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China's Enforcement of Its Anti-Monopoly Law and Risks to Multinational Companies

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China's recent enforcement of its Anti-Monopoly Law (AML) has caused alarm and concern among Multinational Companies (MNCs). Many MNCs believe that the primary purpose of China's AML is not to create open, fair, and market-based competition but is to serve the Industrial Policy goals of China's ruling Communist Party. These goals result in the enforcement of the AML in favor of Chinese companies, especially China's massive State-owned Enterprises, at the expense of MNCs doing business in China. In addition, China's AML enforcement authorities seem to be using the AML to force MNCs to transfer their valuable technologies (intellectual property rights) at below market rates to Chinese firms and to force price reductions of their products sold in China. AML enforcement authorities also appear to be using the AML to protect famous Chinese brands from being acquired by foreign firms. China's use of the AML appears to be consistent with China's overall goal of strengthening its position as a global economic power.

I. Introduction

China's Anti-Monopoly Law (AML) has been in effect for only seven years since 2008,¹ but since its inception it has led to controversial results and recent trends in its enforcement is a rising cause of concern for multinational companies (MNCs).² The AML, as enforced, contains at least three trends, set forth below, which pose significant risks for MNCs actively doing business in China. These risks apply as well as to MNCs that have only a small presence in China, but which may require China's approval of a merger of Chinese business entities as part of a world-wide merger of the parent MNCs. What are these risks that so concern MNCs?

First, for China, the main purpose of the AML is not to promote fair, open, and market-based competition; rather the goal of the AML is at least in part to further the Industrial Policy goals established by the Communist Party (the Party), which often means that the AML enforcement authorities will favor Chinese companies, usually state-owned enterprises, over foreign MNCs.³ China views MNCs as having competitive advantages in capital, technology, and management skills and seeks to offset these advantages through the use of the AML.⁴ Second, China applies the AML in ways that are openly discriminatory against MNCs forcing MNCs to sell assets to China's SOEs or to provide access to technology (intellectual property) to

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1. See Anti-Monopoly Law of the People's Republic of China (adopted at the 29th Session of the Standing Committee of the Tenth Nat'l People's Cong., effective Aug. 1, 2008) [hereinafter AML].
 2. See Neil Gough, Chris Buckley, & Nick Wingfield, *China's Energetic Enforcement of Antitrust Rules Alarms Foreign Firms*, N.Y. TIMES (Aug. 10, 2014), http://www.nytimes.com/2014/08/11/business/international/china8217s-energetic-enforcement-of-antitrust-rules-alarms-foreign-firms.html?_r=0.
 3. See Part II.A-II.B *infra*.
 4. See Part II.B *infra*.

China's SOEs as below market rates.⁵ Third, although China's laws on the books provide for appeals to both administrative bodies and to courts in AML cases, there is in reality is no meaningful recourse from decisions of China's AML enforcement authorities.⁶ This is because MNCs are unlikely to challenge an AML enforcement authority's decision due to fear by MNCs of retribution. In addition, the Party controls the government bureaucracies, the courts, and all entities that might consider an appeal.⁷ Party control means that the first AML entity has followed Party policy at the enforcement level and thus any entity considering an appeal will also likely follow Party policy in upholding the actions of the enforcement authority.⁸ An appeal may not only result in retribution but the chances of a reversal of an undesirable outcome at the enforcement level by an appellate authority may be illusory.⁹

This article will develop these themes as follows: Part II provides a brief overview of the AML and the Industrial Policy goals that the AML seeks to further. As strengthening SOEs are a vital party of China's Industrial Policy, Part II will also consider the vital role of SOEs in China's economy as well as the threat that China perceives is posed to SOEs by MNCs, the main competitors to SOEs in China and abroad.

