HIGHLIGHTS OF CHINA’S NEW ANTI-MONOPOLY LAW

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For many years, the People’s Republic of China belonged to the command economy category, as opposed to the market economy. But changes began with the economic reforms in 1978, and then in 1992, China accelerated and deepened its economic reform process. China’s Constitution, amended in 1993 with Article 15, declared, “The State practices a socialist market economy.”1 To fulfill the task of developing such a market economy, China has been making efforts to build itself into a country under laws that fit into the global market. Especially important among these laws are those that protect competition because under a market economy, the producers must put their products on the market for appraisal by consumers, and this process requires competition.

In 1993, China promulgated the Law Against Unfair Competition.2 After more than a decade of discussions, debates, and drafting, China adopted its Anti-Monopoly Law at the Twenty-Ninth Meeting of the Standing Committee of the Tenth National People’s Congress on August 30, 2007.3 Based on this long history, one might easily predict there

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3 Anti-Monopoly Law of the People’s Republic of China (promulgated by the Standing Committee of the National People’s Congress on Aug. 30, 2007 and effective Aug. 1, 2008) [hereinafter AML]. Adoption of the Anti-Monopoly Law was listed in the legislative plan of the Eighth and Ninth National People’s Congress, as well. The citations and translations provided in this article are taken from the unofficial English translation, available at

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will be enforcement challenges facing China’s new AML. However, I believe that the law represents a milestone for the establishment of a Chinese comprehensive legal system because it demonstrates both the achievement of Chinese economic reform and that the allocation of resources in China is committed to market mechanisms and competition. In short, the AML’s promulgation suggests that the Chinese economic system has been basically transformed from a command economy to a market economy.

I. INTRODUCTION TO THE NEW CHINESE ANTI-MONOPOLY LAW

The drafting process of the AML was relatively open, and it was not only open domestically, but also externally. The Ministry of Commerce (MOFCOM), the State Administration of Industry and Commerce (SAIC), and the State Council and the Standing Committee of the National People’s Congress (NPC) hosted many conferences with Chinese and foreign legal and economic experts. The competition enforcement agencies of other countries, in particular the U.S. Department of Justice, the U.S. Federal Trade Commission, and the European Commission contributed significant assistance.

In my view, the promulgation of the Chinese AML should thus be regarded as a great achievement of international cooperation. Therefore, it is no surprise that many good provisions from other well-established antitrust laws have been incorporated in the Chinese AML. For example, from the experience of the United States, we find “domestic effects doctrine,”4 “consent decrees,”5 and a “leniency policy.”6 The Chinese AML also absorbed experiences from Europe, for instance the block exemptions for certain agreements,7 the factors considered for determination of the existence of dominant market position,8 and the rebuttable presumptions of dominant position,9 which are obviously based on...
on the legislative technique from the German Act Against Restraints of Competition (GWB).\textsuperscript{10}

In considering the legislative trends in other jurisdictions, an earlier draft provision to immunize utility enterprises in the sectors of postal services, railroads, electricity, gas, and tap water were deleted, so that the final version of the AML applies to almost every industry.\textsuperscript{11} In view of the worldwide concern with the abuse of intellectual property, in particular due to the fact that China mainly is an importer of intellectual property, Article 54 stipulates that through the AML, intellectual property rights are recognized: the AML is applicable only to the conduct of a business operator that abuses intellectual property rights to eliminate and restrict market competition. Because many of the pricing and output restraints in China were organized or encouraged by industry associations (often under government authority), the AML stresses that these associations shall not organize business operators (i.e., persons, corporations, or other legal entities—also referred to in some translations as "undertakings") within their industries to engage in monopolistic conduct.\textsuperscript{12}

Like other established antitrust laws, the Chinese AML essentially also provides for three areas of regulation: the prohibition of monopoly agreements (Chapter 2), the prohibition of abuse of dominant position (Chapter 3), and merger/acquisition reporting and control (Chapter 4). Additionally, in the law there is a special chapter on administrative monopoly (Chapter 5)\textsuperscript{13} because the most serious restrictions on competition come not from industry, but from governments themselves, as Judge Robert Bork has noted.\textsuperscript{14} But unfortunately, because the Anti-Monopoly Authority may find it difficult to deal with administrative monopoly,\textsuperscript{15} this provision may not deter government agencies from restricting competition.\textsuperscript{16}

