



For centuries China stood as one of the most advanced societies, economies, and civilisations in the world, but the country was beset by internal weakness, civil war, and foreign occupation during the 19<sup>th</sup> and the early 20<sup>th</sup> centuries. Feudalist China lasted over 2000 years until the collapse of the Qing Dynasty and the subsequent establishment of the Republic of China in 1911. In 1949, People’s Republic of China (PRC) was founded along with the victory of Communist Party of China (CPC) over the Kuomintang.

The PRC covers an area of 9.6 million square kilometers and, in 2012, had a population of 1.35 billion, and that figure is expected to reach 1.4 billion by the end of 2015.<sup>1</sup> At the provincial level, China consists of four centrally administered municipalities, 23 provinces including Taiwan, five autonomous regions, and two special administrative regions.<sup>2</sup> The State Council is China’s highest executive organ and is composed of a premier, vice-premiers, State councilors, ministers in charge of ministries and commissions, an Auditor-General, and a Secretary-General.

Founded in 1921, the CPC is China’s ruling party and the leading political power. According to the Constitution, China is based on the ‘Four Fundamental Principles’, i.e. the socialist road, the people’s democratic dictatorship, the leadership of the CPC, and the Marxism-Leninism and Mao Zedong Thought.<sup>3</sup> At the end of 2009, the CPC had a membership of approximately 77.9 million.<sup>4</sup> Ranging from the legislature, the executive, and the judiciary to the military, many important positions are held by CPC members. The CPC Central Committee holds the final decision-making power of the party and has substantial influence over China’s legislative, executive, and judicial processes.

### Economy

In late 1978, China started moving from a sluggish, inefficient, Soviet-style centrally planned economy to a more market-oriented system. Though the market system still has to operate within a political framework of strict Communist control, the economic participation of non-

PROFILE	
Population:	1.315 billion****
GDP (Current US\$):	8.358 trillion****
Per Capita GDP: (Current Price, US\$)	5,680 (Atlas method)**** 7,945 (at PPP)***
Surface Area:	9,600 thousand sq. km***
Life Expectancy:	75years***
Literacy (%):	94 (of ages 15 and above)**
HDI Rank:	101****
Sources: - WorldDevelopmentIndicatorsDatabase,WorldBank,2012 - HumanDevelopmentReportStatistics,UNDP,2012 (**)For the year 2010 (***)For the year 2011 (****) For the year 2012	

state organisations and individual citizens has been steadily increasing.

The authorities switched to a system of household and village responsibility in agriculture in place of the old collectivisation, increased the authority of local officials and plant managers in industry, permitted a wide variety of small-scale enterprises (SSEs) in services and light manufacturing, and opened the economy to increased foreign trade and investment.

Economic reform has accelerated since 1992 following the Fourteenth National Congress of the CPC. In 1993, the Second Amendment to the *Constitution 1982* declared clearly that ‘the State implements socialist market economy’.<sup>5</sup> Even though there is no a consensus explanation of the concept “socialist market economy” till today in China, it was Deng Xiaoping who brought the idea of ‘socialism with Chinese characteristics’ into China.<sup>6</sup> When answering the question of whether there is a latent contradiction between a market economy and the socialist system, Deng stated that “There is no fundamental contradiction between socialism and a market economy. The problem is how to develop the productive forces more

❖ The original paper was written (2006-07) & updated in April 2012.

effectively. We used to have a planned economy, but our experience over the years has proved that having a totally planned economy hampers the development of the productive forces. If we combine a planned economy with a market economy, we shall be in a better position to liberate the productive forces and speed up economic growth.”<sup>7</sup>

Obviously since then China has been implementing the open door policy and economic reform in a progressive manner, which has resulted in a long transitional period in the economic regime. This transition process has been speeded up in particular during and after China’s accession to the WTO. Many of the structural reforms introduced in China’s economy have improved the operating environment for all enterprises, both state-owned and private. These encourage not only SoEs to perform better, but also provide a framework in which newly-privatised firms are so likely to do well. The major structural reforms, which have been undertaken in China, included the following:

- entry barriers to most of the markets have fallen;
- extensive trade liberalisation has allowed competition from imports;
- extensive price liberalisation has taken place;
- foreign investment has been promoted;
- hard budget constraints are increasingly common;
- a large number of wealthy domestic private buyers are now in the market for state assets;
- the government is relatively coherent both in terms of policy formulation and implementation;
- a basic framework needed to facilitate secondary sales has been developed;
- there are firm-level incentives for privatisation;
- private entrepreneurs have gained sufficient influence to skew sales methods to their advantage.

As the reforms progressed, there has been a gradual radicalisation of policy, moving in the 1990s to a creeping recognition of the role of private capital and the utility of privatisation to some extent. The result has been a quadrupling of GDP since 1978. Measured on a purchasing power parity (PPP) basis, China in 2004 stood as the second-largest economy in the world after the US, although in per capita terms the country is still lagging far behind as compared to many other economies. Agriculture and industry have posted major gains, especially in the coastal areas near Hong Kong and opposite Taiwan and in Shanghai, where foreign investment has helped spur output of both domestic and export goods. For much of the population, living standards have improved dramatically and the room for personal choice has expanded.

