China's Antimonopoly Law

BY LESTER ROSS

AUGUST 2008 WILL BRING THE world's greatest athletic competition to China for the first time in history. While all eyes at 8:08:08 p.m. China time on August 8 (an auspicious date and time in Chinese numerology) will be focused on the opening ceremony of the Olympics, another event with longer-term legal consequences will have taken place just a week earlier. That is the date on which China's long-awaited Antimonopoly Law (AML)[1] takes effect. It constitutes a notable step along the path of transition from an economy dominated by state ownership and central planning toward a competitive, market-based and price-driven economy. The AML has even been referred to as China's "economic constitution."[2] It also provides for two new government entities to administer the AML, furthering China's progression from a government dominated by industrial ministries toward a regulatory state.

History of the AML

The People's Republic of China with its Marxist-Leninist-Maoist heritage was generally hostile to the concept of a market economy for decades after its founding in 1949. There were repeated episodes of hostility toward the emergence of market forces, most notably during the Great Leap Forward (1958–1961)[3] and Great Proletarian Cultural Revolution (1966–1976).[4] The state retained control of the commanding heights of the economy even during periods of economic liberalization through the exercise of monopoly control by state-owned enterprises in the banking, insurance, foreign trade, and other sectors.[5]

The economic reform policies led by Deng Xiaoping beginning in 1978 after the Cultural Revolution accelerated in 1992 following his inspection tour to the south of the country to outmaneuver more conservative leaders.[6]

This in turn led to the enactment of statutes with provisions regulating competition, but none of them constituted a full-fledged competition law. The Law Against Unfair Competition (1993), administered by the State Administration for Industry & Commerce (SAIC),[7] is primarily a consumer protection statute but also prohibits abuses of authority by utilities to eliminate competition, certain tying conduct, administrative restrictions on competition from enterprises in other jurisdictions, setting prices below cost to exclude competition, and certain other anticompetitive conduct.

The Consumer Rights and Interests Protection Law (1993),[8] also administered by the SAIC, provides that consumers have the right to choose among venders with respect to purchases and the right to reject compulsory transactions.

The Price Law (1997),[9] administered by the National Development and Reform Commission (NDRC) and its predecessors, is intended to promote fair, open, and lawful market competition by standardizing and safeguarding normal price order and prohibiting price collusion, false or misleading pricing methods, price discrimination and other unlawful pricing conduct. It also reserves the government's right to control prices (by fixing prices or setting price guidelines) under specified circumstances: commodities with a material impact on economic development or people's livelihood, commodities in extremely short supply, commodities subject to a natural monopoly, and prices for major public utilities or welfare services.

The process of drafting the AML began in 1994.[10] During the long, drawn-out process of finalizing the AML, China in 2003,[11] and again in 2006,[12] promulgated merger control regulations, both of which applied only to acquisitions by foreign investors, not to acquisitions by domestic parties. Their promulgation was hastened by China's admission to the World Trade Organization, which required China to make significant market-opening commitments with respect to foreign trade and investment.[13]

The concentration control provisions in the 2006 Regulations applied both to direct foreign acquisitions of domestic enterprises and to foreign acquisitions of other foreign enterprises with an impact on China. Under Article 51, approval was required by the Ministry of Commerce (MOFCOM) and SAIC with respect to acquisitions of domestic enterprises under any of the following circumstances:

(i) a party's annual turnover in China exceeded RMB1.5 billion in the current year;
(ii) a party had acquired more than 10 domestic enterprises in the related industry in the last year;
(iii) a party had a 20 percent or larger market share in China; or
(iv) the transaction would result in a party having a 25 percent or larger market share in China.

MOFCOM and SAIC approval was also required with respect to offshore transactions under similar thresholds:

(i) a party's Chinese assets equaled or exceeded RMB3 billion;
(ii) a party's annual turnover in China exceeded RMB1.5 billion in the current year;
(iii) a party, together with its affiliates, had a 20 percent or larger market share in China;
(iv) the transaction would result in a party, together with

Lester Ross is Partner-in-Charge of Wilmer Cutler Pickering Hale and Dorr LLP's Beijing office.

its affiliates, having a 25 percent or larger market share in China; or

(v) the transaction would result in a party, directly or indirectly, having more than fifteen foreign-invested enterprises in China in the relevant industry.[14]

MOFCOM and SAIC also had the right to convene hearings and issue exemptions should a transaction:

(i) improve conditions for fair competition;
(ii) restructure a loss-suffering enterprise and guarantee employment;
(iii) import advanced technology or expertise to improve an enterprise's international competitiveness; or
(iv) be capable of improving the environment (Article 54).

