

Chinese Antitrust—Act II, Scene 1

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Two months have passed since China's first comprehensive competition law, the Antimonopoly Law (AML), took effect.¹ No earth-shattering enforcement actions have been announced so far, and many governmental and commercial practices that have been decried as anticompetitive persist. Awareness of antitrust issues at home and abroad is, however, spreading among Chinese firms and Chinese consumers. The first concrete implementing measures to flesh out the new enforcement structure have been issued, and the first high-profile test cases for the new regime are simmering. The stage is set for a lengthy but lively second act in the drama of modern Chinese competition policy.

A Synopsis of Act I

Act I lasted thirteen years—not counting the prologue of tentative proposals for Chinese antitrust laws in the late 1980s.² The AML's drafting officially commenced in 1994 with the formation of a working group of officials and academics, but progress was sporadic.³ Meanwhile, China's transition from central planning to greater reliance on market forces profoundly altered China's economy and regulatory institutions. Accession to the World Trade Organization (WTO) in 2001 spurred the drafters on, as Chinese officials tasked with opening markets and reforming regulatory practices looked to competition policy as a "valid" instrument for intervening in the marketplace.

The legislative endgame began with the AML's submission to the National People's Congress (NPC) in 2006. By that time, policymakers had largely moved beyond preoccupation with WTO accession to focus on strengthening the role of China and Chinese firms in the global economy while staving off risks of domestic discord. The curtain fell on Act I with the promulgation of the Antimonopoly Law by the Standing Committee of the 10th National People's Congress on August 30, 2007.

Key plot elements for Act II have already been introduced. Antitrust straddles many of the tensions facing Chinese policymakers today: between old habits of central planning and greater faith in market forces; between safeguarding the central role of state-ownership and further loosening the restraints on private enterprise; between promoting world-class "national champions" in key sectors and shielding smaller firms from larger, often more efficient competitors; between the commercial interests of state-owned enterprises and the demands of China's increasingly vocal con-

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¹ See Zhonghua Renmin Gongheguo Fanlongduan Fa [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), available at <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=371229&pdmc=11006>. An unofficial English translation is available as an appendix to Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, ANTITRUST SOURCE, Oct. 2007, <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf>. References and quotations herein are based on this English translation.

² See Youngjin Jung & Qian Hao, *The New Economic Constitution in China: A Third Way for Competition Regime?*, 24 Nw. J. INT'L L. & Bus. 107, 112 (2003).

³ See Wang Xiaoye, *Issues Surrounding the Drafting of China's Anti-Monopoly Law*, 3 WASH. U. GLOBAL STUDIES L. REV. 285, 285 (2004).

sumers; between harnessing the gains from foreign investment and foreign trade and insulating sensitive sectors from foreign influence; and between the de jure primacy of the central government and the de facto independence of many local authorities.

There is no clear consensus within China's establishment on how to resolve these tensions. A nucleus of antitrust-savvy officials and scholars view competition policy as a means of promoting consumer welfare and economic efficiency through competitive markets.⁴ (Some within this group, admittedly, support the protection of small- and medium-size enterprises as a freestanding antitrust policy goal.) Officials more removed from the drafting efforts, however, tend to view competition policy as a complement or instrument of industrial policy. Different passages of the AML reflect these competing viewpoints.

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The extent to which Chinese antitrust policy will actually converge with prevailing international practices remains uncertain. As explained elsewhere, the AML rules against “monopolistic conduct” by “business operators” cover much of the same ground as foreign competition laws; most substantive provisions derive from practices in the European Union, United States, Germany, Japan, and other jurisdictions.⁵ Largely following European practice, it prohibits anticompetitive agreements and concerted practices among multiple firms as “monopoly agreements” and confronts unilateral conduct by prohibiting “abuse of dominance.” The AML also establishes new procedures for reviewing mergers, acquisitions, and other “concentrations” on competition grounds. In addition, the AML addresses “administrative monopoly”—the anticompetitive misuse of governmental power to protect or promote favored enterprises. Although the AML imports many general concepts from foreign antitrust laws, it is unclear whether Chinese competition authorities will also embrace the nuances of these doctrines. Much depends on the capabilities and motivations of China's new competition authorities.

Casting the Enforcement Agencies

Among the most contentious issues in the drafting of the AML was determining how to allocate enforcement authority. The three principal contenders included the Ministry of Commerce (MOFCOM), the State Administration of Industry and Commerce (SAIC), and the National Development and Reform Commission (NDRC). Each staked its claim to antitrust leadership on different areas of policymaking and enforcement experience, and each boasted distinct strengths, constituencies, and agendas.

