

# The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead

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On August 30, 2007, the Standing Committee of the National People's Congress (NPC) adopted China's first comprehensive competition statute, the Antimonopoly Law (AML).<sup>1</sup> Although the final text reflects thirteen years of drafting, it leaves unanswered many basic questions about China's substantive competition rules and antitrust enforcement program. While some outstanding issues should be resolved before the law takes effect on August 1, 2008,<sup>2</sup> uncertainties will doubtless persist.

The key provisions of the AML are surveyed below in light of the political circumstances shaping its drafting and implementation. The final text leaves ample room for Chinese antitrust either to converge with prevailing practices of well-established antitrust jurisdictions or to serve other strategic or industrial policy goals. As with most Chinese laws, the AML's impact depends less on the text itself than on the resources, motives, and clout of the enforcement authorities.

## The AML's Translucent Drafting Process

Several prior Chinese laws touch on antitrust issues, but the relevant provisions are vague, largely toothless, and scattered among multiple laws under different enforcement agencies. A committee drawn from several central government agencies began drafting the AML in 1994, but progress was sporadic. China's accession to the World Trade Organization (WTO) in 2001 reinvigorated the process. In the course of revising domestic laws and dismantling trade barriers to comply with China's WTO commitments, many Chinese officials and scholars "discovered" competition policy as an accepted tool for regulating developed market economies.

The AML's drafting process was far less opaque than most Chinese legislative efforts. Though drafting occurred behind closed doors, "unofficial" drafts circulated frequently. Seminars and formal written comments of these drafts allowed meaningful input from domestic stakeholders and from foreign antitrust scholars, enforcement officials, and private practitioners (including the American Bar Association and the International Bar Association), as well as such multilateral institutions as the World Bank, Organization for Economic Co-operation and Development, and the United Nations Conference on Trade and Development. This dialogue followed the drafting from the ministries to the State Council (China's cabinet) and on to the NPC. Meanwhile, Chinese per-

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<sup>1</sup> See Antimonopoly 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 on Aug. 1, 2008)(AML), available at <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=371229&pdmc=11006>. Unofficial translation by O'Melveny & Myers LLP is appended to this article.

<sup>2</sup> See AML, art. 57.

sonnel were assigned to competition authorities in Europe, and Chinese academics (as well as their students) devoted greater attention to studying antitrust policies worldwide.

Engagement paid off. Successive drafts shed unworkable provisions and drew closer to modern U.S. or EC rules. Provisions importing vestigial or cumbersome foreign practices (such as a scheme of individual exemptions for agreements among competitors and a strong essential facilities doctrine) disappeared, partially in response to foreign commentary. However, several constructive provisions inserted in response to foreign advice were deleted, some potentially mischievous provisions survived, and many key issues were reserved for the enforcement authorities.

The result is a statutory text that can be construed—and stretched in some places—to conform with prevailing international antitrust principles and practices. The AML targets three types of private “monopolistic conduct”: anticompetitive “monopoly agreements,” abuses of dominant market positions, and concentrations that are “likely to eliminate or restrict competition.”<sup>3</sup> Most substantive provisions clearly derive from foreign models (particularly EC and German practices), but many of the nuances and details of foreign doctrines are omitted. While such generality is common in competition statutes (and routine for Chinese laws), it defers many key decisions to implementing regulations, guidelines, judicial interpretations (quasi-legislative pronouncements from higher Chinese courts), and case-by-case enforcement decisions. Thus, it remains to be seen whether the abstract foreign concepts embedded in the law will be applied with imported analytical techniques and judgments.

### The Divergent Purposes of Chinese Antitrust

Whether Chinese competition policy makers embrace prevailing international practices depends, understandably, on whether such foreign practices will achieve their policy goals. Problematically, China’s antitrust priorities remain unsettled.

Article 1 of the AML lists the new law’s aims, ranging from promoting “efficiency” and “consumer interests” to advancing “fair market competition,” “the public interest,” and “the healthy development of the socialist market economy.” Sloganeering aside, Article 1 reflects real disagreement within the Chinese government and academic establishment as to the proper role of the AML. Some recognize modern competition policy as a means of promoting consumer welfare and efficiency through the competitive process. Many reformers also seek to rein in “administrative monopoly,” the anticompetitive misuse of official power by local authorities and sector regulators to protect favored companies. Others embrace the goals of protecting small and medium enterprises from larger competitors. More menacing, perhaps, are frequent calls for the AML to shield domestic enterprises from foreign rivals or to reinforce industrial policies aimed at promoting homegrown innovation, brand-building, and market leadership by Chinese companies. Chinese commentators can point to the competition and industrial policies of various foreign jurisdictions (including the populist periods of U.S. antitrust) to validate each approach. These views resonate in different passages of the law and in different sections of the government. Indeed, the selected excerpts from the NPC Standing Committee’s final discussion of the AML published on the NPC’s official Web site suggest that each of these approaches to competition policy influenced different standing committee members.<sup>4</sup> These competing viewpoints will con-

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<sup>3</sup> See AML, art. 3. Language limiting the AML’s prohibitions to misconduct that “substantially” eliminates or restricts competition appeared throughout an earlier draft, but was deleted. It is unclear whether this principle will be revived during implementation.

tinue to shape the interpretation and enforcement of the AML in years to come. The relative influence of the competing approaches is left unresolved by the final text of the AML and will depend heavily on the allocation of policymaking and enforcement authority.

### The Policy Making and Enforcement Climate

Authority over competition policy is precious bureaucratic turf, and struggles for this turf have erupted along three dimensions: rivalry between central government agencies to become the general antitrust authority, resistance to the central government's efforts to rein in anticompetitive regulatory practices by local and provincial officials with new "administrative monopoly" rules, and efforts by key sector regulators to retain primacy over competition within their jurisdictions. The final text of the AML addresses, but does not clearly resolve, these tensions.

### The Antimonopoly Authority (or Antimonopoly Authorities?)

Three central government agencies have asserted leadership over competition policy: the State Administration of Industry and Commerce (SAIC), the National Development and Reform Commission (NDRC), and the Ministry of Commerce (MOFCOM). Each has its own strengths, constituencies, and agenda. The SAIC issues business licenses and administers various commercial laws, including the Anti-Unfair Competition Law, which includes prohibitions on predatory pricing, tying, and bid rigging.<sup>5</sup> In 2004 the SAIC released a controversial report cataloguing the allegedly anticompetitive practices of leading multinationals engaged in China's domestic markets.<sup>6</sup> Meanwhile, the NDRC, a powerful macroeconomic policy body, supervises enforcement by local price bureaus of the 1997 Price Law, which broadly bars collusion and discriminatory or predatory pricing.<sup>7</sup> In 2003 the NDRC issued the Interim Provisions on Preventing Acts of Price Monopoly, cursory measures that read like an outline of the AML.<sup>8</sup> Though the 2003 initiative was stillborn, the NDRC gained visibility in the antitrust field by actively confronting collusion in the food sector in the summer of 2007. MOFCOM, the leading ministry on international trade and investment issues, has taken the lead in drafting the AML and in reviewing mergers involving foreign parties on "antimonopoly" grounds pursuant to the Regulations on the Mergers & Acquisitions of

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<sup>4</sup> The NPC published selected excerpts of the Aug. 24, 2007, discussion on its official Web site in Chinese. Relevant excerpts (and their corresponding URLs) include: "Antimonopoly Law Draft Basically Mature, Proposed to be Put to a Vote," available at <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=371689&pdmc=110106> (visited Sept. 12, 2007); "Identification of Abuse of Dominant Market Position," available at <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=371690&pdmc=110106>; and "Enhancing Supervision of Mergers and Acquisitions, Preventing Abuse of Administrative Power to Exclude and Restrict Competition," available at <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=371691&pdmc=110106>. Unofficial translations available from the author.

