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VIEWPOINT:

The New Chinese Anti-Monopoly Law – An Overview

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The New Chinese Anti-Monopoly Law – An Overview

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I. Introduction

On August 30, 2007, the Anti-Monopoly Law ("AML") was enacted by the Standing Committee of the National People's Congress ("NPC").[1] This law is the culmination of a drafting process which lasted over 13 years.[2]

During this process, the various actors (including the Chinese government and academia) have shown a relatively high degree of openness.[3] Compared to previous drafts of the AML, its final version is perhaps the most advanced document.

Nonetheless, while the law itself can provide a good basis for future competition policy and enforcement, it needs to be refined. More detailed rules will be required to implement the provisions of the AML. The AML takes effect on August 1, 2008 in order to give the Chinese authorities time to adopt implementing regulations and guidelines.

According to the AML, during this period until August 1, 2008, the State Council will also resolve one of the fundamental issues which the AML has left open—to decide which authority or authorities will be responsible for implementing the AML.[4] The AML itself provides for a two-level structure of governance, with the Anti-Monopoly Commission at the top. Its responsibility is to organize, coordinate, and guide the

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[1] PRC Anti-Monopoly Law, [2007] Presidential Order No. 68 [中华人民共和国反垄断法, [2007] 主席令第 68 号], reprinted in THE ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA, China Democracy and Legal Press, 1-17 (2007) [《中华人民共和国反垄断法》, 中国民主法制出版社, 2007 年版, 1-17 页].

[2] SHANG MING (ED.), THE ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA: INTERPRETATION AND APPLICATION (2007), at 1 ("SHANG MING, ANTI-MONOPOLY LAW") [尚明主编,《中华人民共和国反垄断法理解与适用》法律出版社 2007 年版]; MARK WILLIAMS, COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN (2005), at 172 *et seq.*; and Youngjin Jung & Qian Hao, *The New Economic Constitution in China: A Third Way for Competition Regime?*, 24 NW. J. INT'L L. & BUS. 107-108 (2003).

[3] H. Stephen Harris, *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, 183 (2006); Bruce M. Owen, Su Sun and Wentong Zheng, *China's Competition Policy Reforms: The Antimonopoly Law and Beyond*, SIEPR Discussion Paper No. 06-32 (2007) at 9; and Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, THE ANTITRUST SOURCE (2007), at 1. Since 2003, MOFCOM has participated in more than 30 international conferences, seminars or meetings with experts and enterprise representatives, organized over 10 trips to Europe, the United States and Japan, and translated about 30 antitrust laws of other countries. *See* Ma Xiuhong, Vice-Minister of the Ministry of Commerce ("MOFCOM"), *Speech at the Seminar on the PRC Anti-Monopoly Law*, September 10, 2007, Xiamen, China, at 6 [on file with the authors].

[4] AML, Articles 9 and 10. *See*, also, SHANG MING, ANTI-MONOPOLY LAW, *supra* note 2, at 35-36.

implementation of the AML, and it is entrusted with a number of specific (but general) tasks.[5] The Anti-Monopoly Enforcement Authority is a body or, perhaps more likely, a number of bodies in charge of the enforcement of the AML.[6]

The language of Article 9 of the AML suggests that the Anti-Monopoly Commission will be newly created.[7] By contrast, at the time of writing, it is not clear whether the functions of the Anti-Monopoly Enforcement Authority will be allocated to a new body or, on the contrary, to existing bodies.[8] Currently, at least three bodies—the Ministry of Commerce ("MOFCOM"), the National Development and Reform Commission ("NRDC") and the State Administration of Industry and Commerce ("SAIC")—share responsibility in enforcing competition law rules, and these bodies are also reported to be interested in assuming responsibilities under the AML.[9] Although it is distinctly possible that the Anti-Monopoly Enforcement Authority will be composed of several bodies, we will refer to it in singular in this article, for the sake of simplicity.

The remainder of this article is organized as follows: Section 2 deals with the scope of application of the AML. The subsequent sections examine the four types of restraints on competition at which the AML is targeted. Section 3 analyzes the rules applicable to monopoly agreements. Section 4 examines the provisions regarding abuses of dominant market positions. Section 5 will examine the procedural rules which apply to investigations on monopoly agreements and abuses of dominant market positions. Section 6 looks at the regime for the control of concentrations, and Section 7 briefly explains the concept of "administrative monopolies." Finally, Section 8 provides some concluding remarks.

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[5] AML, Article 9. Huang Yong appears to doubt that the Anti-Monopoly Commission will be powerful in practice. Huang Yong, *China's Draft Anti-Monopoly Law*, paper presented at the ABA Antitrust Law meeting on April 20, 2007, available at http://www.abanet.org/antitrust/at-committees/at-ic/spring/07/04-20-07.shtml (last visited on October 8, 2007).

[6] AML, Article 10. *See*, also, AML, Articles 21-30, 38-45, 46-49 and 52-54.

[7] Article 9 states that the Anti-Monopoly Commission shall be "established" (设立) by the State Council, as opposed to the more ambiguous word "appointed" (规定) used in Article 10 referring to the Anti-Monopoly Enforcement Authority.

[8] Owen, Sun and Zheng, *China's Competition Policy Reforms: The Antimonopoly Law and Beyond*, *supra* note 3, at 33.

[9] Jared A. Berry, *Anti-Monopoly Law in China: A Socialist Market Economy Wrestles with Its Antitrust Regime*, INTERNATIONAL LAW & MANAGEMENT REVIEW 129 (2005), at 149-150 and notes 82 and 86; Maher M. Dabbah, *The Development of Sound Competition Law and Policy in China: An (Im)possible Dream?*, WORLD COMPETITION 341, 356 (2007); and Bush, *supra* note 3, at 4. For example, in the draft prepared by MOFCOM and submitted to the State Council in 2004, MOFCOM presented itself as the only enforcement authority. *See* 2004 Draft AML, Article 9. This proposal was taken out from the draft by the NPC at the time of the first reading, due to opposition from other agencies. Cao Kangtai (Chairman of the Legislative Affairs Office of the State Council), Explanation of the AML Draft [曹康泰, 关于《中华人民共和国反垄断法(草案)的说明》], reprinted in THE ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 1, at 28-29.

II. Scope of the law

The AML has several purposes. The law aims to prevent and prohibit monopolistic conduct, protect market competition, promote efficiency, safeguard the interests of consumers and public welfare, and promote the development of the socialist market economy.[10]

The AML applies to conduct with restrictive effects on competition within China. This includes both activities within China[11] and conduct outside China which has a restrictive impact in China.[12] In principal, the extension of jurisdiction to include conduct taking place abroad but which has effects within the jurisdiction is in line with international practice. However, the laws of the United States ("U.S.") and the European Union ("EU") further qualify the jurisdictional threshold requiring that the anti-competitive conduct must have a direct, substantial and reasonably foreseeable effect to fall under U.S. or EU jurisdiction.[13] Under the AML, by contrast, China can exercise jurisdiction if there is an "eliminative or restrictive impact on competition" in China's domestic market without further qualification.[14] Hopefully, future regulations or guidelines will ensure that the jurisdictional reach of Chinese law complies with international principles.