\textsuperscript{10} See German Cartel Law (revised July 15, 2005), arts. 2, 3 & 19.
\textsuperscript{11} Compare the promulgated AML, supra note 5, with pre-2000 drafts prepared by the State Economic and Trade Commission and the State Administration of Industry and Commerce.
\textsuperscript{12} See AML, supra note 3, art. 16.
\textsuperscript{13} Article 6 of the Draft of November 2005 reviewed by the State Council.
\textsuperscript{14} ROBERT H. BORK, THE ANTITRUST PARADOX 144, 159 (1978, rev. 1993) ("Misuse of courts and governmental agencies is a particularly effective means of delaying or stifling competition.").
\textsuperscript{15} See AML, supra note 3, art. 51.
\textsuperscript{16} In Part II infra, I comment further on the prohibition of administrative monopoly provisions in the AML.
A. Prohibition of Monopoly Agreements

The first task of the Chinese AML is to prevent monopoly agreements. Based on the experience of German law, the Chinese AML separates horizontal agreements from vertical agreements. Article 13 lists the following monopoly agreements between competitors as prohibited: (1) fixing or setting minimums for product prices; (2) restricting the output or sales volumes of products; (3) allocating markets; (4) restricting the purchase of new technology or new facilities or the development of new technology or new products; (5) jointly boycotting transactions; and (6) other monopoly agreements determined by the Anti-Monopoly Law Enforcement Authority (Anti-Monopoly Authority). According to the second paragraph of Article 13, monopoly agreements in the AML refer to "agreements, decisions, or other concerted behavior that eliminate or restrict competition." 17

With respect to vertical monopoly agreements, Article 14 prohibits only (1) fixing the resale price; (2) restricting minimum resale prices; and (3) other monopoly agreements determined by the Anti-Monopoly Authority. Although it appears that vertical agreements are treated differently from horizontal agreements, the general catchall provision may allow the Anti-Monopoly Authority to harmonize these two areas.

Like Article 81(3) of the EC Treaty, Article 15 of Chinese AML contains a series of exceptions for both horizontal and vertical agreements from the prohibitions of Articles 13 and 14. The exempted agreements are those that involve (1) technology improvement, or research and development of new products; (2) upgrading product quality, reducing costs, and improving efficiency, unifying product specifications or standards, or carrying out professional labor distribution; (3) improving operational efficiency and enhancing the competitiveness of small- and medium-sized enterprises; (4) achieving such public interests as energy saving, environmental protection, disaster relief, etc.; (5) mitigating the severe decrease in sales volume or excessive overstock during economic recessions; (6) safeguarding legitimate interests in foreign trade and economic cooperation; or (7) other circumstances as stipulated by the law or the State Council. According to Article 15, paragraph 2, in the case of (1) to (5) mentioned above, the respondents must prove that the agreement will not substantially restrict competition and can enable the consumers to share the benefits derived from such agreements. This

17 This definition is similar to that found in Article 1 of the German Act Against Restraints of Competition, art. 37(1), No. 4 (1999).
burden is similar to, but likely broader than, the “rule of reason” used by U.S. courts.  

Points (5) and (6) above are of great concern. In my view, a cartel formed for the purpose of mitigating serious decreases in sales or excessive overstock during economic depressions should not be exempted because economic downturns are part of normal commercial risks and often create efficiencies that are necessary to the operation of a free market. Additionally, competition during an economic depression may be benefited by the adjustment of the market and product structure.

Clearly, under certain conditions, these provisions could protect an exporting cartel. This could create tension within the global competition arena. Even though it may be justifiable for Chinese companies to organize price cartels to avoid a price war among them and to avoid antidumping suits from foreign countries, these provisions may conflict with the laws of other countries. For example, many countries like China have antitrust laws with extraterritorial application when the effects of the conduct affect the commerce of the country at issue. Indeed, Chinese exporting companies have been targeted in at least two antitrust suits in the United States, and thus the exemption for an exporting cartel may not provide Chinese exporting companies any real legal protection.