In practice, only MOFCOM, and not SAIC, has exercised its power of approval under the 2003 Merger Regulations and the 2006 Regulations.

Concentration Control Under the AML

The AML applies to concentrations of enterprises that eliminate, have a restrictive effect, or may eliminate or have a restrictive effect, on competition (Article 3(3)). The AML applies to conduct in China and to conduct outside China that has a restrictive effect on competition in China (Article 2).

Concentrations are governed by Articles 20–31. Concentrations under the AML include mergers, acquisitions of equity interests or assets, and obtaining control or the ability to exercise decisive influence over another undertaking by contractual means (Article 20). The AML does not itself indicate how control or the exercise of decisive influence are to be determined, although presumably contractual control over a board of directors would qualify. The reach of the AML to all concentrations constitutes a major departure from the 2003 Regulations and 2006 Regulations, which applied only to acquisitions by foreign parties and thus had an explicitly protectionist cast.

All undertakings that reach the notification thresholds must file an advance clearance application with the antimonopoly enforcement authority, and no transaction can proceed without prior clearance (Articles 21 and 26). The notification thresholds are to be set by the State Council (Article 21), so the nature of the thresholds is as yet unclear. Some earlier drafts indicated, however, that the number of thresholds would be reduced compared to the 2003 Regulations and 2006 Regulations, the turnover threshold would be higher, and there would be no threshold based on the number of subsidiaries or transactions in the industry.[15] Moreover, affiliated transactions in which a party holds 50 percent or more of the voting rights or equity interests of the other party are expressly exempt (Article 22).

The notification is to consist of an application for clearance, an explanation of the concentration's impact on competition in the relevant market, the concentration agreement itself (if practice under the 2006 Regulations continues, only the most substantive portions of offshore agreements will need to be translated into Chinese), certified financial and accounting statements for the last year, and such other documents and materials as may be required by the antimonopoly enforcement authority (Article 23). The review period is thirty calendar days, substantially shorter and in closer conformity to international practice than the thirty business days under the 2006 Regulations (Article 25). The enforcement authority has the power to require the submission of supplemental documents and materials (Article 24); conduct a second review which, as in the 2006 Regulations may last up to ninety days, subject to extension for up to an additional sixty days if agreed to by the undertakings or if additional verification is required because of deficiencies in the submission or if material changes have occurred with respect to the transaction subsequent to the notification (Article 26); and impose conditions on a clearance to reduce the adverse effects of the concentration (Article 29).

The antimonopoly enforcement authority's review of a concentration is to be based on the following factors:

(i) the market shares of the undertakings and their capability to control the market;
(ii) the degree of concentration in the relevant market;
(iii) the effect of the proposed concentration on market access and technological progress;
(iv) the effect of the proposed concentration on consumers and other undertakings;
(v) the effect of the proposed concentration on national economic development; and
(vi) such other factors as the authority deems necessary for evaluating their effects on market competition (Article 27).

Although the enumerated factors relate primarily to the concentration and/or its effect on consumers, the concern with the effect on other undertakings and national economic development indicates that the review process will include protection of existing competitors and the effect on the national economy in addition to the effect on competition as such. The concentration may be cleared if its positive effects on competition outweigh its negative effects or if it can be cleared subject to conditions (Article 30). In a significant step toward transparency, all decisions to prohibit concentrations or to attach restrictive conditions to clearances must be published (Article 30). As there is no comparable obligation to publish announcements of notifications, the practice of not publishing unconditional clearances under the 2006 Regulations may continue.

National Security-Related Transactions Under the AML

Article 31 of the AML provides that a national security review shall be undertaken with respect to mergers and acquisitions of domestic enterprises or participation by other means in concentrations by undertakings with foreign capital which impact national security. The national security review is to be conducted alongside the concentration review.

