

The Anti-Monopoly Law: Still a Work in Progress

Paul Jones

I. Introduction

The adoption of the 中华人民共和国反垄断法¹ or Anti-Monopoly law (the “AML”) on August 30, 2007 may yet turn out to be one of the more significant events in China’s long march towards the implementation of 依法治国² or “rule of law,” as added to China’s Constitution in 1999.³ But a year after its adoption, and a month after it came into effect on August 1, 2008, there still remains a great deal of work to be completed to make it a workable piece of legislation. Despite the lack of interpretative regulations and guidelines however it is already having an effect on business in China and its progress is followed closely by the Chinese media.

The provisions of the law itself were summarized in an earlier article⁴ and the goal of this article is report on the developments over the past year. Those wishing a more general overview of the law may wish to read both articles. Generally the government has not made as much progress as was hoped in building the legal infrastructure for implementation of the law. But it is not clear that this is necessarily a bad thing.

One of the concerns in some foreign governments was that a rush to issue regulations and guidelines would produce some items that were not as well thought out as they should be, given the lack of experience that China’s cadres have with competition law principles in general. Accordingly a delay in the issuance of the regulations may mean that better quality regulations will produced somewhat later.

As one of the experts who worked on the drafting of the AML has pointed out, the development of a “culture of competition” in China faces very different issues than it does in western countries. In the West markets grew from the bottom up and there was a need to stop inappropriate practices by the businesses, but in China the problem is

¹ 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 force on August 1, 2008.

² “Yi fa zhi guo” translated variously as the “rule of law” and the “rule by law.”

³ 宪法, Article 5.

⁴ Paul Jones, [“China’s New Anti-Monopoly Law: An Economic Constitution for the New Market Economy?”](#)3(5) China Law Reporter p.3-13, (September 2007), Newsletter of the China Law Committee of the International Section of the American Bar Association, Chicago.

creating market that is free of inappropriate government restrictions.⁵ For this reason the provisions in the AML on administrative monopolies may be one of the more important aspects of the law.

II. Regulations and Guidelines

The AML has only 57 articles in 8 chapters and is generally considered a very brief outline of the basic principles of competition law in China. In this regard it appears to exemplify the civil law nature of China's legal system. Civil law uses deductive logic to work downward from general principles towards applications of those principles to increasingly specific situations. This is the opposite of common law jurisprudence with its emphasis on precedent. In this regard the AML sets out the general principles of competition law in China more concisely than does the equivalent German legislation.⁶ It reads more like a portion of a civil code than most other competition laws.

However what is now required are the regulations from the State Council and guidelines or measures from the relevant ministries or agencies to apply the principles to increasingly specific situations. Prior to the implementation date of August 1st only one draft regulation had been released for consultation; the "Rules of the State Council on Notification of Concentrations of Undertakings (Draft)."⁷

According to press reports there were more than 40 draft regulations in progress as of August 1, 2008 but not one had been implemented.⁸ The number of regulations suggests that many regulations are with respect to the application of the AML to specific industries, such as insurance or finance.

Chinese commentators were openly disappointed by this and said so in the press. They pointed out that not only was the AML limited to an expression of the general principles,

⁵黄勇 (Huang Yong), 和市场经济共同成长——看中国的反垄断法 (A Common Market and Economic Growth – A Look at China's Anti-Monopoly Law), 财经 (Caijing), 2007-08-31, available online at: <http://www.caijing.com.cn/2007-08-31/100028703.html> .

⁶ Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 15. Juli 2005 (BGBl. I S. 2114), zuletzt geändert durch Artikel 1a des Gesetzes vom 18. Dezember 2007 (BGBl. I S. 2966); (Act Against Restraints of Competition in force from July 15, 2005; last amended December 18, 2007), was originally adopted in 1958. It has 131 articles in 6 chapters. A German version is here: <http://bundesrecht.juris.de/bundesrecht/gwb/gesamt.pdf> and an English translation is here: http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_GWB_7_Novelle_e.pdf .

⁷国务院关于经营者集中申报的规定（征求意见稿）released March 27, 2008 by the State Council Legislative Affairs Office.

