

GCP

THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

The Antimonopoly Law and Its Structural Shortcomings

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I. INTRODUCTION

The new Chinese antitrust regime is taking shape. The Antimonopoly Law (“AML”) became effective on August 1, 2008; the first implementing regulation has been adopted; and it has become clear which government agencies will be the Antimonopoly Enforcement Authorities (“AMEAs”).

The AML represents substantial progress over the patchwork of prior antitrust rules. More generally, the law is also a significant step in China’s slow, but steady, transformation from a planned economy to a market economy. However, in spite of the overall positive impression that the AML has made, certain aspects of the law are not satisfactory.

This commentary will focus on three areas where structural shortcomings exist. First, the allocation of the enforcement powers to three distinct bodies (the Ministry of Commerce (“MOFCOM”), the State Administration of Industry and Commerce (“SAIC”), and the National Development and Reform Commission (“NDRC”)) creates a complicated institutional framework where conflicts are probable.

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Second, certain of the AML's provisions contain derogations to the principle that competition policy is the only criterion to assess whether a given conduct is legal under the AML. In some cases, social and political factors allow for otherwise anticompetitive behavior to become lawful under the AML. The derogations have the potential of affecting the AML's credibility as a modern, economics-based antitrust law.

Third, the many open-ended provisions in the AML can be a double-edged sword. While leaving room for an economics-based, case-by-case approach, they also leave the door open to arbitrary enforcement actions and may reduce legal certainty for business operators.

II. THE INSTITUTIONAL FRAMEWORK

The AML established a two-level governance for the enforcement of its provisions, consisting of the Antimonopoly Commission ("AMC") and the AMEAs, but failed to give details about the identity of the agencies. Indeed, it even failed to specify whether one or several bodies would assume the role of the AMEAs. In the meantime, the State Council has (in part) filled this vacuum. However, given its unsatisfactory choice of designation, significant uncertainties remain.

Under the new division of enforcement mandates, MOFCOM is responsible for merger control.¹ The role of SAIC covers anticompetitive conduct other than price-related behavior. SAIC has jurisdiction over agreements, abuses of dominant market positions, and abuses of administrative power (so-called "administrative monopolies")

¹ State Council Regulation on the notification thresholds for concentrations between undertakings, State Council Order 529 (2008), at art. 3 & 4.

which are not related to pricing.² Reportedly, NDRC is in charge of conducting investigations and adopting decisions related to anticompetitive pricing behavior.

This allocation of enforcement mandates is problematic in three main ways. First, the designation of three AMEAs, instead of a single authority, will decrease the efficiency of the AML's enforcement.³ With three agencies participating, the decision-making may become fragmented, incoherent, or even inconsistent.⁴ For instance, it is not clear whether one authority would be bound by the findings in a formal decision of another authority.

As an illustration, Article 12 sets out the basic principles on how to define the relevant market for the purposes of the AML. This means that the relevant market should be defined in the same way for merger control as for abuses of dominant market positions. However, given the lack of formal coordination mechanisms and (sometimes) existing inter-ministerial rivalry, it is not clear whether, for example, in practice MOFCOM's merger control decisions would follow SAIC's market definition made in a contemporaneous abuse of dominance case.

² Notice of the State Council's General Office regarding the publication of the preparatory rules on SAIC's main mandates, internal bodies, and officials, Guofaban No. 88 (2008).

³ See Huang Yong, *Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75(1) ANTITRUST L.J. 177, 126 (2008); and Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75(1) ANTITRUST L.J. 133, 145 (2008).

⁴ Jared A. Berry, *Anti-Monopoly Law in China: A Socialist Market Economy Wrestles with Its Antitrust Regime*, INT'L L. & MGMT REV. 129 (2005), at 149-50; Huang Yong, *China's Draft Anti-Monopoly Law*, Paper presented at the ABA 2007 Spring Meetings (Apr. 20, 2007), at 2, available at <http://www.abanet.org/antitrust/at-committees/at-ic/spring/07/04-20-07.shtml>; and Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, ANTITRUST SOURCE (2007), at 4.

Second, the delimitation of each authority's jurisdiction is ambiguous, and bears the potential for conflicts between AMEAs.⁵ While MOFCOM's responsibilities are delimited relatively clearly, the mandates of NDRC and SAIC may overlap at times. For example, the decision by cartel participants to increase prices and share markets could theoretically trigger the jurisdiction both of NDRC and SAIC, because the cartel's conduct would concern pricing behavior and non-pricing behavior at the same time. Thus, using the pricing and non-pricing distinction as a criterion to delineate the authorities' jurisdiction is somewhat arbitrary.⁶ The experience in the United States teaches that concurrent jurisdiction by various enforcement agencies can lead to protracted conflicts.⁷

Third, the functional independence of AMEA case handlers may be reduced more than would be the case with a single authority.⁸ Although the officials handling antitrust cases are located in specific units, those units are integrated in larger government entities. Given that these entities have many goals and tasks other than antitrust enforcement, the likelihood that a different policy objective (e.g., industrial policy) would influence the AMEAs' decisions is considerably higher. Furthermore, the integration of the AMEAs in larger entities will make the creation of an esprit de corps, a particular working ethos

⁵ WORLD TRADE ORGANIZATION, TRADE POLICY REPORT: CHINA (2008), at § III(4)(v).

