lead agency, but is not likely to affect its interaction with NDRC and SAIC in law enforcement activities.

§2.05 CONCLUSION

The AML was preceded by antitrust provisions in a number of nebulous laws and regulations enforced by a wide range of authorities, an idiosyncratic legacy from China's command economy. Legislators faced the threshold challenge to create a strong and centralized institutional force capable of establishing the AML's prevailing power in a country where restrictions on competition arise from both public and private sources. By consensus, one newly-minted and pure competition authority would have been ideal but unfortunately proved unrealistic.

The two-level institutional structure for administrative enforcement of the AML, as a compromise, underlines the central government's lack of ability to harness and reshuffle the entrenched powers of its agencies. The AMC, designed to reach consensus through inter-agency consultation, possesses no enforcement powers. In addition to fulfilling a CCB's typical mission to push polices from the top down, however, the commission provides the key forum for continuing debate on the many major issues unresolved in the AML. Operating behind closed doors, the AMC allows each member agency a hand in shaping China's competition policy and influencing indirectly, but fundamentally, the enforcement of the AML.

Essentially, the AMEAs are three bureaus, respectively, within the multi-mission NDRC, MOFCOM and SAIC. Together they divide up the enforcement of the AML into three parts, along the lines of their previous experience and comparative advantages. The agency trio has gained confidence through intensive capacity building, while at the same time developing different styles and preferences. NDRC has united its enforcement activities under the AML and the Price Law, which has accelerated since 2011. SAIC has emphasized the connection between the AML and the Anti-Unfair Competition Law, and has heavily relied on local offices for enforcement. Merger control by MOFCOM has since the beginning represented the most active and visible part of the AML evolution. However, MOFCOM's performance record of law enforcement and legislative efforts might not necessarily be viewed entirely positive. Given the staff size of its Anti-Monopoly Bureau, currently around 30, suspicion could arise concerning the quality of some of its decisions and draft rules.

The AML's entry into force roughly coincided with the State Council's institutional reconfiguration in 2008. Within the context of China's government structure, the institutional framework under the AML has been put into place and continuously evolved. Multiple agencies have obtained or strengthened their role in the new competition regime. Another round government structuring is expected in 2013 at the beginning of the five-year term of the new administration. Given the number of agencies involved in the AML enforcement, the institutional specifics under the AML is bound to change. However, underlying dynamics as played out in the first five years will persist in one way or another.

3 Policy Objectives of Public Enforcement of the Anti-Monopoly Law: An Assessment of the First Five Years

Wendy NG

§3.01 INTRODUCTION

The enactment of the Anti-Monopoly Law[1] (AML) in 2007 marked a milestone in China's transition from a centrally planned economy to a socialist market economy, confirming China's commitment to adopt market-based principles. Given the size and potential of China's economy, there is understandably intense interest from governments, businesses, institutions and commentators worldwide in how the AML is and will be interpreted and enforced. The AML appears to be a modern competition law, largely consistent in form and substance with the prevailing practices of well-established competition law jurisdictions, in particular those of the European Union and Germany. However, there are aspects of the AML that clearly indicate that the AML is a distinctly Chinese competition law.

One such aspect is its objectives. The objectives of the AML are stipulated in Article 1, which provides that the AML is:

> enacted for the purposes of preventing and prohibiting monopolistic conduct, protecting fair market competition, promoting efficiency of economic operations, safeguarding consumer welfare and the public interest and promoting the healthy development of the socialist market economy.

The goals of preventing and prohibiting monopolistic conduct, protecting fair market competition, promoting efficiency of economic operations and safeguarding consumer welfare have generally been supported by most commentators, who feel comfortable that these goals—broadly considered to be "competition objectives"—are likely to take

1. Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, Aug. 30, 2007.

on similar meanings as they do in established competition law jurisdictions such as the United States, the European Union and Japan.[2]

In contrast, the meanings of "safeguarding ... public interest" and "promoting the healthy development of the socialist market economy" are more indeterminate and have therefore attracted the most discussion, as commentators speculate over what these terms might mean and whether they might conflict with or detract from the pursuit of competition objectives.[3] Their main concerns are that industrial policy goals[4] (such as fostering national champions), the protection of Chinese businesses from competition, discrimination against foreign companies and exemption of state-owned enterprises (SOEs) from the application of the AML will be pursued under the guise of public interest or the healthy development of the socialist market economy.[5] These fears have been exacerbated by the institutional structure of administrative enforcement of the AML. Enforcement is shared amongst three anti-monopoly enforcement authorities, all of which are subordinate to the State Council. A number of commentators are concerned about:

- the authorities' purported lack of independence and their susceptibility to political influence;
- whether they will take so-called non-competition factors into account in their AML enforcement;
- potential enforcement conflicts;
- how their pre-existing non-AML enforcement responsibilities might affect their AML enforcement; and
- whether they have sufficient political and administrative power to enforce the AML (especially against SOEs).[6]

2. *See*, e.g., The Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association, *Joint Submission to the Ministry of Commerce of the People's Republic of China* 7 (Jul. 15, 2003).
3. *See*, e.g., *id.*, at 9–10; Zhengxin Huo, *A Tiger Without Teeth: the Antitrust Law of the People's Republic of China*, 32 Asian-P. L. & Policy J. 45 (2008).
4. In this article, industrial policy refers to government interventions directed at the supply side and aimed at encouraging structural changes. It encompasses both horizontal policies, which are policies that aim to influence the whole economy, and vertical policies, which are policies aimed at specific sectors, industries or companies. *See* Damien Geradin & Ianis Girgenson, *Industrial Policy and European Merger Control—A Reassessment*, in *International Antitrust Law & Policy: Fordham Competition Law 2011*, at 354–355 (Barry E. Hawk, ed., 2012). Wu notes that Chinese industrial policy falls into four categories: industrial structure policy, industrial organization policy, industrial technology policy, and industrial landscape policy: Li-Fen Wu, *Anti-Monopoly, National Security and Industrial Policy: Merger Control in China* World Competition 477, 494 (2010).
5. *See*, e.g., Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, Antitrust L.J. 133, 142–144 (2008); Nathan Bush, *Constraints on Convergence in Chinese Antitrust*, Antitrust Bull. 87–88, 96–97 (2009).
6. *See*, e.g., Bruce M. Owen, Su Sun & Wentong Zheng, *China's Competition Policy Reforms: the Anti-Monopoly Law and Beyond*, Antitrust L.J. 231, 261 (2008); Xiaoye Wang, *The New Chinese Anti-Monopoly Law: a Survey of a Work in Progress*, Antitrust Bull. 579, 590–591 (2009); H. Stephen Harris Jr et al., *Anti-Monopoly Law and Practice in China* 265–266, 268 (2011).

Further, a number of provisions in the AML indicate that public policy and other objectives will impact enforcement. For example, Article 27(5) requires that one of the factors to be considered in merger review is the effect of the merger on national economic development.

Coming up to five years of AML enforcement, it is a good time to examine the public enforcement of the AML to date and consider whether commentators' fears of its politicized enforcement have come true. This article will examine the enforcement decisions made by the antitrust enforcement authorities to date and consider the policy objectives they have pursued in practice. An assessment of whether the commentators' concerns have materialized will follow.

§3.02 POLICY OBJECTIVES OF MERGER ENFORCEMENT

The Ministry of Commerce (MOFCOM) is in charge of merger enforcement, and the Anti-Monopoly Bureau is the responsible department within MOFCOM.[7]

As of the end of 2012, MOFCOM unconditionally approved 517 concentrations, conditionally approved 16 concentrations and prohibited one concentration. MOFCOM published only 17 decisions, as it is only required to publish reasons for decisions if it imposes conditions to or prohibits a concentration.[8] These decisions tend to be quite short and lack detailed reasoning and analysis.[9] For example, MOFCOM's most recent published decision was its conditional approval of the joint venture between ARM, Giesecke & Devrient and Gemalto.[10] It was less than three pages long and discussed the impact of the transaction on one product market. In contrast, the European Commission's decision in the same transaction was 49 pages long with detailed discussion on the scope of the product and geographic markets of the main affected market as well as other relevant product markets that might be impacted by the joint venture, the competitive impact of the joint venture and how the proposed commitments address the European Commission's concerns.[11] Whilst MOFCOM ultimately imposed remedies similar to those imposed by the European Commission, this case shows the comparative lack of transparency in MOFCOM's decision-making process and perhaps a lower level of soundness and sophistication in its merger analysis. Nonetheless, even in these short decisions, we can still observe some of the policy objectives that drive MOFCOM's decision-making.

