RECENT DEVELOPMENTS

China's New Anti-Monopoly Law: An Economic Constitution for the New Market Economy?

by Paul Jones

On August 30, 2007, after 13 years of discussion, the 29th Session of the 10th National People's Congress adopted the Anti-Monopoly Law[1] ("AML") to come into effect on August 1, 2008. Will this be the new "economic constitution" for China's market economy as hoped by the sponsors;[2] or a source of "uncertainty for domestic and foreign companies over how the government will use its new powers?"[3] Foreign companies are particularly concerned about provisions[4] allowing for a review of mergers and acquisitions on national security grounds.[5]

The answer at this time must be that, like the development of China's market economy, the AML is still a work in progress. While the basic framework of general principles has been set out in the AML, as would be appropriate for a fundamental piece of civil law legislation, the details that expand upon and clarify the principles will come in the regulations, measures and guidelines that hopefully will be issued in the months to come.

In addition the AML specifies that the State Council shall create two new entities to develop and enforce the law; namely the Anti-Monopoly Commission[6] (the "Commission") and the Anti-Monopoly Enforcement Agency (the "Agency").[7] Some observers question whether the Agency will be a truly independent body under the State

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[1] 中华人民共和国反垄断法 (Zhonghua Renmin Gongheguo Fan Longduan Fa), Presidential Decree No. 68, adopted at the 29th Session of the Standing Committee of the 10th National Peoples Congress and promulgated on August 30, 2007 to come into effect August 1, 2008.

[2] 郭晓宇, "经济宪法"剑指垄断行为, 法制日报, 2007-08-26 (Guo Xiaoyu, "Jingji Xianfa" Jian Zhi Longduan Xingwei, Fazhi Ribao – Guo Xiaoyu, "The Economic Constitution" A Sword Pointed at Monopoly Behavior, Legal Daily) available online at: http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=370729&pdmc=110106 .

[3] Andrew Batson and Jason Leow, Beijing's Antitrust Plan Raises Questions, Wall Street Journal Online, August 30, 2007.

[4] Article 31.

[5] Keith Bradsher, Beijing Seeks New Scrutiny of Investments by Outsiders, The New York Times, August 28, 2007.

[6] 反垄断委员会 (Fan Longduan Weiyuanhui); in Article 9. The Chinese word "委员会 – weiyuanhui" can also be translated as "committee."

[7] 反垄断执法机构 (Fan Longduan Zhifa Jigou); in Article 10. The Chinese word "机构 – Jigou" can also be translated as a state "authority."

Council or will be part of a particular Ministry.[8] This too will become clear over the coming year.

Still the AML will not be the only Chinese law dealing with competition issues. The 1993 Unfair Competition Law[9] has provisions on exclusive dealing by firms in a dominant market position, predatory pricing, tied selling and bid rigging[10] and the 1997 Price Law[11] has provisions on price-fixing and predatory pricing.[12] A previous draft of the AML had suggested that these laws would pre-empt the application of the AML, but this wording was removed. And there are other laws and regulations with competition provisions.

This article will review the basic components of the new law and discuss the possible indicators of how the law and the enforcement will develop and what the remedies under the new law may be.

Chapter I – General Provisions

Article 1 of the AML sets out the purposes of the law. They may be summarized as (1) stopping monopolistic conduct; (2) safeguarding fair competition; (3) improving economic efficiency; (4) protecting consumer and public interests; and (5) promoting the healthy development of the "socialist market economy." Aside from the choice of nomenclature in the last provision none of these would be out of place in a competition statute outside of China.

For example, Canada's Competition Act,[13] has a purpose clause that was inserted in 1986. The purposes in the Canadian Act may be summarized as (1) to maintain and encourage competition; (2) to promote the efficiency and adaptability of the economy; (3) to expand opportunities in world markets; (4) to ensure that small and medium-sized enterprises have equitable opportunities; and (5) to provide consumers with competitive prices and product choices.[14] Arguably the reference in the Canadian statute to opportunities for small and medium-sized enterprises is not quite in keeping with modern notions of competition law as having consumer welfare as its purpose.[15]

The AML also provides that businesses may grow through fair competition and voluntary mergers in accordance with the law to expand their scale and increase their

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[8] Batson and Leow, *supra* note 3.

