The New Economic Constitution In China: A Third Way for Competition Regime?

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Market needs a regulator. Greedy businessmen try to stand on high position to take control of the trade for big profits. – Mencius (372-289 BC)

I. INTRODUCTION

Despite China’s astounding economic growth in the midst of a worldwide economic downturn,¹ concerns both in China and abroad have been mounting over the looming threats that may endanger China’s high-geared economic engine. A particularly urgent challenge is its chaotic market that has been saddled with years of unruly

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competition. The drafting of an anti-monopoly law, which is deemed to be the core of an effective competition regime, has thus gained renewed attention in China. The public, in effect, has been calling for an “economic constitution” to harness the rife market disorder, occasioning intensified discussion among scholars. This has prompted SETC (“State Economic and Trade Commission”) and SAIC (“State Administration of Industry and Commerce”) to accelerate the drafting the anti-monopoly law. During 2001 and 2002, four drafts have been written and circulated for review amongst Chinese and foreign anti-monopoly experts. On the basis of these drafts, the basic framework of a long awaited antitrust regime has started to take shape.


3 As early as in 1987, a working group on drafting the antimonopoly law was established under the Legislative Affairs Bureau of the State Council, which produced a draft on anti-monopoly and anti-unfair competition regulations in 1988. In 1993 the Anti-Unfair Competition Law was passed. In 1994, the 8th National People’s Congress included the anti-monopoly law in its legislative plan and authorized State Economic & Trade Commission and State Administration of Industry & Commerce to work on drafting the legislation. See Hu Shuli, *Long Way to Go for Antimonopoly Mission*, at http://www.chinapostnews.com.cn/288/kd04.htm (last visited Mar. 22, 2002).

4 For example, during the 5th Plenary Session of the 9th National People’s Congress (NPC) held in March 2002, the first bill submitted was one to urge the enactment of PRC anti-monopoly law from 31 representatives. See China NPC News (Mar. 7, 2002), available at http://www.npcnews.com.cn/gb/paper289/1/class028900001/hwz204276.htm

5 Following a general practice, the drafting of the anti-monopoly law, which will eventually be promulgated by NPC as a statute, can be assigned to the State Council (the chief executive branch) or concerned ministries thereof, in this case, the SETC and SAIC.

6 The discussion of this article is based on the latest two drafts, which came out in April and October 2002 respectively. All the drafts were obtained during the process of soliciting comments. Only Chinese versions were circulated and the English translation in this article is not official.

7 From a comparison of the two latest drafts, it is clear that both the framework and most of the stipulations have been settled on. This has been officially confirmed in China’s note submitted for the OECD Global Forum on Competition (Feb. 10-11, 2003), in which the antimonopoly law draft was included as the basis for overview. See China, *Objectives of the Competition Law of PRC and the Optimal Design of Competition Authorities*, at
Although the willingness to accommodate foreign insight and assistance in pulling together the drafting clearly indicates China’s determination to tap into the experiences of the most advanced competition legal regimes, the most recent draft (hereinafter “the Draft”), which is likely to take effect soon, reveals a different set of problems that the legislation is expected to tackle from development economies such as the U.S.. Most notably, China, like many other transitional countries, must first strive to create a free market, by overcoming the hurdles originating from its anti-market legacy, among others, administrative intervention. At the same time, years of rapid economic development have fostered market distortions that deter competition while increased presence of foreign companies also has brought forth additional monopoly concerns. Furthermore, both the design and future enforcement of the antitrust law are inevitably constrained by China’s incomplete economic reform and weak legal institutions. China has been criticized by observers for lacking the necessary political will or capital to usher in a competent anti-trust regime. But it appears the impasse may have been due to the difficulty of the mission as much as the political deliberated decision to retain certain flexibility and influence on the part of the government or its surrogates.

Such extraordinary challenges have prompted far-reaching innovations in the Draft, which is today the most hotly debated and closely followed legislation to be enacted in China. For example, the emerging Chinese competition law has a unique feature that sheds light on how to integrate national competition regimes that are predicated upon the notion that public regulatory anticompetitive behaviors and private anticompetitive behaviors are fundamentally distinct and should be addressed with a different mechanism. It is a long-standing practice that competition authorities do not address anti-competitive behaviors that are created and fostered by other administrative agencies. However, Chinese competition law apparently attempts to integrate the two enforcement areas that have been tradi-

———. http://www.oecd.org/pdf/M00038000/M00038054.pdf. Although changes may still be made before the enactment, they will very likely be limited to minor or expressional ones.

tionally demarcated: administrative and private anticompetitive behaviors. Another case in point is the employment of private suit, whose role to deter anticompetitive behaviors is not so impressive in competition laws that follow the EU model. The eagerness to combat widespread anticompetitive activities seems to have deterred a much-deserved deliberation as to whether private suits will bear fruit under the current underdeveloped litigation system in China. In addition, the Draft does not allow some of the derogations from the basic obligations that other countries codify in their competition laws. For instance, the Draft does not contain a blank exemptions provision that puts out of its scope acts of private enterprises in accordance with other regulatory statutes. In short, the Draft demonstrates peculiarities of varying degree that pose to challenge conventional notions of competition policy. In tune with its ambition to achieve a market economy without completely abandoning the socialist political system, China is experimenting with what may be referred to as “a third way” in framing competition law, which rejects both pure capitalism and socialism.

Not only will the legislation lay the fundamental rules for the still nascent market and substantially reshape the economic landscape, it will also present solutions to the increasing challenges developing and transitional countries face today, thereby, adding novel elements to competition law at the international level.

Nevertheless, the Draft also contains significant drawbacks in terms of substantive standards for enforcement. The Draft allows for significant ranges of exemption with respect to cartel regulations. And as for the substantive appraisal standard in merger control review, while most countries as a general rule review merger mainly on competition grounds, China adopts a multi-prong standard, which assigns equal weights to “national economy” and “public interests”, factors often in conflict with competition considerations. As a result, under the Draft, China’s competition authorities will entertain a significant degree of discretion in determining combating anticompetitive behaviors. Decades to come will testify to the impact of the newly minted competition law on the economy and legal development of both China and the world.

It is against this backdrop that this article will discuss the basic features of the competition regime China is ready to set up, as envisaged in the Draft. This article intends to, by comparing different
antimonopoly systems worldwide, and their relevance with China’s idiosyncrasies in its antimonopoly law, promote a better understanding of China’s emerging antitrust regime by providing illustrative comments and legislative suggestions will be presented. Part II of this article will focus on the economic and legal contexts of the drafting of the antimonopoly law to illuminate the unique priorities of the Chinese lawmakers. Part III will highlight the distinctive traits of China’s competition law. Part IV will proceed to a detailed analysis of the Draft provisions on the merits and demerits of this legislation. In part V, we conclude by offering comments and observations on the Draft.

II. WHY NOW?

A. COMPETITION POLICY GAINS MOMENTUM WITH THE DEEPENING OF ECONOMIC REFORM

The attitude towards competition has undergone a gradual but definite reversal in China since the founding of the People’s Republic of China in 1949. The central planning system that was pursued until the late 1970s was a close replica of the Soviet model of “state syndicate”. Each state-owned enterprise ("SOE“) had to abide by the central mandatory planning delivered through the administration agency directly in charge. Immune to the supply and demand rule and only concerned with fulfilling their planned task, the SOEs were reduced to mere production organs. As the economy was for the most part dominated by state with private enterprises playing a negligible role, it does not come as a surprise that competition was virtually non-existent during this period. In fact, the prevalent ideology of

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10 In 1978, for example, state owned enterprises consisted of 77.6% of the national industrial output, collectively owned enterprise (COE, another form of public ownership. As far as decision-making power is concerned, they were subject to almost the same degree of central planning) 22.2% and private enterprises only 0.2%. SOEs also made up 54.6% of the national retail sales, COEs 43.3% and private enterprise 2.1%. See Statistical Yearbook of China, at www.cei.gov.cn.
socialism labeled competition as the crux of capitalism’s inferiority. According to Lenin, competition based on anarchic production and motivated by unlimited greed for profits would inevitably lead to economic monopoly and political oppression, which heralded the inevitable fall of capitalism and justified socialist revolution.11 Competition was thus not only irrelevant to the economic reality but also inherently condemned by enshrined communist ideology.

When China embarked on a new journey to modernization in 1978, the “over concentration of authority” in economic management became subject to reform. 12 The initial strategy was to develop a “planned commodity economy”, 13 which supposedly operated in a market setting but did not amount to an overall market economy. 14 Accordingly, the policy makers displayed a modified interest in competition - competition was no longer considered to be unique to capitalism, but could “stimulate the economy and benefit socialism”. But, at the same time, it was stressed that “competition between socialist enterprises” was “fundamentally different from that under capitalism”.15 At this point, the endorsement of competition was only incidental to implanting vitality into state enterprises entrusted with more autonomy. For example, competition was discouraged when it posed a threat to other more favorable strategies to strengthen enterprises, such as merger. 16

11 “Imperialism, the Highest Stage of Capitalism”, in 22 V.I. Lenin, COLLECTED WORKS (Moscow, 1964).


15 Liu Sunian and Wu Quangan, supra note 13, at 688.

16 Such as horizontal economic co-operation (jing ji liang he) between enterprises. See, e.g., Center of Economics Studies of Fu Dan University, NEW APPRACH TO ENTERPRISE REFORM AND DEVELOPMENT 199-203 (1988).
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The unleashing of market incentive forces and gradual expansion of non-state enterprises, in turn, propelled economic liberalization to an even higher level. In 1992, the goal of China's economic reform was further readjusted to establishing a socialist market economy, in which the market would replace planning in allocating the resources. 17 Competition as an integral part of the market mechanism gained recognition by its own right.

China has since accelerated its endeavor to overhaul the old planning system by carrying out gradual privatization as well as reforms of SOEs, pricing, tax, fiscal, banking systems, and government administration. 18 Consequently, a legal structure has been laid down and general consciousness of rule of law has improved. However, the transition process has been saddled with trial and error and the interdependent nature of the different reforms often meant a single improvement is constrained by countless limitations. In fact, a handful of reforms in China leave much to be desired and some institutions have yet to be established from scratch. Yet, China’s chosen path toward marketization has proven to be an irreversible trend. China’s successful accession to the World Trade Organization (“WTO”) in December 2001 not only attests to international recognition and confidence of China as an emerging market economy,19 but also has been a catalyst to the maturation of its market mechanism. Drawing experience from other transitional economies, where rapid privatization without simultaneous promotion of competition resulted in enormous cost, 20 protecting competition by improving regulatory framework has become one of the key missions of the Chinese policy makers.