Competition concerns and analysis play an important role in MOFCOM's decision-making. With the exception of its first decision, MOFCOM has framed its decisions based on the standard antitrust theories of harm, which have been widely

7. Regulation on Major Duties of the Internal Structure and Staffing Requirements of the Ministry of Commerce, [2008] MOFCOM Order, Aug. 24, 2008, Art. 3(11).
8. AML, Art. 30.
9. Xinzhu Zhang & Vanessa Yanhua Zhang, *Chinese Merger Control: Patterns and Implications*, J. Competition L. & Econ. 477, 494 (2010).
10. ARM/Giesecke & Devrient/Gemalto, [2012] MOFCOM Order No. 87, Dec. 6, 2012.
11. Case No. COMP/M.6564 – *ARM/Giesecke & Devrient/Gemalto/JV*, [2012] OJ C 368/4.

accepted in other jurisdictions.[12] For example, MOFCOM was concerned with the anti-competitive effects of a conglomerate merger in the *Coca-Cola/Huiyuan*[13] case. It considered that, post-merger, Coca-Cola would be able to leverage its dominant position in the carbonated soft drink market to the fruit juice beverage market to exclude or restrict fruit juice companies. MOFCOM is also concerned about the unilateral and coordinated effects of horizontal mergers. Both the *Seagate/Samsung*[14] and *Western Digital/Hitachi*[15] acquisitions concerned the hard disk drive market, a market that MOFCOM considered to be highly concentrated and transparent. MOFCOM was concerned that the transactions would increase the possibility that competitors would coordinate to restrict competition. In the *Panasonic/Sanyo*[16] transaction, MOFCOM found that the merged entity would be able to unilaterally raise prices, and that this ability was unlikely to be effectively constrained by competition. Whilst MOFCOM is continuing to learn and develop its approach to merger analysis, especially in relation to vertical and conglomerate mergers, the acceptance and application of these standard theories of harm show that competition concerns and objectives are influential in MOFCOM's decision-making.

Even though the decisions are generally framed in the language of competition analysis, in some cases the remedies imposed by MOFCOM are not consistent with the competition concerns expressed. Instead, the remedies suggest that MOFCOM was motivated, or at least influenced, by non-competition concerns. For example in the *Wal-Mart/Newheight*[17] case, MOFCOM stated that it was concerned that Wal-Mart would be able to leverage its competitive advantage in the physical supermarket store market into the online retail market and value-added telecommunications services (VATS) market. However, the conditions imposed were all aimed at preventing Wal-Mart from entering the VATS market without first obtaining the necessary government approvals.

Also, in each of the *Mitsubishi Rayon/Lucite International*,[18] *General Motors/Delphi*,[19] *Seagate/Samsung* and *Google/Motorola Mobility*[20] transactions, MOFCOM was the only competition authority to impose restrictive conditions when other competition authorities such as the European Commission, the US Department of Justice, the US Federal Trade Commission, the Korea Fair Trade Commission, the Taiwan Fair Trade Commission and the Japan Fair Trade Commission cleared these transactions unconditionally. It also imposed remedies that were different to or went beyond

12. Dan Wei, *China's Anti-Monopoly Law and its Merger Enforcement: Convergence and Flexibility*, J. Intl. Econ. L. 807, 833 (2011); Ping Lin & Jingjing Zhao, *Merger Control Policy Under China's Anti-Monopoly Law*, Rev. Indus. Org. 109, 124 (2012).
13. *Coca-Cola/Huiyuan*, [2009] MOFCOM Public Announcement No. 22, Mar. 18, 2009.
14. *Seagate/Samsung*, [2011] MOFCOM Public Announcement No. 90, Dec. 12, 2011.
15. *Western Digital/Hitachi*, [2012] MOFCOM Public Announcement No. 9, Mar. 2, 2012.
16. *Panasonic/Sanyo*, [2009] MOFCOM Public Announcement No. 82, Oct. 30, 2009.
17. *Wal-Mart/Newheight*, [2012] MOFCOM Public Announcement No. 49, Aug. 13, 2012.
18. *Mitsubishi Rayon/Lucite International*, [2009] MOFCOM Public Announcement No. 28, Apr. 24, 2009.
19. *General Motor/Delphi*, [2009] MOFCOM Public Announcement No. 76, Sep. 28, 2009.
20. *Google/Motorola Mobility*, [2012] MOFCOM Public Announcement No. 25, May 19, 2012.

those required by other jurisdictions, for example in the *Inbev/Anheuser-Busch*[21] and *Western Digital/Hitachi* transactions. Of course, this is not to say that the mere fact that MOFCOM reached a different decision or imposed different remedies to other competition authorities means that MOFCOM based its decision on non-competition policies and concerns. Such variation may have been due to the different competitive landscape in China. But these different outcomes may also be due to MOFCOM's consideration of non-competition factors, especially in cases where MOFCOM, like other competition authorities, found the geographic market to be worldwide. Indeed, the AML requires that MOFCOM consider the impact of the transaction on national economic development in its merger review. Further, during its review, MOFCOM consults with relevant government departments, industry associations, customers, suppliers and competitors of the merging parties and consumers. As a result, MOFCOM may be subject to the influence of these parties—especially other government departments—and their influence might be reflected in MOFCOM's decisions. Despite continuing efforts by MOFCOM to improve the transparency of its merger review process,[22] it is still relatively opaque, even for the parties going through the notification process.

In this section, I will look at the conditional and prohibition decisions made by MOFCOM to date to discern the policy objectives, aside from competition objectives, it has pursued in its enforcement.

[A] Actors of Concern to MOFCOM

[1] Domestic Companies

MOFCOM's decisions do not suggest that protecting Chinese companies from competition is a motivating factor. Instead, it seems that MOFCOM pays close attention to how the transaction will impact the interests of Chinese companies more generally, whether they are competitors or customers.

MOFCOM's consideration of the interests of Chinese companies is apparent in its review of non-horizontal transactions.[23] In these cases, MOFCOM was concerned that the upstream entity would leverage its advantage or leading position to adversely affect competitors in the downstream market. For example, MOFCOM had clear concerns about the impact of the Coca-Cola/Huiyuan acquisition on Chinese fruit juice companies, as it believed that the proposed acquisition would squeeze out domestic small and

21. *Inbev/Anheuser-Busch*, [2008] MOFCOM Public Announcement No. 95, Nov. 18, 2008.
22. In November 2012, it released a list of all the unconditional clearances it approved from August 2008 to September 2012, with the commitment that the list would be updated on a quarterly basis. *See* Ministry of Commerce News Release, *The Anti-Monopoly Bureau Enhances Disclosure of Notifications of Concentration between Business Operators*, Nov. 15, 2012, http://fldj.mofcom.gov.cn/aarticle/xxfb/201211/20121108436852.html (accessed Mar. 8, 2012). The list of unconditionally cleared concentrations is available at: http://fldj.mofcom.gov.cn/aarticle/zcfb/201211/20121108437868.html (accessed Mar. 8, 2012). As at the time of writing, MOFCOM is preparing regulations to implement a fast-track notification process for non-contentious concentrations.
23. *Coca-Cola/Huiyuan*, *General Motors/Delphi*, *General Electric/Shenhua*, *Henkel/Tiande Chemical*, and *Google/Motorola Mobility*.

can only offer an economic approach to show how to possibly prove competitive effects in the liquor market. While there is no mentioning of any adverse price effects, one of the decisions indicated a strong market position. Economic theory does suggest that market power is needed for firms to raise prices. An observation of market power may be used as a check on the competitive effects arising from the use of minimum RPM. This framework is relatively general in that it can be extended to private litigation, which may reflect a growing trend in China regarding how the AML might be used as a way to address contractual disputes using civil procedures.[40] Manufacturers and distributors are apt to include some form of RPM in their distribution contracts.[41] NDRC's decisions have provided initial legal and economic insights into how to address the pertinent issues with such contracts in China.