B. Prohibition of the Abuse of a Dominant Position

Chapter 3 prohibits the abuse of a dominant position. According to Article 17, business operators holding a dominant market position are prohibited from engaging in the following activities: (1) selling or buying products at unfairly high or low prices; (2) selling products at prices below cost without any justification; (3) refusal to supply without any justification; (4) exclusive dealing without any justification; (5) tie-in sales or imposing other unreasonable trading conditions without justification; (6) discriminatory pricing or terms without justification; (7)

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18 See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (“Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”).


20 Although, arguably, such a case brought in the United States may be defended on other grounds, such as the “state action” or “filed rate” doctrines. See, e.g., California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (state action); Parker v. Brown, 317 U.S. 341 (1945) (state action); Keogh v. Chicago & Nw. Ry. Co., 260 U.S. 156, 163 (1922) (filed rate doctrine).
other abuse of a dominant market position as determined by the Anti-Monopoly Law Enforcement Authority.

According to Article 17, paragraph 2, a dominant market position refers to a market position held by business operators “that can control the price or quantity of commodities or other trading conditions in the relevant markets, or can block or affect the entry of other business operators into the relevant markets.” This definition is similar to the concept of a dominant position in EC competition law\(^2\)\(^1\) and the concept of market power of U.S. antitrust law.\(^2\)\(^2\) As the premise for determining market dominance, Article 12, paragraph 2, formulates the relevant market as an area or a scope within which the business operators “compete against each other during a certain period of time for specific commodities or services.”

Article 18 provides a non-exhaustive list of six factors for verifying the existence of a dominant market position: (1) the market share of the business operators and their competitive status in the relevant market; (2) the ability to control the upstream or downstream market; (3) the financial status or technical resources of the business operators; (4) the extent of dependence on the business operators by other business operators; (5) the accessibility of other business operators to enter the relevant market; (6) other factors relating to the dominant market position of the business operator.

In view of the fact that the market structure plays a key role in influencing the market behavior of business operators,\(^2\)\(^3\) Article 19 contains three presumptions of the market dominant position of business operators based entirely on the market share thresholds. It provides that the business operators can be presumed to have a dominant market position under the following conditions: (1) the market share of one business operator accounts for 50 percent or more; (2) the combined market share of two business operators accounts for 66 percent or more; or (3) the combined market share of three business operators accounts for 75 percent or more. If business operators fall under conditions (2) or (3), however, any business operator that has a market share of less than 10 percent shall not be considered to have a dominant market position. The source of these presumptions can be traced to the German

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Act Against Restraints of Competition.\textsuperscript{24} As is the case under German law, these presumptions may be rebutted. If the business operator can demonstrate that the relevant market remains substantially competitive, or the business operators under consideration have no dominant market position in relation to the remaining competitors, the relevant business operator or business operators should not be seen as having a dominant position. In reality, however, a market economy can be volatile. Therefore, an excessively rigid rule for determining a presumption of a dominant position may not be flexible enough to reflect the competitive market place or to identify every instance of an abuse of dominance.\textsuperscript{25}

C. Mergers and Acquisitions

Article 20 defines transactions (or concentrations) as (1) mergers; (2) acquisitions of control over another business operator by acquiring their voting shares or assets to an adequate extent; or (3) acquisition of control by means of contract or other means.

Article 21 provides that business operators shall notify the Anti-Monopoly Authority regarding transactions that meet the thresholds of notification stipulated by the State Council. Article 21 contains no minimum notification criteria, but instead only indicates that the State Council will stipulate these criteria. In my opinion, the lack of criteria in the law may indicate that the People’s Congress was not satisfied with the notification standard decided by the State Council in its submitted draft\textsuperscript{26} and, thus, desires that the State Council consider the issue again.

Article 23 refers to the necessary submitted documents when notifying a transaction to the Anti-Monopoly Authority. According to Article 24, if the submitted documents are not complete, the business operators

\textsuperscript{24} For instance, according to article 19, a market share of one-third is sufficient to establish a presumption of dominance. AML, supra note 3, art. 19, ¶ 3, § 1.

\textsuperscript{25} For example, some courts in the United States have allowed evidence of direct effects to substitute for strict market share thresholds. See, e.g., Toys “R” Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000).