B. Competition Issues In Spotlight

The Draft of anti-monopoly and anti-unfair competition regulations in 1988\(^2\) met with intense opposition. As a result only the part on anti-unfair competition was enacted in 1993. China has been continuously deliberating over the feasibility and desirability of regulating monopoly actions. Some opponents of this particular law believe that monopolies can only arise in advanced markets where intense competition renders it possible for large-scaled companies to become monopolies or oligopolies. While China is still in the process to establish a market economy, they argue, the legislation effort would be anachronism. \(^2\) Leading economists, such as Zhang Wuchang go further to question the presumption of whether a monopoly merits regulation to start with. They cite the debate in the US over the antitrust law and side with those who criticize the US antitrust law to be an arbitrary pretext under which the government interferes with the economy, which is exactly the problem China should counter at this stage through deregulation. \(^2\) A practical concern of the Chinese legislators is that the law will be severely undermined by weak enforcement clouded by widespread local protectionism, \(^2\) the entrenched interests which effectively blocked the first legislation draft of 1988. \(^2\)

During the past few years, however, monopoly related problems have aroused public uproar for the market control. Concerned that economic development and further reform may be stifled, Chinese leaders are resolved to carry on a full-scale anti-monopoly campaign. Against the backdrop of such public support, the clamor for an anti-monopoly legislation has never been stronger. In fact, three

\(^2\) See supra note 3.
\(^2\) See The Starting Point of Anti-monopoly, (Apr. 12, 2001), at http://www.sinolaw.net.cn/zhuanti/fld/hgbd/06.htm
\(^2\) See editorial: Starting Point to Fight Monopoly (Apr.12, 2001), at http://www.sinolaw.net.cn/zhuanti/fld/hgbd/06.htm
\(^2\) See supra note 3.
key factors have contributed to the resurgence of the legislation efforts to curb monopolistic behaviors.

1. The Focal Point: Widespread Administrative Monopoly

By far the most hotly debated and intensively condemned monopoly in China today, unlike economically advanced countries, is administrative monopoly. “Administrative monopoly”, widely used in China, refers to monopolistic activities initiated by government agencies at various levels by abusing regulatory or administrative power. Such monopolistic activities cover a wide variety of activities including both that of legalized monopoly and explicitly prohibited ultra vires measures. The rampant administrative monopoly, a remnant of the old planning system, takes two forms – industry monopoly and regional monopoly.

The planning system was so designed that SOEs were under dual leadership. Vertically, each SOE belonged to one specific industry headed by a Ministry under the State Council and was subject to the Ministry’s policies. At the same time, except those that were directly operated by the Ministries, the enterprises were also horizontally subject to the authorities of local government at all levels, depending on their size, importance and formation. Despite reform efforts to separate administration and management, institutional inertia and vested interests have reinforced the “stripe” (tiao, industry/department) and “block” (kuai, regional) fragmentation, by which the ministries and local governments retained incentive and power to engage in restrictive activities.

2. Industry/Department Monopoly

After consecutive rounds of government restructuring, state monopolies now are only found in a limited number of industries. They include national security, natural monopoly, public goods and services, and key high technology enterprises. The Ministries and their subsidiaries operating or regulating those industries, how-

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27 Fourth Plenum of the Fifteenth CCP National Congress solidified the policies of SOE reform and state sector adjustment laid out by the Fifteenth CCP National Congress.
ever, have been widely criticized for abusing their regulatory power.  

In industries where state monopolies have been abolished, such as machine manufacture, corresponding ministries have officially relinquished their power to directly interfere with management of the enterprises. However, even in those industries the ministries and their subsidiaries often either manage to keep their affiliate companies or maintain close ties with certain enterprises and therefore, in varying degree, continue to exert discriminative influence by using their regulatory power. To illustrate this point, many ministries have fixed industry self-discipline price, which is in fact a price cartel since 1998. To obtain a license from the Ministry of Radio, Film and Television, foreign service providers must buy products from one specific semi-affiliated company. At local levels, the administrative departments often condition issuance of approvals or licenses on acceptance of designated services. For example, department of motor vehicles may require vehicle owners to use designated garages for maintenance services in order to obtain or renew licenses.

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28 For instance, in early 1999, when its affiliated airlines started to lower airfare price, the China Civil Aviation Bureau imposed a ban on ticket discounts, See Official Notice from State Planning Commission and China Civil Aviation Bureau on Strengthening the Administration of Domestic Airfare to Ban Low-Price Competition (Jan. 25, 1999). In 1999, a power department in Jiang Su province required users to buy electric products they provided, based on an official circular issued by the Ministry of Electricity. See SAIC Gazette (1999) 275 (Oct. 26, 1999). In many areas, consumers can only use post packages offered by postal departments, and are required to accept other services by certain providers. See, e.g., SAIC Gazette (1999) 278 (in Hu Bei province, the postal department required customers to open savings account with them); SAIC Gazette (1999) 132 (in Jiang Su province, the postal and telecommunication department required the customers to use debit card service from a specific bank).

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30 See, e.g., SAIC Gazette (1999) 278 (in Hu Bei province, the postal department required customers to open savings account with them); SAIC Gazette (1999) 132 (in Jiang Su province, the postal and telecommunication department required the customers to use debit card service from a specific bank).


32 Interview with Han Yan, employee of the company in Beijing, China. (Aug. 25, 2002)

3. **Regional Monopoly**

Regional monopoly is motivated by economic (increased local revenue) and political (promotion of local government officials’ depends partially on local economic performance) considerations. Local governments take various measures to prevent or discriminate against non-local products and service and effectively set up regional blockades. Those measures include forbidding local business from engaging in wholesaling or retailing non-local products; employment of discriminative standards in quality inspection, license issuance and technical requirements; fixing higher price or price standards for non-local commodities; and setting up checking points on the local border to obstruct, intercept or even confiscate products originating in other regions. 

For example, in Jilin and Hebei, regional governments once required non-local beer manufacturers to contribute to a “beer adjustments fund” and in effect imposed an additional fee on each bottle of beer sold in the local market. An unidentified local government in the Northeast was reported to have issued an official circular requiring all local retailers to sell only locally manufactured fertilizers. Any violation would result in confiscation of the “illegal goods”, punitive fines and even revocation of the retail license.

Widespread administrative monopoly at all levels of Chinese government has become a cancer in the Chinese economy. It fosters low efficiency and poor quality service, creates income gaps, encourages corruption, and prevents the formation of a unified national market. In April 2001, the State Council (the chief executive branch) held a working conference on regulating the market order. In the two official documents adopted in this meeting, the State Council made clear that priority should be given in combating department/industry

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monopoly and local blockade/protectionism. During national and local “enforcement campaigns” designed to restore market order acknowledge the seriousness of the problem and echo public resentment against public anticompetitive behaviors, authorities have focused exclusively on addressing administrative monopoly.

4. Private Monopoly On the Rise

Private monopoly as a result of market competition and concentration has also started to appear in China. However, a salient feature of private monopoly is that it is active at a local rather than national level. This is due to a lack of national industry concentration, underdeveloped enterprises and fragmentation of the market.

The rapid economic development of China has seen a rise in the large number of enterprises. However, they are small in size compared with their foreign counterparts. According to the National Bureau of Statistics, there were 2710 enterprise groupings in the year 2001. In 2000, the total revenue of the top 500 Chinese enterprise groupings was only 89% of the total income of the world’s top 3 companies. Furthermore, the largest enterprises in China are often found in state monopoly industries. Statistics from the State Economic and Trade Commission show that in 2000, the profits of the top ten enterprises constituted 74.2% of total profits earned by the

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39 A common practice in China, which means during a certain period of time, the authorities focus and intensify work on enforcement of specific laws to address serious violations. It normally lasts up to six months.


41 See Han Zhenjun, Chinese Enterprise Groupings Increased Total Asset by 19.7% Last Year, GUO JI JIN RONG BAO, Sept.16, 2002.

country’s 520 major enterprises and all of them were from state monopoly or state dominated industries. Enterprises in non-state monopolized industries have been underdeveloped.

5. **National Private Monopoly: A Case Study**

The generally small size and low competitive capacity of Chinese enterprises has made it almost impossible to form private monopolies on a national scale. A case study of a failed color TV cartel is helpful in illustrating the situation. On June 9, 2000, nine leading Chinese color television manufacturers met in Shenzhen for a “color TV producers summit”, during which a price cartel was established and minimum sale prices of color TVs fixed. Unlike previous price cartels, it was not orchestrated in any way by the government and therefore widely alleged by the media as a high profile private monopoly. The State Planning Commission immediately declared the cartel in violation of Article 14 of Price Law by attempting to form a monopoly. But the authorities did not move to ban the cartel, as it turned out to be a failure from the beginning. The biggest color TV producer, Changhong, refused to join in the cartel, retailers ignored the minimum price agreement, and three cartel members did not enforce the price. Despite two follow-up “summits”, the price cartel was never effectuated but instead triggered a new round of price wars.

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43 See statistics at http://www.setc.gov.cn/gjzdqyxx/zhfx/200209140072.htm. (last visited Mar. 13, 2002). The top ten were China National Petroleum Corporation, China Mobile, China Petrochemical Corporation, China Telecom, China National Offshore Oil Corp, the State Power Corporation of China, Guangdong Electricity Corporation, Shanghai Automotive Industry Corporation (group), China Unicom, and Yuxi Hongta Tobacco (group) Co., Ltd., Total profit 156.3 billion RMB ($18.8 billion).


In fact, a closer examination reveals that the reason the cartel failed was the low degree of market concentration, even though the TV industry has the highest degree of competition allowed in China. In 1995, there were 91 Chinese color TV producers. Ten of these producers had the capacity to manufacture one million color televisions each year. By the end of 2002, the number of producers decreased to 68, but the number of larger producers (with over one million units of production capacity) remained at 10. Concentration has been slow and the development of large producers has been impeded mainly by the following three factors. Many of the color TV producers are SOEs, who often choose and can afford to sustain loss to maintain some market share. In addition, the large profitable producers are routinely asked to take over poorly performed enterprises to avoid consequences of bankruptcy such as unemployment. This practice has added substantial costs to those producers and is undoubtedly detrimental to their growth. Local protectionism has also constrained the larger and more competitive producers to expand their market share. When production exceeded the domestic demand, the rigid market structure forced the TV producers to engage in constant and fierce price wars, in which certain color TVs were sold below cost. In fact, the 2000 price cartel was an effort to stop

50 For example, the mergers between Konka and Ruyi, Haixin and Jinfeng. See Wang Xiu, One Perspective on the TV Cartel, ZHONG GUO JI JING SHI BAO (July 6, 2000), available at http://finance.sina.com.cn/view/market/2000-07-06/39927.html
52 For example, according to a survey in 2001, the yearly domestic production was 30 million, while the domestic demand was 23 million. See, Winner and Losers of the TV Industry, BEIJING CHEN BAO (Jan. 15, 2001), available at http://www.trident.com.cn/news/section/20010115.htm
53 For example, in 2001, the average price of color TVs dropped 18% and the loss of the whole industry amounted to 3 billion RMB. See, http://www.people.com.cn/GB/jinji/32/176/20021105/859110.html
the suicidal price war and minimize loss rather than secure high profits.

In addition, Chinese producers are only competing with each other in the conventional TV market, which has low profit yields than the high-tech color TV market. Foreign color TV producers dominate the high-tech color TV market in China. According to a survey in September 2002, five foreign producers (Toshiba, LG, Sony, Panasonic and Samsung) jointly held 71.3% of the rear projections TV market in China, while Changhong only 9.1%. In year 2000, Sony alone profited 1 billion RMB from one million color TV sales in China, while all the domestic producers combined only profited 540 million RMB. The high cost and low return of Chinese color TV producers are highly restrictive to their potential competitiveness.