II. The Anti-Monopoly Law

The AML was enacted in 2008 to prevent monopolistic conduct.¹⁰ The AML provides for review of proposed corporate mergers and acquisitions in China to prevent undue concentrations of power that might lead to monopolistic conduct.¹¹ Reviews of mergers and acquisitions are conducted by the Ministry of Commerce (MOFCOM), which has over authority over foreign and domestic trade and is concerned one of China's most powerful bureaucracies.¹² The AML also provides for remedies against existing monopolistic or anticompetitive conduct, such as price fixing and other monopoly agreements.¹³ This provision of the AML is enforcement

5. See Part II.B *infra*.

6. See Part III *infra*.

7. See *id.*

8. See *id.*

9. See *id.*

10. See AML, *supra* note 1, at art. 1.

11. See AML, *supra* note 1, at arts. 3, 20, 21, 25-26.

12. The State Council has delegated the authority to review mergers and acquisitions to MOFCOM. See MICHAEL J. MOSER & FU YU, *DOING BUSINESS IN CHINA*, §5.2.01[1] (2014). For a discussion of MOFCOM's role, see MOFCOM's official website available at <http://english.mofcom.gov.cn/column/mission2010.shtml>.

13. See AML, *supra* note 1, at art. 13.

by a different entity, the National Development and Reform Commission (NDRC),¹⁴ which has the authority to levy fines for such illegal conduct. A third entity, the State Administration of Industry and Commerce (SAIC) and its local branches (AICs) also has investigatory powers into current anti-competitive conduct.¹⁵

A. Industrial Policy Goals

As noted earlier, the AML is used by China to further Industrial Policy goals established by the Party. References to Industrial Policy are found throughout articles of the AML. For example, Article 1 of the AML states:

This Law is enacted for the purpose of preventing and restraining monopolistic conduct, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and interests of the society as a whole and promoting the healthy development of the socialist market economy.¹⁶

In Article 1, the terms “socialist market economy” mean public ownership and is a reference to state-owned enterprises, further discussed in the next section. Other references to Industrial Policy goals included Article 7 (special role for SOEs as “lifeline of the national economy”)¹⁷; Article 8 (carving out a special role for “administrative monopolies”)¹⁸; and Article 55 (carving out as a form of anti-competitive behavior the abuse of dominance with respect to intellectual property rights).¹⁹ As noted earlier, these Industrial Policy goals, referenced in the AML, have been carried out by AML enforcement authorities to (1) strengthen SOEs at the expense of MNCs; (2) obtain technology from MNCs at below market rates; and (3) to protect famous Chinese brands.

B. State-Owned Enterprises

Since state-owned enterprises (SOEs) are singled out in the AML as deserving special treatment under China’s Industrial Policy goals, a brief overview of SOEs is useful to provide a clearer understanding of the role of SOEs in China’s economy. SOEs are business entities that are owned by the State-Party as opposed to being owned by a private individual, entity, or groups of private individuals and private

14. *Competition Policy and Enforcement in China*, THE U.S.-CHINA BUSINESS COUNCIL, <https://www.uschina.org/reports/competition-policy-and-enforcement-china> (last visited Nov. 14, 2015).

15. *See id.*

16. *See AML, supra* note 1, at art. 1.

17. *See AML, supra* note 1, at art. 7.

18. *See AML, supra* note 1, at art. 8.

19. *See AML, supra* note 1, at art. 55.

entities.²⁰ SOEs continue to control all important strategic industries in China, such as oil and gas exploration; banking; transportation (including air and rail transport); telecommunications, and electricity supply.²¹ SOEs also have access to easy credit from China's state-owned banks. Many SOEs are now among the largest companies in the world.²² China's long-term goal is to create SOEs that are "national champions" that can compete with the world's largest MNCs.²³ In November 2013 at the conclusion of the Third Plenum of the Communist Party, the Party pledged to "incessantly strengthen the vitality" of SOEs.²⁴

China seems intent on using the AML to strengthen the position of SOEs and to weaken the position of MNCs, their main competitors in China as well as on the worldwide stage. MNCs are viewed as possessing "huge advantages in technology, scale, capital, etc. It is easy for them to gain a competitive edge, even monopoly positions, in the market . . . There is a need to impose countermeasures to regulate multinationals' anticompetitive conduct."²⁵ There is a general sense in the state-controlled media that greedy MNCs are able to take advantage in many different areas of China's still developing legal and economic system to gain various advantages over Chinese companies.²⁶ In other contexts, such as commercial bribery, MNCs are also targets of intense criticism by the media. Some media reports state that MNCs are "under siege" in China.²⁷