This is not the first time that a national security-related review has been authorized with respect to mergers and acquisitions. Article 12 of the 2006 Regulations provides for a national economic security review whenever a foreign investor acquires a domestic enterprise and obtains actual control thereof under any of the following circumstances:

(i) the domestic enterprise is related to a key industry;
(ii) the domestic enterprise has an actual or potential impact on national economic security; or
(iii) the acquisition results in transfer of actual control of a domestic enterprise possessing a famous trademark or historic Chinese brand.

The 2006 Regulations thus extend well beyond national security in its narrow national defense sense to economic security, i.e., the control of enterprises in sensitive sectors of the economy, and cultural traditions, i.e., the ownership of famous trademarks and historic brands. The broad reach of Article 12 allowed domestic competitors to challenge concentrations by foreign undertakings even in an industry as remotely related to national security as cookware. Although the acquisition by a French company of a controlling interest in a Chinese cookware company was eventually cleared,[16] acquisitions by foreign private equity firms in particular of controlling interests in Chinese companies in industries like construction equipment, which also appear to have little relationship to national defense or cultural traditions, have been subject to indefinite delays and restrictions on ownership based in part on competition concerns.[17]

Article 31 of the AML on its face constitutes a retreat from the broad reach of the 2006 Regulations by narrowing the scope of review to national security rather than national economic security and issues of cultural identity. In this sense Article 31 corresponds more closely to the regulations governing an Exon-Florio or CFIUS-type national security review of acquisitions by foreign parties in the United States,[18] and indeed both Article 12 of the 2006 Regulations and Article 31 of the AML were formulated after CNOOC's proposed acquisition of Unocal in 2005 in the United States failed in the face of heavy opposition on national security and other grounds.[19] It remains to be seen how the national security review under Article 31 will be separated from the concentration review which is the larger focus of the AML.

Concerted Action Under the AML

Articles 13–16 of the AML govern concerted action. Concerted action agreements are referred to as "monopoly agreements." The AML adopts a per se rule prohibiting certain kinds of monopoly agreements, but partially tempers the effect of that rule by allowing agreements under certain circumstances.

Article 13 prohibits the following monopoly agreements among competitors:

(i) fixing or changing commodity prices;[20]
(ii) restricting the quantity of commodities produced or sold;
(iii) dividing sales markets or raw materials procurement markets;
(iv) restricting the purchase of new technologies or new facilities, or the development of new technologies or new products;
(v) joint boycotts of transactions; and
(vi) such other monopoly agreements as may be determined by the antimonopoly enforcement authority.

Article 16 prohibits industry associations from organizing undertakings to engage in monopoly conduct. Thus, undertakings may not engage in concerted action even under the auspices of an industry association. Moreover, industry associations are separately directed under Article 11 to discipline their members to engage in competition lawfully and to maintain market competition order.

Leaving aside the open-ended nature of subcategory (vi) which is a staple discretionary clause in Chinese administrative law, the prohibited agreements arguably would be candidates for the per se rule in any jurisdiction.

Following enactment of the AML, the NDRC showed new boldness in 2007 by criticizing and effectively forcing the rollback of agreements to fix the price of instant noodles.[21] This action was especially significant because the agreement was orchestrated by one of China's industry associations, which function to some extent as appendages of MOFCOM or other government departments. It should be noted that in this industry the largest competitors are foreign-invested enterprises rather than purely domestic enterprises.

Article 14 separately prohibits agreements between parties to a transaction that would:

(i) fix the prices of commodities for resale to third parties;
(ii) fix minimum prices of commodities for resale to third parties;[22] and
(iii) such other monopoly agreements as may be determined by the antimonopoly enforcement authority.

Article 14 would thus prohibit producers or upstream distributors from setting prices or setting minimum resale prices for downstream distributors and retailers. This is a conventional view of competition law that was only recently overturned in the United States by a Supreme Court ruling that reversed a nearly century-old precedent.[23] It would arguably be unrealistic to expect Chinese legislators to be conversant with so modern an understanding of competition law as to legitimize vertical price maintenance on consumer welfare grounds. Article 14's hostility to vertical agreements appears to be limited, however. In particular, it does not prohibit a licensor from restricting a licensee's use of technology, nor does it prohibit a producer from allocating distribution territories.

