

Interview with Xu Kunlin, Director General of the Department of Price Supervision Under the National Development and Reform Commission of People's Republic of China

Editor's Note: It has been over two years since China's Anti-Monopoly Law (AML) took effect, in August 2008. Three government agencies split enforcement responsibilities under the AML. The National Development and Reform Commission (NDRC) is in charge of regulating price-related anticompetitive conduct. In this interview with The Antitrust Source, Mr. Xu Kunlin, the Director General of the Department of Price Supervision of NDRC since January 2010, discusses the structure and function of the agency, the enforcement activities to date, and regulatory rules issued so far. DG Xu also provides helpful perspectives on cooperation between different antitrust agencies within China, and between NDRC and other antitrust agencies around the world.

DG Xu has had substantial experience in price regulation during his government service. Since 1990, he has served in various positions in the NDRC and the State Price Control Bureau, the State Planning Commission, and the State Development Planning Commission, which are former government entities that performed some of the functions of the current NDRC.

This interview was conducted on January 10, 2011, by Fei Deng and Yizhe Zhang for The Antitrust Source. Several other officials from the Department of Price Supervision of NDRC were also present at the interview and provided helpful comments, including Deputy Director General Li Qing, Director Zhi Shengmin, and Mr. Zhou Zhigao. We would like to express our thanks to DG Xu, and to the other officials from NDRC, for sharing their views with us.

—FEI DENG, H. STEPHEN HARRIS, JR., AND YIZHE ZHANG



DG Xu Kunlin

THE ANTITRUST SOURCE: It is our understanding that the Department of Price Supervision of the National Development and Reform Commission (NDRC) is in charge of anti-monopoly work related to prices. Could you please briefly describe the organizational set-up and functions of the Department of Price Supervision?

DIRECTOR GENERAL XU KUNLIN: As mandated by the State Council, the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM) and the State Administration for Industry and Commerce (SAIC) are the anti-monopoly enforcement agencies in China, and NDRC is in charge of investigating and punishing anti-price monopolies, i.e., price-related anti-competitive conduct by monopolies. Such conduct includes price monopoly agreements among undertakings, price-related abuse of dominant market position, and price-related abuse of administrative authority to eliminate and restrict competition. Within NDRC, the Department of Price Supervision is specifically in charge of regulating anti-price monopolies. Within the Department, the Anti-Price Monopoly Division has been set up to specifically take charge of this work.

Pursuant to the relevant stipulations of the Anti-Monopoly Law (AML), NDRC has authorized and delegated the provincial-level pricing authorities to take charge of price-related anti-monopoly enforcement within its respective administrative jurisdiction in accordance with the AML, and cooperate with NDRC in the investigation of anti-price monopolies, whereby a two-tier enforce-

ment regime, comprised of the NDRC and the provincial pricing authorities, is set in place for enforcement against price monopolies. At the same time, the NDRC and the provincial pricing authority may, within their statutory limit of authority, delegate the pricing authority to a lower level to investigate suspected price monopolies.

ANTITRUST SOURCE: Please describe the *Anti-Price Monopoly Rules* and the *Administrative Enforcement Procedures Against Anti-Price Monopolies* recently enacted by NDRC.

DG XU KUNLIN: NDRC recently enacted two implementing anti-monopoly rules, the *Anti-Price Monopoly Rules* and the *Administrative Enforcement Procedures Against Anti-Price Monopolies*. The *Anti-Price Monopoly Rules* cover the forms of price monopolies, such as price monopoly agreements, price-related abuse of market dominant position, and abuse of administrative authority, and the legal liabilities thereof. On the other hand, the *Administrative Enforcement Procedures Against Anti-Price Monopolies* mainly cover case reporting and handling, investigative measures, penalties, suspending investigation, exemptions, and responsibilities of the pricing authority to ensure that the pricing authority duly performs its anti-price monopoly functions. The two sets of rules further refine the anti-monopoly legal system in China, and will duly strengthen anti-price monopoly enforcement, foster the culture of market-based competition, and promote self-conscious regulation of undertakings to jointly maintain orderly competition in the market.

ANTITRUST SOURCE: Please describe the enforcement actions taken by NDRC since the AML became effective.

DG XU KUNLIN: Since the AML came into effect, NDRC has been working actively to enforce the AML against price monopolies. NDRC has investigated and imposed punishments in a number of price monopoly cases. Based on the reported and investigated cases so far, the suspected price monopolies can mainly be categorized as follows: (i) where trade associations organized undertakings in their respective industries to reach monopoly agreements that aimed at fixing or changing prices or setting a minimum price for resale to third parties; (ii) where competing undertakings in some industries reached monopoly agreements aimed at fixing or changing prices; and (iii) where certain undertakings with dominant market positions abused their positions by engaging in tie-in, thus disrupting normal price order in the market. We have announced some of these cases, and you may access the relevant information from the Web site of NDRC.

ANTITRUST SOURCE: Is the current anti-monopoly enforcement leaning towards certain industries, such as agriculture and its by-products? Do you think the focus of the anti-monopoly enforcement in the next phase will change? What are the specific plans?

DG XU KUNLIN: The purpose of enforcement against price monopolies is to protect fair competition in the market, improve economic efficiency, and safeguard the interests of consumers and the society's public interest. From this perspective, enforcement should focus on every industry in the economic area. Note that the AML does not apply to joint or concerted activities by farmers or rural economic organizations in the production, processing, sale, transportation, warehousing, and other activities related to agricultural products. Also, the AML does not apply to the conduct of undertakings exercising their intellectual property rights in accordance with the intellectual property laws and relevant administrative regulations, unless they abuse their intellectual property rights to eliminate or restrict market competition.

In addition to the AML, the Price Law also regulates the pricing activities of undertakings. During the first half of 2010, because of the rapid rise in the prices of garlic and mung bean and other agricultural products, some undertakings engaged in speculation to rampantly raise prices, which disrupted the normal market order. We investigated and punished some violations in a series of agricultural areas in accordance with the Price Law, and strongly safeguarded the normal price order in the market.

At present, the market economy in China is still in a primal stage, and price competition is the main means of competition for the majority of undertakings, and price monopoly is the main form of monopoly. Enforcement against price monopoly is an onerous task, and at a certain stage of economic development, it is possible that in certain industries there tend to be more price monopolies and more price monopoly cases. We will strengthen supervision to prevent and stop price monopolies based on actual economic conditions.

ANTITRUST SOURCE: We learned that in terms of division of responsibilities, NDRC is in charge of enforcement against price monopolies, while SAIC is in charge of enforcement against monopoly agreements, abuse of market dominant position, and abuse of administrative authority not relating to prices. Please explain how the two authorities cooperate in the investigation of suspected cases that involve both price-related monopolistic activities and monopolistic activities that are not price related. In addition, has there already been any such cooperation on a specific case?

DG XU KUNLIN: The pricing authorities and the administration for industry and commerce* have always maintained close cooperation for market supervision. Because monopolistic activities are rather complicated, and in many cases, both price and non-price issues are concerned, the close cooperation among the anti-monopoly enforcement agencies is of even more importance. Since the AML came into effect, NDRC and SAIC have gradually stepped up communications and cooperation, and there is also close cooperation between the provincial price authorities and the local administration for industry and commerce, and such cooperation has been proven effective. For instance, in the drafting of the implementing rules for the AML, the two authorities had many discussions regarding the common areas involving both authorities in anti-monopoly enforcement procedures, and reached a common understanding on those areas. Information and comments are exchanged between the authorities on an ongoing basis at meetings or by other means regarding reported suspected monopolistic activities.

In the course of enforcement, NDRC will continue to cooperate with SAIC to explore and set up a case coordination mechanism, and it is possible that the two authorities may jointly investigate high profile cases with significant impacts and media attention.

ANTITRUST SOURCE: We understand that in addition to the AML there are other laws concerning price and competition (for example, the Price Law). How does NDRC coordinate the relationship between the two sets of laws in the course of its law enforcement activities?

DG XU KUNLIN: The PRC Price Law, which came into force in 1998, explicitly prohibits conduct, such as collusive price increases, price discrimination, predatory pricing, etc. The AML, which

* *Editor's note:* The "pricing authorities" would include both national (NDRC) and local authorities. Similarly, the "administration for industry and commerce" would include both national (SAIC) and local authorities.

was promulgated in 2008, also contains relevant provisions. At present, both sets of laws do not contradict each other, though they have differences.

First, with respect to the regulation approaches, the Price Law emphasizes more the examination of whether the conduct itself stays in compliance with provisions of the law; the AML emphasizes the examination of the impact of such conduct on competition in the market.

Second, in terms of the law enforcement entity, at present, only the price authorities under the central government or at the provincial level are empowered to enforce the AML, while all responsible price authorities at the county level or above are empowered to enforce the law against price-related conduct in violation of the Price Law.

Third, in terms of determination, one example of the difference is that the finding of monopolistic conduct under the AML requires relevant economic analysis of the infringements. As another example, the finding of predatory pricing under the Pricing Law does not require that the undertaking has dominant market position, while under the AML, only when an undertaking with dominant market position engages in such activities, can we find it a violation of the AML.

Therefore, we will decide whether to apply the Price Law or the AML based on the specific circumstances of the case.

Irrespective of whether a price-related illegal conduct is investigated and punished under the Price Law or the AML, the procedure of law enforcement shall follow relevant provisions of the Administrative Punishment Law. However, compared to the Price Law, the AML introduces a new suspension procedure for the investigation of monopoly cases, which specifically includes the following three aspects. First, the undertaking may apply in writing for suspension of the investigation. Second, the anti-monopoly law enforcement authority may decide whether to suspend the investigation upon review and shall supervise the performance of commitments by undertakings. Third, the AML enforcement authority may resume the investigation based on the specific circumstance of the case.

ANTITRUST SOURCE: Has NDRC received many complaints from consumers or enterprises since the enactment of the AML? To what types of complaints will NDRC respond and carry out an investigation? By which means will NDRC carry out the investigation? Is there any practical case that has been investigated and punished based on a complaint?

DG XU KUNLIN: Following the enactment of the AML, we did receive many complaints from consumers, undertakings, and lawyers. Up to now, complaints received by NDRC involve many sectors, such as cement, paper-making, car washes, insurance, express shipping services, etc. In accordance with relevant provisions of the AML, where a complaint is submitted in writing and contains related facts and evidence, the AML enforcement authority shall conduct the necessary investigation.

When conducting investigations of the suspected price monopoly cases, the anti-monopoly authority may take the following measures: (i) conducting inspection of the business premises or other relevant locations of the undertakings under investigation; (ii) inquiring of the undertakings under investigation, interested parties, and other relevant entities or individuals, requiring them to provide relevant information; (iii) examining or copying the relevant documents and information including related documentation, agreements, accounting books, business correspondence, electronic data, etc. of the undertaking under investigation, interested parties and other relevant entities or individuals; (iv) sealing off and detaining relevant evidence; and (v) inquiring about the bank accounts of the undertakings under investigation.