C. How the AML Applies to MNCs

The AML applies when MNCs acquire an existing Chinese company as a form of foreign direct investment (FDI). For example, an MNC that wishes to establish a

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20. DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 22-23 (3d ed. 2015) [hereinafter CHOW, *LEGAL SYSTEM OF CHINA*].
 21. Chow, *Legal System of China* at 24, *supra* note 20.
 22. See GLOBAL 500 2014, *FORTUNE*, <http://fortune.com/global500/> (last visited Nov. 14, 2015). Sinopec Group is ranked third, China National Petroleum is ranked fourth, and State Grid is ranked seventh.
 23. See *The State Advances*, *THE ECONOMIST* (Oct. 6, 2012), <http://www.economist.com/node/21564274> (discussing China's concerted effort to convert SOEs into national champions).
 24. See Bob Davis & Brian Spegele, *State Companies Emerge as Winners Following Top China Meeting*, *WALL ST. J.* (Nov. 13, 2013), <http://www.wsj.com/articles/SB10001424052702303559504579195551704526972>.
 25. SAIC Fair Trade Bureau, *Multinationals' Anti-Competition Behavior in China and Countermeasures Therefore*, State Administration of Industry and Commerce (Mar. 1, 2004), available at http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/programs/Multinationals_anti_competition_behavior_eng_v1.pdf.
 26. See, e.g., Jin Shanming, *Multinationals in China Must Operate According to Law*, *CHINA TODAY* (Sept. 25, 2013), available at http://www.chinatoday.com.cn/english/economy/2013-09/25/content_569718.htm.
 27. See Simon Zadek, *The End of Irresponsible Business Practices by Multinationals in China*, *SOUTH CHINA MORNING POST* (Aug. 22, 2013), available at <http://www.scmp.com/comment/insight-opinion/article/1298364/end-irresponsible-business-practices-multinationals-china?page=all>.

business entity in China has in the main two options: first, the entity can set up a “greenfield” investment, which is considered to an entirely new entity that the MNC establishes on its own from start to finish.²⁸ An alternative arrangement is to acquire an existing Chinese company. The acquisition of an existing Chinese company has a number of advantages as the MNC is able to exploit the acquisition target’s existing customer base, its connections with government bureaucracies, and its reputation with consumers. On a world-wide level, mergers and acquisitions are the most popular form of FDI in the world today.²⁹ If an MNC acquires an existing Chinese company, the merger may be subject to a merger review conducted by MOFCOM under the AML.

The AML also applies when there is a foreign merger between entities (MNCs) that have business operations in China. Suppose for example that an MNC with its headquarters located in the United States and subsidiaries and branch offices around the world, including China, seeks a worldwide merger with an MNC with its headquarters located in Europe, which also has subsidiaries and branches around the world, including in China. The world-wide merger cannot be completed without approval by China due to the presence of business entities owned by the MNCs in China. In both the case of a worldwide merger of MNCs and the acquisition by an MNC of a domestic Chinese business entity, the merger cannot be completed with the approval of MOFCOM. If the merger is subject to MOFCOM review, it cannot be lawfully completed without MOFCOM’s approval. MOFCOM can approve the merger unconditionally, approve the merger with conditions, or reject the merger.

The AML also applies to anti-competitive conduct of existing business operations by MNCs (as well as domestic Chinese companies) in China. Article 13 of the AML targets the existing anti-competitive conduct of companies doing business in China, such as price fixing.³⁰ This provision of the AML is enforced by the National Development and Reform Commission, which has the power to implement on the ground investigations and levy hefty fines as punishment.³¹

1. MOFCOM Anti-Monopoly Cases

A review of recent MOFCOM merger review cases illustrates how MOFCOM uses the AML to further China’s Industry Policy goals. The Glencore/Xstrata case³²

28. DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS* 353 (3d ed. 2015).

29. *See id.* at 353.

30. *See AML, supra* note 1, at art. 13(1).

31. *See supra* note 14.