In terms of sectors, the scope of the AML is quite broad. The application of the AML is only explicitly (but partially) excluded in the agricultural sector.[15] In previous drafts of the AML, there was a provision stating that anticompetitive conduct would be regulated and investigated under sectoral legislation where such legislation existed.[16] Fortunately, this provision has not been retained in the adopted AML.

Article 7 appears to contain some sectoral exceptions to full application of the AML. Nonetheless, strictly speaking, this provision applies to *undertakings* in certain industries, not to the industries directly. Article 7 contains complex wording, probably as a result of thorny negotiations within the government and legislature during the drafting

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[10] AML, Article 1.

[11] Although this is not clearly stated, it appears that the AML only applies to Mainland China. Hong Kong, Macao and Taiwan are separate jurisdictions for the purposes of competition policy, and the AML does not apply there.

[12] AML, Article 2. This provision may have been inspired by German competition law. German Act against Restraints of Competition, [2005] BGBl. I S. 2114, as amended, Article 130(2).

[13] For the US, *see* Foreign Trade Antitrust Improvements Act, 96 Stat. 1246, 15 U.S.C. Section 6a(1)(A), 2; and Hoffmann-La Roche v. Empagran, 542 U.S. 155 (2004). For the EU, *see* Case T-102/96, Gencor v. Commission, [1999] ECR II-753.

[14] In that sense, Harris, *supra* note 3, at 187; and SHANG MING, ANTI-MONOPOLY LAW, *supra* note 2, at 9-10.

[15] AML, Article 56.

[16] Draft AML, Article 56 (draft for the second reading at the NPC, submitted in June 2007). For an explanation of the reasons for deleting this article, *see* NPC Legal Committee, *Report on Deliberation of the Second Reading Draft of PRC Antimonopoly Law*, reprinted in THE ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 1, at 42 [全国人大法律委员会关于《中华人民共和国反垄断法 (草案二次审议稿)》审议结果的报告].

process. Pending the adoption of implementing regulations and guidelines, Article 7 as it currently stands seems to partially exclude the application of the AML to state-owned enterprises ("SOEs") in three different categories of industries—(1) industries vital to the national economy, (2) industries vital to national security and (3) industries subject to exclusive operations and sales according to the law.[17]

These concepts are not entirely new in Chinese law.[18] For example, in the area of concentrations, the Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors require a separate notification to MOFCOM if, among other things, the proposed takeover of a domestic company concerns an "important industry" or is likely to have an impact on "national economic security."[19] While the concept of "exclusive operations and sales according to the law" has not been used too often prior to the adoption of the AML,[20] Chinese law contains provisions with similar concepts.[21]

Although Article 7 has the potential to provide the Chinese authorities with a mechanism to exclude entire sectors from the application of the AML,[22] there are certain limitations. First, the second paragraph of Article 7 can be interpreted in the sense that any exclusion should only be partial. In particular, that paragraph states that undertakings in the above-mentioned industries "shall not use their controlling position or exclusive position to the detriment of consumer welfare."[23] Admittedly, the provision resorts to the word "use," not "abuse." Nonetheless, it cannot be excluded that Article 17, regarding the

[17] AML, Article 7.
[18] The *Guidance on the Restructuring of State Capital and State-owned Enterprises* issued in 2006 sheds some light on the government's plans in the "strategic" sectors, including the industries concerning national security. This guidance also refers to companies that have exclusive operations and sales according to the law (and to public utility companies). Guidance on the Restructuring of State Capital and State-owned Enterprises, [2006] Order No. 97 of the State-Owned Assets Supervision and Administration Commission of the State Council ("SASAC") [关于推进国有资本调整和国有企业重组的指导意见, 国办发[2006] 国资委第 97 号].
[19] Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, [2006] Order No. 10 of MOFCOM, SASAC, State Administration of Taxation, SAIC, China Securities Regulatory Commission and State Administration of Foreign Exchange, Article 12 [关于外国投资者并购境内企业的规定, [2006] 商务部等六部委令 第 10 号, 第 12 条]. The case of takeovers of domestic companies holding a "famous trademark" has been subject to a notification obligation under the *Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*. However, this obligation has not been retained as a threshold for triggering the "national security" review under the AML. *See* AML, Article 31.
[20] *See* Guidance on the Restructuring of State Capital and State-owned Enterprise, *supra* note 18.
[21] *See*, for example, PRC Anti-Unfair Competition Law, [1993] Presidential Order No. 10, Article 6 [中华人民共和国反不正当竞争法, [1993] 主席令第 10 号, 第 6 条]; or Reply on the Determination of Other Undertakings Subject to Exclusive Operations according to the Law, [2000] SAIC Order No. 48 [关于如何认定其他依法具有独立地位经营者问题的答复, [2000] 工商公字第 48 号]. For public utility companies, *see*, for example, PRC Electric Power Law, [1995] Presidential Order No. 60, Articles 35 to 43 [中华人民共和国电力法, [1995] 主席令 (八届第 60 号), 第 35-43 条]; or Measures for Price Administration of Water Supply of Water Engineering, [1998] Planning Commission No. 1810, Article 5 [城市供水价格管理办法, [1998] 计价格 1810 号, 第 5 条]. For commercial monopolies, *see*, for example, PRC Law on the Tobacco Monopoly, [1991] Presidential Order No. 46, Article 3 [中华人民共和国烟草专卖法, [1991] 主席令 (七届第 46 号), 第 3 条].
[22] Harris, *supra* note 3, at 187.
[23] AML, Article 7, paragraph 2.

abuse of a dominant market position, finds application to conduct other than the pricing behavior of undertakings in those specific industries.[24] For example, China Telecom has traditionally fulfilled public service obligations as the national telephone provider. In the past, China Telecom has reportedly made the installation of new telephone lines conditional upon the purchase of its handsets.[25] This could be considered as tying and may, under certain circumstances, fall afoul of Article 17(v).[26]

Second, if the definition of industries falling under Article 7 is relatively narrow, the effects upon foreign undertakings may be more limited. In many industries related to national security or other key industries, foreign-invested enterprises are actually not entitled to perform activities, or only to a limited degree.[27]

Finally, the scope of the AML *vis-à-vis* other competition rules in Chinese law (for example, the Anti-Unfair Competition Law, the Price Law[28] and the Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors) is unclear.[29]

III. Monopoly agreements

With regard to agreements, the AML closely follows the two-prong approach of EU law (the prohibition of Article 81(1) EC and the exemption under Article 81(3) EC). First, it must be examined whether an agreement, decision or other concerted practice[30] (jointly, "agreement") restricts competition. If so, it is deemed to be a monopoly

[24] A necessary step in that approach would be to examine whether the controlling position or the exclusive position also amounts to a dominant position in a given relevant market. *See* AML, Article 17, paragraph 3 and Article 18.

[25] Market News, *Ministry of Information Industry Issues Two Notices*, July 21, 1999, at 1 [信息产业部发出两项通知,《市场报》1999 年 7 月 21 日第一版].

