II. China's Anti-Monopoly Law – A Reflection of the Successful Transition from a Centrally-Planned to a Market Economy

A. Important Milestones

China introduced economic reforms at the end of the 1970s. The ambitious market-oriented measures aimed at encouraging private business, foreign investment through joint ventures (JV) with Chinese enterprises and foreign trade. As a result, competition increased, private sector exploded, and living standards improved. After ten years of fast growth, the annual inflation rate in China skyrocketed to almost 20 percent by the end of the 1980s.[20] In order to control the situation, various austerity measures including tighter monetary controls and limitations of foreign JV projects were adopted in 1988. This "cooling-off" period[21] came to an end following Deng Xiaoping's famous tour to southern China in 1992. Thereafter China was put on a path of renewed and unprecedented economic growth. During this period China accelerated its pace of economic reforms by privatizing and replacing management in state-owned enterprises (SOEs). The "wild capitalism" of the 1990s called for tougher regulations to harness the market disorder. It became imperative to introduce new legal norms to safeguard and enhance competition. The consistent competition policy needs to protect the competitive processes by addressing private sector restraints, and state-initiated arbitrary behaviour.

In 1994 China's 8th National People's Congress (NPC) adopted legislation to have a new Anti-Monopoly Law drafted by the State Economic & Trade Commission (SETC, predecessor of MOFCOM) and the State Administration of Industry & Commerce (SAIC). In the following thirteen years, the drafting group had countless hearings with Chinese and foreign legal and economic experts. Hot debates took place between various Chinese authorities during the drafting process. After three revisions of the

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20 National Bureau of Statistics of China, available at http://data.stats.gov.cn/search.htm?s=1988 年中国通货膨胀率.

21 Another important factor that led to an economic downturn at that time was related to the Tiananmen Square incident in 1989, which led to subsequent sanctions by Western countries.

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draft law, the Chinese Anti-monopoly Law (AML) was finally promulgated and came into effect in 2008. Never before in Chinese legislative history had a drafting and consultation process taken that long before the law came into effect. This illustrates how difficult it is for the Chinese government to balance domestic industrial policies with the conflicting goals of the AML. In addition, enforcing widespread administrative controls under the AML could pose further challenges to governmental authorities and the judiciary alike.[22] Nonetheless, the first modern Chinese competition law has been viewed as a "milestone of the country's efforts in promoting a fair competition market and cracking down on monopoly activities".[23]

B. China's Competition Regime Prior to the AML

Competition policy is not entirely new in China. The starting point for a Chinese competition regime can be traced back to October 1980 when the State Council promulgated an interim *Regulation on Promotion and Protection of Socialist Competition*. Even though the regulation was not effectively enforced, this was a breakthrough in the economic reform process in terms of competition policy.[24] In the following years, legislative bodies have been experimenting with reform measures and have enacted various laws and regulations which are vital to the economic development of China. A brief overview will be provided of the most pertinent laws which contain competition-related stipulations prior to the AML.

1. The Anti-Unfair Competition Law of 1993

The Anti-Unfair Competition Law (AUCL), promulgated in 1993 appears to be rather broad and primarily covers the protection of consumers. Yet, the statute has been a valuable tool in fighting against unfair business practices, including actions against passing-off and trade secret theft. Some provisions contained in the law forbid certain conducts such as tie-

22 *Supra* note 3, page 8.
23 Nie Peng, *China's First Anti-monopoly Law Takes Effect,* Xinhua News Agency, August 1, 2008.
24 Carl J. Green and Douglas E. Rosenthal, *Competition Regulation in the Pacific Rim* (Oceana Publications, Inc. 1996) 130.

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in sales, price fixing and bid rigging (e.g. Art. 6 and Art. 7 and Art. 11 Art. 15), which are normally part of antitrust law in other jurisdictions.[25] Prior to the AML some companies did infer the AUCL and initiate administrative and private actions against abusive conduct of competitors.