MOFCOM was created in 2003 through the consolidation of the State Economics and Trade Commission and the Ministry of Foreign Trade and Economic Cooperation (MOFTEC). MOFCOM's portfolio includes broad authority over international trade and investment issues and over many domestic commercial matters. MOFCOM led the review of transactions on “antimonopoly” grounds pursuant to the Regulations on the Mergers & Acquisitions of Domestic Enterprises by Foreign Investors (M&A Rules).⁶ These measures, first released in 2003 and overhauled in 2006,

⁴ See, e.g., Wang Xiaoye, Challenges in Enforcing Chinese Antimonopoly Law—The Conflicting Goals of the Law, Presented at the Third Annual Asia Competition Forum 2 (Dec. 11, 2007) (on file with the author).

⁵ See Bush, *supra* note 1 (analyzing the text of the AML).

⁶ See Guanyu Waiguo Touzizhe Binggou Jingnei Qiye de Guiding [Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors], (promulgated by Ministry of Commerce, State Owned Asset Supervision and Administration Commission, State Administration of Taxation, State Administration of Industry and Commerce, China Securities Regulatory Commission and State Administration of Foreign Exchange on Aug. 8, 2006 and effective on Sept. 8, 2006), available at http://www.legaldaily.com.cn/misc/2006-08/29/content_397421.htm. (Translation available by subscription at <http://www.chinalawinfo.com>.)

sketch out procedures for reviewing certain “mergers/acquisitions of domestic enterprises by foreign investors” and for “offshore mergers and acquisitions.”⁷ Despite widespread confusion as to the requirements (and skepticism as to their relevance), MOFCOM gradually ramped up its merger review efforts. In 2004, MOFCOM organized a new Antimonopoly Office to review mergers and coordinate MOFCOM’s central involvement in the drafting of the AML. By the end of 2007, MOFCOM had reviewed over 400 notified transactions. MOFCOM has also been the primary interlocutor in government-to-government exchanges on competition policy, and most of the Chinese officials who have closely studied foreign competition practices are MOFCOM personnel. MOFCOM is not, however, structured as an investigative agency, and its provincial and local commerce bureaus do not have antimonopoly departments.

The SAIC is a ministry-level organization charged with administering various commercial regulations. It operates through provincial and local Industry and Commerce Administrations (AICs). Although the SAIC also received merger notifications pursuant to the M&A Rules, it assumed a more passive “archival” role. The SAIC’s credentials as an antitrust enforcement agency rest more on its experience enforcing the Anti-Unfair Competition Law.⁸ Most of this enforcement activity involves rules against commercial bribery and deceptive trade practices; the “antitrust” provisions are largely toothless. The SAIC has, however, emphasized its record of enforcing the Anti-Unfair Competition Law’s rules against state-sanctioned monopolies and government agencies that compel consumers to trade with designated firms and against government entities that exclude products from other regions.⁹ In a December 13, 2007 speech, SAIC Vice-Minister Zhong Youping trumpeted the SAIC’s investigation of 6,479 compulsory trading cases involving the power, mail, telecommunications, insurance, banking, gas, tobacco, and salt industries and of 490 cases involving local protectionism.¹⁰ Despite this experience as an investigative and enforcement agency, the SAIC’s current role does not encompass significant economic analysis or economic policymaking.

The NDRC is a powerful macro-economic planning body with broad authority over nationwide industrial policy and economic policy. The NDRC also administers the Price Law, which enables the NDRC to issue guidance or controls for prices of certain products while prices for other products are left to the market.¹¹ The Price Law also prohibits certain “abnormal pricing behaviors,” including price fixing, predatory pricing, and price discrimination. In 2003, the NDRC issued the

⁷ See Waiguo Touzizhe Binggou Jingnei Qiye Zanxing Guiding [Provisional Regulations Regarding Mergers and Acquisitions of Domestic Enterprises by Foreign Investors], (promulgated by Ministry of Foreign Trade and Economic Cooperation, State Administration of Taxation, State Administration of Industry and Commerce, and State Administration of Foreign Exchange on Mar. 13, 2003 and effective on Apr. 12, 2003), available at <http://tfs.mofcom.gov.cn/aarticle/date/i/s/200509/20050900366385.html>. (Translation available by subscription at <http://www.chinalawinfo.com>.)

⁸ See Zhonghua Renmin Gongheguo Fanbuzhengdang Jingzheng Fa [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 on Dec. 1, 1993), available at <http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027909.html>. (Translation available by subscription at <http://www.chinalawinfo.com>.)

⁹ See *id.*, arts. 6–7.