[26] Prior to the enactment of the AML, public utility companies "using their market power" would be prohibited from tying other products to the product or service supplied in exclusivity. Certain Regulations on Prohibiting Anti-Competitive Practices of Public Enterprises, [1993] SAIC Decree No. 20, Articles 3, 4(3) and 4(4) [禁止公用企业限制竞争行为的若干规定, [1993] 国家工商局令第 20 号, 第 3、4, 3、4.4 条]. With regard to telecommunications services in particular, the conduct described above may also conflict with Article 41(2) of the Telecommunications Regulations. PRC Telecommunications Regulations, [2000] State Council Order No. 291 [中华人民共和国电信条例, [2000] 国务院令第 291 号].

[27] Catalogue for the Guidance of Foreign Investment Industries, [2004] Order No. 24 of NDRC and MOFCOM [外商投资产业指导目录, [2004] 国家发改委令, 商务部令第 24 号]. According to this Catalogue, for example, telecommunications and railway cargo transportation are "restricted" industries in which foreign investment is subject to investment ceilings, and postal service and electricity are "forbidden" industries where foreign investment is not allowed.

[28] PRC Price Law, [1997] Presidential Order No. 92 [中华人民共和国价格法, [1997] 主席令第 92 号].

[29] As a newer law, the AML is likely to be considered as carrying more weight than other laws. For example, in the case of conflict between the AML and the *Price law*, a judge may give priority to the AML. However, more certainty can be created if the legislature gives guidance on potential overlaps or conflicts by revoking or amending certain provisions of other laws. The Anti-Unfair Competition law is being amended, and it is said that certain articles will be deleted in order to avoid conflict with AML.

[30] AML, Article 13, second paragraph. *See*, also, Article 81(1) of the Treaty Establishing the European Community (consolidated text), [2006] OJ C 321E ("EC Treaty").

agreement.[31] Although not explicitly stated in the AML, the consequence is that the agreement is null and void *ex tunc*.[32] Second, the agreement can be exempted if one of several conditions, set out in Article 15, is met. In that case, the prohibition of Articles 13 and 14 no longer applies, and the agreement is valid.[33]

Prohibitions

Article 13 applies to horizontal agreements— agreements between competing undertakings. That provision lists a series of examples of what constitute monopoly agreements—those that fix prices, limit output, partition markets, limit the development of new technologies, or amount to a collective boycott. This list strongly mirrors the examples set out in Article 81(1) EC. The fact that the list in Article 13 is not exhaustive follows the tradition in Chinese law to confer an ample margin of discretion upon the administrative authorities. On the other hand, it also reflects the degree of flexibility necessary for an economics-based case-by-case approach under competition law.[34] In the EU, the enumerations in Articles 81(1) EC and 82 EC are also open-ended.[35]

Vertical agreements are dealt with in Article 14. Only two examples of prohibited agreements are specified in that provision—agreements fixing the direct resale price and those fixing the minimum resale price.[36] Nonetheless, the list of examples is not exhaustive.

It remains to be seen whether implementing regulations add further qualifications to the prohibition contained in Article 14 (for example, by setting market share thresholds for the prohibition to apply).[37] In the EU, resale price maintenance and the fixing of minimum resale prices are also deemed as "hardcore" restrictions of competition. Under current EU competition law, resale price maintenance and minimum resale prices are

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[31] AML, Articles 13 and 14.

[32] In fact, clear language to this effect was included in the draft submitted for the first reading of the NPC in June 2006. Cao Kangtai, *supra* note 9, at 23. Although it disappeared from the final text of the AML, the same consequences follow, according to the general legal principles of contract law. PRC Contract Law, [1999] Presidential Order No. 15, Articles 52 and 56 [中华人民共和国合同法, [1999] 主席令第 15 号, 第 52、56 条].

[33] AML, Article 15. *See* Cao Kangtai, *supra* note 9, at 23.

[34] SHANG MING, ANTI-MONOPOLY LAW, *supra* note 2, at 60. There is a general concern that excessive flexibility in the legal rules may give the authorities wide discretion, which could lead to increased control by the authorities over market players. *See* European Commission, *Closer Partners, Growing Responsibilities – A Policy Paper on EU-China trade and investment: Competition and Partnership*, COM(2006) 631 final, p. 9; and WILLIAMS, *supra* note 2, for example at 146-147, 426 or 440. For a pessimistic view on the future enforcement of the AML, *see* Berry, *supra* note 9, at 152.

[35] *See*, for example, Case C-333/94 P, Tetra Pak International v. Commission, [1996] ECR I-05951, paragraph 37; or Case T-201/04, Microsoft v. Commission, [2007] not yet reported, paragraph 860.

[36] AML, Article 14.

[37] Other rules of Chinese competition law also contain a *per se* prohibition of resale price maintenance. *See* Administrative Measures for Fair Transactions between Retailers and Suppliers, [2006] Order No. 17 of MOFCOM, NRDC, Ministry of Public Security, State Administration of Taxation and SAIC, Article 18 [零售商供应商公平交易管理办法, [2006] 五部委第 17 号令, 第 18 条].

likely to be unlawful irrespective of the market shares of the contracting parties.[38] In the U.S., by contrast, the recent *Leegin* decision by the Supreme Court has brought more flexibility for agreements fixing resale prices. Such agreements no longer fall under a *per se* prohibition, but must be assessed under a rule of reason approach.[39]

Exemptions

Agreements can be exempted under Articles 13 and 14 if one of the conditions listed in Article 15 is fulfilled. Each of the first five conditions is meant to represent a pro-competitive benefit offsetting the anti-competitive effects that an agreement falling afoul of Articles 13 and 14 typically has. Similar to EU law, however, an in-depth analysis and explicit balancing of pro-competitive and anticompetitive effects may not be necessary under the AML.[40] The only requirement is that the agreement does not significantly restrict competition in the relevant market and allows consumers to share the resulting benefit.[41] Although using slightly different terminology, this approach follows that of EU competition law.[42]

The first three conditions follow the EU approach under Article 81(3) EC.[43] To the extent that the agreements improve technology or product quality or enhance the

[38] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, [1999] OJ L 336, p. 21, Article 4(a); and Commission Notice - Guidelines on Vertical Restraints, [2000] OJ C 291, p. 1, for example at recitals 46 and 47.

[39] Leegin Creative Leather Products, Inc. v. PSKS, Inc., DBA Kay's Kloset … Kay's Shoes, 551 U.S. ___ (2007). In this respect, the U.S. approach has obviously been noted by the Chinese authorities. *See* SHANG MING, ANTI-MONOPOLY LAW, *supra* note 2, at 70-73; SHANG MING (ED.), ANTI-MONOPOLY: LAW AND PRACTICE IN MAJOR COUNTRIES AND INTERNATIONAL ORGANIZATIONS (2005), at 46-49 ("SHANG MING, MAJOR COUNTRIES AND INTERNATIONAL ORGANIZATIONS") [尚明主编,《反垄断 - 主要国家与国际组织反垄断法律实践》, 中国商务出版社 2005 年版]; and WANG XIAOYE, COMPETITION LAW (2007), at 243 [王晓晔,《竞争法学》, 中国社会科学文献出版社 2007 年版].