Article 15 tempers Articles 13 and 14 by exempting any agreement upon a showing that it has been concluded for any of the following purposes:

(i) upgrading technology or research and development of new products;

(ii) improving product quality, reducing costs and enhancing efficiency, unifying product specifications or standards, or engaging in professional division of work;
(iii) improving the operating efficiency of small and medium-sized enterprises and enhancing their competitiveness;
(iv) realizing such social and public interests as energy conservation, environmental protection, and disaster relief and assistance;
(v) coping with an economic depression by moderating decreases in sales volumes or obvious production surpluses;
(vi) protecting proper foreign trade and foreign-related economic cooperation interests; and
(vii) such other circumstances as may be provided by law or the State Council.

These exemptions are similar to the public interest and economic necessity waivers available under Article 54 of the 2006 Regulations. With respect to circumstances (i)–(v), the undertakings also have to show that the agreement does not have a materially restrictive impact on market competition and that consumers can share in the resulting benefits. Foreign trade and foreign economic cooperation-related agreements are not subject to these additional requirements. This indicates that agreements between foreign investors and their Chinese subsidiaries are exempt from the AML's provisions relating to concerted action even though they may restrict the capability of the subsidiary to compete with the foreign parent.

Unilateral Conduct Under the AML

Arguably the most troubling provisions of the AML for foreign investors are those concerning abuse of market dominance. A dominant market position is defined as any undertaking which has a position capable of controlling the price or quantity of commodities or other trading conditions or preventing and/or restricting access to the relevant market by other undertakings (Article 17 par. 2). Market dominance is determined based on the following factors:

(i) market share and competitive conditions in the relevant market;
(ii) ability to control the sales market or raw materials procurement market;
(iii) financial and technological conditions of the undertaking;
(iv) dependence of other undertakings on the relevant undertaking with respect to transactions;
(v) ease of market entry by other undertakings; and
(vi) other factors that may be relevant (Article 18).

A dominant market position is presumed under any of the following circumstances:

(i) one undertaking has a 50 percent market share;
(ii) two undertakings have a 66.7 percent market share; or
(iii) three undertakings have a 75 percent market share;

provided that smaller undertakings under items (ii) and (iii) will not be deemed to be in a market dominant position if their market shares are less than 10 percent (Article 19).

Although Article 19 allows the presumption of market dominance to be rebutted, the core presumption based on market share alone assumes that a concentrated market share is inconsistent with consumer welfare regardless of technology, economies of sale, or other lawful causes, and assumes that competitors in a concentrated market collude, rather than compete, with one another.

While the presumption of market dominance may be rebutted, a finding of market dominance (or more likely, the risk of challenge from smaller competitors, consumers, or the antimonopoly enforcement authority itself) will prohibit the following:

(i) selling or buying commodities at unfairly high or low prices;
(ii) selling commodities at prices below cost without a valid rationale;
(iii) refusing to trade with another undertaking without a valid rationale;
(iv) restricting another party's freedom to trade or requiring it to trade only with designated parties without a valid rationale;
(v) tying sales or imposing other unreasonable conditions on transactions without a valid rationale;
(vi) discriminating among trading partners with respect to prices or other terms without a valid rationale; and
(vii) such other abuses of a market dominant portion as determined by the antimonopoly enforcement authority (Article 17).

The restriction on pricing (item (i)) is consistent with the Law Against Unfair Competition and the Price Law, but reflects an outdated view of monopoly pricing power from the perspective of competition law. It is nevertheless the only conduct that is per se illegal without apparently allowing the presentation of an exculpatory rationale. It appears to be inconsistent with item (ii), which allows for rebuttal when commodities are sold below cost. It also prohibits sales at unfairly high prices even though such pricing would invite market entry by other undertakings.

The other prohibitions under Article 17 are subject to a rule of reason test but still reflect a hostility toward vertical agreements (item (iv)) or restrict the right of an undertaking to decide with whom it will do business (items (iii) and (v)–(vi)).

