Anti-Monopoly Law of China: an insight on the regime defined by a most “competent” competition law

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Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University.

This dissertation shall endeavor to present the Anti-Monopoly Law of China that came into force on August 1, 2008 and changed the landscape of competition law in a country where the concept of competition was unknown prior the 1990s. The AML consists of eight chapters: general provisions, monopoly agreements, abuse of dominant market position, concentration of undertakings, abuse of administrative power to eliminate or restrict competition, investigation into suspected monopolistic conduct, legal liabilities and supplementary articles.

The purpose of this dissertation is to present the four basic pillars of Chinese competition law, i.e. monopolistic agreements, abuse of a dominant market position, mergers (concentrations under the AML) and abuse of administrative power, as well as the enforcement regime established under the AML. The historical and political context, prior and during the drafting of the law, is mentioned, as well as the controversies over certain provisions. The AML, while a competent competition law, has several weaknesses that are presented as part of this dissertation’s analysis. Special notice should be given to the enforcement framework established under the AML and the unique decision of the State Council of China to authorize three different enforcement agencies (MOFCOM, NRDC and SAIC). Ultimately, the influences from foreign legislation (European Union legislation, United States legislation) and international practices combined with the characteristics of Chinese society contributed in the creation of the AML.

Keywords: competition law, China, Anti-Monopoly Law

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Preface

This dissertation is part of a very long journey filled with hardships, excitement and knowledge. It is said that in the end we reminisce the beginning and I find that to be true. My participation in the LLM program of the International Hellenic University provided me with an opportunity to enhance my knowledge in commercial law, to gain further insight in contract law and ultimately, to combine two fields that fascinate me: competition law and Chinese culture.

I wish to thank my exceptional supervisor, Dr. Thomas Papadopoulos, who guided me and took the time to answer repeatedly -if I might add- my persistent questions with clear head and patience. My efforts were aided, also, by my family that supported me during my studies at the International Hellenic University.
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Introduction

Competition is the cornerstone of a fair market operation. The protection of competition is upheld by the antitrust legislation. A compact and comprehensive antitrust legislation can be the necessary tool for the prevention and elimination of monopolistic practices, the protection of fair market competition and of consumers’ interests as well as the promotion of economic efficiency that is a factor of stability in a prosperous state.¹ The Anti-Monopoly Law of China² that came into force on August 1, 2008 shared the above-mentioned goals and through its provisions strived to achieve them.

For China, the enactment of antimonopoly legislation has been a long and tortuous journey and the Anti-Monopoly Law could be considered, despite its considerable flaws, an important milestone, since it includes -for the first time ever in the history of China- provisions that touch upon every important aspect of antitrust, even anticompetitive practices endorsed by administrative agencies, a subject not usually dealt with in antitrust laws.³

The Anti-Monopoly Law of China (hereinafter AML) is the subject of this paper. There are eight chapters in this law: chapter 1 of general provisions, that includes articles detailing the purpose of the law, definitions of various terms, as well as articles that set general prohibitions and guidelines for the establishment of the appropriate authorities, chapter 2 of monopoly agreements, chapter 3 regarding the abuse of a dominant market position, chapter 4 dealing with the concentration of undertakings, chapter 5 that addresses the abuse of administrative power for the purpose of elimination or restriction of competition, chapter 6 regarding the investigation of suspected monopolistic conducts, chapter 7 that refers to legal liabilities and finally

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¹Zhenguo Wu, ‘Perspectives on the Chinese Anti-Monopoly Law’ [2008] 75 American Bar Association Antitrust 73, 76
chapter 8 that includes supplementary articles, stipulating mainly exemptions of this law regarding intellectual property and agricultural industry.

The purpose of this paper is to present the historical and political conditions under which the AML formulated as well as the basic pillars of antitrust that are introduced through the various chapters in the law: monopoly (or monopolistic) agreements, abuse of dominant market position, concentration of undertakings and abuse of administrative power. Furthermore, this paper addresses the subject of enforcement under the AML. However, the exemptions set regarding intellectual property and agricultural industry shall not be discussed in this paper. The provisions of the law shall be presented, and it will be undoubtedly clear that each one of them is a component of a greater unit with the purpose to regulate practices and behaviors that could potentially harm competition. It should be stressed though that an analysis of each provision shall not take place since this paper aims to address the spirit of each chapter of the law stressing certain key points.

The first part of this paper will address briefly the historical background of the AML, and the necessity for its enactment due to the inadequacy of existing legislation in establishing a comprehensive framework for the protection of competition. The second part will discuss the monopolistic agreements under the scope of the AML with references to prohibited practices as well as exceptions to said prohibitions. The third part will address the abuse of a dominant market position with references to practices that constitute abuse and the factors determining the dominance of an undertaking within a defined market. The fourth part will present the framework of concentration of undertakings and address the issue of the notification thresholds for impeding concentrations. The fifth part will focus on the administrative monopolies and their important role within the Chinese society due to its form as well as the struggle to contain their potential abuse. The sixth part will discuss the establishment of the three competent enforcement authorities, the investigation of suspected monopolistic practices, the penalties for an infringement of the law and lastly, the possibility of an administrative review and administrative litigation regarding the decision made by a competent authority. Finally, the last part of this paper will include certain conclusion remarks regarding the AML and its strengths and weaknesses.
The enactment of Anti-Monopoly Law

The drafting process of the AML began in 1994 and it was helmed by the State Economic and Trade Commission (SETC) -later to be succeeded in this particular assignment by the Ministry of Commerce (MOFCOM)- and the State Administration for Industry and Commerce (SAIC). After the circulation of a draft in 2002 with the intention to gather valuable commentary, numerous revisions took place followed by the submission of a draft to the National People’s Congress Standing Committee for its first review in June 2006. The final draft of the AML was approved during its third review on August 30, 2007.4

The drafting and reviewing process of the AML lasted more than a decade, but what powered the decision to enact a comprehensive anti-monopoly law? In 1992, during the Fourteenth Meeting of the Chinese Communist Party, the objective of pursuing the establishment of a socialist market economy was unequivocally declared, thereby indicating the conversion of the State’s economic model from central-planned economy to market economy.5 For this purpose, a number of laws as well as administrative regulations were adopted in the 1990s, as part of the bigger picture: a comprehensive antimonopoly legislation that protects competition and by extension consumers’ rights.

Among the laws that were adopted in the 1990s was the Anti-Unfair Competition Law6 which included several provisions aimed to eliminate monopolistic practices, such as tying7 and predatory pricing8. That law signified the first serious attempt of China in antitrust law, but its flaws far surpassed its strengths. The first important drawback of that law was that in its essence was “more like a consumer protection law than an antitrust law”, as Bruce M. Owen, Su Sun and Wentong Zheng aptly pointed out in their article ‘China’s competition policy reforms: The Anti-
Monopoly Law and beyond” and they further stressed the fact that the Anti-Unfair Competition Law contains numerous provisions with little to no relevance to competition per se, such as provisions on bribery and deceptive advertising. Moreover, despite its best intentions, the Anti-Unfair Competition Law suffered from a lack of guidelines regarding the enforceability of its provisions and the competence of a specific authority to supervise the implementation of the law and enforce its provisions.

Various antitrust laws and regulations, such as the Anti-Unfair Competition Law, the Price Law, the Foreign Trade Law suffer from vagueness and repetitiveness in their provisions, whereas the AML succeeded in consolidating “the antitrust provisions into a uniform set of rules”. Zhenguo Wu summarizes concisely the problems of the antimonopoly legislation prior to the enactment of the AML in his article ‘Perspectives on the Chinese Anti-Monopoly Law’. Specifically, he mentions the lack of a unified and complete anti-monopoly law, the impotency of the existing rules due to their impracticality and vagueness, which logically affects their impact and lastly, the insufficient penalties and liabilities that face those who violate the law.

Nevertheless, the AML is not without faults and its long drafting process revealed the political struggle behind its enactment. Chapter 5 of the AML that addresses the administrative monopolies was and still is the field where conflicting interests from different branches of government and private sector collide. Despite the lack of overall knowledge and experience on the field of competition, the much needed consultation that was provided by the international community (by individuals, both experts and practitioners, and organizations) and the high controversy of certain topics, the drafting process was successful in creating a law that would reflect the new system of socialist market economy, with characteristics applied directly to the Chinese economy and with the knowledge and experience from successful practices of foreign antimonopoly legislation. Lastly, this law enabled the accession of China in the World Trade Organization and facilitated the harmonization of the Chinese economy to the current economic trends internationally.
Monopolistic Agreements

Chapter 2 of the AML (articles 13 to 16) is dedicated to monopolistic agreements. Under the scope of art. 3 of the AML,\(^{13}\) monopolistic agreements, abuse of a dominant market position as well as concentration of undertakings that do eliminate or restrict competition or could possibly lead to that effect shall be construed as “monopolistic conduct”. This part of the paper will explore the prohibition of monopolistic agreements and their potential absolution under the scope of the AML.

A conduct between two or more market operators that constitutes an agreement, either written or oral and leads unequivocally to the elimination or restriction of competition is strictly prohibited. That prohibition covers also agreements concluded between market operators with the purpose of elimination or restriction of competition, even if there is no actual restriction to competition yet. The protection of competition and by extension the protection of fair market operation are critical for the stability of a state’s economy and therefore even the intention to impede free competition is enough to guarantee the protection of the law.

Art. 13 of the AML states that “For the purposes of this law, monopoly agreements include agreements, decisions and other concerted conducts designed to eliminate or restrict competition”. The pattern of the monopolistic agreements follows that of art. 101(1) TFEU that covers ‘all agreements between undertakings, decisions by association of undertakings and concerted practices’.\(^{14}\) This similarity within the two texts is not the only one since the Chinese did draw from the European experience while drafting their Anti-Monopoly Law. Therefore, it is only logical to deduce that the agreements, decisions and concerted actions cited in art. 13 of the AML share the same characteristics with those cited in art. 101(1) TFEU.

Under this scope, it is surmised that the decisions could include articles of incorporation, by-laws or even rules of a trade association in which the intention to behave in a manner irrespective of potential distortions in competition is clearly

\(^{13}\)See Anti-Monopoly Law, supra note 2, art. 3

depicted. Regarding the concerted actions, it should be pointed out that a certain level of coordination is implied in order to achieve a distortion of competition. Therefore, market operators that jointly coordinate their actions even without an explicit agreement between them and their actions contribute to the elimination or restriction of competition, should be liable under art. 13 of the AML.

The AML makes a distinction between horizontal agreements and vertical agreements without explicitly mentioning those terms. Horizontal agreements are those that involve operators at the same level of production or sales process, e.g. producers, wholesalers, whereas vertical agreements are those that involve operators at a different level of production or sales process, e.g. a producer and a wholesaler or a wholesaler and a retailer.\footnote{Supra note 1, p. 81} Accordingly, the AML dedicates art. 13 to the prohibition of horizontal agreements and art. 14 to the prohibition of vertical agreements.