[40] This approach differs from the rule of reason approach under US law where the positive and negative effects on competition of an agreement (or a unilateral practice) are examined in a single analysis.

[41] AML, Article 15, last paragraph.

[42] On the one hand, Article 15 seems to be more demanding than EU law. Where an agreement "significantly restricts competition", the exemption cannot apply. Under EU law, only the elimination of competition excludes the application of Article 81(3) EC. In other respects, however, the AML is less demanding than Article 81(3) EC. First, according to Article 81(3) EC, consumers must obtain a "*fair* share of the resulting benefit", while the AML only speaks of a "share of the resulting benefit" without further qualifying the degree of participation by consumers. Second, unlike Article 81(3) EC, the AML does not require that the restriction on competition is "indispensable" for the achievement of the pro-competitive objectives. In this sense, *see* Bush, *supra* note 3, at 7.

[43] With regard to small and medium-sized enterprises ("SMEs"), although EU law does not categorically exclude the application of Article 81 EC to agreements between SMEs, such agreements are generally unlikely to raise competition concerns. *See*, to that effect, Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) EC, [2001] C 368, p. 7, recital 3; and Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 EC, [2004] C 101, p. 7, recital 50.

competitiveness of small and medium-sized enterprises, such agreements are exempted from the prohibitions of Articles 13 and 14.[44]

In contrast, the remaining three conditions do not appear to have clear equivalents in EU law. Condition (iv) allows agreements to be exempt from the prohibition of Articles 13 and 14 if they "serve social public interests" such as energy saving, environmental protection and disaster relief. While these are also worthy goals for public intervention in the EU, they would mainly be pursued through means other than competition policy.[45] Chinese law, too, allows for public intervention in these fields on the basis of other laws and regulations.[46]

Another condition for exemption is where an agreement alleviates decreases in sales or cuts production overcapacity in periods of economic downturn. The European Commission has exceptionally exempted similar agreements (so-called "crisis cartels").[47] However, such exemptions were granted infrequently and are of dubious efficacy.[48] If this condition is interpreted too broadly in China, the necessary restructuring of inefficient sectors (particularly concerning SOEs) may be hindered.

Finally, condition (vi) allows the exemption of agreements which safeguard legitimate interests in foreign trade. Pending the adoption of further regulations and guidelines, it is difficult to anticipate how this provision will operate in the future. One possibility is that this condition will allow the coordination of export prices in order to prevent Chinese exporters from being subject to anti-dumping charges abroad.[49] Another possibility may be that this condition can be used by the Chinese authorities to conform to the principle of international comity (that is, to avoid conflicts of jurisdiction with countries where an agreement is mandatory under the laws of that country).[50]

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[44] AML, Article 15, indents (i) to (iii).

[45] However, the Commission has in the past granted exemptions for agreements under Article 81(3) EC on the basis of the environmental benefits resulting from product improvement. *See*, for example, Commission Decision of 17 September 2001, *DSD*, [2001] OJ L 319, p. 1, recitals 142-146.

[46] *See*, for example, PRC Energy Saving Law, [1997] Presidential Order No. 90 [中华人民共和国节约能源法, [1997] 主席令第 90 号]; or PRC Environmental Protection Law, [1989] Presidential Order No. 22 [中华人民共和国环境保护法, [1989] 主席令第 22 号]. However, people involved in drafting the AML seem to have been inspired by the "public interests" exemption in German law, although they also acknowledge that this exemption was barely used by the German authorities. *See* SHANG MING, ANTI-MONOPOLY LAW, *supra* note 2, at 93-94; and SHANG MING, MAJOR COUNTRIES AND INTERNATIONAL ORGANIZATIONS, *supra* note 39, at 50.

[47] IVO VAN BAEL AND JEAN-FRANÇOIS BELLIS, COMPETITION LAW OF THE EUROPEAN COMMUNITY (2005), in particular at 452.

[48] *See*, for example, André Fiebig, *Crisis Cartels and the Triumph of Industrial Policy over Competition Law in Europe*, BROOKLYN JOURNAL OF INTERNATIONAL LAW 607, 634 *et seq*. (1999).

[49] SHANG MING, ANTI-MONOPOLY LAW, *supra* note 2, at 88.

[50] For a discussion of the principle of international comity, *see* for example the judgment of the US Supreme Court in Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993).

The list included in Article 15 is open-ended.[51] However, unlike other provisions (such as Articles 13 and 17), the list of Article 15 can only be extended by the State Council and on the basis of a law.

IV. Abuse of a dominant market position

Article 6 prohibits undertakings from abusing a dominant market position.

Dominance

Article 17 sets out the general meaning of the concept of a "dominant market position." As in the EU, this concept[52] centers around the notion of a "relevant market."[53] Article 12 defines the relevant market as the product scope and the geographical scope in which undertakings compete against each other.

According to the AML, the factors that determine whether an undertaking is in a dominant market position in a relevant market include market shares, control of markets, financial and technical capacity, relationships of economic dependence, and barriers to entry.[54] The most important of these factors is market share.[55] Article 19 establishes a presumption of dominance if certain market thresholds are exceeded. A single undertaking is presumed dominant if its share is above 50% of the relevant market. There are further presumptions that two or three undertakings are in a dominant market position if their aggregate market share exceeds two thirds or three fourths respectively. Nonetheless, an individual undertaking is excluded from this presumption if its market share is less than 10%.[56]

These presumptions are inspired by the *German Act against Restraints of Competition* ("GWB") which establishes similar market share thresholds to presume collective dominance.[57] According to the GWB, undertakings reaching a market share threshold can nonetheless prove that the presumption of collective dominance does not apply by showing that substantial competition exists between them or that the totality of

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[51] AML, Article 15, last paragraph.
[52] In the EU, the concept is called "dominant position."
[53] Commission notice on the definition of the relevant market for the purposes of Community competition law, [1997] OJ 372, p. 5; SHANG MING, REGULATING THE ABUSE OF DOMINANT POSITIONS THROUGH ANTI-MONOPOLY LAW (2007), at 30 ("SHANG MING, ABUSE OF DOMINANT POSITIONS") [尚明著,《对企业滥用市场支配地位的反垄断法规制》, 法律出版社 2007 年版]; and KONG XIANGJUN, STUDIES ON ANTI-MONOPOLY LAWS (2001), at 279 [孔祥俊著,《反垄断法原理》, 中国法制出版社 2001 年版].
[54] AML, Article 18. Compared to the pre-existing rules, this article provides clear guidance as to which criteria can be employed to determine a dominant market position. *See* WANG XINLIN, WTO COMPETITION AND CHINA'S ANTI-MONOPOLY LEGISLATION (2005), at 200 [王先林著,《WTO 竞争政策与中国反垄断立法》, 北京大学出版社 2005 年版].
[55] SHANG MING, ABUSE OF DOMINANT POSITIONS, *supra* note 53, at 153.
[56] AML, Article 19.
[57] GWB, Article 19(3). *See*, also, SHANG MING, ABUSE OF DOMINANT POSITIONS, *supra* note 53, at 16.

undertakings meeting the threshold have no predominant market position *vis-à-vis* the other market participants.[58]

The AML also allows undertakings presumed to be dominant to rebut that presumption. Quite obviously, it should be possible to rely on the factors listed in Article 18 to rebut a presumption solely based on market shares.