We have investigated and punished several price monopoly cases based on complaints. For example, recently we investigated and punished Fuyang Paper Making Industry Association in Zhejiang Province, which organized undertakings to reach a price monopoly agreement within the association. We found evidence of infringement indicating that since 2010, the association organized five meetings among twenty executive council members to jointly fix the ex-factory price of white paper board for packaging. The price authority imposed a fine of RMB 500,000 on this association according to law. This case was published to the public on January 4 this year.

ANTITRUST SOURCE: In recent years the anti-monopoly law enforcement authorities of other countries, such as the U.S. Department of Justice, the European Commission, and KFTC of South Korea, have investigated and punished several international price cartels. Does NDRC communicate and exchange information with these other law enforcement authorities regarding specific cases?

DG XU KUNLIN: We have been paying close attention to law enforcement activities of anti-monopoly law enforcement authorities of other countries, in particular the treatment of some international price monopoly cases. These cases involve certain multinational companies, and may cause adverse impact on the market competition in relevant economic areas in many countries. Therefore, we expect to conduct in-depth communication with anti-monopoly law enforcement authorities of these countries about the investigation and punishment of such cases. We would like to invite them to introduce the process and related details of the investigation and punishment, so as to further strengthen coordination in anti-monopoly law enforcement among different countries and jointly safeguard the market order of fair competition in the world.

ANTITRUST SOURCE: Is there any cooperation between NDRC and anti-monopoly law enforcement authorities of other countries? If yes, could you describe these cooperations?

DG XU KUNLIN: It is of significant importance to strengthen communication and cooperation for anti-monopoly enforcement among different countries and regions to safeguard fair competition in the market and facilitate healthy operation of the global economy. NDRC pays great attention to the international communication and cooperation in the anti-price monopoly area. Ever since the implementation of the AML, we have gradually established close connection with anti-monopoly law enforcement authorities of other countries and regions, including the DOJ and FTC of the United States, the Directorate General for Competition of the European Commission, the Office of Fair Trading of the United Kingdom, the Fair Trading Commissions of South Korea and Japan, etc.

Currently, we are in the process of coming to a memorandum of understanding with the anti-monopoly law enforcement authorities of the U.S., EU, and the United Kingdom, seeking to establish a long-term mechanism for anti-monopoly cooperation. At present we have developed cooperation, including joint workshops and visits, etc. We are actively exploring other forms, such as roundtable meetings, video conferences, etc. to discuss certain issues of mutual concern, in order to further broaden and strengthen the communications, to enhance understanding and mutual trust, and to jointly safeguard fair competition in the market.

ANTITRUST SOURCE: In your view, what are the challenges that NDRC is facing in AML enforcement?

DG XU KUNLIN: It has been more than two years since the AML came into force, during which time we have promulgated two sets of implementing rules, investigated and punished a series of price

monopoly cases, strengthened the training for law enforcement personnel, and actively launched international communications. Therefore we have made positive progress in anti-monopoly work.

At present, we are facing certain challenges in further strengthening AML enforcement. For example, we need to further refine the relevant laws and regulations based on the experience during the law enforcement practice. We need to accumulate more experience in AML enforcement, including through learning from and using for reference the law enforcement experiences of other countries, so as to improve our capabilities and competence level. In addition the competition consciousness of market participants remains to be further enhanced, etc. We will further strengthen efforts relating to anti-price monopoly enforcement, endeavor to build a sound competition environment for economic development, and protect consumer interests and public interests.

ANTITRUST SOURCE: Director-General Xu, thanks very much for sharing your views on these important issues with us. ●

Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Ministry of Commerce of the People's Republic of China

Editor's Note: The Antitrust Source first interviewed Director General Shang in the February 2009 issue,* about six months after the Anti-Monopoly Law (AML) took effect. Two years later, we again sought DG Shang's views on how China's merger review process has developed. DG Shang also provides a preview of rules and regulations that will be forthcoming from the Ministry of Commerce (MOFCOM), and gives advice to businesses on how to facilitate the review process.

This interview was conducted on January 7, 2011, by Fei Deng and Yizhe Zhang for The Antitrust Source. Director Yin Yanling and Mr. Lin Hang, two other officials from the Anti-Monopoly Bureau of MOFCOM, were also present at the interview. We would like to express our thanks to DG Shang for sharing his views with us, and to other officials from MOFCOM for facilitating this interview.

—FEI DENG, H. STEPHEN HARRIS, JR., AND YIZHE ZHANG



DG Shang Ming

THE ANTITRUST SOURCE: The Antitrust Source's 2009 interview of you generated a lot of interest from our readers. We are honored to have the opportunity to talk with you again and would be delighted to hear what has happened since then. Could you give us an update on the Anti-Monopoly Bureau's merger review activities?

DIRECTOR GENERAL SHANG MING: In 2010, MOFCOM continued to improve its enforcement mechanism in conducting antimonopoly review of concentrations of undertakings. Generally speaking, there are three characteristics of our 2010 antimonopoly review work.

(1) There was a significant increase over the previous year in the number of notifications filed and in the number of notifications accepted. During 2010, MOFCOM's Anti-Monopoly Bureau conducted more than 100 pre-acceptance consultations, and received more than 120 filings, of which more than 110 were accepted. In comparison, during 2009, 77 filings were accepted. In 2010, the Anti-Monopoly Bureau completed the review of most of the accepted filings. The percentage of cases that were reviewed is about 20 percent higher than year 2009. In 2010, among the reviewed cases, one was approved subject to commitments, two were withdrawn by the filing parties, and all others were approved without restrictive conditions imposed. Compared with the merger review enforcement in the European Union, the percentage of cases approved unconditionally is higher for MOFCOM than for the European Commission.

(2) A substantial percentage of filings involved manufacturing industries and listed companies. In 2010, about 70 percent of filings came from manufacturing industries. Other industries accounted for smaller percentages. At the same time, most of the filings involved listed companies, at a percentage of about 60 percent.

* Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Ministry of Commerce of the People's Republic of China, ANTITRUST SOURCE, Feb. 2009, <http://www.abanet.org/antitrust/at-source/09/02/Feb09-ShangIntrvw2-26f.pdf>.

(3) Follow-up monitoring of remedy enforcement achieved satisfactory results. Between the enactment of the AML in 2008 and November 2010, MOFCOM approved six cases subject to restrictive conditions: Inbev/Anheuser-Busch, General Motors/Delphi, Mitsubishi/Lucite, Pfizer/Wyeth, Panasonic/Sanyo, and Novartis/Alcon. In 2010, MOFCOM conducted follow-up investigations to determine whether the parties have abided by their obligations. MOFCOM found that in all cases—but especially for those cases that involved behavioral remedies—the parties have abided by their obligations, and there have not been any complaints received from relevant parties so far.

ANTITRUST SOURCE: MOFCOM has also published some new rules during the last two years. Can you give us an update on those?

DG SHANG MING: In terms of legislation, MOFCOM has continued to make progress on rules complementary to the AML. MOFCOM has drafted and promulgated several rules, including *Rules on Notification of Concentration Between Undertakings* (Notification Rules), *Rules on Review of Concentration Between Undertakings* (Review Rules), and *Provisional Rules on Divestiture of Assets or Businesses to Implement Concentrations between Undertakings* (Provisional Divestiture Rules).

The Notification Rules serve the purpose of specifying the requirements for the notifying party to comply with, and the requirements for the antitrust agency to accept the filing. The Notification Rules define issues, including but not limited to the calculation of transaction turnover amount, pre-notification consultation, the documents and materials required for the notification filing, voluntary submission of other documents and materials, confidentiality obligations during the notification and review process.

The Review Rules specify procedural matters regarding antimonopoly review of concentrations of undertakings, including withdrawal of a notification, the reviewing procedure, the proposal and revision of restrictive conditions, the right of notifying parties to make statements and defenses, the decision of further review, the monitoring of the implementation of restrictive conditions, etc.

The Provisional Divestiture Rules serve the purpose of providing more detailed and clarified rules for the implementation of restrictive conditions involving divestiture of assets or businesses and specifying the qualification and selection of the monitoring trustee and the divestiture trustee.

Up to now, these regulations have been implemented with good results. The procedures of acceptance and review are becoming more orderly. The rights of the relevant parties are better protected. The decisions and the implementation of decisions are more informative and transparent.

ANTITRUST SOURCE: Does MOFCOM have any plans to draft or publish any new guidelines or rules in the coming year?

DG SHANG MING: In 2011, MOFCOM is going to continue the work of drafting other rules complementary to the AML that regulate concentration of undertakings.

In 2011, the priority of MOFCOM's antimonopoly rule making is to push forward the drafting of *Regulations for Implementation of Antimonopoly Review of Concentrations of Undertakings* (Implementations Regulations). Although there have already been a few promulgated rules and regulations in the aspect of concentrations of undertakings, most of them are of weaker authority and not quite systematic. There are still some critical issues faced in the enforcement of AML that deserve to be further explained. MOFCOM hopes to address all of these issues in the framework

of Implementations Regulations to ensure the consistency of enforcement, improve the predictability and workability of the review process, and improve the effectiveness of the AML implementation.

At the same time, in order to provide better guidance on our analysis of the competitive impacts of concentrations of undertakings, MOFCOM is in the process of drafting guidelines entitled *Rules on Evaluating the Competitive Effects of Concentrations of Undertakings* (Evaluation Rules). The Evaluation Rules will further clarify the factors considered and analytical perspectives used in evaluating the competitive effects of particular concentrations of undertakings. In addition, in order to further clarify the procedures involved in determining the remedies for the purpose of conditional approval of concentrations of undertakings, MOFCOM is in the process of drafting *Rules on Imposing Restrictive Conditions on Concentrations of Undertakings*, consistent with the Provisional Divestiture Rules promulgated in 2010. This set of rules will specify with further clarity the category of remedies, applicable parties, and relevant steps and procedures to follow.

ANTITRUST SOURCE: Have there been any changes in the review mechanism in the Anti-Monopoly Bureau since we last interviewed you in 2009?

DG SHANG MING: The Anti-Monopoly Bureau was set up in 2008. As we gain more experience and improve relevant procedures over time, our review mechanism has improved as well. There are three aspects that are worth mentioning here:

(1) We have always set the goal of improving the quality of our review work as a high priority. With accumulation of experience, particularly in aspect of analytical tools, we have been actively seeking to apply economic analysis tools, emphasizing the gathering and utilization of market survey data, and improving the effectiveness and reliability of our case review tools. In terms of analytical perspectives, the Anti-Monopoly Bureau emphasizes the complete evaluation of all kinds of effects, analyzes all possible factors that may induce competitive effects, and avoids the tendency of simplistic structural methodologies. Some outsiders have speculated, based only on information from the notices that MOFCOM has published so far, that MOFCOM is inclined to use such structural methodologies. However, this speculation is baseless.

(2) We highly value the use of a self-monitoring system within the Anti-Monopoly Bureau. In order to standardize the review process, improve the efficiency of the review process, and better serve the needs of this process, the Anti-Monopoly Bureau has made an adjustment to the setup and function of its divisions, separating out into different divisions the functions of pre-notification consultation and pre-acceptance review of notification filing materials, post-acceptance investigation and review, and our self-monitoring of cases we handle. This adjusted organization serves well the function of self-monitoring: currently, for each individual case, the Anti-Monopoly Bureau sets up a dedicated team, consisting of three or more persons, from various backgrounds of law and economics with one person on the team in charge of the self-monitoring of the case. This setup has been functioning well in our implementation as it provides a good balance and a way to monitor our review work.