[9] 中华人民共和国反不正当竞争法 (Zhonghua Remin Gongheguo Fan Bu Zhengdang Jingzheng Fa) adopted at the 3rd Session of the Standing Committee of the 8th National People's Congress on September 2, 1993, effective December 1, 1993.

[10] Articles 6, 11, 12, and 15, respectively.

[11] 中华人民共和国价格法 (Zhonghua Renmin Gongheguo Jiage Fa) adopted at the 29th Meeting of the Standing Committee of the 8th National People's Congress, effective as of May 1, 1998.

[12] Articles 14(1) and (2), respectively.

[13] R.S.C., c. C-34 as amended.

[14] Ibid., Section 1.1.

[15] See for example Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself (New York: The Free Press, 1978) Chapter 4.

competitiveness.[16] In other words, being a large and dominant business is not prohibited. But such positions shall not be used to eliminate or restrict competition.[17]

It also provides that so long as firms simply exercise their intellectual property rights in accordance with the laws and regulations, then the provisions of the AML are not applicable.[18]

Chapter II – Monopoly Agreements

This Chapter is organized into three basic sets of provisions. Article 13 lists six types of agreements that are prohibited between competitors. Article 14 lists three types of agreements that are prohibited in vertical relationships. Finally Article 15 lists seven purposes for which the agreements prohibited by Articles 13 and 14 would be exempt form the restrictions.

The majority of the prohibitions listed in Article 13 are what one would expect to see; fixing prices, restricting output or sales, dividing up the markets, and boycotts. In addition there is a prohibition on the "restriction of the purchase of new technology or new equipment, or restrictions on the development of new technology or new products."[19] Concerns about the relationship between intellectual property rights and competition policy have increased significantly over the last decade or so.[20] In Canada the Competition Act has provisions regarding the abuse of intellectual property rights in a separate and very rarely used section.[21] China has now integrated these concerns into the basic structure of the AML.

The final prohibition in Article 13 has probably raised some concerns amongst foreign lawyers, and particularly amongst common law lawyers who expect statutes to precisely set out the boundaries of the prohibitions. It reads "[o]ther monopoly agreements as otherwise determined by the Anti-Monopoly Enforcement Agency under the State Council."[22]

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[16] Article 5.
[17] Article 6.
[18] Article 55.
[19] Article 13(4).
[20] For example, see the Reports, "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy" (October 2003), http://www.ftc.gov/opp/intellect/index.shtm ; and "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition: A Report Issued By the U.S. Department of Justice and the Federal Trade Commission" (April 2007), http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf .
[21] *Supra* note 13, Section 32.
[22] Article 13(6). The Anti-Monopoly Enforcement Agency under the State Council is established in Article 10. See note 7, *supra*.

However China is a civil law jurisdiction, modeled on Germany's legal system,[23] and in civil law statutes are general statements of legal principles rather than precise and narrowly read restrictions on freedoms. In such statutes the prohibitions need not be as precisely stated as in common law statutes and it is acceptable to allow the lawmakers (through regulation or judicial decision) to elaborate on the general principles. In other regulations China has used the character "等" which can be translated as "so on and so forth, etcetera (etc.)" to indicate that the requirements listed are not exhaustive.[24] This has not found much favor with foreign commentators from common law jurisdictions and phrases similar to those used in Article 13(6) have replaced the use of "等."[25]

The exemptions listed in Article 15 are also illustrative of the general principles prohibiting restrictions of competition. Two of the seven exceptions are based on the achievement of efficiencies in the economy or the sector.[26] One is where the agreement is for the purpose of "technology improvement or the research and development of new products,[27] and three more are based on broader public interests such as disaster relief, environmental protection and mitigating economic depression; and in implementing foreign trade agreements.[28] Arguably the objective of the exemptions continues to be overall consumer welfare, albeit in the later case with the government stepping in and setting priorities in areas where market failure is likely.

The last exemption in Article 15 is a new provision added in the last hearings in the State Council on August 24-30, 2007 that allows the State Council to prescribe other exemptions. Again it is suggested that this is a product of China's civil law drafting.

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[23] In 1902, following the coming into force of Germany's Bügerliches Gesetzbuch (BGB or Civil Code) in 1900, officials of the Qing Dynasty started work on a new civil code patterned after the German model. A draft was presented to the Emperor on October 26, 1911 just before the end of the dynasty, but it was never adopted. It was not until 1929-30 that a similar form of civil code was promulgated under the 国民党 (Guomindang) administration in Nanjing. See Philip C.C. Huang, *Code, Custom and Legal Practice in China: The Qing and the Republic Compared* (Stanford: Stanford University Press, 2001) at 16.