Art. 13 of the AML explicitly prohibits five horizontal agreements that involve the fixing or alteration of products’ prices, the restriction of the output or sales of products, the division of the sales market or of the raw material purchasing markets, the restriction of the purchase or development of new technology and/or new facilities and finally the joint boycott of transactions. Whichever agreements fall within the above-mentioned categories are considered illegal and incur the penalties of the law. Moreover, the law grants the antimonopoly authorities the competence to identify and accordingly prohibit other monopolistic agreements.

Art. 14 of the AML explicitly prohibits vertical agreements between an undertaking and a counterparty that involve the fixing of the resale price of products and the restriction of the minimum resale price. Correspondingly to art. 13 of AML, this provision provides also the antimonopoly authorities with the competence to identify other monopolistic agreements between operators at different stages in the production.

This broad discretion that is granted to the competent antimonopoly authorities regarding the identification of behaviors and practices that could fall under the prohibition of horizontal and vertical agreements has two sides. China due to its former economic system (central-planned economy), lacks the experience of identifying and handling anticompetitive practices in a uniform way. Therefore, it is
conceivable that in its first comprehensive law regarding the protection of competition would allow for “breathing” room for the competent antimonopoly authorities. Moreover, the lack of practical experience of operating in the market under standard rules that are explicitly set as part of antimonopoly legislation combined with the lack of case law that could provide for the further identification of practices that restrict or eliminate competition were taken into account from the drafters of the law and as a result a ‘catch-all’ provision\textsuperscript{16} was added to both articles 13 and 14. However, it has been observed in the international practice, that provisions which include broad or vague terms or their intention is somewhat unclear or they purposely do not define actions or even penalties, then those provisions create uncertainty in the market. A fair market operation is not abided by loosely defined terms and certainly not by the ambiguity of legality of certain actions according to an eventual decision by the competent antimonopoly authority.

Art. 15 of the AML lists the conditions under which a horizontal or vertical agreement could not be prohibited. This article lists seven, rather broad, exemptions in the general rule of prohibition of monopolistic agreements given that those agreements pursue very specific objectives. Monopolistic agreements with the purpose to improve technology as well as research and development of new products, agreements that aspire to the improvement of product quality, efficiency and unifying standards or reducing costs, agreements made specifically by enterprises that operate in a small or medium scale within the market and which desire to improve their operational efficiency and their competitiveness, agreements made under the threat of economic depression, in order to mitigate a serious decrease in sales volume or excessive overstock and finally agreements that serve besides the parties’ interests, also the public interests such as energy preservation or disaster relief, all fall under the scope of art. 15. In order for those specific agreements\textsuperscript{17} to qualify as an exception to the general prohibition of monopolistic agreements, it should be determined whether the consumers shall indeed share the benefits derived from said agreements and furthermore, it should be determined that the elimination of competition in the relevant market is not absolute. Those two important criteria are included in art. 15 for

\textsuperscript{16}Supra note 3, p. 263
\textsuperscript{17}Listed from (i) to (v) in the text of art. 15 of the AML
the purpose of mitigating the effects of anticompetitive agreements and securing the resulting benefits for the public. Finally, the article includes in the exemptions the monopolistic agreements with the purpose of maintenance of legitimate interest in the cooperation with foreign economic entities and foreign trade and provides a catch-all provision, according to which any other circumstances stipulated by laws and the State Council could justify an exemption of the general prohibition.

Arguably, these exemptions could provide safe haven for anticompetitive agreements that could have restrictive effects on competition on the market of foreign states. As the art. 2 of the AML calls attention to the extraterritorial application of the law mentioning that even conducts outside the territory of China with restrictive effects on competition on the domestic market fall within the scope of its application, similarly various foreign antitrust legislations contain provisions regarding the extraterritoriality of their laws. Essentially, an agreement that could fall under the exemptions of art. 15 of the AML, but effectively restricts competition in a foreign market, could very well be prohibited as anticompetitive in that territory and the operators could be punished under this state’s laws.

Moreover, it should be noted that the provision regarding the agreements made under the threat of economic depression has been highly criticized. Xiaoye Wang addresses this issue in her article ‘Highlights of China’s new Anti-Monopoly Law’ stating that “...a cartel formed for the purpose of mitigating serious decreases in sales or excessive overstock during economic depressions should not be exempted because economic downturns are part of normal commercial risks...”. In a free market where normal commercial risks are undertaken by the operators, such a provision could prove to be a threat to the fair market operation.

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18Xiaoye Wang, ‘Highlights of China’s new Anti-Monopoly Law’ [2008] 75 American Bar Association Antitrust 133, 137
Abuse of dominant market position

Chapter 3 of the AML (articles 17 to 19) is dedicated to the abuse of a dominant market position by an enterprise. Art. 6 of the AML states that "Undertakings holding a dominant position on the market may not abuse such position to eliminate or restrict competition". This part of the paper shall examine the context of a dominant market position within a relevant market, the constructive and adverse characteristics of dominance within a market, the prerequisites of the law in determining a dominant market position and lastly, the actions declared prohibited under the scope of the AML when exercised by enterprises holding a dominant market position.

As already mentioned above, prior to the enactment of the AML, various laws and regulations composed the framework of competition law. The concept of a dominant market position was notoriously absent from the antimonopoly legislation up to 2003 and the Provisional Measures for the Prohibition against Monopolistic Pricing issued by the National Development and Reform Commission (hereinafter NRDC). These measures prohibit several actions provided that they are exercised by undertakings holding a dominant market position. The concept of a dominant market position was new and, according to these measures, dependent for its determination from the market share of the undertaking within the relevant market, the potential substitutability of the product as well as the difficulty experienced by the competitors to access the relevant market.

Three years later, in 2006, the Administrative Measures for Fair Transactions between Retailers and Suppliers are issued by the Ministry of Commerce (hereinafter MOFCOM), the NRDC, the Ministry of Public Security, the State Administration of Taxation and the State Administration of Industry and Commerce (hereinafter SAIC). These measures introduce the concept of an “advantageous position” with a scope similar to the dominant market position under the AML. With that historical background and with the influence of European legislation as well as United States

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21Supra note 19
legislation, the AML drafters adopted the concept of dominant market position and included provisions in the law regarding its abuse.

Not a few commentators remark the influence of the European competition law in structuring the definition of the dominant market position in art. 17. Xiaoye Wang mentions in her article ‘Highlights of China’s new Anti-Monopoly law’ that “This definition is similar to the concept of a dominant position in EC competition law...”, an opinion supported also by Adrian Emch in his article ‘Abuse of dominance in China: a paradigmatic shift?’ who states that “To a certain extent, this definition is based on the concept of a “dominant position” in European Union competition law”.

According to art. 17 of the AML, an undertaking with a dominant market position shall possess certain powers over the relevant market, such as the ability to control the prices, quantities or even the trading conditions of the products or the ability to hinder or merely affect the accession of competing undertakings to the relevant market. Art. 12 of the AML supplements the definition of dominant market position with the definitions of undertaking and relevant market. The experiences from the European Union legislation prove that the context of the relevant market is crucial when dealing with competition issues. The definition in the AML contains a geographical aspect, in referring to a territorial area within which the market operators compete against each other as well as a reference to the relevant commodities/products and services. In the determination of the relevant market, the competent antimonopoly authorities are assisted by the SSNIP (the so-called small but significant and non-transitory increase in price) test that is utilized also in many jurisdictions.

But how exactly dominance affects market operation? Are there per-chance positive elements from the existence of dominance within a relevant market? It could be advocated that the occurrence of a dominant market position could prove to be somewhat essential in a market. A dominant enterprise, due to its scale, is based on efficiency, a sound utilization of limited resources and the promotion of lower costs

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22Supra note 18, p. 138
23Supra note 19, p. 616
24See Anti-Monopoly Law, supra note 2, art. 12
throughout the production. Moreover, a dominant position in the market could allow for the enterprise to undertake more risks in technological innovations that could benefit the development of the industry.\textsuperscript{26}

However, the adverse effects of a dominant position in the market cannot be understated. One can argue that a dominant enterprise operating without the pressure from competitors is not really motivated to control production costs or improve the resource utilization since its position in the market is granted. Moreover, an enterprise that could essentially control the market is prone to desire maximization of its profits through lower product quality combined with higher product prices. The motivation to innovate would be buried under the allure of high profits. With that objective, it is not difficult to perceive how a dominant enterprise would abuse its power resulting in elimination or restriction of competition. It is obvious from the arguments presented from each perspective, that the same aspects of the market that could be benefited from the existence of a dominant enterprise (costs, efficiency, technological innovations) could also be materially undermined.\textsuperscript{27}

From the international practice has been observed a dichotomy regarding the dominant market position. In certain jurisdictions, such as in Japan, the obtainment of dominance from an enterprise activates the competent agency of the State in order to examine whether or not a dismissal (break-up) of the dominant enterprise should be carried out. In other jurisdictions, such as in Korea and in European Union, the obtainment of a dominant market position is not prohibited per se, whereas the abuse of such a position with adverse effects to the relevant market is indeed prohibited.\textsuperscript{28} From the provisions of the AML, it is evident that China opted not to prohibit dominance, albeit its abuse within a relevant market.

Art. 6 of the law confirms the will of the AML drafters to not prohibit undertakings from holding a dominant market position. An enterprise could obtain a dominant market position through competition (such an occurrence was quite uncommon in China due to its former central-planned economy and the State’s

\textsuperscript{26}Supra note 1, p. 84

\textsuperscript{27}See id

unwillingness to relinquish power over large scale industries), through State authorization, where the State itself sanctions the control of certain products such as tobacco or salt from specific enterprises, and finally through the law itself, as required by the scale of economy since that kind of enterprises enjoy a privileged position within the market as they “are entrusted with the performance of public services”. Regarding the second category, i.e. the State-sanctioned monopolies, it should be noted that the primary reason for the granting of dominance in the relevant market is a fiscal one, in order for the State to maintain its revenues from these products. Regarding the third category, i.e. the privileged enterprises by law, it should be pointed out that their existence occurs mainly in sectors such as the postal service, the transportation, the utilities (electricity, water etc.) and it is not an uncommon practice even in other countries, e.g. Greece.

In structuring art. 17, China opted to follow the EU practice of listing certain prohibited abusive actions (“general plus listing” mode) and refrained from providing only a set of principles upon which the determination of abusive practices would be based (“general” mode), a practice adopted by the United States. Therefore, the AML drafters enumerate in art. 17 of the law a number of behaviors considered abusive if performed by a dominant enterprise which could potentially eliminate or restrict competition. The following conducts are prohibited when carried out by a dominant enterprise: selling products at unfairly high prices or buying them at unfairly low prices, selling products at prices below cost without legitimate reasons, refusing to trade with counterparties without legitimate reasons, compel a counterparty to trade exclusively with certain enterprises without legitimate reasons, tying products and applying dissimilar prices or other transaction conditions to equivalent counterparties. Finally, any other conducts identified by the competent authorities as abusive shall fall under the scope of application of art. 17 of the AML. The existence of the term “justifiable reasons” in nearly every clause of this article creates a cause of

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29Supra note 1, p 84
30Supra note 19, p. 620
31Supra note 19, p. 620
32Supra note 1, p. 85
33See Anti-Monopoly Law, supra note 2, art. 17
concern due to the lack of definition of that particular term and the broad discretion of the competent authorities for once more.