⁸辛红 (Xin Hong), 反垄断法遭遇尴尬：40余个配套规则无一出台 (Anti-Monopoly Law Implementation is an Embarrassing Experience: More than 40 Subordinate Regulations Have not Yet Been Released), 法制日报 (Legal System Daily) 2008-07-28.

but that China does not have a history of competition law enforcement upon which the regulators and affected parties can draw for interpretation of the principles.⁹

The final version of the State Council regulation on the Notification Thresholds for Concentrations of Undertakings¹⁰ were issued shortly after the implementation date, but a month later it was still the only explanatory regulation to have emerged.

Foreign companies with operations in China should be monitoring developments as an industry regulation to their business may eventually emerge.

III. The Enforcement Agencies

Immediately after the adoption of the AML last year a debate arose as to how the law would be administered and enforced. AML specifies that the State Council shall create two new entities to develop and enforce the law; namely the Anti-Monopoly Committee¹¹ and the Anti-Monopoly Enforcement Agency (the “Agency”).¹² Some observers questioned whether the Agency would be a truly independent body under the State Council or would be part of a particular ministry.¹³

As the implementation date approached and the agencies were still not designated many wondered how the regulations could be completed and how enforcement could begin. In mid-July the news leaked out that three agencies, the Ministry of Commerce (“MOFCOM”),¹⁴ the National Development and Reform Commission (“NDRC”),¹⁵ and the State Administration for Industry and Commerce (“SAIC”),¹⁶ rather than one agency would be responsible for enforcement. About that time it was also announced that

⁹ 黄勇 (Huang Yong), quoted in Xin Hong, *Id.*

¹⁰ 国务院关于经营者集中申报标准的规定 (Rules of the State Council on Notification Thresholds for Concentrations of Undertakings) State Council Decree No. 529, issued August 3, 2008. Also known as “Provisions on the Reporting Threshold for Concentrations of Business Operators.”

¹¹ 反垄断委员会 (Fan Longduan Weiyuanhui); in Article 9. The Chinese word “委员会 – weiyuanhui” can also be translated as “commission.”

¹² 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.”

¹³ Andrew Batson and Jason Leow, Beijing’s Antitrust Plan Raises Questions, Wall Street Journal Online, August 30, 2007.

¹⁴ 商务部 (pronounced “Shang Wu Bu”), web site at: <http://www.mofcom.gov.cn/>.

¹⁵ 国家发展和改革委员会 (pronounced “Guojia Fazhan He Gaige Weiyuanhui”) web site at: <http://www.ndrc.gov.cn/>.

¹⁶ 国家工商行政管理总局 (pronounced “Guojia Gong Shang Xingzheng Guanli Zongju”) web site at: <http://www.saic.gov.cn/>.

MOFCOM would set up an “Anti-Monopoly Enforcement Bureau.”¹⁷ This led to considerable concern as to how these three agencies would co-ordinate their work.

On August 1, 2008 the State Council formally announced that the Anti-Monopoly Committee had been formed, but provided little further information.¹⁸ Some idea of the roles of the three agencies has however emerged as the State Council approved their formal descriptions of their main functions, internal structure and staffing requirements, known in Chinese as their “三定” or “San Ding.”¹⁹

MOFCOM’s document²⁰ listed one of its main duties as “(15) In accordance with the law review the conduct of the merger of operators for anti-competitive behavior, co-operate in the international enforcement of antitrust law, and participate in bi-lateral and multi-lateral exchanges and co-operation.”²¹ It was also specified that there would be an “Anti-Monopoly Bureau” to carry out this work. MOFCOM responsibilities as a member of the Anti-Monopoly Committee were listed separately under “other issues.”

SAIC’s document²² also list as one of its main duties “(6) To be responsible for AML enforcement with respect to monopoly agreements, abuse of dominant position, abuse of administrative powers restricting competition (except for monopolistic behavior with respect to prices). To investigate and deal with breaches of the unfair competition law, commercial bribery, smuggling and peddling contraband, and other economic offences.”²³ SAIC also has a separate unit responsible for investigation and enforcement.

¹⁷“反垄断调查局” as reported in “国家商务部筹建反垄断调查局 8 月 1 日前成立 (Ministry of Commerce established as the Anti-Monopoly Lead Investigator on August 1st),” in 腾讯科技 (Tencent Technology) 2008-07-13.

¹⁸ The announcement, entitled “国务院日前成立反垄断委员会 具有四项主要职责” is on the web site of the State Council at: http://www.gov.cn/jrzq/2008-08/01/content_1062161.htm. See also 胡红伟 (Hu Hongwei), 杨华云 (Yang Huayun), 国务院成立反垄断委员会 (State Council establishes the Anti-Monopoly Committee), 新京报 2008 年 08 月 02 (Beijing News 2008-08-02).