Qu Weizhi, Vice Minister of Ministry of Information Industry, pointed out that the survival of the Chinese color TV industry depends on further concentration, expansion of production scale, elimination of less competitive producers, and improvement of technology. Until then, no Chinese color TV producer is capable of dominating the national market and initiating any monopolistic activities. Since the attempt in 2000 to create a color TV price cartel, no comparable attempt in any industry has ever been made at the national level. In this respect, the color TV industry is representative of the majority of industries in China today, consisting of large number of small firms unable to monopoly the market.

6. Local Private Monopoly

At various local levels, by contrast, monopolistic activities have become more common. The original structure of the Chinese economy was centered around decentralization and despecialization. The emphasis on self-reliance during the Mao era

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54 See ZHONG GUO DIAN ZI BAO, #135, Dec. 6, 2002.
encouraged provinces and localities to establish all-encompassing regional economies. Since the late 1970s, reform strategies to devolve power to local governments further reinforced the cellular structure. Local protectionism, especially the above-mentioned regional administrative monopoly, has significantly increased barriers between local markets and exacerbated market fragmentation. A World Bank study revealed in 1994 a low level of variation of industry structures across the regions in China. In late 2001, the government acknowledged the persisting problem that “regional industry structures are still seriously similar”.

One of the negative implications of the fragmented nature of Chinese market is that even companies not large enough to influence the national market are able to effectively monopolize the relatively closed and isolated local market. In the more economically developed areas, where companies have experienced substantial growth, local private monopolies are more likely to happen. Most of those monopolistic actions take the form of concerted action. For example, in 1997, five big shopping malls in Jinan boycotted Changhong color TV and forced the producer to lower its price. In June 2002, seven gas companies in Xinyang, Henan province jointly raised the gas price by 66%. One term of the agreement even required each to deposit 5000RMB as “good faith pledge”, which may be forfeited upon

58 In the Third Plenary Session of the 11th Central Committee of the Communist Party, which marks the historical turning point to reform, it was decided that “it is necessary to shift the it (authority) to lower levels so that the local authorities and industrial and agricultural enterprises will have great power of decision in management under the guidance of unified state planning…..” See Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China (Adopted on December 22, 1978), for the English Translation, see CHINA’S SOCIALIST ECONOMY- AN OUTLINE HISTORY (1949-1984) (Liu Suinian, Wu Quangan eds.,1986).


violation of the price cartel.62 A recent trend is cartel orchestrated by trade associations. In Shanghai minimum price for gold was set by the local trade association and TV retailers raise price uniformly the second day after an association meeting in early 2002.63 The powerful Shenzhen Furniture Association constantly controls price, “recommends color or style” and uses furniture exhibition as a leverage to enforce its decisions. 64

7. The Globalization Impetus: WTO Membership Raises Concern on Foreign Competition

China’s accession to the WTO in 2001 started a new era for its integration to the rest of the world economy. As China’s market opens up more to the world, a legitimate concern arises whether Chinese companies can compete with foreign firms and China’s many fledging industries can fare well or even survive.

At present, most Chinese business entities are still small and weak. Even some large industrial companies, are relatively small when put in the context of the global market. In 2002, China had only eleven firms listed in Fortune’s Global 500,65 all of which have operated under protected domestic environment, enjoyed preferential treatment as large SOEs and half of them prospered as monopolies or oligopolies. Five of the biggest employers in Global 500 are Chinese companies,66 which indicates serious inefficiency and downsizing

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63 Interview with Xiang Ti, Official at the Legal Affairs Office of Shanghai Municipal Government, in charge of drafting bill of local association legislation, in New Haven. (June 25, 2002)

64 Interview with Du Xingqiang, Official at the State Council’s Office of Legislative Affairs, in charge of market regulation.

65 See the July 22, 2002 Issue. Available at http://www.fortune.com/fortune/global500/0,15119,1,00.html Those firms are: State Power (60), China National Petroleum (81), SINOPEC (86), China Telecom (214), Industrial and Commercial Bank of China (243), Bank of China (277), China Mobile (287), Sinochem (311), China Construction Bank (389), Chinese Petroleum (467), Agricultural Bank of China(471).

problems. Furthermore, despite of countless reform efforts, in most sectors the Chinese enterprises are still vulnerable to international competition. Right now no Chinese firm is qualified as a global giant corporation and the daunting difficulties in SOE reform and economic transition may continue to dim that prospect.

Due to China’s WTO commitments, however, the large Chinese firms will soon find themselves competing with the multinational firms on the global level. China has promised to fully open up an array of protected sectors after relatively short grace periods. At the same time, because of global economic slowdown and China’s steady growth foreign companies have also intensified their efforts to penetrate the Chinese market. More than 400 of the Fortunate Global 500 companies have investment in China and about 110 of them established study and designing centers in China. Two third of the

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68 Id.

69 For example, in the telecommunication industry, long considered one of China’s key national industries, foreign investment will be allowed and after various phasing periods (2-6 years), geographical restrictions will be removed and foreign ownership will be allowed up to 49% for mobile telephone and domestic and international service, and 50% for value added services. In the banking sector, where China’s commercial banks lag far behind, by 2007, foreign banks will be allowed, among other things, to offer Chinese currency (RMB) services to both foreigners and Chinese nationals without geographical restrictions. In the automobile industry, which has been protected by high tariff (55%) and import quota, China will reduce the automobile import tariff to 25% by 2006, cut the average import tax on car spare parts to 10%, and phase out the import quota. Relaxation in other sectors, such as distribution, energy, securities, insurance and agriculture, will similarly subject Chinese firms to intense competition. and import quota, China will reduce the automobile import tariff to 25% by 2006, cut the average import tax on car spare parts to 10%, and phase out the import quota. Relaxation in other sectors, such as distribution, energy, securities, insurance and agriculture, will similarly subject Chinese firms to intense competition. In addition, in those originally less protected industries, foreign investors and firms will benefit by China’s compliance with WTO rules to improve transparency, promote rule of law, enforce of national treatment and eliminate trade barriers. See Protocol on the Accession of People’s Republic of China, Annex 9: Schedule of Specific Commitments on Services, available at http://www.chinawto.gov.cn/article/articleview/555/1/280/ (last visited May 12, 2003).

established study and designing centers in China.\textsuperscript{71} Two third of the world’s largest 50 retailers have established business in China during the first year after China joined WTO.\textsuperscript{72} These are just a few examples of the change of China’s role in the multinational firms’ global strategy: transition from merely a potential large market to a workshop of world’s manufacturing factory. A few trends in FDI have become manifest in recent years to confirm such a shift, including diversification of investment structure, localization of management and utilization of more advanced technology.\textsuperscript{73} One notable change is the increase of wholly foreign-owned enterprises and decrease of joint ventures.\textsuperscript{74} Foreign investors are also showing a growing interest in M&A as a channel for expansion rather than joint ventures since 2002.\textsuperscript{75} This is clearly an indication of foreign firms’ elevated confidence in both their long-term presence in China and their competitive capacity.

Chinese leaders are fully aware of the double-edged nature of foreseeable intensification of competition in China’s home market. While policy makers have counted on it to improve the performance


\textsuperscript{74} According to the statistics of MOFTEC, in 2002, joint –equity ventures decreased 4.74% from previous year, Co-Operative Joint Ventures dropped 18.59%, while wholly foreign-owned enterprises increased by 32.87%. The newly established wholly foreign-owned enterprises in 2002 numbered 22173, consisted 65% of all the new established FDI enterprises of the year (34171). Statistics available at http://www.moftec.gov.cn/table/wztj/2002_12.html.

\textsuperscript{75} See supra note 74.
of domestic firms and boost economic growth, they are concerned that foreign firms may muscle in too swiftly and become monopoly powers before the Chinese enterprises are well established. Foreign conglomerates with technical expertise, efficient management and ample capital pose a formidable power to crush many of China’s fledging industries. Alarms of early signs have proved this fear not totally unfounded. Foreign companies already are dominating markets of computers, cables, sedan cars, rubber, switchboards, beer, paper, elevators, pharmaceutical, detergent etc. In the electronics product market, foreign manufactures tend to form and comply with price cartel on the high-tech products they control to guarantee high margin profits. Cases of M&A for purpose of obtaining larger market share have been noted. In anticipation of WTO obligations to reduce trade barriers, China turned to put into place a viable legal mechanism to address competition ramifications. In October 2001, on the eve of the WTO accession, the Chinese government pledged to enact or revise “a series of laws in compliance with WTO rules to preserve fair protection and protect domestic industries”, including, specifically, an anti-monopoly law, the Anti-dumping and Anti-subsidy Regulations and a safeguard regulation. The anti-dumping, anti-subsidy and safeguard regulations were enacted shortly afterwards, which China has displayed distinctive readiness to utilize fully whenever possible. The envisaged anti-monopoly law, with fundamental and

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78 For example, Kodak’s merger with two Chinese firms in 1998 led to its 70% market share in film products in 2001. See, Perspectives of Mergers of Chinese Firms by Foreign Investors (working Paper by MOFTEC), at http://www.moftec.gov.cn/article/200302/20030200071550_1.xml.
80 The three regulations were adopted on Oct. 31, 2001 and became effective on Jan. 1, 2002.
81 See Youngjin Jung, China’s Aggressive Legalism—China’s First Safeguard Measure, J.W.T. vol.36 no.6 (2002).
far-reaching implications on competition and market order, has thus become a top priority on the legislative agenda. However, it remains to be seen whether China’s intentions to protect its domestic firm from international competition by resorting to competition law will materialize. An unintended consequence of the enforcement of an antimonopoly law, especially the fighting against administrative monopoly, may well be to create a better environment for the multinational firms to compete more effectively in China’s market.82

III. A THIRD-WAY: SOCIALIST MARKET ECONOMY

Around the world today 100 countries have established competition laws or antitrust laws83 as well as enforcement institutions to promote economic efficiency by protecting competition in the market84. Although every country has its own version of the competition law, competition regimes can be divided into two prototypes: the American-model and the EU-model. There are several distinctive characteristics for each model.

First, the American model is more court-oriented whereas the EU model is more administrative agency-oriented. In the US, a variety of actors actively participate in the court proceedings in the enforcement of antitrust laws. For instance, private parties motivated by such an incentive as treble damages system aggressively pursue their interests in court proceedings. The Antitrust Division of the US Department of Justice, a major criminal antitrust enforcement agency (along with the Federal Trade Commission, which enforces civil antitrust laws), discharges its statutory responsibilities by pursuing criminal cases through court proceedings. Second, as regards the objective of competition law, profoundly influenced by scholars of so-called Chicago School [YJ],85 the American model is more prone to

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82 A greater enforcement of competition law may result in an increase in market access. For implications of competition law on market access, see Eleanor M. Fox, Toward World Antitrust and Market Access, 91 Am. J. Int’l. L. 1 (1997).