\textsuperscript{26} The Draft submitted by the State Council to the Standing Committee of the NPC included criteria for merger and acquisition notification. According to draft Article 17, where all parties participating in a transaction have worldwide turnover in the previous year exceeding RMB 12 billion, and one of the parties has total turnover in China in the previous year exceeding RMB 800 million, the parties to the transaction should notify the Anti-Monopoly Authority before the transaction. In my opinion, this criteria was not practical because there was almost no consideration as to whether the notified merger or acquisition had a substantial effect on the Chinese domestic market. See INTERNATIONAL COMPETITION NETWORK, MERGER NOTIFICATION AND PROCEDURES IMPLEMENTATION HANDBOOK: RECOMMENDED PRACTICES (May 3–5, 2006), available at http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ImplementationHandbookApril2006.pdf.
concerned shall supplement them within the period provided by the Anti-Monopoly Authority. A notification shall be deemed as having not been filed if the documents fail to be supplemented within the provided period.

Articles 25 and 26 provide a two-stage timetable for reviewing the transaction by the Anti-Monopoly Authority. According to Article 25, following notification and during “Phase I,” the Anti-Monopoly Authority must decide within thirty days whether to initiate a further review. However, if the Anti-Monopoly Authority makes no decision during the Phase I thirty-day period, the transaction can be deemed to have been cleared. If the Anti-Monopoly Authority decides to carry out a further review proceeding, it must inform the parties to the transaction of this in writing. The parties may not close the deal before the Anti-Monopoly Authority finishes its review and clears the transaction

According to Article 26, the Anti-Monopoly Authority has ninety working days to carry out a further review proceeding, but “Phase II” can be extended by up to sixty workings days if the business operators agree to extend, or the submitted documents are inaccurate or need further verification, or if the relevant circumstances have significantly changed since the initial notification. If the Anti-Monopoly Authority makes no decision during Phase II, the filed transaction can be deemed to have been cleared. But until Phase II is complete, the parties may not close the transaction.

At any time, if the Anti-Monopoly Authority decides to prohibit the transaction, the decision must be justified. According to Article 28, a transaction is to be prohibited by the Anti-Monopoly Authority if it is apt to eliminate or significantly restrict market competition. However, the listed factors in Article 27 for assessment of proposed transactions include not only (1) the market shares of the involved business operators and their ability to control market; (2) the degree of concentration in the relevant market; (3) the effect of the transaction on market access and technological progress; (4) the effect of the transaction on consumers and other relevant business operators’ development; but they also include (5) the effect of the transaction on the development of the national economy; and (6) other factors considered by the Anti-Monopoly Authority. Due to the fact that the competition policy expressed in subparagraph (1), for example, and the industrial policy expressed in subparagraph (5), are not always harmonized with each other as a practical matter, it is not clear how the Anti-Monopoly Authority will weigh their relative importance.
Article 28 also contains exemptions if the parties can demonstrate either that the advantages of a transaction exceed its disadvantages or that the transaction is beneficial to public interest. It is not yet clear how parties will do this in practice. It may help the process if the Anti-Monopoly Commission uses the directive of Article 9 to develop merger guidelines to help provide some better certainty in the process. In approving any transaction, the Anti-Monopoly Authority may require certain restrictions and obligations for the parties to ensure that the proposed transaction is not harmful to competition.27

Article 31 also provides a special provision on national security. It stipulates that in the case of national security, the acquisition of domestic business operators by foreign capital or other kinds of transactions involving foreign capital shall be, in addition to the anti-monopoly review according to this law, examined according to the relevant provisions of the State for national security review. In my view, the provision related to national security review may be totally unnecessary for competition law purposes because it is related neither to market structure nor to anticompetitive behaviors. But this provision demonstrates a concern that excessive mergers and acquisitions involving foreign investors would not only impede competition but also harm Chinese national security.28 This provision is not unlike the United States Exon-Florio

27 I understand that the attached conditions and obligations should be compatible with the commitments of the Operators concerned according to Article 45 of the AML, supra note 3.


Before 2004, the proportion of the transaction volume of the merger and acquisition of domestic enterprises by foreign investors to the foreign direct investments accounted for only 5 percent of the total transactions. In 2005, this proportion was 11 percent, and in 2006, reached 20 percent. See http://business.sohu.com/20070625/n2507421325.html.
merger review of certain foreign investments involving national security.\textsuperscript{29}

II. CHALLENGES IN ENFORCING THE ANTI-MONOPOLY LAW

Even though the enactment of the AML could be seen as one of the cornerstones of pro-market economic reform in China, the adoption of the law is just a first step in China’s search for ordered competition and pro-market reform. In light of the current Chinese competition climate and the existing legal system and environment, in my view there will be some challenges to the enforcement of the Chinese AML in its early years. One should not be surprised by this likelihood: All countries that have enacted competition laws have faced this struggle.