<sup>5</sup> See Anti-Unfair Competition Law of the People's Republic of China (promulgated by the Standing Committee of the National People's Congress on Sept. 2, 1993, and effective Dec. 1, 1993), arts. 11 (predatory pricing), 12 (tying), and 15 (bid rigging), available at <http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027909.html>. Translation available by subscription at <http://www.chinalawinfo.com>.

<sup>6</sup> See *Antimonopoly Law to Benefit All*, CHINA DAILY (Jun. 2, 2004), translation available at <http://www1.china.org.cn/English/government/97133.htm> (visited Jun. 17, 2004). The report, entitled *Competition-Restricting Behavior of Multinational Companies in China and Possible Countermeasures*, was issued by the Antimonopoly Division of the Fair Trade Bureau of the SAIC in the SAIC's official publication, *Industry and Commerce Administration*, on March 1, 2004.

<sup>7</sup> See Price Law of the People's Republic of China, (promulgated by the Standing Committee of the National People's Congress on Dec. 29, 1997 and effective May 1, 1998), art. 14.1 (collusion) and 14.2 (predatory pricing), available at [http://www.gov.cn/ziliao/fffg/2005-09/12/content\\_31188.htm](http://www.gov.cn/ziliao/fffg/2005-09/12/content_31188.htm). Translation available by subscription at <http://www.chinalawinfo.com>.

<sup>8</sup> See Interim Provisions on Preventing Acts of Price Monopoly, Order [2003] No. 3 (adopted by the State Planning and Development Commission (SPDC) on June 18, 2003 and effective November 1, 2003), available at [http://www.sdpc.gov.cn/zcfb/zcfbl/zcfbl2003/t20050613\\_6683.htm](http://www.sdpc.gov.cn/zcfb/zcfbl/zcfbl2003/t20050613_6683.htm). Translation available by subscription at <http://www.chinalawinfo.com>. The NDRC was formerly known as the SPDC.

Domestic Enterprises by Foreign Investors, which were provisionally issued in 2003 and revised in 2006.<sup>9</sup>

The NPC sidestepped this controversy through the common Chinese legislative maneuver of charging the State Council with designating the enforcement agency. Article 10 calls for the State Council to designate one or more “antimonopoly authorities of the State Council.”<sup>10</sup> Possible enforcement schemes include: a new independent enforcement authority, likely to draw personnel from various existing agencies; enforcement by a single existing agency; overlapping enforcement authority in different agencies; or enforcement of different provisions by different agencies. The last scenario seems most likely, with MOFCOM continuing to review mergers, the SAIC policing abuses of dominance, and the NDRC’s price bureaus expanding their regulation of cartel activity. Parceling out authority, particularly among rival agencies with separate agendas, raises risks of inconsistent enforcement. Moreover, unless the relationship between the new AML and existing measures is clarified, competing agencies may regulate the same conduct by applying different standards under different rules.

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### Rules Against Administrative Monopoly

Another controversial feature of the enforcement scheme arises from the rules against “administrative monopoly.” Local and provincial authorities routinely act to promote local enterprises or exclude competitors from other regions or countries, and industry regulators are often suspected of favoring certain enterprises (often state-owned) over competitors. Existing measures to combat administrative monopoly have yielded only modest results. While some drafters advocated use of the AML as a new weapon against “administrative monopoly,” others feared policing the bureaucracy would compromise enforcement in the private sector.

In the end, the NPC adopted detailed “administrative monopoly” rules in Chapter V of the AML.<sup>11</sup> These rules apply not to private actors, but to “administrative agencies and organizations empowered by laws or regulations with responsibility for the administration of public affairs.”<sup>12</sup> Article 33 bars several common tactics of local protectionism, such as discriminatory taxes, fees, charges, licensing and inspection requirements, local content requirements, and checkpoints, as well as all “other actions which impede the free flow of products among different regions.” Similarly, Articles 34 and 35 prohibit discrimination against parties from other regions in the public tendering processes and in the approval of new branches or investments. (Chinese law requires most domestic entities to establish branches in the various localities where they do business, so discrimination in approval of new branches is a substantial barrier to entry.) Article 32 prohibits measures compelling the consumption of goods and services from designated providers, and Article 36 prohibits government actors from compelling companies to engage in

<sup>9</sup> See Regulations on the Mergers & Acquisitions of Domestic Enterprises by Foreign Investors (promulgated by the Ministry of Commerce, State-owned Assets Supervision and Administration Commission of the State Council, State Administration of Taxation, SAIC, China Securities Regulatory Commission, and State Administration of Foreign Exchange, Aug. 8, 2006 and effective Sept. 8, 2006) (M&A Rules), arts. 51–54, available at <http://tfs.mofcom.gov.cn/accessory/200612/1164956339653.doc> (visited Oct. 7, 2007). See also Provisional Regulations on the Mergers & Acquisitions of Domestic Enterprises by Foreign Investors (promulgated by the Ministry of Foreign Trade & Economic Cooperation, Mar. 7, 2003 and effective April 12, 2003) (Provisional M&A Rules), arts. 19–22, available at <http://tfs.mofcom.gov.cn/aarticle/date/i/IV/ag/200304/20030400082880.html>. Translation available by subscription at <http://www.chinalawinfo.com>.

<sup>10</sup> See AML, art. 10. The Chinese language does not clearly distinguish singular and plural nouns, so Article 10 allows designation of a single enforcement agency or multiple enforcement agencies.

<sup>11</sup> See AML, arts. 32–37.

<sup>12</sup> See *id.*

monopolistic conduct otherwise prohibited by the AML. Moreover, Article 37 prohibits “abuse of administrative power by” issuing regulations that “eliminate or restrict competition”—a potentially unworkable limitation on administrative power.

Many of these rules, however, simply duplicate existing measures. Moreover, government agencies are responsible for policing their own subordinate departments and offices for violating the AML’s rules against administrative monopoly.<sup>13</sup> As a result, aside from acting as an advocate and watchdog, the antimonopoly authority will lack power to compel compliance by other government agencies.

### State-Dominated and Strategic Industries

To complicate the enforcement climate further, existing industry regulators seek to retain authority over competition within their respective sectors. Indeed, an earlier draft included language that would have granted industry regulators a “right of first refusal” in enforcing the law, authorizing the antimonopoly authorities to step in only when the regulators fail to act. Although this language did not survive, Article 7 calls for special supervision of industries that are “controlled by the state-owned economy and that are critical to the well-being of the national economy and national security” and of sectors involving state-sanctioned exclusive monopolies. The government is to safeguard both the “legitimate activities” of the firms in these industries as well as the “legitimate interests of consumers.” The AML does not identify the sectors carved out for special supervision. Given the prevalence of state ownership in some energy, mining, communications, and manufacturing sectors, Article 7 may, ironically, derail general competition rules in many of the most inefficient sectors of the economy. It may also gut the rules against administrative monopoly in the sectors where they are needed most.

### Antimonopoly Commission

The drafters anticipated the need for interagency policy coordination. Article 9 calls for the establishment of a new “Antimonopoly Commission” to “organize, coordinate, and guide antimonopoly work.” The commission’s functions include research, policy making, coordinating administrative enforcement efforts, and performing other duties assigned by the State Council. The composition of the commission, however, is left to the State Council. Previous drafts of the law suggested that the primary enforcement agencies, key sector regulators, and even “experts” from academia might be included. The Antimonopoly Commission may provide a viable channel for resolving turf disputes—if real political support from higher levels lends credibility and discipline to the process.