84 Id.

85 See RICHARD A. POSNER, ANTITRUST LAW (2nd)(2001); RORBER H. BOR, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF,(2nd)(1993); Richard
promote exclusive economic efficiency\(^8^6\) while the EU model pursues more diverse or inclusive objectives such as market integration, small and medium-sized firms and fair competition and so forth.\(^8^7\) Third, the founders, at least, of each system had a different view over the term ‘bigness.’ As far as statutory languages go, American antitrust law would suppose that the state of monopoly could be condemned whereas EC competition law posits that one could be subject to disciplines only when he/she abuses dominant position. The drafters of EC Competition law imported the concept of abuse of dominant position from the German Competition Law. The term “bigness” was not an imminent problem to the EC drafters. They, rather, were of the view that corporations in EC were too small and fragmented, espe-


\(^8^7\) VALENTINE KORAH, An INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE (6th) 10-11 (1997).
cially in comparison to US companies, to face international competition.\(^88\)

With its long history and rich precedents, the American model has been used studied as a yardstick by many other nations. In China, the American antitrust law has been extensively discussed.\(^89\) Nevertheless, the EU model appears to be gaining momentum in the world. Recent years have witnessed that the EU model frequently adopted by most transitional economies for the reasons set out below.\(^90\) In fact, China also follows the EU competition law model in terms of its basic structure and legal setting.

First, the civil law tradition of countries emulating EU model has great impact on the decision about which model they should follow. Because China is not equipped with a well-developed judicial review system, the Chinese government must have found it very difficult to adopt the American-style antitrust system. The legal tradition of a country oftentimes overcomes semantic differences between the American and EU model. For instance, Japan has been regarded as a country that has adopted the American model of antitrust law because the legislative history shows that the US planted its own version of antitrust law into the Japanese legal system,\(^91\) but even some of the elements similar to those of American antitrust law are practiced in line with the continental civil law tradition. It is quite natural that China commonly classified as having a civil law tradition has shown its penchant for the EU model.

Second, since China’s Constitution proclaims to pursue a socialist market economy, China cannot adopt the objective of the US antitrust law, which many courts and scholars [cite simply footnote 92YJ] believe has “economic efficiency” as its exclusive goal. Article 1 of the Draft states “[t]his law is enacted for the purposes of prohibiting monopoly, safeguarding fair competition, protecting the legal

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\(^{91}\) JOHN O. HALEY, ANTITRUST IN GERMANY AND JAPAN 52-63 (2001).
rights of business operators and consumers, and the public interest, and to ensure the healthy development of the socialist market economy.” Apart from the language “prohibiting monopoly”, all the other elements Article 1 enumerated as a goal of the Draft clearly deviates from the goal of US antitrust law.

Third, China is not confronted with the “bigness” problem. Rather, the Chinese government believes that Chinese companies are too small in scale and vulnerable to foreign competition. Thus, it is quite understandable that the Chinese government adopts the scheme of “abuse of dominant position” following the EU model.

Therefore, Chinese competition law is similar to the EU model. However, it is important to note that the Chinese competition law greatly resembles the German competition law. This is primarily because since the EU competition is based on a handful of provisions, China may well have looked at the German competition law with a bulk of sophisticated provisions, which is considered to have had significant impacts in drafting the EU competition law.92 One commentator advocates to post-socialist countries the value and ideas (so-called “ordoliberalism”)93 that underlies the German competition law.94 Since German Competition Law pursues neither a pure capitalist market economy nor pure socialism,95 the drafters of the Chinese competition law would find many provisions of the German Competition Law to lend itself to the situations of the Chinese socio-political economy.

Despite these similarities, China follows neither the EU or German prototypes exactly. China distinguishes itself, for example, by incorporating its paramount concerns over administrative monop-

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92 The German had just completed almost a decade of debates about competition, and had just passed Europe’s first modern competition statute. See David J. Gerber, Book Review: Law & Competition In Twentieth Century Europe: Protecting Prometheus, 6 Colum. J. Eur. L. 259, 263 (2000).

93 Ordoliberalism had profound impacts in laying out the foundation for German competition law. It, unlike pure liberalism advocated by such intellectuals as Friedrich von Hayek, recognizes the need for the state to play a major role in maintaining the conditions of competition. See David. J. Gerber, Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the “New” Europe, 42 Am. J. Comp. L. 25, 28-52 (1994).

94 Id., at 25, 79-80.

95 Id.
oly. In this respect, the Chinese draft legislation has much in common with other East Asian neighboring countries such as Korea and Japan. They contain in their competition laws a very unique set of provisions that deal with the issue of general concentration. For instance, Korean and Japanese competition laws contain provisions on restricting cross-share holding, holding companies, etc. Competition law is not merely an economic-related legislation. It is at the heart of a broader socio-economic system of every country. Thus the law is carefully crafted to address what are the most important economic problems in each country; China has a problem of administrative monopoly; Korea and Japan have a problem of industrial business conglomerates, Chaebol, prewar Zhaibatsu/postwar Keitetsu respectively.

The specific focus on administrative monopoly in the Draft demonstrates that China is striving to lead its economic system from central planning to a market-oriented system. The successful transition from centralized economic system to a market economy requires a massive amount of privatization as well as exposing state-own companies to competitive market forces. A tough stance toward administrative monopoly would be viewed as the first positive step toward a more competitive market environment in China because regulatory/legal monopoly is prevalent in China as a former communist country. The idea of combating administrative monopoly can be understood as a regulatory reform in a broad context as advocated by Organization For Economic Cooperation and Development (“OECD”). In fact, a sufficient regulatory reform should precede

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96 Korea’s Monopoly Regulation and Fair Trade Act, Chapter 3: Restrictions on Business Combinations and Economic Concentration; Japan’s Act Concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade, Chapter IV: Stockholdings, Interlocking Directorates, Merger and Acquisitions.
97 Id.
98 See generally EDWARD M. GRAHAM, REFORMING KOREA’S INDUSTRIAL CONGLOMERATES (2003).
99 For a general explanation of Keiretsu, see Akira Goto & Kotaro Suzumura, KEIRETSU: Interfirm Relations In Japan, in COMPETITION POLICY IN THE GLOBAL ECONOMY: MODALITIES FOR COOPERATION, 361-78 (Leonard Waverman et al. eds., 1997).
adequate level of competition enforcement since the latter is supposed to be applied to private anticompetitive behaviors. However, China’s initiatives to crack down on administrative monopoly are more focused on integrating fragmented national markets. This is a daunting task. In the US, the dormant commerce clause under the US Constitution was employed to attain integration of the national market. In the EU, other potent legal instruments such as trade policies (prohibition of quantitative restrictions and non-discrimination principle) have been extensively utilized to accelerate the integration of the EU market in addition to the EU competition law regime.

With a single competition law, the Chinese government is attempting to achieve two objectives: integration of national market and realization of competitive market. The Draft is a good manifestation of all-out efforts by the Chinese government to clamp down anticompetitive behaviors in the market, which requires cooperation from all levels of the society. Article 7 of the Draft codifies the government’s expectation of such cooperation: “[t]he State encourages, supports and protects social supervision of monopoly by all organizations and individuals.” This is a very ambitious project and quite instructive for the future development of competition law. Thus far, there is a dichotomy: competition law is perceived as dealing with only private anticompetitive behaviors while to address government monopoly, additional legislative actions are required. In this sense, China’s competition regime aims establish an economic constitution that overrides other laws and regulations hindering the creation of an effective competitive market. It is unclear how such a novel notion will play out, especially given the fact that all statutes have equal weight and status. Clearly Chinese competition laws are pursuing a third-way under the name of realizing socialist market economy.

IV. CHINESE ANTI-MONOPOLY REGULATIONS
A. Formative Years of China’s Competition Regulations

As early as 1980, the State Council promulgated the Transient Provisions on the Development and Protection of Socialist Competition,101 China’s first legal document on competition. With

101 Promulgated on October 17, 1980. See Official Gazette of the State Council, No. 487.
the benefit of hindsight, one can easily detect the contradictions of
the competition policy due to the constraints of underlying ideology.
This regulation tried to introduce maximum degree of competition
into the planning system. For example, although it acknowledges that
necessary adjustments should be made to the pricing system in order
to conduct competition, at the same time the regulation stipulates that
the enterprises must apply for government approval to raise prices.
Furthermore, the regulation states that prices of designated key prod-
ucts must remain “stable”. While it encourages technology devel-
opment and commercial transfer, the regulation also urges enterprises
to engage in technology exchange in the spirit of socialist co-
operation.

The most significant provision in this legislation is Article 6,
which prohibits “regional blockade” and “department fragmentation”,
the earliest attempt to address administrative monopoly. But over-
all, the regulation is toothless without any implementing mechanism.
No enforcement institutions, legal remedies or sanctions were spelt
out. Instead, it requires involved regions and departments to imple-
ment detailed measures.

In 1993, the Law of the People’s Republic of China for
Countering Unfair Competition (hereinafter ‘LCUC’) was enacted.
Rather than incorporating a separate anti-monopoly law, several anti-
monopoly provisions were inserted into the LCUC. Article 6 of the
LCUC prohibits public utility operators or other monopolies from
imposing transactions with the view to preclude competitors. Article 11
forbids setting predatory prices. Collusion in bidding is prohibited in Article 15. Article 7 explicitly opposes administrative monopoly in the form of forced transactions and local protection-

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102 Transient Provisions on the Development and Protection of Socialist Competition, article 5.
104 Article 6 states “[n]o region or department is allowed to blockade the market, or pro-
hibit the sale of commodities from other regions in the local market or within the depart-
ment.”
106 Law of the People’s Republic of China for Countering Unfair Competition, article 11.
107 Law of the People’s Republic of China for Countering Unfair Competition, article 15.
ism. In relevant provisions, legal liabilities and sanctions of those monopolistic activities (except the predatory price in article 11) are stipulated. Although the usage of the term ‘anti-monopoly’ is avoided, the LCUC thus addresses certain forms of restrictive agreement, abuse of dominant market position and administrative monopoly, albeit limited in scope.

The LCUC authorized the State Administrations of Industry and Commerce (‘SAIC’) and its local branches (‘AICs’) as enforcement institutions. This is particularly important to enforcing such anti-monopoly provisions, because to implement the general terms used in the LCUC, SAIC can pass regulations within its authority, which in effect substantiate those provisions and maximize their applicability in practice. Over the years SAIC enacted and issued numerous regulations and circulars, such as Provisions on Prohibiting Restrictive Activities on Competition by Public Utility Enterprises, Reply on the Definition of Illegal Acts and Calculation of Illegal Earnings under Article 23 of LCUC, Reply on the Nature of Restrictive Measures by the Travel Administration and Unreasonable Charges by the Travel Agencies. This body of legislation, although with lower authority, constitutes the real operating rules in combating the specified monopolistic activities under LCUC. Thus under LCUC and its ramifications, a narrow and limited de facto competition mechanism was set up.

However, although some jurisdictions, such as Taiwan combine antimonopoly and unfair competition together under one law, China’s current competition structure is nowhere near a similar system in serving as a basis for a complete and effective competition regime. Furthermore, as will be detailed later, institutional and legal limitations have developed since its establishment, which has reduced

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113 Lawrence L.C. Lee, Taiwan’s Antitrust Statutes: Proposals For a Regulatory Regime and Comparison of U.S. and Taiwanese Antitrust Law, 6 Ind. Int’l & Comp. L. Rev. 583.
its strength to the point of paralysis. With rapidly mounting pressure for an anti-monopoly law, China’s competition structure has become patently inadequate and desperately in need of an overhaul for the following reasons.