¹⁹ This can be roughly translated as their “three specifics.”

²⁰ 商务部主要职责内设机构和人员编制规定, State Council (2008) No. 11, available online at: <http://www.mofcom.gov.cn/aarticle/difang/zhejiang/200808/20080805750909.html?3573042152=40985069>.

²¹ In Chinese: (十五) 依法对经营者集中行为进行反垄断审查, 指导企业在国外的反垄断应诉工作, 开展多双边竞争政策交流与合作。

²² 国家工商行政管理总局主要职责内设机构和人员编制规定, State Council (2008) No. 88, available online at: http://www.saic.gov.cn/zwxq/zwdt/zyfb/t20080725_43236.htm.

²³ In Chinese: (六) 负责垄断协议、滥用市场支配地位、滥用行政权力排除限制竞争方面的反垄断执法工作 (价格垄断行为除外)。依法查处不正当竞争、商业贿赂、走私贩私等经济违法行为。

In contrast the document for the NDRC,²⁴ the agency that is to deal with price related behavior, does not have a separate section for its AML duties. There is a mention of “prosecuting acts such as price monopoly” under the description of its duties with respect to fiscal and pricing policy and the management of commodity prices. And under “Other Issues” there is mention of its role together with MOFCOM in the national security reviews provided for in the AML.

A number of commentators have questioned how SAIC and NDRC will allocate cases of abuse of dominant position or minor resale price maintenance agreements where pricing issues are obviously involved. But it would appear that if the NDRC does not even have a unit dedicated to AML enforcement the primary agency responsible will be SAIC. Perhaps it will consult NDRC on major cases.

It should be noted that the NDRC was formerly part of the State Planning Commission and has traditionally had a broad macro-economic mandate. It is said to have a higher ranking than SAIC or MOFCOM. Perhaps this means that the cases will be initially handled by either SAIC or MOFCOM and that NDRC will be consulted, or will intervene, on difficult or important cases.

On Saturday, September 13, 2008 the State Council approved operating rules for the Anti-Monopoly Committee, and the Committee under the Chairmanship of Wang Qishan,²⁵ the Vice Premier of the State Council, held its first meeting.²⁶ Mr. Wang is a former Mayor of Beijing who does not appear to have had strong prior relationship with any of the three agencies that make up the Committee. The approved main functions of the Committee include the development and publishing of anti-monopoly guidelines and to co-ordinate the anti-monopoly administrative and law enforcement work.

Whether this tri-partite structure will survive over time or a single regulator will emerge is still an open question. Some have suggested that there will be a consolidation as happened previously with the commission responsible for securities regulation. On the other hand in the U.S. antitrust matters are dealt with by the Department of Justice and the Federal Trade Commission, and by the Attorney Generals of the individual states.

At the moment it appears that the direct link to the State Council through Mr. Wang’s chairmanship will provide the Committee with its source of power and a method for resolving inter-agency disputes.

²⁴国家发展和改革委员会主要职责内设机构和人员编制规定, State Council (2008) No. 11, available online at: <http://zfxgk.ndrc.gov.cn/PublicItemView.aspx?ItemID={2050a9f4-cd8e-41de-836e-e2ea2a9950d5}> .

²⁵王岐山.

²⁶国务院批准反垄断委员会工作规则 反垄断工作有序推进 , (State Council approves the rules for the Anti-Monopoly Commission: Anti-Monopoly work advances in an Orderly Manner) 新花网 (Xinhuanet) 2008-09-13, available online at: http://news.xinhuanet.com/politics/2008-09/13/content_9982466.htm .

It would appear that foreign companies looking for guidance on the interpretation of the AML should pay particular attention to developments in MOFCOM for mergers and SAIC for most other matters.

IV. Private Enforcement in the Courts

While the regulators in the agencies are still pre-occupied with getting organized, the private right of action in Article 50 of the AML has taken on a more significant role. As was mentioned in last year's article the general rule in civil law is that a party who has suffered damage as the result of another party's breach of the law has a private right of action against the party separate from any action that the regulators may take.

With the advent of the AML the Regulation on Causes of Action in Civil Cases was revised²⁷ by the Supreme People's Court in October, 2007 to add "No. 162 Monopoly Disputes" in "Part V - Intellectual Property Rights Disputes, Sub-Section 16 – Unfair Competition and Monopoly Disputes." On the one hand this is a simple administrative act, but it does suggest an association between IPR and the AML in the minds of the court administrators.