[24] See for example, the 商业特许经营管理办法 (Shangye Texujingying Guanli Ban Fa - Measures for the Regulation of Commercial Franchising), Ministry of Commerce Order No. 25 of 2004, in effect February 1, 2005, Article 19 in general and 19(9) in particular.

[25] See the author's discussion of the reaction to the Measures for the Regulation of Commercial Franchising in The Regulation of Franchising in China and the Development of a Civil Law Legal System – 中国特许经营法规及其民法体系的发展, 2(1) Chinese Law & Policy Review, 60-80, July 2007, University of Pennsylvania, http://www.law.upenn.edu/groups/clsa/clr/articles/volume2.html ; and Article 22 of the new "商业特许经营管理条例- Shangye Texujingying Guanli Tiaoli - Commercial Franchise Administration Regulation" Decree No. 485, adopted on January 31, 2007 at 167th Regular Meeting of the State Council, in effect from May 1, 2007.

[26] Articles 15(2) and (3).

[27] Article 15(1).

[28] Articles 15(4), (5), and (6).

Chapter III – Abuse of Dominant Market Position

This Chapter of the AML consists of just three Articles. One article sets out the prohibitions on unilateral conduct; the second sets out the basis for finding that a firm is in a dominant market position; and the third sets out when market dominance may be presumed, subject to the submission of evidence to the contrary.

Most of the prohibitions contained in Article 17 are common in any law on competition; predation, refusal to deal, exclusive dealing, tied sales and price discrimination.[29] Each of these is qualified by a requirement that the conduct must be "without justification." There is another prohibition that is not qualified in that manner and is the subject of some controversy in Western competition statutes.[30] Dominant firms are prohibited from selling at "unfairly high prices" or buying at "unfairly low prices."[31] The concept of what is "unfair" suggests a circular definition.

It should also be noted that again the last of the sub-articles in Article 17 allows the Anti-Monopoly Agency to define other prohibitions. And Article 18, which sets out the factors to consider in determining whether a firm has a dominant market position, includes a provision permitting the consideration of "other factors relating to the dominant market position of the firm."[32]

Chapter IV - Concentrations of Firms

One of the major policy concerns for the AML, as expressed in the press, in the hearings of the Standing Committee and in the full session of the National People's Congress,[33] was that foreign firms were using their superior access to capital to acquire dominant positions in certain industries. While security concerns were frequently cited, they were not always clearly articulated. It was sometimes suggested that Chinese industries still needed protection in order to grow.[34] Such sentiments are not new in China, and China had previously issued two sets of regulations on acquisitions and mergers by foreign firms.[35]

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[29] Articles 17(2), (3), (4), (5), and (6) respectively.
[30] David S. Evans and A. Jorge Padilla, "Excessive Prices: Using Economics to Define Administrable Legal Rules" (September 2004). CEPR Discussion Paper No. 4626. Available at SSRN: http://ssrn.com/abstract=620402
[31] Article 17(1).
[32] Article 18(6).
[33] See for example: Yang Fan, Are M&As Suffocating Chinese Businesses?, Beijing Review, June 4, 2007 http://www.bjreview.com.cn/expert/txt/2007-06/04/content_65184.htm ; Chinese lawmakers call for cautious handling of foreign mergers, People's Daily Online, March 4, 2007; Improved laws sought on M&A by foreign firms, Shanghai Daily, March 5, 2007; Wang Jun, A Law to Curb Monopoly-Finally, Beijing Review, July 13, 2006.
[34] People's Daily Online, *Id.*
[35] "Regulations on Acquisitions of Domestic Enterprises by Foreign Investors," issued jointly by the Ministry of Commerce, the State Assets Supervision and Administration Commission, the State Taxation Administration, the Sate Administration for Industry and Commerce, the China Securities Regulatory Commission and the State Administration of Foreign Exchange on August 6, 2006, effective September 8,

The provisions of this Chapter of the AML, however, apply to both foreign and domestic firms, except for Article 31. Article 31 provides that mergers, acquisitions and other forms of concentration involving foreign investors that raise security concerns shall also be examined "in accordance with the relevant provisions of the State for national security review."