A. THE CONFLICTING GOALS OF THE LAW

Article 1 states: “This Law is enacted for the purpose of preventing and curbing monopolistic conduct, protecting fair market competition, enhancing economic efficiency, maintaining the consumer interests and the public interests, and promoting the healthy development of socialist market economy.” That means that the immediate purpose of the Chinese AML is to guard against and prohibit monopolistic conduct and to safeguard fair market competition, but it appears that the ultimate goals of the law are to improve economic efficiency and maximize consumer welfare and public interest.

In China, what is meant by “economic efficiency” includes both allocative efficiency and productive efficiency. Without a doubt, the use of antitrust law to preserve a competitive market may achieve the efficient allocation of resources and achieve production efficiency. These efficiencies may ultimately maximize consumer welfare due to lower prices and better quality. But the “public interests” provision in this article is a controversial concept. Some might consider the public interest as a consumer interest; others may consider it a national interest. In the literal meaning of the word “public,” in my view, it should not include providing protection for certain business but, instead, for the universal good of the Chinese people. In any case, the “public interest” is not clearly defined and, therefore, is ambiguous in the context of this legislation. Yet it is a critical part of the law. For example, under Articles 15 and 28, business operators may obtain an exception from the law if they can prove that their monopoly agreements or transactions are for the purpose of achieving the public interest.

\textsuperscript{29} 50 App. U.S.C.A. § 2170.
But in practice, what kind of business operators are more likely to demonstrate such an exemption? State-owned, large companies are the obvious examples. Other provisions in the law may favor such entities as well. For example, Article 7 states: “With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries implementing exclusive operation and sales according to law, the State shall protect the lawful business operations conducted by the business operators therein . . . .” Article 5 also provides that “Business operators may, through fair competition, elect to form associations [joint ventures] and lawfully consolidate in order to expand their operational scope and increase their market competitiveness.” It seems that Article 4 provides an industrial policy that may guide the implementation of Articles 5 and 7: “The State shall make and implement competition rules suitable for the socialist market economy, perfect the macro control, and improve a united, open, competitive and well-ordered market system.”

Theoretically, protecting the legitimate interest of business operators, even protecting the legitimate interest of monopolists, is not wrong, because any legitimate interest of anyone could be protected. But if an anti-monopoly law at same time protects the interests both of the business operators and consumers, the enforcement authority would be in a dilemma: whose interest should be preferred if there is a conflict between them? During the first review by the Standing Committee of NPC in June 2006, the word “protecting the legitimate interest of business operators” was deleted according to the suggestion of the NPC. But the adopted law still retains the goal of protecting the public interest. Because consumer interests and the public interest may not be parallel, it may still be difficult for the Anti-Monopoly Authority to make a choice. For example, consumers usually prefer to have choices and, hence, usually prefer competition. But Article 5 encourages transactions in order to “expand the business scale” (supposedly to increase efficiencies). Additionally, Article 28 states that any transaction that is “in harmony with the public interests” shall not be prohibited. Yet, a transaction that benefits some public interest may not benefit competition. Thus, it is not difficult to imagine that the goals to protect consumers and to protect the public interest could, thus, easily conflict with each other. For example, it may be in the public interest for automobiles to be crashworthy, but competition may lead to more inexpensive, and hence less crashworthy automobiles. In this example, the role of the State is to resolve such a conflict for the public good.