¹⁰ See Zhong Youping zai Fanlongduan Zhifa Guoji Yantaohui shang Zhichu Gongshang Bumen Yifa Kaizhan Jingzheng Zhifa Qude Jiji Chengxiao [Statement by Zhong Youping at the International Symposium on Antitrust Law Enforcement that AICs’ Enforcement of Competition Rules Has Achieved Positive Results] (Dec. 15, 2007), available at http://www.saic.gov.cn/zwxqx/zwdt/gsyw/zjyw/t20071218_28643.htm.

¹¹ See Zhonghua Renmin Gongheguo Jiage Fa [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 on May 1, 1998), available at http://www.gov.cn/ziliao/tf/g/2005-09/12/content_31188.htm. (Translation available by subscription at <http://www.chinalawinfo.com>.)

Interim Price Monopoly Rules, which read like a rough draft of the AML provisions on monopolistic agreements and abuse of dominance.¹² These measures were largely unenforced. However, as the Chinese government became increasingly concerned with inflation in mid-2007, the NDRC responded vigorously to allegations of collusion in regional food markets. In January 2008, the State Council increased the penalties for collusion to fix or increase prices.¹³

The State Council did not rush to name the enforcement authorities—arguably with sound reason. In March 2008, the five-year term of the 10th NPC ended and the 11th NPC began its own five-year term. The last NPC transition triggered a major restructuring of the central government, including the consolidation of the SETC and MOFTEC into MOFCOM. Advocates of a unified enforcement structure hoped a new round of reorganization would lead to a single enforcement agency, or at least alleviate the turf battle. While some ministries were consolidated, MOFCOM, the SAIC, and the NDRC all survived (although the expansion of the Ministry of Industry and Information Technology siphoned away some power from the NDRC).

As August 1 approached, a series of organizational notices unveiled the new enforcement scheme. The State Council opted for a division of authority roughly tracking the existing responsibilities of MOFCOM, the NDRC, and the SAIC.

- MOFCOM formed a new Antimonopoly Bureau, essentially elevating the stature of the former Antimonopoly Office within the ministry.¹⁴ The new Bureau is responsible for reviewing mergers under the AML, building on its experience reviewing mergers involving foreign parties reported under the M&A Rules. It is also responsible for coordinating bilateral and multilateral cooperation on competition policy issues. Somewhat paradoxically, MOFCOM is also responsible for guiding Chinese parties participating in antitrust proceedings overseas. While support for exporters ensnared in foreign antidumping proceedings might make sense, support for firms facing antitrust charges may compromise MOFCOM's ability to cooperate with its foreign peers in cartel investigations.
- The SAIC is now responsible for enforcing the rules against monopoly agreements and abuse of dominance—except for price-related conduct. The SAIC's new Antimonopoly and Anti-Unfair Competition Enforcement Bureau is expected to expand the SAIC's current program for enforcing the Anti-Unfair Competition Law to include AML enforcement.¹⁵

¹² See Zhizhi Jiage Longduan Xingwei Zanxing Guiding [Interim Provisions on Preventing Acts of Price Monopoly], Order [2003] No. 3 (adopted by the State Planning and Development Commission on June 18, 2003 and effective on Nov. 1, 2003), available at http://www.sdpc.gov.cn/zcfb/zcfbl/zcfbl2003/t20050613_6683.htm. (Translation available by subscription at <http://www.chinalawinfo.com>). The State Planning and Development Commission was restructured and renamed the NDRC during the same 2003 government reorganization which created MOFCOM.

¹³ See Guowuyuan Guanyu Xiugai Jiage Weifa Xingwei Xingzheng Chufa Guiding de Jueding [Decision of the State Council on Revision of Provisions on Administrative Punishment of Price-Related Violations] (Jan. 13, 2008).

¹⁴ See Shangwubu Zhuyao Zhizhe Neishe Jigou he Renyuan Bianzhi Guiding [Regulation on Major Duties of the Internal Structure and Staffing Requirements of Ministry of Commerce], issued on Aug. 23, 2008, art. 3 (11), available at http://www.china.com.cn/policy/zhuanti/xbwzj/2008-08/24/content_16316678.htm.

¹⁵ See Guowuyuan Bangongting Guanyu Yinfa Guojia Gongshang Xingzheng Guanli Zhongju Zhuzhao Zhizhe Neishe Jigou he Renyuan Bianzhi Guiding de Tongzhi [Office of the State Council Issued the Notice on the Major Duties of the Internal Structure and Staffing Requirements of State Administration for Industry and Commerce], issued on July 11, 2008, available at http://www.saic.gov.cn/zwxqx/zwdt/zyfb/t20080725_43236.htm.