Just before the AML came into effect the Supreme People's Court issued a Notice on how such cases should be handled.²⁸ Firstly the Notice emphasized the importance of the AML as a basic law to protect market order of fair competition. Courts were asked to give full play to their trial functions. Secondly the Notice stipulates that in accordance with Article 50 of the AML, and so long as the plaintiff has fulfilled the requirements of Article 108 of the Civil Procedure Law²⁹ and other requirements as to admissibility the case should proceed.

²⁷最高人民法院 关于印发《民事案件案由规定》的通知 (Supreme People's Court Notice On the Issuance of "Civil Cause of Action Provisions"), Decree No. 11 (2008), adopted at the 1438th Supreme People's Court Judicial Committee Meeting on October 29, 2007 to come into effect on April 1, 2008.

²⁸最高人民法院关于认真学习和贯彻《中华人民共和国反垄断法》的通知 (Supreme People's Court Notice on Conscientiously Studying and Implementing the People's Republic of China Anti-Monopoly Law), dated July 28, 2008.

²⁹中华人民共和国民事诉讼法 – Zhonghua Renmin Gongheguo Minshi Susong Fa, adopted at the Fourth Session of the Seventh National People's Congress on April 9, 1991. Article 108 is translated as follows:

Article 108. The following conditions must be met when a suit is brought:

- (1) the plaintiff must be an individual, legal person or any other organization that has a direct interest in the case;
- (2) there must be a specific defendant;
- (3) there must be a concrete claim, a factual basis, and a cause for the suit; and

The Notice allocates AML cases to the Intellectual Property Adjudication Division of each court on the basis that the AML and the abuse of intellectual property rights are closely related to the protection of intellectual property rights, and the Anti-Unfair Competition Law³⁰ is part of competition law. Whether this rationale will be significant will be seen when AML cases involving intellectual property rights emerge. Otherwise the IP divisions of the courts are generally regarded as commercially more astute and some see this assignment as likely to be positive.

There is considerable uncertainty as to whether there is a private right of action for a breach of the administrative monopoly provisions in Chapter V of the AML. Unfortunately the Notice does not clarify matters in this area. It states that to appeal decisions of the Anti-Monopoly Enforcement Agency the matter must be examined for compliance with the Administrative Litigation Law³¹ and Article 53 of the AML. This can be interpreted as being separate from the issue of whether there is a private right of action.

With respect to the question of a private right of action for administrative monopolies generally one view is that there is a private right of action using a broader civil law reading of the text of the Notice and the AML. The other view uses a narrower common law type of analysis of the specific words and considers the compromises made to include administrative monopolies in the AML over the determined opposition of the state agencies.

Thirdly the Notice emphasizes the complexity and inter-relatedness of the legal and economic issues in these types of cases. It warns courts to be attentive to jurisdictional issues; to who are the proper plaintiffs and defendants; and the standards necessary to define monopolistic behavior, civil liability, and “anti-monopoly specific administrative actions.”

As will be seen in the discussion of the initial cases on one hand the use of the right of private enforcement has been an example of the how the AML may contribute to the development of the rule of law in the PRC. On the other hand the ambiguity with respect

(4) the suit must be within the scope of acceptance for civil lawsuits of the people's courts and within the specific jurisdiction of the people's court where it is filed.

³⁰反不正当竞争法 (Fan Bu Zhengdang Jingzheng Fa) adopted at the 3rd Meeting of the Standing Committee of the National People's Congress on September 2, 1993; Promulgated by Order No. 10 of the President of the PRC, and effective as of December 1, 1993.

³¹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. Also known as the “Administrative Procedure Law” or the “Administrative Review Law.”

to the existence of a right of private action for breaches of the administrative monopoly provisions needs prompt clarification from the Anti-Monopoly Committee, or better yet from the State Council or the Standing Committee of the NPC.

V. Initial Cases and Other Responses

There are now reports of four private cases having been filed under the AML. In addition one merger is said to be under review and another one is expected shortly. There has already been an initial procedural decision in one of the four private cases. This burst of activity suggests the degree of commercial interest in the AML and it may be an indicator of the future importance of the AML for the development of the rule of law in the socialist market economy.