The Chinese economy is now in its final stage of transforming into a full-fledged market economy. However, this remarkable economic progress has been made against a backdrop of limited political reforms. The robust performance of the Chinese economy has surprised

observers and many are watching carefully to see if China can stay on the fast-growth track. A number of salient policy problems challenge China’s economic system and sustainable development.<sup>8</sup>

Amongst other things, China is making efforts to restore long-term growth following from the global economic crisis, restructure the economy away from heavily relying on exports, reduce the high national saving rate, foster higher domestic consumption, resolve regional and urban-rural imbalances, and to build a resource-efficient and eco-friendly society.<sup>9</sup> It is noted that, going forward, ‘the centre of gravity of the global economy is on course to continue to shift towards China’.<sup>10</sup>

### Competition Evolution and Development

Chinese competition law was conceived in the 1980s, soon after China adopted its economic reform and opening-up policy. The Interim Provisions on Promoting and Protecting Socialist Competition 1980 was the first normative document to protect competition and regulate government monopolies in China.<sup>11</sup> The Interim Provisions stipulated that, ‘in economic activities, with the exception of products exclusively managed by State-designated departments and organisations, monopolisation or exclusive dealing is not allowed’.<sup>12</sup>

The enactment of the Anti-Unfair Competition Law 1993 (AUCL) was the first major step in establishing China’s competition law system. The AUCL prohibits unfair trading practices and incorporates provisions that address certain types of restrictive behaviour, including designated transactions by public utility enterprises or other business operators having monopolistic status by law, administrative monopoly, dumping, tie-in sale, and bid rigging.<sup>13</sup>

The provisions under the AUCL are primarily enforced by the State Administration for Industry and Commerce (SAIC). Penalties for breach include confiscation of illegal gains, imposition of fines up to the higher of RMB 200,000 and three times the value of the illegal gains. (Where damage is suffered by a third party, the injured party may seek civil damages for such losses).

The Price Law 1997 is principally a price control law enforced by the National Development and Reform Commission (NDRC) and the corresponding local price authorities. The Price Law also prohibits certain unfair pricing activities. These include colluding with others to manipulate the market price, dumping commodities at prices lower than production cost in order to drive out rivals or monopolise the market, providing the same commodities or services with price discrimination against other business operators with equal transaction conditions, and making exorbitant profits in violation of the provisions of laws and regulations.<sup>14</sup>

The PRC Price Law is enforced by the NDRC. Penalties for contravention of the Price law include confiscation of illegal gains and cancellation of the business license. In serious cases, a fine of up to five times of the amount of the illicit gains may be imposed by the NDRC.

In 2003, a merger control regime was introduced as part of the Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (hereinafter 'Interim M&A Rules').<sup>15</sup> The Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (hereinafter 'M&A Rules') were issued in 2006 and replaced the Interim M&A Rules.<sup>16</sup>

Before the 2009 amendment, the M&A Rules provided a basic regulatory framework for mergers and acquisitions of domestic enterprises by foreign investors and included a chapter that contained four articles devoted to anti-monopoly review, under which the Ministry of Commerce (MOFCOM) and the State Administration for Industry and Commerce (SAIC) were jointly responsible for accepting, reviewing, and approving mergers and acquisitions.<sup>17</sup>

Nevertheless, the piecemeal competition-legislation regime mentioned above resulted in fragmented and discriminatory provisions, ill-designed procedures and remedies, and insufficient enforcement power. For example, the AUCL not only prohibits designated transactions by public utility enterprises or any other business operators occupying statutory monopoly status, but also prohibits dumping and tie-in arrangements without considering whether a business operator is dominant in the relevant market.<sup>18</sup>

The M&A rules only regulate mergers and acquisitions of domestic enterprises by foreign investors and thus raises concerns of discrimination against foreign investors. As regards sanctions and remedies, for example, the maximum administrative fine for abusive behaviour by public utility enterprises is only CNY 200,000, which does not provide the AUCL with effective and sufficient deterrent force.<sup>19</sup>

In addition, without a centralised and independent competition authority, a number of agencies and their corresponding local bureaus have shared enforcement powers and the situation has caused fragmented and unaccountable enforcement activities.

Following the promulgation of the AUCL in 1993, the drafting of the Antimonopoly Law (AML) bill had started in 1994 and the AML, envisaged as a principal pillar of Chinese competition law, was placed on the legislative agendas of the Eighth, Ninth and Tenth NPC. It seems that the AML took the longest drafting time in China. The legislative history of the AML had witnessed intense debates on the necessity and suitability of the law, fighting between agencies to gain enforcement powers, warnings about the potential damage generated by AML on the State-owned economy and foreign investment, and complaints

of foreign control and anticompetitive behaviour, real or perceived, of multinational corporations in the Chinese market. Globalisation and China's accession to the WTO have been two of the main driving forces behind the enactment of the AML.

In 2004, the MOFCOM, as the agency responsible for drafting the AML, submitted a bill to the Legislative Affairs Office of the State Council. After another two years of consideration and consultation, the State Council submitted a bill to the Standing Committee of the Tenth NPC in June 2006. The bill was then reviewed and revised three times in June 2006, June 2007, and August 2007. The AML was finally enacted on August 30, 2007 at the Twenty-Ninth Session of the Standing Committee of the Tenth NPC and became effective on August 01, 2008.