- The NDRC is now responsible for addressing price-related violations of the AML rules against monopoly agreements and abuse of dominance.¹⁶ These duties fall to the Price Supervision Department, which currently administers the Price Law.

Ironically, the May 2002 draft of the AML anticipated this eventual compromise; it assigned merger review and administrative monopoly issues to MOFCOM's predecessor, MOFTEC, assigned the rules against "price agreements" and collusion to the State Planning and Development Commission (now the NDRC), and assigned the remaining rules against monopoly agreements and abuse of dominance to the SAIC.

This division of authority heightens concerns about inconsistent enforcement and policy coordination. Distinguishing "price-related" violations and "non-price" violations may prove unworkable. Where a single course of anticompetitive conduct combines pricing practices with other non-price measures, it is unclear whether and how the SAIC and NDRC will coordinate their investigations. Conceptually, it may often be difficult to distinguish explicit "price-related" violations and "non-price" violations with equivalent economic effects. Overlaps between the Anti-Unfair Competition Law, the Price Law, and other measures compound these risks, particularly with respect to price-related violations of the Anti-Unfair Competition Law.

More importantly, MOFCOM, the SAIC, and the NDRC may embrace divergent views of the proper goals of antitrust and its role in the Chinese government's overall agenda. Some dissonance is perhaps inevitable in any scheme involving multiple enforcement agencies, as illustrated by recent differences between the U.S. Federal Trade Commission and the Department of Justice Antitrust Division concerning unilateral conduct.¹⁷ The Chinese enforcement authorities, however, may clash on even more fundamental goals and tools of antitrust. Different approaches to defining markets, gauging market power, and weighing the interests of consumers and competitors when applying the many "public interest" exceptions of the AML may lead to inconsistent, if not contradictory results.

To mitigate these risks, the AML calls for the establishment of a new interagency Antimonopoly Commission to coordinate policymaking. China has over a dozen such "advisory and coordinating bodies" to handle issues cutting across ministries. Official media recently confirmed the appointment of Vice Premier Wang Qishan, whose portfolio also includes trade and financial policy, to head the Commission. With robust political support, the Antimonopoly Commission might reconcile the enforcement programs of the three primary enforcement agencies and resolve clashes with other ministries' own priorities.

The Antimonopoly Bureau of MOFCOM has been designated to serve as the secretariat for the Antimonopoly Commission. This may enable MOFCOM to infuse lessons from the last several years of engagement with foreign authorities, scholars, and practitioners into the enforcement decisions of the SAIC and NDRC.

Although the AML focuses on administrative enforcement, it also authorizes judicial enforcement through private actions for damages. The Supreme People's Court (SPC) issued a circular on July 31, 2008, exhorting People's Courts at all levels to study the new AML and stressing the compli-

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¹⁶ See Guojia Fazhan he Gaige Weiyuanhui Zhuyao Zhizhe Neishe Jigou he Renyuan Bianzhi Guiding [Regulation on Major Duties of the Internal Structure and Staffing Requirements of National Development and Reform Commission], issued on Aug. 22, 2008, art. 3 (23), available at http://www.ndrc.gov.cn/gzdt/t20080821_231802.htm.

¹⁷ See Press Release, Federal Trade Comm'n, FTC Commissioners React to Department of Justice Report, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (Sept. 8, 2008), available at <http://www.ftc.gov/opa/2008/09/section2.shtm>.

cated blend of legal and economic issues in competition cases. The SPC also assigned cases involving claims under the AML to the courts that handle intellectual property cases. Although the SPC normally issues quasi-legislative “judicial interpretations” fleshing out the substantive and procedural aspects of new laws, no formal judicial interpretations of the AML have yet been issued. Future interpretations might condition actions for damages on a prior finding of a violation by an enforcement agency. At this point, however, the doors to Chinese courts remain open.

A Tale of Two Rulemakings

On November 24, 2007, Cheng Siwei, Vice-Chairman of the Standing Committee of the NPC, announced that over twenty subsidiary regulations would be forthcoming before August 1, 2008.¹⁸ As of July 31, 2008, no final implementing regulations had come forth. On August 1, 2008, the State Council adopted the Rules of the State Council on Notification Thresholds for Concentrations of Undertakings (Notification Threshold Rules).¹⁹ No other implementing measures have been circulated in draft for public comment or formally issued, and the pace of further rulemaking remains uncertain. The NDRC has, however, reportedly drafted new regulations concerning price-related monopolistic conduct that await State Council approval.²⁰ The course of these two rulemaking initiatives may suggest the path of future implementing measures.