Of course, similar conflicts between different goals exist in other competition laws. For instance, the objective of the European Union’s Arti-
Article 82 is the protection of competition in the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.\textsuperscript{30} Thus, is the purpose of EU competition law to protect competition? Or is competition only a tool for the purpose of consumer welfare and economic efficiency? In the European Union, the controversy surrounding the goals of competition law may not influence the enforcement of competition law. In the United States, such general policy concerns may be considered by any court in deciding whether to block a transaction.\textsuperscript{31} But in China, laws are more specific and are usually carried out to the letter. Thus, what the law expressly states is fundamental. In the current text, there are two policies in the law — industrial policy and competition policy. Thus, any enforcement authority will have to decide which one predominates. However, the Chinese Anti-Monopoly Authority may lack the necessary level of independence to balance these goals. For example, the Authority may find it difficult to balance its role, on the one hand, to protect consumers from “monopolistic conduct” and “safeguard fair market competition” with, on the other hand, its role to protect the public interest of a State-owned monopolistic enterprise. I am hopeful that the regulations that will be drafted to implement the AML will resolve this issue by giving clear guidance and authority to the Anti-Monopoly Authority.

B. THE NEED FOR AN INDEPENDENT ANTI-MONOPOLY LAW ENFORCEMENT AUTHORITY

The establishment of an effective enforcement authority is a critical and most important precondition for an effective enforcement of the law. Even the AML itself demonstrates an intent to establish only one agency and give it sufficient authority.\textsuperscript{32} But unfortunately, such an outcome is not yet clear.

1. The Need for a Unified Authority

According to Article 10 of the AML, “The anti-monopoly law enforcement agency designated by the State Council (hereinafter referred to as the Anti-Monopoly Law Enforcement Agency under the State Council)


shall be responsible for the anti-monopoly law enforcement work.” However, it is not clear which institution should be responsible for AML enforcement. The legislative history contained in the explanation on the draft AML submitted by the State Council to the Standing Committee of NPC in 2006 indicated that anti-monopoly enforcement may continue to be divided among different agencies, as is the case today. The AML, as promulgated, is simply not clear on this issue.33 As it currently stands, three enforcement agencies — the National Commission for Development and Reform (NCDR), the State Administration of Industry and Commerce (SAIC) and the Ministry of Commerce (MOFCOM) — have parallel authority to enforce the AML.

It would make more sense if the State Council would consider a complete restructuring of existing agencies to make a unified enforcement agency. In my view, having three parallel, competition law enforcement agencies would not only be inefficient, but it may also create conflict and friction among the three agencies. This potential conflict may become even more complex with the inclusion of such diverse authorities as the provincial, regional, and municipal enforcement agencies (Article 10) as well as the government agencies responsible for governing administrative monopolies (Article 51). Having multiple agencies in the AML may result in less authority and independence for any and all of the agencies because no enforcer may have the legal authority to override an alternative enforcer’s decision not to enforce the AML against a specific business operator. A more practical solution would be to have a unified enforcement agency with sufficient authority to enforce the AML. Such an agency could still delegate certain powers to other enforcers but would have the authority to make the final decision regarding enforcement, subject to review by the courts, of course.34

2. The Anti-Monopoly Commission Under the State Council

Article 9 requires the State Council to establish the Anti-Monopoly Commission, which shall be responsible for organizing, coordinating, and guiding anti-monopoly work, and it shall have the following functions: (1) researching and formulating relevant competition policies; (2) organizing investigations, assessing the state of overall market competition, and issuing an assessment report; (3) formulating and promulgating anti-monopoly guidelines; (4) coordinating the anti-monopoly

33 See Cao Kangtai, Notes to the Draft PRC Anti-Monopoly Law (June 24, 2006). This note is an official instrument submitted to the NPC by the State Council, serving as the formal annotation of the draft AML. See Issue 53 by State Council (2006).

34 See AML, supra note 3, art. 53 (allowing court challenges to decisions by the Anti-Monopoly Law Enforcement Authority).
administrative enforcement work; and (5) performing other functions as specified by the State Council. According to paragraph 2 of Article 9, the State Council shall stipulate the composition of and the work protocols of the Anti-Monopoly Commission.

With separate anti-monopoly enforcement agencies, it is necessary for the State Council to set up an Anti-Monopoly Commission in order to coordinate and guide the anti-monopoly work. In my view, no matter how the State Council establishes this Commission, however, the Commission should also be an institute for promotion and advocacy of competition policy — perhaps like the U.S. Federal Trade Commission. But according to the draft submitted by the State Council to the Standing Committee of the NPC, the Anti-Monopoly Commission under the State Council will likely be composed of the principals of relevant departments and organs of the State Council and certain experts. However, the majority of the departments and organizations of the State Council have experience in implementing only industrial policy and are generally not expert in competition law. For example, the NCDR and the State-Owned Assets Supervision and Administration Commission of the State Council (SASAC) have other primary responsibilities. Thus, the Commission may become a coordinator among different organizations responsible for anti-monopoly enforcement but may not likely be as effective in determining or advocating competition policy. Such a commission may be more effective if it is established as an independent agency that could develop the peculiar expertise necessary for the development of AML policy and enforcement.