Meanwhile, Article 55, which governs intellectual property, provides that the AML is not applicable to the exercise of intellectual property rights in accordance with applicable intellectual property rights laws and administrative regulations, but only to conduct which abuses such rights to eliminate or restrict competition. Despite the efforts of legislators to insulate intellectual property rights from the reach of the

AML, a tension inevitably arises as the core of a patent is the right to exclude, and the value of a trademark lies in its ability to brand a product that may otherwise be largely indistinguishable from the products of competitors. It remains unclear under what circumstances the exercise of intellectual property rights may be deemed to constitute an abuse of such rights when such rights include the right to deny licenses or otherwise to exclude competitors for the term of a patent or to restrict competition by branding. Article 55 is therefore of major concern to foreign companies with advanced technology and globally recognized brands.

Administrative Monopolies Under the AML

Perhaps the most controversial provisions of the AML concern administrative monopolies. Under China's decades-long system in which state ownership dominated the economy, administrative monopoly was the natural order. For many years China had a single airline, a single bank, and a single insurance company, and still has a single railway company.

Even as the benefits of competition began to be recognized, competition was often limited by dividing state-owned enterprises into smaller geographically based enterprises with limited prospects for competition, e.g., in the civil aviation and petroleum industries.

The regulation of administrative monopolies was included, amended, and omitted in successive drafts of the AML before being ultimately included in the final version,[24] albeit in somewhat weakened form. Articles 32–37 govern administrative monopolies but the underlying tension in the AML with respect to this issue is embodied in the AML's General Principles. Article 7 of the AML provides that the national government may protect the lawful operating activities of undertakings in industries in which state-owned enterprises occupy a controlling position and serve important roles with respect to the national economy and state security. Such undertakings are obligated to conduct their lawful operations in good faith and perform strict self-discipline, accept public supervision, and not take advantage of their controlling positions or exclusive operating or sales positions to harm the interests of consumers. Article 7 thus allows the national government, but not subnational governments, to create or maintain monopolies by state-owned enterprises, which are then subject to self-regulation or regulation by their superior government department rather than by the antimonopoly enforcement authority.

Article 8 separately bars administrative authorities and organizations authorized to administer public affairs from abusing their administrative powers to exclude or restrict competition. Thus, government departments may not exceed their authority if the effect is to eliminate or restrict competition, but the national government or its departments may act to protect the position of state-owned enterprises even if the effect is to eliminate or restrict competition if the underlying state-owned enterprises serve important roles in the national economy and state security. Precisely which industries qualify for such status will presumably be determined by law or regulation, but at the outset the parameters are unclear.

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Articles 32–37 add some detail to Article 8's prohibition on abuse of administrative power by specifying that such abuse consists of requiring dealings with, purchases of commodities from, and use of commodities supplied by an undertaking (Article 32). Administrative abuse also consists of various forms of discrimination against commodities from other regions (Article 33), restrictions against participation in local tenders by undertakings from other regions (Article 34), prohibitions or restrictions on investments by undertakings from other regions (Article 35), compelling undertakings to engage in monopoly conduct prohibited by the AML (Article 36), and formulating regulations which eliminate or restrict competition (Article 37).

The administrative monopoly provisions of the AML are primarily intended to address restraints on commerce by local governments and officials to protect local champions and the tax revenues and other benefits which they generate. Eradication of local trade barriers may benefit foreign-invested as well as purely domestic competitors. Nevertheless, the scope of industries in which state-owned enterprises would be allowed to hold controlling positions and the extent to which they may engage in otherwise restricted sales, purchases, or other conduct remains unclear. This may explain the flurry of activity prior to the effective date of the AML in industries like civil aviation and telecommunications, where some state-owned enterprises, with the support of their industry regulators, are maneuvering to acquire controlling interests in competitors and thereby reduce the limited competition that does exist.

Enforcement Under the AML

One of the AML's most divisive, and as yet still unresolved, issues concerns the identity and powers of the enforcement authority. Three government departments hold authority under existing law: MOFCOM with respect to merger control and foreign trade and investment, SAIC with respect to market manipulation and consumer protection, and NDRC with respect to pricing and approval of major projects. At different stages in the drafting process it appeared that enforcement authority would be granted to MOFCOM or shared between MOFCOM and SAIC, while NDRC's role remained unresolved.