The Notification Threshold Rules debuted on March 27, 2008, when the Legislative Affairs Office of the State Council released draft Rules of the State Council on Notifications of Concentrations of Undertakings (Draft Notification Rules) for public comment.²¹ An unofficial draft of these measures had circulated several weeks beforehand. The Draft Notification Rules tackled many procedural issues left open by the AML: the definition of “concentration,” the designation of the parties responsible for notifying transactions, the handling of “incomplete notifications” and the commencement of the review period, the duty to update notifications, confidentiality, and translation requirements. Nevertheless, commentators readily pointed out areas where the Draft Notification Rules deviated from prevailing international practices or left crucial questions unanswered.²² The State Council whittled the nineteen articles of the Draft Notification Rules down to five brief articles in the Notification Threshold Rules adopted on August 1, 2008. It remains to be seen whether any of the omitted articles of the Draft Notification Rules resurface in future measures or how MOFCOM will eventually deal with the underlying issues.

Even though many questions remain, the new Notification Threshold Rules bring China’s merger review scheme closer to the international mainstream. First and foremost, the final rules omit a previous proposal requiring notification of transactions that would “result in one undertaking hav-

¹⁸ See *Beijing Drawing Up New Rules on Foreign Buyouts*, SOUTH CHINA MORNING POST, Nov 27, 2007.

¹⁹ See Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaozhun de Guiding [Rules of the State Council on Notification Thresholds for Concentrations of Undertakings], (adopted and effective on Aug. 1, 2008), available at http://www.gov.cn/zwgk/2008-08/04/content_1063769.htm.

²⁰ See *State Council Established Antimonopoly Law Commission*, BEIJING NEWS, Aug. 2, 2008, <http://www.thebeijingnews.com/economy/2008/08-02/011@073825.htm>.

²¹ See Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao de Guiding (Zhengqiu Yijian Gao) [Draft Rules on Notification of Concentrations of Undertakings Issued by the State Council] (released by the Legislative Affairs Office of the State Council on Mar. 27, 2008), available at http://www.china.com.cn/finance/txt/2008-03/28/content_13777686_2.htm.

²² See, e.g., AMERICAN BAR ASS’N, JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW AND PRACTICE ON DRAFT FOR COMMENTS OF THE PEOPLE’S REPUBLIC OF CHINA STATE COUNCIL REGULATIONS ON NOTIFICATIONS OF CONCENTRATION OF UNDERTAKINGS (2008), available at <http://www.abanet.org/antitrust/at-comments/2008/04-08/UndertakingDraft.shtml> [English version at p. 11].

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ing a market share of 25% or more within China.” Echoing the recommended practices of the International Competition Network, an explanatory “Q&A” sheet released by the State Council Legislative Affairs Office (SCLAO) explained that notification thresholds should be “objective, clear and easily judged and understood by business operators and authorities” and that revenue-based criteria are “objective and clear.”²³ In relying solely on revenue thresholds, the SCLAO explained, the Notification Threshold Rules adopted the “common international practice.”²⁴

The final notification thresholds are largely modeled on the EC Merger Regulation.²⁵ They require notification of a transaction where: the combined global sales turnover of all parties exceeded RMB 10 billion (approximately US\$1.46 billion) and the turnover from within China of at least two parties each exceeded RMB 400 million (approximately US\$58 million) during the previous year; or the combined sales turnover from within China of all parties exceeded RMB 2 billion (approximately US\$292 million) and the turnover from within China of at least two parties each exceeded RMB 400 million (approximately US\$58 million) during the previous year.²⁶

The SCLAO explained that these revenue thresholds were based on a comparative survey of the notification criteria and economic indicators of foreign jurisdictions conducted by the Quantitative and Technical Economics Institute of the Chinese Academy of Social Sciences and on the 2006 revenues of Chinese enterprises as reported by the National Bureau of Statistics. The SCLAO described the thresholds as commensurate with the scale of China's economy and with “industrial policies aimed at encouraging enterprises to be stronger and bigger.”²⁷

The revised quantitative thresholds bring China within the lower range of quantitative thresholds employed by well-established merger review regimes.²⁸ Indeed, the SCLAO pointed to Germany, France, and Japan as countries with lower thresholds.²⁹

The Notification Threshold Rules call for eventual formulation of “detailed measures on the calculation of turnover” by the enforcement authorities. Such measures may clarify which entities' revenues should be considered in connection with different types of transactions. MOFCOM has generally accepted the notion of aggregating the turnover of all affiliates subject to common control of a single ultimate parent entity in the merger context, but this practice remains uncodified. It is less clear whether China will follow prevailing international practices with respect to acquisitions by focusing on the revenues of the “target” (i.e., the business being sold) rather than “seller” as a whole.