The challenges of managing multiple competition authorities are not unique to China. The United States, after all, has two federal antitrust agencies, fifty state attorneys general, and a handful of sector regulators. Mechanisms for resolving jurisdictional disputes in the United States are, however, reasonably transparent and robust (e.g., executive leadership, legislative oversight, and judicial review). The hydraulics of Chinese policy making are far more fluid and opaque, with turf fights often entangled in broader political tussles. Many compelling questions about the AML’s enforcement—from the handicapping of global market leaders to the shielding of vulnerable state-owned enterprises—have not yet been resolved by the government and party leadership. The Antimonopoly Commission might expedite this political process, but it cannot eclipse it. In the long run, the way in which conflicts between the rival antitrust enforcers, sectoral regula-

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<sup>13</sup> See AML, art. 51.

tors, and provincial and local authorities are resolved (or left unresolved) will largely dictate the antitrust agenda in individual cases. In any case, it may be difficult for any government agencies to move forward with the release of implementing regulations and guidelines until the basic enforcement scheme is decided.

### Substantive Provisions

Given the uncertain policymaking and enforcement climate, it is difficult to predict future policy based solely on the final text of the AML. As explained below, the AML incorporates many essential features of prevailing international antitrust practices aimed at promoting consumer welfare while providing ample textual hooks for serving alternate policy goals.

**Market Definition.** Market definition is an implicit first step in applying most of the AML's rules against "monopolistic conduct." Article 12 defines a "relevant market" as the "scope of products and the scope of territory within which undertakings<sup>14</sup> compete with each other within a specific period of time with respect to specific products or services." This captures the basic product and geographic dimensions of market definition under U.S. and EC practice, but it does not necessarily mean that markets will be defined in terms of vulnerability to the exercise of market power using U.S. or EC methods (such as the "hypothetical monopolist" methodology).

**Extraterritoriality.** The AML applies to all "economic activities within the territory of the PRC" and "monopolistic conduct outside the territory of the PRC that has eliminative or restrictive effects on competition in the domestic market of the PRC."<sup>15</sup> It is unclear whether a requirement for "substantial" or "appreciable" effects on China will be read into this standard for extraterritorial jurisdiction.

**Monopoly Agreements.** Chapter II of the AML, inspired by Article 81 of the EC Treaty,<sup>16</sup> prohibits anticompetitive "monopoly agreements" among multiple firms. "Monopoly agreements" are defined to include "agreements, decisions, or other concerted actions that eliminate or restrict competition."<sup>17</sup> Separate articles address horizontal and vertical "monopoly agreements." Article 13 prohibits horizontal agreements "among competing undertakings," specifically including agreements to fix or change prices, limit production or sales volume, divide markets, conduct joint boycotts, or limit the purchase of "new technology or new equipment" or the "development of new technology or products." Article 14 on vertical agreements expressly prohibits two modes of resale price maintenance: specifying resale prices and setting minimum resale prices. In addition, both Article 13 and Article 14 prohibit any other monopoly agreements defined by the enforcement authorities. Though such catch-alls are common in Chinese laws, in the AML they may allow accretion of new principles to keep pace with foreign antitrust trends.

Article 15 allows block exemptions for agreements entered for the purposes of:

- "improving technology, research, and developing new products";
- "improving product quality, reducing costs, enhancing efficiency, unifying product specifications and standards, or implementing specialized division of labor";

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<sup>14</sup> "Undertakings" are defined in Article 12 to include natural persons, juridical persons, and other organizations involved in producing or dealing in goods and services. The relevance of the assets, sales, and activities of affiliates under control of a common "ultimate parent," an element of current MOFCOM practice, remains to be seen.

<sup>15</sup> See AML, art. 2.

<sup>16</sup> See Treaty Establishing the European Community, Feb. 7, 1992, O.J. (C 224) 1 (1992) 1 C.M.L.R. 573 (1992), art. 81.

<sup>17</sup> See AML, art. 13.

- “improving operational efficiency and enhancing competitiveness of small and medium-sized undertakings”;
- “realizing public interests, including, but not limited to, energy conservation, environmental protection, and disaster relief”;
- “alleviating serious decreases in sales volume or distinct production surpluses due to economic depression”;
- “ensuring legitimate interests in foreign trade and foreign economic cooperation”; and
- “other circumstances provided for by laws and the State Council.”

Like Article 81(3) of the EC Treaty, these exemptions are limited to restraints that are intended for the achievement of the exempt objectives, “enable consumers to share fairly” in the benefits of the agreement, and do not “materially restrict competition in the relevant market.”<sup>18</sup> A further requirement under EC practice that the restraints imposed be “indispensable” or necessary to the attainment of the exempt objectives is missing—making the exemptions for crisis cartels, export cartels, and unspecified “public interests” even more worrisome. Without clear blacklisting of hard-core restraints, Article 15 may be used to authorize or forgive gravely anticompetitive conduct.

**Abuse of Dominance.** Chapter III of the AML, modeled on Article 82 of the EC Treaty, addresses abuse of dominance. Article 17 expressly prohibits “undertakings with dominant market positions” from “abusing their dominant market positions.” Dominant market positions are defined as “market positions held by undertakings which are able to control the price, quantity, or other transaction conditions of products in the relevant market or to prevent or affect other undertakings’ entry into the relevant market.”<sup>19</sup>

There are two mechanisms for determining whether or not a firm is dominant. First, dominance may be established through a multi-factor analysis of: the market shares of the dominant firm and its competitors, the dominant firm’s “ability to control” the market, the dominant firm’s financial and technological conditions, barriers to entry, the extent of dependence on the dominant firm by other companies, and “other factors affecting market competition.”<sup>20</sup> Although these factors are vague and somewhat circular, they provide a textual hook for U.S. and EC methods of gauging market power.

Second, dominance may be presumed based solely on the market share of the alleged dominant firm.<sup>21</sup> Any firm with a market share exceeding 50 percent is presumed dominant. Collective dominance is presumed when two undertakings have combined market shares exceeding two-thirds, or three undertakings have combined market shares exceeding three-quarters. A firm with a market share of 10 percent or less will not be deemed dominant, even if the market shares of its largest competitors otherwise trigger presumptions of collective dominance.

Fortunately, the final text confirms that these market-share based presumptions are rebuttable. Recent drafts implied that the presumptions were irrefutable, raising risks that firms might be deemed dominant solely by virtue of high market shares even if they lacked meaningful market power. The final text, however, clarifies that firms that otherwise trigger a presumption of dominance based on market share under Article 19 will not be deemed dominant “if it is proved other-

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<sup>18</sup> See AML, art. 15.

<sup>19</sup> See AML, art. 17.

<sup>20</sup> See AML, art. 18.

<sup>21</sup> See AML, art. 19.

wise.” Alleged dominant firms will have the opportunity—and burden—of demonstrating the lack of market power, presumably using the factors outlined in Article 18.

Article 17 lists illustrative abuses of dominance. Rules against predatory pricing (“selling below cost”), refusals to deal, exclusive dealing, tying, and discrimination are brief, and omit key elements of foreign doctrines. These prohibitions apply only to conduct “without justification”—perhaps inviting “rule of reason” assessment of both the procompetitive and anticompetitive effects of the challenged conduct on a case by case basis. Article 17 also bars dominant firms from “selling products at unfair high prices or buying products at unfair low prices.” Although Article 82(a) of the EC Treaty is similar, Chinese regulators may be more prone than their Brussels counterparts to scrutinize the pricing practices of dominant firms based on intuitions of “fairness” or industrial policy rather than sound economic analysis. Finally, Article 17 also includes a catch-all prohibiting other abuses as defined by the enforcement authorities.

**Review of Concentrations.** Chapter IV outlines a new merger review scheme to replace the skeletal antitrust provisions of the M&A Rules.<sup>22</sup> Although some continuity with current MOFCOM practices is likely, the new merger rules may cure many of their shortcomings. And whereas the existing merger control rules apply only to foreign parties, the AML applies to domestic and foreign parties alike. Although the AML’s merger review scheme is clearly patterned on the European system for review of concentrations, it will be difficult to predict the compliance burden until implementing regulations are released.