G. The Relationship with the Regulators

The prohibition of abusive conduct in the AML is specifically directed at the business operator with a dominant or monopoly market position. But in China, there are numerous incumbent monopolists in the sectors of telecommunication, post, railway, electricity, banking, etc. Moreover, in China almost every State-owned monopolist is under the supervision and administration of an industrial regulator according to a law or regulation related to that specific industry. For example, the Telecommunication Regulation stipulates “the supervision and regulation of the telecommunication industry shall be based on the principles of separation of government administration from enterprise management, elimination of monopoly, encouragement of competition and promotion of development, as well as the principle of openness, fairness, and impartiality.
ality." That means that when the relevant anti-monopoly enforcement authority has the jurisdiction over the anticompetitive conduct in a regulated sector, any antitrust enforcement could raise difficult political questions.

According to the draft submitted by the State Council to the Standing Committee in 2006, “If there are relevant laws and administrative regulations stipulating that the monopolistic conducts prohibited by this Law shall be investigated and handled by the relevant departments or supervisory organs, the laws and regulations are to be applied.” In consideration of the economic theory of “regulatory capture,” it is possible that many regulators may find it difficult to be neutral and independent when they are facing disputes between consumers, and especially the State-owned entities that are the business operators in the regulated sectors. Additionally, the industry regulators typically focus on issues, such as technical problems or product safety, and have little experience with competition policy or enforcement.

Thus, I propose that the anti-monopoly enforcement agency or agencies that result from the State Council’s regulations be given decisive authority to enforce the AML, even when it may be applied to regulated industries. For example, under the German Telecommunications Law, the regulatory authority for the telecommunication and the postal sector is responsible for preventing abusive behaviors in these sectors. But the Federal Cartel Office communicates closely with the regulatory authority in matters of market definition and market position. Additionally, competition enforcement with respect to the control of mergers and the ban on cartels, even for the telecommunication, post, electricity, gas, and railway sectors, is still the responsibility of the Federal Cartel Office. In other countries, like the United States, the relationship between competition laws and regulated (or formerly regulated) industries has proved to be a difficult topic for the courts to handle. If

55 See Article 4, Telecommunication Regulations of the People’s Republic of China (promulgated by the State Council on Sept. 25, 2000 and effective Sept. 25, 2000). (Translation available by subscription at http://www.chinalawinfo.com.)

56 Article 44 of the Draft of Anti-Monopoly Law submitted by the State Council to the Standing Committee of National People’s Congress in 2006.

57 See German Telecommunications Law of July 25, 1996, art. 82.


59 There are numerous cases, too many to cite, in U.S. courts and the Federal Trade Commission that have struggled with regulated and quasi-regulated industries under court-made doctrines, such as the filed rate and state action doctrines. See cases cited supra note 20.
possible, it would be preferable for these issues to be clearer in the new regulations that the State Council will promulgate next year.

In the adopted AML, there is no explanation of the relationship between the Anti-Monopoly Authority and other regulators. This does not mean that this problem has been resolved. Instead, it may be determined by the State Council in the near future along with other issues related the enforcement authority as a whole. In the end, for the AML to be enforced effectively, however, it is my recommendation that the State Council make the authority of the Anti-Monopoly Authority clear. If, however, the Council decides not to grant the Anti-Monopoly Authority clear and decisive jurisdiction over the anticompetitive conduct of regulated industries, the resulting uncertainty may keep a large sector of the market outside of the effective scope of the AML.

D. Enforcement Mechanism for Administrative Monopoly

Under the AML, an “administrative monopoly” refers to the acts of the governments and their subordinate agencies that abuse administrative power to restrict competition. For instance, local governments may refuse to issue business licenses to enterprises that engage in transactions of commodities originating in other regions and even confiscate their products or impose fines.