(3) The Anti-Monopoly Bureau greatly emphasizes enhancing international communication and cooperation. The Anti-Monopoly Bureau has maintained working communication with antitrust agencies of other countries and regions including the United States and European Union. The Anti-Monopoly Bureau has also held, or participated in, programs such as seminars and training sessions organized by various international institutions such as OECD. Such exchanges and cooperation programs provide a good platform for sharing experiences, and help us improve the

quality of our policy making and training. Up to now, the areas of exchange and cooperation have mainly concentrated on exchanging thoughts about general theoretical matters and evaluation of competition policy and rule making. In the future, the Anti-Monopoly Bureau hopes to further deepen international exchange and cooperation.

ANTITRUST SOURCE: Can you elaborate on the use of economic analysis in the review process of the Anti-Monopoly Bureau? What is the role of the economics division? Would it be possible for the Anti-Monopoly Bureau to hire outside economists if such needs arise?

DG SHANG MING: The economics division of the Anti-Monopoly Bureau was specifically set up to be tasked with dealing with issues related to economic analysis during our case review process. The Anti-Monopoly Bureau has several professional staff members with an economics background who specialize in economic analysis. In addition, the Anti-Monopoly Bureau has organized a number of seminars, in which the topics covered involve many issues related to economic analysis and application, in order to help our staff understand and grasp the basic economic analytical methods. For individual cases, the Anti-Monopoly Bureau does not rule out the possibility of involving outside economists. The Anti-Monopoly Bureau will implement appropriate application of economic analysis and utilize economic analysis tools to the fullest, based on the specifics of individual cases.

ANTITRUST SOURCE: What is the role of local commerce offices in antimonopoly review of concentrations of undertakings?

DG SHANG MING: In China, the power and responsibility for antimonopoly review of concentrations of undertakings belongs to MOFCOM, the only government agency at the national level. MOFCOM currently does not have its own local offices at the provincial or other local levels. For specific cases, MOFCOM could ask its local counterpart agencies to help verify local facts, but the specific functions of case review are performed by MOFCOM, including the final decision that comes from MOFCOM.

ANTITRUST SOURCE: What is your overall evaluation of the compliance of merging parties in China? Do you feel that so far the merging parties have been cooperative in providing the information that MOFCOM requests?

DG SHANG MING: From what we have experienced in the review work in 2010, most of the filing parties cooperated actively in facilitating our review in terms of submitting required notification materials and relevant materials as requested. This kind of cooperation makes our work proceed more efficiently and more smoothly, thereby making it easier for the filing parties themselves to complete the concentration. We appreciate and value the cooperation of most of the filing parties to fulfill their obligations as required by the law, and we sincerely hope that the filing parties will continue their support and cooperation in the process of our antimonopoly review work in the future.

Nevertheless, I also have to point out that there exist some cases where the filing parties did not provide their information and materials in a timely, truthful, and accurate fashion. There could be two reasons: either the filing parties did not have the information themselves, or the filing parties intentionally did not provide the requested information. Such situations negatively affected our process of case review. We hope this will happen less or not at all in the future.

In addition, there are a small number of undertakings whose concentrations exceed the notification threshold but did not file as required by the law. This is an outright violation of the law. We will discipline and punish such behavior, and we also welcome relevant individuals and businesses who learn about such cases to report them to us.

ANTITRUST SOURCE: What advice would you like to offer to private parties that might be subject to China's merger review process in the future?

DG SHANG MING: MOFCOM will continue to improve the enforcement mechanism, including making supplementary rules and regulations and improving the efficiency of our reviews. I think the undertakings should pay attention to the following aspects when conducting notification filings in the future:

(1) Make an effort to understand the relevant rules and regulations in the Chinese antimonopoly legal system related to concentration of undertakings, pay attention to MOFCOM's updates on law enforcement of concentration of undertakings, and communicate and consult with MOFCOM actively when questions arise in the notification and review process or when questions arise regarding the interpretation of the law and regulations. The Antimonopoly Bureau has set up a consultation division specifically to answer such questions.

(2) Cooperate willingly and actively with MOFCOM case teams in both the pre-notification consultation process and the review and investigation process, etc. Provide truthful and accurate relevant information consistent with MOFCOM's request. Try to reduce or avoid the delay in case processing caused by incomplete or untimely information.

(3) Comply with the law seriously. We strongly discourage lobbying efforts that go beyond the rules and regulations, otherwise it will create an unnecessary disturbance to the regular work process of MOFCOM and negatively impact the completion of the review process.

ANTITRUST SOURCE: Thanks very much for sharing your views with us. Is there anything else you would like to add?

DG SHANG MING: It's my pleasure to share my thoughts. I want to emphasize that the Anti-Monopoly Bureau has only had a little more than two years of implementation experience so far. During 2010, we made some new changes and progresses. But I believe there is much room for improvement in the future. ●

Interview with Ning Wanglu, Director General of the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau Under the State Administration for Industry and Commerce of People's Republic of China

Editor's Note: It has been over two years since China's Anti-Monopoly Law (AML) took effect, in August 2008. Three government agencies split enforcement responsibilities under the AML. The State Administration for Industry and Commerce (SAIC) is in charge of regulating non-price related anticompetitive conduct. In this interview with The Antitrust Source, Mr. Ning Wanglu, the Director General of the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of SAIC, discusses the structure and function of the agency, the enforcement activities to date, and the regulatory rules that SAIC has issued so far. DG Ning also provides helpful perspectives on law enforcement in the areas of intersection between SAIC and the National Development and Reform Commission (NDRC), and between the AML and China's Anti-Unfair Competition Law.

DG Ning has long been involved in the drafting and enforcement of China's competition and market regulation laws, including the Anti-Unfair Competition Law and the AML. He joined SAIC in 1982. Before he chaired the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau, he had served in various positions in the China Consumer Association and several other bureaus within the SAIC, including the Market Regulation Bureau and the former Fair Trade Bureau. DG Ning holds a bachelor's degree in Economics, and is a board member of the China Law Society.

This interview was conducted on January 7, 2011, by Fei Deng and Yizhe Zhang for The Antitrust Source. We would like to express our thanks to DG Ning for sharing his view with us, and to Ms. Song Yue of SAIC, also present at the interview, for facilitating the process.

—FEI DENG, H. STEPHEN HARRIS, JR., AND YIZHE ZHANG



DG Ning Wanglu

THE ANTITRUST SOURCE: Could you please explain the functions and structure of the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau under SAIC? Also, could you please describe your involvement in the drafting of the AML?

DIRECTOR GENERAL NING WANGLU: The main functions of the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau under SAIC include: drafting rules and regulations related to anti-monopoly and anti-unfair competition; undertaking enforcement of the AML in the relevant areas; regulating unfair competition, commercial bribery and other law-breaking economic and market activities; and monitoring important and exemplary cases. The main divisions under the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau include the Anti-Monopoly Law Enforcement Division, the Anti-Monopoly Legislative Affairs Division, the Anti-Unfair Competition Division, and the Case Inspection Division. In China, the legal responsibility for enforcement of the AML resides at the national level. The national-level antitrust enforcement agency can empower a provincial-level antitrust agency to investigate cases based on the AML. Currently, there are a total of around one thousand competition enforcement staff persons at the national and the provincial levels of the Administration for Industry and Commerce.

Along with the development of a reform and open-door policy and market economy, the Chinese government has paid great attention to building and improving the competition law mechanism. In 1987 we started drafting the Anti-Unfair Competition Law, which regulates both anti-unfair competition activities and some other activities that restrict competition, so this single law serves two purposes. In 1993, after the Anti-Unfair Competition Law went into effect, an AML drafting team was set up consisting of officials from SAIC, the former State Economic and Trade Commission, and other agencies to begin the research and drafting work of the AML. After many years of work, the AML was promulgated in 2007 and came into effect in 2008.

ANTITRUST SOURCE: It has been about two and a half years since the AML came into effect. Could you summarize the enforcement of the AML by SAIC and the regulations or rules that have been issued so far?

DG NING WANGLU: Since the AML came into effect, we have been making positive progress in rule-making and enforcement in areas that fall into our areas of responsibility. First, we have been actively drafting supporting regulations. Up to now, we have promulgated five regulations under the AML, including two procedural regulations issued in 2009—*Procedural Regulation of the Administration for Industry and Commerce on Prevention of the Abuse of Administrative Power to Eliminate or Restrict Competition*; and *Procedural Regulation of the Administration for Industry and Commerce on Investigation and Prosecution of Cases Involving Monopoly Agreements and Abuse of Market Dominance*—and three substantive rules passed on December 30, 2010—*Regulation of the Administration for Industry and Commerce on Prohibition of Monopoly Agreements*; *Regulation of the Administration for Industry and Commerce on Prohibition of Abuse of Market Dominance*; and *Regulation of the Administration for Industry and Commerce on Prohibition of Abuse of Administrative Power to Eliminate or Restrict Competition*. Throughout the drafting process we have sought advice and comments widely through various channels, from both domestic and foreign parties, and we have referred to and absorbed many useful foreign experiences and methods.

Second, understanding that training is essential to improving our enforcers' knowledge level, we have organized a variety of training sessions for our enforcement officials. These training sessions include those held in individual provinces; those co-organized with enforcement agencies and institutions from other countries and regions such as the United States and the European Union; and visits to enforcement agencies and institutions in other countries and regions. Also, together with MOFCOM and NDRC, we have held teaching seminars to provincial officials and managers of large state owned enterprises.

Third, we have steadfastly undertaken enforcement work. Following the implementation of the AML, we have received a large number of complaints. We have investigated and prosecuted those that are relevant to anti-monopoly. Faced with the international financial crisis, we have strengthened the implementation of competition law by investigating and prosecuting activities that restricted competition involving parties, such as public enterprises and activities that eliminated or restricted competition by abuse of administrative power.

Fourth, under the guidance of the Anti-Monopoly Commission under the State Council, we have been working with MOFCOM and NDRC to study the state of competition in certain important industries.

Fifth, we have continued to deepen international cooperation. We have strengthened international exchanges with countries, such as the United States, European Union, Japan, Russia,

India, Brazil, and Korea. In 2009, together with Russia, Brazil, and India, we held the BRIC International Competition Conference, with participation from representatives from over forty countries and international organizations. Topics, such as the development of competition policy, law enforcement, and promotion of competition policy, were discussed extensively during the conference.

ANTITRUST SOURCE: What are the current priorities of SAIC? Are there any new guidelines or rules being drafted? Are there any particular industries that are of higher priority for investigation? Do you envision the priorities to change over the next few years?

DG NING WANGLU: It is unavoidable that the recent international economic crisis has generated negative effects on China's economic development. It has always been our view that effective market competition is the best tool for fighting against economic crisis. Thus, the priority of SAIC's enforcement has been to prohibit local protectionism and industry monopoly. During year 2010, the Administration for Industry and Commerce at all levels has prosecuted 645 cases involving various types of activities that restricted competition.