Article 20 defines “concentrations” to include mergers of undertakings or acquisitions by one undertaking of control over another undertaking’s “equity or assets” or of “control or capability to exercise decisive influence on other undertakings through contract or other means.”

Article 21 requires the advance reporting of all concentrations that satisfy the notification thresholds set by the State Council and expressly prohibits the consummation of unreported concentrations. The final text, however, does not define the notification thresholds. Earlier drafts contained a battery of alternative thresholds based on the parties’ market shares, assets and income in China and worldwide, and the value of the assets or securities to be acquired through the transaction. Some proposed thresholds deviated from the International Competition Network’s recommended practices by failing to require at least two parties to have a substantial nexus with China and by relying on subjective assessments of market share rather than objective measures such as assets and revenues. (The notification thresholds under the existing merger review rules have been criticized for similar reasons.)

The NPC delegated the task of defining the notification thresholds to the State Council. It remains unclear whether the enforcement authorities will have the power to fine-tune the notification thresholds to exempt transactions that trigger the notification thresholds set by the State Council but nevertheless pose no meaningful risks to competition or consumers in China.

Article 23 outlines basic materials required for a notification, but it leaves the enforcement authority to develop the specific requirements and forms. MOFCOM’s current merger review practices suggest that China will follow the European model. In March 2007, MOFCOM issued Guidelines on Antitrust Filing for Mergers & Acquisitions of Domestic Enterprises by Foreign Investors,<sup>23</sup> which call for parties to provide much of the same information as a European Form CO

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<sup>22</sup> See AML, arts. 20–31.

<sup>23</sup> See Guidelines on Antitrust Filing for Mergers & Acquisitions of Domestic Enterprises by Foreign Investors (issued by the Ministry of Commerce and effective on Mar. 8, 2007), available at <http://tfs.mofcom.gov.cn/aarticle/bb/200704/20070404597464.html>. Translation available by subscription at <http://www.chinalawinfo.com>.

(and in some instances to provide even more data). If these filing requirements survive, acquisitive firms may face high compliance burdens in the future—particularly if the notification thresholds are unduly low or broad.

The AML contemplates a two-stage review process. Upon receipt of a complete notification, the authorities have thirty days to complete a preliminary review.<sup>24</sup> The transaction may proceed if the antimonopoly authority affirmatively approves the transaction or takes no action. If the antimonopoly authority decides to review the transaction further, it must notify the parties in writing before the thirty-day deadline. The review should be completed within ninety days of the decision to conduct a full review.<sup>25</sup> The deadline may be extended up to an additional sixty days with the parties' consent, if the submitted documents are inaccurate or require "further verification" or if "relevant circumstances significantly change" after the initial notification. Thus, the maximum review period is 180 days. The final text is silent on whether these periods refer to business days (as under current antitrust review rules) or calendar days (a more likely view).<sup>26</sup>

Concentrations that may "exclude or restrict competition" are to be blocked or approved subject to restrictive conditions, unless the parties to the transaction "can prove that the positive effects of such concentration on competition obviously outweigh the negative effects" or that "the concentration is in the public interest."<sup>27</sup> Likely competitive effects of concentrations should be evaluated based on: the parties' market shares, the concentration of the relevant market, the effects on "market access and technological progress," the effects on consumers and other relevant enterprises, the "development of the national economy," and "other factors that may affect the market competition" as the enforcement authorities may deem necessary.<sup>28</sup> These provisions may be applied to promote consumer welfare but they may also be applied to serve other industrial policy goals. If the authority prohibits the concentration, it must provide a written explanation of the reasons.<sup>29</sup>

**Intellectual Property.** The antitrust-intellectual property interface remains controversial in the United States and Europe so it is unsurprising that the intersection of China's undernourished intellectual property regime and fledgling antitrust rules will likewise prove controversial. The final text of the AML, however, sheds little light on the authorities' approach to licensing restrictions, patent pools, standard setting, mergers of intellectual property holders, compulsory licensing as a remedy for abusive conduct, and other intellectual property-related antitrust issues. Article 55 simply provides that AML shall not apply to the "exercise of intellectual property rights pursuant to the stipulations in laws and administrative regulations relating to intellectual property" but "shall apply to actions taken . . . to eliminate or restrict competition by abusing intellectual property rights." "Unreasonable" royalties charged by foreign patent holders (particularly in high-tech industries) are a perennial complaint of Chinese industry groups and regulators. Notably, proposed amendments to the Patent Law would explicitly authorize compulsory licensing as a remedy for anticompetitive conduct. If, as some fear, the AML becomes an instrument of industrial policy, licensing practices may be among the early targets. For example, firms deemed "dominant" in a market co-extensive

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<sup>24</sup> See AML, art. 25.

<sup>25</sup> See AML, art. 26.

<sup>26</sup> See AML, art. 25–26.

<sup>27</sup> See AML, art. 28–29.

<sup>28</sup> See AML, art. 27.

<sup>29</sup> See AML, art. 26.

with their intellectual property rights might be threatened with actions for abuse based on their refusal to license or extraction of “unfair high” royalties which the market might otherwise bear. Although specific guidelines on intellectual property issues are expected, they are unlikely to defuse many future controversies over innovation, competition, and industrial policy in China.

**Trade Associations and Farm Cooperatives.** Chinese trade associations have been implicated in a number of recent scandals involving alleged price fixing or market division. In response, the NPC added several last-minute provisions targeting trade associations to the final draft of the AML. Article 11 exhorts industry associations to “strengthen the self-discipline of industries and to lead undertakings within their respective industries to carry out lawful competition and to protect the market competition order.” Article 16 warns that “industry associations shall not organize undertakings within their industries” to violate the rules against monopoly agreements. Article 46 authorizes the antimonopoly enforcement authority to fine trade associations up to RMB 500,000 for engaging in monopolistic conduct and authorizes the social organization registration administration authority to revoke their registrations in “serious” cases. Article 56 exempts certain concerted actions by agricultural enterprises and farmers from the AML.

### Administrative Enforcement and Penalties

The AML will principally be enforced through administrative investigations conducted by the anti-monopoly authorities and the imposition of administrative penalties. Chapter VI grants the anti-monopoly authority substantial investigative powers. Investigations may be initiated based on written complaints including “relevant facts and necessary evidence” from any organization or individual.<sup>30</sup> Chinese civil litigation burdens plaintiffs with the production of relevant evidence with their complaints, though the extent of evidence needed to trigger an investigation remains to be seen. Complainants may, however, remain confidential.<sup>31</sup> The enforcement authority may investigate interested parties and other relevant entities or individuals through on-site inspections (presumably including unannounced “dawn raids”); seizing, copying, or sealing relevant electronic and printed materials; questioning; inquiry into bank accounts; and sealing offices, as necessary.<sup>32</sup> Investigations must be conducted by at least two enforcement officials, written records of the investigation must be maintained, and any commercial secrets disclosed to investigators must be kept confidential.<sup>33</sup> The individuals and entities under investigation are entitled to submit statements and evidence in their defense, and the authorities are to verify any alleged facts, asserted justifications for conduct, and evidence as necessary.<sup>34</sup> If a target of investigation for anticompetitive conduct admits the alleged activities and undertakes to take corrective action within a specified time frame, the authority may suspend the investigation and reduce or waive penalties.<sup>35</sup> If the enforcement authority determines upon investigation that the AML has been violated, it may publish its decision.<sup>36</sup>

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<sup>30</sup> See AML, art. 38.

<sup>31</sup> See AML, art. 38.

<sup>32</sup> See AML, art. 39.

<sup>33</sup> See AML, art. 40–41.

<sup>34</sup> See AML, art. 43.

<sup>35</sup> See AML, art. 45.

<sup>36</sup> See AML, art. 44.

