<sup>28</sup> In this context, it is necessary to introduce more specific rules or guidelines on fair competition review system with quantified factors for consideration so as to enhance predictability of the rules. For example, for disaster relief, protection of the ecological environment and the like, the relevant subsidy standards may need to be more detailed to include specific monetary thresholds to enhance legal certainty.

#### **D. Strengthening Competition Advocacy and Nurturing Sustainable Consumers**

Competition advocacy is a helpful supplement to antitrust enforcement and is of great significance to a young antitrust enforcement jurisdiction like China. In recent years, the Chinese antitrust authority has paid particular attention and made significant efforts in promoting competition advocacy and has been fostering the competition culture in China in various ways including promulgating the *Anti-Monopoly Compliance Guide for Undertakings*.<sup>29</sup> In the context of promotion of sustainable development, the Chinese antitrust authority would also benefit from competition advocacy, especially competition advocacy targeting consumers. Through competition advocacy, the antitrust authority can proactively encourage undertakings to pay due attention to SDGs when competing in the market, and drive undertakings to focus on competing in aspects that are conducive to SDGs. In addition, the antitrust authority can guide consumers to pay attention to SDGs in their choice of products, raising consumers' awareness of sustainable development and nurturing "sustainable consumers."<sup>30</sup> In this way, consumer choices may exert pressure on undertakings which can be leveraged to drive undertakings to develop products, services and business models that are more in line with SDGs.

<sup>26</sup> <http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm>.

<sup>27</sup> [http://gkml.samr.gov.cn/nsjg/fldj/202006/t20200603\\_316208.html](http://gkml.samr.gov.cn/nsjg/fldj/202006/t20200603_316208.html).

<sup>28</sup> Wei Han, Yajie Gao, *Antitrust Enforcement During COVID-19: China's Response and the Long-Term Implications* (CPI Asia Column, September 2020).

<sup>29</sup> [http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918\\_321796.html](http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321796.html).

<sup>30</sup> <https://www.consumersinternational.org/what-we-do/world-consumer-rights-day/sustainable-consumer-2020/>.

## V. CONCLUSION

China's economic development model is at the early stage of a massive transformation. The achievement of SDGs will become a key criterion to evaluate China's economic development at the next stage. Therefore, it is critical to think about to what extent the AML, as the core competition policy, could promote non-economic SDGs, in particular those related to environmental protection and social development, in addition to serving the economic goals.

In this paper, we briefly go through the Chinese antitrust rules and cases that are related to or have addressed non-economic SDGs. Based on a distinction between indirect and direct models, we analyze the options and major challenges the AML and its enforcement are facing for promotion of the non-economic SDGs. On this basis, we are of the view that the AML in general should play a more active yet supporting role in promotion of sustainable development and the indirect model remains the more suitable approach for law enforcement in light of the various constraints. We suggest that the direct model should only be considered for the non-economic SDGs related to environmental protection and only in exceptional circumstances.

The role of antitrust law in promoting sustainable development is a controversial topic that is attracting attention from all walks of life.<sup>31</sup> We should try to strike the balance between promoting the non-economic SDGs through the antitrust law and over-broadly expanding the application scope of the antitrust law, so that the antitrust law could avoid bearing "unbearable weight." We expect that the increased awareness and debates over the role antitrust law should play for promotion of SDGs, and in particular, the Chinese antitrust authority's legislative efforts (such as the promulgation of the exemption guidelines) and enforcement, will open up new horizons in China.

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<sup>31</sup> For example, the relevant research programs by the Greek antitrust authority. See, <https://www.epant.gr/en/enimerosi/competition-law-sustainability.html>.

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