However, the AML does not give any guidance on whether and how the a collective dominant market position can be challenged. Clarifications in the implementing regulations or guidelines may give more details. In the EU, for a finding of a collective dominant position, it is necessary for a competition authority or a plaintiff to prove that the undertakings follow a common policy (which does not need to qualify as an agreement or concerted practice as such). Three basic conditions must be fulfilled under EU law. First, there must be sufficient market transparency to allow each undertaking which forms part of the collective dominant position to monitor whether the other undertakings adopt the common policy. Second, it must be possible to establish a retaliation mechanism for conduct deviating from the common policy. Third, other competitors, and consumers, are not able to jeopardize the result of the common policy.[59]

Abuse

Article 17 contains a non-exhaustive list of abuses including excessive pricing, below-cost pricing,[60] refusal to deal,[61] exclusive dealing, tying, and discriminatory treatment.

The list may be inspired by Article 82 EC, although in the EU some of the abuses have been developed by the case law. Like the EU case law on Article 82 EC,[62] the conduct falling under the examples of Article 17 is only considered abusive if it is "without justification."[63] The AML does not give further guidance on the burden of proof, but it is possible that Chinese law follows EU law—the authority or the plaintiff would need to prove that the conduct is in principle abusive, while the defendant would be able

[58] GWB, Article 19(3).
[59] Case T-342/99, Airtours v. Commission, [2002] ECR II-2585, paragraph 62; and Case T-464/04, IMPALA v. Commission, [2006] ECR II-2289, paragraph 247.
[60] The definition of below-cost pricing is less precise than in Article 42 of the *Telecommunications Regulation* which prohibits below-cost pricing to the extent that it aims "*to foreclose competitors*." PRC Telecommunications Regulation, *supra* note 26, Article 42.
[61] Under EU law, a refusal to deal by a dominant undertaking is unlawful only under exceptional circumstances. *See* Case C-7/97, Bronner v. Mediaprint Zeitungs- und Zeitschriftenverlag, [1998] ECR I-7791. Pending implementation of the AML, it is unclear how the concept of refusal to deal will be operated under the AML. In that regard, *see*, also, Wu Zhenguo, *The Draft Chinese Anti-Monopoly Law*, paper presented at the ABA Antitrust Law meeting on April 20, 2007, available at http://www.abanet.org/antitrust/at-committees/at-ic/spring/07/04-20-07.shtml (last visited on October 8, 2007), at 14.
[62] Case C-95/04 P, British Airways v. Commission, [2007] not yet reported, paragraphs 84-90.
[63] AML, Article 17.

to rebut the claim by showing that it had legitimate reasons to behave in that particular way.[64]

Another provision related to abusive conduct is contained in Chapter VIII entitled "supplementary provisions." Article 55 states that, in principle, the AML does not apply to undertakings exercising their lawful intellectual property rights ("IPRs"). However, where undertakings abuse their IPRs to eliminate or restrict competition, the AML applies.[65]

The exact wording of this provision has changed substantially during the drafting process, although the core principle may remain. Article 55 has drawn a lot of attention and criticism, particularly from foreign commentators.[66] This may at first seem surprising—at least with regard to the final version of the adopted AML. This type of provision seems, in principle, to be in line with international practice. For example, the TRIPS Agreement explicitly allows WTO member states to take appropriate measures to prevent the abuse of IPRs,[67] and in EU law there is a similar concept.[68]

However, it is true that in the absence of further implementing measures, the exact scope of the provision remains unclear, and such uncertainty may have a chilling effect on undertakings' willingness to innovate.

In our view, this provision does not seem to create an additional abuse of IPRs which would be distinct from the abuses listed in Article 17. Rather, it seems to delimit the boundaries of IPRs and competition law. It may be reasonable to interpret Article 55 in the sense that the conduct of an IPR holder in the relevant market to which the IPR belongs does not fall under the AML, provided that the conduct conforms to the IPR laws and regulations.

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[64] With regard to Chinese law, *see* SHANG MING, ABUSE OF DOMINANT POSITIONS, *supra* note 53, at 170-173. With regard to EU law, *see* DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005) available on the website of DG Competition, recital 77.

[65] AML, Article 55. *See*, also, WANG XIANLIN, INTELLECTUAL PROPERTY AND ANTI-MONOPOLY LAW (2001), at 194 [王先林著,《知识产权与反垄断法》, 法律出版社 2001 年版]; and SHANG MING, ABUSE OF DOMINANT POSITIONS, *supra* note 53, at 200.

[66] *See*, for example, Joy K. Fuyuno, Yukiko Masuda and Leo Tian, *Antitrust and Intellectual Property Law in China*, paper presented at the ABA Antitrust Law meeting on April 20, 2007, available at http://www.abanet.org/antitrust/at-committees/at-ic/spring/07/04-20-07.shtml (last visited on October 8, 2007). *See*, also, SHANG MING, ABUSE OF DOMINANT POSITIONS, *supra* note 53, at 211 and 214-215.

[67] Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), Annex 1 C to the Agreement Establishing the World Trade Organization, Articles 8(2) and 40(2). Furthermore, rules providing the possibility for compulsory licensing, under certain circumstances, already exist in Chinese law. PRC Patent Law, [2000] Presidential Order No. 36, as amended, Article 48 [中华人民共和国专利法, [2000] 主席令第 36 号, 第 48 条]. *See*, also, Measures for Compulsory Licensing of Patent Implementation, [2003] Order No. 31 of the State Intellectual Property Office [专利实施强制许可办法, [2003] 国家知识产权局令第 31 号]. *See also*, Fuyuno, Masuda and Tian, *supra* note 66, at 15.

[68] Joined cases C-241/91 P and C-242/91 P, Radio Telefis Eireann (RTE) v. Commission, [1995] ECR I-00743 ("*Magill*"); Case C-418/01, IMS Health v. NDC Health, [2004] ECR I-05039; and Case T-201/04, Microsoft v. Commission, [2007] not yet reported.

For example, a patent holder has the right to exclude others from making or using the invented product or process, and is, in principle, free to set the sales conditions for the patented product (or the product resulting from the patented process) as well as the conditions for licensing the patent. The prohibition from adopting excessive prices contained in Article 17(i) would therefore not apply, as it directly concerns the exercise of the IPR in the relevant market pertaining to the invented product or process. In our view, the refusal to license its IPR would also be lawful, as it occurs in the very market where the IPR is granted. Therefore, there is no reason, except perhaps in exceptional circumstances, to resort to compulsory licensing.[69]

By contrast, where the conduct of the IPR holder has an impact in a relevant market other than the market pertaining to the IPR, Article 17 might apply. For example if an IPR holder ties the sale of its IPR-protected product with another product. In that case, the general prohibition of abuses of dominant market positions may be applicable.[70]

V. Procedure applicable to monopoly agreements or abuses of dominant market positions

The procedure for the investigation of monopoly agreements and abuses of dominant market positions is essentially the same.[71] Pending the adoption of implementing measures, both the provisions for agreements and for abuses may be applied in two sets of procedures—administrative procedures before the Anti-Monopoly Enforcement Authority and judicial proceedings.

