

**Summary:**

The People's Republic of China ("**China**") recently joined the "competition" club, which now includes more than 100 jurisdictions in the world. The Anti-Monopoly Law ("**AML**"), the first comprehensive competition law enacted in China, was adopted in August 2007 and came into force in August 2008.

The evolution of the AML, from its planning, then proceeding to numerous drafts and finally its enactment, took more than 10 years. The process coincided with the internal reform and economic development of the market economy in China. This paper discusses the legislative history against the historical background.

At this initial stage the most developed aspect under the AML continues to be merger control. The mechanisms for controlling anti-competitive agreements and abuses of dominance have also progressed, but at a lower pace. This paper also includes a section on the basic legal and enforcement structure of the AML and its implementation status to date.

One particularly difficult question for China is the distinction and overlap between industrial policy and competition policy. This paper also explores this issue by analysing the merger filing decisions issued to date by the Ministry of Commerce.

## Competition law in China, from merger control onwards

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The AML was a long awaited baby, which took years before its delivery. For those who have followed the numerous drafts since 1994 when the Ministry of Commerce ("**MOC**") was initially delegated the task of drafting the law, it was a historic moment when the National People's Congress finally passed the AML on 30 August 2007.

Since the AML came into force on 1 August 2008,<sup>2</sup> the competition system in China has been gradually developing over the past three years and every step has attracted high-level attention both domestically and internationally.

Despite all the discussion of whether competition legislation is needed or not in China, the AML and the implementation rules have become reality and have been developing steadily. Since the very beginning, the competition policy in China has to strike a delicate balance between what should be and what can be.

To date, merger control remains the area with much more enforcement experience and precedence. Due to the turnover-based thresholds in the law and the comparatively active M&A transactions involving operations in China, merger control under the AML continues to be the major focus of multinational companies, though we observe an increasing attention on other compliance fronts as well. There is an unbalance between international companies and domestic Chinese companies regarding awareness, willingness and the extent to tolerate legal risk. It is not surprising that from time to time the competition law principles do not marry easily with the deeply rooted business practice and environment in China.

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<sup>2</sup> According to Article 57 of the AML, the law came into force on 1 August 2008. It intended to leave a one-year transitional period for enforcement agencies to prepare resources and issue implementation rules.

Looking ahead, the main task of the enforcement agencies in China in the next few years remains to be raising the general awareness about the AML, and creating incentives for nation-wide compliance and enforcement.

## **I. Legislation**

Competition legislation is usually considered as a sign for market economy. The AML has been on the legislative agenda of the Chinese government since 1994. The timing then was arguably premature, considering the economic status, when the majority of sectors were state owned and many aspects of the market were still subject to state planning. Therefore, the drafting process continued in the 1990s and only accelerated when China joined WTO in 2001. Many private practitioners, academic experts and the competition enforcement agencies in the major countries were involved and many consultation meetings were held with various domestic interested parties. While the basic structure and content of the AML was gradually agreed and settled, different approaches also emerged, in particular concerning the following issues:

- a single enforcement agency versus combination of existing agencies
- position of the state-controlled / monopolised industries under the AML
- inclusion of the chapter on administrative monopoly.

A closer look at the three issues reveals that all of them reflect the "hiccups" of incorporating competition law principle and regime into the practical context in China.

If regard is only given to the effect and efficiency for enforcement, the preferred approach is to have a single, independent enforcement agency apply the AML to all state-controlled industries and provide separate legislation for administrative monopoly as the issues concern more the internal market in China. The reality is more complex. For instance, establishing a new competition agency under the State Council will require reallocation of civil servants, which is time consuming and may not be achievable in the current personal registration / civil servant quota system in China.

The compromise therefore is to provide a solution between what is ideal and what is feasible: enforcement powers are divided among existing agencies; there is a

special exemption for stated-controlled industry<sup>3</sup> and the administrative monopoly chapter is included.<sup>4</sup>

## II. Implementation

### A. Institution

The three-tier institutional structure has been set up: the top tier is the Anti-Monopoly Commission, which comprises representatives of various regulators with the main function of coordination and issuance of policies. The second tier and also the core tier is formed of the following agencies: the MOC, the State Administration of Industry and Commerce ("**SAIC**"), and the National Development and Reform Commission ("**NDRC**") (together the "**Enforcement Agencies**"), which are responsible for different aspects of the AML.<sup>5</sup> The province-level local branches of the Enforcement Agencies are the third tier, which assist central Enforcement Agencies in investigations or are in charge of individual cases under specific authorisation.

At central level, the MOC established the Anti-Monopoly Bureau ("**AMB**") with six divisions: general office, competition policy, consultation, legal, economics, and supervision / enforcement.<sup>6</sup> The SAIC has reorganised the original division responsible for Anti-Unfair Competition Law so it covers the AML as well. The NDRC also assigned personnel to the Pricing Division.