Chapter VII outlines administrative penalties that may be imposed by the antimonopoly authority. Penalties for entering monopoly agreements and abuses of dominance include confiscation of illegal gains, fines of 1 percent to 10 percent of the offenders' total turnover from the preceding year, and orders to cease the offending conduct. The mandatory minimum fines are troubling, particularly since the fines are not limited to turnover from China or from the relevant market. Where concentrations are consummated in violation of the AML, the enforcement authorities may order corrective measures to restore pre-transaction conditions and impose fines up to RMB 500,000.

Inspired by foreign leniency programs, Article 46 provides that participants in monopoly agreements (not limited to horizontal agreements) that report the misconduct and "provide important evidence" to the enforcement authorities may receive reduced penalties or be spared punishment.

### Private Enforcement and Compensation

Though largely neglected in the public debate of the AML, China's judiciary might play a meaningful role in the development of Chinese antitrust. Article 50 opens the door for private judicial enforcement of the AML. It provides that where violations "cause losses to others," the offenders are to "bear civil liabilities according to law"—conventional language used in Chinese legislation to establish a private cause of action in a People's Court. As drafted, Article 50 appears to allow consumers (or competitors) to pursue litigation in Chinese courts and file administrative complaints with the antimonopoly authority simultaneously—raising the risks of inconsistent rulings by the agencies and the courts on the same matter. The Supreme People's Court (SPC) should eventually issue a judicial interpretation of the AML, a quasi-legislative measure guiding lower courts in handling litigation under the new law. Indeed, the SPC might condition private claims on a prior finding by the enforcement authorities that the defendant had violated the AML. The SPC issued a similar interpretation in 2003 conditioning private actions for damages in securities fraud cases on prior determinations of misconduct by the China Securities Regulatory Commission (CSRC) or on prior criminal convictions, and similar requirements appeared in a 2005 draft of the AML.<sup>37</sup> Allowing the antimonopoly authority to act as a gatekeeper for private causes of action may mitigate the risks of inconsistent enforcement. A judicial interpretation might also articulate limitations on standing and damage calculations.

Prospects for adjudication of private antitrust claims raise concerns raise a worrisome question: Are China's courts equipped for antitrust litigation? Chinese plaintiffs seem ready. Sony and Intel have already faced lawsuits in Chinese courts from Chinese plaintiffs asserting antitrust-like claims, and new claimants may emerge after August 1.<sup>38</sup>

### Administrative and Judicial Review

China's judiciary may be involved in reviewing decisions of the antimonopoly authorities. Aggrieved parties may challenge most decisions of the antimonopoly authorities either by apply-

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<sup>37</sup> See Some Provisions of the Supreme People's Court on Trying Cases of Civil Compensation Arising from False Statement in Securities Market, Interpretation [2003] No. 2 (promulgated by the Supreme People's Court on January 9, 2003 and effective February 1, 2003), art. 5, available at <http://www.court.gov.cn/lawdata/explain/civilization/200303200005.htm>. Translation available by subscription at <http://www.chinalawinfo.com>.

<sup>38</sup> See, e.g., *Intel Accused of Monopoly In Beijing Court*, CHINATECHNEWS.COM, Apr. 4, 2005, available at <http://www.chinatechnews.com/2005/04/04/2472-intel-accused-of-monopoly-in-beijing-court/>; see also Roger Parloff, *Sony's China Problem—Will a Lawsuit Against Sony in China Set a Scary Precedent?*, CNNMONEY.COM, Mar. 5, 2007, available at [http://money.cnn.com/magazines/fortune/fortune\\_archive/2007/03/05/8401275/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2007/03/05/8401275/index.htm).

ing for administrative reconsideration (i.e., seeking review by a higher administrative office) or by initiating administrative litigation (i.e., challenging the decision in court). However, any challenge to a decision to prohibit or conditionally approve a concentration must first be brought through administrative reconsideration. Only after a higher administrative organ completes the administrative reconsideration may the aggrieved party resort to the courts through administrative litigation challenging the decision on administrative reconsideration (and, indirectly, the underlying agency decision).<sup>39</sup>

### National Security Review

China's recent initiatives to consider national security when approving foreign investment commanded substantial attention in the domestic and international press. This policy is not new; the 2003 Provisional M&A Rules listed national security as a consideration in the antitrust review of foreign acquisitions of Chinese firms.<sup>40</sup> Responding both to growing unease with penetration of key sectors by foreign investors and to public outrage at the political rebuff of the China National Offshore Oil Corporation's abortive 2005 bid for UNOCAL, the 2006 revisions to the M&A Rules introduced separate requirements for foreign acquisitions of Chinese firms that "result in actual control by the foreign investor" and "involve key industries, have factors imposing or possibly imposing material impact on the economic security of the State, or would result in transfer of actual control in a domestic enterprise which owns any well-known trademarks or Chinese historical brands."<sup>41</sup> MOFCOM, "together with other relevant departments," may act to block, modify or unwind unreported transactions with actual or potential "material impact" on the "economic security of the State." MOFCOM's review procedures remain in flux, and other authorities are rumored to be getting involved in the process.

The AML does not change this situation. Article 31 of the AML provides that where a foreign investor merges with or acquires an enterprise within China or where any other form of concentration "concerns national security," the transaction will be subject to separate review on national security grounds "in accordance with relevant regulations of the State" in addition to the antitrust review under Chapter IV of the AML. Chinese officials have explained that Article 31 simply confirms that the approval of a concentration under the AML would not trump other national security review procedures, much as antitrust clearance of a transaction under the Hart-Scott-Rodino process in the United States does not affect the separate national security review by the Committee on Foreign Investment in the United States.<sup>42</sup> As noted above, Article 7 does not specify the sectors "with a direct bearing on national economic wellbeing and national security" subject to special supervision.

### Implementation Challenges

The good news is that a growing number of Chinese officials and scholars appreciate the complexity of competition policy and the value of experiences from other antitrust jurisdictions. The bad news is that many obstacles to implementing modern competition policies in other transitional economies assume grotesque proportions in China.

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<sup>39</sup> See AML, art. 53.

<sup>40</sup> See Provisional M&A Rules, *supra* note 9, art. 19.

<sup>41</sup> See M&A Rules, *supra* note 9, art. 12.

<sup>42</sup> See generally 50 U.S.C.A. App. § 2170 (2007).

Recruiting and training enough qualified personnel to manage a nationwide antitrust enforcement program—particularly economists specializing in industrial organization—will take time. Snarled regulations and inefficient distribution systems cut many product markets into tiny regional markets, complicating analysis of transactions and practices which, in other markets, might be more straightforward. Simply obtaining accurate data for antitrust analysis may prove difficult—official statistics are notoriously unreliable, and company recordkeeping is often poor, if not fraudulent (to conceal tax evasion). The residual impulse to plan rather than regulate commercial activity remains strong in many government offices, as do the incentives for officials to promote or protect favored enterprises at the expense of consumers. Chinese administrative and judicial traditions do not encourage detailed explanations of decision making, so publication of AML enforcement decisions may provide little prospective guidance for market players—at the risk of chilling activities that would benefit Chinese consumers.

Continued engagement is crucial. Once the antimonopoly authorities have been formally designated, it should be easier for foreign enforcement agencies and intergovernmental agencies to sustain technical assistance programs targeting the right agencies and personnel. Expectations should be realistic—the AML's relevance is likely to vary with the industry, region, and political strength of the parties involved in any given case. It took thirteen years to finalize the AML, and that was the easy part. ●

# Appendix



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## **Anti-Monopoly Law of the People's Republic of China**

*(Adopted by the 29<sup>th</sup> Session of the Standing Committee of the 10<sup>th</sup> National People's Congress on August 30, 2007)*

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## Chapter One General Provisions

Article 1 This law is enacted for the purposes of preventing and prohibiting Monopolistic Conduct, protecting fair market competition, promoting efficiency of economic operation, safeguarding the interests of consumers and the public interests, and promoting the healthy development of the socialist market economy.