One of the most famous cases under the AUCL was the lawsuit brought by the Chinese battery company *Tsum* against the Japan's *Sony Corporation* for illegal bundling of its InfoLITHIUM batteries in Shanghai in November 2004. The plaintiff claimed that *Sony* abused its dominant market position in China and misused its encryption technology to exclude competitors pursuant to Art. 2 of the AUCL. The encryption by *Sony* foreclosed the market and directly damaged the interests of consumers and competitors alike. *Sony* eliminated fair competition by abusing its market dominance and by creating technical barriers to force consumers to purchase only *Sony* batteries. This way, *Sony* earned monopolist profits by tying products when marketing its camcorders and cameras.[26]

This case involving IPR and bundling sales was regarded as the first IP and anti-competitive court matter in China. However, the court eventually dismissed the plaintiff's claim, ruling that there were no tie-ins. The *Sony* case demonstrated the importance of having a comprehensive anti-monopoly law in China.

The Anti-Unfair Competition Law had been in force for more than twenty years since its first release. In the meantime, the Chinese economic, social and legal environment has changed greatly. New types of unfair competition behaviour have emerged with Internet and online software, which were not listed under the AUCL. Due to the promulgation of the AML, the amended *Trademark Law of PRC* and the amended *Advertising Law of PRC*, there were certain overlappings, ununiformed definitions of terms that need to be deleted or revised. Other stipulations need to

25 Bruce M. Owen, Su Sun & Wentong Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 Antitrust L.J. 231 (2008), available at http://scholarship.law.ufl.edu/facultypub/223.

26 The Sony InfoLITHIUM batteries Model NP-FP90 was being sold at RMB 890, while the same type of battery from Tsum costed RMB 283. In one year Sony generated a profit of RMB 330 million by selling 550 000 digital devices. Considering that InfoLITHIUM batteries need to be replaced every 1 – 2 years, Sony's additional profit due to tie-ins were significant. See Wang Xianlin, "*Preliminary observations and thoughts on China's first lawsuit concerning anti-monopoly law*", East Law Study (关于中国反垄断诉讼第一案的初步观察与思考, 东方法学), 2006, Issue 2.

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be updated and added in order to cover unfair behaviour by using online technology.

On February 26, 2017 the 12th Standing Committee of the NPC released the amendments[27] to the AUCL for public opinion solicitation. In November 2017 the amendments were approved by the Standing Committee of the NPC and the new AUCL became effective on January 1, 2018. What is worth mentioning is that the revised law has significantly increased the range of penalties against violators, from RMB 100 000 to RMB 3 million (about USD 15 000 to USD 460 000).

2. The Price Law of 1997

The Price Law of the PRC was promulgated on December 29, 1997, and became effective on May 1, 1998. This law gives importance to the role of prices for rational allocation of resources. Art. 1 of the law sets the aim of protecting the interests of consumers and business operators by standardizing price behaviour.

The pertinent stipulation on competition policy in this law is Art. 14, which forbids collusive practice to control market price to the detriment of other market participants and consumers. Art. 14(5) explicitly prohibits price discrimination. Art. 40 of the Price Law stipulates that violators of any acts listed in Art. 14 "*shall be ordered to correct, have their illegal proceeds confiscated and be fined concurrently for an amount less than five times the illegal proceeds. In cases of no illegal proceeds involved, a warning shall be issued, together with a fine. For serious cases, they shall be ordered to stop operation for correction or have their business licenses revoked.*"

The Price Law has been an important instrument for Chinese authorities to maintain price discipline in economy, especially when prices relate to consumer products and services. One of the landmark decisions under the Price Law was the administrative sanction issued by the NDRC against the company *Unilever* for "disseminating information to the public anticipat-

27 Out of the current thirty-three articles of AUCL, amendments were made to thirty provisions: seven articles were deleted, nine articles were added. The revised version composes of thirty-five article in total. Available at http://www.legaldaily.com.cn/Finance_and_Economics/content/2017-04/05/content_7080645.htm?node=76109.