The abusive practices listed above have themselves anticompetitive characteristics and when they are exercised by an enterprise with a dominant market position with the purpose to enhance its influence in the relevant market, then the competition suffers. Nevertheless, before the enactment of the prohibition regarding the above-listed abusive practices, it is crucial to determine whether an enterprise occupies indeed a dominant position within the relevant market.

Art. 18 of the AML provides a non-exhaustive list of factors taken under consideration when determining the dominance of an enterprise. Specifically, art.18 refers to the market share in the relevant market as well as the existing competition within, the ability to control sales or raw material purchasing markets, the financial status and technical conditions of the enterprise, the extent of dependence showed by other enterprises during transactions, the degree of difficulty experienced by enterprises aiming to enter the relevant market. The last clause of art. 18 is rather vague since it provides the competent authorities with broad discretion in determining any other potential factors that could mark an enterprise as dominant.

The market share is listed in art. 18 as one of the determining factors of dominance in a relevant market and an apt definition of it is proposed by Zhenguo Wu in the article ‘Perspectives on the Chinese Anti-Monopoly Law’ where he states that “Market share refers to the percentage of the total output, sales value, or production capacity of a specific enterprise in the relevant market...” 34 The importance of market share is further confirmed in art. 19 of the AML, where certain thresholds regarding the market share possessed by a dominant enterprise are presented.

The proposed thresholds regarding market share that enable the determination of dominance are the following: the market share of one enterprise covers ½ or above of the relevant market, the joint market share of two enterprises covers ⅔ or above of the relevant market and lastly, the joint market share of three enterprises covers ¾ or above of the relevant market. It is clarified in the same provision, that when an enterprise holds market share less than 10% of the relevant market in the last two

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34Supra note 1, p. 86
categories mentioned above, then in that case, this specific enterprise shall not be considered to occupy a dominant market position.\textsuperscript{35}

A most interesting element of art. 19 is the last clause of the provision where it is noted that the enterprises which can provide opposite evidence regarding their dominant market position, will indeed not be considered as dominant enterprises. Bearing that in mind, it is logical to conclude that art. 19 introduces a rebuttable presumption of dominance, a notion not unknown to other jurisdictions, such as Germany or Korea.\textsuperscript{36} Once more, it is obvious that China has contemplated the international practice and opted to adopt certified methods in determining dominance.

\textsuperscript{35}See Anti-Monopoly Law, supra note 2, art. 19
\textsuperscript{36}Supra note 1, p. 86
Concentration of Undertakings

Chapter 4 of the AML (articles 20-31) regulates the concentration of undertakings. This part of the paper will address the notification obligation of impending concentrations, the notification thresholds, the two stages of the review process along with the strict requirements of such a notification, the conditional allowance of concentrations under specific restrictions and finally, the national security review aimed at impending concentrations helmed by foreign investors.

Regulation of concentrations exists in nearly every jurisdiction, as part of competition legislation. Concentrations have both a positive and negative scope: on the one hand, fewer enterprises that are healthy and economically sustainable can provide the market with quality products without engaging in commercial risks with potential destabilizing effects for the entire economy, while on the other hand, as already mentioned in the previous part of this paper, the existence of few -albeit economically sustainable- enterprises could lead to price increases, lower product quality and reluctance to engage in technological innovations. Since concentrations create this conflict, state regulation should be legislated and implemented.

The AML addresses the regulation of concentrations according to international standards. The influence of European Union and United States experiences has been decisive, mostly regarding the review process of concentrations and its implementation through two stages. It should be noted that this chapter of the AML is much more elaborate than the previous chapters, indicating the will of the drafters to regulate sufficiently the field of concentration which is a complex and specialized one.

Art. 20 of the AML includes three categories under the broad term “concentration”. Those categories are the following: mergers of undertakings, acquisitions of undertakings by means of purchasing their shares or assets and

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37 As K.L. Alex Lau, Angus Young and Y.N Hong also mention: “A merged entity is capable of producing more products at lower cost than if the two entities were to operate separately.”, see “Merger control in China under the anti-monopoly law: a competition regime in transition” [2016] Company Lawyer 285

38 Supra note 28, p. 312
acquisitions of undertakings by contract or any other means or acquisition of the ability to exercise decisive influence over said undertakings.\textsuperscript{39}

Article 21 of the AML indicates that the minimum notification criteria shall be stipulated by the State Council. In a previous draft of the law, specific notification criteria were included. However, their lack of consideration regarding the effects of an impending concentration on the Chinese domestic market resulted in their disapproval during the last review, prior to the promulgation of the law.\textsuperscript{40} This decision was reinforced by the following argument as presented by Zhenguо Wu in his article ‘Perspectives on the Chinese Anti-Monopoly Law’, regarding the appropriate notification thresholds, “…if the standards were set too low, then notifications would be required too frequently...[I]f the standards were set too high, it would be disadvantageous for the prevention of monopoly caused by over-concentration’.\textsuperscript{41} Among the commentators were those who proposed different notification thresholds for different industries, while others believed that the market share presents an important factor that should be considered when determining the notification thresholds.\textsuperscript{42} The current form of art. 21 proves the lack of consensus regarding the notification thresholds and the adoption of the notion that the State Council should be authorized to stipulate the notification thresholds.\textsuperscript{43} Another important element of the provision is that the notification of a concentration to the competent authorities is compulsory and it should be filed prior to said concentration.

Concentrations that do not meet the notification thresholds stipulated by the State Council can be implemented without a notification to the competent antimonopoly authorities. Furthermore, the law in art. 22 provides two exemptions to the general rule of filing a concentration notification prior to its implementation.\textsuperscript{44}

\textsuperscript{39}The terms concentration and acquisition of control were not defined in the law, possibly with the intention to grant the competent enforcement authority discretionary powers, supra note 37, p. 288
\textsuperscript{40}Supra note 18, p. 139
\textsuperscript{41}Supra note 1, p. 89
\textsuperscript{42}See id
\textsuperscript{43}The Regulation on Notification Thresholds for Concentration of Undertakings by the State Council that was promulgated on August 3, 2008 included the long-awaited notification thresholds that were based upon the turnover of the undertakings in the international market as well as in the Chinese domestic market, see Peter Wang, H. Stephen Harris,Jr. and Yizhe Zhang, ‘New Merger Notification Thresholds under the AML published’ (29 August, 2008)
\textsuperscript{44}See Anti-Monopoly Law, supra note 2, art. 22
A concentration notification should include per art. 23 of the AML a summary of the notification, a report on the effect of the concentration on competition on the relevant market, the concentration agreement of the enterprises involved, financial and accounting reports of the enterprises involved dated to the previous accounting year and any other documents required by the competent antimonopoly authorities. It is interesting that among the prerequisites of a notification file is a report regarding the effects on competition on the relevant market. As Dan Wei states in the article ‘Antitrust in China: an overview of recent implementation of Anti-Monopoly Law’, “It can be very difficult for a single business operator to gather data about the relevant market and the impacts on the market competition structure...”.\[^{45}\] Art. 24 of the AML further states that an incomplete file due to the absence of certain documents or materials shall result in considering the notification not filed. The article further stipulates that a period of time will be granted to the applicants in order to submit the documents not included in the initial file.

Unlike the previous chapters, the chapter on concentration of undertakings sets strict time limits during which the competent antimonopoly authorities should review and decide upon the implementation of a concentration.\[^{46}\] With the expiration of the allotted period of time, the concentration can be implemented whether there is a decision allowing it or not. According to articles 25 and 26 of the AML, the review process of a concentration notification is divided into two stages: a preliminary review stage and a further review stage.

Art. 25 of the law describes the preliminary review stage that lasts thirty calendar days\[^{47}\] and during that time the competent antimonopoly authorities should decide whether to initiate a further review. It is also stipulated that the thirty days are calculated from the date of receipt of the complete notification file. The potential outcomes of this first stage are two: either the concentration is deemed to have little to no effect on competition on the relevant market and therefore no further review is needed, or the concentration is estimated to potentially affect competition on the

\[^{45}\text{Supra note 25, p. 124}\]
\[^{46}\text{Supra note 3, p. 265}\]
\[^{47}\text{Supra note 1, p. 90}\]
relevant market and therefore the review process shall continue and conclude with the second stage, during which a further review of the concentration shall take place.

In the event of a concentration that does not affect competition, the authorities will notify the applicants, in order to proceed with the concentration. The last clause of art. 25 provides that when no decision has been made within the allotted time limit, then the concentration may be implemented. In the event of a concentration that is deemed to restrict competition, the authorities will notify the applicants in writing.

Art. 26 of the AML describes the second stage of the review process, i.e. the further review stage that lasts ninety days calculated from the date of the initial decision being taken. Within these ninety days, the competent antimonopoly authorities shall first, review the concentration and decide whether or not to prohibit it and second, inform in writing the applicants of said decision. In the event of a negative decision regarding the concentration, the reasons shall be explained. At this second stage, a concentration can be implemented if a positive decision has been issued by the authorities or if the authorities have not decided whether the concentration indeed threatens the competition on the relevant market upon the expiration of the allotted time limit. The last element of this provision is the extension of the initial deadline (by sixty days) that can be granted under the circumstances stipulated in the article. Specifically, if the involved undertakings agree to the extension of the time limit or if the documents submitted with the notification are inaccurate and in need of verification, or in the event of significant changes of the relevant circumstances after the filing of the notification, thereupon the extension of the time limit is granted.

The competent antimonopoly authorities during the review of a concentration shall take under consideration a list of factors presented in art. 27 of the AML. Those factors are based on common international practice and can assist the authorities in their decision regarding an impending concentration. The market share of the undertakings in the relevant market and their controlling power over the market should the concentration be allowed, the degree of concentration within the relevant market, the impact regarding the access to the market and to technology

48Supra note 1, p. 93
developments, the impact to consumers and other market operators, the impact over national economic development and any other factors deemed by the authorities to affect competition, can provide a guideline to the competent antimonopoly authorities deciding upon the concentration. Those factors are freely evaluated and according to Xiaoye Wang in her article ‘Highlights of China’s new Anti-Monopoly Law’, “…it is not clear how the Anti-Monopoly Authority will weigh their relative importance.”

The first clause of art. 28 of the AML sets the general prohibition of concentrations that have or may have adverse effects on competition in the relevant market. However, in the second clause of the provision two exemptions of the general rule are cited: a concentration with adverse effects on competition could be allowed if the involved undertakings could prove that the implementation of the concentration will have a positive effect on competition that outweighs its potential negative impact or if the involved undertakings could prove that the concentration is in harmony with public interests. From the phrasing of these two exemptions, it can be deduced that it is upon the discretion of the competent antimonopoly authorities to accept any evidence provided by the involved undertakings and decide not to prohibit a concentration. It must be stressed that even if a concentration is allowed to be implemented, the negative impact on competition would still ensue which presents a conundrum: how could such a concentration be in harmony with public interests and how “public interests” are really defined?