Administrative procedure

The final version of the AML differs from some of the previous versions in a fundamental respect—there is no provision for a notification procedure to the authorities, whether compulsory or voluntary. The AML thus seems to follow the EU model which, in 2004, switched from a notification procedure for agreements[72] to a system where undertakings have to make a self-assessment.[73] This means that undertakings must assess themselves whether their agreements and unilateral conduct are in line with the AML. The Anti-Monopoly Enforcement Authority only intervenes when it suspects that there has been an infringement of the law. Whether the implementing regulations will establish a voluntary notification or a consulting system remains to be seen.[74]

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[69] *See*, to that effect, TRIPS, Articles 13, 26(2) and 30.
[70] Provided that the tying leads to foreclosure of competitors and that the conduct is without justification.
[71] AML, mainly Chapter VI.
[72] By contrast, no notification procedure had been available for the provision concerning the abuse of a dominant position (Article 82 EC). Since the entry into force of the EC Treaty, undertakings were required to conduct a self-assessment with regard to that provision.
[73] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1, p. 1, in particular Article 1.
[74] In the EU, the competent authority (the European Commission) still takes on cases filed on a voluntary basis. However, the criteria for accepting a voluntary filing are stringent. Commission Notice on informal

The AML confers investigative powers upon the Anti-Monopoly Enforcement Authority including, *inter alia*, searching business premises and sending requests for information.[75] Investigations must be carried out by at least two officials who are required to duly identify themselves. They are also required to make a report of the investigation which is to be signed by the person under investigation.[76] By contrast, a judicial warrant is not necessary for searches of business premises, although a written report of the measures to be taken must be submitted and approved by the person(s) in charge at the Anti-Monopoly Enforcement Authority.[77]

The undertakings under investigation, as well as other interested parties, have a right to be heard.[78] Although not explicitly provided for in the AML, the undertakings subject to the investigation may have a right to request an oral hearing.[79]

If the Anti-Monopoly Enforcement Authority finds an infringement of the provisions relating to agreements or abuses, it must adopt a corresponding decision. Unfortunately, however, the AML says only that the authority "may" publish the decision.[80] This is a pity, as the publication of decisions by the authority is likely to be an important source of guidance for undertakings—in particular taking into account that there may not be any notification system for agreements.[81] At least in the short term, the business community may be faced with substantial uncertainties.

The fines for concluding and implementing anticompetitive agreements or abuses of dominant market positions can be very high. In such cases, the text of the AML appears to require the Anti-Monopoly Enforcement Authority to impose a fine between 1% and 10% of the undertaking's annual turnover.[82] Within that bracket, the Anti-Monopoly Enforcement Authority must take into account the nature, gravity, and duration of the infringement to set the exact amount of the fine. Articles 46 and 47 are

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guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases, [2004], OJ C 101, p. 78. In practice, therefore, few cases have been dealt with by the European Commission under the voluntary filing procedure. With regard to China, Lorenz appears to assume that undertakings will be obliged to seek some sort of authorization from the authority. *See* Moritz Lorenz, *Guarding the Pass: The Forthcoming Chinese Competition Legislation*, World Competition 137, 144 (2007).

[75] AML, Article 39.

[76] AML, Article 40.

[77] AML, Article 39.

[78] AML, Article 43. *See*, also, PRC Law on Administrative Penalties, [1996] Presidential Order No. 63, Articles 6 and 32 [中华人民共和国行政处罚法, [1996] 主席令第 63 号, 第 6、32 条].

[79] This may be the case where the authorities impose a "large sum of fine." PRC Law on Administrative Penalties, *supra* note 78, Article 42.

[80] AML, Article 44.

[81] Furthermore, as Harris notes, there is no general obligation upon the authority to sufficiently reason its opinion. Harris, *supra* note 3, at 220.

[82] AML, Articles 46 and 47.

formulated in stringent terms.[83] By contrast, the European Commission enjoys more flexibility to set the amount of the fines.[84] Seen in this light, it is not impossible that future implementing measures will soften the effects of Articles 46 and 47.

The AML itself allows a number of exceptions to the general rule contained in Articles 46 and 47. First, where a monopoly agreement has not been implemented, the Anti-Monopoly Enforcement Authority can impose a fine of less than RMB 500,000 (the equivalent of EUR 50,000).[85] Second, parties to a monopoly agreement can file a leniency application with the Anti-Monopoly Enforcement Authority. If the application is substantiated with evidence, the authority can reduce the fine or grant immunity to the applicant.[86] In order for this provision to be workable in practice, further implementing measures will be needed to provide undertakings with more certainty.[87]

Third, the AML establishes a procedure where undertakings under investigation offer commitments.[88] EU law has a similar system.[89] While this provision provides welcome flexibility to find adequate and speedy solutions to competition issues detected by the Anti-Monopoly Enforcement Authority,[90] there is also a danger inherent in the fining system established by the AML—either an undertaking is heavily fined under Articles 46 and 47, or the commitment procedure under Article 45 applies and the undertaking may not be subject to any fine at all. Future implementing regulations should clarify this issue.

Finally, the AML does not explicitly address the issue of the statute of limitation of anticompetitive conduct. Until implementing measures are adopted, it would seem, based on existing law, that prosecution of infringements under the AML is time-barred after two years.[91]

Judicial proceedings

Decisions of the Anti-Monopoly Enforcement Authority can be challenged before the courts.[92] Subject to future implementing measures, the provisions of the

[83] At present it is unclear whether the provisions of the *Law on Administrative Penalties* continue to apply. For example, Article 27 of that law establishes criteria for administrative organs to adopt mitigated penalties. PRC Law on Administrative Penalties, *supra* note 78, Article 27.
[84] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C 210, p. 2. *See*, also, *Microsoft v. Commission*, *supra* note 35, paragraph 1361.
[85] AML, Article 46, first paragraph.
[86] AML, Article 46, second paragraph.
[87] SHANG MING, ANTI-MONOPOLY LAW, *supra* note 2, at 338.
[88] AML, Article 45.
[89] Council Regulation (EC) No 1/2003, *supra* note 73, Article 9.
[90] *Contra*: WILLIAMS, *supra* note 2, at 194.
[91] PRC Law on Administrative Penalties, *supra* note 78, Article 29.
[92] AML, Article 53.

Administrative Litigation Law regulate the judicial procedure that would be followed in such cases.[93]

In addition to administrative litigation, it appears that the provisions of the AML can also be relied upon in civil litigation.[94] Thus, the administrative authorities do not have a monopoly for enforcing the AML. This mirrors the system of other Chinese competition law rules. The Anti-Unfair Competition Law, for example, is directly enforceable by courts,[95] and has indeed generated a non-negligible amount of civil litigation.