The Notification Threshold Rules call for the calculation of turnover to “take into account the actual circumstances of such special industries and sectors as banking, insurance, securities, futures, etc.” The SCLAO suggested that sector-specific rules would be forthcoming in the future.

²³ See Guowuyuan Fazhiban Fuzheren Jiu “Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaozhun de Guiding” Da Jizhe Wen [The Officials of the Legislation Office of State Council Answering Reporters' Questions Regarding Rules of State Council on Notification Thresholds for Concentrations of Operators], Aug. 4, 2008, [hereinafter SCLAO Q&A], available at http://www.gov.cn/zwhd/2008-08/04/content_1063736.htm.

²⁴ *Id.*

²⁵ See Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings, 2004 O.J. (L 24) 1, art. 1(2).

²⁶ See Notification Threshold Rules, *supra* note 19, at art. 3.

²⁷ See SCLAO Q&A, *supra* note 23.

²⁸ For example, the RMB 400 million local nexus requirement approaches the United States' screen of transactions involving foreign parties with less than US\$63.1 million (RMB 432 million) in annual U.S. revenues or U.S. assets, and it is higher than the €25 million (RMB 266 million) single party local nexus threshold applied in Germany.

²⁹ See SCLAO Q&A, *supra* note 23.

The Notification Threshold Rules also empower the enforcement authorities to investigate concentrations that do not otherwise trigger notification if “facts and evidence” indicate that the transaction may eliminate or restrict competition. The text implies that such concentrations would then be subject to the suspensive waiting periods pending the investigation. In explaining this provision, the SCLAO pointed to scenarios in which undertakings with low revenues nevertheless enjoy high market shares.³⁰ This concern is legitimate. Given the geographic fragmentation of the domestic markets for many products and services and the stratification of many product areas to reflect the vast disparities in income among consumers, properly defined markets in many sectors may often prove surprisingly small. Indeed, the market-share-based notification criteria were apparently intended to reach transactions creating monopoly positions in tiny markets. On balance, the risk of investigation of non-reportable deals is probably a lesser evil than either the burdens of a general market-share-based notification threshold or the risks that the NDRC or SAIC might otherwise address unreportable transactions as “monopoly agreements.” Nevertheless, foreign commentators highlighted the risks that competitor complaints might hold up deals. Perhaps in response to these comments, the SCLAO stressed that such investigations would have to be based on “facts and evidence collected according to prescribed procedures” to “prevent the authorities’ discretion from being too great.”³¹ As a practical matter, MOFCOM may be unable to divert substantial resources to the investigation of otherwise unreportable transactions for the foreseeable future.

The Notification Threshold Rules reflect receptiveness to prevailing international practices and willingness to consider public comments. It is not certain, however, that future implementing measures will follow the same tack. For example, the NDRC has reportedly drafted implementing measures for price-related violations, with no indication of plans for a public comment period. “Price-related” violations notably include Article 17(2) of AML which prohibits dominant firms from charging “unfairly high” prices. Although Article 82(a) of the EC Treaty likewise prohibits “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,” in practice the European Commission does not actively pursue “high pricing” as an abuse of dominance absent any exclusionary or predatory conduct. Nevertheless, the draft NDRC implementing measures reportedly translate the prohibition on unfair pricing into rules barring dominant firms from charging prices 20 percent higher than competitors’ prices or realizing profits over 20 percent on sales. The feasibility of these measures is doubtful. How should monopolists identify relevant competing products? And monitor competitors’ pricing on a rolling basis? Without sliding into collusion? How should costs, expenses, and revenues be allocated to determine the profits on individual sales? Even if these measures are not enacted, their mere proposal demonstrates the gap in perspectives between the NDRC and colleagues in the SCLAO and MOFCOM.

National Security Review: Sideshow or Subplot?

National security has long figured in the Chinese government’s review of foreign investments, but growing apprehension about foreign influence in sensitive sectors and indignation at the failure of China National Offshore Oil Corporation’s 2005 bid for UNOCAL have brought the issue to the foreground.³² The Carlyle Group’s proposed investment in Xuzhou Construction Machinery,

³⁰ *See id.*

³¹ *See id.*

³² *See* Harry L. Clark & Lisa W. Wang, *Foreign Investment and National Security*, CHINA BUS. REV., Jan.–Feb. 2008, at 52; *see also* *Foreign M&As in China Take a Tricky Turn*, CHINA KNOWLEDGE PRESS, Nov. 13, 2007, 2007 WLNR 22379812.