⁶ MARK WILLIAMS, COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN 210 (2005).

⁷ Lauren Kearney Peay, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60(4) VAND. L. REV. 1307-46 (2007).

⁸ Wang (2008), *supra* note 3, at 145.

within the competition authority, much more difficult.⁹ The absence of a strong esprit de corps is likely to reduce the functional independence of AMEA case handlers given the hierarchy of the larger government entities. This in turn means that AMEA case handlers will find it (even) harder to withstand political pressure.¹⁰

III. INFLUENCE OF NON-COMPETITION POLICY OBJECTIVES

A. Selective Incorporation of Other Policy Objectives

The substantive provisions in the AML target conduct which “eliminates or restricts competition.” This criterion for assessing the legality of companies’ conduct applies to monopoly agreements,¹¹ abuses of dominant market positions,¹² and concentrations between undertakings.¹³ This criterion refers to competition grounds alone to determine the lawfulness of business conduct. However, certain provisions of the AML make reference to policies other than competition policy. In particular, the law incorporates concepts of industrial, social and trade policies, and also refers to the broad notion of the “public interest.”

⁹ See Adrian Emch and Qian Hao, *The New Chinese Anti-Monopoly Law—An Overview*, GCP MAGAZINE 2 (Nov. 2007), at 21, available at <http://www.globalcompetitionpolicy.org/index.php?id=604&action=907>.

¹⁰ See Youngjin Jung & Qian Hao, *The New Economic Constitution in China: A Third Way for Competition Regime?*, 24 NW. J. INT’L L. & BUS. 107, 159 (2003).

¹¹ AML, at art. 13 *in fine*.

¹² AML, at art. 6.

¹³ AML, at art. 3(3). Similarly, Article 2, which delimits the AML’s territorial application, states that the AML applies to “monopolistic conduct outside the territory of the People’s Republic of China which has an eliminative or restrictive impact on competition in the domestic market of the People’s Republic of China.”

With regard to industrial policy, Article 27(5) allows MOFCOM to take account of a notified concentration's "impact on the development of the national economy."¹⁴ Similarly, the possibility to exempt a potentially illegal agreement on the grounds that it improves the operational efficiency and enhances the competitiveness of small- and medium-sized enterprises also appears to respond to industrial policy concerns.¹⁵ More generally, Article 1 includes the "promotion of the healthy development of the socialist market economy" as one of the law's purposes, opening the door for industrial policy objectives to play a role.

With regard to social policy, Article 15(4) explicitly refers to "social public interests" that may allow an exemption of a restrictive agreement.¹⁶ Although not explicitly framed as such, Article 15(5) can also be considered as responding to social objectives. The reason behind allowing the exemption of agreements in order to "alleviate serious decreases in sales volumes or significant production overcapacities during economic recession" seems to be social in nature, that is to avoid sudden bankruptcies and the resulting heavy number of lay-offs.¹⁷ As an exemption possibility for restrictive agreements, Article 15(6) refers to "legitimate interests in foreign trade and

¹⁴ Emch & Hao (2007), *supra* note 9, at 18; and Subrata Bhattacharjee, *The Merger Review Process under the PRC Anti-Monopoly Law: Selected Issues*, Paper presented at ABA teleseminar (2008), at 9-10.

¹⁵ AML, at art. 15(3). The achievement of efficiencies as such would be viewed as falling under competition policy. Nonetheless, the AML allows for efficiencies to be taken into account to justify restrictive agreements in a separate provision. AML, at art. 15(2). This may mean that the SMEs provision has a separate, autonomous meaning.

¹⁶ The examples given in that provision are energy saving, environmental protection and disaster relief.

¹⁷ Even the prohibition upon dominant undertakings to discriminate between trading partners may respond to social objectives, even though similar rules are contained in U.S. and EU antitrust laws. *See* AML, at art. 17(6).

foreign economic cooperation.” This provision openly integrates trade policy factors into the analysis under the AML.