Article 2 This law is applicable to Monopolistic Conduct in economic activities within the territory of the People's Republic of China. This law is applicable to Monopolistic Conduct outside the territory of the People's Republic of China that has eliminative or restrictive effects on competition in the domestic market of the People's Republic of China.

Article 3 "Monopolistic Conduct" referred to herein includes:

- (1) conclusion of monopoly agreements by undertakings;
- (2) abuse of dominant market positions by undertakings;
- (3) concentrations of undertakings that have or are likely to have the effect of eliminating or restricting competition.

Article 4 The State shall formulate and implement competition rules suitable for the socialist market economy to improve control of the macro-economy and to strengthen a unified, open, competitive, and orderly market system.

Article 5 Undertakings may implement concentrations in accordance with the law through fair competition and voluntary combination to expand their business scale and to improve their market competitiveness.

Article 6 Undertakings with dominant market positions shall not abuse their dominant market positions to eliminate or restrict competition.

Article 7 With respect to industries that are controlled by the state-owned economy and that are critical to the wellbeing of the national economy and national security, as well as industries in which exclusive operation and exclusive sales are the norm of business in accordance with the law, the State shall protect the lawful business activities of the undertakings in such industries. The State shall regulate and supervise the business activities of such undertakings and regulate the prices of commodities and services provided by such undertakings in accordance with the law so as to protect the interests of the consumers and to promote technological progress.

Undertakings in the industries referred to in the preceding paragraph shall conduct their business in accordance with the law, shall be honest and reputable in their business dealings, and shall maintain strict self-discipline and accept public supervision. They shall not harm the interests of consumers by utilizing their controlling positions or their status as the exclusive provider of certain services or products.

Article 8 Administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs shall not abuse their administrative power to eliminate or restrict competition.

Article 9 The State Council shall establish the Anti-Monopoly Commission which shall be responsible for organizing, coordinating, and guiding the anti-monopoly work. The Anti-Monopoly Commission shall perform the following duties:

- (1) to research and formulate competition policies;
- (2) to organize investigations, assess the overall market competition conditions, and publish the assessment reports;
- (3) to formulate and promulgate anti-monopoly guidelines;
- (4) to coordinate the anti-monopoly administrative enforcement work;
- (5) to undertake other duties as designated by the State Council.

The State Council shall stipulate the composition of and the working rules of the Anti-Monopoly Commission.

Article 10 The authority appointed by the State Council to perform the function of anti-monopoly law enforcement (the “Anti-Monopoly Law Enforcement Authority under the State Council”) shall be responsible for the anti-monopoly law enforcement work in accordance with the provisions of this law.

The Anti-Monopoly Law Enforcement Authority under the State Council may, if there is a practical need to do so, delegate to the corresponding agencies of the People’s Governments at the levels of province, autonomous region and municipality directly under the central government responsibilities of the anti-monopoly law enforcement work in accordance with the provisions of this law, if necessary.

Article 11 The trade associations shall strengthen the self-discipline of industries to lead undertakings within their respective industries to carry out lawful competition and to maintain the order of market competition.

Article 12 “Undertakings” referred to herein mean natural persons, legal persons and other organizations that are engaged in manufacturing or otherwise dealing with commodities, or providing services.

“Relevant Market” referred to herein means the scope of commodities and the scope of territory within which the undertakings compete with each other during a specific period of time with respect to specific commodities or services (collectively “commodities”).

## Chapter Two Monopoly Agreements

Article 13 The following Monopoly Agreements among undertakings with competing relationship shall be prohibited:

- (1) fixing or changing the price of commodities;
- (2) limiting the outputs or sales volume of commodities;
- (3) allocating the sales markets or the raw material purchasing markets;
- (4) restricting the purchase of new technology or new equipment or restricting the development of new products;
- (5) jointly boycotting transactions; or
- (6) other Monopoly Agreements determined by the Anti-Monopoly Law Enforcement Authority under the State Council.

“Monopoly Agreements” referred to herein mean agreements, decisions or other concerted conducts that eliminate or restrict competition.

Article 14 Undertakings are prohibited from entering into Monopoly Agreements with their counter-parties that:

- (1) fix the resale price of commodities sold to third parties;
- (2) limit the minimum resale price of commodities sold to third parties; or
- (3) other Monopoly Agreements determined by the Anti-Monopoly Law Enforcement Authority under the State Council.

Article 15 The provisions of Articles 13 and 14 shall not apply to agreements among undertakings if the undertakings can prove that such agreements fall under any of the following:

- (1) for the purpose of improving technology, researching and developing new products;
- (2) for the purpose of improving the product quality, reducing costs, enhancing efficiency, unifying specifications and standards of products, or implementing division of labor based on specialization;
- (3) for the purpose of improving operational efficiency of small and medium-sized undertakings and enhancing their competitiveness;
- (4) for the purpose of achieving public interests, including, but not limited to, energy saving, environmental protection, and disaster relief;

(5) for the purpose of alleviating serious decreases in sales volume or distinctive production surpluses due to economic depression;

(6) for the purpose of safeguarding legitimate interests in foreign trade and foreign economic cooperation;

(7) other circumstances as stipulated by laws and by the State Council.

If any Monopoly Agreements fall into the circumstances set forth in sub-clauses (1) to (5) above so that the provisions of Articles 13 and 14 are not applicable, the relevant undertakings must also prove that the agreement so concluded will not materially restrict competition in the Relevant Market and that the agreement can allow consumers to share the benefits generated therefrom.

Article 16 The trade associations shall not organize undertakings within their industries to engage in Monopolistic Conduct prohibited under this Chapter.

### **Chapter Three Abuse of Dominant Market Position**

Article 17 Undertakings with dominant market positions are prohibited from abusing their dominant market positions by engaging in the following activities:

(1) selling commodities at unfair high prices or buying commodities at unfair low prices;

(2) selling commodities at prices below cost without any justification;

(3) refusing to transact with counter-parties with respect to a transaction without any justification;

(4) restricting, without any justification, their counter-parties to transact with such undertakings exclusively or to transact with other parties designated by such undertakings exclusively;

(5) engaging in tie-in sales of commodities or imposing other unreasonable conditions with respect to transactions without any justification;

(6) applying differential treatments to counter-parties to transactions who have the same qualifications with respect to transaction price and other transaction terms, without any justification;

(7) other activities that are deemed by the Anti-Monopoly Law Enforcement Authority of the State Council as abusing dominant market positions.

“Dominant Market Positions” referred to herein mean the market positions held by undertakings who are able to control the price or quantity of commodities, or other transaction terms in the Relevant Market or to block or affect the entry of other undertakings into the Relevant Market.

Article 18 A finding that certain undertaking has a Dominant Market Position shall be based on the following factors:

- (1) the market share of the undertaking in the Relevant Market, and the competition conditions in the Relevant Market;
- (2) the ability of the undertaking to control the sales market or the raw material purchasing market;
- (3) the financial resources and the technical capacities of the undertaking;
- (4) the extent to which other undertakings depend on the subject undertaking with respect to relevant transactions;
- (5) the level of difficulty for other undertakings to enter the Relevant Market;
- (6) other factors relating to the determination whether the subject undertaking has a Dominant Market Position.

Article 19 Undertakings may be presumed to have a Dominant Market Position if they satisfy any of the following conditions:

- (1) the market share of one undertaking in the Relevant Market accounts for 1/2;
- (2) the joint market share of two undertakings in the Relevant Market accounts for 2/3; or
- (iii) the joint market share of three undertakings in the Relevant Market accounts for 3/4.

In case of circumstances set forth in the sub-clauses (2) and (3) above, if any of such undertakings has a market share less than 1/10, it shall not be presumed to have a Dominant Market Position.