Similar to competition law regimes in other jurisdictions, the AML covers three main areas: monopoly agreements, abuse of dominant market position and merger control. Additionally, AML also covers a fourth area, which is the abuse of administrative powers to eliminate or restrict competition, widely referred to as 'administrative monopoly'.

Certain types of monopoly agreements by and between undertakings are prohibited in China. These restrictions apply to specific types of horizontal and vertical monopoly agreements which are set out in the AML. Where a monopoly agreement does not severely restrict competition in the relevant market the parties involved may be able to rely on certain express exemptions under the AML to permit the relevant arrangement.

Monopoly agreements are agreements, concerted practices or decisions involving two or more independent business operators having the purpose or effect of eliminating or restricting competition in the PRC market. They may take the form of an agreement (such as a signed MOU), a resolution or other collaborative acts. In China, it is not necessary to demonstrate that a monopoly agreement has had any actual effect of eliminating or restricting competition. It is sufficient for AML purposes that an agreement has the purpose of eliminating or restricting competition.

Basically, monopoly agreements are divided into two categories, i.e. horizontal monopoly agreements and vertical monopoly agreements.

Horizontal agreements are monopoly agreements entered into between business operators that are in a competitive relationship, or a potential competitive relationship, at the same level of the production chain. Article 13 of the AML prohibits the following horizontal monopoly agreements: agreements to fix prices or price alteration; agreements to restrict output or sales; agreements to share or segment markets; agreements to restrict innovation; agreements to

engage in a joint boycott; and agreements to engage in bid rigging. The existence of a competitive relationship between business operators cannot be presumed, but needs to be ascertained through an individual case analysis. Generally speaking, the Chinese Anti-monopoly Enforcement Agencies (AMEA) are mostly concerned with hard core cartel arrangements such as price fixing and market sharing agreements.

The AML also prohibits certain anti-competitive vertical agreements entered into between business operators and their trading counterparts (i.e., their suppliers or distributors operating at different levels of the production chain). Often, vertical agreements can also have pro-competitive effects. Accordingly, Article 14 of the AML only expressly prohibits resale price fixing and minimum resale price arrangements between business operators and their trading counterparts.

A monopoly agreement will not violate the AML (and the relevant business operators will be exempt from the relevant sanctions under the AML) if the relevant monopoly agreement: does not severely restrict competition in the relevant markets but enables consumers to share the benefits derived from the agreement; and falls under a specified exemption category in Article 15.

Business operators which have a dominant market position in a relevant market are prohibited from “abusing” such position to eliminate or restrict competition. Basically, if the market share of a single undertaking reaches 50 per cent; the market shares of two undertakings reaches 2/3 (i.e. 66.67 per cent); or the market shares of three undertakings reaches 3/4 (i.e. 75 per cent), then the relevant undertaking(s) will be presumed to have a dominant market position (Dominant Market Position) in the relevant market.

In addition, there are other facts to be considered when determining if a certain undertaking has a Dominant Market Position, including: the ability of the relevant undertaking(s) to control the sales market or the raw material supply; the financial and technological conditions of the undertaking(s); the extent of reliance on the undertaking(s) by other undertakings in the transaction; and the degree of difficulty for other undertakings to enter the relevant market.

The existence of a Dominant Market Position is not prohibited by the AML, only the abuse of that Dominant Market Position is. However, undertakings with such a Dominant Market Position are prohibited from committing any of the following acts: selling products at unfairly high prices or buying products at unfairly low prices; selling products at prices below cost without any justifiable cause; refusing to trade with a trading party without any justifiable cause; restricting their trading party so that it may conduct deals exclusively with themselves or with the designated

business operators without any justifiable cause; implementing tie-in sales or imposing other unreasonable trading conditions at the time of trading without any justifiable causes; applying discriminatory treatments on trading prices or other trading conditions to their trading parties with equal standing without any justifiable cause; or other forms of abusing the dominant market position as determined by the NDRC or SAIC.

In practice, if an undertaking holds a Dominant Market Position, it is more likely to receive complaints from competitors (and possibly customers) and therefore is more likely to attract the attention of the relevant PRC regulators.

In respect of a number of the above prohibited conduct, the prohibition will only apply to conduct which is not justifiable (for example conduct in the public interest). Again, such justification will not be confirmed by relevant authorities upon application but must be tested on a case-by-case basis. An undertaking having a Dominant Market Position will need to undertake its own self-assessment to determine whether its conduct can be supported by valid justification.

Most AML provisions broadly conform to international norms and are comparable to competition laws in the European Union, the US and elsewhere, although some of the provisions have notable Chinese characteristics. Focusing on business operators’ competitive behaviour in the marketplace and based on the rationale that competition delivers lower prices, better quality and more choices, the AML is expected to improve consumer and social welfare in China. Furthermore, the AML affects government agencies at all levels through the prohibition of administrative monopoly. Therefore, as a milestone in China’s legal history, the promulgation of the AML reflects the immense success of three decades of economic and political reform and promotes the establishment and development of a competition culture in China.