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ing price increases, thus distorting the market price order".[28] The NDRC and the Shanghai Price Administration Bureau found that *Unilever* deliberately spread such information at various press interviews, which gave time to Unilever's competitors to align their prices for similar products accordingly. Factually, competitors responded by taking similar actions, and this caused panic purchasing in various Chinese cities in 2011. The NDRC further specified in the statement that this prior signaling helped to achieve a *price cartel* without significant changes in market shares among existing competitors in the industry. *Unilever* was compelled to rectify its violations and had to pay a fine of RMB two million (around USD 300,000).[29] This was the first highly publicized price-related law enforcement action against a multinational company in China.

C. The Anti-Monopoly Law Comes into Force

When considering the AUCL and the Price Law, one may conclude that the Chinese competition regime prior to the enactment of the AML was fragmented. Isolated laws and administrative rules tried to deal with competition issues as they arose along with the economic reform and modernizations process in China.[30] Different authorities were mandated by different laws to enforce anticompetitive behaviour.[31] In contrast, all AML stipulations promote fair competition and combat monopoly activities. The AML prohibits monopolistic conduct in the following areas:

- Monopoly agreements between business operators (Chapter II)
- Abuse of dominant market position by business operators (Chapter III)
- Concentration of business operators which may have the effect of eliminating competition (Chapter IV), and
- Abuse of administrative powers for elimination of competition (Chapter V)

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28 News released on the official website of NDRC, *Unilever, "High Penalty"*(联合利华，高额处罚") available at http://xwzx.ndrc.gov.cn/mtfy/zymt/201105/t20110512_411787.html.

29 *NDRC: Unilever Was Fined RMB Two Millions for Spreading Rumors of Price Rising* (发改委：联合利华散布涨价信息被罚 200 万), available at http://finance.qq.com/a/20110506/002832.htm.

30 *Supra* note 25.

31 *Id.*

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Apart from Chapter V, which addresses administrative monopoly in the country[32], the AML adopted the "three pillar" system of modern competition law. It comprises eight chapters and 57 articles, which cover the following areas:

	Main Topics of Each Chapter	Article numbers
Chapter 1	General principles of AML: Objectives, applicability, coverage, role of SOEs in important sectors, role of trade associations	Articles 1 – 12
Chapter 2	Classification of types of prohibited monopoly agreements	Articles 13 – 16
Chapter 3	Prohibition of abuse of market dominant position; criteria of judging market dominance; description of abusive conduct	Articles 17 – 19
Chapter 4	Concentration of business operators: mergers & acquisition, JVs.	Articles 20 – 31
Chapter 5	Prohibition of anticompetitive activities by government agencies, particularly forbidding various forms of local protectionism	Articles 32 – 37
Chapter 6	Description of investigative procedures to be followed by enforcement agencies	Articles 38 – 45
Chapter 7	Liability and penalties for violating the AML	Articles 46 – 54
Chapter 8	Supplementary provisions IPR is not per se unlawful monopoly, but abuse of such rights is subject to the AML	Articles 55 – 57

32 Due to the long history of planned economy there are still regional and industrial monopolies. For instance, local governments may refuse to issue business licenses to business operators coming from another province. Ministries and their subsidiaries from certain key industry sectors (e.g. petroleum) use their administrative powers to designate only specific companies to operate in that sector.

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Art. 55 is the only IP related provision. It is worth noticing that Art. 55 of the AML, though very general, established the relationship between IPR and the anti-competition regime, which reads as follows:

> *"This Law shall not apply to the exercise of intellectual property by business operators pursuant to the relevant laws and administrative regulations on intellectual property; however, this Law shall apply to the abuse of intellectual property by business operators to exclude or restrict competition."*

This provision offers IPR holders a safe harbour but also explicitly prevents the abuse of IPR rights.[33] The basic principle of the interplay between the IPR regime and Chinese competition policy is thus highlighted. However, no definition or framework is provided on the boundaries between legitimate practice of IP rights and abuse of exclusive rights. The recently published IP Guidelines attempt to provide more clarity on these issues, which will be discussed in greater detail in Chapter IV.