40. For further discussions on private antitrust litigation under the AML in China, *see* Dennis Lu and Guofu Tan, *Economics and Private Antitrust Litigation in China*, Sep. 15, 2012, Competition Policy International (forthcoming). For a discussion on strategic antitrust litigation, *see* D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. Cal. L. Rev. 689–732 (2012), and R. Preston McAfee and Nicholas V. Vakkur, *The Strategic Abuse of the Antitrust Laws*, 1 J. Strategic Mgt Educ. 1–18 (2005).
41. Competition laws on RPM have been involved in private disputes between manufacturers and their dealers. A pre-Leegin study examining US private antitrust litigation concerning RPM showed that 87% of the cases involved terminated dealers as plaintiffs, 70% of the cases were settled, and only 28% of the cases resulted in the plaintiffs winning. For more details, *see* Pauline Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34(2) J. L. Econ. 263–294 (1991).

9 Refusal to Deal in China: A Missed Opportunity?

Sébastien EVRARD & ZHANG Yizhe

§9.01 INTRODUCTION

Refusals to deal have traditionally been one of the most contentious issues in competition law. The ability to freely decide with whom to contract and the importance of property rights have indeed long been considered as one of the fundaments of free market capitalism.

China should be a fertile ground for refusal to deal claims given the importance of state-owned enterprises and their monopolies in multiple industries such as energy, telecommunications or transportation. Like in Europe, these claims could be used to take on historical monopolies and open up certain industries. When the Anti-Monopoly Law (AML)[1] was enacted in 2008, some market watchers welcomed the inclusion of a specific prohibition on refusals to deal and speculated on how it could be applied in a "socialist market economy." Others feared that the provisions would be used against foreign intellectual property owners to extract cheap technology licenses.

However, so far, the AML has not lived up these expectations: very few decisions, from both courts and regulators, involving refusals to deal have been published.

The activity in this field has been largely limited to the publication of guidelines by the National Development and Reform Commission (NDRC)[2] and the State Administration for Industry and Commerce (SAIC)[3] in which they have set out their views.

1. Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, Aug. 30, 2007.
2. Anti-Price Monopoly Regulation, [2010] NDRC Order No. 7, Dec. 29, 2010.
3. Regulation on the Prohibition of Conduct Abusing a Dominant Market Position, [2010] SAIC Order No. 54, Dec. 31, 2010.

As a result, it is unclear whether China will impose broad obligations to deal on dominant firms, or adopt a more moderate approach, like the European Union, or even a lenient one like the United States.[4]

The next five years could see some changes with the continued maturation of the competition law framework but also the possible desire of the central government to push for more liberalization in certain sectors of the economy. However, speculating on an unrestrained application of the AML to sectors dominated by state-owned enterprises would not be justified. After all, while borrowing from foreign jurisdictions, the AML has some specific Chinese features and, in particular, must serve to promote the healthy development of the socialist market economy. Also, Chinese companies are increasingly at the forefront of intellectual property ownership. They may be reluctant to see the development of competition law theories that could result in curtailing their own rights.

§9.02 REFUSALS TO DEAL UNDER THE AML

The AML seeks to prohibit "monopolistic conduct," which includes abuses of a dominant position (*see* Article 3 of the AML). Article 6 of the AML provides that "a business operator in a dominant market position shall not abuse its dominant market position to eliminate or restrict competition." This means that the mere possession of a dominant position is not prohibited but only its abuse.

Article 17(1) of the AML provides a non-exhaustive list of conduct that may constitute an abuse of a dominant position, including refusals to deal: "a business operator in a dominant market position is prohibited from engaging in the following conduct abusing the dominant market position: [...] without valid justification, refusing to deal with trading partners."

[A] Jurisdictional Aspects

Both NDRC and SAIC may have jurisdiction over refusals to deal. NDRC is responsible for the enforcement of *price-related* monopoly conduct and SAIC for *non-price related* monopoly conduct.

It is unclear how such distinction will apply in relation to refusals to deal. A literal reading of the Anti-Price Monopoly Regulation seems to suggest that NDRC will have jurisdiction when the refusal to deal is applied through the imposition of an "excessively high price" (i.e., so-called constructive refusal to deal). Similarly, SAIC would have jurisdiction when the refusal is implemented through a reduction of the current trading volume, delaying, or terminating the current trading volume, a refusal to have a new

4. For more details about refusals to deal in United States and in the European Union, *see*, e.g., *Verizon Communications v. Law Offices of Curtis V. Trinko LLP*, 540 US 398 (2004) (for the United States); and Case C-7/97, *Oscar Bronner GmbH & Co. KG v. MediaprintZeitungs- und Zeitschriftenverlag GmbH & Co. KG*, [1998] ECR I-7791 and European Commission Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C 45/7 (for the European Union).

transaction, the imposition of restrictive conditions making it difficult for the counterparty to continue trading, or in the case of refusal to access to essential facilities.

The question of which authority will have jurisdiction is not without significance. Indeed, both have issued rules and, as further explained below, NDRC's Anti-Price Monopoly Regulation is more precise on the possible valid justifications for a refusal to deal. NDRC would accept the existence of alternative sources of supply as a valid justification for refusing to deal. SAIC's Regulation on the Prohibition of Conduct Abusing a Dominant Market Position (SAIC Dominance Regulation) does not mention specific justifications but simply lists two factors that the authority will take into account when assessing the existence of a valid justification, namely whether the conduct is based on normal operations and normal benefits of the company, and the effect of the relevant conduct on economic efficiency, public interest, and economic growth.

If there are indeed alternative sources of supply, a dominant firm may want to implement its refusal to deal by the application of an excessively high price rather than by simply sending a termination notice.[5]

From a policy standpoint, it would, however, make little sense to treat differently a refusal to deal implemented by way of a termination notice from another implemented through the imposition of an excessively high price. Therefore, it remains to be seen whether both authorities will, in practice, enforce the AML consistently.

[B] Substantive Aspects

There are three conditions for a refusal to deal to constitute a violation of the AML:

- the refusal must come from a firm that has a dominant position;
- the dominant firm's conduct must constitute a "refusal;" and
- there must be no valid justification for the refusal.

[1] The Existence of a Dominant Position

The prohibition on refusals to deal only applies to companies with a dominant position. Article 17(2) of the AML defines a dominant position as "a market position where a business operator is able to control the price, the quantity or other trading conditions in the relevant market, or is able to restrict or affect the ability of another business operator to enter into the relevant market."

According to the AML (*see* Article 18), the following elements will be taken into account to determine whether a company has a dominant market position:

- market shares;
- ability to control the sales market or the raw material purchasing market;
- its financial and technical status;

5. The question would then be whether the application of such an excessively high price would amount to an unfair price, which in itself could constitute an abuse of a dominant position, or a possible discrimination if such high price is only targeted at one particular customer.

- the degree of reliance on it by other companies; and
- the difficulty for other companies to enter the relevant market.[6]

Other yet unspecified factors can also be considered.

Importantly, the AML provides for presumptions of dominance where:

- one firm's market share is above 50%;
- two firms' combined market share exceeds two-thirds; or
- three firms' combined market share exceeds three-fourths.

However, the presumption will not apply to a firm whose market share is below 10%. These presumptions are rebuttable. So far, courts have been relatively conservative in abuse of dominance cases. In most of them, they have not concluded to the existence of a dominant position. In the *Dongfeng-Nissan* case, for example, an individual customer sued Dongfeng-Nissan, a car maker, and Hunan Huayuan, a 4S shop operator, alleging that they had monopolized the supply of Dongfeng-Nissan spare car parts, charged excessively high prices and refused to sell the parts and repair services separately.[7] The court ruled in favor of the defendants in December 2011 on the ground that the plaintiff failed to define the relevant market or prove the defendants' dominance.[8] The case is now reportedly on appeal.

[2] A "Refusal" to Deal

The prohibition on refusals to deal is not limited to outright refusals to supply.