Art. 29 of the AML addresses the discretion of the competent antimonopoly authorities to impose restrictions and further conditions upon a concentration in order for it to meet with approval. The restrictions and further conditions should aim to mitigate the negative effect of the concentration on competition. This article follows a common practice adopted by the competent authorities in different jurisdictions: certain restrictive conditions with close connection to competition factors are placed upon the impending concentration in order to diminish the potential negative impact

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49Supra note 18, p. 140
50Restrictive conditions on a transaction can be categorized into three types: structural remedies, behavioural remedies and combinations of structural and behavioural remedies, see H. Stephen Harris, Peter J. Wang and Yizhe Zhang, ‘China’s antitrust agency provides insights into the merger review process under the new Anti-Monopoly Law’ [2009] International Company and Commercial Law Review 172, 174
on competition.\textsuperscript{51} The close connection of the restrictive conditions to competition factors aims “To protect the legitimate interests of the operators and prevent the anti-monopoly law enforcement authorities from abusing their power...”\textsuperscript{52} as Zhenguo Wu explains in the article ‘Perspectives on the Chinese Anti-Monopoly Law’.

Art. 31 of the AML addresses the potential of a national security review when foreign investors participate in a concentration of an enterprise that involves national security. For the purpose of national security, these concentrations shall be submitted into a national security review besides the required review process of articles 25 and 26 of the law. Within the context of the provision, it is not clear which agency shall conduct the national security review,\textsuperscript{53} which, unfortunately, is not the only concern regarding this provision. The last article of chapter 4 of the AML is a rather controversial one that concerns the international community since it adds an unpredictable element in commercial agreements.

While the AML offers a much-needed regulation of the concentrations landscape, it also makes a distinction, in art. 31, between domestic market operators and foreign market operators that could potentially increase the difficulty of penetration into the market for the latter. This distinction can be observed only in that article and, thusly, it can be surmised that the rest provisions of chapter 4 of the AML apply equally to domestic and foreign investors.

Neither in the general provisions of the law nor in the text of art. 31 is clarified what constitutes national security. The ambiguity of the term causes uncertainty, justifiably so, to foreign investors. It is more likely that China wished to limit foreign investment in certain sensitive sectors and opted to include this provision in the law despite the adverse comments on the topic by the international community. It is extremely interesting that despite the many dissenting opinions of the AML drafters over various of the provisions of the law, at the subject of limiting the entry of foreign investors in certain key sectors of the economy, there was a near consensus.\textsuperscript{54} Despite the controversy of the topic, this kind of restriction on foreign investments in a domestic market is not unheard of. For instance, the United States do limit the foreign

\textsuperscript{51}Supra note 1, p. 92
\textsuperscript{52}See id
\textsuperscript{53}Supra note 3, p. 266
\textsuperscript{54}Supra note 4, p. 253
ownership in certain sectors, such as broadcast stations, airlines and merchant vessels.55

Another issue regarding this provision is that “...the provision related to national security review may be totally unnecessary for competition law purposes...”, according to Xiaoye Wang in the article ‘Highlights of China’s new Anti-Monopoly Law’.56 There is no organic connection between a national security review and the market structure or the anticompetitive practices exercised within it (the market), which are the main focus of the AML. Ultimately, the harm to the consumers’ interests by anticompetitive practices condoned by either domestic or foreign enterprises is not dissimilar.57

Consequently, it should be pointed out that chapter 4 of the AML handles adequately the subject of concentration of undertakings, setting tight time requirements, emphasizing the need of notification prior to the implementation of a concentration, specifying the necessary documents that should be submitted alongside the notification and providing for the event of a concentration with adverse effects on competition, that nonetheless could be implemented. This chapter includes also catch-all provisions that attempt to cover any case scenario by granting the competent antimonopoly authorities the power to decide whether or not a specific case falls under the scope of application of a certain provision, but also elects to grant the State Council the authority of determining the notification thresholds. Ultimately, unlike the practice in European Union and in United States, the review of an impending concentration does take into account other factors,58 as stipulated in the specific provision, besides the effect on competition.

55See id
56Supra note 18, p. 141
57It is argued by Li Junfeng that pressure has been created upon the Chinese authorities to enact AML in order to safeguard domestic enterprises against foreign invested enterprises that enjoy a robust economic development, see ‘Foreign invested companies: more risky facing up to china’s anti-monopoly law’ [2009] International Journal of Law & Management 179, 182
58Supra note 25, p.125
Abuse of administrative power

Chapter 5 of the AML (articles 32 to 37) addresses the issue of abuse of administrative power with the purpose to eliminate or restrict competition. This part of the paper will focus not only on the so-called administrative monopoly, but also to the state-owned enterprises and their behavior, since in reality those two topics are intertwined. Moreover, the historical background of the administrative monopoly, its manifestation in the market and its effect on competition will be examined.

Administrative monopoly

“Administrative departments or organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to eliminate or restrict competition”, according to art. 6 of chapter 1 of the AML. Chapter 5 of the law elucidates on this matter and sets forth detailed prohibitions regarding the abuse of administrative power. Before presenting the articles included in this chapter of the law, it is important to comprehend the historical background of administrative monopoly as well as the controversy presented by its regulation from the AML.

Since no definition of administrative monopoly is presented by the AML, it would be logical to deduce that this kind of monopoly manifests when the state or its agencies that control a certain sector of the economy, abuse their power with the purpose to restrict or eliminate competition. The existence of such a monopoly is not limited to China, but it can be also observed in Russia and other Eastern European countries, like Hungary and Bulgaria,59 that have similar experiences in dealing with administrative monopoly. Essentially, administrative monopoly separates the market into two sub-sections: the first one where market entry is open, and competition thrives and the second one where market entry is restricted, and competition is weak due to the predominance of administrative monopoly aptly depicted in the treatment of state-owned enterprises.60

59 Supra note 28, p. 312
The regulation of administrative monopoly has been attempted prior to the enactment of AML by virtue of different provisions on various laws and regulations. Art. 30 of the Anti-Unfair Competition Law prohibits the use of administrative power to impose restrictions on competition,\textsuperscript{61} whereas the Rules on Prohibiting Regional Blockades in Market Economic Activities\textsuperscript{62} prohibit, specifically, regional blockades that manifest as “local protectionism” by local and provincial authorities with the purpose to prevent commodities and services from other areas of the state to enter in the local market.\textsuperscript{63} It is obvious that the effective regulation of administrative monopoly could not be achieved through provisions fragmented over various laws and rules.

However, during the drafting and review process of the AML, a disagreement arose of whether this new law on the protection of competition should include provisions regulating administrative monopoly. The main opinions were two: some believed that since the AML aims to regulate private commercial monopolistic conduct, the existence of provisions regarding the abuse of administrative power is pointless since an administrative monopoly manifests, essentially, as the misuse of administrative powers and has little to do with private commercial monopolistic conducts, while others supported the reasoning that since an administrative monopoly impedes competition and disrupts the fair operation of the market as well as undermines the legitimate interests of both consumers and market operators, it should be regulated by the law with the mandate to protect competition.\textsuperscript{64}

The indecision regarding this matter is depicted in the actions of the State Council which officially approved a draft of the law in June 2006 that did not include a chapter regulating the administrative monopoly, but later on when that draft was submitted by the State Council itself to the Standing Committee for its first reading, the deleted chapter on administrative monopoly had been reinstated.\textsuperscript{65} Ultimately, “...even though in theory administrative monopoly is not a problem to be solved by the AML and in practice it will indeed be very hard for the AML to solve this problem, it is

\textsuperscript{61}See Anti-Unfair Competition Law, supra note 6, art. 30
\textsuperscript{63}Supra note 1, p. 76
\textsuperscript{64}Supra note 1, p. 94
\textsuperscript{65}Supra note 4, p. 255
nonetheless necessary to have clear and specific regulations on administrative monopoly in the AML, which is a specific and fundamental law to protect competition”, as Zhenguo Wu points out in the article ‘Perspectives on the Chinese Anti-Monopoly Law’.

As already mentioned above, administrative monopoly has its roots in the central-planned economy system under which state-owned enterprises dominated nearly every sector of the economy and not only the traditional state-protected sectors such as utilities and transportation. In China, state-owned enterprises operated even in sectors such as entertainment and tourism. In reality, administrative monopolies manifested through various practices engaged by either the local or central government, such as the setting of industrial trade barriers or the setting of regional blockades.

According to Bruce M. Owen, Su Sun and Wentong Zheng in the article ‘China’s competition policy reforms: the Anti-Monopoly Law and beyond’, administrative monopolies could be classified into three categories: those that result from governmental (either in local/provincial level or in central level) measures with the purpose to restrict competition in a particular industry or to compel a specific anticompetitive conduct, those that result from governmental measures which oblige the use of products or services by market operators strictly defined by the competent government agencies and lastly, those that result from governmental actions with the purpose to restrict market entry. A quite famous example of the first category is the ban on air ticket discounts set by the Bureau of Civil Aviation, that was, however, disregarded by the airlines and ultimately lifted. An example of the second category is the obligation set by certain local civil affairs agencies that permitted the consumers to visit only designated photo studios for pictures intended for marriage licenses. Finally, regarding the last category, it should be mentioned that it encompasses

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66 Supra note 1, p. 94
68 William E. Kovacic in his article ‘Competition policy and state-owned enterprises in China’ lists certain common practices of administrative agencies, such as the setting of discriminatory prices and non-tariff barriers, the prohibition of sales of non-local products or services, compulsory takeover and collusive cartels to name a few, see supra note 59, p. 701
69 Supra note 4, p. 255
70 See id
71 See id
restrictions to enter a certain economic sector, but also restrictions to enter an adequately defined geographic market (local protectionism). An example of local protectionism is the decision to charge higher fees for cars produced outside of Shanghai.  

In tackling these issues, the AML stipulated specific prohibitions in the articles 32 to 37. Art. 32 of the law sets a prohibition for all administrative agencies and organizations which administer public affairs to obligate consumers or market operators in purchasing or using commodities of designated undertakings.

Art 33 of the law prohibits all administrative agencies and organizations which administer public affairs to impede regional commodity circulation and lists certain conducts that fall under this provision’s scope of application: discriminatory charge rates or prices for non-local commodities, imposition of technical specifications on non-local commodities that differentiate from those imposed on similar local commodities or implementing discriminatory technical measures (for instance, repeated certification) against non-local commodities, targeting of non-local commodities through the implementation of special practices of administrative licensing with the purpose of restricting access to the market, creation of barriers or adopting any other means in order to block non-local commodities from entering the market or local commodities from exiting the local market. The last clause of art. 33 stipulates that any other conducts that impede the free regional commodity circulation are prohibited.