Based on our current situation, we will be focusing on the following four areas in the near future: (1) continue the legislative work based on issues we encounter in our practical experience; (2) continue to train our officials, especially in the areas of law and economics—talent building is a basic and long process; (3) continue to improve our enforcement work. We have achieved good results in guiding the provincial level of the Administration for Industry and Commerce to prosecute monopoly activities, and we are going to continue that work. And lastly, (4) We will continue to promote and educate the public about the AML.

ANTITRUST SOURCE: We understand that SAIC is responsible for investigating and sanctioning any anticompetitive agreements, abuses of dominant market positions, and abuses of administrative power that are not related to pricing conduct, while the NDRC covers essentially the same types of conduct as SAIC in cases where the conduct is price-related. For cases that involve both types of conduct, there would be coordination between SAIC and NDRC. Can you describe how the coordination would be achieved? Have there been actual cases to date that involved close coordination between the two agencies?

DG NING WANGLU: There are clear divisions between SAIC's and NDRC's responsibilities in anti-monopoly, as mandated by the State Council. The two agencies have smooth information exchange channels and have cooperated closely. In 2010, we have experimented with NDRC in setting up a case coordination mechanism. For cases that involve both price and non-price related conduct that require prosecution by both agencies, we would cooperate closely. In fact, our first anti-monopoly case was prosecuted together with NDRC and other relevant departments.

ANTITRUST SOURCE: In addition to the AML, there are also other laws related to non-price related competition issues, such as the Unfair Competition Law. Would the AML supersede these other laws? How would SAIC's procedures under the AML differ from those it used under the other laws? Are there types of cases in which both laws will be applied?

DG NING WANGLU: It is crucial that prosecution of a case be based on the nature and characteristics of the conduct in order to correctly and properly implement the law. It is unsurprising that dif-

ferent laws would apply to conduct that has limited effects versus conduct that has systematic effects and harms consumers' overall welfare. Taking the AML as an example, the AML governs those anti-monopoly issues that would have a systematic and macro-level impact and applies mainly to those anti-monopoly cases that severely impact market competition and harm consumer welfare. This characteristic differentiates the AML from other competition laws in terms of application. There are other differences, such as that the enforcement of the AML requires collecting substantial amounts of economic data, building economic models, defining relevant markets, and analyzing market dominance. Also, in terms of mechanism design, the AML contains leniency and commitment provisions, which are not available under other competition law enforcement procedures.

ANTITRUST SOURCE: What causes SAIC to open an investigation? Have you received many customer or competitor complaints? What kinds of investigative methods are currently employed by SAIC? How does SAIC collect information and evidence related to a complaint?

DG NING WANGLU: Since the implementation of the AML, SAIC has received a large number of complaints, coming from a wide range of parties, including enterprises, consumers, and lawyers. SAIC pays attention to complaints because this is a very important channel through which we can discover monopoly behavior.

The AML contains general provisions that govern the investigation of anti-monopoly behavior. In order to provide further details, SAIC issued the two procedural rules in 2009, which contain provisions governing the handling of complaints, case acceptance and investigation, and case closing. We place a complaint in one of three categories: (1) if the conduct involved does not fall within our anti-monopoly function responsibility, we would pass the case on to the relevant agency; (2) if after initial investigation, the complaint does not reflect the actual situation, we would explain the reason and situation to the party submitting the complaint; (3) if after initial investigation, the complaint seems to reflect mostly the actual situation, we would accept the case and start further investigation. During the investigation, we would utilize all the methods and tools authorized by the AML. Of course, we would give the targeted parties enough chance to make their own statement, and we strictly protect the confidentiality of the trade secrets involved in the investigation.

ANTITRUST SOURCE: Are there any industries that would be exempt from SAIC investigation, such as industries consisting mostly of State Owned Enterprises?

DG NING WANGLU: The AML applies to all industries and entities equally. Item 2 under Article 7 of the AML specifies clearly that State Owned Enterprises "shall conduct their business in accordance with law in an honest and trustworthy manner, impose strict self-discipline, and accept supervision from the public. These undertakings shall not harm the interests of consumers by making use of their position of control or their position of exclusive and monopolistic sales." This indicates that State Owned Enterprises should also be under the regulation of the AML. All entities are treated the same in the eyes of the law.

ANTITRUST SOURCE: In your view, what are some of the current challenges that SAIC faces?

DG NING WANGLU: Currently, there has been an increasing trend toward global economic integration. It is a common challenge faced by antitrust enforcement agencies all over the world as to

how to regulate effectively the economic activities that involve a large geographic area or that are global. We need to further strengthen international cooperation and improve the effectiveness of the global cooperation of competition law enforcement. Nowadays, along with the prosperous development of the market economy, the goal of the Chinese competition law enforcement agencies has been to strive for improving the efficiency of economic operation, enhancing sustainable economic development, and achieving optimization of consumer welfare. In the future, we will continue to contribute to the sustainable, healthy, and stable development of China's economy by enforcing the law fairly and equitably.

ANTITRUST SOURCE: Director-General Ning, thank you very much for sharing your views on these important issues with us. ●

Disentangling Industrial Policy and Competition Policy in China

By Nate Bush and Yue Bo

Concerns that China's Antimonopoly Law (AML) might emerge as an instrument of industrial policy surfaced long before the AML took effect in August 2008.¹ Recent initiatives to consolidate state-owned enterprises (SOEs) in key sectors into national champions, to spur "indigenous innovation," and to propel homegrown brands into foreign markets have galvanized these anxieties. The sparse data, however, suggests that many Chinese competition officials are genuinely willing to pursue default rules roughly analogous to those of more mature antitrust jurisdictions—unless higher priorities or higher authorities dictate otherwise.

Given Beijing's current policymaking climate, it is virtually inevitable that industrial policy goals will, at times, override default antitrust rules. Unless China's competition regulators can enable companies—both Chinese and foreign—to distinguish decisions based purely on competition policy grounds effectively from actions driven by industrial policy or politics, there is a risk of confusion about the ground rules for competing in China and of impairment to the credibility of China's competition laws and authorities.

Resurgence of the State Sector

Many jurisdictions face tension between competition policies aimed at promoting consumer welfare and economic efficiency, and industrial policies aimed at directing investment to areas of anticipated comparative advantage or to reinforce other policy objectives. China's new competition authorities, however, face the compound challenge of injecting a modern competition policy into the world's largest transition economy while senior policymakers in Beijing have renewed their faith in industrial policy and direct intervention in domestic markets.

In the wake of Western regulators' failure to avert the global financial downturn, many Chinese policymakers are increasingly skeptical of imported regulatory practices and confident in their own capacity to devise policies suited to China's unique circumstances. China's thirty-year transition from central planning to greater reliance on market forces with a policy of "reform and opening up" seems to have stalled with emergence of "command capitalism."² Chinese regulators can deploy subsidies and tax expenditures, discretionary approval and licensing powers, informal administrative guidance, and formal intervention to direct investment to targeted sectors and channel opportunities to favored firms. New policies under the banner of "indigenous innovation"

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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), http://www.gov.cn/fifg/2007-08/30/content_732591.htm [hereinafter AML]. The Chinese government generally does not issue official English translations of Chinese laws, regulations, and administrative or judicial decisions. Quotations to Chinese sources in this article are based on English translations of the relevant measures prepared by the author's law firm.

² See, e.g., Rana Foroohar, *Why China Works*, NEWSWEEK, Jan. 10, 2009, <http://www.newsweek.com/2009/01/09/why-china-works.html> (characterizing China's current system as "command capitalism").

The resurgence of the state sector resonates in a new epithet among China's entrepreneurs: gong jin si tui—"the public progresses, the private retreats."

promote research and development in targeted fields and focus on the "nationality" of the technology's ownership.³ Although privatization of state-owned enterprises continues in some sectors, current policy favors the establishment of national champions in strategic sectors through the consolidation of SOEs and, in some cases, acquisition of smaller private firms along the way.⁴ The resurgence of the state sector resonates in a new epithet among China's entrepreneurs: *gong jin si tui*—"the public progresses, the private retreats."⁵ Multinational companies likewise worry that formal and informal regulatory hurdles continue to shield China's burgeoning domestic markets from foreign competition while China's industrial policies are nurturing formidable state-backed competitors in global markets.⁶

The AML, China's first comprehensive competition statute, might be applied as a liberalizing counterweight to industrial policy, an instrument of industrial policy, or both, depending on the commercial and political stakes. The AML addresses three categories of "monopolistic conduct" (*longduan xingwei*) by "business operators" (*jingyingzhe*): "monopoly agreements" among multiple parties, encompassing hard-core cartels and other horizontal and vertical practices; "abuse of a dominant market position," including both single-firm conduct and collective dominance; and "concentrations of business operators that have or are likely to have the effect of eliminating or restricting competition."⁷ The AML also prohibits "administrative monopoly" (*xingzheng longduan*), a Chinese concept encompassing the misuse of governmental authority for anticompetitive purposes.⁸ The Antimonopoly Bureau of the Ministry of Commerce (MOFCOM) administers the merger review provisions of the AML. The Price Supervision and Inspection Division of the National Development and Reform Commission (NDRC) and its local Price Bureaus have authority over price-related violations of the rules against monopoly agreements and abuse of dominance, while the Antimonopoly and Anti-Unfair Competition Enforcement Bureau of the State Administration of Industry and Commerce (SAIC) is responsible for enforcing the rules against monopoly agreements and abuse of dominance not related to price. The AML also authorizes parties injured by violations of the AML to sue for damages in Chinese courts.⁹

Early in the AML's drafting, blunt calls for antitrust enforcement to build national champions, protect vulnerable domestic firms, and curb the influence of multinationals were common.¹⁰ More

³ See James McGregor, CHINA'S DRIVE FOR 'INDIGENOUS INNOVATION' A WEB OF INDUSTRIAL POLICIES 23 (2010).

⁴ See M. Forsythe, *Chairman Mao Never Left Board as Communists Dominate China Inc.*, BLOOMBERG, Oct. 13, 2010, <http://www.bloomberg.com/news/2010-10-12/chairman-mao-never-left-board-as-communists-assert-control-over-china-inc-.html>.

⁵ See "Guo Jin Min Tui" Weihe Juantu Chonglai? [Why the "Public Economy Progresses, Private Economy Retreats" Revived?], CNFOL.COM, Feb. 3, 2010, <http://news.cnfol.com/100203/101,1277,7218345,00.shtml>; see also Wei Sen: Shenme Shi Zhenzheng de Guo Jin Min Tui? [Wei Sen: What Is the Exact "Guo Jin Min Tui"?], CAIJING.COM.CN, Feb. 9, 2010, <http://www.caijing.com.cn/2010-02-09/110375152.html>.

⁶ See McGregor, *supra* note 3, at 5-7; see also China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy, Inv. No. 332-514 USITC Pub. 4199 at 5-5 to 5-7 (Nov. 2010).

⁷ See AML, art. 3.

⁸ See *id.* art. 8.

⁹ See *id.* art. 50.