While some see the addition of a national security review as an indication of an "industrial strategy" component to what should be a law regulating competition, China has found itself subject to such concerns in Western nations. The Chinese state-owned firm CNOOC faced strong opposition from U.S. lawmakers when it made a bid for Unocal, and ultimately withdrew the bid.[36] Canada is currently considering formally adopting such national security review measures and there is concern in other countries as well.[37]

Foreign firms may take some comfort in the release of the 2007 China Foreign Investment Report by the Ministry of Commerce. The English language news reports state that China "does not face an imminent risk of monopoly by foreign companies in any industry."[38]

This Chapter provides for notification[39] of mergers, acquisitions of shares or assets, or acquisitions of control[40] to the Anti-Monopoly Enforcement Agency and a decision by the Agency as to whether or not the proposed transaction "has or may have the effect of eliminating or restricting competition"[41] based on a review that must include consideration of the factors set out in Article 27.

The thresholds for notification are not set in the AML but are left to the State Council to set by regulation. While this has caused some concern, arguably it is better to have monetary limits set in regulations that can be more easily adjusted to take into account changes in China's fast moving economy. Article 23 set out the primary items to be submitted in the notification with further items to be stipulated by the Agency. There is a requirement for an initial response from the Agency within 30 days, failing which the transactions may proceed.[42] If the Agency decides to undertake a further review it is to be

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2006; which superseded the "Temporary Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors issued on March 7, 2003.

[36] David Teather, Washington opposition forces Chinese to withdraw oil offer, Guardian, August 3, 2005. Later a Dubai based corporation was forced to sell off its U.S. operations when it acquired London based Peninsular and Oriental Steam Navigation Co. See Jonathan Weisman and Bradley Graham, Dubai Firm to Sell U.S. Port Operations, Washington Post, March 11, 2006.

[37] Steven Chase, Takeovers will face national security test, Globe and Mail, June 26, 2007.

[38] Jiang Wei, No threat of foreign monopoly in any industry – Report, China Daily, September 10, 2007, available online at: http://www.chinadaily.com.cn/china/2007-09/10/content_6092203.htm . Interestingly the Chinese language news articles on the release of the Report are silent on this aspect.

[39] Article 21.

[40] As defined in Article 20.

[41] Article 28.

[42] Article 25.

completed within 90 days from the date that the Agency decides on such further review,[43] essentially from the end of the initial 30 review day period.

The factors that must be considered in reviewing a proposed merger include items such as market shares of the participants, degree of concentration in the relevant market and the effect on consumers.[44] Once again the Agency is given the authority to take other factors into consideration.[45] Concerns about the relationship between intellectual property and competition have been built into the basic review through the requirement to consider "the effect of the proposed concentration on market access and technological progress."[46] The Agency is also required to consider the effect on the "development of the national economy." This might be generally described as a public interest consideration beyond the usual scope of competition law. This is also an example of what some have described as the "industrial policy" taint to the AML.

It is important to note that if the proponents of the transaction can prove that the positive effects on competition significantly exceed the negative effects, or that the transactions are in the public interest, the Agency may[47] decide not to prohibit the transaction.

Chapter V – Abuse of Administrative Powers to Eliminate or Restrict Competition

In the United States and Canada the state action doctrine[48] and its Canadian equivalent,[49] while of interest to the regulating agencies,[50] have not caught the interest of the general public as evidenced in press stories.

In China there is comparatively widespread interest in the role of state-owned enterprises and government regulators in the economy.[51] One of the concerns is that the employees in state controlled industries such as oil, electricity telecommunications and tobacco are taking advantage of their position to enrich themselves using public assets. Such concerns