Unlike previous drafts, the AML does not provide for details on the calculation of damages for infringements of the AML.[96] And, finally, there is no indication at present that courts handling AML cases are bound by decisions adopted by the Anti-Monopoly Enforcement Authority.[97]

VI. Control of concentrations

The AML establishes a fully-fledged system for the control of concentrations to replace the preexisting system under the Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors. Unlike the previous system, the control of concentrations under the AML applies both to foreign and domestic undertakings.[98]

The AML appears to take a positive viewpoint on concentrations. As a matter of principle, undertakings are entitled to engage in concentrations.[99]

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[93] PRC Administrative Litigation Law, [1989] Presidential Order No. 16 [中华人民共和国行政诉讼法, [1989] 主席令第 16 号].

[94] AML, Article 50.

[95] PRC Anti-Unfair Competition Law, *supra* note 21, Article 20. It should be noted, however, that Article 20 of the *Anti-Unfair Competition Law* only grants standing in court to competitors. In the case of the AML, it is not clear yet whether consumers may bring a suit based on Article 50.

[96] SHANG MING, ANTI-MONOPOLY LAW, *supra* note 2, at 350.

[97] Decisions made by administrative agencies are considered as a kind of "evidence" before the courts. Therefore, the courts have discretion to decide whether or not to accept the findings of such decisions. Rules on Civil Litigation Evidence by the Supreme People's Court, [2001] Court Interpretation No. 33, Article 77(1) [最高人民法院关于民事诉讼证据的若干规定, [2001] 法释第 33 号, 第 77.1 条].

[98] This finding is however subject to the interpretation of Article 7. An expansive interpretation of that provision may exempt certain SOEs from the application of the AML's provisions on the control of concentration. *See* above, at Section 2.

[99] AML, Article 5. The reference to "voluntary alliance" in Article 5 raises some questions. At first sight, this reference could be interpreted as making the notification, and therefore the implementation, of hostile takeovers impossible. However, the predominant view among Chinese scholars seems to be that this article is only programmatic in character, and does not exclude hostile takeovers from the application of the AML. Rather, it seems that this article was added to the draft AML submitted for the second reading of the NPC in June 2007 to alleviate the widespread concerns outside the legal community that the AML would become an obstacle to legitimate enterprise expansion. *See Report on the Revision of AML Draft by NPC Legal Committee*, reprinted in THE ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 1, at 35 [全国人大法律委员会关于,《中华人民共和国反垄断法（草案）》修改情况的汇报].

The law uses a concept of "concentration," similar to that under EU law.[100] A concentration arises when undertakings merge or when an undertaking acquires a controlling right[101] in another undertaking through the purchase of shares or assets or otherwise obtains a decisive influence over the latter.[102] Although the AML does not explicitly mention it, the formation of joint ventures may trigger the notification obligation.[103] Concentrations above certain thresholds must be notified to the Anti-Monopoly Enforcement Authority.[104]

However, the AML itself does not fix the thresholds which trigger the notification obligation.[105] Reportedly, the issue of the nature and level of the thresholds has been an object of contention during the drafting process of the AML.[106] The AML confers the power to fix the thresholds upon the State Council. The determination of the thresholds is expected to be made before August 1, 2008 when the AML enters into force.

In principle, only concentrations between previously independent undertakings are subject to the control of concentrations. Article 22 exempts undertakings belonging to the same group from the notification obligation. Some doubt remains about whether this provision means that a concentration between SOEs would not need to be notified because the ultimate parent of all SOEs is the same—the State.[107] In our view, this is unlikely to be the case. Article 22(ii) states that the owner must be an "undertaking." The State would not likely qualify as an undertaking as defined under the law.[108]

The main criterion to guide the Anti-Monopoly Enforcement Authority in its assessment of a notified concentration is whether the concentration has, or is likely to have, the effect of eliminating or restricting competition.[109] In this assessment, the authority must take into consideration a series of factors, namely the undertakings' market shares and ability to control the market, the degree of market concentration, the concentration's impact on market access and technical progress, and the concentration's

[100] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] OJ L 24, p. 1.
[101] The concept of "control" is not defined in the AML. This has been criticized by legal scholars. *See* Harris, *supra* note 3, at 212.
[102] AML, Article 20.
[103] In the practice under the Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, the formation of joint ventures has already been considered as a concentration. Since 2004, MOFCOM has handled numerous notifications of concentrative joint ventures, both inside and outside China. Indeed, one of the reasons for adopting the Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors seems to have been the government's concerns about the expansion of foreign investors through joint ventures.
[104] AML, Article 21.
[105] *Id*.
[106] Cao Kangtai, *supra* note 9, at 25-28.
[107] Harris, *supra* note 3, at 212.
[108] AML, Article 12. Chinese policymakers are clear in defining the State's role as an owner of public assets "所有者" as opposed to an undertaking "经营者", which is the term used in Article 22.
[109] AML, Articles 3(iii) and 28.

impact on consumers and other undertakings.[110] In addition, the Anti-Monopoly Enforcement Authority is also required to examine "the impact of the concentration on the development of the national economy."[111] It remains to be seen whether this provision will be used for the creation of "national champions" or to otherwise promote industrial policy.[112]

The AML lists a number of documents and information necessary for the notification.[113] The implementing measures are expected to provide more details on the information requirements.

The procedure before the Anti-Monopoly Enforcement Authority is a two-phase process similar to that in the EU.[114] Undertakings are prohibited from implementing a concentration prior to obtaining clearance,[115] subject to fines and the obligation to divest the acquired assets.[116] In the first phase, the authority has 30 days after the receipt of the complete notification to investigate the proposed concentration. If the Anti-Monopoly Enforcement Authority takes the view that an in-depth investigation is necessary, it will decide to enter into the second phase which lasts up to 90 days.[117] Under certain circumstances, the deadline can be extended for a maximum of 60 days.[118] By contrast, the AML does not explicitly refer to the possibility to "stop the clock,"[119] although it may be provided for in the implementing measures.

After its assessment of the concentration (both in the first phase and second phase), the Anti-Monopoly Enforcement Authority can make one of the following decisions: (1) prohibit the concentration; (2) authorize the concentration subject to conditions; or (3) unconditionally authorize the concentration.[120] When the Anti-Monopoly Enforcement Authority does not take a decision within the deadline, the concentration is deemed as authorized.[121] The authority is under an obligation to publish the decision prohibiting or attaching conditions to a concentration.[122] A decision of the Anti-Monopoly Enforcement Authority can be challenged through administrative

[110] AML, Article 27(i)-(iv).
[111] AML, Article 27(v).
[112] Bruce M. Owen, Su Sun and Wentong Zheng, *Antitrust in China: The Problem of Incentive Compatibility*, Journal of Competition Law and Economics 123, 147 (2005), at 36. *See*, also, Cao Kangtai, *supra* note 9, at 24.
[113] AML, Article 23.
[114] Council Regulation (EC) No 139/2004, *supra* note 100, mainly Articles 6, 8 and 10.
[115] AML, Articles 21, 25 and 26.
[116] AML, Article 48.
[117] AML, Articles 25 and 26.
[118] AML, Article 26.
[119] For the EU, *see* Council Regulation (EC) No 139/2004, *supra* note 100, Article 10(4); and Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, [2004] OJ L 133, p. 1, Article 9.
[120] AML, Articles 28 and 29.
[121] AML, Articles 25 and 26.
[122] AML, Article 30.

reconsideration, and subsequently be appealed to the courts.[123] Unfortunately, the wording of Article 53 is not entirely clear on whether competitors of the undertakings involved in a concentration would have standing to challenge a decision of the authority.[124]

Finally, Article 31 establishes a system of national security review, which would be in addition and parallel to the control of concentrations under the AML. While this provision has drawn much attention inside and outside China,[125] the analysis does not belong to competition law in the strict sense. Furthermore, given that the national security review is likely to be conducted by officials outside the Anti-Monopoly Enforcement Authority, a further discussion of Article 31 goes beyond the scope of this article.