With respect to departmental monopoly, the petroleum products market is a good example. In 1999, certain departments under the State Council issued a document to prohibit any other company from wholesaling petroleum products except SinoChem and PetroChina; this prohibition was renewed in 2001. Some critics refer to this phenomenon as “doing business by abusing administrative power” and consider administrative monopoly to raise serious issues. However, other countries, including the United States, have had to deal with this difficult problem; China will undoubtedly find a way to resolve it as well. But it certainly will not be an easy process.

Along with the gradually deepening economic reform, the State Council released “the opinions on encouraging and guiding development of non-public economy” in the beginning 2005. According to the opinions, the non-public economy should enjoy equal treatment with the State-owned enterprises in investment, tax, use of land, and foreign trade. Obviously, eliminating administrative monopoly is the most im-

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portant precondition for the realization of fair competition and equal
treatment between different business ownership. Out of this consider-
tion, the strongest appeal for breaking administrative monopolies
comes from non-public enterprises. Accordingly, the provisions of Chap-
ter V on administrative restraints on competition are not only desirable
but are also indispensable. This chapter presents a clear rule that re-
olves such complex matters that under United States would be dealt
with by the Commerce Clause, or the state action or filed rate doc-
trines—certainly not easy issues to resolve under a common law tradi-
tion and even more difficult to deal with absent the clear provisions of
Chapter V.

But, unfortunately, Article 51 adds a provision that could detract from
the clarity of the main provision: “If administrative agencies and organi-
zations empowered by laws and regulations to have the function of ad-
ministrating public affairs abuse their administrative power and engage
in activities eliminating or restricting competition, their superior au-
thority shall order them to make correction.” In my opinion, there are
at least two reasons why the governmental agencies at the highest level
may find it difficult to supervise and inspect the administrative restric-
tions created by the governmental organizations at a lower level. First,
any administrative restriction on competition usually reflects treatment
in favor of the State-owned entity, and behind that favoritism there al-
ways exists significant economic benefit for local, government-owned
businesses or large State-owned enterprises. This situation makes it diffi-
cult for a superior agency to keep a neutral attitude in a dispute
between its inferior agency and the non-State-owned enterprises or com-
petitors from another region. Second, we have to think about the ability
of the governmental agencies to deal with the restrictions on competi-
tion. Because the so-called “higher-level agency” could be any agency, it
is not likely that it would have an experienced understanding of competi-
tion law or policy. Moreover, having numerous agencies determine
what should be the competition policy of the State may yield conflicting
goals that could be difficult to resolve, absent additional anti-monopoly
regulation.

I believe that it is likely that some administrative monopolies will be
challenged by the Anti-Monopoly Authority. But, absent clear authority
or policy guidelines or recourse to a higher authority, such enforcement
may be futile. I expect that the State Council will consider these issues,
however, and hope that it will spell out such guidance and authority in
the regulations that are expected to be promulgated in the next year.
III. CONCLUSION

In view of the challenges mentioned above, I believe that the initial enforcement of the Chinese AML will not be smooth. But that should not be surprising. It took decades for the United States to iron out its enforcement mechanisms and its laws to develop a coherent antitrust policy.

A deliberate and rapid resolution of the issues facing China in its AML will be critical to the success of China in interfacing with the global market economy. In particular, the law will be difficult to enforce without a unified Anti-Monopoly Authority and, without an effective prohibition of administrative monopoly, the law will have limited effect in today’s China. Thus, it may become necessary to complete this competition law reform for China to promote and realize a greater separation of government administration of State-owned entities from competition management. Additionally, due to fact that the AML lacks many of the implementation guidance and processes necessary for enforcement of the law, the Anti-Monopoly Commission should formulate relevant guidelines or detailed rules for the implementation of the law as soon as possible, including guidelines for the definition of relevant market, for horizontal and vertical restraints, for technology transfer agreements, and for merger/acquisition control.

Even though implementation of the AML faces challenges that should be expected with such a critical change in China’s law, the promulgation of this AML should still be deemed as a significant milestone in the history of China, because this a very important step directed at pro-market reform. I am very confident that China’s growing and developing economy requires a strong watchdog to maintain free and fair competition in the world’s fastest-growing economy. In the end, economic globalization will certainly motivate China to continue down this path to establish an effective competition policy.