### **Competition Law Enforcement**

The design of the AML enforcement mechanism was one of the most heavily debated issues in the AML legislative process. A single enforcement authority was considered or perceived to be politically impossible. Due to the fact that the NDRC, the SAIC and the MOFCOM had enforced the various competition-related laws in existence prior to the enactment of the AML, those same three agencies enforce the AML with respect to their particular functions.<sup>20</sup> That means that the three Antimonopoly Enforcement Agencies (AMEAs), mandated with concrete enforcement functions, have a triumvirate structure that consists of three departments under each of the AMEAs. The MOFCOM Anti-Monopoly Bureau is solely in charge of merger control, the SAIC Competition Enforcement Bureau is responsible for non-price related anti-monopoly agreements, abuse of dominance, and administrative monopoly, and the NDRC Price Supervision and

Antimonopoly Bureau is responsible for price-related anti-monopoly agreements, abuse of dominance, and administrative monopoly. Because the price related case is often connected with non-price related matters, the SAIC, the NDRC and the MOFCOM play even though separate, but sometimes overlapping, roles in the enforcement of competition law.

In addition to the three AMEAs, an Anti-Monopoly Commission (AMC) was also established in August 2008 when the AML entered into force. Headed by the Vice Prime Minister and comprised of senior officials from fifteen ministries, a high-level AMC is in charge of developing general policy and policy guidelines, assessing overall market conditions and coordinating AML enforcement by the AMEAs pursuant to the AML. The AMC established a working office within the MOFCOM. Since the AML entered into force, some implementing regulations and guidance were issued or are currently under consideration. For example, the State Council enacted the Regulation on the Notification Thresholds for Concentrations between Business Operators,<sup>21</sup> and the Anti-Monopoly Commission under the State Council issued the Guidelines on the Definition of the Relevant Market.<sup>22</sup>

From the AML's entry into force until August 01, 2013, MOFCOM's Anti-Monopoly Bureau examined and completed the review of close to 640 merger filings, among which one transaction (acquisition of Huiyuan by Coca-Cola) was prohibited, 11 transactions were approved conditionally, and the remaining transactions were approved unconditionally, and a few of filings were withdrawn by the parties. The percentage of unconditional clearances thus represents over 95 percent of the total filings reviewed and completed. By way of example, the mergers approved conditionally by MOFCOM in the latter half of 2011 include the acquisition of Savio Macchine Tessili by private equity fund Alpha V,<sup>23</sup> the establishment of the joint venture between General Electric and Shenhua,<sup>24</sup> Seagate's acquisition of the Samsung hard disk drive business<sup>25</sup> and, in February 2012, MOFCOM cleared the joint venture between Henkel and Tiande Chemical subject to conditions.<sup>26</sup> These cases demonstrate that even where MOFCOM believes a merger has significant negative effects on competition in the market, it may still be willing to grant approval so long as the parties can come up with a way to remove those effects.

In coordination with its local offices, up to November 2013 the Price Supervision and Anti-Monopoly Bureau of NDRC has handled more than 20 cases involving price-related monopoly behaviours including the tying by the salt companies in Hubei and Jiangsu, and sanctioned the cartel between rice noodle producers in Nanning and Liuzhou and the price-fixing implemented through a paper industry association in Zhejiang.<sup>27</sup>

Due to the limited experience at these early stages of Anti-Monopoly enforcement, the basis for the above-mentioned investigations was the Price Law, promulgated in 1997. In November 2011, the NDRC relied on the AML to impose heavy penalties on two pharmaceutical enterprises located in Weifang, Shangdong Province, confiscating the illegal gains and imposing fines in the amount of RMB6,877,000 (around US\$1.1mn) and RMB152,600 (around US\$24,000), respectively. The agency held that the two enterprises had significantly raised the price of the raw materials necessary to produce compound reserpine tablets by way of entering into restrictive agreements with the only two domestic producers of those raw materials. The effect of the price rise led many pharmaceutical enterprises to suspend production of reserpine tablets, thereby inflicting significant harm upon consumers.<sup>28</sup> On November 09, 2011, NDRC announced that it was investigating potential abuses by China Telecom and China Unicom in the broadband sector. According to the statements made by an NDRC official, if the investigation were to bring to light clear evidence confirming the abuses, then a penalty in the range of hundreds of millions could be imposed upon the companies, in line with Article 47 of the AML.

As shown above, the NDRC has been very proactive in recent years in investigating both horizontal and vertical monopoly agreements. From recent cases, NDRC is particularly sensitive of resale price maintenance arrangements. During the course of this year NDRC has launched two resale price maintenance investigations, one against Kweichow Maotai and Wuliangye and the other against several infant formula companies. The penalty for violation of AML ranges from 1 to 10 percent of the business operators sales amount of the preceding year. Although Maotai and Wuliangye case generated the highest imposed fine since the enactment of AML (being RMB 247 million and RMB 202 million respectively), the fine involved in this case is actually the lowest end of the applicable penalty range. This was as a result of the level of cooperation shown by the relevant undertakings in respect of the NDRC investigation.

Another recently closed investigation in relation to the supply of infant formula also shows the application of the leniency programme. In April 2013, NDRC launched investigation against 9 infant formula companies and subsequently imposed fines totaling RMB668.73mn. Wyeth, Beingmate and Meiji were not fined because they took the initiative to self-disclose and provided key evidence and took remedial steps. Dumex, Abbott, Friesland and Fonterra each had a fine imposed equal to 3 percent of their annual revenue because they cooperated in the investigation and took active remedial measures. Biostime had a fine of 6 percent of its annual revenue imposed because the illegal conduct involved was more serious and Biostime failed to carry out remedial steps in time.