VII. Administrative monopolies

Chinese scholars frequently distinguish between "economic monopolies" and "administrative monopolies."[126] The first category encompasses the anti-competitive conduct attributable to the autonomous behavior of undertakings. In the AML, this would include the figures of monopoly agreements, abuses of dominant market positions and anticompetitive concentrations.

In the view of many scholars, the category of administrative monopolies encompasses conduct restrictive of competition which is to be attributed to government authorities. In the EU, such anticompetitive measures would be considered as barriers to trade and would fall outside the scope of competition law in the strict sense.[127]

The AML contains eight provisions on administrative monopolies.[128] The general rule that administrative authorities are prohibited from abusing their powers to eliminate or restrict competition[129] is complemented by a series of more specific prohibitions.[130] In our view, two of them merit special attention. Article 36 prohibits authorities from forcing undertakings to engage in anticompetitive practices. In the EU, rules exist which

[123] AML, Article 53.
[124] Subject to implementing measures, the *Administrative Litigation Law* may apply subsidiarily. Under that law, competitors may be entitled to challenge a decision by the Anti-Monopoly Enforcement Authority clearing a notified concentration. PRC Administrative Litigation Law, *supra* note 93, Article 11.
[125] *See*, for example, Xinhua News, *China adopts anti-monopoly law*, August 30, 2007, available at http://news.xinhuanet.com/english/2007-08/30/content_6634232.htm (last visited on October 4, 2007); or Xinhua News, *Legislature: China's anti-monopoly law not to affect foreign investment*, September 4, 2007, available at http://news.xinhuanet.com/english/2007-10/04/content_6830440.htm (last visited on October 4, 2007).
[126] *See*, for example, CHAOWU JIN AND WEI LUO, COMPETITION LAW IN CHINA (2002).
[127] EC Treaty, in particular Articles 28, 39, 43, 49 and 56. *See*, also, WILLIAMS, *supra* note 2, at 142.
[128] AML, Articles 8, 32-37 and 51.
[129] AML, Article 8.
[130] AML, Articles 32-37.

impose similar obligations upon governmental bodies—Article 86 EC and the case law on Articles 10 and 81 EC (and, sometimes, Article 3(1)(g) EC).[131]

The most "explosive" provision is Article 37, which prohibits authorities from abusing their administrative powers by issuing rules with content that eliminates or restricts competition. The language of this provision is very broad. Interpreted literally, virtually any rule has the potential to restrict competition.[132] For example, a rule prohibiting the use of certain chemical substances in the manufacture of products is certainly liable to eliminate or restrict competition between producers of that substance.[133]

The practical implications of the AML's provisions concerning administrative monopolies may be limited for undertakings. The text of the AML itself does not indicate that undertakings can directly rely on those provisions before the authorities or courts. Rather, the AML to a large extent copies the system existing under previous laws, such as the Anti-Unfair Competition Law,[134] where the superior authority of the infringing body is to seek redress for the unlawful conduct.[135] The Anti-Monopoly Enforcement Authority can only make "recommendations" to the superior authority. The sanctions system thus relies exclusively on self-correcting supervision mechanisms within an administrative institution. Subject to the possibility that implementing measures provide additional rules, the procedure applicable to address administrative monopolies may remain that provided for under the Regulations on Penalties to Officials and the Law on Administrative Supervision.[136]

VIII. Conclusions

The AML is the result of a drafting process which lasted 13 years. Nonetheless, without implementing regulations and guidelines, the AML will be incomplete and may

[131] *See*, for example, Case C-185/91, *Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff*, [1993] ECR I-5801; Case C-299/96, *Corsica Ferries II*, [1998] ECR I-3949, mainly paragraph 49; Case C-35/96, *Commission v Italy*, [1998] ECR I-3851, mainly paragraph 53; Case C-35/99, *Arduino*, [2002] ECR I-1529, paragraphs 34-35; or Joined Cases C-94/04 and C-202/04, *Cipolla*, [2006] ECR I-11421, mainly paragraph 47.

[132] In a certain sense, *see* Owen, Sun and Zheng, *Antitrust in China: The Problem of Incentive Compatibility*, *supra* note 112, at 37.

[133] To a certain extent, this provision is reminiscent of the EU case law prior to *Keck & Mithouard* where the EU court limited the extent of the notion of trade barriers. Joined Cases C-267/91 and C-268/91, *Keck and Mithouard*, [1993] ECR I-6097.

[134] PRC Anti-Unfair Competition Law, *supra* note 21, Article 30. *See*, also, PRC Product Quality Law, [1993] Presidential Order No. 71, as amended, Article 67 [中华人民共和国产品质量法, [1993] 主席令第 71 号, 第 67 条].

[135] AML, Article 51. *See*, also, Huang Yong, *supra* note 5.

[136] PRC Regulations on Penalties to Officials, [2007] State Council Order No. 495 [行政机关公务员处分条例, [2007] 国务院令第 495 号]; and PRC Law on Administrative Supervision, [1997] Presidential Order No. 85 [中华人民共和国行政监察法, [1997] 主席令第 85 号].

be unworkable in practice. The authorities are expected to issue major measures before the AML enters into force on August 1, 2008.

As the AML is largely inspired by EU competition law, it is in our view possible that, at least at the beginning of China's antitrust era, EU law (including EU case law and the Commission's decisional practice) may in practice have a certain guiding influence in the implementation of the AML.

Although some provisions are clearly the result of a political compromise, we think that the AML provides a sound basis for China's competition policy and enforcement.

That being said, however, enforcement will be very difficult if, instead of a single competent Anti-Monopoly Enforcement Authority, there will be three different authorities exercising jurisdiction over the enforcement of the AML. This means that the officials engaging in enforcement of the AML will have limited independence and *esprit de corps*. Also, unsystematic and perhaps inconsistent policymaking and enforcement may ensue. Conflicts of jurisdictions seem to be inevitable. In some cases, several authorities may claim competence over a case. In other cases, each authority may decline jurisdiction hoping that the other authorities assume responsibility. As an old Chinese proverb says, "one monk can shoulder the water by himself; two monks can carry the water together; but when three monks are involved, no water will be provided at all."

Hopefully, the enforcement of the AML will not follow this saying but will, to the contrary, be a source of legal certainty for the undertakings in the marketplace.