Article 28 introduces the notion of “public interest.” This provision gives guidance on the criterion of “eliminating or restricting competition” to be applied in the substantive assessment of notified concentrations, and allows MOFCOM to clear a concentration if the positive effects exceed the negative effects arising from the restriction of competition. But, the provision goes on to state that clearance is possible “if the concentration is in line with the public interest.”¹⁸ Indeed, one of the AML’s purposes is to safeguard the public interest.¹⁹ This reference to the public interest is very general and, therefore, ambiguous.²⁰ Such a broad concept allows for broad interpretation.²¹

The effect of these provisions is that they allow the AMEAs to import public policy objectives other than competition policy into the assessment under the AML. Coupled with the fact that the AMEAs may be subject to influence from other units within their government entities that implement different policy objectives,²² the AML’s focus on competition policy may be diluted.

B. The “SOE Exemption”

Article 7 provides for a partial exemption for certain state-owned enterprises (“SOEs”). The provision reads:

¹⁸ See, also, Jung & Hao (2003), *supra* note 10, at 156.

¹⁹ AML, at art. 1.

²⁰ Wang (2008), *supra* note 3, at 142.

²¹ See, e.g., THE THEORY OF CHINESE ANTI-MONOPOLY LAW AND PRACTICE 48 (Shang Ming, ed. 2008).

²² See Section II, *supra*.

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

The undertakings in the sectors mentioned in the preceding paragraph shall operate in accordance with the law, in good faith and in strict self-discipline, shall subject themselves to the supervision of the public, and shall not use their controlling position or exclusive position to the detriment of consumer welfare.

The ultimate reason behind this partial exemption seems to be that the AML is reluctant to touch on certain companies due to the social and economic functions they fulfill.

Article 7 may be concerned with the performance of public services (e.g., universal service obligations).

However, the scope of Article 7 is clearly broader. The concept of an “industry vital to the national economy” appears to encompass sectors deemed strategic for reasons of industrial policy (e.g., the automobile industry).²³ Furthermore, the concept of an “industry subject to exclusive operations and sales according to the law” appears to refer to commercial monopolies such as in the salt and tobacco sectors.²⁴ The principal reason for maintaining these monopolies may be fiscal policy. Therefore, Article 7 not only takes into account social, industrial, and fiscal policies, but, for certain sectors, gives these policies priority over competition policy. Although the scope of the “Article 7 exemption” is rather uncertain, it is clear that a broad interpretation will considerably open the influx of non-competition concerns into the ambit of the AML.

²³ THE ANTI-MONOPOLY LAW OF THE PEOPLE’S REPUBLIC OF CHINA: INTERPRETATION AND APPLICATION 25 (Shang Ming, ed. 2007) [hereinafter “Shang (2007)”].

²⁴ SHANG MING, REGULATING THE ABUSE OF DOMINANT POSITIONS THROUGH ANTIMONOPOLY LAW (2007), at 103; and Shang (2007), *supra* note 23, at 25.

IV. CATCH-ALL CLAUSES

The AML contains a number of “catch-all clauses,” which give the AMEAs the possibility to intervene in cases not specifically foreseen by the law. These clauses apply to all types of anticompetitive behavior. Under Articles 13(6) and 14(3), the AMEAs are entitled to declare that an agreement is a monopoly agreement for reasons other than those listed in the law. Article 17(7) allows the authorities to sanction abuses of a dominant market position other than those explicitly mentioned in Article 17.²⁵ As far as merger control is concerned, Article 27(6) entitles the AMEA to resort to “other factors having an impact on market competition” to determine whether a notified concentration is anticompetitive.²⁶

These open-ended clauses confer a margin of discretion upon the AMEAs, allowing them to target conduct with an impact similar to that of the listed examples. This flexibility is in principle consistent with antitrust rules in other jurisdictions such as the United States and the European Union. Competition law is essentially economics-based, and as such, concerned with the impact of a given conduct, not its form. Seen in this light, it makes sense to have open-ended provisions that give sufficient flexibility to take account of the economic impact of the conduct.²⁷

However, in China’s case, open-ended provisions are often viewed with suspicion. The reason is that Chinese law sometimes contains such catch-all clauses not

²⁵ Furthermore, Article 18(6) allows the AMEAs to take into account “other factors relevant to the determination of the dominant market position of the undertaking.”

²⁶ Even the prohibition of “administrative monopolies” includes a general formula, prohibiting the adoption of “other measures which obstruct the free circulation of products across regions” by administrative bodies. *See AML*, at art. 33(5).

²⁷ Emch & Hao (2007), *supra* note 9, at 7.

because the underlying reasoning is economics-based, but because the government and its agencies are still, to a certain degree, reluctant to accept that the law limits their powers.²⁸

Indeed, a closer look at the AML's text seems to reveal that the catch-all clauses were at least in part inserted to alleviate the reluctance by the government bodies to irrevocably cede their power to intervene in market operations. Articles 13(6), 14(3), 17(7), and 27(6) clearly state that only the AMEAs can expand the list of anticompetitive conduct to include conduct not explicitly listed in these articles. In contrast, the Chinese courts, which are also entitled to apply the AML's provisions,²⁹ do not have this possibility. This is consistent with the special characteristics of the Chinese legal order where, in principle, the administrative body that has issued a norm retains the authority to interpret it, not the judiciary.³⁰

The drawback of the AMEAs' margin of discretion is, of course, that it creates uncertainty for market players. Companies can never be entirely sure that their conduct is legal. This is a very serious concern especially where the AMEAs' analysis is not only economics-based, but takes into account other factors (e.g., social or industrial policies).³¹ Worse still, uncontrolled discretion may lead to arbitrariness on the part of the authorities.