¹⁰ In March 2004, SAIC released a controversial report alleging that many leading multinationals "exploit financial and technological advantages to dominate markets, suppress competition, and injure competitors and consumers" in China. See ANTIMONOPOLY DIVISION OF THE FAIR TRADE BUREAU, SAIC, *COMPETITION-RESTRICTING BEHAVIOR OF MULTINATIONAL COMPANIES IN CHINA AND POSSIBLE COUNTER-MEASURES*, BIWEEKLY OF ADMINISTRATION FOR INDUSTRY AND COMMERCE, Vol. 5 (2004); see also *Antimonopoly Law to Benefit All*, CHINA DAILY, Jun. 2, 2004, <http://www.china.org.cn/english/government/97133.htm>. Several of the purportedly "anticompetitive" practices described in the SAIC report, however, would not necessarily run afoul of U.S. or EC competition rules. See Org. for Econ. Cooperation & Dev. [OECD], *Competition Law and Policy as Tools for China to Prevent Anticompetitive Conduct and to Ensure that Government Policies Realise Their Objectives as Efficiently as Possible*, OECD Doc., CCNM/CHINA(2004)12 (Dec. 23, 2004), at ¶ 40 & n.11.

recently, some influential officials and scholars have argued that competition policy should be tempered by industrial policy goals. For example, Zhao Xiaoguang, the Director of the Department of Industry, Transport, and Commerce of the Legislative Affairs Office of the State Council, recently addressed the role of industrial policy in antitrust enforcement during a training session for AML enforcement personnel.

Companies of our country are not well developed as market players yet. As for the actual situation, market competition is insufficient or not at proper levels. The development of various kinds of companies is not in balance, and their competitiveness needs improvement. As a whole, the scale of companies of our country is relatively small, the concentration level of industries is not high, and competitiveness is not strong. The industrial policy of the state is to encourage companies to develop themselves and become bigger and stronger through means such as mergers and restructuring, to develop the economies of scale, increase economic efficiency, strengthen enterprise innovation ability, and thus increase the overall developing level and international competitiveness of our economy. Therefore, the guiding role and regulatory functions of the Anti-Monopoly Law have to be exercised, make the Anti-Monopoly Law a powerful policy tool of inhibiting monopoly, encouraging competition, increasing the quality of introduced foreign investment, and promoting the adjustment of the economic structure and the development of economies of scale.¹¹

In a similar vein, Professor Liu Jifeng of the China University of Political Science and Law directly tackled the tensions between competition policy and industrial policy in a recent edition of *Macroeconomics*, an official journal of the Academy of Macroeconomic Research of the NDRC.¹² While Professor Liu argues that “industrial policy should prioritize competition policy,” he also emphasizes the need to “position competition policy and industrial policy appropriately” in light of economic development strategies.¹³ Professor Liu highlights the national interests of industrialized countries in promoting market access and liberalized economies in the developing world in calling for the consideration of national interests in the context of merger review:

Developed countries hope developing countries will open more markets, and hope the developing countries will implement competition policy on the scale of the enterprises so that the companies of the developed countries can smoothly enter the markets of developing countries. Therefore, developing countries should coordinate competition policy and industrial policy well. In particular, for those developing countries where phases of economic development have been truncated or compressed, since market components are not fully secured, and risks exist all the time in opening, merger review has to consider economy security and economic sovereignty.¹⁴

Professor Liu highlights merger review as a means of checking the advances of multinational corporations while leading the way for domestic consolidation, concluding that merger review regulations “should have the function of monitoring and sanctioning monopolistic activities of multinational companies, and guiding concentrations of domestic companies.” Professor Liu concludes:

¹¹ See ZHAO XIAOGUANG, FANLONGDUANFA DE XINGZHI, DIWEI, TEZHENG JIQI ZHUYAO ZHIDU LINIAN [THE NATURE, POSITION, CHARACTERISTICS, AND MAJOR INSTITUTIONAL CONCEPT OF ANTI-MONOPOLY LAW] (Aug. 29, 2008), http://jjs.ndrc.gov.cn/gzdt/t20080829_233729.htm.

¹² See Liu Jifeng, *Lun Woguo Fanlongduan Fa zhong Jingzheng Zhengce yu Chanye Zhengce de Xietiao* [Coordination of the Competition Policy under the AML and Industrial Policies], *MACROECONOMICS*, no. 4, 2008, available at http://www.cel.cn/show.asp?c_id=112&c_upid=110&c_grade=3&a_id=11837.

¹³ *Id.*

¹⁴ *See id.*

[U]nder the situation of economic globalization, the main task of our country's companies for a certain period should be to develop and grow, and to increase economies of scale. During the whole process, we cannot neglect the adverse effect on the growth of our country's companies. The AML should fully consider this task and obstacles for this task, and provide technical support for the fulfillment of the task.¹⁵

The text of the AML itself allows the competition authorities to consider industrial policy objectives in formulating and enforcing antitrust policy. Its formal goals include “preventing and restraining monopolistic conduct, protecting fair market competition, increasing efficiency of economic operations, safeguarding the consumers’ interests and the public interests of the whole society, and promoting the healthy development of the socialist market economy.”¹⁶ The AML further provides that “the State shall formulate and implement competition rules suitable for the socialist market economy, perfect macro-control, and improve a unified, open, competitive, and orderly market system.”¹⁷

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Moreover, a last-minute revision to the AML by the National People’s Congress expressly directs the authorities to “protect the lawful interests” of companies in industries that are “controlled by the state-owned economy and that are critical to the wellbeing of the national economy and national security” and sectors involving state-sanctioned monopolies, and regulate such sectors “so as to protect the interests of the consumers and to promote technological progress.”¹⁸

The AML’s substantive provisions likewise provide textual hooks for considering industrial policies.

- Anticompetitive “monopoly agreements” may qualify for an exemption if they advance one of the many “public policy” objectives listed in the AML, provided that such restraints do not materially restrict competition in the relevant market and “enable consumers to share the benefits derived from the agreement.”¹⁹ Restrictive practices comporting with industrial policies might be covered by exemptions for practices enhancing the competitiveness of small and medium sized enterprises, for responding to severe decreases in sales volume or production increases, and “for the purposes of achieving public interests such as saving energy, protecting the environment, providing disaster relief, etc.”²⁰ Although the NDRC and the SAIC both released long-awaited implementing regulations in January 2011, neither agency’s regulations provide general principles for applying these exemptions.²¹

¹⁵ See *id.*

¹⁶ See AML, art. 1.

¹⁷ See *id.* art. 4.

¹⁸ See *id.* art. 7.

¹⁹ See *id.* art. 15.

²⁰ See *id.*

²¹ In January, 2011, the NDRC released two final implementing regulations to take effect on February 1, 2011. See Fan Jiage Longduan Guiding [Regulations on Anti-Price Monopoly] (promulgated by the National Development and Reform Commission on Dec. 29, 2010 and effective on Feb. 1, 2011), available at <http://www.ndrc.gov.cn/zcfb/zcfbl/2010ling/W020110104330950438166.pdf>; Fan Jiage Longduan Xingzheng Zhifa Chengxu Guiding [Procedural Regulations on the Administrative Enforcement of Anti-Price Monopoly] (promulgated by the National Development and Reform Commission on Dec. 29, 2010 and effective on Feb. 1, 2011), available at <http://www.ndrc.gov.cn/zcfb/zcfbl/2010ling/W020110104333527987891.pdf>. The SAIC, in turn, released three sets of new implementing regulations. See Gongshang Xingzheng Guanli Jiguan Jinzhi Longduan Xieyi Xingwei de Guiding [Regulations by Industrial and Commercial Authority on Prohibition of Monopoly Agreements], promulgated by SAIC on Dec. 31, 2010 and effective on Feb. 1, 2011, available at http://www.saic.gov.cn/zwgk/zyfb/zj/fld/201101/t20110104_103266.html; Gongshang Xingzheng Guanli Jiguan Jinzhi Lanyong Shichang Zhipei Diwei Xingwei de Guiding [Regulations by Industrial and Commercial Authority on Prohibition of Abuse of Dominant Market Position] (promulgated by SAIC

[C]oncerns persist among the international business community and China's domestic entrepreneurs that the ambiguities in the AML might be exploited to benefit SOEs and favored "national champions."

- Dominant firms are expressly prohibited from "abusing" their dominant market positions "to eliminate or restrict competition."²² Most rules against specific abuses under the AML are formulated as prohibitions against engaging in certain practices "without justification."²³ However, neither the AML nor the final NDRC and SAIC rules clarify the general principles or methodologies for gauging the elimination or restriction of competition or determining whether an allegedly abusive practice is "without justification." While there is no exemption for "abuses in the public interest," industrial policy concerns may guide the delineation between abusive and justified practices.
- The merger review standard calls for the prohibition of any concentration that "will result in or may result in the effect of eliminating or restricting market competition."²⁴ However, MOFCOM "may decide not to prohibit the concentration if the business operators involved can prove either that the positive effect of the concentration on competition obviously outweighs the negative effect, or that the concentration is in the public interest."²⁵ While the weighing of "positive effects . . . on competition" under the first clause targets typical antitrust concerns, the second clause opens an escape hatch for patently anticompetitive concentrations that nevertheless advance the public policy goals of the central government. Significantly, this "public policy" exception only serves to rescue anticompetitive deals; as drafted, it does not explicitly allow transactions to be blocked on public policy grounds.
- Article 55 of the AML provides that the law 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." Although specific guidelines on intellectual property issues are anticipated, none have been issued. Consonance with China's industrial policy might affect the delineation between legitimate exercises and abuse.

Such ambiguities are by no means unique to China. Competition statutes and regulations around the globe often hinge on economic concepts and abstract notions of fairness, reasonability, and public interest. Similarly, China is not the only jurisdiction where competition law coexists with industrial policy and state-ownership of commercial enterprises. But given China's legacy of centralized control of the economy, opaque political process, and contemporary focus on industrial policy, concerns persist among the international business community and China's domestic entrepreneurs that the ambiguities in the AML might be exploited to benefit SOEs and favored "national champions."

For example, selective enforcement might enable SOEs or favored firms to engage in misconduct where private domestic firms and foreign firms would face investigation. Although the AML mandates protection for the confidentiality of "commercial secrets" submitted to the authorities,

on Dec. 31, 2010 and effective on Feb. 1, 2011), available at http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103267.html; Gongshang Xingzheng Guanli Jiguan Zhizhi Lanyong Xingzheng Quanli Paichu Xianzhi Jingzheng Xingwei de Guiding [Regulations by Industrial and Commercial Authority on Prohibition of Abuse of Administrative Power to Eliminate or Restrict Competition] (promulgated by SAIC on Dec. 31, 2010 and effective on Feb. 1, 2011), available at http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103268.html.

²² See AML, art. 6.

²³ See *id.* art. 17.

²⁴ See *id.* art. 28.