The AML passed the question of the identity of the enforcement authority to the State Council. Article 10 pro-

vides that an antimonopoly enforcement authority under the State Council will be responsible for the enforcement of antimonopoly regulations in accordance with the AML. It does not specify whether the enforcement authority will be an entirely new body, presumably created in part by the transfer of relevant sections from MOFCOM and other departments, or, less likely, will be housed in MOFCOM itself. Regardless, it is unclear whether and to what extent its functions will overlap with those of the existing regulatory bodies, e.g., with respect to pricing which is a particularly sensitive policy area at present because of recent spikes in inflation.

Article 9 also authorizes the State Council to establish an antimonopoly commission to be responsible for organization, coordination, and guidance, including:

(i) research and proposal of applicable competition policies;
(ii) organization of investigations and appraisal of overall market conditions and issuance of reports appraising such conditions;
(iii) formulation and publication of antimonopoly guidelines;
(iv) coordination of enforcement of antimonopoly regulations; and
(v) such other duties as may be provided by the State Council

Although the antimonopoly commission has the authority to set policy guidelines, organize investigations, and coordinate enforcement, it appears intended to function more as a coordinating body, likely with representatives from different government departments, rather than as an operating or enforcement body. If so, it is likely to be eclipsed in importance by the antimonopoly enforcement authority.

Chapter 6 of the AML, comprising Articles 38–45, makes no reference to the role of the commission with respect to enforcement. It is only the antimonopoly enforcement authority, not the antimonopoly commission, that is assigned responsibility for enforcement with investigative authority.

The AML strengthens the basis for enforcement to a substantially greater extent than existing law or the 2003 Regulations or 2006 Regulations. Whereas neither the 2003 Regulations nor the 2006 Regulations provided sanctions for failure to file a notification, the antimonopoly enforcement authority has the authority under the AML to order the undertakings to cease and desist from implementing the concentration, order a concentration to be unwound, take other necessary actions to restore the situation to its original state, and impose fines of up to 500,000 yuan (Article 48). The authority may also order a halt to concerted action through entry into and implementation of a monopoly agreement, confiscate the illegal proceeds, and impose a fine of 1–10 percent of turnover in the previous year, or, if the agreement has yet to be implemented, of up to 500,000 yuan (Article 46 par. 1). An industry association which orchestrates such an agreement may separately be fined up to 500,000 yuan and, in serious circumstances, have its registration revoked (Article 46 par. 3). Abuse of a dominant market position is punishable by an order to cease the activity, confiscation of the illegal proceeds, and a fine of 1–10 percent of turnover in the previous year (Article 47). The amount of any fine will vary with the nature, degree, and duration of the violation (Article 49), and a leniency provision allows reduced punishment or waivers for voluntary reporting of such an agreement (Article 46 par. 2). Criminal as well as administrative prosecutions are available under Article 52 for a failure to cooperate with the antimonopoly enforcement authority. Administrative appeals and lawsuits are available under Article 53 if a decision by the antimonopoly enforcement authority, including a decision with respect to a concentration, is not accepted.

Potentially the strongest ground for enforcement under the AML is civil liability for undertakings that engage in monopoly conduct and cause losses to others (Article 50). The AML is unclear whether an administrative or judicial finding of monopoly conduct is a precondition to civil litigation, but the Supreme People's Court may so hold as it has done with respect to civil litigation concerning securities law violations. If so, the impact of Article 50 will be dependent among other factors on the investigative zeal and capability of the antimonopoly enforcement authority.

The burdens on officials of the antimonopoly enforcement authority in particular, but also on the antimonopoly commission and potentially on the judiciary, will be very substantial. They will have to provide detailed rules on all of the issues that the AML has either left to them to decide or on which the AML is too vague to implement in the absence of substantially greater detail. This will be a particular challenge with respect to such issues as the determination of the contours of product and geographic markets rather than national markets and the analysis of dominance. The challenges will be magnified by the shortage of economists as well as lawyers and judges trained in competition law. If, as some Chinese commentators have analogized, the AML is China's "economic constitution" and this constitution, unlike China's actual constitution, is to be a live and justiciable document, officials must be prepared to enforce the "constitution" in a manner which protects the rights and interests of all parties and not allow abuse or maladministration by the state.