Obviously as a compromise to accommodate conflicting interests, the LCUC leaves a leeway that has backfired on its own efficacy. According to article 3, SAIC and AICs of the governments above county level are the enforcement institutions, but ‘where laws or administrative rules and regulations provide that other departments shall exercise the supervision and inspection, those provisions shall apply’. This in effect allows any other government department unchecked exemption of the LCUC application and a share of the enforcing power. Indeed, quite a few departments, many notoriously engage in administrative monopoly, have taken advantage of this inviting opportunity. For example, the China Civil Aviation Bureau, Ministry of Information Industry, People’s Bank, Ministry of Justice have adopted regulations and taken over power to regulate monopolistic activities under their portfolio. The dismemberment by those regulations severely spoils the effect of anti-monopoly provisions under the LCUC.

As the LCUC is limited in scope and its implementing regulations have low authority, anti-monopoly provisions have appeared in legislations beyond the reach of the LCUC. An example is the Price Law passed in 1997. Article 14 of the Price Law forbids ‘unfair pricing activities’ such as collusion to manipulate market price to impair the interests of other business operators or consumers, sell products below costs in order to eliminate competitors or monopolize the market, or offer the same products/service at discriminative price. The Price Law grants enforcement power to “price administrations above county level.” As China enacted more laws to modernize its legal system, the number of such competition provisions

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has increased.\textsuperscript{117} To complicate the legislative chaos, different authorities have issued directives, interpretations and circulars at all levels with diverging effects. Without a single umbrella scheme, the widely dispersed competition provisions have given rise to inconsistencies, contradictions and difficulty in enforcement.

SAIC and local AICs, as primary enforcement agencies, have proven to be very weak. The AICs at all levels are part of the executive branch and lack sufficient independence and authority. Not only are they often challenged by contradictory regulations adopted by other departments, but also their investigations are often interfered and enforcement obstructed.\textsuperscript{118} The State Council, trying to empower the AICs to better combat monopoly, upgraded SAIC to Ministerial level in April 2001,\textsuperscript{119} but to little effect. The reality is revealed in a recent case in Fangchenggang of Guangxi province. In early 2003, three local government departments jointly issued a circular, requiring gas users to buy designated burners before the end of June. Alarmed by a high amount of public complaints, the mayor intervened and the circular was repealed. The local AIC played no role other than an advocate of relevant LCUC provisions to the mayor and involved departments.\textsuperscript{120} Consultations and coordination are still the

\textsuperscript{117} For example, Article 32 and Article 6 of The Law on Bidding and Inviting Biddings, adopted on August 30, 1999 by the Standing Committee of the 9\textsuperscript{th} National People’s Congress, require ‘bidders shall not collude each other in a tender’ and no bidding or bidding-inviting shall be subject to local or department intervention. Also article 29 of Regulations on Administration of Import and Export of Technologies, adopted by the 46th Regular Meeting of the State Council on Oct. 31, 2001 in Decree of the State Council of P. R. China (No. 331) prohibits certain restrictive clauses in a contract of import of technologies, including clauses imposing conditions to purchase “unnecessary technologies, raw materials, products, equipment or services”; restricting the assignee or licensee to obtain similar to or competitive technologies from other sources; “unreasonably restricting the channels or sources for the assignee or licensee to purchase raw materials, spare parts, products or equipment”; etc.


working rule of the Chinese government, and AICs inherently lack the leverage to prevail in carrying out many of their antimonopoly missions.

Under the current system, legal sanctions are rarely effective. For example, although setting predatory price is prohibited by article 11 of the LCUC, no corresponding sanction is provided, which deprives its enforceability. Under article 23, AICs can impose RMB 50,000-200,000 (about $6040-24155) on a public utility enterprise or other monopoly for restricting users to purchasing designated commodities. Such a range is normally only a fraction of the profits made by those enterprises and thus can hardly deter them from violating the statute. For administrative monopoly violating Article 7 of the LCUC, Article 30 only requires administrative agency at a higher level to ‘make corrections’. Even if ‘the circumstances are serious’, the higher agency may impose internal administrative sanctions on the officials directly responsible. Neither the AICs nor the victims injured by monopolistic activities can challenge those decisions.

B. The Draft of China’s Anti-Monopoly Act

The Draft is composed of 8 chapters and 58 articles. From the comparative standpoint, it is notable that the Draft contains a series of provisions to address “abuse of administrative powers” in addition to abuse by private enterprises of dominant position monopoly and of a very strong enforcement mechanism. As for the whole structure of the Chinese competition law regime, the Draft should be construed along with the LCUC, which was explained in the preceding section. The Draft does not have provisions for “unfair trade practices” in a strict sense, such as those provided in Korea and Japan’s competition laws, which were supposedly influenced by Article 5 of the US Federal Trade Commission Act. Both countries also adopted discrete laws for “unfair trade practices” outside their competition laws narrowly defined, modeled after German Unfair Trade Law. The concept of “unfair trade practices” is nebulous. At the minimum, the regulation of “unfair trade practices” is mainly to pro-

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121 See Chapter five of the Draft, “Prohibition of Administrative Monopoly”.

122 Article 5 (a) (1): “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.”

123 Gesetz gegen den unlauteren Wettbewerbs (“UWG”).
tect “fairness in competition process” or “fair competition” so as to include even competitors as its object. As such unfair trade laws regulate practices that have less direct effects on the market itself than on the process in transactions among interested parties. For a system in which particularly abuse of dominant position is provided in the competition law, inclusion of unfair practices law in competition law may create overlapping regulations against unfair trade practices by both abuse of dominant position and unfair practices laws. In this respect, it is understandable that following German competition regime, China addresses unfair trade practices chiefly by the separate law, the LCUC, not by the Draft.  

1. Territorial Scope

Following the model of the German Competition Law, the Draft explicitly recognizes the possibility that China’s law can be applied outside the territory of China. The drafters may have believed that since the extraterritorial application of competition law is commonplace in major countries such as the US and EU, it would be appropriate to codify the basic principle of extraterritoriality of competition law.

Indeed, the International Antitrust Guidelines, which were promulgated in 1995 by US antitrust authorities, DOJ and FTC, state that “anticompetitive conduct that affect U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.” ("effects" doctrine) The Guidelines refer to the Supreme

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124 In Korea, some scholars argue that the structure of Korea’s competition law is reconsidered because it has provisions on abuse of dominant position as well as on lengthy “unfair trade practices.” Ohseung Kwon, Wirtschatsrecht(4th) 311 (2002).

125 Article 130(2) of GWB states that “[t]his Act shall apply to all restraints of competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act.”

126 Article 2 of the Draft states that “[t]his Law shall apply to behavior outside the territory of the People’s Republic of China that violates provisions of this Law and limits or affects domestic market competition within the territory of the PRC.”

Court’s 1993 decision in *Hartford Fire Insurance Co. v. California*\(^{128}\) and state that “imports into the United States by definition affect the U.S. domestic market directly, and will, therefore, almost invariably satisfy the intent part of the *Hartford Fire* test. Whether they in fact produce the requisite substantial effects will depend on the facts of each case.”\(^{129}\) For instance, where a cartel formed by foreign producers with no U.S. subsidiaries or production has raised the prices of products the substantial sales of which, both in absolute terms and relative to total U.S. consumption, has been imported into the United States, the US enforcement agencies would find in line with the *International Antitrust Guidelines* that the Sherman Act jurisdiction is clear because there was an intended and foreseeable effect on U.S. commerce.\(^{130}\)

The EU employs the “implementation” test adopted by the European Court of Justice.\(^{131}\) This test is perceived to produce a similar outcome as the “effects” test employed in the United States.\(^{132}\) Articles 81(1) and 82 of the Treaty of Rome prohibit certain conduct that may affect trade between Member States and has an anticompetitive effect “within the Common Market.” The former requirement is


\(^{129}\) *INTERNATIONAL ANTITRUST GUIDELINES*, §3.11. *See also* Caribbean Broad. Sys. v. Cable & Wireless PLC, 148 F.3d 1080 (D.C. Cir. 1998) (holding that FTAIA conferred jurisdiction over a foreign radio station’s complaint alleging anticompetitive conduct by another foreign radio station based on injuries to U.S. advertisers).

\(^{130}\) *INTERNATIONAL ANTITRUST GUIDELINES*, Illustrative Example A.


\(^{132}\) Charles F. Rule, Assistant Attorney General, Antitrust Division, The Justice Department’s Antitrust Enforcement Guidelines for International Operations, Address Before the International Trade Section and Antitrust Committee of the D.C.Bar (Nov. 29, 1988). Compare Sir Leon Brittan, Address, Jurisdictional Issues in EEC Competition Law (Feb. 8, 1990) (In Wood Pulp, “the Court did not endorse the effects doctrine.”). Apparently, the Community’s jurisdiction to apply its competition rules to conducts outside the EU market is covered by the (objective) territorial principle, as universally recognized in public international law.
fulfilled whether the effect is direct, or indirect, actual or potential. However, the tests in both systems are different. In the EU “appreciable” effect, which appears to mean more than “de minimis” or “perceptible” is enough. But in the US such effect must be “substantial,” which is more stringent than “appreciable.”

The foregoing discussions are only the very first threshold question to be answered to exercise jurisdiction extraterritorially; a concept generally known as subject matter jurisdiction. Even if such a test is passed and the subject matter jurisdiction is found to exist, a country intent on extraterritorial application of competition law should pass another hurdle such as personal jurisdiction and judicial service and so on. Most importantly, such a country must find the foreign conduct at issue has violated any of substantive provisions of its competition law. Essentially, to apply competition law extraterritorially is to impose its own (substantive) competition model on foreign countries with a different economic system. As such, it is much more likely that a country that has a more mature competition market is willing to exercise its competition law over conducts that takes place in foreign countries. It remains to be seen whether China will aggressively exercise its competition law over foreign anticompetitive behaviors, but one cannot rule out the possibility that China may do so given the recent showing of its “aggressive legalism.”


135 It is a question of whether a country has a jurisdiction to prescribe and enforce rules of law governing persons and conduct beyond national borders.

136 Even if subject matter jurisdiction exists, a country cannot exercise its jurisdiction without personal jurisdiction. In International Shoe Co. v. Washington, the US Supreme Court held that due process “requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”(326 U.S. 310, 316 (1945).

137 ABA, ANTITRUST LAW DEVELOPMENT 1176-1201 (5th ed., 2002) vol. II.

138 Jung, supra note 82.
2. Prohibition of Administrative Monopoly

Ironically, the most important catalyst behind China’s anti-monopoly law - administrative monopoly - is not a commonly found theme in other countries, especially developed economies. Even in comparison with competition laws of other transitional countries that have similar regulations, China’s efforts to curb governmental anti-competitive actions, embodied in chapter five of the Draft are far-reaching and ambitious. Unlike other competition regimes, where private monopolies are the main target of enforcement agencies, administrative monopoly in China constitutes the most destructive barrier to the formation of an orderly market. For instance, it often encourages other types of monopolistic activities, such as abuse of dominant position and cartels. More importantly, it reflects the recurring problem Chinese reformers have all along strived to solve but with little success: to harness administrative power and replace direct administration of economy with legal rules. The various constraints in China’s current stage of development, however, render the prohibitive measures on administrative monopolies less potent than they appear.