32. *See* MOFCOM Announcement No. 20 (Apr. 16, 2013) on Conditional Approval of the Concentration of Business Operators by the Acquisition of Xstrata by Glencore International AG.

involved the attempt by Glencore, a Swiss commodity and trading company, to acquire Xstrata, also a Swiss mining company, for \$41 billion. Although both companies had their major operations overseas and had only minor and non-operating assets in China, the companies still needed MOFCOM approval of the merger of the business entities in China or else the world-wide merger could not be successfully completed. MOFCOM approved the deal on condition that Glencore sell a mine in Peru to a Chinese SOE to further China's goal of securing more natural resources from South America.³³ The mine in Peru was not related to Glencore and Xstrata's activities in China but its acquisition did further China's strategic goal of acquiring more natural resources in South America. Glencore/Xstrata is an example of how MOFCOM uses the AML in a nationalistic effort to strengthen SOEs, often at the expense of MNCs. Glencore/Xstrata is an example of China's Industrial Policy goal of strengthening SOEs and creating "national champions."³⁴

The Microsoft/Nokia case involved Microsoft's acquisition of Nokia, a Finnish cellular phone manufacturer, for \$7 billion. On April 20, 2014, MOFCOM approved the deal on the condition, among others, that Microsoft cap licensing fees of technology to Chinese domestic companies.³⁵ China has also put pressure on other MNCs (Interdigital and Qualcomm) to license their technology to Chinese companies at below market rates. These cases are an example of how China uses the AML to further the Industrial Policy goal of acquiring access to foreign technology at below market rates.

In one of the most important notorious cases before MOFCOM, Coca Cola sought to acquire China Huiyuan Juice Group Limited, a famous Chinese juice maker, for \$2.4 billion.³⁶ The proposed acquisition was blocked by MOFCOM. While MOFCOM offered some explanations for its decision, many found the reasoning to be deficient and believe that the sole purpose of the decision was to keep Huiyuan in Chinese hands. This decision seemed to reflect past policies of earlier competition law related to protecting "well-known trademarks" of Chinese domestic companies and "Chinese historical brands."³⁷

2. NDRC Anti-Monopoly Law Cases

The National Development and Reform Commission has used the AML to

33. *See id.*

34. *See supra* note 23.

35. *See AML, supra* note 1, at art. 55 (specifically prohibiting "the abuse of intellectual property rights to exclude or limit competition.")

36. *See* MOFCOM Announcement No. 22 (Mar. 18, 2009).

37. *See* MOFCOM Announcement No. 24 (Apr. 8, 2014) on the Decision of Conditional Approval upon Anti-Monopoly Review of the Concentration of Business Operators by the Acquisition of Nokia's Devices and Services Business by Microsoft.

investigate and crackdown on MNCs for what the NDRC claims to existing anticompetitive conduct, such as price fixing. Many believe that NDRC is using its investigations to pressure MNCs to lower their prices. NDRC has announced that it will focus on several key industries, including aviation, cosmetics, automobiles, telecommunications, pharmaceuticals, and household appliances. The NDRC has never published a written opinion or decision explaining its fines.

In February of 2015, Qualcomm agreed to pay \$1 billion in fines to NDRC and to lower patent royalty payments owed by Chinese licensees of Qualcomm's patents by one third.³⁸ In 2014, NDRC fined Chrysler and Audi \$45 million for price fixing³⁹ and a Japanese auto parts maker \$200 million.⁴⁰ In 2013, NDRC fined MNC makers of infant formula over \$100 million and forced price reductions.⁴¹ In 2011, NDRC fined Unilever and forced other MNC consumer products companies (Procter & Gamble) to lower their prices.⁴² These recent actions have led to claim by U.S. companies that they are being unfairly targeted by Chinese AML enforcement authorities.⁴³ MNCs claim that the real purpose of these investigations is to force price reductions for their products sold in China.