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<sup>3</sup> Article 7 of the AML states that undertakings controlled by the state-owned economy that engage in lawful operations in industries relating to the lifeline of national economy and national security, and undertakings that engage in industries that implement exclusive operation and sales in accordance with law, shall be protected by the State. Therefore the general interpretation is that the AML applies to those sectors but any violation will be exempted if there is a legal basis for such violations, e.g. price coordination among petrochemical companies based on sector laws and regulations.

<sup>4</sup> The chapter on administrative monopoly was taken out in one of the later drafts but put back in the final version of the AML. The effect of the chapter so far is more symbolic than substantial due to the limited "suggestion" power of the enforcement agencies towards violations of local government. See Article 51 of the AML.

<sup>5</sup> The MOC is responsible for merger filings; the SAIC is responsible for non-pricing-related anti-competitive agreements and abuse of dominant positions; the NDRC is responsible for pricing-related anti-competitive agreements and abuse of dominant positions.

<sup>6</sup> Please see

<http://fldj.mofcom.gov.cn/aarticle/gywm/200811/20081105868495.html?3665802120=221583129>, (in Chinese).

Regarding the courts, AML-related cases are allocated to the IP tribunals due to their special nature. Some provincial courts have established special tribunals for AML-related cases.

### B. Rules on procedure and substance

Based on the experience before and after the AML came into force, the MOC has issued a few department rules and guidelines on procedure and substance, such as the documents/information required. The SAIC and the NDRC issued further rules at the beginning of 2011. On 25 April 2011, the Supreme Court issued a draft Judicial Interpretation on Anti-Monopoly Civil Lawsuits for comments ("**Judicial Interpretation**"). The Judicial Interpretation contains clarifications on issues of private enforcement such as the burden of proof.

Those department rules do provide more details as the AML is quite general and broad. Several gaps still need to be filled in, such as the definition of undertakings and concentrations. The lack of experience in the cartel and abuse of dominant position enforcement is one reason to limit the degree of details in those rules. Another reason could be the lack of internal agreement on certain issues, such as the type of transactions to be reviewed by the MOC.

## **III. Enforcement**

### A. Enforcement Agencies

The MOC began to review filings under previous legislation even before the AML came into force. In 2010, the MOC reviewed more than 100 merger filings. Most of the filings were cleared without any conditions. To date, the MOC has only imposed conditions on six transactions and prohibited one transaction.<sup>7</sup>

The SAIC and the NDRC so far have not yet initiated any national-wide investigations but have been receiving complaints and intervening on certain occasions. For instance, the recent media report on a proposed price increase by Unilever and P&G led to a meeting between the NDRC and the relevant companies. The proposed plan was postponed after the meeting.<sup>8</sup>

The NDRC has imposed penalties on local paper manufacturers and associations for price coordination. The local branch of the NDRC assisted in the case. The focus of the NDRC seems to be the agricultural sector and basic consumer

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<sup>7</sup> Please see Annex 1 for a list of the cases.

<sup>8</sup> Please see [http://news.xinhuanet.com/food/2011-04/01/c\\_121257542.htm](http://news.xinhuanet.com/food/2011-04/01/c_121257542.htm) (in Chinese).

products. It is interesting to observe the connection with the recent high inflation rate in China.

The Enforcement Agencies have been conducting seminars in various locations in China with the local branches. Due to limited personnel and resources at central level, the enforcement of the AML will rely heavily on the participation of local branches.

#### B. Private enforcement

According to public sources, from August 2008 to the end of 2010, national wide, the courts have accepted 43 cases and concluded 29.<sup>9</sup> A few cases were initiated by "public benefit" lawyers.

The previous draft of the Judicial Interpretation included provisions for higher compensation. The current published version removed the provisions. The court system has been criticised for how long cases take to be adjudicated and the low enforcement rate. In most cases, a lawsuit may cause more public reputational damage than the actual financial impact.

#### C. International cooperation

Since China is not yet a member of ICN, the main cooperation is bilateral with other countries. Currently, there are programs with the EU, US, Japan, South Korea, Russia, and UK, etc. The cooperation currently is mainly limited to training and exchange of personnel. So far there is no public information on cooperation in a specific case, e.g. exchange of information.

### **IV. Future**

The implementation and enforcement of law in many cases can be challenging in China. The amount of existing legislation is large and the stage where a foreign lawyer can read translations and know all the rules in China within a month has long since passed. The elements influencing implementation and enforcement vary. The direction of the policy from central government plays an important role.

One important aspect is the compliance from domestic companies in particular the big state-owned enterprises ("**SOEs**"). Taking merger control as example, there are no public statistics on the percentage of filings involving foreign parties and involving only domestic companies. Nevertheless, all the decisions imposing

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<sup>9</sup> Please see <http://www.caijing.com.cn/2011-04-25/110701983.html> (in Chinese).

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conditions and prohibitions so far include at least one foreign party. It raises an interesting question as to whether all the mergers between domestic companies including SOEs are compatible with the AML and raise no concerns.

Given the recent speeches by officials and the new national security review procedure, it seems that merger control will become more integrated with other foreign investment control mechanisms in the future. The line between industrial policy and competition policy may become even more ambiguous.