D. Institutional Design of Competition Agencies under the AML

1. Administrative enforcement agencies

According to Articles 9 and 10 of the AML, two levels of regulatory agencies are established:

- Anti-Monopoly Commission (AMC) under the State Council: responsible for studying and drafting relevant competition policy, organising market investigation, formulating guidelines and coordinating competition administrative enforcement tasks.
- Anti-Monopoly Enforcement Authority (AMEA) designated by the State Council, which is responsible for the enforcement of the AML

The AMC does not enforce the law directly, but rather supervises and coordinates AML-related activities. A group of legal and economic experts provides advice to the Commission for tackling major issues in the field of competition.

It is no secret that heavy debates on institutional design of competition enforcement agencies behind the scenes also largely contributed to the de-

33 Dr. Yijun Tian, *The Impacts of the Chinese Anti-Monopoly Law on IP Commercialization in China & General Strategies for Technology-Driven Companies and Future Regulators*, Duke Law & Technology Review, 2010.

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lay of the adoption of AML. Finally, three government agencies acting under the Chinese State Council, and enjoying ministry status, were empowered to rule over competition enforcement in China. Depending on the abusive conduct, responsibilities are allocated as follows:

– The National Development and Reform Commission (NDRC): Enforcing price related rules of the AML, including anti-competitive agreements and abuse of dominant position
– The State Administration of Industry and Commerce (SAIC): Enforcing non-price related rules of the AML, including abuse of administrative powers
– The Ministry of Commerce (MOFCOM): Enforcing merger controls.

Some scholars and practitioners expressed their concerns on possible lack of efficiency and consistency regarding decision makings derived from the tripartite system.[34] Others argued that decentralization of enforcement and competition among agencies might improve the quality of work.[35] Some referred to the US which has a dual enforcement system consisting of the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) sharing responsibility of enforcing federal antitrust law. A single competition enforcement agency may not be necessarily the best option, as evidenced by Japan's Fair Trade Commission (JFTC).[36] The Chinese tripartite enforcement system can advantageously tap the experiences and strength that each agency had early obtained in its own field prior to the adoption of the AML.

Friction can indeed exist and investigation tasks might overlap between SAIC and NDRC. Supposing that monopolists and oligopolists are engaged in both price-related and non-price related anticompetitive conducts such as charging excessive patent royalty fees, abusing dominant positions, or having restrictive agreements, both authorities could practically become involved. In order to avoid conflict, NDRC and SAIC adopted implementation rules[37] for enforcement of the AML and divided their responsibilities in 2011.

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34 Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75 Antitrust L.J 133, 144-46, 2008.

35 *Supra* note 3, page 130.

36 *Supra* note 3, page 130.

37 NDRC : *Anti-Pricing Monopoly Rules* promulgated by on 29 December, 2010 (反价格垄断规定), available at http://www.gov.cn/flfg/2011-01/04/content_1777969.htm; SAIC: *Rules on the Prohibition of Abusing Dominant Mar-*

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Responsibilities of NDRC and SAIC

	NDRC	SAIC
Restrictive agreement	Price fixing	Restriction of output/sales; division of sales, division of raw material markets; boycotting
Abuse of dominant position	Resale price maintenance, predatory pricing, unfairly high or low prices	Refusal to deal, exclusive dealing, bundling, tying and discriminatory treatment

2. Judicial enforcement

Numerous Chinese companies and individuals could barely wait to take judicial actions based on the AML. On August 1, 2008 when the AML became effective, three cases were brought to courts. At initial stages it was very difficult for plaintiffs to collect evidence for lack of information and sufficient economic knowledge by Chinese courts to determine violations. Till the end of 2011 totally 61 cases were filed at first instance nationwide, of which 53 were concluded by settlement or final ruling.[38] Hundreds of other cases were dismissed by courts, and where final court ruling was taken, it was mainly defendants who prevailed. The situation started changing after the Supreme People's Court (SPC) issued the "Monopoly Case Provision" [39] taking into account past judicial experiences in China and abroad and addressing essential issues such as jurisdiction, plaintiff qualification and allocation of burden of proof.