III. Lack of Effective Recourse from AML Decisions

An additional concern by MNCs is that there is no effective recourse to what they perceive to be erroneous, unfair, or discriminatory decisions by AML enforcement authorities. Although AML decisions are in theory subject to review by the AML enforcement authorities or by the courts in some cases, no MNC is likely to ever challenge an AML decision because fear of retribution by Chinese government authorities. MNCs need approval from these same authorities, such as MOFCOM,

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38. See Zach Warren, *Chinese Regulators to Fine Qualcomm \$1 billion in Antitrust Case*, INSIDE COUNSEL (Feb. 9, 2015), <http://www.insidecounsel.com/2015/02/09/chinese-regulators-to-fine-qualcomm-1-billion-in-a?ref=rss>.
39. See Lucy Hornby & Charles Clover, *China Fines Audi and Chrysler for Price Fixing*, FINANCIAL TIMES (Sept. 11, 2014), <http://www.ft.com/cms/s/0/69fff63a-3991-11e4-83c4-00144feabdc0.html#axzz3RjqFd9YU>.
40. See Rose Yu & Megumi Fujikawa, *China Fines Japan Auto-Parts Makers \$200 million*, WALL ST. J. (Aug. 20, 2014), <http://www.wsj.com/articles/china-fines-japan-auto-parts-makers-200-million-1408530257>.
41. See Xiaoqing Pi, *China Fines Dairy Companies*, WALL ST. J. (Aug. 7, 2013), <http://www.wsj.com/articles/SB10001424127887323968704578653081355672350>.
42. See *NDRC Fined Unilever for Making Advanced Price Increase Announcements*, CLEARY GOTTlieb STEEN & HAMILTON LLP (May 16, 2011), <http://www.cgsh.com/files/News/ecdd50f4-b8c2-4183-be71-f396bda49842/Presentation/NewsAttachment/a394d28d-584c-4d50-a183-f3a2ca5ad4b8/NDRC%20Fined%20Unilever%20For%20Making%20Advanced%20Price%20Increase%20Announcements.pdf>.
43. See Zach Warren, *American businesses feel unfairly targeted by Chinese antitrust enforcement, survey says*, INSIDE COUNSEL (Sept. 2, 2014), <http://www.insidecounsel.com/2014/09/02/american-businesses-feel-unfairly-targeted-by-chin>.

for all kinds of investment projects. MNCs are in constant contact with Chinese government authorities, including AML enforcement entities (e.g. AICs).

A related concern is that the AML enforcement authorities, other government entities, the SOEs, and the courts are controlled all by the State-Party. Almost all important government posts are held by Party members.⁴⁴ All import posts in SOEs are also held by Party members.⁴⁵ This allows the Party to control the government and the economy by placing its members in all key positions. This means that the key positions in AML enforcement authorities are Party members and are unlikely to deviate from Party Policy in any appeals. The courts at all levels are also controlled by the Party. Not only are leading judges (Presidents of courts) Party members, but every court has an adjudication committee that often decides the case (before it is tried) and will instruct the court on how to decide a case.⁴⁶ The adjudication committee is also controlled by the Party.

The pervasive presence of the Party in all enforcement and review mechanisms of the AML means that the decisions of the on the ground AML enforcement authorities have already been vetted or approved by the Party. As the Party also controls the appellate review mechanism for these decisions (i.e. the AML enforcement entities and the courts), it is unlikely that the initial decision will be overturned by an appeal. Although Chinese law provides for the review of AML decisions, this avenue might prove to be illusory in practice.

IV. Conclusion

Although China's AML was hailed at its enactment as a new "economic constitution"⁴⁷ for China, the actual enforcement of the AML in its first seven years indicates that Industrial Policy goals play a significant role in China's enforcement of the AML. As the AML applies to many transactions and activities by MNCs both in China and on a world-wide level, MNCs now find themselves at significant risks that China will use its AML not as a means to create fair, open, and market-based competition but to further Industrial Policy goals that strengthen Chinese companies, particular SOEs, at the expense of MNCs as part of China's overall goal of enhancing its position as a global economic power.

44. CHOW, LEGAL SYSTEM OF CHINA, *supra* note 20, at 119-20, 133-35.

45. *See id.*

46. *See id.* at 213-14.

47. Eric C. Ip & Michael K.H. Law, *Decentralization, Agency Costs, and the New Economic Constitution of China*, 22 CONST. POL. ECON. 355, 356 (2011).