This clause of art. 33 follows the pattern of many other provisions of the law that are characterized as catch-all provisions and intend to provide for any other conduct or practice that the drafters have not foreseen or has not yet appeared or identified in the market. However, the important factor, in this case, is that the law does not stipulate who will decide which conducts are deemed to impede the free regional commodity circulation. The catch-all provisions of this law, usually, allow the competent antimonopoly authorities to decide which other conducts or practices not specified in this law could fall under the scope of application of a certain provision. Perhaps, this is the will of the drafters in that provision as well.

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72Supra note 67, p. 873
Art 34 of the law prohibits all administrative agencies and organizations which administer public affairs from restricting the entrance of non-local undertakings in local bid activities or excluding them from those activities altogether by the implementation of discriminatory qualification requirements.

Art 35 of the law prohibits all administrative agencies and organizations which administer public affairs from restricting or rejecting the establishment of local branches initiated by non-local undertakings or the implementation of investments in the local area. Such actions from the administrative agencies and organizations shall fall under the scope of application of this provision provided that they differentiate between non-local and local undertakings, with non-local undertakings bearing the unfair treatment.

Art 36 of the law prohibits all administrative agencies and organizations which administer public affairs from forcing other undertakings to engage in monopolistic conducts. Monopolistic conduct as defined by art. 3 of the AML includes monopolistic agreements, abuse of a dominant market position and concentration of undertakings. The AML drafters recognized that an administrative agency with considerable power could force other undertakings to engage in monopolistic practices prohibited by this law, perhaps even more easily due to its position, and therefore included such a prohibition in the law.

Finally, art. 37 of the law stipulates that administrative agencies with the power to formulate regulations shall not include terms within said regulations that promote or restrict competition. The AML drafters acknowledged the fact that certain administrative agencies within the government structure are granted with the power to control certain sectors of the economy and, furthermore, issue regulations that should be adhered to by the undertakings operating within the market, and opted to prohibit the abuse of administrative power through a catch-all provision.73

One of the most critical issues that the Chinese economy faces is the elimination of local protectionism that has a long and tortuous history. Despite the existence of provisions in various laws and regulations prohibiting acts of local protectionism, the issue persisted not only in the level of regulation and supervision,
but also in the level of enforcement ("central versus local governments” problem).\textsuperscript{74} The AML through its provisions in chapter 5 attempts to put a stop to actions of local governments which by abusing their administrative power aim to protect local commodities and services against non-local ones, distorting thusly the competition.

Consequently, it is undeniable that the administrative monopoly and its regulation are highly important as well as controversial. The administrative system that has been created decades ago is in need of reforms, both of political and economic nature. The prohibitions of chapter 5 are an important step towards the right direction, since the illegality of certain actions is highlighted, and it rests with the competent enforcement authorities to act accordingly to the mandate of the law.

\textit{State-owned enterprises}

During the former economic system of China, every major industry in the market was controlled and essentially operated by a corresponding ministry. After the transition to a market economy based on competition between market operators, the Chinese government chose to retreat from industries such as machinery and textiles and retain its control in industries with close connection to national security and overall economic development, such as utilities (electricity, water supply etc.) and transportation (railways, aviation etc.).\textsuperscript{75}

Those industries to which the Chinese government retains control involve natural monopolies. In that sector of the market, where state-owned enterprises operate, there is a lack of competition due to natural conditions as well as technology restraints.\textsuperscript{76} Natural monopolies encapsulate an inherent monopoly and subsequently, are manifested as restrictions on competition. Moreover, these state-owned enterprises are the subject of preferential treatment that quite usually is interpreted as access to resources, such as capital and land bestowals.\textsuperscript{77}

It has been observed that the lack of competition in these industries results in lack of motivation for achieving operation efficiency and improving product or service

\textsuperscript{74} Supra note 4, p. 257
\textsuperscript{75} Supra note 4, p. 240
\textsuperscript{76} Xuego Wen, ‘Market dominance by China’s Public Utility Enterprises’ [2008] 75 American Bar Association Antitrust 151, 153
\textsuperscript{77} Supra note 59, p. 708
quality. Moreover, the lack of competition is translated to a dominant market position and by extension, to adoption of abusive behaviors. Specifically, state-owned enterprises quite often engage in the following practices: excessive pricing (when the price of the product or service offered is set above the competition level), compulsory charges (refers to the unreasonable fees imposed upon the consumer along with the use of the service or the product) that have either obtained governmental approval or are imposed by the discretion of the enterprise and they are often not disclosed to the final consumers, cross-subsidizing (when the reduced profits from the offer of services at a lower margin in remote locations is financed by the higher prices imposed elsewhere), boycotting (refers to the refusal to deal with current or potential competitors), restrictions on access to infrastructure (refers to the cases where the state-owned enterprise controls the access to infrastructure), tying of products (refers to the cases when the consumer is obligated, in order to utilize a service or buy a product, to further engage in another unreasonable transaction).

The State does not wish to relinquish its control in certain “strategic” industries, such as national defense, electrical power generation and grids, telecommunications. On the other hand, it has been stressed that the monopolistic power of the state-owned enterprises should be detained, an argument supported by the dissatisfaction of the general public over the poor service quality combined with the high prices of products and services offered by state-owned enterprises. For these reasons, the State opted to introduce competition into certain sectors, such as the telecommunication industry, by breaking the original state-owned enterprise into multiple entities that shall compete with one another. The enactment of legislation regarding the state-owned enterprises and their conduct within the market would be another way to control their monopolistic power.

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78 Supra note 76, p. 156
79 Supra note 76, p. 160
80 Supra note 76, p. 164
81 See id
82 Supra note 76, p. 165
83 See id
84 Supra note 4, p. 244
85 Supra note 1, p. 99
Under art. 7 of the AML state-owned enterprises that operate in certain industries crucial for the national economy and the national security shall act in accordance with the law. The lawful exclusive operation of these enterprises is protected by the State that has also the authority to regulate and control the prices of commodities and services within these industries. The last clause of this article indicates certain requirements regarding the behavior of the state-owned enterprises that include the lawful and in good faith conduct of business operations, the strict self-regulation as well as the acceptance of public supervision and finally, the abstaining of abusive practices that could potentially restrict competition and harm consumers’ interests. This provision was absent from the draft that the State Council submitted to the Standing Committee for review and was later added by the Standing Committee itself, a fact that underlines its importance.

According to Jacob S. Schneider in the article ‘Note: Administrative monopoly and China’s new Anti-Monopoly Law: Lessons from Europe’s State Aid doctrine’, “A major flaw in the AML is the lack of clear distinction between SOEs that are essentially commercial and should be subject to the AML and other administrative organs which serve traditional public functions and should be exempt from it”.  

Commercial state-owned enterprises, as already mentioned above, do not perform public service, albeit they operate under state regulations in order to guarantee the revenues from certain activities, whereas the state-owned enterprises serving public functions include those that facilitate production and everyday life.  

There is a lack of direction, regarding those two categories that is depicted in art. 7 which does not differentiate among them. However, art. 7 does impose a general obligation for state-owned enterprises to operate accordingly to the AML, determining thusly that their actions will be examined under the scope of application of the law that prohibits any conduct with the potential to eliminate or restrict competition.

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86 Supra note 67, p. 890
87 Supra note 19, p. 621
88 Supra note 76, p. 153
Enforcement under the scope of AML

This part of the paper will examine the enforcement regime of the AML, the competent enforcement agencies, and their allocated tasks, the investigation of suspected monopolistic conducts, the imposition of penalties, the leniency program adopted under the AML and finally, the administrative review and litigation against decisions issued by the competent enforcement agency.

Competent enforcement agencies

In order to comprehend the mandate under which the enforcement agencies exercise their power under the AML, it will be prudent to examine the goals of the law that create the nexus within which all decisions shall be taken. According to art. 1 of the AML, the law aims to prevent and restrain monopolistic conducts, safeguard fair market operation, consumers’ interests and public interests, improve economic efficiency and promote the socialist market economy. This provision, while comprehensive, does have weaknesses, one of which is the ambiguity of the term public interests (society interests) that could be perceived as describing either a consumer interest or a national interest.\footnote{Supra note 18, p. 142} Moreover, the provision does not explicitly state the hierarchy of its aims. For instance, what happens when a monopolistic conduct that restricts competition benefits the public interests? The diversity of AML’s goals could impede the enforcement agencies in the performance of their appointed tasks since they are burdened with the duty to reconcile the law’s (somewhat) conflicting aims.\footnote{Supra note 59, p. 695}

Under art. 9 of the AML, the State Council establishes an Antimonopoly Commission that is tasked with the organization, coordination, and guidance of the antimonopoly work. Contrariwise, art. 10 of the AML does not establish a specific agency in charge of the antimonopoly enforcement, albeit it stipulates that said enforcement should be carried out in accordance with the provision of the law. By virtue of art. 10 of the law three enforcement agencies have been established by the
State Council: the Ministry of Commerce (MOFCOM) that enforces the merger control regime, the National Development and Reform Commission (NDRC) that enforces the prohibitions of the AML regarding price-related anticompetitive conducts and the State Administration for Industry and Commerce (SAIC) that has authority over non-price related matters.

Regarding the competent enforcement agency, under the scope of AML, there were different opinions expressed during the drafting process. Some supported the idea that MOFCOM should be the designated enforcement authority, others believed that SAIC was more suitable as the competent enforcement authority and finally, there were those who advocated in favor of the establishment of a brand new independent anti-monopoly law enforcement authority. The argumentation in favor of a new independent enforcement authority was sound and adhered to the common international precept: a new independent enforcement agency due to its lack of prior connection with any administrative organ could ensure a low probability of influence during the exercise of its duties. Furthermore, with an enhanced authority, a new enforcement agency would not hesitate to take actions against state-owned enterprises as well as other administrative organs, since its autonomy from political branches would be ensured by its independence. Finally, a new agency could be designed with a considerable amount of resources that would enable the exercise of its duties.

Despite the different opinions, the State Council enacted to entrust the enforcement of AML to three different agencies: MOFCOM, NRDC and SAIC. However, a number of problems arise from this decision. The AML units within these agencies are relatively small, with a limited amount of resources that could, subsequently, restrict the performance of their duties. The basic functions of these agencies as stated by William E. Kovacic in the article ‘Competition policy and state-owned enterprises in China’ are the following: “NRDC has extensive industrial policy functions (including price control). MOFCOM oversees domestic and foreign trade and international

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92Supra note 59, pp. 696-697
93Supra note 1, p. 103
94Supra note 59, p. 698
95Supra note 4, p. 261
economic cooperation. SAIC promotes and regulates entrepreneurship through registration and administration of business enterprises”.

These agencies enforce the AML along with attending to their basic functions. It is a given for those agencies, that conflict shall ensue between serving competition law and the basic functions granted to them by the state. The AML units of these agencies shall also face pressure from other government bodies, even some functioning at a higher level, such as ministries, which adopt countervailing policies that promote specific interests, e.g. economic interests of a state-owned enterprise.

Another drawback of the three-tiered enforcement system established in accordance with the AML, is the fact that, in reality, monopolistic cases may not involve only one form of violation, since a combination of price and non-price related elements in a single case is not unusual. For those cases, it is not abundantly clear which agency shall have jurisdiction. It is more likely, that the cooperation between agencies shall be necessary, a fact that could potentially cause conflict and friction among them.