²⁵ *Id.*

the text does not clearly address disclosure to other governmental agencies, mechanisms for determining whether information qualifies for protection, and scenarios where parties' requests for confidential treatment are denied.²⁶ China's competition authorities must, as a practical matter, confer with China's sector regulators in the course of their work. Consequently, AML investigations *might* morph into fishing expeditions for sensitive data for use by state planners and SOEs. Merger conditions and remedies for anticompetitive conduct might compel licensing of intellectual property on terms aimed at transferring technology to Chinese parties rather than maintaining competition. Moreover, the mere fear of such enforcement actions may prod multinationals and domestic entrepreneurs to avoid commercial confrontation with SOEs and favored firms. To bolster claims that a transaction or practice is both "good for consumers" and "good for China," multinationals and private Chinese parties may feel compelled to license technology or accept other terms with no bearing on general antitrust concerns. In short, the international business community remains concerned that the Chinese government's interests as a player, coach, and team owner in domestic and global markets may compromise its role as referee. But what do the actual practices of Chinese competition authorities to date suggest?

Administrative Enforcement: Actual Practice

Conventional wisdom holds that, when in conflict, industrial policy trumps antitrust in China. This does not, however, imply that industrial policy will drive antitrust enforcement in all circumstances. To the contrary, experience to date suggests that MOFCOM, the SAIC, and the NDRC remain inclined to develop default antitrust rules approximating the basic antitrust rules of other jurisdictions.

Officials from MOFCOM, the NDRC, the SAIC, and other government bodies are devoting substantial resources to studying foreign competition enforcement through formal technical assistance and exchange programs, secondment of personnel to foreign enforcement authorities, such as the U.S. Federal Trade Commission, and direct exchanges with foreign practitioners, scholars, and industry groups. Although the roster of Chinese antitrust officials with specialized training remains short, sophistication is trending up quickly in each of the agencies. Within the last year, MOFCOM has repeatedly invited frank and detailed input from international and domestic law firms on strategies for improving the merger review process. Companies and counsel find that China's antitrust authorities are genuinely interested in understanding prevailing international practices (as well as areas of divergence between jurisdictions) and genuinely willing to consider foreign precedent in applying China's own competition laws.

This willingness is reflected in the agencies' final implementing measures. China's antitrust authorities have proven far more willing than many other departments not only to circulate draft measures for public comment, but also to actively respond to public comment in finalizing the measures. The final regulations retreated from some complicated issues tackled in earlier drafts, deferring tough choices to future enforcement.²⁷ While several potentially problematic provisions

²⁶ See AML, arts. 41 & 54.

²⁷ For example, although MOFCOM previously circulated draft measures containing provisions clarifying the concept of "control" for purposes of determining whether a transaction is reportable as concentration. See Jingyingzhe Jizhong Shenbao Zanxing Banfa (Zhengqiu Yijian Gao) [Provisional Measures on the Notification of Concentrations of Business Operators (Draft for Comments)], MOFCOM, art. 3, Jan. 20, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106011461.html> [hereinafter MOFCOM Draft Notification Measures]. Subsequent measures issued by the State Council Legislative Affairs Office (SCLAO) added language carving out customary protections for minority investors. See Jingyingzhe Jizhong Shenbao Zanxing Banfa (Caoan) [Provisional Measures on the Notification of

persisted into the final regulations, the most worrisome provisions (such as the rules against “unfair” pricing by dominant firms) stemmed from the statutory text.²⁸ Overall, the timing and direction of the drafting process suggests that the NDRC, SAIC, and MOFCOM deliberately sought to incorporate many “best practices” in the final implementing measures.²⁹

Quantifying the influence of industrial policy on actual enforcement practice is more challenging. Available information is sparse. The AML only mandates that decisions to block or conditionally clear a merger be published.³⁰ The publication of other enforcement decisions is left to the discretion of the agencies.³¹ Moreover, the few decisions that are published need not articulate detailed factual findings or legal analysis to support the final conclusion. Speeches, press briefings, and periodic releases of case statistics only provide glimpses into the enforcement programs. Consequently, the public record of AML enforcement is confined to MOFCOM’s published decisions blocking or imposing conditions on transactions and to the other agencies’ selective announcements of enforcement actions.

The NDRC and SAIC have been cautious in their implementation of the rules against “monopoly agreements” and “abuse of dominance.” The recent promulgation of final implementing measures by the NDRC and SAIC may signify plans to ramp up enforcement in the future.³² To date, however, as described below, the SAIC has not announced any formal enforcement actions, and the NDRC has only announced the completion of two investigations.

On March 30, 2010, the NDRC announced the results of its investigation of an elaborate arrangement among thirty-three competing rice-noodle plants in the neighboring cities of Nanning and Liuzhou to raise prices during the annual Lunar New Year festival. The three organizers were

Concentrations of Business Operators (Draft)], SCLAO, Mar. 13, 2009, available at http://bmyj.chinalaw.gov.cn/lismsPro/law_download/fulltext/1236930767681.doc [hereinafter SCLAO Draft Notification Measures]. The final version of the regulations, however, shied away from the controversy and deleted all of these provisions. See Jingyingzhe Jizhong Shenbao Banfa [Measures on the Notification of Concentrations of Business Operators] (promulgated by the Ministry of Commerce on Nov. 21, 2009 and effective on Jan. 1, 2010), available at <http://fldj.mofcom.gov.cn/aarticle/c/200911/20091106639149.html>; Jingyingzhe Jizhong Shencha Banfa [Measures on the Review of Concentrations of Business Operators] (promulgated by the Ministry of Commerce on Nov. 24, 2009 and effective on Jan. 1, 2010), available at <http://fldj.mofcom.gov.cn/aarticle/c/200911/20091106639145.html>.

²⁸ Article 17 (1) of the AML prohibits dominant firms from making sales at “unfair high prices” or buying products at “unfair low prices.” To implement this provision of the statute, the NDRC’s final rules outline principles for gauging the “fairness” of dominant firms’ pricing. See Regulations on Anti-Price Monopoly, *supra* note 21, art. 11. These factors include: “(1) Whether the sales price or the purchase price is obviously higher or lower than the price of other business operators in the sale or purchase of commodities of the same type; (2) Whether the sale price was increased or the purchase price was decreased beyond the normal range when the costs are generally stable; (3) Whether the extent of the increase in the sale price of a commodity obviously exceeds the extent of increase in cost, or the extent of price decrease in the purchase of a commodity obviously exceeds the extent of cost decrease of the trading party; [and] (4) Other related factors which shall be considered.” *Id.*

²⁹ For example, the NDRC’s final measures omitted language from previous drafts (1) allowing a presumption of “consistency of price behavior” where firms “fix or change the prices of the same sorts of commodities in a same or similar period to the same or similar standard and extent,” and (2) listing “possession of essential facilities such as pipelines and networks,” requirements for “economies of scale” based on “sales networks, capital and technology,” and “cost advantages” as indicia of dominance. See Fan Jiage Longduan Guiding (Zhengqiu Yijian Gao) [The Draft Anti-Price Monopoly Regulations], NDRC, Aug. 12, 2009, arts. 5, 18, available at http://www.ndrc.gov.cn/fjbak/t20090812_296055.htm.

³⁰ See AML, art. 30.

³¹ See AML, art. 44.

³² See Regulations on Anti-Price Monopoly, Procedural Regulations on the Administrative Enforcement of Anti-Price Monopoly, Regulations by Industrial and Commercial Authority on Prohibition of Monopoly Agreements, Regulations by Industrial and Commercial Authority on Prohibition of Abuse of Dominant Market Position, Regulations by Industrial and Commercial Authority on Prohibition of Abuse of Administrative Power to Eliminate or Restrict Competition, *supra* note 21.

fined RMB 100,000, eighteen of the companies received fines ranging from RMB 30,000 to RMB 80,000, and the remaining participants received warnings.³³

On January 4, 2011, the NDRC announced the imposition on a trade association of the maximum penalty for orchestrating price fixing.³⁴ According to the NDRC notice, the Zhejiang Fuyang Paper Industry Association convened five meetings among over twenty competing companies during 2010 to set uniform price increases on various products. The NDRC concluded that the association that had “organized the business operators within the industry to conclude monopoly agreements to change or fix prices has violated relevant provisions of the Price Law and the Anti-Monopoly Law” and imposed the maximum penalty of RMB 500,000.³⁵

The NDRC’s selection of these enforcement actions for publication may have been intended to send specific messages to the Chinese marketplace. Combating inflation in basic food prices has been a challenge for NDRC planners in recent years, so the rice noodle cartel’s transgressions in jacking up food prices during the holidays transcended mere cartel behavior. Similarly, the stiff penalty for the Zhejiang Fuyang Paper Industry Association (though not its individual members) reflects a continuing effort to discipline China’s trade associations.

Tellingly, the NDRC invoked the Price Law alongside the AML in both cases.³⁶ The Price Law, enacted in 1997, provides the legal framework for China’s mixed economy in which prices for most goods and services are generally set by the market, but the NDRC (and other authorities) retain power to issue price guidance for certain products or to set prices for all products under extraordinary circumstances. The NDRC continues to rely on the Price Law in regulating many markets. In the rice noodle cartel case, the local price bureaus “ordered the operators to stop illegal activities, correct their faults, and formulated the emergency proposal for stabilizing the rice noodle price and ensuring the market supply.”³⁷ Although Article 46 of the AML contemplates ordering cartel participants to “cease illegal acts” by ending collusion, the local Price Bureaus specifically directed the cartel participants to restore pre-cartel pricing pursuant to the Price Law and its implementing measures. The NDRC explained that these expedient measures were taken “to quickly stabilize the rice noodle market, protect the consumers’ legal rights and interests, and ensure the people to have a peaceful and happy Chinese New Year.”³⁸ In essence, the Price Bureaus opted to reverse the price effects of the cartel through old habits of direct regulatory intervention rather than waiting for the resumption of competition to reset pricing.

The NDRC appears comfortable wielding the Price Law in one hand and the AML in the other when confronting misconduct or crises in the marketplace. For example, on July 1, 2010, the NDRC announced a series of measures to address market manipulation and hoarding in region-

³³ See Nanning, Liuzhou Bufen Mifen Shengchan Changjia Chuantong Zhangjia Shoudao Yanli Chachu [Some Rice Noodles Producers in Nanning and Liuzhou Were Severely Punished for Colluding on Price Increase], NDRC News, Mar. 30, 2010, http://www.ndrc.gov.cn/xwfb/t20100330_338104.htm [hereinafter NDRC Rice Noodle Notice].

³⁴ Zhejiangsheng Fuyangshi Zaozhi Hangye Xiehui Zuzhi Jingyingzhe Dacheng Jiage Longduan Xieyi Shoudao Yanli Chufa [Zhejiang Fuyang Paper Industry Association Has Been Strictly Punished for Organizing Business Operators to Conclude Monopoly Agreements], NDRC, Jan. 4, 2011, http://jjs.ndrc.gov.cn/gzdt/t20110104_389453.htm [hereinafter NDRC Paper Trade Association Notice].

³⁵ *Id.*

³⁶ 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), http://www.gov.cn/ziliao/flfg/2005-09/12/content_31188.htm.

³⁷ See NDRC Rice Noodle Notice, *supra* note 33.

³⁸ *Id.*

al markets for garlic and mung beans.³⁹ Acting in concert with the State Council, MOFCOM, and the SAIC, the NDRC's measures resulted in substantial reductions in prices (with Beijing prices falling 30.8 percent for garlic and 12.3 percent for mung beans). But while the announcement trumpeted the AML as one of the primary laws governing pricing, the actual enforcement measures all relied on the Price Law.