Conclusion

The AML and the attendant formation of the antimonopoly enforcement authority and antimonopoly commission constitute China's long-awaited full-fledged entry into the world of competition laws and competition authorities. They also constitute another major step away from central planning and state ownership of the economy toward a market-based competitive economy. Some elements of the latter will remain in the form of state-owned enterprises with controlling positions in industries with important links to the national economy and state security. On the whole, however, concentrations and concerted action will be more

vulnerable to regulation than has heretofore been the case. Unilateral market dominance, vertical arrangements, and the exercise of intellectual property rights will also be subject to regulation under particular circumstances despite the more questionable theoretical basis for dong so.

A great deal will depend on the size and capability of the antimonopoly enforcement authority. Development of such authority presents major challenges as the existing regulators are below strength. Personnel with training in economics are in particularly short supply. Yet the complexity of the tasks to confront the authority will require that it establish its credibility on a transparent basis in short order. The precise nature of its composition, its rules of operation, and other features, as well as its relationship to the antimonopoly commission, await the promulgation of implementing regulations. By the same token, the role of the judiciary with respect to appeals of administrative decisions and civil litigation under the AML awaits regulations from the Supreme People's Court. ■

[1] Antimonopoly Law of the People's Republic of China, (promulgated by the Standing Committee of the National People's Congress on Aug. 30, 2007 and effective on Aug. 1, 2008) [hereinafter AML], *available at* http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=371229&pdmc=11006.

[2] *See, e.g.*, Huang Yong, *Understanding China's Antimonopoly Law*, CAIJING, Sept. 3, 2007, at 140.

[3] DALI YANG, CALAMITY AND REFORM IN CHINA: STATE, RURAL SOCIETY AND INSTITUTIONAL CHANGE SINCE THE GREAT LEAP FAMINE (1996); RODERICK MACFARQUHAR, THE ORIGINS OF THE CULTURAL REVOLUTION: VOLUME 2: THE GREAT LEAP FORWARD (1983).

[4] RODERICK MACFARQUHAR & MICHAEL SCHOENHALS, MAO'S LAST REVOLUTION (2006).

[5] NICHOLAS R. LARDY, CHINA'S UNFINISHED ECONOMIC REVOLUTION (1998).

[6] *Deng Xiaoping: Leading Thinker in China's Market Economy*, Aug. 12, 2004, http://english.peopledaily.com.cn/200408/12/print20040812_152737.html.

[7] Anti-Unfair Competition Law of the People's Republic of China (promulgated by the Standing Committee of the National People's Congress on Sept. 2, 1993 and effective Dec. 1, 1993), *available at* http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027909.html. (Translation available by subscription at http://www.chinalawinfo.com.)

[8] Consumer Rights and Interests Protection Law of the People's Republic of China, (promulgated by the Standing Committee of the National People's Congress on Oct. 31, 1993 and effective Jan. 1, 1994), *available at* http://www.gdgs.gov.cn/cyfg/XFZQYBHf.htm. (Translation available by subscription at http://www.chinalawinfo.com.)

[9] Price Law of the People's Republic of China (promulgated by the Standing Committee of the National People's Congress on Dec. 29, 1997 and effective May 1, 1998), *available at* http://www.gov.cn/ziliao/flfg/2005-09/12/content_31188.htm. (Translation available by subscription at http://www.chinalawinfo.com.)

[10] Duan Hongqing, *The Fog of Antimonopoly Legislation*, CAIJING, Oct. 4, 2004, at 110.

[11] *See* Provisional Regulations Regarding Mergers And Acquisitions of Domestic Enterprises by Foreign Investors (promulgated by former Ministry of Foreign Trade and Economic Cooperation, State Administration of Taxation, SAIC, and State Administration of Foreign Exchange on Mar. 13, 2003 and effective Apr. 12, 2003), *available at* http://tfs.mofcom.gov.cn/aarticle/date/i/s/200509/20050900366385.html. (Translation available by subscription at http://www.chinalawinfo.com.)