The SAIC Dominance Regulation provides that the following conduct, without valid justification, shall constitute a refusal to deal:

- reducing the current volume of trading with the counterparty;
- delaying or terminating its current transaction with the counterparty;
- refusing to have a new transaction with the trading party;
- imposing restrictive conditions which make it difficult for the trading party to continue dealing with the dominant firm; and
- refusing to allow the counterparty to use its necessary facilities under reasonable conditions in the course of production and operations.[9]

6. For a more detailed analysis of these elements, *see* H. Stephen Harris, Jr., et al., *Anti-Monopoly Law and Practice in China*, at 96 et seq.
7. Changsha Intermediate People's Court, *Liu Dahua v. Dongfeng Nissan Passenger Vehicle Company of Dongfeng Motor Co., Ltd. and Hunan Huayuan Industrial Company*, Dec. 12, 2011, [2011] Chang Zhong Min Wu Zhu Zi No. 158.
8. *See* Legal Daily, *Consumer Lost in the First Chinese Antitrust Lawsuit in Automobile Area*, http://www.legaldaily.com.cn/index_article/content/2012-08/16/content_3773665.htm?node=5954 (accessed Mar. 1, 2013).
9. *See* Regulation on the Prohibition of Conduct Abusing a Dominant Market Position, [2010] SAIC Order No. 54, Dec. 31, 2010, Art. 4.

As regards the reduction of the current volume of trading, there may be circumstances where the dominant firm's capacity will be insufficient to continue to supply the same volume to a customer (e.g., because the supplier's manufacturing plants would be out of service for a certain period of time). It could also be that the dominant firm's capacity does not decrease but it wants to keep more output for its own operations, or it would prefer to supply a higher paying customer. It is unclear at this stage whether SAIC would consider that these reductions of supply can rely on a valid justification and, therefore, are consistent with the AML.

The SAIC rules on abuse of dominance also consider as a refusal to deal the imposition of "restrictive" (限制性) conditions making it "difficult to continue dealing" (难以继续) with the dominant firm, which means that SAIC will also consider constructive refusals to deal. However, the requirement that the conditions imposed by the dominant firm be merely "difficult" (as opposed to "impossible") for the customer seems to be a rather low threshold. Indeed, new investments by the dominant firm (resulting in better products or services) may sometimes equally require investments from its customers (e.g., the development of more powerful software by a dominant firm could require the customer to acquire new hardware which, under certain circumstances, can constitute a significant investment). In the absence of clear guidance from SAIC on the possible valid justifications for refusing to deal and on the requirement that the refusal to deal results in anti-competitive effects, this provision risks hampering legitimate behavior on the part of the dominant firm but that makes the life of its customer more "difficult."

The NDRC Anti-Price Monopoly Regulation provides that the imposition of "excessively high prices" amounts to a refusal to deal (or an excessively low price in the case the buyer has a dominant position and tries to extract low prices from a supplier).[10] It is unclear what constitute an "excessively high price" (过高的销售价格). In particular, it is unclear how it relates to the prohibition on dominant firms to impose "unfairly high prices" (不公平的高价) in Article 17(1)(1) of the AML. According to the Anti-Price Monopoly Regulation, a price is "unfairly high" if it is "obviously" higher that the price charged by other companies to sell the same type of products.[11] The interplay between these two notions is unclear.

In the context of intellectual property rights, the determination of what constitutes an "excessively high price" will be even more difficult. In this respect, the Patent Law itself does not explain how to determine what constitutes a reasonable royalty.[12] In patent infringement cases, courts use one of several possible damages measures: the losses incurred by the patent owner, the profits of the infringing party from the

10. *See* Article 13 of the NDRC Anti-Price Monopoly Regulation, which provides that "without valid justification, a business operator with a dominant market position shall be prohibited from refusing to deal with a trading counterparty in a disguised form by setting excessively high selling prices or excessively low buying prices."
11. *See* Anti-Price Monopoly Regulation, [2010] NDRC Order No. 7, Dec. 29, 2010, Art. 11.
12. The Patent Law only articulates that royalties shall be paid by the licensee to the licensor in case of patent licensing. *See* Patent Law of the People's Republic of China, [2008] Presidential Order No. 8, as last amended on Dec. 27, 2008, Art. 12.

The problem of the application of antitrust law to state actions is one that all competition regimes have had to deal with, and China is no exception. It is heartening to see that both the AML and the activities of the relevant enforcement authorities have already started to grapple with the complex issues that it involves. We hope that the next five years will provide increased clarity and that, in time, anti-competitive government actions will be treated in a similar way as anti-competitive actions by private businesses. Without such a level-playing field, the objective of the AML will be—in part—undermined, and the benefits that it brings to the Chinese economy and people will be reduced.

15 The Uneasy Relationship between Antitrust Enforcement and Industry-Specific Regulation in China

MENG Yanbei

§15.01 INTRODUCTION

Throughout the history of antitrust enforcement in China, there have been apparent tensions and confusion between antitrust enforcement and the actions of industry-specific regulators.

For example, in 2010, the Chinese internet industry witnessed the beginning of the antitrust dispute between Beijing Qihoo 360 Technology Co., Ltd. (Qihoo 360) and Shenzhen Tencent Computer System Co., Ltd. (Tencent). This dispute mainly concerned the interoperability between the two companies' products, and an allegation by Qihoo 360 that Tencent had abused a dominant position by preventing both firms' software from operating on the same computer. After the dispute drew widespread public attention, the Ministry of Industry and Information Technology (MIIT) intervened by calling Qihoo 360 and Tencent in for questioning. Later, the two companies reached a settlement brokered by MIIT which ensured the temporary compatibility between Qihoo 360's and Tencent's products.[1]

Despite this regulatory intervention, Jinshan Corporation subsequently filed an application with the State Administration for Industry and Commerce (SAIC)—one of the authorities responsible for enforcing the Anti-Monopoly Law (AML)[2]—asking the

1. Ministry of Industry and Information Technology, *Criticism of Beijing online security software developer Qihoo 360 and Shenzhen Tencent*, Nov. 21, 2010, http://www.antimonopolylaw.org/article/default.asp?id=2355 (accessed Jan. 22, 2013).
2. Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, Aug. 30, 2007.

authority to conduct an investigation into Qihoo 360's conduct.[3] Some lawyers also filed an application asking SAIC to investigate Tencent's allegedly monopolistic conduct.[4] But no stance was taken on the issue. Hence, the parties instead turned to private litigation.[5]

In a separate development in 2011, the Price Supervision and Anti-Monopoly Bureau of the National Development and Reform Commission (NDRC) initiated an investigation against China Telecom and China Unicom under the AML. The issue in NDRC's investigation was whether the two companies had abused their dominant position for broadband access and interconnection to prevent other Internet service providers from entering the relevant market.[6]

In response to the news revealed by the national television broadcaster CCTV that NDRC had started an investigation against the two companies, a journal belonging to MIIT reported that "China Unicom and Telecom say there is no basis" for the NDRC investigation. Similarly, another article in an industry-specific publication managed by MIIT stressed that the fact that "in the market for Internet access providers China Telecom and Unicom have a dominant market position is not itself illegal."[7] These statements are curious. Although they do not represent the official opinion of MIIT, we can speculate that MIIT—which is the government body with regulatory supervision powers over the Internet industry—was, to an extent, speaking on behalf of the two defendant companies. At the very least, it appears that they had different ideas from NDRC. Other than these statements, MIIT has not clarified its position in public.