The NDRC also appears comfortable in relying on soft administrative guidance rather than formal enforcement actions to address anticompetitive conduct. Regulators in China frequently relay opinions and expectations informally. On January 8, 2010, the Publishers Association of China, the Books and Periodicals Distribution Association of China, and the China Xinhua Bookstore Association jointly published "Book Fair Trading Rules" capping discounts on new books (published within the past year) at 15 percent.⁴⁰ The measures were subsequently revised and the discount cap stricken, reportedly at the request of the NDRC. The NDRC, however, did not publish any report of its investigation and any remedial measures.⁴¹ Similarly, Chinese media have reported that the NDRC in 2009 investigated the implementation by TravelSky, a computerized air ticketing network responsible for most computerized airline ticket sales in China, of a uniform discount formula resulting in increased fares, though no results of the investigation were published.⁴²

The reported investigations of TravelSky and the Book Fair Trading Rules presumably implicated the activities of important SOEs. While these reports suggest that the NDRC will actively investigate collusion among SOEs, they also suggest that SOEs may be policed through informal guidance and remedial agreements rather than formal enforcement actions. Due to the lack of transparency, it is difficult to determine the extent of such soft enforcement by the NDRC, the extent to which the SAIC is pursuing similar tactics, and the extent to which private domestic and foreign companies enjoy similar treatment. The most conspicuous episodes of "selective enforcement" involve mergers of SOEs. The last two years witnessed numerous consolidations and restructurings involving prominent SOEs. While many of these transactions appear to satisfy the revenue thresholds for mandatory merger review by MOFCOM, few of these deals appear to have been filed. The merger of China's principal telephone companies, China Unicom and China Netcom, was one example of such apparent failure to report.⁴³

The role of industrial policy concerns in MOFCOM's handling of reported transactions is less certain. As of August 2010, MOFCOM had received over 140 notifications under the AML.⁴⁴ Roughly one-third of the reviews appear to have proceeded beyond the thirty-day initial review period. Many of these extensions, however, may reflect resource constraints or delays in completing the formal approval process within the ministry's broader bureaucracy rather than substantive concerns.

The NDRC also appears comfortable in relying on soft administrative guidance rather than formal enforcement actions to address anticompetitive conduct.

³⁹ See Guojia Fazhan Gaigewei, Shangwubu, Guojia Gongshang Zongju Youguan Fuzeren jiu Jiaqiang Nongchanpin Shichang Jianguan Gongzuo Da Jizhe Wen [Officials of NDRC, MOFCOM, and SAIC Answered Journalists' Questions on Strengthening the Supervision and Administration of Agricultural Products Market], NDRC, July 1, 2010, http://www.sdpc.gov.cn/xwfb/t20100701_358444.htm.

⁴⁰ See ZHONGGUO JINGZHENG FALU YU ZHENGCE YANJIU BAOGAO 2010 NIAN [REPORT ON COMPETITION LAW AND POLICY OF CHINA 2010] 134 (Competition Policy and Law Section of China Society for World Trade Organization Studies ed., Law Press China 2010).

⁴¹ *Id.* at 134.

⁴² *Id.* at 133.

⁴³ See Fanlongduan, Yigeren de Zhanzheng [Anti-Monopoly, the Battle of a Single Man], EEO.COM.CN, Nov. 22, 2009, http://www.eeo.com.cn/Politics/beijing_news/2009/11/21/156314.shtml.

⁴⁴ See Shangwubu 12 Ri Zhaokai Fanlongduan Gongzuo Qingkuang Zhuanti Xinwen Fabuhui [MOFCOM Held Press Conference on the Monographic Topic of Anti-Monopoly Work on August 12], Aug. 12, 2010, http://www.gov.cn/gzdt/2010-08/12/content_1678211.htm.

MOFCOM has thus far imposed conditions on six transactions.⁴⁵ Certain remedies imposed by MOFCOM were not clearly tethered to protecting consumers. Examples include conditioning Mitsubishi's acquisition of Lucite, in part, on an agreement to abstain from investments in new methyl methacrylate capacity in China, and conditioning General Motors' acquisition of Delphi on various measures aimed at protecting upstream Chinese auto-part makers.⁴⁶ Strict conditions on Panasonic's acquisition of Sanyo may reflect heightened concern for the downstream Chinese purchasers of the parties' battery products.⁴⁷ Coca-Cola's bid to acquire Chinese juice maker Huiyuan remains the only transaction to have been prohibited outright—a decision which, as explained below, remains controversial.⁴⁸

Considerable investigative activity and deliberation remain shrouded from the public, and data remains scarce. Nevertheless, with the possible exception of the Coke/Huiyuan decision, none of the published merger decisions appear aimed at hobbling foreign competitors to make space for

⁴⁵ See Zhonghua Renmin Gongheguo Shangwubu Gonggao [2008] Di 95 Hao [Notice [2008] No. 95 of the Ministry of Commerce of the People's Republic of China] (issued by Ministry of Commerce, Nov. 18, 2008, effective the same day), available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html?246920359=2853606895> [hereinafter InBev/AB Notice]; Zhonghua Renmin Gongheguo Shangwubu Gonggao (2009 Nian Di 28 Hao) [Notice [2009] No. 28 of the Ministry of Commerce of the People's Republic of China] (issued by Ministry of Commerce, Apr. 24, 2009, effective the same day), available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html?28751015=2853606895> [Mitsubishi/Lucite Notice]; Zhonghua Renmin Gongheguo Shangwubu Gonggao 2009 Nian Di 76 Hao [Ministry of Commerce of the People's Republic of China No.76 of 2009], Sept. 28, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906540211.html?1805288025=1142016402> [hereinafter GM/Delphi Notice]; Zhonghua Renmin Gongheguo Shangwubu Gonggao [2009] Di 77 Hao (Guanyu Fu Tiaojian Pizhun Huirui Gongsì Shougou Huishi Gongsì Fanlongduan Shencha Jueding de Gonggao) [Ministry of Commerce of the People's Republic of China No.77 of 2009 Notice on Anti-Monopoly Review Decision of Approving with Conditions Acquisition of Wyeth by Pfizer], Sept. 29, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html?4103766617=1142016402> [hereinafter Pfizer/Wyeth Notice]; Zhonghua Renmin Gongheguo Shangwubu Gonggao [2009 Nian] Di 82 Hao Gonggao (Guanyu Fu Tiaojian Pizhun Songxia Gongsì Shougou Sanyang Gongsì Fanlongduan Shencha Jueding de Gonggao) [Ministry of Commerce of the People's Republic of China No.82 of 2009 Notice on Anti-Monopoly Review Decision of Approving with Conditions Acquisition of Sanyo by Panasonic], Oct. 30, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200910/20091006593175.html> [hereinafter Panasonic/Sanyo Notice]; Zhonghua Renmin Gongheguo Shangwubu Gonggao [2010 Nian] Di 53 Hao (Guanyu Fu Tiaojian Pizhun Nuohua Gufen Gongsì Shougou Aierkang Gongsì Fanlongduan Shencha Jueding de Gonggao) [Ministry of Commerce of the People's Republic of China No. 53 of 2010 Notice on Anti-Monopoly Review Decision of Approving with Conditions Acquisition of Alcon by Novartis], Aug. 13, 2010, available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/201008/20100807080639.html> [hereinafter Novartis/Alcon Notice].

⁴⁶ See Mitsubishi/Lucite Notice, *supra* note 45. See also GM/Delphi Notice, *supra* note 45. The remedies imposed on GM aimed to curb discrimination by GM in favor of Delphi over unaffiliated auto-parts manufacturers. The parties agreed that: (1) Delphi would continue to supply its Chinese auto customers without discrimination, continue the timely and reliable supply and quality of its products consistent with current practices, and would ensure that prices and quantity will be based on market conditions and agreed arrangements; (2) GM would not illegally obtain competitively sensitive information belonging to any third party and in the possession of Delphi; (3) Delphi would, if requested, assist customers in smoothly switching suppliers without intentional delays or restrictive conditions aimed at increasing switching costs; and (4) GM would continue with its principle of multiple sourcing and nondiscrimination for auto parts, without unreasonable conditions favoring Delphi. The standards for assessing compliance with these commitments remain uncertain.

⁴⁷ See also Panasonic/Sanyo Notice, *supra* note 45. MOFCOM required the parties to: (1) divest Sanyo's lithium coin-cell secondary battery business in Japan, including the right to use any specialized intellectual property related to the production of such batteries; (2) divest either Sanyo's consumer NiMH battery businesses in Japan or Panasonic's comparable business in China; (3) divest Panasonic's automobile HEV NiMH battery business in Japan; and (4) with regard to the Panasonic-Toyota joint venture for HEV NiMH batteries, reduce Panasonic's capital contribution percentage, give up its voting rights, rights to appoint board members, and veto rights, and remove "Panasonic" from the joint venture's name.

⁴⁸ See Zhonghua Renmin Gongheguo Shangwubu Gonggao [2009 Nian] Di 22 Hao (Shangwubu Guanyu Jinzhi Kekoukele Gongsì Shougou Zhongguo Huiyuan Gongsì Shencha Jueding de Gonggao) [Notice [2009] No. 22 of the Ministry of Commerce of the People's Republic of China Notice on Anti-Monopoly Review Decision of Prohibiting Acquisition of Huiyuan by Coca-Cola] (issued by Ministry of Commerce, Mar. 18, 2009, effective the same day), available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html?3695772507=1142016402> [hereinafter Coca-Cola/Huiyuan Notice].

Chinese national champions. Both of the NDRC's published enforcement actions targeted flagrant cartel activity—consistent with foreign advice to start with the basics. So while the context of the AML's formulation and implementation provides ample circumstantial evidence that Chinese regulators may have the motive, means, and opportunity to apply the AML to advance industrial policy, there is scant direct evidence that this has actually occurred so far.

Displacement by Sector Regulators

The interplay between industrial policy and competition policy is not determined by the competition authorities in isolation. Most sectors of the Chinese economy are regulated by multiple ministries and commissions, many of which exercise tremendous power in directing or approving investment and innovation. Sectoral regulators naturally recognize the possibility that antitrust enforcement might interfere with their own industrial policy agendas. Indeed, early drafts of the AML included language that would have granted the industry regulators the authority to enforce the AML within the sectors under their supervision—implicitly conferring discretion to abstain from enforcement.

Under the final text of the AML, competition policymaking and enforcement is subject to the guidance of the Anti-Monopoly Commission of the State Council (AMC), an interagency committee comprising representatives from most central government bodies with a stake in regulating commerce. Although little has been published about the AMC's activities, its mere existence signifies the potential for competition policy to be constrained by industrial policy. As a practical matter, MOFCOM routinely confers with relevant sector regulators and trade associations when assessing mergers. Any direct clashes between antitrust enforcers and sector regulators are likely to be resolved behind closed doors through the AMC or the general political process, assuming that the antitrust enforcers are willing to invest political capital and resources in challenging a sector regulator on its own turf.