The last clause of art. 10 of the AML stipulates that the competent enforcement authorities could sanction the delegation of enforcement activities to provincial agencies. From this clause, it is surmised that local governments are ineligible, without the proper authorization, to perform enforcement activities, a task conserved for the competent agencies of the central government.

The last important point regarding the enforcement regime established under the AML is presented in art. 51 of the law where it is stipulated that the authority with the power to enforce the AML is not empowered to punish administrative agencies that abuse their power. Essentially, in the event of an abuse of administrative power by the corresponding agency, the competent -under the AML- enforcement authority shall submit a proposal to the administrative agency’s higher-level authority regarding the abusive practice. The final clause of this article refers to the supremacy of other laws or regulations that regulate the function of administrative agencies and any potential abuse of their power, over the provisions of the AML.

96 Supra note 59, p. 697
97 Supra note 59, p. 698
This controversial provision presents certain problems. First, it is highly possible that a restriction on competition by the abuse of administrative power is performed with the intention of gaining economic benefits (favoritism of state-owned enterprises). If that be the case, the higher-level authority shall decide upon the behavior of its inferior agency and take into account the interests of the competitors. This presents a problem without a solution: an administrative agency participates in the market as an operator and it is also the regulator of said market, rendering impossible a fair and competition-friendly market operation, furthermore its affiliate higher-level authority shall decide about a potential abusive practice. Second, the designation of the higher-level authority as responsible for the imposition of rectifying measures or penalties to an inferior agency that abuses its administrative power does not guarantee a proper application of competition law, since it is quite possible the higher-level authority to have little or no experience regarding competition law and policy.98 Third, there is no assurance that the higher-level authority shall, indeed, take under consideration the corrective actions addressed in the proposal of the enforcement authority since there is no obligation to publicize its decisions and therefore, there is no pressure from the public opinions.99 Fourth, this unspecified higher-level authority is certainly not a judicial body100 and what happens when the administrative organ that commits the abuse is at the highest level of hierarchy? Finally, the designation of supremacy of an unspecified number of laws and regulations regarding each administrative agency against the AML does not create certainty regarding the protection of competition in a relevant market.

Investigation of suspected monopolistic conducts

Chapter 6 of the AML (articles 38 to 45) addresses the procedures followed during the investigation of a suspected monopolistic conduct, the obligations of the competent authority, as well as potential allowances for the enterprises investigated.

According to art. 38 of the AML the competent enforcement authority has also the procedural power of investigating suspected monopolistic practices. Any entity or

98 Supra note 18, p. 149
99 Supra note 59, P. 702
individual can report a suspected monopolistic practice to the enforcement authority and it is upon its discretion to further investigate, if it suspects a violation of the law. Articles 39 and 40 set strict requirements regarding the procedures that must be followed by the enforcement authority during an investigation and furthermore, specify the measures that can be taken for the facilitation of the investigation, such as inspections in premises relevant to the enterprise under investigation or interviews with interested parties.\footnote{See Anti-Monopoly Law, supra note 2, art. 39}

Under art. 41 of the AML, the enforcement authority is obliged to keep confidential any commercial secrets that are disclosed during the investigation, whereas under art. 42 of the law, all relevant (to the investigation) parties are obliged to enable and not hinder the task of the enforcement. Art. 43 of the law states that the enterprise under investigation as well as any other relevant party have the right to express their opinions, in order to defend their legitimate interests. According to art. 44 of the law, the decision regarding the investigation and the verification of a monopolistic practice may be publicized if the enforcement authority decides upon it. There is no obligation regarding the publicity of the enforcement authority’s decisions, which undermines the transparency of the system.

Finally, art. 45 of the AML provides for rectifying measures that an enterprise can undertake within a specified time limit in order to eliminate all its practices that could potentially restrict or eliminate competition. In that case, the enforcement authority has the discretion to decide upon the suspension of the investigation that could be reinstated under certain circumstances, exhaustively listed in the last clause of the provision. This article borrows from the experiences in Japan\footnote{Supra note 1, p. 108} and confirms that the main objective of the AML is the protection of competition and not the punishment per se of violations. This is quite logical since a mere punishment of the offending enterprise shall not restore the competition in the relevant market. Nevertheless, caution must be exercised, since it is improbable that an enterprise might undertake certain commitments aiming at the delay of the investigation. It
should, also, be stressed that the commitments undertaken by an enterprise should not be used as evidence of monopolistic practices.\textsuperscript{103}

\textit{Leniency program-penalities-civil liability-administrative review and litigation}

Chapter 7 of the AML (articles 46 to 54) addresses the matter of the penalties in the event of violation of the provisions, the possibility to reduce said penalties under certain circumstances, the civil liability that the market operators bear and defines the parameters under which an enterprise could seek administrative review of a decision made by the competent enforcement authority or proceed to administrative litigation.

Art. 46 of the law stipulates the fines that shall be imposed in the case of monopolistic agreements along with the confiscation of illegal gains resulted from the implementation of the monopolistic agreements. A fine shall be imposed even in the case where the monopolistic agreement has not yet been implemented. Also, a fine can be imposed to trade associations violating the provisions regarding the monopolistic agreements. Finally, the article includes a clause regarding the voluntary disclosure of monopolistic agreements along with the presentation of relevant evidence and the possibility of reduced fines or no punishment for the reporting enterprises.

In jurisdictions such as the United States or the European Union, the implementation of leniency provisions has assisted in the disclosure and punishment of monopolistic agreements (mainly cartels) that have been carried out to the detriment of competition as well as consumers’ rights. Likewise, in the AML there is a provision regarding leniency that includes only two conditions: voluntary report the monopolistic agreement and provide material evidence.\textsuperscript{104} A fact that could present an obstacle to the leniency program is that the SAIC and the NRDC, as competent enforcement authorities do not adhere to the same conditions regarding the qualification of the applicants for immunity or reduction in the fines, as Florin Danciu stresses in the article ‘Chinese leniency program-recent developments’, “Under the NRDC rules all participants can meet the criteria for exemption from penalty even if

\textsuperscript{103}See id
\textsuperscript{104}Florin Danciu, ‘Chinese leniency program-recent developments’ [2016] European Competition Law Review 294, 295
they initiated or forced other undertakings to collude, whilst under the SAIC rules they cannot.\footnote{105}

Articles 47 and 48 of the law refer to the fines to be imposed in the event of abuse of dominant market position and for implementation of an unauthorized concentration of undertakings respectively, while art. 49 points out that in the determination of the appropriate fine the enforcement authorities shall take under consideration the nature, extent and duration of the violation.

Art. 50 of the law introduces a private cause of action that can be exercised by parties whose legitimate interests have been harmed against enterprises that bear civil liability. The intention of the provision to enable consumers to claim restitution for their losses against enterprises meets with certain obstacles, since it is not clear in which court those private lawsuits could be filed or what should be the measure of damages.\footnote{106}

Finally, the AML allows for enterprises to seek redress against a decision made by the enforcement authorities which was not based on the facts or there was misapplication of the law.\footnote{107} Art. 53 of the law provides that in cases regarding decisions on monopolistic agreements or abuse of dominant market position the enterprise should either apply for an administrative review and, if dissatisfied with it, then proceed to administrative litigation or, alternatively, proceed from the beginning with administrative litigation. This does not apply for concentration of undertakings due to their technical nature and therefore, the procedure that must be followed is that firstly, the enterprise files for administrative review and afterward, if dissatisfied with the results of the administrative review, it may file a suit against the administrative agency (administrative litigation).\footnote{108} This distinction in the AML is justified by the fact that Chinese judges lack experience in dealing with complex cases, since a large portion of them (until recently) had not received formal legal training or training in economics and business\footnote{109} and concentrations constitute, undeniably, a specialized and complicated area. An interesting point of the article that could prove to

\footnotesize{\begin{itemize}
\item \footnote{105}See id
\item \footnote{106}Supra note 3, p. 272
\item \footnote{107}Supra note 1, p. 112
\item \footnote{108}Supra note 1, p 113
\item \footnote{109}Supra note 4, p. 242
\end{itemize}}
be problematic in practice is that the same enforcement authority that has issued a decision shall review it, e.g. MOFCOM will be reviewing its own decisions\textsuperscript{110} and as Angela Huyue Zhang points out in her paper ‘The enforcement of the Anti-Monopoly Law in China: An institutional design perspective’, “...in the merger review process, MOFCOM plays the role of investigator, prosecutor and adjudicator.”\textsuperscript{111}

A final provision referring to administrative sanctions for members of the enforcement authorities that abuse their position, engage in malpractices or even disclose commercial secrets concludes chapter 7 of the AML.\textsuperscript{112}


\textsuperscript{111}See id

\textsuperscript{112}See Anti-Monopoly Law, supra note 2, art. 54
Conclusions

While perusing the provisions of the AML, one could easily detect the law’s influences from international practices and legislation (determination of relevant market, state aid, leniency program etc.), but also its uniqueness. This law, with its long and tortuous history, with the many drafts and the many reviews, with controversies and dissenting opinions characterizing a number of its provisions, has managed nonetheless to unify competition law that for decades was fragmented over various laws and regulations and in that spirit, it is indeed a most competent competition law.

As a rule, no legislation is perfect. There are always vague or inadequately drafted provisions, indications of favoritism or legal vacuums. In the AML there are undefined terms, such as public interests or national security, there are catch-all provisions that grant the competent authority a broad discretion to decide upon specific matters, there are indications -despite the law’s best intentions- of favoritism towards domestic enterprises,\textsuperscript{113} and also there are provisions that betray the indecision of the drafters, e.g. art. 7. To balance those elements, there are provisions addressing important issues, such as the abuse of administrative power, there are provisions crafting a sturdy concentration regime and also there are provisions stipulating strict terms for the inspection of suspected monopolistic conducts.

And then there is the matter of the enforcement. In a nutshell, there are three main reasons for ineffective regulation of monopolies and competition in China: first, the lack of uniformity, caused by the fragmented provisions on monopolies over various laws and regulations resulting in undermining the authority of said provisions, second, the lack of decisive enforcement measures against monopolistic practices, that were also scattered over various provisions, and finally, a weak enforcement authority.\textsuperscript{114} The AML provides an impressive competition framework, but its enforcement provisions, institute exemptions\textsuperscript{115} that could undermine the uniform implementation of enforcement. Finally, the three enforcement agencies-system could

\textsuperscript{113}See Anti-Monopoly Law, supra note 2, art. 31 that stipulates the national security review
\textsuperscript{114}Supra note 67, p. 875 see n44
\textsuperscript{115}See Anti-Monopoly Law, supra note 2, art. 51 that essentially stipulates a different enforcement regime for administrative agencies
prove problematic, since competition cases can involve a wide range of violations. At the end of the day, even an exceptional law if combined with ineffective enforcement, simply cannot achieve its potential.
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Appendix

Anti-Monopoly Law of the People’s Republic of China

(Adopted at the 29th Meeting of the Standing Committee of the Tenth National People's Congress on August 30, 2007)

Chapter I General Provisions

Article 1 This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and the interests of the society as a whole, and promoting the healthy development of socialist market economy.