NDRC generally focuses on clear breaches of the AML such as price fixing and resale price maintenance. In particular, further collaboration between Chinese regulators and international counterparts should be expected. In the current LCD cartel case,<sup>29</sup> noting that the fines imposed by the NDRC were significantly less than the fines imposed in other jurisdictions. In particular, further action against international cartels and resale price maintenance cases that have adversely affected China is likely to trigger an investigation by the NDRC. It is noteworthy that in public enforcement, the burden of proof is not as high as that in private actions.

In the respect of the SAIC, the first published case was concluded at the beginning of 2011, by a local office in Jiangsu Province under the guidance of the SAIC headquarters in Beijing. This case was involved a restrictive agreement executed by the construction material and machinery association in the city of Lianyungang. SAIC confiscated illegal earnings of RMB140,000 (approximately US\$22,000) and imposed a fine of RMB 730,000 (approximately US\$116,000) upon the related association and five of its members.<sup>30</sup>

As of the end of July 2013, the SAIC investigated 24 cases in total, including 23 cases investigated by provincial bureaus empowered by the SAIC with one case investigated by the SAIC. From those cases 12 provincial level cases involved the imposition of penalties on the relevant undertakings. The industries involved included second-hand auto, cement, insurance, travel agency, bricks, construction inspection, gas and packaging materials. For instance, in the recent investigation against TetraPak, SAIC repeatedly received complaints against TetraPak for using its strong market position in the packaging equipment and maintenance services markets to bundling packaging materials, as well as implementing differential treatment.

In practice, instead of conducting formal antitrust investigations, the authorities may directly contact the relevant business operators suspected of engaging in anti-competitive conduct and request a rectification of the relevant conduct. Often, public investigations are initially instigated as a result of third party complaints, media reports and/or the regulators' own-investigations.

In addition to potential responsibility of administrative fines, there could be civil liabilities imposed on monopolistic conductors, as Article 50 of the AML provides that "if a business operator implements monopolistic conduct and causes loss to others, it shall be responsible for civil liabilities in accordance with the law." In this case, the people's court can play also an important role in respect of the AML enforcement. Since the AML took effect, the courts have accepted more than 40 antitrust actions filed on the basis of this provision, for examples Zhou Ze v. China Mobile,<sup>31</sup> Tangshan Renren v. Baidu<sup>32</sup> and so on.

### Box: 1 Qualcomm Accused of Overcharging

China's anti-monopoly regulator said Qualcomm Inc. was suspected of overcharging and abusing its market position, allegations which could see the US chip giant hit with record fines of more than US\$1bn.

The NDRC also said it was in talks with another US technology firm, InterDigital Inc, about a possible settlement to a separate anti-monopoly probe as the regulator focuses on the rapidly evolving information technology market.

In its first public statements about the Qualcomm investigation, the watchdog said it began making enquiries after receiving complaints that the San Diego-based company was charging higher prices in China than it does in other countries.

The NDRC dual investigations are part of a focus on information technology providers, especially companies that licence patent technology for mobile devices and networks.

Under the anti-monopoly law, the NDRC can impose fines of between 1 and 10 percent of a company's revenues for the previous year. Qualcomm earned US\$12.3bn in China for its fiscal year ended September 29, or nearly half of its global sales.

*Source: Reuters, 19.02.14*

But all of abuse of dominance actions so far have been dismissed or settled. From these cases it can be seen that plaintiffs in private litigation have experienced difficulties in meeting the heavy burden of proof. In reaction to this perceived weakness of existing rules, the Intellectual Property Bench of the Supreme People's Court circulated for comment the Provisions of the Supreme People's Court on Several Issues concerning the Application of the Law in Adjudication of Monopoly-Related Civil Disputes (Draft for Comments)<sup>33</sup> in April 2011 (Judicial Interpretation). The Judicial Interpretation came into effective on June 01, 2012.

In the recent successful anti-monopoly lawsuit involving Rainbow and Johnson & Johnson, the court confirmed that the effect of eliminating or restricting market competition is an essential factor to be considered in the court for the identification of monopolistic agreements in the context of a private action brought under the AML provisions. In addition, it is the plaintiff's burden to prove the anti-competitive effects of such agreement.

The Shanghai Higher Court has recently held that a monopoly agreement can involve both anti-competitive effects and pro-competitive effects. This ruling adds a

degree of complexity to the self-assessment to be undertaken by relevant undertakings and, in the case of plaintiffs, can be a factor which complicates claims brought under the private action provisions of the AML.

Despite of the case above, we see the burden of proof on the plaintiff is still relatively high in private actions.