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[43] Article 26.
[44] Articles 27(1), (2), and (4).
[45] Article 27(6).
[46] Article 27(3).
[47] The Chinese word is "可以" (keyi) which is usually translated as "may." However the concepts of "may" and "shall" in English do not precisely overlap with similar concepts in Chinese, with the Chinese having a slightly more imperative quality to them. The imperative quality may be added to somewhat when the word is used in a law or regulation. But when it refers to the authority of the government, as here, it is best translated as "may."
[48] As established in *Parker v. Brown*, 317 U.S. 341 (1943).
[49] The "regulated conduct defense" as first articulated in *R. v. Chung Chuck* [1929] 1D.L.R. 756. See also Canadian Competition Bureau, Technical Bulletin on "Regulated" Conduct, June 2006.
[50] FTC Office of Policy Planning, Report of the State Action Task Force, September 2003; available on line at: http://www.ftc.gov/os/2003/09/stateactionreport.pdf .
[51] See , for example: Shangguan Zhoudong, China considers pay caps in monopoly industries, China Daily, July 18, 2007 available at: http://www.chinadaily.com.cn/bizchina/2007-07/18/content_6000875.htm ; Liang Qiwen, Monopolies wages in the cross hairs, China Daily, June 6, 2007, available at: http://www.chinadaily.com.cn/china/2007-06/06/content_887864.htm ; Fu Chenghao, State firms hold monopoly on income, ShanghaiDaily.com, August 2, 2006.

are significant features of transitional economies such as Russia and China where state-owned assets must be re-distributed to develop a private sector market economy.

A review of the press stories on the AML prior to adoption suggests that concerns about administrative monopolies exceeded concerns regarding foreign domination of key Chinese industries. The history and size of China's state-owned sector is obviously an important factor in such attitudes. Thus the inclusion of a separate chapter on administrative monopolies in China's AML is not so surprising, giving this aspect of competition law more prominence than it has held in Western statutes.

But the ministries in charge of the relevant industrial sectors opposed the inclusion of this chapter. At one point it was dropped altogether,[52] and in the next draft the article on the application of the law stated that it did not apply where other laws and regulations provided corresponding provisions. Thus regulated industries were not subject to the law.[53]

Interestingly the Articles that were finally adopted are not arranged from the general to the particular as is common in civil law statutes, and as occurs in other chapters of the AML. The most general provision is the last Article, Article 37, which provides that "[a]dministrative agencies shall not abuse their administrative powers to make laws and regulations containing provisions eliminating or restricting competition."

The first Article in the Chapter, Article 32, provides that administrative agencies shall not mandate the use of any one firm's products. The Article does not even contain the defense or limitation of the phrase "without justification." Articles 33, 34 and 35 focus on prohibiting artificial regional trade barriers within China. Until March of 2007 provincial governors were evaluated on their performance based on the economic growth of their province. This was a further incentive to the historical Chinese tendency for "地方保护主义"[54] or "local protectionism." These provisions are designed to reverse that tendency.

The inclusion of this Chapter in the AML is both a major victory for competitive markets in China and a major enforcement problem for the Anti-Monopoly Enforcement Agency. In this regard the development of the Agency and the enforcement of this aspect of the AML will be part of a larger struggle taking place to implement the 1999 amendment to the Constitution mandating that the country be "依法治国" or ruled by law.[55]

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[52] Susan Ning, Overview of the Anti-Monopoly Law of China (Draft), King & Wood, April 2007.

[53] *Id.* The adopted form of Article 2 has no such limitations. It states:

> This Law is applicable to monopolistic conduct in economic activities within the territory of the People's Republic of China. This Law is applicable to monopolistic conduct outside the territory of the People's Republic of China that eliminates or has restrictive effects on competition in the domestic market of the People's Republic of China.

[54] Difang baohu zhuyi.

[55] "Yi fa zhi guo," as adopted on March 15, 1999 by the Second Session of the Ninth National People's Congress.

Chapter VI – Investigation of Suspected Monopolistic Conduct

The Anti-Monopoly Enforcement Agency has both the authority to investigate suspected monopolistic conduct[56] and the authority to make a decision as to whether a violation has occurred.[57] In civil law courts judges play a significantly different role than in common law courts. Civil law judges are presumed to know the law and have the power, even in criminal matters, to conduct their own investigations. In this regard the fact that the Agency has both investigative and decision making powers is in accordance with Chinese civil procedure.

Anyone can report suspected monopolistic conduct,[58] but investigative measures such as the search of premises and seizure of documents may only be implemented after the investigators have submitted a written report to the head of the Agency and approval has been obtained.[59]

Article 44 provides that the decisions of the Agency "may"[60] be published. Notwithstanding this choice of words it is likely that the decisions will be published, given the volume of court decisions that are now being put online, the foreign interest in such decisions, and China's WTO commitments to transparency.