Further, in the subsequent antitrust investigation, a declaration made and revised by China Telecom after the investigation was discussed. In its revised declaration, China Telecom announced, it had "carefully studied the related laws and regulations such as the Anti-Monopoly Law and the Telecommunications Regulation," but the Telecommunication Regulation was not mentioned in the first declaration.[8] Moreover, the earlier wording of the declaration stated that "price management was not in place and large price differences existed," while the revised declaration noted that "large price differences existed as a result of competition and management."[9] In making reference to the Telecommunications Regulation and price management, the revised declaration makes references to industrial policy as an antitrust defense. This indicates

3. Jin Shan, *SAIC to Investigate Abuse of Monopolistic Position of 360*, Nov. 12, 2010, http://tech.sina.com.cn/i/2010-11-12/19374860806.shtml (accessed Jan. 16, 2013).
4. Lawyers ask SAIC to Investigate Monopolistic Conduct of Tencent, Nov. 10, 2010, http://tech.sina.com.cn/i/2010-11-10/08304849124.shtml (accessed Jan. 16, 2013).
5. The Key Issues of *360 v. Tencent*: Whether there is an Abuse of Market Dominant Position, May 8, 2012, http://news.ifeng.com/society/1/detail_2012_05/08/14378242_0.shtml (accessed Jan. 16, 2013).
6. Luo Lan, *China Telecom and China Unicom become targets of anti-monopoly investigation*, People's Daily Overseas Edition, Nov. 11, 2011.
7. Zhao Jin and Li Lei, *Two media outlets belonging to MIIT refute the report on China Telecom and China Unicom's suspected monopoly practices*, Nov. 12, 2011, http://finance.jrj.com.cn/tech/2011/11/12072611543388.shtml (accessed Oct. 8, 2012).
8. Telecommunications Regulations of the People's Republic China, [2000] State Council Order No. 291, Sep. 25, 2000.
9. Wang Yong, *China Telecom Statement to Industry Regulator*, Dec. 9, 2011, http://tech.sina.com.cn/t/2011-12-09/14106462656.html (accessed Jan. 22, 2013).

the relatively high potential for conflict between antitrust law and industry-specific regulation.

A third example happened in April 2012 when two of the three major Chinese oil companies—China National Petroleum Company and Sinopec—possibly expanded their efforts to stop wholesaling refined oil to private gas stations and intermediary traders. Some observers queried whether limiting the wholesale of refined oil could be an issue under the AML.[10] At the same time, the question arose as to whether the energy regulator should intervene against the companies' actions.

These three examples illustrate the difficult relationship between antitrust enforcement and the actions of industry regulators. This article will endeavor to shed more light on this relationship. The remainder of the article is organized as follows: Section §15.02 explores the consistency and potential for conflict between competition policy and industrial policy, and Section §15.03 suggests that the two kinds of policies can be considered as imposing reciprocal checks and balances on each other rather than being in inherent conflict. Section §15.04 focuses on the practical interactions between competition policy and industrial policy in China, and Section §15.05 concludes.

§15.02 COMPETITION POLICY AND INDUSTRIAL POLICY: CONSISTENCY AND POTENTIAL FOR CONFLICT

[A] The Concepts

The core objective of competition policy is to protect and promote competition in the market, thereby increasing the efficiency of production and the allocation of resources, and ultimately enhance consumer welfare.[11] It is implemented through general prohibitions and sanctions against anti-competitive or unfair conduct.

Industrial policy refers to measures taken to promote the industrial development of a given sector. The principal role of this kind of policy is to *adjust* market mechanisms by restructuring and influencing demand and supply. It usually involves positive directorial intervention by the government or an industry regulator to promote the coordinated development of firms in the industry as a whole—for example, rationalizing the structure of an industry and modernizing it. Industrial policy can include setting the price and adopting other measures. For instance, in the antitrust investigation case against China Telecom and China Unicom, the Telecommunications Regulation requires the inter-network interconnection to be subject to the relevant state provision, and shall not be higher than the stated level. The Measures for the

10. Yu Minghui, *The application of the Anti-Monopoly Law to the "limiting wholesales of refined oil,"* The Beijing News, Apr. 9, 2012, http://news.xinhuanet.com/fortune/2012-04/09/c_122946604.htm (accessed Jan. 16, 2013).
11. Wang Xianlin, *The relationship between competition policy and industrial policy*, 1 Hebei L. Sci. 36–39 (2006).

Inter-Network Settlement of Internet Exchange Center[12] issued by MIIT in 2007 stipulate that other interconnection entities shall pay settlement expenses to China Telecom and China Netcom not higher than RMB 1,000 per Mbps/month. Price regulation is often part of a broader means for the government to control the national macroeconomic situation.

[B] Limited Conflict in Objective

The Chinese government—like governments across the world—uses both competition and industry policy instruments to intervene in markets.

Upon a first look, there does not appear to be an inherent, inextricable conflict between competition policy and industrial policy.[13] Competition policy and industry-specific policies share the same ultimate goal and common theoretical basis.

First, the ultimate goal of both kinds of policies is the same—i.e., improving the efficiency of resource allocation to achieve social and economic stability.

Second, both competition policy and industrial policy focus on the same problem —i.e., that the interests of society as a whole may be different than the interests of individual members or a sub-system within society.

As a consequence, both competition policy and industrial policy take the view that government intervention in the economy is sometimes necessary to correct "market failures." Competition policy prevents the abuse of market power that undermines the proper working of markets, or market power that is created by means other than market success. In turn, industrial policy is the instrument for government intervention to correct situations where market forces themselves lead to an inefficient or inappropriate allocation of resources.

[C] Different Means Pursued, in Practice

Even though there is no inherent, inextricable conflict between competition and industrial policies, it is clear that, on some occasions, there is clearly a potential for conflict between them.

This is so for three reasons. The first is that the *methods* that competition policy and industrial policy deploy are different. Competition policy's objective is to ensure that the competitive process works properly, rather than stipulating a particular outcome of this process. Competition policy is "agnostic," since its aim is to promote economic development in general, not the pursuit of industry-specific objectives. In that sense, competition policy aims to prevent anti-competitive or unfair conduct, thereby creating the conditions necessary for an efficient allocation of resources.

12. Measures for the Inter-Network Settlement of Internet Exchange Center, Oct. 31, 2008, http://www.miit.gov.cn/n11293472/n11293832/n11294057/n11302390/11656117.html (accessed Jan. 22, 2013).
13. Liu Guiqing, *Industrial policy and Competition policy in Anti-Monopoly Law* 19–21 (Beijing U. Press 2010).

In turn, with industrial policy, the government intervenes directly or indirectly to *substitute* or influence the allocation of resources. This policy includes the allocation of resources by the government between, or within, industries. Industrial policy pursues specific development objectives for particular industries. That is, this kind of policy aims to promote, protect, support or limit an industry on the basis of the government's strategy for economic and industrial development. If done properly, government intervention through industrial policy can promote industrial development and improve socio-economic stability.

Second, in terms of the *means for implementation* of the policies, competition policy and industrial policy also diverge. Competition policy prevents firms from undertaking certain actions, while industry-specific policies are often implemented through positive government directives regarding regulation, such as taxing, financing, setting or limiting price, foreign exchange, or other business activities.

Finally, while the broad objectives of industrial policy and competition policy are the same, specific objectives and means in particular industries may diverge.

The core purpose of industrial policy is to correct situations where the "invisible hand" of the market has limitations, for examples because of barriers to competition, externalities, public goods or partial information. However, in addition, government industrial policies sometimes have objectives other than economic efficiency such as equitable income distribution or currency stability. In these situations market mechanisms may not be an effective solution and the industry-specific objectives of competition and industrial policy may differ. Indeed, industrial policy sometimes will explicitly mistrust the benefits of greater competition.

At the same time, however, the allocation of resources dictated by government may be inefficient, due to the government's lack of information, corruption, rent-seeking, overlapping bureaucracy and a number of other reasons.[14] In such cases, competition policy sometimes will explicitly mistrust the benefits of industrial policy.

Against this background, while both competition policy and industry policy deal with market failures, the question as to whether and how it may be necessary for the government to intervene in any particular market may receive a different answer for different circumstances.

[D] Separate Regimes

Antitrust law and a government's industrial policy regimes play separate roles in most cases.

First, the legislative goals of the two kinds of policies are different and independent. For example, the legislative goal of the AML is to prevent and eliminate monopolistic conduct, protect fair competition in the market, enhance economic efficiency, safeguard the interests of consumers and those of society, and promote the healthy development of the socialist market economy.[15]

14. Zhang Zhouwen, *General Introduction to Economic Law* 7 (Renmin U. China Press 2009).
15. AML, Art. 1.

20 Chinese Companies' Navigation of Outbound Investment

Ninette DODOO & BAI Yong

§20.01 INTRODUCTION

China's outbound investment has increased dramatically in recent years, as Chinese cash-rich companies invest overseas. The latest official statistics show that Chinese non-financial outbound direct investment (ODI) surged by 14% to USD 68.58 billion during 2011, making China the world's sixth largest overseas investor.[1] Energy and resources topped the list for China's ODI, but there are increasing signs that China is diversifying its ODI from energy to other sectors including commercial services, wholesale and retail, manufacturing and transportation—and to some extent telecommunications.[2] Although Chinese state-owned enterprises (SOEs) account for the large majority of China's cumulative ODI to date, private companies increasingly represent an important proportion of China's outbound investment. Official statistics show that, in 2011, private companies accounted for nearly half of China's outbound investment.