### **Competition Enforcement and Sectoral Regulation**

The prohibition of abusive conduct in the Antimonopoly Law is specifically directed at the business operators with dominant or monopoly market position. In China, there are numerous incumbent monopolists in the sectors of telecommunication, post, railway, electricity, banking etc. Moreover, almost every State-owned monopolist is under supervision and administration of an industrial regulator according to a law or regulation. For example, the State Electricity Regulatory Commission (SERC) is empowered by the State Council to perform administrative and regulatory duties with regard to the national electric power sector in accordance with laws and regulations. That means that when the relevant AMEA has the jurisdiction over the anticompetitive conduct in the regulated sectors, the competition enforcement could raise difficult political questions. Additionally, in view of the regulatory capture doctrine, and in particular the State-owned economy in the regulated sectors in China, there have been fears that competition law could not be applied in the regulated sectors based on the rules of the AML.

However, there are cases indicating the positive trend for China to deal with the relationship between the competition enforcement and sector regulation particularly in the regulated sectors of television broadcasting and telecommunications.

In the case of China Telecom and China Unicom, on November 9, 2011, Price Supervision and Anti-Monopoly Bureau of the NDRC announced an antitrust investigation against these two giants.<sup>34</sup> This case has been closely watched because it is the first time that the AMEAs launched an antitrust investigation into large state-owned enterprises in the regulated sectors, and it indicates that AML may be ready to show its teeth to all antimonopoly law violators regardless of their identity. As alleged, the two companies separated their customers into “black and white list”, and charge rivals higher fees while offering favourable prices to the user who are not competing with them. As the Deputy Director of the Price Supervision and Antimonopoly Department of the NDRC said, if the allegation of price discrimination based on dominant position proves to be true, the two companies may be liable for a fine of 1 to 10 percent of their revenue of the previous year, which could amount to hundreds of millions to billions of Chinese Yuan.<sup>35</sup>

Following that announcement, China Telecom and China Unicom released their statements on their websites, and said that they had submitted an application for “suspension of the antitrust investigation.” The two companies acknowledged the existence of obvious difference between their charged prices for broadband access of different customers, and promised to improve connection speed, and lower internet prices. For example, China Telecom promised to lower internet access prices by about 35 percent in 5 years.<sup>36</sup> Even though there is no deadline for NRDC to release its decision on whether or not it will accept the commitment proposal of the two giants, but this investigation indicates that the AMEAs have authority to deal with the restriction of competition in the regulated sectors.

Separately, on January 5<sup>th</sup> 2013, the Xi’an Intermediate People’s Court ruled in favour of a consumer who sued Shanxi Broadcast & TV Network Intermediary (Group) Co., Ltd., the local cable service provider, for tie-in sales and imposing unreasonable sales conditions by tying basic cable services with digital channel services. The court found that the network is a lawful monopoly in the local market for cable TV. However, its conditioning of sale of basic cable service on the customer’s subscription for digital channels infringed the customer’s freedom of choice and diminished consumer welfare. This is one of the few cases so far where the court has found in favour of the plaintiff in an antitrust private action and to the extent of our knowledge, the first published case involves tying.

### **Consumer Protection**

Consumers are essential economic agents in markets, and they should be empowered to act in their best interest at all times. Along with the economic reform, law makers and policy makers in China have paid more attention to the consumer protection.

The Law of the People’s Republic of China on Protection of the Rights and Interests of the Consumers (Consumer Protection Law) was adopted by the 4<sup>th</sup> Session of the Standing Committee of the Eighth National People’s Congress on October 31, 1993, and became effective on January 01, 1994. This Law is formulated in order to protect the lawful rights and interests of the consumers, to maintain the socio- economic order, and to promote sound development of the socialist market economy.

According to the Article 2 of this Law, the rights and interests of consumers when purchasing or using commodities or receiving services as consumer needs for daily use shall be protected by this Law; and the rights and interests not covered by this Law shall be protected by other relevant laws and regulations. Concretely speaking, the consumer has the following 9 rights:

- To the safety of person and property guaranteed;
- To knowledge of the true facts concerning commodities purchased and used or services received;
- To free choice in purchasing commodities or services;
- To fair dealing;
- To obtain compensation where harm is inflicted upon their person or property as a result of the purchase or use of a commodity or the receipt of a service;
- To establish social organisations ensuring their legal rights and interests;
- To obtain information relating to consumption and the protection of the rights and interests of consumers;
- To have human dignity, national customs and traditions respected; and
- To supervise the protection of consumers' rights and interests in work related to commodities and services.

A national consumer association and other consumer's organisations have been established according to law to carry out social supervision over commodities and services, and to protect the lawful rights and interests of the consumers. The China Consumer Association exercises the following 7 duties and functions according to the Article 32 of the Law:

- To provide consumers with information on consumer issues and advice;
- To assist relevant administrative departments in supervising and inspecting consumer goods and services;
- To report to relevant administrative departments, inquire in to and put forward suggestions on issues concerning the rights and interests of the consumers;
- To take cognizance of consumer complaints, investigate and mediate such complaints;
- To submit to the appraising departments for appraisal, where the complaints involve quality of goods and services, and the appraising departments shall inform on their findings;
- To support the consumer whose rights and interests are infringed upon in filing suits; and
- To expose and criticise through the mass media such acts which infringe upon the lawful rights and interests of the consumers.

The Consumer Protection Law encourages the governments at all levels to support the consumer movement to protect the consumer rights.