In some circumstances, however, sector regulators might intervene openly in antitrust disputes, as demonstrated in a recent dispute between prominent Chinese Internet companies Tencent and Qihoo 360. Throughout 2010, Chinese media reported a series of commercial and technical moves involving the companies' browser, instant messaging, and security applications aimed at preventing consumers from utilizing rival products. The feud escalated into a brawl as Tencent and Qihoo traded public allegations of privacy invasions and criminal conduct, with other prominent Chinese software and Internet companies calling for a boycott of Qihoo. In November, Tencent and other software vendors announced that their products would no longer "co-exist" with Qihoo products, and Tencent took steps to disable its messaging software on systems running a Qihoo security program.⁴⁹ Tencent sued Qihoo in a Beijing court for unfair competition under the 1993 Anti-Unfair Competition Law of the People's Republic of China (AUCL),⁵⁰

⁴⁹ See *Tengxun Cheng Jiangzai Zhuangyou 360 Ruanjian de Diannao shang Tingzhi Yunxing QQ* [Tencent Announces QQ Will Cease Working in Computers with 360 Installed], SINA, Nov. 3, 2010, <http://tech.sina.com.cn/i/2010-11-03/18214824295.shtml>; *Jinshan Sougou Keniu Aoyou Baidu Xuanbu Jiang Bu Jianrong 360* [Kingsoft, Sougou, Keniu, Maxthon, and Baidu Announce Their Software Will Not Co-Exist with 360], SINA, Nov. 5, 2010, <http://tech.sina.com.cn/i/2010-11-05/10084832568.shtml>.

⁵⁰ 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 Dec. 1, 1993), arts. 6, 8, 11–12, 15, available at <http://fs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027909.html>.

while a Beijing lawyer filed a complaint with the SAIC requesting an investigation of Tencent for abuse of dominance under the AML.⁵¹ The stage was set for a landmark IT antitrust case.

Then the Ministry of Industry and Information Technology (MIIT), the chief regulator of the Chinese information technology sector, stepped in. On November 9, 2010, Minister Li Yizhong, the head of MIIT, publicly chastised both parties for acting immorally. Chinese media reported that MIIT would consult China's cabinet, the State Council, on the matter.⁵² On November 21, 2010, MIIT issued the *Notice on Criticizing Beijing Qihoo Technology Co., Ltd. and Shenzhen Tencent Computer System Co., Ltd.* rebuking both parties for "improper competition activities" and the "harmful social effects" of their dispute. The MIIT notice instructed both parties to issue public apologies, cease attacking one another, and ensure the compatibility of relevant software. Although MIIT is represented on the Antimonopoly Commission, MIIT has no direct enforcement authority under the AML.⁵³ Accordingly, the notice warned that MIIT would further investigate the matter "together with other relevant agencies" to determine if any unlawful conduct had occurred. The MIIT notice admonished both parties to "learn" from the dispute, and closed with a warning to other technology companies to "comply with industrial regulations, maintain the market order, respect users' rights and interests, and promote the development of the internet industry."⁵⁴ After the Notice of Criticism, both Qihoo and Tencent published apologies to the public.⁵⁵ So far, no formal investigative findings or penalties have been announced.

However, MIIT circulated a draft for new *Provisional Measures on the Supervision and Administration of the Order of the Internet Information Service Market* for public comment on January 14, 2011.⁵⁶ These measures were widely viewed as a proactive response to the risks exposed by the fracas between Tencent and Qihoo. The draft measures prohibit "unfair competition" by internet service providers, such as disparaging competing services, deliberately causing incompatibility with other services without justification, interfering with the operation of other

⁵¹ See Tengxun Su 360 Buzhengdang Jingzheng Beijing Chaoyang Fayuan Zhengshi Shouli Gaian [Tencent Sues 360 for Unfair Competition, Chao Yang District People's Court of Beijing Formally Accepted the Case], PEOPLE.COM.CN, Nov. 3, 2010, <http://media.people.com.cn/GB/40606/13120242.html>; Fanlongduanju Jinji Yuejian Tijiao dui Tengxun Fanlongduan Diaocha Lvshi [Anti-Monopoly Bureau Urgently Invited Lawyers Who Submitted Application for Anti-Monopoly Investigation against Tencent to Meeting], SINA, Nov. 9, 2010, <http://tech.sina.com.cn/i/2010-11-09/01024841632.shtml>.

⁵² See Li Yizhong: Gongxinbu Zheng Zhuajin Chuli 360 yu Tencent QQ Jiufen Shijian [The Ministry of Industry and Information Is Quickly Handling the Conflict Between 360 and Tencent QQ], XINHUANET.COM, Nov. 10, 2010, http://news.xinhuanet.com/fortune/2010-11/10/c_12760092.htm.

⁵³ The NDRC published an article authored by a member of the National People's Congress arguing that the dispute had demonstrated the need for measures protecting online privacy. See Renda Daibiao Jianyi: Jinkuai Lifa Baohu Wangluo Yinsi [National People's Congress Member Suggest Legislate to Protect Online Privacy as Soon as Possible], NDRC, Nov. 10, 2010, available at http://www.ndrc.gov.cn/xxfw/fgdt/20101109_379608.htm.

⁵⁴ See Guanyu Piping Beijing Qihu Keji Youxian Gongshe he Shenzhenshi Tengxun Jisuanji Xitong Youxian Gongshe de Tongbao [Notice on Criticizing Beijing Qihoo Technology Co., Ltd. and Shenzhen Tencent Computer System Co., Ltd.], Nov. 20, 2010, issued by the Ministry of Industry and Information Technology on Nov. 21, 2010, available at <http://www.miit.gov.cn/n11293472/n11293832/n11293907/n11368223/13499351.html>.

⁵⁵ See 360 Zaici Zhi Shehui he Wangmin de Daoqianxin [The Apology Letter of 360 to Re-Apologize to the Society and Netizens], Nov. 21, 2010, available at <http://bbs.360.cn/3229787/40204940.html?recommend=1>; Tengxun Gongshe Zhi Guangda Yonghu Daoqianxin-He Ni Zai Yiqi [The Apology Letter of Tencent to Broad and Extensive Users- Be with You], Nov. 21, 2010, <http://tech.qq.com/a/20101121/000069.htm>.

⁵⁶ See Hulanwang Xinxi Fuwu Shichang Zhixu Jiandu Guanli Zanxing Banfa (Zhengqiu Yijian Gao) [Provisional Measures on the Supervision and Administration of the Order of the Internet Information Service Market] (Draft for Comments) (released by the Ministry of Industry and Information Technology of the People's Republic of China on Jan. 14, 2011), available at <http://www.miit.gov.cn/n11293472/n11293832/n11293907/n11368223/13567763.html>.

business operators' products on end-users' systems, modifying other companies' products or services, blocking information from competing services, and deceiving or coercing end-users into disabling competing products.⁵⁷ The draft measures also prohibit internet service providers from unilaterally refusing to provide service without justification, restricting users' rights to select products or services, or altering software on users' systems without their consent.⁵⁸

While the MIIT's intervention avoided further disruption of services to Chinese Internet users, it remains to be seen whether the SAIC or NDRC will ever opine on the dispute from the standpoint of Chinese competition law. Reactive intervention may be expedient, but it may also stunt the growth of Chinese competition law. In effect, sectoral regulation by the MIIT has displaced the evolution of antitrust in China's information technology industry.

Conclusion: The Threat of False Positives

China's competition authorities will inevitably confront conflicts between promoting consumer welfare and economic efficiency and achieving the immediate objectives of Chinese industrial policy. The text of the AML invites antitrust enforcers to consider non-antitrust goals; in Beijing's current policymaking environment, on some occasions this invitation may not be easily refused. As previously stated, when industrial policy and antitrust policy collide, industrial policy is likely to prevail. This does not, however, necessarily imply that industrial policy will drive competition policy in all circumstances. In the absence of overriding industrial policy goals, the antitrust enforcement authorities retain considerable discretion to follow their default competition rules.

In scanning Chinese antitrust law for industrial policy contaminants, the opacity of the policymaking and enforcement process increases the risks of false positives. Where a decision appears to deviate from prevailing international practices, the authorities may not provide sufficient factual or legal analysis for companies, counsel, and trading partners to determine whether the deviation results from: (1) novice error in a good-faith application of prevailing practice, (2) deliberate adherence to a minority view of a competition policy issue, (3) deliberate development of a "new" approach, (4) application of prevailing practice based on factual findings differing from general public knowledge of the case, or (5) influence by industrial policy or other political factors.

The Coke/Huiyuan decision demonstrates this risk.⁵⁹ The prospect that one of China's most successful domestic household brands might fall into the hands of a major multinational provoked a nationalistic outcry from the Chinese public. MOFCOM's brief notice blocking the deal advanced a theory of competitive harm arising from the "leveraging" of Coca-Cola's dominance in the carbonated beverage market into the fruit juice market.⁶⁰ Although reliance on theories of 'leveraging' or 'portfolio effects' to block conglomerate mergers meets skepticism in the U.S. and Europe, MOFCOM could have nonetheless pointed to U.S. and EU precedents.⁶¹ MOFCOM could have also pointed to the Australian Competition and Consumer Commission's 2003 decision to oppose

⁵⁷ See *id.* art. 6.

⁵⁸ *Id.*

⁵⁹ See *Coca-Cola/Huiyuan Notice*, *supra* note 48.

⁶⁰ *Id.*

⁶¹ See Org. for Econ. Cooperation & Dev. [OECD], Portfolio Effects in Conglomerate Mergers, OECD Doc., DAFFE/COMP (2002)5 (Jan. 24, 2002), available at <http://www.oecd.org/dataoecd/39/3/1818237.pdf>.

Coca-Cola's acquisition of Berri Limited on a leveraging theory.⁶² Given the political context of the decision, suspicions about the "real" rationale for the decision (as well as rumors about the parties' goals) persist. Because the public notice itself does not describe MOFCOM's factual findings and economic analysis, the rigor of MOFCOM's leveraging analysis remains in doubt. Had the transaction involved a global integration of multinationals akin to the merger of General Electric and Honeywell blocked by the European Commission in 2001 (following clearance by the United States), prohibition on the strength of such conclusory analysis might have provoked a rebuke from China's trading partners exponentially sharper than the acrimony following GE/Honeywell.

The subordination of competition policy to industrial policy in specific cases should not deter the progressive refinement of China's general competition regime. Foreign observers should be circumspect in assessing the motives of Chinese competition enforcement, and cautious in framing Chinese antitrust as an item on the trade agenda. But because the policymaking climate in Beijing validates concerns that industrial policy might distort antitrust enforcement, Chinese competition authorities must articulate more detailed factual findings and legal reasoning to overcome suspicions that industrial policy or politics drives decisions. While this goes against the grain of Chinese administrative practices and legal traditions, greater transparency in the AML enforcement program will provide clearer guidance to companies about China's default antitrust rules and build confidence in China's antitrust regime. ●

⁶² See ACCC assessment of Coca-Cola Amatil Limited's proposed acquisition of Berri Limited, available at <http://www.accc.gov.au/content/item.phtml?itemId=503214&nodeId=933cf0f7f72fc1bbe102c39b6243b815&fn=Coca-Cola+Amatil+Ltd's+proposed+acquisition+of+Berri+Ltd+-+8+October+2003+-+re+carbonated+soft+drink+and+fruit+juice.pdf>.