In addition there have been a number of press reports regarding a complaint to the agencies against Microsoft. And there have been reports that some automobile dealers have changed their pricing policies in response to the law.

1. Private Actions

The four private actions, as reported in the press, are as follows:

1. 刘方荣 (Liu Fangrong) v. 重庆保险协会 (Chongqing Baoxian Xiehui – Chongqing Insurance Association) filed August 1, 2008.³²
2. 浙江余姚名邦税务师事务所 (Zhejiang Yuyao Mingbang Tax Accountants) v. 余姚市政府 (Yuyao City Administration) filed August 1, 2008.³³
3. 北京兆信信息技术有限公司 (Beijing Zhaoxin Information Technology Ltd., 东方惠科防伪技术有限责任公司 (Eastern Huike Anti-Counterfeiting Technology Ltd.), 中社网盟信息技术有限公司 (Zhongshe Wang Meng Information Security Technology Ltd.), and 恒信数码科技有限公司 (Heng Xin Digital Technology Ltd.) v. 国家质量监督检验检疫总局 (State General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ),

³² According to 张友 (Zhang You), 保险反垄断第一案 重庆保险协会被诉 (First Anti-Monopoly Insurance Case: Chongqing Insurance Association Sued), 21 世纪网 (21st Century Net) 2008-08-13, available online at: http://www.21cbh.com/HTML/2008/8/13/HTML_FLH1G1U8AIQR.html .

³³ According to 秦旭东 (Qin Xudong), 浙江余姚市政府遭遇反行政垄断诉讼 (Zhejiang Yuyao City Administration is served with an Anti-Administrative Monopoly Lawsuit), 财经网 (Caijing Net) 2008-08-05, available online at: <http://www.caijing.com.cn/2008-08-05/110002570.html> .

filed August 1, 2008 in Beijing No. 1 Intermediate People's Court, assigned file number "(2008)一中行初字第 1340 号."³⁴

4. 重庆西部破产清算公司(Chongqing Western Bankruptcy Liquidation Corporation) v. 建设银行重庆分行 (China Construction Bank, Chongqing Branch), filing date not known, Chongqing Intermediate People's Court.³⁵

It is significant to note that two of the four initial cases are administrative monopoly cases. One of other cases is against an insurance trade association that was set up by the China Insurance Regulatory Commission - Chongqing Authority in 1996 and the remaining case is against one of China's major banks.

The trade association was accused of setting rates in contravention of Articles 3 and 13 of the AML. The bank was accused of charging excessive fees and refusal deal, however an expert providing commentary for the press story about the case suggested that the dispute is really about the contract between the parties.

In the Yuyao case, the Mingbang accounting firm alleges that it was discriminated against in the established of a service center for the setting up of new businesses when its competitor, Yangming, was allowed to set up a window in the new service center, resulting in a loss of business. The plaintiffs cite Article 8 and Chapter V of the AML concerning administrative monopolies as the basis for their action. Ming Bang had previously applied to Ningbo Municipal Government for administrative re-consideration and lost. The State Administration of Taxation has issued a notice specifically requiring that tax offices and tax agents cannot share the same office space.³⁶

The facts of the AQSIO case are complicated but it may be summarized as a case of a standard setting body requiring the use of a technology in which it had a financial interest, to the detriment of the plaintiffs' technologies. In early September the Beijing No. 1 Intermediate People's Court ruled that they would not accept the case because the

³⁴ This case is widely reported in the press. For a summary of the case in English see Zhu Tao, Antitrust Claim Puts State Agency on Trial, *Caijing*, 2008-08-27, available online at: <http://english.caijing.com.cn/2008-08-27/100077449.html>. For a copy of the Statement of Claim, see 佚名 (Yi Ming), 四家防伪企业向国家质检总局提起反垄断诉讼 (Antitrust Complaint filed by the Four Anti-Counterfeiting Companies against AQSIO) *网易科技*, 2008-08-01, available online at: <http://www.erpworld.net/article/2008-08-04/0P4224K2008.shtml>.

³⁵ 胡俊华 (Hu Junhua), 银行业反垄断第一案 建行成被告 (China Construction Bank is the Defendant in the first Anti-Monopoly Case in the Banking Sector), *每日经济新闻* (Daily Economic News), 2008-09-12, available online at: http://www.nbd.com.cn/_NewShow.aspx?D_ID=124006.