Article 2 This Law is applicable to monopolistic conducts in economic activities within the territory of the People's Republic of China; and it is applicable to monopolistic conducts outside the territory of the People's Republic of China, which serve to eliminate or restrict competition on the domestic market of China.

Article 3 For the purposes of this Law, monopolistic conducts include:

1. monopoly agreements reached between undertakings;

2. abuse of dominant market position by undertakings; and

3. concentration of undertakings that lead, or may lead to elimination or restriction of competition.

Article 4 The State shall formulate and implement competition rules which are compatible with the socialist market economy, in order to improve macro-economic regulation and build up a sound market network which operates in an integrated, open, competitive and orderly manner.
Article 5 Undertakings may, through fair competition and voluntary association, get themselves concentrated according to law, to expand the scale of their business operations and enhance their competitiveness on the market.

Article 6 Undertakings holding a dominant position on the market may not abuse such position to eliminate or restrict competition.

Article 7 With respect to the industries which are under the control of by the State-owned economic sector and have a bearing on the lifeline of the national economy or national security and the industries which exercise monopoly over the production and sale of certain commodities according to law, the State shall protect the lawful business operations of undertakings in these industries, and shall, in accordance with law, supervise and regulate their business operations and the prices of the commodities and services provided by them, in order to protect the consumers' interests and facilitate technological advance.

The undertakings mentioned in the preceding paragraph shall do business according to law, be honest, faithful and strictly self-disciplined, and subject themselves to public supervision, and they shall not harm the consumers' interests by taking advantage of their position of control or their monopolistic production and sale of certain commodities.

Article 8 Administrative departments or organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to eliminate or restrict competition.

Article 9 The State Council shall establish an anti-monopoly commission to be in charge of organizing, coordinating and guiding anti-monopoly work and to perform the following duties:
(1) studying and drafting policies on competition;

(2) organizing investigation and assessment of competition on the market as a whole and publishing assessment reports;

(3) formulating and releasing anti-monopoly guidelines;

(4) coordinating administrative enforcement of the Anti-Monopoly Law; and

(5) other duties as prescribed by the State Council.

The composition of and procedural rules for the anti-monopoly commission shall be specified by the State Council.

Article 10 The authorities responsible for enforcement of the Anti-monopoly Law specified by the State Council (hereinafter referred to, in general, as the authority for enforcement of the Anti-monopoly Law under the State Council) shall be in charge of such enforcement in accordance with the provisions of this Law.

The authority for enforcement of the Anti-monopoly Law under the State Council may, in light of the need of work, empower the appropriate departments of the people's governments of provinces, autonomous regions or municipalities directly under the Central Government to take charge of relevant enforcement of the Anti-monopoly Law in accordance with the provisions of this Law.

Article 11 Trade associations shall tighten their self-discipline, give guidance to the undertakings in their respective trades in lawful competition, and maintain the market order in competition.
Article 12 For the purposes of this Law, undertakings include natural persons, legal persons, and other organizations that engage in manufacturing, or selling commodities or providing services.

For the purposes of this Law, a relevant market consists of the range of the commodities for which, and the regions where, undertakings compete each other during a given period of time for specific commodities or services (hereinafter referred to, in general, as “commodities”).

Chapter II Monopoly Agreements

Article 13 Competing undertakings are prohibited from concluding the following monopoly agreements:

1. on fixing or changing commodity prices;

2. on restricting the amount of commodities manufactured or marketed;

3. on splitting the sales market or the purchasing market for raw and semi-finished materials;

4. on restricting the purchase of new technologies or equipment, or the development of new technologies or products;

5. on joint boycotting of transactions; and

6. other monopoly agreements confirmed as such by the authority for enforcement of the Anti-monopoly Law under the State Council.

For the purposes of this Law, monopoly agreements include agreements, decisions and other concerted conducts designed to eliminate or restrict competition.
Article 14 Undertakings are prohibited from concluding the following monopoly agreements with their trading counterparts:

(1) on fixing the prices of commodities resold to a third party;

(2) on restricting the lowest prices for commodities resold to a third party; and

(3) other monopoly agreements confirmed as such by the authority for enforcement of the Anti-monopoly Law under the State Council.

Article 15 The provisions of Article 13 and 14 of this Law shall not be applicable to the agreements between undertakings which they can prove to be concluded for one of the following purposes:

(1) improving technologies, or engaging in research and development of new products; or

(2) improving product quality, reducing cost, and enhancing efficiency, unifying specifications and standards of products, or implementing specialized division of production;

(3) increasing the efficiency and competitiveness of small and medium-sized undertakings;

(4) serving public interests in energy conservation, environmental protection and disaster relief;

(5) mitigating sharp decrease in sales volumes or obvious overproduction caused by economic depression;
（6） safeguarding legitimate interests in foreign trade and in economic cooperation with foreign counterparts； or

（7） other purposes as prescribed by law or the State Council.

In the cases as specified in Subparagraphs (1) through (5) of the preceding paragraph, where the provisions of Articles 13 and 14 of this Law are not applicable, the undertakings shall, in addition, prove that the agreements reached will not substantially restrict competition in the relevant market and that they can enable the consumers to share the benefits derived therefrom.

Article 16 Trade associations may not make arrangements for undertakings within their respective trades to engage in the monopolistic practices prohibited by the provisions of this Chapter.

Chapter III Abuse of Dominant Market Position

Article 17 Undertakings holding dominant market positions are prohibited from doing the following by abusing their dominant market positions:

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

（2） without justifiable reasons, selling commodities at prices below cost；

（3） without justifiable reasons, refusing to enter into transactions with their trading counterparts；

（4） without justifiable reasons, allowing their trading counterparts to make transactions exclusively with themselves or with the undertakings designated by them；
（5）without justifiable reasons, conducting tie-in sale of commodities or adding other unreasonable trading conditions to transactions;

（6）without justifiable reasons, applying differential prices and other transaction terms among their trading counterparts who are on an equal footing; or

（7）other acts of abuse of dominant market positions confirmed as such by the authority for enforcement of the Anti-monopoly Law under the State Council.

For the purposes of this Law, dominant market position means a market position held by undertakings that are capable of controlling the prices or quantities of commodities or other transaction terms in a relevant market, or preventing or exerting an influence on the access of other undertakings to the market.

Article 18 The dominant market position of an undertaking shall be determined on the basis of the following factors:

（1）its share on a relevant market and the competitiveness on the market;

（2）its ability to control the sales market or the purchasing market for raw and semi-finished materials;

（3）its financial strength and technical conditions;

（4）the extent to which other business managers depend on it in transactions;

（5）the difficulty that other undertakings find in entering a relevant market; and
Article 19 The conclusion that an undertaking holds a dominant market position may be deduced from any one of the following circumstances:

1. The market share of one undertaking accounts for half of the total in a relevant market;

2. The joint market share of two undertakings accounts for two-thirds of the total, in a relevant market; or

3. The joint market share of three undertakings accounts for three-fourths of the total in a relevant market.

Under the circumstance specified in Subparagraph (2) or (3) of the preceding paragraph, if the market share of one of the undertakings is less than one-tenths of the total, the undertakings shall not be considered to have a dominant market position.

Where an undertaking that is considered to hold a dominant market position has evidence to the contrary, he shall not be considered to hold a dominant market position.

Chapter IV Concentration of Undertakings

Article 20 Concentration of undertakings means the following:

1. Merger of undertakings;

2. Control over other undertakings gained by an undertaking through acquiring their shares or assets; and

3. Other factors related to the determination of the dominant market position held by an undertaking.
control over other undertakings or the ability capable of exerting a decisive influence on the same gained by an undertaking through signing contracts or other means.

Article 21 When their intended concentration reaches the threshold level as set by the State Council, undertakings shall declare in advance to the authority for enforcement of the Anti-monopoly Law under the State Council; they shall not implement the concentration in the absence of such declaration.

Article 22 In any of the following circumstances, undertakings may dispense with declaration to the authority for enforcement of the Anti-monopoly Law under the State Council:

1. one of the undertakings involved in the concentration owns 50 percent or more of the voting shares or assets of each of the other undertakings; or

2. one and the same undertaking not involved in the concentration owns 50 percent or more of the voting shares or assets of each of the undertakings involved in the concentration.

Article 23 To declare concentration to the authority for enforcement of the Anti-monopoly Law under the State Council, the undertakings shall submit the following documents and materials:

1. declaration in writing;

2. explanation of the impact to be exerted by the concentration on competition in a relevant market;

3. concentration agreement;
（4）the financial report of each of the undertakings in the previous fiscal year, which is audited by a certified public accountant firm；and

（5）other documents and materials as specified by the authority for enforcement of the Anti-monopoly Law under the State Council.

In the written declaration shall clearly be stated the titles of the undertakings involved in the concentration, their domiciles, business scopes, the anticipated date for concentration and other matters specified by the authority for enforcement of the Anti-monopoly Law under the State Council.

Article 24 In case documents or materials submitted by the undertakings are incomplete, the undertakings concerned shall supplement the relevant documents or materials within the time limit prescribed by the authority for enforcement of the Anti-monopoly Law under the State Council. If they fail to do so at the expiration of the time limit, they shall be deemed to have made no declaration.

Article 25 The authority for enforcement of the Anti-monopoly Law under the State Council shall, within 30 days from the date it receives the documents or materials submitted by the undertakings which conform to the provisions of Article 23 of this Law, make a preliminary review of the concentration declared by the businesses and make a decision whether to conduct a further review, and notify the undertakings of its decision in writing. Before the authority for enforcement of the Anti-monopoly Law under the State Council makes such decision, the undertakings shall not implement concentration.

Where the authority for enforcement of the Anti-monopoly Law under the State Council decides not to conduct further review or fails to make such a decision at the expiration of the specified time limit, the undertakings may implement concentration.
Article 26 Where the authority for enforcement of the Anti-monopoly Law under the State Council decides to conduct further review, it shall, within 90 days from the date of decision, complete such review, decide whether to prohibit the undertakings from concentrating, and notify them of such decision in writing. Where a decision on prohibiting the undertakings from concentrating is made, the reasons for such decision shall be given. The undertakings shall not implement concentration during the period of review.

Under any of the following circumstances, the authority for enforcement of the Anti-monopoly Law under the State Council may extend the period for review as specified in the preceding paragraph on condition that it notifies the undertakings of the extension in writing, however, the extension shall not exceed the maximum of 60 days:

1. The undertakings agree to the extension;

2. The documents or materials submitted by undertakings are inaccurate and therefore need further verification; or

3. Major changes have take place after the undertakings made the declaration.

Where the authority for enforcement of the Anti-monopoly Law under the State Council fails to make a decision at the expiration of the time limit, the undertakings may implement concentration.