Under the Draft, administrative monopoly is used to cover anticompetitive activities by governments and their subordinate departments by abusing their administrative power\textsuperscript{139}: industry monopoly and regional monopoly. Chapter five details these two types of administrative activities into five categories of prohibitive government actions - (1) discriminatory practice by forcing purchases from certain business operators or restricting other business operators’ legal business activities (article 31); (2) regional monopoly, which is to limit inflow of products into the local market or outflow of local products to other markets using all kinds of proscribed means under article 32; (3) department and industry monopoly, by which to limit operators from entering into the markets of particular industries and to eliminate or limit market competition (article 33); (4) compel business operators to take actions to eliminate or restrict market competition prohibited by the Draft (article 34); and (5) enactment of regulations that eliminate or limit competition to obstruct fair competition (article 35).

\textsuperscript{139} The Draft, Article 3 (4).
While state/government actions sometimes inflict deleterious distortion on competition, most countries do not address this problem primarily through competition law. In a sense, the notion of civil/criminal enforcement by one government department against other government department does not appear to be consistent with the notion of the government as a single entity. For instance, not only the Japanese competition law (Act Concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade ("Fair Trade Act")), as its title reveals, openly set its scope against only “private monopolization”; competition enforcement is often impeded when private anticompetitive actions are the result of government collaboration. Starting in World War II, a pattern of close cooperation developed between the Japanese business and government.\textsuperscript{140} To enforce “industrial policy”, Japan’s administrative agencies, notably the Ministry of International Trade and Industry (MITI, now METI), routinely provided “administrative guidance” through informal persuasion that effectively induces voluntary cooperation of private companies.\textsuperscript{141} For obvious reasons, this created thorny problems for competition law enforcement. For example, as part of a 1980 landmark decision by the Tokyo High Court that imposed most severe punishment on antitrust offenders, the defendants in an output restriction case were still not convicted in the criminal charges based on the finding that their illegal activities were a result of close MITI supervision and guidance and under erroneous assumption that their conduct was not unlawful.\textsuperscript{142} As such, widely practiced state interference, though in most case non-binding legally, is both beyond the reach of competition law and serves as a defense to private competition law violations in Japan. Moreover, many, if not most, competition laws including German,\textsuperscript{143} Japanese,\textsuperscript{144} and Korean\textsuperscript{145} versions have provisions ex-

\textsuperscript{140} HALEY, supra note 92, at 52.

\textsuperscript{141} See, e.g., James D. Fry, Struggling to Teethe: Japan’s Antitrust Enforcement Regime, 32 Law & Pol’y Int’l Bus.825, 2001.


\textsuperscript{143} GWB Chapter V—Special Provisions for Certain Sectors of the Economy.

\textsuperscript{144} Japan’s Fair Trade Act, Chapter VI Exemptions. For a suggestion for reconsideration of these exemptions clauses, see Toshiaki Takigawa, The Prospect of Antitrust Law and Pol-
plicitly exempting actions by other government agencies from the scope of such laws. For instance, Article 58 of the Korean competition law states that “This Act shall not apply to the acts of an enterprise or an enterprisers organization conducted in accordance with any Act or any decree to such an Act.” By way of this type of exemption clause, competition authorities practically condone acts of regulatory enterprises authorized by relevant legislations, much less abuse of authority of other government agencies responsible for certain regulatory industries. However, notably, China does not recognize such blank exemptions in an apparent attempt to send an unambiguous signal [YJ]to other administrative bodies and related industries.\textsuperscript{146}

In the United States, the Supreme Court in 1943 in \textit{Parker v. Brown} established immunity from antitrust liability under the state-action doctrine.\textsuperscript{147} The Court concluded that the Congress had no intent in the Sherman Act to “restrain state action or official action directed by a state”. State agents acting in furtherance of state policies and private parties acting on state law or legal mechanisms therefore are immune from antitrust enforcement under the Sherman act. In its 1992 decision on \textit{FTC v. Tocor Title Insurance Company},\textsuperscript{148} the Supreme Court applied the same principle to suits brought under the Federal Trade Commission Act. The establishment and development of state-action immunity in antitrust enforcement reflects political rather than economic considerations. As noted by the majority in \textit{Parker}, the court relied on principles of federalism in its conclusion. In \textit{Tocor}, Justice Kennedy stressed that the purpose of the active state supervision inquiry was “not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices”, as “the question is not how well state regulation works but

\textsuperscript{145} Korea’s Fair Trade Act, Chapter XI Exemptions.
\textsuperscript{146} Of course, following most competition regime, the Draft exempts exercise of intellectual property rights from its scope with some provision. Article 56 of the Draft states: “[t]his law is not applicable to the conduct of business operators exploiting intellectual property in accordance with the copyright law, trademark law, patent law and other laws protecting intellectual property rights.”
\textsuperscript{147} 317 U.S. 341, 63 S. Ct. 307.
\textsuperscript{148} 504 U.S. 621, 112 S. Ct. 2169.
whether the anticompetitive scheme is the States’ own”. In the final analysis, the state action exemption is predicated by the necessity to preserve the State’s own administrative policies and the legitimacy to replace competition by state regulation. Only actions taken by cities and municipalities not acting to enforce state policies are subject to antitrust law.

To achieve the overriding goal of an open market, the European Union is open to broader competition enforcement to curb state measures distorting free competition.  

149 In the Spaak report that preceded the Treaty of Rome establishing the EC, it was expressively stated that the Commission might propose the removal of distortions of competition that create a real and serious threat to the competition relations150. While in many cases it is hard to determine whether state intervention has gone too far, several explicit provisions on state actions were included in the Treaty of Rome ("EC Treaty").151 It must be noted, however, as an inter-states institution, the EU can only aim to remove those measures that seriously hamper integration of the different national markets.

Generally speaking, it is common to assert that competitive concerns over other government departments should be addressed by “deregulation” programs or regulatory reform initiated by the central government. In recent years, OECD has tried to bring attention to the importance of regulatory reform153 because driving out anticompetitive practice from the market via competition law is not made possible until sufficient regulatory reform is achieved. For instance, the

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149 For a detailed discussion, see CARL MICHAEL VON QUITZOW, STATE MEASURES DISTORING COMPETITION IN THE EC (2001).

150 Id, at12.

151 The Treaty of Amsterdam of 1997 renumbered the EC Treaty. Article 86 (1) prohibits member states, when grant special or exclusive rights, enact or maintain any measure contrary to the rules of the Treaty, in particular those on competition. Article 87 forbids, subject to exceptions, state aid that distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods to the extent incompatible with the common market. Procedural rules to regulate State aid is found in Articles 88 and 89. Articles 90-93 deal with distortions due to indirect discriminatory taxation.


153 OECD, supra note 101.
Korea Fair Trade Act has a couple of provisions that facilitate cooperation or coordination between Korea’s Fair Trade Commission and relevant Ministries that have statutory authorities to regulate certain industries.\textsuperscript{154}

Regarding regional monopoly, federal or quasi-federal entities such as in the US and EU respectively, have employed potent legal instruments other than competition law to cope with regional monopoly. The US has regulated regional monopoly undertaken by States by virtue of the so-called “Dormant Commerce Clause.”\textsuperscript{155} In

\textsuperscript{154} Korea’s Monopoly Regulation and Fair Trade Act Article 3.2: “The Fair Trade Commission may give opinions to the chief-officers of the appropriate administrative authorities as to the introduction of competition or other measures necessary to improve market structures, where it appears to be necessary for the Commission to carry out action plans…” Also Article 63 (Consultation on Enactment of Acts which Restrain Competition) has elaborate provisions to facilitate cooperation and coordination between the competition agency and other government agencies in charge of regulation. It states:

The chief-officer of the competent administrative authority shall seek, in advance, consultation with the Fair Trade Commission, where he wishes to propose legislation or amend enactments containing anti-competitive regulations such as restrictions on the fixing of prices or the terms of transaction, entry to markets, business practices, unfair collaborative acts, prohibited practices of an enterpriser or an enterprisers organization, etc. and where he wishes to approve or make other measures involving anti-competitive factors against an enterpriser or an enterprisers organization.

The chief-officer of the competent administrative authority shall give, in advance, notice to the Fair Trade Commission when he intends to enact or amend any rules or regulations involving anti-competitive factors.

With regard to approvals or other measures involving anti-competitive factors under paragraph (1), the chief-officer of the competent administrative authority shall give notice to the Fair Trade Commission regarding the contents of the approval concerned or other measures.

In relation to notice under paragraph (2), where it is recognized that rules or regulations to be enacted or amended contain anti-competitive provisions, the Fair Trade Commission may give advice to the chief-officer of the competent administrative authority as to the modification of such anti-competitive provisions. This paragraph shall also apply to enactments made or amended without the Fair Trade Commission as prescribed by paragraph (1), Acts and subordinate statutes enacted or amended without notice, approvals or other measures given without notice.

the EU, the nondiscrimination principle within the region has greatly contributed to integrating the EU-wide single market. In other words, these federal or quasi-federal entities have cracked down on regional monopoly primarily in reliance on trade policy tools within the region rather than of a competition law framework. Competition laws in addressing regional monopoly are very limited.

In contrast, since China unlike the US and EU lacks federal or quasi-structures and there are no trade policy tools within the country, the Chinese government should devise an instrument by which the rampant administrative monopoly can be addressed. That is why the Draft elaborates detailed provisions to address administrative monopoly. Therefore, a practical need exists for the special provision on combating administrative monopoly. One could understand the provisions to address administrative anticompetitive activities mentioned above only by putting those provisions in the extraordinary circumstances that require extraordinary measures beyond ordinary legal instruments. As mentioned in the previous Chapter, the biggest challenge China is facing toward realizing effective competitive market is intransigent administrative anticompetitive activities.

For the foregoing reasons, China assigns extraordinary role to its competition law in combating government anticompetitive actions. Unlike the US and EU, where antitrust/competition law only apply vertically to regulatory activities at lower level government entities, the Draft also attempts to address competition barriers within certain industries imposed by departments or ministries with equal legal status to the competition authority.

The Draft also distinguishes between violation of individual enterprises and government agencies. It imposes sanctions against government agencies separately from the enterprises that acted on

AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 139-166 (Thomas Cottier and Petros C. Mavrodis, eds., 2000).


157 According to Article 33 of the Draft, “The government and its subsidiary departments shall not abuse their administrative power to compel business operators to take actions to eliminate or restrict market competition that are prohibited under articles 2, 4 and 4 of this law.”
their mandate or support. In other countries such as U.S. antitrust enforcement against private companies whose violations are based on government actions might be sufficient by invalidating the disputed regulation. In some countries, competition law regulates state monopolies or enterprises to reduce possible anticompetitive actions by the State. For example, the German GBW is applicable to undertakings “entirely or partly in public ownership or are managed or operated by public authorities”.\textsuperscript{158} Article 31 of the EC Treaty deals with State monopolies in relation to goods. According to the Draft enterprises, regardless of whether private or public, are liable for violations such as abuse of dominant position or concerted actions, while at the same time, the responsible government actions will also induce liabilities stipulated by the law.