³⁶ 国家税务总局 (Guojia Shui Wuzongju - State Tax Administration), 关于进一步规范税收执法和税务代理工作的通知 (Notice regarding further Standardizing the Law regarding Tax Enforcement and Tax Agency Work), (国税函字 [2004] 957 号).

limitation period for the complaint under the Administrative Litigation Law (the “ALL”) had expired.³⁷ The plaintiffs are reported to have said that they will appeal.

This decision has raised a number of questions about actions regarding administrative monopolies. If the interpretations of the SPC Notice and the AML that suggest that only the Anti-Monopoly Enforcement Agency can bring such actions are correct, why did the court not simply say that instead of relying on the limitation period expiry? The Beijing No. 1 Intermediate People’s Court is very experienced in ALL matters. In addition there is the Yuyao case.

Secondly the Administrative Litigation Law allows for actions against “specific” or “concrete” administrative actions, as set out in Article 11 of the ALL. Article 12 lists actions that shall not be accepted, including “administrative rules and regulations, regulations, or decisions and orders with general binding force formulated and announced by administrative organs.”³⁸

However the AML allows for actions against both “specific” administrative actions and against “regulations containing provisions eliminating or restricting competition.”³⁹ Thus broader administrative actions appear to be permitted. But Article 53 of the AML appears to require an AML based action to comply with the ALL. This is a key area that requires clarification.

In any event foreign companies in China may soon encounter private actions under the AML, particularly as a defense to any action that they may bring.

2. Mergers

The international merger of the mining companies BHP Billiton and Rio Tinto has been submitted to MOFCOM and is still being reviewed.⁴⁰ The companies are the second and

³⁷ 朱弢 (Zhu Tao), “反垄断第一案”未被法院受理 (“First Anti-Monopoly Case” has not been accepted by the Court), 财经 (Caijing) 2008-09-04, available online at: <http://www.caijing.com.cn/2008-09-04/110010483.html>. The decision appears to be based on Article 41 of the 最高人民法院关于执行《中华人民共和国民事诉讼法》若干问题的解释 (Supreme People’s Court Interpretation on Several Problems in Implementing the PRC Administrative Litigation Law) adopted at the 1088th Meeting of the Judicial Committee on November 24, 1999 and in effect from March 10, 2000. The actual decision is not yet available.

³⁸ Article 12(2) in Chinese: (二) 行政法规、规章或者行政机关制定、发布的具有普遍约束力的决定、命令.

³⁹ Article 37, in Chinese: 第三十七条 行政机关不得滥用行政权力, 制定含有排除、限制竞争内容的规定.

⁴⁰ 中钢协建议商务部否决“两拓合并” 调查仍在进行中 (China Steel Association suggests that MOFCOM reject proposed merger, Review is Ongoing) 上海证券报 (Shanghai Securities News) 2008-08-02.

third largest producers of seaborne iron ore and the proposed merger would make the combined entity the largest producer with a 40% market share. The merger is also being reviewed by other competition authorities around the world.

A more significant test of the AML will be the review of the proposed acquisition by Coca-Cola of Huiyuan Juice Group Limited,⁴¹ but at the time of writing an application had not yet been submitted. Although Huiyuan conducts its business in the PRC, it is incorporated in the Cayman Islands and is listed on the Hong Kong Stock Exchange.

One of the issues will be whether “汇源” qualifies as “well-known brand” deserving of special protection. The brand is not very old as the company was established in 1992. On the other hand there has been concern expressed in the media regarding foreign control of a local brand, and other juice producers are planning to submit an alternate acquisition plan to MOFCOM.⁴² This case would appear to be the test for the foreign concerns that the AML would be used in a protectionist manner.

3. Microsoft and New Cars

There have been a number of reports in the press about a complaint made by a Beijing lawyer regarding Microsoft.⁴³ On August 1st the lawyer sent letters to each of MOFCOM, NDRC and SAIC requesting that the agencies investigate Microsoft for anti-competitive conduct and suggested a fine of \$1 Billion USD. The alleged conduct was abuse of dominant position by excessive pricing, lack of inter-operability and bundling. The lawyer had received a written response from MOFCOM and NDRC as of the time of writing, but not from SAIC. In the press there were statements that these letters indicated that the relevant agency had accepted the case, but later there were reports that perhaps these were simply acknowledgement letters.⁴⁴ In this regard it is important to note that SAIC, the agency most likely to be responsible for the matter, had not yet responded.

⁴¹ In Chinese: 中国汇源果汁集团有限公司.