Chinese ODI is a stated priority under China's 12th Five-Year Plan for the period 2011–2015.[3] Chinese ODI presents a number of special issues for Chinese companies investing and conducting business abroad. One set of issues relates to foreign investment controls, which raise national security or public interest considerations. A second set of issues relates to trade disputes, anti-dumping and countervailing measures. A

1. *See* Statistical Bulletin of China's Outbound Foreign Direct Investment (2011) jointly issued on Aug. 30, 2012 by the Ministry of Commerce, the National Bureau of Statistics and the State Administration for Foreign Exchange, http://hzs.mofcom.gov.cn/aarticle/date/201208/20120808315019.html?2104784354=3530418730 (accessed Mar. 14, 2013).
2. *See* Statistical Bulletin of China's Outbound Foreign Direct Investment (2011).
3. *See* China's 12th Five-Year Plan (2011–2015) adopted by the National People's Congress on Mar. 14, 2011, Part XII: Mutual Beneficial and Win-Win, Improving the Opening Up, http://www.gov.cn/2011lh/content_1825838.htm (accessed Mar. 14, 2013).

third set of issues revolves around perceived market distortions raised by Chinese companies' preferential access to finance, export credits or guarantees or other state support. Others revolve around merger control and compliance with competition laws that regulate conduct in the marketplace. In this article, we focus on the latter set of issues.

Until relatively recently, Chinese companies have avoided scrutiny by overseas competition authorities and courts, but this is changing as Chinese companies expand overseas. The ongoing litigation in United States' courts against Chinese companies for alleged price-fixing, *In re Vitamin C Antitrust Litigation*, is an example of the kind of price-fixing cartel being challenged in the United States[4] and can be expected to be challenged elsewhere. In Europe, which many Chinese companies perceive as a slightly more favorable environment for Chinese investment compared with other regions,[5] the treatment of Chinese SOEs for merger control purposes has attracted special attention by the European Commission. In this article, we consider the competition issues faced by Chinese companies and suggest a roadmap for addressing some of the competition risks associated with outbound investment.

This article is organized as follows. Section §20.02 discusses global competition enforcement and implications for Chinese companies investing abroad. Section §20.03 considers China's unique economic and corporate context and how this has shaped China's corporate governance culture. Sections §20.04 and §20.05 discuss recent competition cases involving Chinese companies drawing from precedents in the United States involving cartel enforcement and the European Union in the merger control context. Section §20.06 concludes.

§20.02 GLOBAL COMPETITION ENFORCEMENT AND IMPLICATIONS FOR CHINESE COMPANIES INVESTING ABROAD

Today, more than 100 countries have some form of competition law. Competition laws around the world continue to expand in number and complexity, including in countries with developing economies and in those transitioning to free markets. Asia has been particularly active in the past decade with the adoption of competition laws including in China, India, Pakistan, Singapore, Vietnam, and Hong Kong with the adoption of its first cross-sector competition law on June 14, 2012.

In today's globalized economy, anti-competitive conduct and M&A activity often transcend national boundaries. Although there is no central clearinghouse to address

4. *In re Vitamin C Antitrust Litigation*, 584 F. Supp. 2d 546. (E.D.N.Y. 2008). The European Commission recently launched a cartel investigation in the shipping sector involving a Chinese shipping magnate. Limited information is available other than a press release confirming a dawn raid in the shipping sector.
5. *See* Chinese Outbound Investment in the European Union, European Union Chamber of Commerce in China, Jan. 2013, at 16.

multi-jurisdictional conduct yet, important steps have been taken towards international cooperation between competition authorities and convergence through international organizations such as the Organisation for Economic Co-Operation and Development (OECD) and the International Competition Network (ICN). A number of cooperation agreements between major competition authorities exist.[6] In the past two years, China has also been active in its coordination efforts.[7] Given the increasing number of multi-jurisdictional transactions and the growing number of jurisdictions where pre-merger approval is required, consistency in enforcement policy and elimination of unnecessary or duplicative procedural burdens stands to benefit consumers and businesses around the world, including Chinese overseas investors. At the same time, cooperation between regulators may include information sharing, increasing the need for a consistent approach in overseas investment.

Despite the proliferation of competition laws around the world, Chinese companies have avoided scrutiny until relatively recently. Competition authorities are reviewing more notified transactions involving Chinese companies—and this trend is likely to continue. As Chinese companies expand and exports to overseas markets surge, the competition compliance risks can be expected to increase.[8] Penalties for infringing competition laws can be severe, including substantial fines in most countries. Penalties may also include civil and criminal sanctions[9] against the company and the offending employee(s), and private litigation for damages. Executives who violate competition laws may also be subject to disqualification as directors, depending on the facts and circumstances. An investigation may also impose significant administrative costs and operating restrictions, which can paralyze a business for many years. Chinese companies are expected to embrace a Western-style competition compliance culture as they expand their activities overseas, but face challenges in doing so. These challenges are rooted in China's unique regulatory and economic context, an understanding of which offers insight into how Chinese companies conduct business and how this impacts how they are regarded overseas.

6. Speech of Joaquín Almunia, *Recent Developments and Future Priorities in EU Competition Policy*, at the International Competition Law Forum (St. Gallen), Apr. 8, 2011, http://europa.eu/rapid/press-release_SPEECH-11-243_en.htm (accessed Mar. 14, 2013).
7. On July 27, 2011, the competition authorities of China and the United States signed a Memorandum of Understanding (MoU) on Antitrust Cooperation for the purpose of fostering cooperation in the enforcement of their competition laws and policies. Similar MoUs have also been signed between competition authorities of China and several other jurisdictions, including the European Union and South Korea.
8. Most recently, the European Commission imposed about EUR 1.5 billion in fines against several companies that had formed two cartels in the market for TV and computer-monitor tubes. *See* Speech of Joaquín Almunia, *The Role of Competition Policy in Times of Crisis*, on the 29th Annual AmCham EU Competition Policy Conference (Brussels), Dec. 6, 2012, http://europa.eu/rapid/press-release_SPEECH-12-917_en.htm.
9. Examples of jurisdictions with criminal penalties include the United States, the United Kingdom, Japan, Taiwan and South Korea.

§20.03 THE UNIQUE CHINA REGULATORY AND ECONOMIC CONTEXT

Until recently, China lacked the basis for developing a sound competition culture. The adoption of the Anti-Monopoly Law (AML) in 2007,[10] and the debates leading to its adoption, laid down the foundations for competition enforcement in China, including against Chinese companies. The absence of a competition culture together with the transition of China's economy from a planned to socialist market economy offer some insight into how many of China's leading companies operate and how this has impacted the way in which Chinese companies are perceived overseas.

[A] From Planned to Socialist Market Economy

In 1978, China's leaders launched the country on a program of economic reform, emphasizing the introduction of market-based principles, the independence of companies, private ownership, and entrepreneurialism. Prior to these reforms, Western style profit-driven competition between companies for markets was virtually unknown in China.[11] As a country operating under centrally planned economic principles, the concept of *competition* was almost alien to Chinese companies—the government determined nearly all prices and output, where companies were active. The gradual transition from a planned to a socialist market economy necessitated reform of China's regulatory environment, including the introduction of market-based competition principles, to sustain this development.