China's largest construction equipment manufacturer and an SOE, appears to have foundered on national security and industrial policy concerns.³³

The 2006 revisions to the M&A Rules introduced 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 a 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."³⁴ 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."³⁵ These provisions are separate from the antitrust provisions of the M&A Rules; indeed, the 2006 revisions deleted a reference to "national security" from the original 2003 rules as a consideration in antitrust review.

The AML likewise severs antitrust review of reported transactions from national security review. Article 31 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." This bifurcation was consciously modeled on the U.S. practice of separating antitrust review from the separate national security review by the Committee on Foreign Investment in the United States.³⁶

In August 2008, the NDRC and MOFCOM released measures suggesting that they would join other "relevant departments" to establish a "Joint Ministerial-Level Meeting for the Security Review of Merger & Acquisitions of Domestic Enterprises by Foreign Investors." This interagency body will review foreign acquisitions or mergers with domestic enterprises having national security implications under the M&A Rules, as well reviewing new foreign direct investment projects with national security dimensions. The precise mechanics of this new interagency clearance process remain murky.

Broad interpretations of "national security" might encompass industrial policy interests with scant relevance to military or security policy. In such cases, contests between "competition policy" and "industrial policy" would be cloaked in the rhetoric of national security. The comments of NPC Vice-Chairman Xu Jialu illustrate this slippage:

State security includes national defense security, information security, environmental security, and economic security. Western multinationals have now reached out to seize China's leading manufacturing enterprises. . . . These large state-owned enterprises have much proprietary intellectual property and represent China's leading-edge manufacturing technology. Control by foreign countries will pose a big obstacle to our future innovation.³⁷

³³ See *Carlye Fails to Secure Stake in China Firm*, Asia Wall St. J., July 23, 2008.

³⁴ See M&A Rules, *supra* note 6, at art. 12.

³⁵ *Id.*

³⁶ See Zhengguo Wu, *Perspectives on the Chinese Antimonopoly Law*, 75 ANTITRUST L.J. 73, 101 (2008); see generally 50 App. U.S.C.A. § 2170 (2007).

³⁷ See Jiaqiang Qiye Binggou De Jiandu Fangzhi Lanyong Xingzheng Quanli Paichu Xianzhi Jingzheng [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=WXLK&id=371691&pdm=110106>. (Unofficial translations available from the author); see also *PRC Analysts Comment on Antimonopoly Law*, WORLD NEWS CONNECTION (NEWSWIRE), Sept. 4, 2007 (translating Xinhua article describing concern about "malicious" foreign investment jeopardizing national security, available at http://news.xinhuanet.com/newscenter/2007-08/30/content_6635146.htm).

A greater risk to sound competition policy, however, would be for national security concerns to seep into the ostensibly separate merger review process. Pressures on MOFCOM to consider national security may be greatest where an offshore transaction falls outside the technical scope of national security review.

The Rising Action: Test Cases

Several high-profile transactions will test the new antimonopoly enforcement authorities' antitrust acumen and their political stamina.

Even if China's

competition authorities

advance "default"

antitrust rules

consistent with

prevailing international

practices, competing

policies and political

interests may often

override them.

- On September 3, 2008, Coca-Cola Co. announced plans to acquire Huiyuan Juice Group Ltd., China's leading fruit juice company.³⁸ Huiyuan was founded in China by entrepreneur Zhu Xinlin in 1992. Huiyuan's Chinese operating companies are ultimately owned by China Huiyuan Juice Group Limited, a BVI company listed in Hong Kong. Its chief shareholders include Zhu Xinlin (41%), Danone (23%), Fidelity International Ventures (7%), ABN AMRO Bank (7%), with the remainder actively traded in Hong Kong.³⁹ Although Huiyuan's ownership structure has already passed overseas with its listing in Hong Kong, the deal has touched a nationalist nerve, provoking public outrage that a foreign multinational would swallow a homegrown brand. Ironically, the provisions of the 2006 M&A Rules concerning control of China's "famous brands" appear inapplicable,⁴⁰ because the transfer of shares in Hong Kong would not technically qualify as a "merger/acquisition of a domestic enterprise by a foreign investor" subject to such review.⁴¹ Nevertheless, Coca-Cola spokespersons have confirmed that it notified the transaction for review under the AML, and Chinese juice companies are clamoring for a hearing of the case.⁴² MOFCOM's handling of the Huiyuan transaction may indicate MOFCOM's capacity to focus on core competition issues in the face of substantial political pressure.
- BHP Billiton's bid for Rio Tinto has agitated China's steel makers and other industries.⁴³ Intervening in this wholly offshore deal would be a path breaking exercise of extraterritorial jurisdiction for China.
- A Chinese lawyer has requested an investigation of Microsoft for violating the rules against unfairly high pricing by dominant firms.⁴⁴ The complaint has been acknowledged, but no formal investigative steps have been publicized.

