

China's Anti-Monopoly Law and Its Merger Enforcement: Convergence and Flexibility

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Abstract

As the biggest emerging economy and a major economic power in the world, China is a late but a significant entrant into the competition law club, with the implementation of a new Anti-Monopoly Law (AML) on 1st August, 2008. The AML is a milestone on the way of economic transition of China and also a matter of major importance to foreign business operators. AML affects monopoly agreements, abuse of dominant position and concentration of undertakings and mirrors the EU's competition rules. After nearly two decades of drafting, Chinese legislator has drawn on the experience of other jurisdictions and introduced leniency programs, settlement agreements, mandatory pre-notification of acts of concentration, extraterritorial effects and many other institutions. While transplanting numerous institutions in the new law, Chinese legislator has also made some adaptations to its economic and political environment, ensuring that the need for economic development becomes a key theme in both competition policy thinking and in legal writing. In the first part, the article summarizes the most important features of the AML and makes an analytical assessment on its alternative approaches.

Amongst the total 57 articles of the AML, 21 are concerned with merger control. Since the law came into force, merger control has been actively implemented by the Chinese competition authorities, while the enforcement of behavioral rules governing anti-competitive agreements and abuse of dominant market positions in China has been slower to start. In the second part, the article focuses on the merger enforcement by examining the implementing regulations and orders related to merger control which were issued after the enactment of the AML, including *Provisions of the State Council on the Standard for Declaration of Concentration of Business Operators* (2008), *Measures for the Undertaking Concentration Examination* (2009), *Measures for the Undertaking Concentration Declaration* (2009), *Provisions on the Merger or Acquisition of Domestic Enterprises by Foreign Investors* (2009), *Interim Provisions on the Divestiture of Assets or Business in the Concentration of Business Operators* (2010) and the very recent *Regulation on National Economic Security Review of the Merger or Acquisition of Domestic Enterprises by Foreign Investors* (2011). In light of the substantive standards and the procedural requirements of merger control, the article makes a comparison between Chinese regime and the U.S. and EU's standards.

In the third part, the article highlights that optimum competition will become an international public good in a globalized world. Some empirical findings on the AML and its merger enforcement has largely illustrated that China, as an emerging country

and an important player in the world arena, is making its efforts to realize a soft convergence with international norms, meanwhile, the gradual approach of convergence gives China the flexibility to stop, to adjust and to make an exception whenever necessary. Both the industrialized countries and China need to learn how to harmonize the existing regulations and escape the mentality of parochialism, because in international antitrust even subtle legal differences between jurisdictions may create significant potential for conflicts. Finally, the article makes some suggestions as the way forward.