If an undertaking which is presumed to have a Dominant Market Position presents evidences showing otherwise, it shall not be deemed to have a Dominant Market Position.

#### **Chapter Four Concentration of Undertakings**

Article 20 Concentration of undertakings means the following circumstances:

- (1) a merger of undertakings;
- (2) an acquisition by an undertaking of the control of other undertakings through acquiring equity or assets;
- (3) an undertaking, by contracts or other means, acquiring control of other undertakings or the capability to exercise decisive influence on other undertakings.

Article 21 If a concentration of undertakings meets the thresholds for notification as stipulated by the State Council, the relevant undertakings shall file a notification with the Anti-monopoly Law Enforcement Authority under the State Council in advance. Without filing such a notification, the undertakings shall be prohibited from implementing the concentration.

Article 22 Undertakings are permitted not to file any notification with the Anti-Monopoly Law Enforcement Authority under the State Council if their concentration meets any of the following conditions:

(1) one undertaking participating in the concentration owns more than 50% of the voting shares or assets of each of the other participating undertakings;

(2) more than 50% of the voting shares or assets of every undertaking participating in the concentration are owned by a single undertaking that does not participate in the concentration.

Article 23 When undertakings file a notification of concentration with the Anti-Monopoly Law Enforcement Authority under the State Council, they shall submit the following documents and materials:

(1) the notification;

(2) an statement explaining the impact of the concentration upon the competition conditions of the Relevant Market;

(3) the concentration agreement;

(4) the financial and accounting reports of the undertakings participating in the concentration in the preceding fiscal year, which are audited by accountant firms;

(5) other documents and materials required by the Anti-Monopoly Law Enforcement Authority under the State Council.

The notification shall indicate clearly the name, address and business scope of the undertakings participating in the concentration, the proposed date for implementing the concentration and other matters as stipulated by the Anti-Monopoly Law Enforcement Authority under the State Council.

Article 24 If the documents and materials submitted by undertakings are not complete, undertakings shall file supplementary documents and materials within the time limit specified by the Anti-Monopoly Law Enforcement Authority under the State Council. If the undertakings make no supplementary filing within the specified time limit, it shall be deemed that no notification is filed.

Article 25 The Anti-Monopoly Law Enforcement Authority under the State Council shall conduct a preliminary review of the reporting undertakings, decide on whether to initiate further review, and notify the undertakings in writing of its decision within 30 days from the date of receipt of the documents and materials submitted by the undertakings in accordance with Article 23 hereof. The undertakings shall not implement the concentration

before the Anti-Monopoly Law Enforcement Authority under the State Council makes its decision.

The undertakings may implement the concentration if the Anti-monopoly Law Enforcement Authority under the State Council decides not to initiate further review or makes no decision within the time limit.

Article 26 If the Anti-monopoly Law Enforcement Authority under the State Council decides to initiate further review, it shall complete the review within 90 days from the date of the decision, decide whether to prohibit the concentration of the undertakings and notify the undertakings in writing thereof; in case of a decision to prohibit the concentration of undertakings, it shall explain its reasons. Undertakings shall not implement the concentration during the review period.

Under any of the following circumstances, the Anti-monopoly Law Enforcement Authority under the State Council may extend the time limit for the review set forth in the above paragraph by giving a written notice to the undertakings, provided that the extension shall not exceed 60 days at the maximum:

- (1) the undertakings agree to extend the time limit for the review;
- (2) the documents or materials submitted by the undertakings are inaccurate and need further verification; or
- (3) material changes have occurred with respect to relevant circumstances since the undertakings filed the notification.

If the Anti-monopoly Law Enforcement Authority under the State Council makes no decision within the time limit, the undertakings may implement the concentration.

Article 27 The following factors shall be taken into consideration in the review of the concentration by undertakings:

- (1) the market shares of undertakings participating in the concentration in the Relevant Market and their ability to control of the market;
- (2) the degree of concentration in the Relevant Market;
- (3) the effect that the concentration of undertakings may have on market access and technological progress;
- (4) the effect that the concentration of undertakings may have on consumers and other relevant undertakings;
- (5) the effect that the concentration of undertakings may have on the development of the national economy;
- (6) other factors affecting the market competition that the Anti-Monopoly Law Enforcement Authority under the State Council deems relevant shall be taken into consideration.

Article 28 The Anti-Monopoly Law Enforcement Authority under the State Council shall make a decision to prohibit a concentration of undertakings if such concentration has or may have the effect of eliminating or restricting competition. However, the Anti-Monopoly Law Enforcement Authority under the State Council may decide not to prohibit a concentration if the undertakings can prove that the positive effects of such concentration on the competition obviously outweigh its negative effects or that the concentration is in the public interest.

Article 29 If the Anti-Monopoly Law Enforcement Authority under the State Council does not prohibit the concentration of undertakings, it may decide to impose restrictive conditions to reduce the adverse effects the concentration may have on competition.

Article 30 The Anti-Monopoly Law Enforcement Authority under the State Council shall publicize in a timely manner its decisions to prohibit the concentration of undertakings or to impose restrictive conditions on the concentration of undertakings.

Article 31 If the merger with or acquisition of domestic enterprises by foreign investors or other forms of concentration involving foreign investors concerns national security, in addition to the review of concentration of undertakings in accordance with the provisions of this Law, it shall be examined for national security review in accordance with relevant regulations of the State.

## **Chapter Five Abuse of Administrative Power to Eliminate or Restrict Competition**

Article 32 Administrative agencies and organizations empowered by laws and regulations to have the function of administering public affairs shall not abuse their administrative powers to require or require in a disguised form organizations or individuals to deal in, purchase or use the commodities supplied by the undertakings designated by them.

Article 33 Administrative agencies and organizations empowered by laws and regulations to have the function of administering public affairs shall not abuse their administrative powers and take any of the following actions to hinder the free flow of commodities among different regions:

(1) to charge discriminatory fees under separate fee categories or at different rates, or fix discriminatory prices for commodities originated from other regions;

(2) to impose on commodities originated from other regions technical requirements or inspection standards different from those applied to similar local commodities, or cause commodities originated from other regions to be subject to discriminatory technical measures such as duplicate inspection or certification, so as to restrict the entry of commodities originated from other regions into the local markets;

(3) to implement special administrative licensing measures applicable only to commodities originated from other regions, so as to restrict the entry of commodities originated from other regions into the local markets;

(4) to set up checkpoints or take other measures to block the entry of commodities originated from other regions or the flow of local commodities out of the region;

(5) other actions that may impede the free flow of commodities among different regions.

Article 34 Administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs shall not abuse their administrative powers to exclude or restrict the participation of undertakings from other regions in local bidding activities by means such as prescribing discriminatory qualification requirements or standards or by not publishing information according to law.

Article 35 Administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs shall not abuse their administrative powers to exclude or restrict investment in their region or establishment of branches or subsidiaries in their region by undertakings from other regions, by applying means such as treatment not equal to what local undertakings are entitled to.

Article 36 Administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs shall not abuse their administrative powers to compel undertakings to engage in any Monopolistic Conduct set forth hereunder.

Article 37 Administrative agencies shall not abuse their administrative powers to make regulations that contain provisions eliminating or restricting competition.

## **Chapter Six Investigation of Suspected Monopolistic Conduct**

Article 38 The Anti-Monopoly Law Enforcement Authority shall investigate suspected Monopolistic Conducts in accordance with the law.

Any organization or individual shall have the right to report any suspected Monopolistic Conduct to the Anti-Monopoly Law Enforcement Authority. The Anti-Monopoly Law Enforcement Authority shall maintain the confidentiality for the reporting organization or individual.

The Anti-Monopoly Law Enforcement Authority shall conduct necessary investigation if the report is in writing and includes relevant facts and evidence.