Another noteworthy comparison is that the proscribed administrative monopolistic activities often do not happen in the normal process of government regulation. The above-mentioned provisions in the EC Treaty target state-sponsored regulations or measures. In Japan, industrial policy is viewed as conducive to the economy fostered by the government. However, in China a major concern arising from reality is abuse of administrative power by adopting practice or engaging in activities in violation of law, therefore obstructs rather than advances state policies. For example, the Chinese policy makers have attempted to reduce departmental and regional fragmentation since the early 1980s. The persisting problem finally led to articles 32 and 33 of the Draft so that the forces entrenching the fragmentation can be undermined. In many cases, the government actions are plainly \textit{ultra vires}. A recent case in point is the local education authorities in Hancheng that required all local school students to purchase milk from a designated producer.\textsuperscript{159} While such abuse of public office is normally addressed in other countries by administrative law, ethics and disciplinary rules, it falls within the scope of antimonopoly law in China.

Such broad scope and strict rules against administrative anticompetitive activities, in a broader perspective, reflect China’s governance crisis as a transitional economy. Although the

\textsuperscript{158} GWB Section 130 (1).

ernance crisis as a transitional economy. Although the government is urged to regulate the economy by enforcing and complying with the law, there are no functional mechanisms to offer necessary constraints or incentives. Old institutions and mentalities encourage rent seeking by turning administrative power into a profitable resource. Government agencies are only subject to self-discipline with little accountability since no external constraints, such as effective judicial review or public election has been developed. As a result, private competition has been smothered by suppressive and irregular government practice. In this sense, the enforcement of administrative monopoly provisions is primarily to create and preserve the basic conditions for a competitive market order, a vital mission that is not needed in developed market economies.

Similar conditions and problems in other transitional economies have produced the same type of competition law provisions to prevent state bodies from taking actions harmful to market competition. Ukraine, with the broadest competition provisions on state actions, is the closest analog to China. Article 6 of Ukraine’s Law on Monopolism contains seven types of regulatory discrimination against enterprises by government agencies or officials. Those illegal conducts are strikingly similar to the administrative monopoly in the draft of China’s antimonopoly law, covering entry barriers, forced transactions, prohibition on goods movement among regions, restraints on specific enterprises etc.162

162 Some differences between the two systems are evident. Ukraine’s Article 6 lists seven specific conduct, while article 35 in the Draft on anticompetitive regulation is in general terms and subject to stretch in application. In addition, article 6 also provides exemption on the grounds of national security, defense and other public interests, while the Draft does not allow for any exemption under chapter five. In the enforcement of article 6 in the Ukraine competition law, the usual remedy is simply a cease-and-desist order.162 By contrast, the Draft devises multiple sanctions. Under article 47, for department monopolies, violation will be cancelled by a superior organization. Responsible officials will be demoted or discharged and criminal sanctions may be evoked. For all other administrative monopolies, article 48 authorizes AMAB to stop the violation in addition to possible internal administrative and
The ambitious goal of prohibiting administrative monopoly, however, may not be so easily achieved in reality. Since most of the anticompetitive actions, being abuse of administrative power by definition, are already prohibited by law, just by putting them under the antimonopoly law does not automatically lead to a better solution. In fact, the inclusion of administrative monopoly in the competition regime is an indicator of low efficacy of other laws, especially the general administrative law. However, the sanctions refer to authorities outside the competition law for enforcement. Other than the power of the Anti-Monopoly Administration Body (hereinafter the AMAB) to stop violation under article 48, other remedies rely on internal administrative procedure (cancellation of illegal action or demolition/discharge) or criminal prosecution, provided it is available by criminal law. AMAB as the competition law enforcement agency cannot initiate or be part of neither of those processes. The enforcement of chapter five in the Draft against administrative monopoly can only expect to encounter more resistance. This is because unlike the drastic political and economic transformation in former socialist countries including Ukraine, China’s transition has been steering on a gradual course, and mainly in the economic sphere. The intact political institutions pose a formidable source of inertia to produce resistance.

A difficult prospect, however, should not undermine the significance of chapter five in the Draft. Strictly speaking, it will be the first piece of legislation that sets direct limits to administrative power in economic regulation. It also openly condemns administrative monopoly to appease public discontent, which is exemplified by the unusual move by the drafters to assure the public that “administrative monopoly” had been indeed included in the Draft. 163 This will in turn enhance the public consciousness on the competition cause and help with enforcement in the long run.

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3. Prohibition of Cartel

(a) Application

Following models of most jurisdictions, chapter two of the Draft appears to enunciate that business operator entering into a “monopoly agreement”, which is broadly defined as any contract, any agreement or other collective conduct to exclude or limit competition is illegal. A combination of specific categories and general proscription is used to set the parameters of the prohibition. Six types of monopoly agreements are identified according to article 8, including price fixing of products; collusion in a tender; limitation on production quantity; markets allocation; limitation the purchase of new technology or new facilitates; and joint hindrance of transactions. They are followed by a general catchall provision to prohibit “other agreements with the effect of limiting competition”. However, the broad range of exemption from cartel regulations spells a great deal of misgivings about China’s commitments to uprooting hard-core cartels such as price-fixing and market division.

In addition, problems may arise due to the application only to “business operators”. Article 4 of the Draft defines “business operators” as a legal entity, other organization or individual that engages in product production and sales or provision of services.” Associations that do not engage in economic activities directly do not fall under the scope of the Draft. In many other jurisdictions, associations are also forbidden to play any role in the formation of anticompetitive agreements. Under section 1 of German GWB “decisions by associations of undertakings” fall under the rules on the prohibition of cartels. The competition laws of Korea, Japan and Taiwan include

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164 According to Article 8, the following agreements are exempted: “1. Joint action taken by business operators to improve technology, upgrade product quality, improve efficiency, lower costs, unify product specifications and models and to study in order to create products or markets; 2. Joint action taken by small and medium size enterprises to improve operational efficiency and to enhance their competitiveness; 3. Joint action taken by business operators to adopt to market changes, to stop seriously decreasing sales volumes or obvious productions surplus; 4. Joint action taken by business operators to promote the rationalization of production operations, division of labor or the development of specialization; 5. Other activities that may eliminate or limit competition, but benefits national economic development and the public interest.
“trade association” in its definition of “enterprise”\(^{165}\) or set up separate provisions for “trade associations.” Therefore, “trade associations” are clearly subject to the competition laws.\(^{166}\) Trade or industry associations are exerting increasing influence in the economic life in China, notably in orchestrating concerted actions among enterprises. Furthermore, many specialized ministries formerly supervising industries are to be transformed into national industry associations as part of the government restructure. They are expected to retain substantial capacity to continue anticompetitive practice but will not be subject to administrative monopoly rules. However, it remains to be seen whether AMAB will regulate business associations by way of interpretation of the statues.

Following the traditions of most countries, the Draft does not draw a distinction between horizontal and vertical agreements as provided in the German competition law. The favorable treatment for vertical agreement based on economic theory is unlikely to influence AMAB at least in the foreseeable future. It is more likely to be explained below that AMAB will take more seriously factors other than the competition element as defined by economic theory. In some Central and Eastern European countries (CEE countries),\(^{167}\) competition authorities have showed a preference to insure their ability to attack certain vertical agreement in a market without dominant firms or in a situation where dominance is hard to prove.\(^{168}\) However, authorities of some of those countries, such as Czech, Slovak and Poland, distinguish between horizontal and vertical agreements in their enforcement.\(^{169}\) In China’s case, when the economic reality demands so in the long run, the provisions might be interpreted and tailored further to differentiate the two types of relationship in enforcement because the statutory languages are minted so open-ended.


\(^{166}\) Fair Trade Law of Taiwan, articles 7, 14-17.


\(^{168}\) Id.

\(^{169}\) Id.
(b) Exemption

The second part of Article 8 in the Draft provides for exemptions for agreements between enterprises.\footnote{Those are joint actions that (1) taken to improve technology, upgrade product quality, improve efficiency, lower costs, unify product specifications and models and to study in order to create products or markets; (2) by small and medium size enterprises to improve operational efficiency and to enhance competitiveness; (3) to adapt to market changes to stop seriously decreasing sales volumes or obvious productions surplus; (4) to promote the rationalization of production operations, division of labor or the development of specialization; and (5) other activities that may eliminate or limit competition but benefits national economic development and the public interest.} In setting out prohibitions and exemption in this article, the Draft does not explicitly declare any agreements to be illegal per se, as the US law applies to certain horizontal agreement such as price-fixing and market division.\footnote{See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). The Supreme Court upheld lower court’s instruction to the jury, in which price fixing or creating price floor under market was considered illegal per se. See also United States v. Topco Assoc. Inc., 405 U.S. 596 (1972). The Supreme Court held that in imposing “territorial restrictions upon its members for their selling of its products”, the appellee’s actions constituted horizontal restraints on trade and were per se violations.}

The structure of article 8 suggests that the competition authorities always consider and weigh all applicable anticompetitive effects and overriding efficiencies/benefits of any agreement, particularly since both the proscription and exemption are codified in a single provision. There is no indication in the statutory language other than the word “exemption” that elements enumerated under the name of “exemption” are really an exception to the general prohibition of cartels. In particular, one of the elements on which exemption is to be made is open-ended, such that any activities benefiting national economic development and the public interest could be held to be legal.

Some jurisdictions such as Germany, Korea and Japan provide for several factors to be employed to enjoy exemption from cartel regulations. However, these countries do not use language narrowly tailored to circumscribe the discretion of enforcement authorities or at least make clear that invocation of exemption is allowed in exceptional and unusual situations. The way in which the prohibition of cartel is enunciated in the Draft runs the risk of sub-
jecting all cartel or collusive behaviors to contain an open-end provision to take into account any “other” factors. This case-by-case approach is similar to the “rule of reason” application of which is entirely in the hands of AMAB. Indeed, in many CEE countries, which similarly do not treat naked cartels as illegal per se by the statutory language, there has been a movement toward more serious treatment for blatant cartel agreements. To some, there is in fact some treatment of cartels in such countries as Russia and Hungary. Nevertheless, it is clear that the way in which cartels are treated in the Draft may well send an ambiguous signal to business operators subject to the Draft, which would greatly undermine the effective enforcement of a nascent Chinese competition regime.

It is not clear from the language of law whether parties to an agreement must apply for exemptions. Under German GWB certain cartels and decisions, i.e., those under sections 2 to 4(1), “must be notified to the cartel authority” in order to be exempted. Agreement and decisions in others, in sections 5-8 “may”, upon application, be exempted by the cartel authority, which means the notification is not a required obligation. Compared with the clear language of the GWB, article 9 states that business operators “can” apply to AMAB to determine whether agreements fall within exemptions of article 8. The interpretation of the term “can” is significant. According to article 44 of the Contract Law, whenever the law requires such procedures as approval or registration, a contract shall not enter into effect before such procedure is completed. If the notification is considered an obligation, then non-compliance renders the agreement not effective even if it would have been exempted. If it is not a required obligation, non-notification of AMAB of an agreement which later upon challenge is found to qualify for exemption would have taken effect when it was concluded between the parties.

To apply for an exemption, business operators must submit required information to the AMAB within 15 days from the date of

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173 GWB section 9(1).
the conclusion of the agreement. The AMAB should make a decision on whether to approve it or not within 60 days upon receipt of the application and the failure to reply within this period will deem to be approval. In granting an approval, the AMAB can impose restrictive conditions to the agreement. It is stipulated that the approval should be of a limited term, but it does not specify the length of the term or whether such a term is renewable, like the practice in Germany. The AMAB is granted with significant power to revoke or modify the agreement or order the termination or correction of the agreement under certain circumstances. However, the law does not provide the mechanics for the on-going supervision necessary for exercise of such power.