In the following years, the number of civil enforcement cases increased drastically and even exceeded those filed with public enforcement agen-

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ket Positions (工商行政管理机关禁止垄断协议行为的规定), available at http://www.gov.cn/flfg/2011-01/07/content_1779945.htm.

38 SPC Issued the First Judicial Interpretations on the AML, Private Parties Can Sue Monopolistic Enterprises Directly (最高人民法院出台反垄断审判第一部司法解释公民可直接起诉垄断企业), May 9, 2012, available at http://www.66law.cn/topic2010/fldspsfjs/21162.shtml.

39 On May 3, 2012 the Supreme People's Court published "*Provision on the Application of Laws in Civil Disputes Cases Arising from Monopoly Activities",* Chinese version available at http://legal.people.com.cn/GB/17836437.html.

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cies (AMEAs).[40]Judicial enforcement has made considerable progress. According to the IP Tribunal of the SPC, there is room for further improvement including optimization in the allocation of burden of proof, evidence deposition by courts, expert witness and opinion at courts. It is also vital for judges to better assess economic and market report, and improve their financial skills. Overreliance on market share threshold could lead to biased decisions especially in new economy sectors.[41]

E. Future Challenges

It is highly debatable whether emerging economies like China should open their markets to competition without limitations, or whether they also need to protect their own national industries and start-up enterprises for the sake of broad public interest. One of the focal issues will be to strike a balance between a modern competition law and indispensable industrial and innovation policies aimed at serving the long-term interest of the country. Another area of concern are China's state-owned enterprises (SOEs) which still dominate certain industries such as finance, defense, raw materials, energy, transportation and infrastructure as well as local administrative powers which may hinder the effective enforcement of competition law.

Art. 7 of the AML explicitly forbids large-scale SOEs from using their controlling or exclusive dealing position to harm the interests of consumers. Art. 7 also calls for public supervision of the behaviour of those companies. It is still questionable that competition agencies remain neutral in assessing abusive conduct from such companies given that their management and shareholdings are controlled by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC), which is also a state body. On the other hand, the Chinese government will have to continue playing an essential role in improving economic efficiency by using SOEs as a vehicle while optimizing their operations. It should

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40 Wang Chuang, IP Tribunal of Supreme People's Court,"*Overview and Perspective of Civil Enforcement under the AML*" (中国反垄断民事诉讼概况及展望), "… From commencement of the AML in August 2008 till December 2015, 430 civil suits have been filed with Chinese courts in comparison with less than 100 cases filed with the competition agencies.", Competition Policy Research, March Issue, 2016, available at http://www.doc88.com/p-3959736501814.html.

41 *Id.*

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be in the interest of a country to privatise state assets in a supervised way. Lessons from the aftermath of the collapse of the Soviet Union which pursued an approach of uncontrolled massive privitisations could be drawn by other transitional economies.

Articles 32 to 37 of the AML prohibit the abuse of power by administrative, regional and sectoral monopolies. However, in the case of abuse the AMEAs are not empowered to impose any sanctions, but only to submit opinions to the corresponding "superior authorities" and to ask them to correct the anticompetitive conduct. The greatest challenge here is the possible lack of neutrality and transparency in enforcing decisions because of the long legacy of entrenched local interests.

Art. 33 of the AML specifically addresses the issue of regional protectionism, forbidding local and regional authorities to abuse their powers to restrict free circulation of commodities between different provinces of China and prevent companies from other regions to establish more effective operations. The Chinese government is aware of the detrimental effect that regional protectionism may have on the national economy because of losses of allocative resources.

In the future, China will definitely make efforts to converge its competition regime with international standards. The adoption of the AML is a clear achievement of a county moving forward on its path toward a true market economy. In turn, China's economic reforms will be further accelerated by the successful adoption and enforcement of its competition law.

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