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

1. The market shares of the undertakings involved in concentration in a relevant market and their power of control over the market;

2. The degree of concentration in relevant market;
（3）the impact of their concentration on access to the market and technological advance;

（4）the impact of their concentration on consumers and the other relevant undertakings concerned;

（5）the impact of their concentration on the development of the national economy; and

（6）other factors which the authority for enforcement of the Anti-monopoly Law under the State Council deems to need consideration in terms of its impact on market competition.

Article 28 If the concentration of undertakings leads, or may lead, to elimination or restriction of competition, the authority for enforcement of the Anti-monopoly Law under the State Council shall make a decision to prohibit their concentration. However, if the undertakings concerned can prove that the advantages of such concentration to competition obviously outweigh the disadvantages, or that the concentration is in the public interest, the authority for enforcement of the Anti-monopoly Law under the State Council may decide not to prohibit their concentration.

Article 29 Where the authority for enforcement of the Anti-monopoly Law under the State Council does not prohibit the concentration of undertakings, it may decide to impose additional, restrictive conditions for lessening the negative impact exerted by such concentration on competition.

Article 30 The authority for enforcement of the Anti-monopoly Law under the State Council shall, in a timely manner, publish its decisions on prohibition against the concentration of undertakings or its decisions on imposing additional restrictive conditions on the implementation of such concentration.
Article 31 Where a foreign investor participates in the concentration of undertakings by merging and acquiring a domestic enterprise or by any other means, which involves national security, the matter shall be subject to review on national security as is required by the relevant State regulations, in addition to the review on the concentration of undertakings in accordance with the provisions of this Law.

Chapter V Abuse of Administrative Power to Eliminate or Restrict Competition

Article 32 Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to require, or require in disguised form, units or individuals to deal in, purchase or use only the commodities supplied by the undertakings designated by them.

Article 33 Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to impede the free flow of commodities between different regions by any of the following means:

（1）setting discriminatory charging items, implementing discriminatory charge rates, or fixing discriminatory prices for non-local commodities;

（2）imposing technical specifications or test standards on non-local commodities, which are different from those on local commodities of similar types, or taking discriminatory technical measures, such as repeated test and repeated certification, against non-local commodities, for the purpose of restricting the access of non-local commodities to the local market;

（3）adopting a special practice of administrative licensing for non-local commodities, for the purpose of restricting the access of non-local commodities to the local market;
（4） erecting barriers or adopting other means to prevent non-local commodities from coming in or local commodities from going out; or

（5） other means designed to impede the free flow of commodities between regions.

Article 34 Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to exclude non-local undertakings from participating, or restrict their participation, in local invitation and tendering by imposing discriminatory qualification requirements or assessment standards, or by refusing to publish information according to law.

Article 35 Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to exclude non-local undertakings from making investment or restrict their investment locally or exclude them from establishing branch offices locally or restrict their establishment of such offices, by treating them unequally as compared with the local undertakings, or by other means.

Article 36 Administrative departments and other organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to compel undertakings to engage in monopolistic conducts that are prohibited by this Law.

Article 37 Administrative organs may not abuse their administrative power to formulate regulations with the contents of eliminating or restricting competition.

Chapter VI Investigation into Suspected Monopolistic Conducts
Article 38 The authority for enforcement of the Anti-monopoly Law shall investigate any suspected monopolistic conduct according to law.

All units and individuals shall have the right to report to the authority for enforcement of the Anti-monopoly Law against suspected monopolistic conducts. The latter shall keep the informations confidential.

If the report is made in writing and relevant facts and evidence are provided, the authority for enforcement of the Anti-monopoly Law shall conduct necessary investigation.

Article 39 When conducting investigations into a suspected monopolistic conduct, the authority for enforcement of the Anti-monopoly Law may take the following measures:

（1）conducting inspection of the business places or the relevant premises of the undertakings under investigation;

（2）making inquiries of the undertakings under investigation, the interested parties, or other units or individuals involved, and requesting them to provide relevant explanations;

（3）consulting and duplicating the relevant documents and materials of the undertakings under investigation, the interested parties and other relevant units and individuals, such as bills, certificates, agreements, account books, business correspondence and electronic data;

（4）sealing up or seizing relevant evidence; and

（5）inquiring about the bank accounts of the undertakings under investigation.
For taking the measures specified in the preceding paragraph, a written report shall be submitted for approval to the principal leading person of the authority for enforcement of the Anti-monopoly Law.

Article 40 For the authority for enforcement of the Anti-monopoly Law to conduct investigation into suspected monopolistic conducts, there shall be at least two law-enforcement officers, who shall produce their law enforcement papers.

The law-enforcement officers shall make written records when conducting inquiry and investigation, which shall be signed by the persons after being inquired or investigated.

Article 41 The authority for enforcement of the Anti-monopoly Law and its staff members are obligated to keep confidential the commercial secrets they come to have access to in the course of law enforcement.

Article 42 The undertakings under investigation, the interested parties or other relevant units or individuals shall cooperate with the authority for enforcement of the Anti-monopoly Law in performing their duties in accordance with law, and they shall not refuse to submit to or hinder the investigation conducted by the authority for enforcement of the Anti-monopoly Law.

Article 43 The undertakings under investigation and the interested parties shall have the right to make statements. The authority for enforcement of the Anti-monopoly Law shall verify the facts, justifications and evidence presented by the said undertakings or interested parties.

Article 44 Where after investigation into and verification of the suspected monopolistic conduct, the authority for enforcement of the Anti-monopoly Law concludes that it constitutes a monopolistic conduct, the said authority shall make a decision on how to deal with it in accordance with law and may make the matter known to the public.
Article 45 With respect to the suspected monopolistic conduct which is under investigation by the authority for enforcement of the Anti-monopoly Law, if the undertakings under investigation commits themselves to adopt specific measures to eliminate the consequences of its conduct within a certain period of time which is accepted by the said authority, the authority for enforcement of the Anti-monopoly Law may decide to suspend the investigation. In the decision shall clearly be stated the details of the undertakings' commitments.

Where the authority for enforcement of the Anti-monopoly Law decides to suspend investigation, it shall oversee the fulfillment of the commitments made by the undertaking. Where the undertaking fulfills its commitments, the authority for enforcement of the Anti-monopoly Law may decide to terminate the investigation.

In any of the following circumstances, the authority for enforcement of the Anti-monopoly Law shall resume investigation:

(1) The undertakings concerned fail to fulfill its commitments;

(2) Material changes have taken place in respect of the facts on which the decision to suspend investigation was based; or

(3) The decision to suspend investigation was based on incomplete or untrue information provided by the undertaking concerned.

Chapter VII Legal Liabilities

Article 46 Where an undertaking, in violation of the provisions of this Law, concludes and implements a monopoly agreement, the authority for enforcement of the Anti-monopoly Law shall instruct it to discontinue the violation, confiscate its unlawful gains, and, in addition, impose on it a fine of not less than one percent but not more than 10
percent of its sales achieved in the previous year. If such monopoly agreement has not been implemented, it may be fined not more than RMB 500,000 yuan.

If the business manage, on its own initiative, reports to the authority for enforcement of the Anti-monopoly Law about the monopoly agreement reached, and provides material evidence, the said authority may, at its discretion, mitigate, or exempt the undertaking from, punishment.

Where a trade association, in violation of the provisions of this Law, has arranged the undertaking in the trade to reach a monopoly agreement, the authority for enforcement of the Anti-monopoly Law may impose on it a fine of not more than 500,000 yuan. If the circumstances are serious, the administrative department for the registration of public organizations may cancel the registration of the trade association in accordance with law.

Article 47 Where an undertaking, in violation of the provisions of this Law, abuses its dominant market position, the authority for enforcement of the Anti-monopoly Law shall instruct it to discontinue such violation, confiscate its unlawful gains and, in addition, impose on it a fine of not less than one percent but not more than 10 percent of its sales achieved in the previous year.

Article 48 Where the undertakings, in violation of the provisions of this Law, implement concentration, the authority for enforcement of the Anti-monopoly Law under the State Council shall instruct them to discontinue such concentration, and within a specified time limit to dispose of their shares or assets, transfer the business and adopt other necessary measures to return to the state prior to the concentration, and it may impose on them a fine of not more than 500,000 yuan.

Article 49 To determine the specific amount of fines prescribed in Articles 46, 47 and 48, the authority for enforcement of the Anti-monopoly Law shall consider such factors as the nature, extent and duration of the violations.
Article 50 Where the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liabilities according to law.

Article 51 Where an administrative development or an organization authorized by laws or regulations to perform the function of administering public affairs abuses its administrative power to eliminate or restrict competition, the department at a higher level shall instruct it to rectify; the leading person directly in charge and the other persons directly responsible shall be given administrative sanctions in accordance with law. The authority for enforcement of the Anti-monopoly Law may submit a proposal to the relevant department at a higher level for handling the matter according to law.

Where otherwise provided for by laws or administrative regulations in respect of administrative departments or organizations authorized by laws or regulations to perform the function of administering public affairs that abuse their administrative power to eliminate or restrict competition, such provisions shall prevail.

Article 52 Where, during the review and investigation conducted by the authority for enforcement of the Anti-monopoly Law, a unit or individual refuses to provide relevant materials or information, or provides false materials or information, or conceals, or destroys, or transfers evidence, or refuses to submit to or obstructs investigation in any other manner, the authority for enforcement of the Anti-monopoly Law shall instruct it/him to rectify, and a fine of not more than 20,000 yuan shall be imposed on the individual and not more than 200,000 yuan on the unit; if the circumstances are serious, a fine of not less than 20,000 yuan but not more than 100,000 yuan shall be imposed on the individual and not less than 200,000 yuan but not more than one million yuan on the unit; and if a crime is constituted, criminal liability shall be investigated for in accordance with law.

Article 53 Where an undertaking is dissatisfied with the decision made by the authority for enforcement of the Anti-monopoly Law in accordance with the provisions of Article
28 or 29 of this Law, it may first apply for administrative reconsideration according to law; and if it is dissatisfied with the decision made after administrative reconsideration, it may bring an administrative action before the court according to law.

Where an undertaking is dissatisfied with any decision made by the authority for enforcement of the Anti-monopoly Law other than the decisions specified in the preceding paragraph, it may apply for administrative reconsideration or bring an administrative action before the court according to law.

Article 54 Where a staff member of the authority for enforcement of the Anti-monopoly Law abuses his power, neglects his duty, engages in malpractices for personal gain, or divulges commercial secrets he comes to have access to in the course of law enforcement, which constitutes a crime, he shall be investigated for criminal liability according to law; and if his case is not serious enough to constitute a crime, he shall be given an administrative sanction according to law.

Chapter VIII Supplementary Provisions

Article 55 This law is not applicable to undertakings who exercise their intellectual property rights in accordance with the laws and administrative regulations on intellectual property rights; however, this Law shall be applicable to the undertakings who eliminate or restrict market competition by abusing their intellectual property rights.

Article 56 This Law is not applicable to the association or cooperation by agricultural producers or rural economic organizations in their business activities of production, processing, sale, transportation, storage of farm products, etc.

Article 57 This Law shall go into effect as of August 1, 2008.