Competition law principles were first introduced in China with the adoption of various laws and regulations such as the Anti-Unfair Competition Law[12] (effective from December 1, 1993) and the Price Law[13] (effective from May 1, 1998). In 1994, China began to consider the adoption of a comprehensive AML, but little progress was made until early 2004 when draft legislation went before the State Council for discussion.[14] Other laws adopted in the interim also included competition law principles such as the

10. Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, Aug. 30, 2007.
11. *See*, for example, Youngjin Jung and Qian Hao, *The New Economic Constitution in China: A Third Way for Competition Regime?* 24 Nw J. Int'l L. Bus. 107, 110 (2003); Lan Cao, Public Perspectives on Privatisation, *Chinese Privatisation: Between, Plan and Market*, 63 L. Contemp. Prob. 13 (2000).
12. Anti-Unfair Competition Law of the People's Republic of China, [1993] Presidential Order No. 10, Sep. 2, 1993.
13. Price Law of the People's Republic of China, [1997] Presidential Order No. 92, Dec. 29, 1997.
14. The government effectively controls the legislative process and important legislation can usually be marshaled through relatively quickly with consensus. The protracted legislative process was unusual, but highlighted the debates on the necessity of the AML. For further background on the adoption of the AML, *see* for example H. Stephen Harris, Jr., *The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, 7 Chi. J. Int'l. L. 169, 175 (2006); and Bruce M. Owen, Su Sun & Wentong Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, Stanford Inst. for Policy Research, SIEPR Discussion Paper No. 06-32, 2007.

Interim Provisions on the Prevention of Price Monopoly Conduct[15] (effective from November 1, 2003) and the Regulation on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors[16] (effective from September 8, 2006).

The AML, which was finally adopted in 2007 and effective since August 1, 2008, has three core pillars: merger control, anti-competitive agreements, cartels, and abusive conduct. It addresses the conduct of all companies—although SOEs with special public or national security interest functions, as well as state-sponsored monopolies, enjoy a privileged position under the law.[17] The AML also addresses conduct by China's administrative bodies that eliminate or restrict competition.

In practice, it is unclear the extent to which the AML and related laws are enforced against Chinese companies. The National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC), responsible for anti-competitive conduct have, until recently, shown considerable restraint in enforcing the AML, including against Chinese companies.[18] The Ministry of Commerce (MOFCOM), responsible for merger control enforcement, has emerged as one of the world's major competition authorities but has reviewed very few transactions between Chinese companies.[19] The lack of precedents may also account for Chinese companies' limited awareness of competition law and compliance risks. This is also true of China's trade associations, some of which may serve as a hub for anti-competitive activity.[20]

[B] Corporatization and State Supervision of China's Major Corporations

The reform of China's corporations—in particular SOEs—has generally lagged behind the reform of China's economic systems. Given the significant role such companies

15. Interim Provisions on the Prevention of Price Monopoly Conduct, [2003] NDRC Order No. 3, Jun. 18, 2003.
16. Regulation on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, [2006] Ministry of Commerce, State-Owned Assets Supervision and Administration Commission, State Administration of Taxation, State Administration for Industry and Commerce, China Securities Regulatory Commssion Order No. 10, Aug. 8, 2006.
17. AML, Art. 7.
18. There are very few decisions published by NDRC and SAIC to date. In the limited number of cases investigated by NDRC, NDRC has shown a preference for applying "simplified" competition provisions in other laws, such as the Price Law. A notable exception is the NDRC's pending investigation against China Unicom and China Mobile for excessive pricing of broadband backbone network access, and the fine against Moutai and for imposing a minimum resale price mechanism on distributors. SAIC has similarly shown restraint in enforcing the law, including against Chinese companies.
19. By Chinese New Year 2013, MOFCOM had adopted decisions in cases of which only approximately 10% involved transactions between Chinese companies. Many Chinese companies choose not to file. Notably, the merger of China's major telecommunications companies after the AML came into force was not filed to MOFCOM, although the turnover threshold appeared to be met. The vast majority of the cases involve transactions between foreign companies, or Sino-foreign transactions. A list of cases submitted to and unconditionally approved by MOFCOM as at Sep. 30, 2012 is available at http://fldj.mofcom.gov.cn/accessory/201211/1353031118730.pdf.
20. A number of enforcement actions to date in China involve trade associations such as the *Vitamin C* cartel case in the United States.

26 The Application of the Anti-Monopoly Law in the Context of Intellectual Property Rights

WANG Xianlin

§26.01 INTRODUCTION

The application of antitrust law in the field of intellectual property rights (IPRs) is a complex and sensitive issue, which requires an understanding of the limit and overlap of the two fields of law, as antitrust and intellectual property laws attempt to strike the right balance between competition and innovation.

With just five years passed, the Anti-Monopoly Law[1] (AML) has been in force for only a relatively short period of time, and its application in the IPR field is an entirely new issue. In addition, the available laws and regulations are relatively general, and there are differences among the views of academics. Hence, the goal of this article is to provide guidance for the process of drafting implementing rules on this issue, and examine several fundamental questions for enforcement of the AML in the IPR field.

The process of drafting implementing rules has already started some time ago, led by one of the authorities responsible for enforcing the AML—i.e., the State Administration for Industry and Commerce (SAIC). The implementing rules being drafted will likely be issued in the form of guidelines: the draft Guidelines on Anti-Monopoly Enforcement in the Field of Intellectual Property Rights. In fact, I had the honor to be invited to research and draft the guidelines by SAIC over the past years.

1. Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, Aug. 30, 2007, Art. 57.

§26.02 THE ROLE OF ARTICLE 55 OF THE ANTI-MONOPOLY LAW

Article 55 is part of Chapter 8 of the AML, which deals with supplementary provisions. It stipulates that:

> this law shall not apply if a business operator exercises its intellectual property rights pursuant to the law and administrative regulations relating to intellectual property rights. However, this law shall apply to the conduct of a business operator which eliminates or restricts competition by abusing intellectual property rights.

Scholars have expressed diverging views on the necessity and reasonableness of this provision.[2] In practice, in order to understand the meaning of Article 55, it is not sufficient to make a literal interpretation of the provision or follow the conclusions reached by other countries based on their legal systems, case law and experience. It is equally necessary to take into account the background and legislative purpose of the provision, as well as the overall logic of the AML.

On their face, antitrust and IPR laws cover two completely different areas, but at the same time they are part of a country's basic economic policies and legal system.

The relationship between the two areas of the law is very complex. On the one hand, antitrust and IPR law both aim to promote competition and innovation as well as protect consumers—i.e., they use different means to achieve the same goals. On the other hand, on certain specific aspects, antitrust and IPR laws differ significantly, and bear the potential for contradiction and conflict. This is especially the case when, through exercising its IPR, a right holder goes beyond the scope permitted by law or the legitimate limits and thereby eliminates or restricts competition.

On this basis, the protection of IPRs and antitrust enforcement (against abuses of IPR that eliminate or restrict competition) are in essence two sides of the same coin—they are complementary, and share the common goal to encourage innovation, protect fair market competition and safeguard the interests of consumers and the public.

Nonetheless, the way of managing the relationship between antitrust and IPR laws varies greatly between countries and changes over time, in particular when it comes to how antitrust should deal with IPR issues. Developed countries and regions in the West have experienced a development process that has been rather torturous and has required constant adjustment. For example, in the early stages of antitrust law in the United States (US), it was thought to be difficult to reconcile the conflicts between the IPR system and antitrust rules, and the enforcement agencies implemented stringent antitrust policies targeted at the exercise of IPRs. However, these enforcement policies received much criticism from economists and legal scholars, who argued that these policies reduced the incentive to innovate and hindered economic development.[3]

2. Zhang Weijun, *The Abuse of Intellectual Property: The Premise or Result of Anti-Monopoly Law Violations? in* Zhang Naigen (Ed.), *Technology Transfer and Fair Competition*, 274–283 (Shanghai Jiaotong U. Press, 2008). *See, also*, Zhao Qishan, *Questioning the IP Exemption Rule under the Anti-Monopoly Law*, Oriental Law, Vol. 1, 2011.
3. John Richards et al., *Legal Issues On Products Imported into the American Market*, 216–216 (translated by Hou Guoyun et al., China U. of Poli. Sci. L. Press 1991).

From the 1990s onwards, the US enforcement agencies began to acknowledge that the antitrust and IPR regimes shared a common goal to promote competition and protect consumer interests, which in practice led to a more lenient antitrust enforcement in the IPR area. On April 6, 1995, the US Department of Justice and the Federal Trade Commission jointly issued the Antitrust Guidelines for the Licensing of Intellectual Property, thereby confirming their common position on antitrust law enforcement with regard to IPR.[4] Similar to the US, the attitude towards enforcement of antitrust law in relation to IPRs in other jurisdictions such as the European Union and Japan also changed over time.