[12] See Regulations on Mergers and Acquisitions by Foreign Investors (promulgated jointly by the Ministry of Commerce, State-Owned Assets Supervision and Administration Commission of the State Council, State Administration of Taxation, SAIC, China Securities Regulatory Commission and State Administration of Foreign Exchange on Aug. 8, 2006 and effective Sept. 8, 2006), *available at* http://finance.people.com.cn/GB.1037.4685010.html [2006 Regulations].

[13] *Protocol on the Accession of the People's Republic of China*, Nov. 10, 2007, *in* COMPILATION OF THE LEGAL INSTRUMENTS ON CHINA'S ACCESSION TO THE WORLD TRADE ORGANIZATION (2001); SAIC Fair Trade Bureau, *The Manifestations of Conduct Restricting Competition by Multinational Companies in China and Countermeasures*, Industry and Commerce Administration, Mar. 1, 2004, No. 5, excerpts *available at* http://news.xinhuanet.com/fortune/2004-05/28/content_1495390.htm (a report at least partially funded by domestic competitors urging a crackdown on multinationals using their intellectual property and other advantages to exercise monopoly control in China).

[14] A foreign-invested enterprise is a company established in China with at least 25 percent foreign ownership.

[15] Antimonopoly Law of the People's Republic of China: Sept. 14, 2005 draft, art. 19 (on file with author).

[16] Groupe SEB's acquisition of 52.74 percent of Zhejiang Supor Cookware Co. Ltd. was announced on December 21, 2007, concluding a process that had taken more than a year to win approval, in part because of opposition orchestrated by domestic competitors. Xinhua, *France's SEB Becomes Controlling Shareholder of Chinese Cookware Maker Supor*, Dec. 22, 2007, http://english.peopledaily.com.cn/90001/90776/90884/6325309.html; Embassy of the People's Republic of China in the United States of America, *China Regulates Foreign Mergers for More Investment*, Sept. 11, 2006, http://www.china-embassy.org/eng/xw/t271391.htm.

[17] Carlyle Group's proposed acquisition of 85 percent of Xugong Construction Machinery Co. Ltd. remains stalled although the size of the acquisition has been trimmed back to 50 percent or less. Sundeep Tuckerin, *Carlyle Backs Down on Size of Xugong Stake*, FIN. TIMES, Mar. 19, 2007; *The Carlyle Group Agrees to Acquire an 85% Stake in Xugong Group Construction Machinery Co., Ltd. for US$375 million (RMB 3 billion)*, CARLYLE NEWS, Oct. 25, 2005, http://www.carlyle.com/news/News%20Achive/2005/item6742.html.

[18] CFIUS, the Committee on Foreign Investment in the United States, is chaired by the Secretary of the Treasury. It is governed by Section 721 of the Defense Production Act of 1950, Pub. L. No. 100-418 made permanent law by Section 8 of Pub. L. No. 102-99, 105 Stat. 487 (50 U.S.C. app. 2170), as amended by Section 837 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2463 and the Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 50 U.S.C. app. §§ 2061 et seq.; 31 C.F.R. pt 800.

[19] Matthew R. Byrne, *Note, Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L.J. 849 (2006); Michael Petrusic, *Recent Development Oil and the National Security: CNOOC's Failed Bid to Purchase UNOCAL*, 84 N. CAR. L. REV. 1373 (2006).

[20] The distinction between fixing and changing is formalistic, i.e., fixing a price means to set a price while changing a price means to adjust a price that has already been set.

[21] NDRC Communiqué regarding the Circumstances of the Investigation of the Instant Noodles Pricing Collusion, Aug. 16, 2007, http://www.ndrc.gov.cn/xwfb/t20070816_154142.htm (the China Branch of the World Instant Noodles Association (formerly known as the International Ramen Manufacturers Association) had violated Articles 7, 14, and 17 of the Pricing Law and Article 4 of the Provisional Regulations on the Prohibition of Monopoly Conduct in Pricing, NDRC, June 18, 2003, http://www.jincao.com/fa/09/law09.47.htm.

[22] Fixing prices and fixing minimum prices is a formalistic distinction between setting prices and setting floor prices.

[23] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (establishing rule of reason test for vertical agreements to set minimum resale prices and overturning *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

[24] *See* Huang Yong, *supra* note 2, at 140.