The PRC Consumer Protection Law has recently been amended.<sup>37</sup> The amended PRC Consumer Protection Law has introduced a few new consumer rights, including privacy data protection and 7-day return period for remote shopping (i.e. online, TV, telephone, or post). In addition, the updated PRC Consumer Protection Law introduced a public interest litigation regime which enables the Consumer Protection Association to commence proceedings against any illegal conduct harming consumers' interests. We consider those amendments are

positive. This is because consumer protection is connected very closely with competition policy, and competition is a necessary condition for consumer welfare.

### Concluding Observations and Future Scenario

Competition law might easily be transplanted from one country into another, but the value and conceptions inherent in the law cannot easily take root in the latter. In this case, despite the transnational dynamics and good influence over China's AML and its enforcement, there must still be serious challenges in front of the AMEA in its early years. For example the case involving China Telecom and China Unicom, to a degree, indicates China's market oriented system, because in this case, the AMEA is not discriminating based on the ownership structures of the companies. However, this case still indicates that China's AMEA is in front of serious challenges, in particular the challenge in applying the AML vested to SOEs in the face of lobbying from powerful interests.

Another serious challenge before AME is the lack of reliable market data in China to a degree. Some Chinese firms have sophisticated accounting systems, book keeping, other firms remains manual and rudimentary. Statistics from China's official and quasi-official sources are infamously inaccurate, and antitrust officials may avoid contradicting the official pronouncements of other ministries or the State Council. China's fragmentation in to regional markets, rampant graft and tax evasion, and poor cooperation at local levels may compound these problems.

Many common assumptions about market conduct,—the stability of property rights, the commercial value of the intellectual property, judicial enforcement of contracts, the predictability and transparency of government action—do not apply uniformly in China. It might be prudent to concentrate initially on cartels and administrative monopolies before phasing in more complicated enforcement efforts. Unfortunately, China's top antitrust priorities – policing abuses by dominant firms and international mergers – both entail intricate economic analysis.

The bite of Chinese antitrust regime may vary with the political circumstances. Other government entities may resist AMEA against favoured SOEs. China's AMEA have to contend with local protection which made contrary policy goals through China's fluid political process. The long term impact of the AML thus depends on the credibility, competence, and stature of the AMEAs.

In 2013, the level of enforcement activity in the PRC has been heightened, particularly in relation to the activities of multinational companies. Further collaboration between Chinese regulators and international counterparts should also be expected (such as in the current LCD cartel case). This is also a signal that the PRC AML regime is becoming more connected to those in other jurisdictions.



Currently, China has two major categories of anticompetitive practices, one is business anticompetitive conduct and the other is administrative anticompetitive conduct. They result from different reasons and have different significance to the Chinese economy at present and in the future. To deal with the business conducts, the major measure should be to complete the legal framework of competition and to enhance the enforcement system.

But to deal with the administrative conduct, the right way is to deepen and further promote the economic reform and implement political reform, including continuing to separate the Government's regulatory and ownership functions, and to democratise the ownership and to establish good governance structure in those monopolised sectors.

---

## Endnotes

- 1 For official information of China, including background, politics, economy, and finance and banking, see 'China Factfile' published by Chinese Central Government at <<http://english.gov.cn/about.htm>>.
- 2 For more information about China's State Council and local governments, see <[http://english.gov.cn/2007-10/29/content\\_30395.htm](http://english.gov.cn/2007-10/29/content_30395.htm)>.
- 3 See *Constitution 1982* (amended in 1988, 1993, 1999, and 2004), Preamble, para. 7. English translation available at <[http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm)>.
- 4 Xinhua News Agency, 'Statistics of the Communist Party of China published' (in Chinese), <[http://news.xinhuanet.com/politics/2010-06/28/c\\_12271914.htm](http://news.xinhuanet.com/politics/2010-06/28/c_12271914.htm)>.
- 5 See Constitution, Art. 15.
- 6 For background information about Deng Xiaoping, see <<http://english.peopledaily.com.cn/data/people/dengxiaoping.shtml>>.
- 7 See excerpts from an interview between Deng Xiaoping and a delegation consisting of senior journalists and entrepreneurs, available at <[www.china.org.cn/english/features/dengxiaoping/103358.htm](http://www.china.org.cn/english/features/dengxiaoping/103358.htm)>.
- 8 OECD, *China in the 2010s*, 1 and 3; Angus Maddison, *Chinese Economic Performance*, 20–22.
- 9 Official information on China's economic system and development strategies is available at <<http://english.gov.cn/about/economy.htm>>.
- 10 OECD, *China in the 2010s*, 3.
- 11 The official Chinese text available at the official Gazette of the State Council, No. 487.
- 12 *Ibid.*
- 13 See AUCL, Arts 6, 7, 11, 12 and 15.
- 14 See Art. 14(1), (2), (5) and (7) of the Price Law, English translation available at <[www.fdi.gov.cn/pub/FDI\\_EN/Laws/law\\_en\\_info.jsp?docid=50956](http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=50956)>.
- 15 English translation available at <[www.fdi.gov.cn/pub/FDI\\_EN/Laws/law\\_en\\_info.jsp?docid=51173](http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51173)>.
- 16 English translation available at <[www.fdi.gov.cn/pub/FDI\\_EN/Laws/law\\_en\\_info.jsp?docid=66925](http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=66925)>.
- 17 English translation of the amended M&A Rules available at <[www.fdi.gov.cn/pub/FDI\\_EN/Laws/law\\_en\\_info.jsp?docid=108906](http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=108906)>.
- 18 See AUCL, Arts 6, 11, & 12.
- 19 See AUCL, Art. 23.
- 20 See the People's Daily Online, 'Three Agencies Designated with the Authorities to Enforce the Anti-Monopoly Law' (in Chinese), <<http://politics.people.com.cn/GB/1025/7751741.html>>.
- 21 See [2008] State Council Order No. 529, August 3, 2008.
- 22 Anti-Monopoly Commission under the State Council, Guidelines on the Definition of the Relevant Market, May 24, 2009.
- 23 Notice of the MOFCOM [2011] Order No. 73, October 31, 2011.
- 24 Notice of the MOFCOM [2011] Order No. 74, November 10, 2011.
- 25 Notice of the MOFCOM [2011] Order No. 90, December 12, 2011.
- 26 Notice of the MOFCOM [2012] Order No. 6, February 09, 2012.
- 27 See JRJ.com website, *NDRC's Price Supervision Bureau holds an anti-monopoly seminar*, 2010, available at <http://finance.jrj.com.cn/2010/12/0714358728278.shtml>.
- 28 See NDRC website, *Two pharmaceutical companies receive significant sanctions for monopolizing compound reserpine BPC*, November 14, 2011, available at [http://www.sdpc.gov.cn/xwfb/t20111114\\_444330.htm](http://www.sdpc.gov.cn/xwfb/t20111114_444330.htm).
- 29 Six international LCD panel makers, including Samsung and LG of Korea, and Chimei, AU Optronics, Chunghwa Picture Tubes and Hannstar of Taiwan, met almost monthly in Taiwan or Korea between 2001 and 2006. During 53 so-called "Crystal Meetings," the companies exchanged market information and discussed prices for LCD panels. Over 5 million LCD panels were sold in China during this time period by the cartel.
- 30 See SAIC press release, the first monopoly case to imposed administrative penalty by the Industry and Commerce Administration has been closed, January 26, 2011, available at [http://www.saic.gov.cn/ywtd/gsyw/dfdt/xxb/201101/t20110126\\_103772.html](http://www.saic.gov.cn/ywtd/gsyw/dfdt/xxb/201101/t20110126_103772.html).