In China, the legal community and government bodies have expressed different points of view on how antitrust and IPR laws relate to each other, especially on how the AML should address the exercise of IPR. During the legislative process for drafting the AML, some advocated that, due to their very nature, IPRs entail a statutory right of monopoly. They argued that the AML should therefore not target IPRs at all, or at least clearly acknowledge that the IPR area is excluded from the scope of the AML.[5] Others argued that the AML should not only regulate the IPR 'problem,' but also include specific IPR provisions or even a special IPR chapter acknowledging the application of antitrust rules in the IPR area.[6] Even after the AML's enactment there were people who publicly advocated for the adoption of special antitrust rules for IPRs and for regulating the anti-competitive use of IPRs as a separate type of monopolistic conduct.

The situation as described above provides the context about the enactment of Article 55 and the issues currently surfacing in that regard. It is important we keep in mind this background when trying to understand the necessity and function of Article 55. This provision reflects the different views and practices from China and abroad, both from the past and the present. In that sense, through Article 55, the AML provides a much-needed clarification on the relationship between antitrust and IPR law, thereby avoiding misunderstandings and extreme positions. The clarification is particularly important because the adoption of China's first comprehensive competition law coincided with the increasing importance attached to IPRs and a surge of attention to the potential for conflict between competition and IPR law. Even though this may be self-evident today, other countries have gone through a similar process, with challenges and setbacks. The need for consistency between IPR protection and antitrust enforcement requires that antitrust law respect and protect the legitimate exercise of IPRs. Hence, certain restrictions on competition should be regarded as necessary costs for the implementation of an IPR system that encourages innovation. This is why IPRs should be subject to a more lenient application of antitrust laws and why Article 55 expressed that the AML "shall not apply if a business operator exercises its intellectual property rights pursuant to the law and administrative regulations relating to intellectual property rights."

4. United States Department of Justice, *Antitrust Guidelines for the Licensing of Intellectual Property*. http://www.justice.gov/atr/public/guidelines/0558.htm (accessed Jan. 21, 2013).
5. Yang Jisheng, *Knowledge Must Enter into Economy through Legal Channels - Second Talk On Knowledge Economy, Economic Information*, Jul. 7, 1998.
6. Wu Changhai, *Abuse of Intellectual Property, How Will the Anti-Monopoly Law React*, http://news.xinhuanet.com/comments/2005-06/16/content_3087345.htm (accessed Jan. 21, 2013).

However, a distinction must be made between IPR ownership and the exercise of IPRs as well between the legitimate and illegitimate exercise of IPRs. This is the reason why Article 55 stipulated that the AML "shall apply to the conduct of a business operator which eliminates or restricts competition by abusing intellectual property rights." This stipulation not only reflects respect and protection of IPRs, but also sets the necessary limit to the exercise of IPRs. Antitrust enforcement against the illegitimate exercise of IPRs does not negate the intrinsic nature of an IPR as a statutory monopoly. On the contrary, it acknowledges and protects IPRs, by way of preventing and controlling any abuse. Viewed in that light, after studying the practices of other countries, China has made an initial step to set boundaries for the exercise of IPRs. At the same time, the new system will ensure China continues strengthening its IPR protection.

In his explanations on the draft Anti-Monopoly Law the former Director of the State Council's Legislative Affairs Office, Cao Kangtai, further elaborated on the necessity of including Article 55 in the AML and its legislative purpose:

> When protecting IPRs, it is also necessary to prevent and limit the abuse of IPRs which eliminate or restricts competition. This is a common problem faced by various countries at present. ... In order to provide a legal basis to prevent or limit an abuse of IPRs that eliminates or restricts competition, the scope of application of the AML must include [such] abuses.[7]

The antitrust laws in jurisdictions such as the US and the European Union do not explicitly stipulate whether the scope of the laws covers the exercise of IPRs. It is their implementing measures or enforcement guidelines that provide more details. In turn, the antitrust laws in Japan and Taiwan state that the laws do not apply to the exercise of IPRs in accordance with the law, and their regulations and guidelines specifically provide whether restrictive clauses in IPR licensing agreements are exempted from the application of antitrust laws. For example, Article 45 of the Taiwanese Fair Trade Law does not explicitly state whether it applies to the abuse of IPRs that restricts competition. It is generally understood that the Fair Trade Law does not sanction legitimate conduct but, if the exercise of IPRs exceeds the scope of "legitimate" conduct or the IPRs' intrinsic boundaries, then the Fair Trade Law would apply. The key question, therefore, is to know what "legitimate" conduct means. In Mainland China, different from places such as Taiwan and Japan where a "reverse understanding" is needed to come to a conclusion, Article 55 of the AML directly states when the AML applies and when it does not. By comparison, this provision is thus relatively clear.

When interpreting Article 55 of the AML, a key question is how to delimit its nature and function, in particular whether it provides a basis for a finding of illegality for certain types of exercises of IPRs. Given the complex relationship between antitrust and IPR laws, the most important function of Article 55 is that it sets out a clear statement of principle. Indeed, Article 55 shows that the AML does not deny the

7. Cao Kangtai, *The Anti-Monopoly Law of the People's Republic of China: Interpretation - Philosophy, System, Mechanism, Measures*, p. 256 (China Legal L. Publishing Publg. House, 2007).

rights provided by IPR law, but it does not exclude or exempt IPRs from the AML's scope either. The AML does not apply to the lawful exercise of IPRs, but only applies when IPRs are used in an illegitimate (abusive) way with the effect that competition is eliminated or restricted. In other words, Article 55 does not set the conditions for holding conduct to be illegal, and should not be the direct legal basis for handling the substance of a case. Rather, other provisions in the AML should be used to determine whether a specific exercise of IPRs is illegal. This means that even if the illegitimate exercise of IPRs is anti-competitive, it cannot be considered as an own-standing type of monopolistic conduct; instead, the conduct needs to be assessed under each of Chapters 2, 3, and 4 of the AML. That is, it must be examined whether, according to the conduct's nature and form, the abuse of an IPR constitutes (individually or jointly) a monopoly agreement, an abuse of a dominant market position or an anti-competitive concentration between business operators.

§26.03 THE CONCEPT OF ABUSE OF IPRS AND ITS RELATIONSHIP WITH MONOPOLISTIC CONDUCT

When applying the AML in the IPR field, the concept of "abuse of IPRs" must be interpreted in a cautious and reasonable way, as well as the concept's relationship with "monopolistic conduct" prohibited under the AML. Among Chinese academics, there are some discrepancies on this point, which focus to a large extent on how to interpret the notion of "abuse of IPRs."[8,9]

The idea that an abuse of rights is prohibited was enshrined early on in Chinese law, but Article 55 of the AML was the first time that the concept of "abuse of IPRs" emerged. This law did not provide explanations of the concept, though. International conventions, to which China adhered, such as the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) refer to the abuse of IPRs.[10] But these conventions equally do not provide any detailed guidance, but leave the issue to be regulated by members in their domestic legislation. Given that neither domestic nor international rules clarify the concept of abuse of IPRs, we must make a reasoned interpretation ourselves by resorting to methods such as theoretical analyses, comparative law studies and strictly legal interpretation and so forth.

From a theoretical perspective, the abuse of IPRs belongs to the scope of abuses of rights. The idea that an abuse of rights is prohibited was first recognized in civil law and then as a principle of Chinese law more generally. In general, the prohibition of an

8. Zhang Weijun, *The Abuse of Intellectual Property: The Premise Or Result Of Violation Against Anti-Monopoly Law?* 274–283, Technology Transfer And Fair Competition (Shanghai Jiaotong U. Press 2008).
9. Zhao Qishan, *Questioning the IP Exemption Rule under the Anti-Monopoly Law*, 1 Oriental L. 2011.
10. Article 8(2) of the TRIPS agreement stipulates that "[a]ppropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology." Article 40 of the agreement further stipulates the problems of abuse of intellectual property in some detail.