⁴² Mainland firms try to block Coke's juice company takeover, South China Morning Post, 2008-09-15. For a summary of the legal issues see: 时建中 (Shi Jianzhong), 时建中: 解读“汇源并购案”应回归法律 (Shi Jianzhong: Explanation of the Legal Issues in the Huiyuan Merger), 瞭望 (Liaowang – The Lookout) 2008-09-13, available online at: http://news.xinhuanet.com/legal/2008-09/13/content_9960806.htm; and 刘春泉 (Liu Chunquan), 可口可乐收购汇源果汁的法律分析 (Legal Analysis Of Coca-Cola's Acquisition of Huiyuan Juice), 上海证券报 (Shanghai Securities News), 2008-09-09, available online at: http://www.chinasecurities.xinhua.org/pl/03/200809/t20080909_1581629.htm.

⁴³ 中国律师对微软提出反垄断调查申请 建议罚款 10 亿美元 (Chinese Lawyer Proposes an Anti-Monopoly Investigation of Microsoft; Suggested Fine 1 Billion USD), 日法制网—法制日报 (Legal System Net/ Legal Daily) 2008-08-17, available online at: http://news.xinhuanet.com/legal/2008-08/17/content_9424867.htm.

⁴⁴ 《反垄断法》实施满月 微软“被告”真相调查 (One Month after the Implementation of the AML the Truth About the Microsoft Investigation), 21 世纪经济报道 (21st Century Economic Reports), 2008-09-04, available online at: http://www.21cbh.com/HTML/2008/9/4/HTML_QQMP0JW62A04.html.

Undoubtedly the Chinese authorities are considering an investigation of Microsoft, but given the angle of the learning curve in front of them, and their performance to date, they may not want Microsoft to be the case that they cut their teeth on.

Prior to the implementation of the AML there were a number of press reports about the practice of foreign automobile manufacturers to set resale prices for their dealers.⁴⁵ And within a week of the implementation of the law there were press reports that Toyota and Ford had in fact issued notices to dealers emphasizing that they were free to set their own prices.⁴⁶

Foreign companies doing business in China may wish to review the compliance of their local operations with the provisions of the AML.

VI. The Way Forward

So a year after its adoption it is clear that the AML is still a work in progress. There are many regulations still to be completed and adopted. But the Anti-Monopoly Committee has now been set up and has held its first meeting. The appointment of State Council Vice Premier Wang Qishan as chair suggests that the development of the AML and its guidelines are considered by the government to be very important tasks. Now that the Committee has had its first meeting the process of issuing regulations may proceed more quickly.

Certainly there is strong public interest in the AML. The activity in the first six weeks since implementation demonstrate that. The four cases filed also show not surprisingly that administrative monopolies are a major concern. The degree to which the AML becomes the “Economic Constitution” of China’s socialist market economy may be determined by how administrative monopolies are dealt with. In this regard it will be instructive to see what private rights of action are allowed against administrative monopolies.

As to whether the AML may be used for protectionist purposes, as some have feared, no such trend is evident in the first cases, but the real test will come in the Coca-Cola/Huiyuan Juice merger.

⁴⁵ 《反垄断法》8月1日起实施 棒喝汽车行业潜规则 (The Implementation of the “Anti-Monopoly Law on August 1st will Shout Stop to the Hidden Rules of the Automotive Industry), 今日早报 (Today’s Morning Post), 2008-07-16, available online at: <http://auto.fivip.com/law/200807/16-156955.html> .

⁴⁶ 反垄断法冲击车市潜规则 配套规则亟待出台 (Implementation of the Anti-Monopoly Law has an Impact on the Hidden Rules of the Automotive Sector: Regulations or Guidelines are Needed), 中国财经报 (China Financial Reports), 2008-08-06, available online at: <http://www.chinanews.com.cn/it/dzsw/news/2008/08-06/1337705.shtml> .

Some would say that the real disputes between China and foreigners over the AML will arise when first cases on intellectual property rights appear. Although a conference was held in April, 2008 to discuss the possible content of regulations and guidelines to define what is an “abuse of intellectual property” as set out in Article 55 of the AML, there have been no further hints of progress. Rightly or wrongly many Chinese officials believe that abuse of IP rights is common in China, and they are not talking about counterfeiting.

How long will it be before a foreign business in China receives a defense of “abuse of intellectual property rights” under the AML in response to its claim of IPR infringement?