²⁸ Stanley Lubman, *Looking for Law in China*, 20(1) COLUM. J. ASIAN L. 1, 36 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982009; WILLIAMS (2006), *supra* note 6, at 147.

²⁹ Notice of the Supreme People's Court on the thorough study and implementation of the Antimonopoly Law of the People's Republic of China (2008).

³⁰ See, e.g., STANLEY B. LUBMAN, *BIRD IN A CAGE – LEGAL REFORM IN CHINA AFTER MAO* 207 (1999).

³¹ See Section III, *supra*.

It is a pity that the AML did not resort to more moderate measures that both grant flexibility and respect legal certainty. For example, a possible solution would have been to require that the expansion of the lists of anticompetitive conduct be made by way of adoption of a generally applicable measure (such as a regulation) before a non-listed conduct can be used in an individual enforcement case. This would have provided more certainty to companies.

To a certain extent, this is the system established by Article 15(7). That provision allows the expansion of the list of criteria that can lead to an exemption of potentially illegal monopoly agreements. Nonetheless, the expansion can only be done “by the law and by the State Council.”³² This mechanism reduces the AMEAs’ discretion to exempt monopoly agreements.

A clear example that illustrates the negative consequences of a catch-all clause is Article 4 of the Regulation on the notification thresholds for concentrations between undertakings, which reads:

The competent commerce department under the State Council shall conduct, in accordance with the law, an investigation of a concentration between undertakings which does not reach the thresholds prescribed under Article 3 if it indicates on the basis of facts and evidence collected in a regulated procedure that such concentration between undertakings has or is likely to have the effect of eliminating or limiting competition.³³

³² Emch & Hao (2007), *supra* note 9, at 10.

³³ State Council Regulation on the notification thresholds for concentrations between undertakings, State Council Order 529 (2008), at art. 4.

MOFCOM can use this article to examine a concentration that does not meet the Regulation's notification thresholds, and its power is not constrained by any time limit in this respect.³⁴

Quite obviously, this clause has a devastating effect on legal certainty for merging parties. Obtaining legal certainty within a tightly framed deadline is *the* major benefit of a merger control system. Potentially, MOFCOM might be able to investigate even long after a deal has been closed. Given that the criterion for MOFCOM to examine a concentration outside the thresholds is that the concentration "is likely to have the effect of eliminating or limiting competition," it is possible, or even likely, that MOFCOM blocks the concentration or imposes remedies.

V. CONCLUDING REMARKS

The AML represents a milestone in China's antitrust history. Its text is solid and generally in line with internationally recognized principles.

However, this commentary has discussed three structural shortcomings that may affect the AML's implementation. In particular, the three-headed agency enforcement, the influx of non-competition policy concerns, and the various catch-all clauses have the potential to make the AMEAs' enforcement unpredictable for market players.

To a certain extent, these three issues are interrelated. Each of the three AMEAs has certain core mandates for policies other than antitrust (although most of them still

³⁴ Compared to an earlier draft version, the final Regulation on the notification thresholds for concentrations between undertakings provides a certain safeguard to the extent that it requires MOFCOM to base its decision on "facts and evidence collected in a regulated procedure." According to the State Council, this requirement was introduced precisely to avoid that MOFCOM's margin of discretion is too large. *See* Replies by the responsible person of the State Council's Legislative Affairs Office to reporters' questions on the State Council Regulation on the notification thresholds for concentrations between undertakings (Aug. 3, 2008), available at http://www.gov.cn/zwhd/2008-08/04/content_1063736.htm.

relate to economic policy). In these circumstances, the designation of three AMEAs would also seem to make the import of other public policy concerns more likely. Similarly, the catch-all clauses may affect legal certainty to an even greater extent because the AMEAs may be more inclined to pursue non-competition policies. Finally, the fact that the catch-all clauses allow the AMEAs to expand the list of proscribed behavior may further blur the already unclear division of responsibilities among them.

Hopefully, in the end, pragmatism will prevail, and both the authorities and companies operating in China will find practical arrangements to reduce uncertainties and streamline procedures. Nonetheless, in the long run, it is worth thinking about structural solutions (such as the creation of a single, relatively independent competition authority) to guarantee that the enforcement of the AML will meet the quality of the text itself.