Chapter VII – Legal Liability

This Chapter sets out the administrative penalties that may be levied by the Anti-Monopoly Enforcement Agency for violations of the AML. The administrative penalties are not likely to be the only risks faced by violators. Generally in China and other civil law jurisdictions there is an implied private right of action in the courts for private parties. Here Article 50 of the AML specifically identifies such rights.

For violations of the monopoly agreement and abuse of dominant position provisions the AML provides that the Agency is authorized to order firms to cease and desist from such actions, to confiscate the illegal gains, and to impose fines of more than 1% and less than 10% of gross sales in the preceding year.[61] This Article also has a provision for a leniency or immunity program for self-reporting for monopoly agreements.

Just before the third reading of the AML in August there was a significant concern in the press over the actions of the Chinese members of the International Ramen Manufacturers Association who implemented an across the board increase in the price of instant noodles

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[56] Article 38.
[57] Article 44.
[58] Article 38, Second paragraph.
[59] Article 39.
[60] "可以" (keyi), see discussion *supra* note 47.
[61] Articles 46 and 47.

on July 25, 2007. Although reports in the Western press suggest that the price hikes may have been justified,[62] the authorities quickly ordered the prices rolled back. [63]

The uproar caused members of the Standing Committee to be concerned that the penalties for cartelization by industry associations were not strong enough, so the draft AML was amended to specify fines of up to 500,000 RMB and, in serious circumstances, revocation of the registration of the industry association.[64]

For violation of the concentration provisions the Agency is empowered to unwind the transaction and may impose fines of up to 500,000 RMB. There are also disciplinary sanctions of abuse of administrative power[65] and penalties for obstructing an investigation.[66]

Article 53 provides for an appeal of the decisions of the Anti-Monopoly Agency by way of administrative review in accordance with the Administrative Procedure Law.[67]

Final Comments

Is the new law simply a source of uncertainty or a new economic constitution? Constitutions are not noted for the specificity of their wording, so the two views of the law are not mutually contradictory.

Certainly much (although not all) of the AML is based upon generally accepted competition principles. The AML has codified doctrines regarding state action and integrated the problems of the intellectual property/antitrust interface into its overall structure. It sets out the general principles of the competition regime but leaves many specific terms to be developed later in regulations and guidelines. It is a work in progress.

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[62] China's Battle Against Inflation Puts Noodle Makers in Hot Water, Wall Street Journal Online, August 29, 2007.

[63] Lan Xinzhen, Nefarious Noodles, Beijing Review, August 30, 2007, available online at: http://www.bjreview.com.cn/quotes/txt/2007-08/30/content_74250_2.htm .

[64]反垄断法草案禁止行业协会组织垄断行为 (Fan Longduan Fa Caoan Jinzhi Hangye Xiehui Zuzhi Longduan Xingwei – Draft Anti-Monopoly Law to Prohibit Monopolistic Conduct by Industry Associations), 法制日报 (Fazhi Ribao – Legal Daily), August 30, 2007, available online at: http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=371090&pdmc=110106;

反垄断法草案有望明日表决 (Fan Longduan Fa Caoan Youwang Mingri Biaojue – The Draft Anti-Monopoly law is expected to be Voted on Tomorrow), 新华网 (Xinhua Wang – New China Online), August 29, 2007, available online at: http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=371097&pdmc=110106 .

[65] Article 51.

[66] Article 52.

[67]中华人民共和国行政诉讼法 (Zhonghua Renmin Gongheguo Xingzheng Susong Fa – Administrative Litigation Law of the People's Republic of China), adopted at the Second Session of the Seventh National People's Congress on April 4,1989 and promulgated by Order No.16 of the President of the People's Republic of China on April 4,1989.

Accordingly it will be important for those whose interests or plans may be affected by the new law to monitor the setting up of the Commission and the Agency by the State Council, and the development of regulations and guidelines by the State Council. While the general structure of the AML indicates that China intends to implement a modern competition regime for the most part, there is still opportunity for special interests to affect these implementation measures in their favor.

If the government is to deliver a law that limits the power of the administrative monopolies in a meaningful way, as appears to be sought by many Chinese citizens, it will be necessary to have a strong agency that is independent of any particular ministry. The best chance for doing that is likely to occur by having it directly under the State Council in the beginning. But it may gain further independence as time passes. Certainly the China Securities Regulatory Commission has over the years successfully moved away from the direct sponsorship of government to become an independent agency.

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