³⁸ See <http://news.brandcn.com/pinpaipinglun/200809/152406.html>.

³⁹ See Kekou Kele Baojia 23 yi Meiyuan Shougou Huiyuan Guoji [Coca-Cola Buying Huiyuan at US\$2.3 Billion], available at <http://news.hexun.com/2008/kekoukelesghy/>.

⁴⁰ See M&A Rules, *supra* note 6, at art. 12.

⁴¹ See *id.* at art. 2.

⁴² See Huiyuan Binggouan Jinru Fanlongduan Shencha Chengxu [Huiyuan Merger Case Entered into Anti-Monopoly Review Process], Sept. 22, 2008, http://www.eeo.com.cn/industry/med_consum_goods/2008/09/22/114440.html; see also Coca-Cola Files Anti-Monopoly Review Application, Sept. 22, 2008, <http://www.cctv.com/program/bizchina/20080922/102011.shtml>; Shangwubu Jiangyi Shichang Jingji Yuanzhe Chuli Huiyuan Binggouan [Ministry of Commerce Will Handle the Acquisition of Huiyuan According to Market Economy Rules], available at <http://www.competitionlaw.cn/show.aspx?id=4101&cid=5>; Official: China to Insist on Principle of Market-Oriented Economy on Huiyuan-Coca-Cola Union, Sept. 10, 2008, available at http://news.xinhuanet.com/english/2008-09/10/content_9904527.htm; Shangwubu Jiangkai Shougou Huiyuan Tingzhenghui [MOFCOM Will Hold a Hearing for the Acquisition of Huiyuan], Sept. 16, 2008, <http://www.21food.cn/html/news/35/368957.htm>.

⁴³ See China's Steel Association Opposes BHP Billiton, Rio Tinto Merger, Aug. 3, 2008, available at http://news.xinhuanet.com/english/2008-08/03/content_8923258.htm.

⁴⁴ See Liangbuwei "Huishen" Weiruan Longduan, Shangdai Gongshang Zongju [Two Ministries Jointly Investigate Microsoft, Waiting for SAIC], available at <http://www.competitionlaw.cn/show.aspx?id=4051&cid=42>; see also China to Investigate Microsoft Under New Anti-Monopoly Law, Aug. 26, 2008, available at <http://www.interfax.cn/news/5134/>.

- Four private technology firms filed suit against the General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China (“AQSIQ”), a governmental body.⁴⁵ The plaintiffs allege that AQSIQ abused its administrative power in violation of the AML by requiring companies to pay annual fees to register for an online quality monitoring network administered by a commercial company in which AQSIQ holds a 30 percent ownership stake. The case presents novel questions about the amenability of government entities to private lawsuits under Article 50 of the AML, which authorizes suits against “business operators.”

Following the Plot

China's new competition authorities will likely spend the coming months grappling with novel live cases, implementing measures, and each other. Many key developments will unfold behind closed doors, and the public record of enforcement activity may be sparse. The AML requires the publication only of written decisions to block or impose conditions on concentrations; publication of other enforcement decisions is at the authorities' discretion. Even those decisions that are published may not fully or accurately articulate the underlying reasoning. Chinese administrative and judicial decisions are often formulaic and conclusory, shedding little light on the underlying analysis.⁴⁶

Even if China's competition authorities advance “default” antitrust rules consistent with prevailing international practices, competing policies and political interests may often override them. Given the dynamics and opacity of Chinese policymaking, administrative decisions, and judicial rulings, it may be difficult to distinguish the progressive development of China's default antitrust rules from episodes of politicized decision making. The plotlines of Chinese Antitrust Act II may prove intricate, intriguing, and difficult for the audience to follow. ●

⁴⁵ See Shijia Fangwei Qiye Xiang Guojia Zhijian Zhongjiu Tiqi Fanlongduan Susong [Four Anti-Fake Enterprises Brought an Antimonopoly Suit Against AQSIQ], Aug. 3, 2008, <http://www.competitionlaw.cn/show.aspx?id=3961&cid=42>.

⁴⁶ See U.S.T.R., 2007 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 33 (2007) (noting procedural shortcomings and lack of transparency in Chinese antidumping proceedings); Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 30 (2006).