- 31 See Zhou Ze's Sina Blog, The plaintiff and defendant reached a settlement in the case of China Mobile being sued for monopolistic conduct, October 25, 2009, available at [http://blog.sina.com.cn/s/blog\\_4bdb1fa00100g27j.html](http://blog.sina.com.cn/s/blog_4bdb1fa00100g27j.html).
- 32 Beijing Intermediate People's Court No. 1, Tangshan Renren v Baidu, [2009] Yi Zhong Min Chu Zi No. 845, December 18, 2009. Upheld on appeal by Beijing High People's Court, Renren v Baidu, [2010] Gao Min Zhong Zi No. 489, July 9, 2010.
- 33 Provisions of the Supreme People's Court on Several Issues concerning the Application of the Law in Adjudication of Monopoly-Related Civil Disputes (Draft for Comments), April 25, 2011, available at [http://www.court.gov.cn/gzhd/zqyj/201104/t20110425\\_19850.htm](http://www.court.gov.cn/gzhd/zqyj/201104/t20110425_19850.htm).
- 34 See the Information by the NDRC: China Telecom and China Unicom were suspected to violate the AML, available at <http://tech.sina.com.cn/t/2011-11-09/12106296381.shtml>
- 35 *Ibid.*
- 36 China Telecom promised to lower internet access prices by 35 per cent in 5 years, available at <http://tech.sina.com.cn/t/2011-12-03/02546417481.shtml>
- 37 The updated PRC Consumer Protection Law was issued on 25 October 2013 and will come into effect on 15 March 2014.

---

### Suggested Readings

1. Xiaoye Wang, *The Prospect of Antimonopoly Legislation in China*, Washington University Global Studies Law Review, No.1&2/ 2002
2. Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, Antitrust Law Journal Issue 1/2008
3. Xiaoye Wang & Jessica Su, *Competition Law in China*, Kluwer Law International, 2012
4. Xiaoye Wang & Jessica Su, *China's Anti-Monopoly Law: agent of competition enhancement or engine of industrial policy?* In: *The Goals of Competition Law*, edited by Daniel Zimmer, 2012.

† **Prof. Dr. Xiaoye Wang** is Law Professor of Hunan University, and of Chinese Academy of Social Sciences. She holds a LL.M. from Remin University in 1984, a Doctor Juris Degree from University Hamburg in 1993. She works in the areas of economic law, international economic law, and focuses on antitrust law. She is the author and editor of 19 books and over 200 papers published in Chinese, German and English. As the leading expert in the field of antitrust law in China, she was advisor of the Drafting Committee of China's Antimonopoly Law and lectured twice for the Standing Committee of National People's Congress. She has served as Vice President of the Chinese Society of Economic Law, and the head of the Consultant Committee for WTO Trade and Competition Policy of Ministry of Commerce. In international academic activities, she is a founding member of Academic Society for Competition Law (ASCOLA), Asia Competition Forum (ACF), and member of the International Advisory Board of CUTS C-CIER and American Antitrust Institute (AAI).