Article 39 When conducting investigations of the suspected Monopolistic Conduct, the Anti-Monopoly Law Enforcement Authority may take the following measures:

(1) entering into business premises of the undertaking being investigated or other relevant places for inspection;

(2) questioning the undertakings being investigated, interested parties, and other relevant organizations or individuals, requesting them to clarify the relevant facts and circumstances;

(3) examining or copying relevant documents, agreements, accounting books, business correspondence, electronic data and other materials of the undertakings being investigated, interested parties, and other relevant organizations or individuals;

(4) sealing or seizing relevant evidence;

(5) making inquiries about the bank accounts of the undertakings.

Measures as stipulated in the foregoing paragraph may be implemented only after a written report has been submitted to the principal responsible persons of the Anti-Monopoly Law Enforcement Authority and the relevant approval has been obtained.

Article 40 Investigations of suspected Monopolistic Conduct by the Anti-Monopoly Law Enforcement Authority shall be carried out by at least two enforcement officers and such officers shall present law enforcement certificates.

The enforcement officers shall maintain written records of their inquiries and investigations. Such written records shall be signed by the persons questioned or investigated.

Article 41 The Anti-Monopoly Law Enforcement Authority and its staff shall keep confidential commercial secrets obtained during the course of law enforcement.

Article 42 The undertakings being investigated, interested parties, or other relevant organizations or individuals shall cooperate with the Anti-Monopoly Law Enforcement Authority with respect to the performance of its functions in accordance with the Law and shall not refuse or hinder the investigation by the Anti-Monopoly Law Enforcement Authority.

Article 43 The undertakings being investigated and interested parties shall have the right to state their opinions. The Anti-Monopoly Law Enforcement Authority shall verify the facts, justifications and evidence presented by the undertakings being investigated and interested parties.

Article 44 After investigating and verifying the suspected Monopolistic Conduct, if the Anti-Monopoly Law Enforcement Authority determines that such conduct constitutes Monopolistic Conduct, it shall make a decision in accordance with the law and may publicize the decision to the public.

Article 45 With respect to a suspected Monopolistic Conduct being investigated by the Anti-Monopoly Law Enforcement Authority, if the undertakings being investigated commit themselves to take specific measures within the time limit approved by the Anti-Monopoly Law Enforcement Authority to eliminate the effects of such Monopolistic Conduct, the Anti-Monopoly Law Enforcement Authority may decide to suspend the investigation. The decision to suspend the investigation shall expressly state the specific commitment made by the undertakings being investigated.

If the Anti-Monopoly Law Enforcement Authority decides to suspend the investigation, it shall monitor the undertakings' performance of their commitments. If the

undertakings have fulfilled their commitments, the Anti-Monopoly Law Enforcement Authority may decide to terminate the investigation.

The Anti-Monopoly Law Enforcement Authority shall resume the investigation if one of the following circumstances occurs:

- (1) the undertakings fails to fulfil their commitments;
- (2) material changes have occurred with respect to the facts based on which the decision to suspend the investigation was made;
- (3) the decision to suspend the investigation was made based on incomplete or untrue information provided by the undertakings.

## **Chapter Seven Legal Liabilities**

Article 46 If the undertakings conclude and implement Monopoly Agreements in violation of relevant provisions of this Law, the Anti-Monopoly Law Enforcement Authority shall order the undertakings to stop such illegal act, confiscate their illegal gains and impose fines of more than 1% and less than 10% of their sales in the preceding year; if the Monopoly Agreement has not been implemented, fines of less than RMB500,000 may be imposed.

If the undertakings, on their own initiative, report to the Anti-Monopoly Law Enforcement Authority information concerning the conclusion of Monopoly Agreements and provide important evidence, the Anti-Monopoly Law Enforcement Authority may reduce the penalty imposed or grant exemption from penalty after weighing the relevant circumstances.

If trade associations organize undertakings within their respective industries to conclude Monopoly Agreements in violation of this Law, the Anti-Monopoly Law Enforcement Authority may impose a fine of no more than RMB500,000; if the circumstances are serious, the authority in charge of registration and administration of social organizations may revoke the registration of the trade organizations in accordance with the law.

Article 47 If the undertakings abuse their Dominant Market Positions in violation of relevant provisions of this Law, the Anti-Monopoly Law Enforcement Authority shall order the undertakings to stop such illegal act, confiscate their illegal gains and impose a fine of more than 1% and no less than 10% of their sales in the preceding year.

Article 48 If the undertakings implement the concentration in violation of relevant provisions of this Law, the Anti-Monopoly Law Enforcement Authority under the State Council shall order the undertakings to stop implementing the concentration, dispose of equity or asset within a specified time limit, transfer their business within a specified time limit or take other necessary measures to revert to the condition of the undertakings before the concentration and may impose a fine of no more than RMB500,000.

Article 49 The Anti-Monopoly Law Enforcement Authority shall take into consideration the nature, extent and duration of the illegal act and other factors in

determining the specific amount of the fines set forth in the Articles 46, 47 and 48 of this Law.

Article 50 Undertakings that cause loss to others as a result of their Monopolistic Conduct shall be liable for civil liabilities in accordance with the laws.

Article 51 If administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs abuse their administrative power and engage in activities eliminating or restricting competition, their superior authority shall order them to make correction; the chief officer directly responsible and other persons who are directly responsible shall be subject to disciplinary sanctions in accordance with the law. The Anti-Monopoly Law Enforcement Authority may propose to the relevant superior authority as to how to address the issue in accordance with the laws.

If there are other provisions in laws and administrative regulations concerning the regulation of actions eliminating or restricting competition that are taken by administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs that abuse their administrative powers, such other provisions shall prevail.

Article 52 If any individual or organization refuses to provide relevant materials or information, or provide false materials or information, or conceal, destroy or remove evidence, or take other action to refuse or hinder the investigation conducted by the Anti-Monopoly Law Enforcement Authority in accordance with the law, the Anti-Monopoly Law Enforcement Authority shall order such individual or organization to make correction. the Anti-Monopoly Law Enforcement Authority may impose a fine of less than RMB20,000 on individuals or a fine of no more than RMB200,000 on organizations; if the circumstances are serious, a fine of more than RMB20,000 and less than RMB100,000 may be imposed on individuals and a fine of more than RMB200,000 and less than RMB1,000,000 on organizations; if any conduct constitutes a criminal offence, the relevant individual or organization shall be prosecuted for criminal liability in accordance with the law.

Article 53 If any individual or organization objects to the decision made by the Anti-Monopoly Law Enforcement Authority in accordance with Articles 28 and 29 hereof, they may first apply for administrative review in accordance with the law; if they object to the decision of the administrative review, they may file an administrative lawsuit in accordance with the law.

If any individual or organization objects to decisions made by the Anti-Monopoly Law Enforcement Authority other than those specified in the preceding paragraph, they may apply for administrative review or file an administrative lawsuit in accordance with the law.

Article 54 Any staff of the Anti-Monopoly Law Enforcement Authority who abuse their powers, fail to fulfil their duties, conduct irregularities for personal gains, or disclose commercial secrets obtained in the course of law enforcement shall be prosecuted for criminal liabilities in accordance with the law if their conducts constitute criminal offences, or shall be subject to disciplinary sanctions in accordance with the law if their conducts do not constitute criminal offences.

## **Chapter Eight Supplementary Provisions**

Article 55 This law shall not apply to Undertakings' conducts that are exercising their intellectual property rights in accordance with the provisions of laws and administrative regulations relating to intellectual property rights. However, this law shall apply to Undertakings' conducts that eliminate or restrict competition by abusing their intellectual property rights.

Article 56 This law shall not apply to the alliance among or concerted actions by farmers and the farmers' economic organizations in connection with the production, processing, sales, transportation, and storage of agricultural products and other business activities related to agricultural products.

Article 57 This law shall become effective as of August 1, 2008.