(c) Sanctions

On violation of prohibitions on monopoly agreement under article 8, the AMAB can order the parties to stop the violation and may decide to fine the offender a fine between RMB 100 thousand to 5 million. In addition, according to article 52 (5) of the Contract Law, “violation of mandatory provisions of laws or administrative regulations” renders the contract null and void. Therefore, another significance of article 8 is that it provides an important basis to nullify a contract or any part thereof, which entails anticompetitive effects.

175 The Draft article 10.
176 The Draft, article 11.
177 The Draft, article 11.
178 GWB Section 10 (4).
179 Those include (1) major changes of economic situation occur; (2) the reason for the approval is invalidated; (3) the business operators fail to observe additional obligations of the approval; (4) the agreement is approved based on incorrect or misleading information; and (5) there is abuse of the exemption. If the last three conditions apply, the revocation is retroactive. See article 12 of the draft.
180 The Draft, article 44.
4. Prohibition Against Abuse of A Dominant Position

(a) Prohibition

Chapter 3 of the Draft deals with the prohibition against abuse of a dominant position. According to article 14, “a business operator shall not abuse its dominant marketing position, obstruct the activities of other business operators, eliminate or limit competition.” The Draft adopts the EU/German standard as opposed to the U.S. standard in addressing monopolization. Article 14 follows a similar line as Section 19(1) of the German GWB, which provides that “the abusive exploitation of a dominant position by one or several undertakings shall be prohibited”. Similarly, the EC Treaty targets “any abuse by one or more undertakings of a dominant position” that is “incompatible with the common market”. As mentioned earlier, this position is understandable because Chinese corporations are so small and the market is so fragmented that the government may well target the abuse of corporations rather than the size of corporations as such.

It should be noted though that the US antitrust law also does not condemn the ‘state’ of being a monopoly itself. Despite the language of section 2 of Sherman Act, the judicial gloss of the section indicates that for there to be a violation of the section, not only the possession of monopoly power, but also a certain exclusionary act should exist. In Grinnell, Supreme Court has required a second element: “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” Nevertheless, there are significant differences between both systems in their applications. In the US, the courts would find there to be an exclusionary act only when such an act has reduced economic efficiencies

by way of either raising prices or reducing output. In contrast, in the EU, the courts and enforcement agencies would find abuse of dominant position even though there has been no increase in price and reduction in output. They would look into factors other than economic efficiencies so that they could take account of the “process” of competition. As a result, the criterion “abuse of dominant position” is likely to result in a more rigorous enforcement against exclusionary practices that hamper competition.

In addition, the types of remedies available to enforcement authorities differ between both systems. In the US, as seen in Standard Oil and AT&T and in the recent attempt by the district court in Microsoft, the enforcement authorities can seek to divest a single company. In contrast, in the EC/Germany, such a divestiture

184 Id.
185 Id.
186 Id.
189 United States v. Microsoft Corp., 97 F. Supp. 2d 59, 64-74 (D.D.C. 2000) (entering the divestiture plan), vacated, 253 F.3d 34 (D.C. Cir. 2001) (per curiam); The DC Court of Appeals held that if the district court finds a "causal connection between divestiture exclusionary conduct and the company's position in the [operating systems] market," divestiture is still proper.
190 For a disappointment of decentralization policy, see RICHARD A. POSNER, ANTITRUST LAW (2nd) 101-117 (2001). The similar line of assessment of decentralization policy includes William E. Kovacic, “Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration,” 74 Iowa Law Review 1005 (1989) (“To most students of antitrust, the history of Sherman Act deconcentration endeavors is largely a chronicle of costly defeats and inconsequential victories”); See also W. ADAMS & J. BROCK, THE BIGNESS COMPLEX 198 (1987) (the "government has since 1890 attacked and defeated monopolies in courtrooms across the country. Yet despite some notable successes, American monopoly policy in practice has fallen short of its promise."). See also Rowe, The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics, 72 GEO. L.J. 1511, 1537 (1984) ("Antitrust's Big Case is doomed to a tragic cycle: by the time the barbecue is fit for carving, the pig is gone.")
of single company is not allowed. Given the lack of authority to di-
vest “existing” single company, it is safe to conclude that the Draft
clearly follows the model of EU/German position on monopolization.
This means an enterprise may acquire and maintain a dominant posi-
tion and use such a position in a nonabusive manner. But it must be
noted that the GWB also includes prevention of acquisition of mar-
ket-dominating position in its provisions of merger control. The con-
cern over concentrations that are expected to “create or strengthen a
dominant position” in GWB, however, finds no parallel anywhere
in the Draft. A dominant market position is a given, pre-existing fact
which article 14 and chapter 3 presume in addressing the anticom-
petitive acts facilitated by such a position.
In China nearly all the monopolies or oligopolies now in
dominating position are those of large SOEs, most of which are in the
process to be privatized, mostly in key infrastructure sectors such as
public utility enterprises, public transport, telecommunications etc. In
fact, a predecessor provision on dominant position traced back in the
LCUC is more explicitly targeted on “public utility” companies.192
Although chapter 3 avoids singling out those SOEs to be more en-
compassing in its application, currently no private firms have been
able to or are likely in the foreseeable future obtain monopoly power
to warrant deliberation on the desirability of certain monopolies. It is
anticipated that private firms with dominant market power will be
those former state monopolies. The acquisition of dominant market
power is therefore a political decision beyond the legal purview in
China. Given the current economic situations in China, the provisions
of abuse of dominant position are essentially expected to be used to
regulate anticompetitive acts of the monopolies or oligopolies which
will be transformed from state firms. The AMAB is empowered to
stop violation and impose a fine of RMB 10 thousand up to RMB 10
million. The possibility of criminal sanction is not discussed.193

(b) Defining “Dominant Position”

What constitutes a dominant position for competition law
purposes is a complex and important threshold question. The Draft’s

191 GWB Section 36 (1).
192 LCUC, article 6.
193 The Draft, article 45.
definition provides that a “dominant market position” is “one or several business operators control a specific market.” A “specific market” in this law means the territorial area affected during a limited time period by the sales of particular products by business operators.194 Furthermore, a business operator is deemed to have a dominant market position if any of the listed conditions exits.195 The Draft looks mainly to the number of enterprises and the extent of competition in a market to determine market position. To establish dominance and abuse, the relevant market (the product and geographic market) should be defined. Given the lack of experience of defining a relevant market, the AMAB will greatly benefit from operation of the Provision Rules currently in force on M&A because the issue of market definition occurs similarly in the inquiry of M&A as well as abuse of dominant position.

It remains to be seen how AMAB interprets “dominant position.” As mentioned earlier, dominant position is different from monopoly power. The concept of dominant position is less the economist’s concept of power over price than a legal concept.196 In United Brands, the European Court of Justice held that a dominant position is “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers (emphasis added).”197 It is understood that economic strength is not necessarily synonymous with power over price. A market share, an important indicator for market dominance is substantially lower than in monopolization case in the US.198

194 The Draft, article 4.
195 Those conditions are: (1) it is the sole business operator in a specific market and makes it difficult for other business operators to enter into the market; (2) it occupies a superior status in a specific market and it is difficult for other business operators to enter into the market; (3) despite the existence of more than two business operators in a specific market, there is no actual competition among them. The Draft, article 15.
196 KORAH, supra note 88.
198 In AKZO Chemie BV v. Commission (case C-62/86, 1991 ECR I-3359), the European Court of Justice held that a 40 percent market share in the presence of significant barriers to entry, can constitute dominance, and a firm with 50 percent of a market or more is
To alleviate administrative difficulties to determine market dominance, following the model of competition laws of countries such as Germany, Korea and Japan, the Draft sets up statutory presumptions of market dominance triggered by certain market shares. Presumption of market dominant arises if: (1) one business operator with market share over 1/2; two business operators with market share over 2/3; (3) three business operators with market share over 3/4. Yet the presumption is not automatic. AMAB has discretion to presume market dominance. The standards are somewhat high from a comparative perspective. Under GWB, the market share standards used are 33 percent for one undertaking, 50 percent for three or fewer undertakings or 66 percent for five or fewer undertakings.199 Many CEE countries, which normally have inherited from socialist systems higher industry concentration than China, adopted 30% as market share criterion for dominance.200 While this may raise fears in those countries that firms are unnecessarily subject to competition office scrutiny and regulation,201 China’s high market share threshold vis-à-vis a decentralized economy will lead to rare application and reduced strength of the dominance-related provisions.

(c) Specific Types of Abusive Practices

Articles 17 to 24 specified eight forbidden abusive practices.202 An important question is whether those are meant to be all the practices that are forbidden, in other words, what are the parameters of the prohibitions. The German GWB subdivided abuses of market dominant position into a more general provision and various examples.203 Abusive conduct not expressly mentioned in the exam-

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199 GWB, Section 19 (3).
201 *Id.*
202 They are: monopolistic high prices, predatory prices, discriminatory treatment, refusal to deal, forced transactions, imposition of unreasonable transaction terms, exclusive agreement, and fixing re-sale price.
203 GWB, Section 19. According to article 19(1), the abusive exploitation of a dominant position by one or several undertakings shall be prohibited. Section 19(4) contains examples
of abusive conduct, including obstruction, exploitation, discrimination, and denying access to essential facilities.

204 According to article 14, a business operator shall not abuse its dominant marketing position, obstruct the activities of other business operators, eliminate or limit competition.

205 ABA, COMPETITION LAW OUTSIDE THE UNITED STATES, vol I., Chapter 5, at 48-49.

206 ABA, COMPETITION LAW OUTSIDE THE UNITED STATES, vol II, Chapter 7, at 32-34.


208 See ABA, PREDATORY PRICING (1996)
Unlike other abusive behaviors enumerated in the Draft, the provision on unilateral refusal to deal allows derogation when a business operator has a “valid reasons.” It is unclear why the drafters accord a special treatment to unilateral refusal to deal and how this statutory difference will affect inquiry of unilateral refusal to deal. Because unilateral refusal to deal has to do with “essential facility doctrine,” how AMAB will assess the legality of unilateral refusal to deal is of great importance.

5. Concentration

Until recently, industry concentration has posed little concern in China. As discussed earlier, Chinese firms are generally small and in industries other than those monopolized by the state, concentration is lacking or low. The government has long fostered an official policy to encourage mergers and all forms of combinations, with the conviction that increased scale enhances competitiveness and breaks up market fragmentation. At the same time, against the high tides of international merger in most part of the world, M&A only made up 6% of the total FDI in China by early 2002 mainly due to legal uncertainty caused by a vacuum in regulation. However, as foreign companies intensify their efforts to penetrate further into China’s market, M&A is rapidly gaining momentum. Chapter four of the Draft sets out basic rules to address concentration control as a general matter. Most notably, to both facilitate and regulate growing demand of M&A by foreign investors, the Provisional Rules on Merger with and Acquisition of Domestic China Enterprises by Foreign Investors (hereafter the Provisional Rules) was adopted on

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March 7, 2003. It includes important and more detailed provisions on merger control, which constitute the first piece enacted into law under the emerging competition legal regime. The Provisional Rules also diverges from the Draft on some substantial points, which reflects a widely understood urgency to prevent expansion of foreign investment into dominance but encourage the growth of domestic firms. The Draft reserves much discretion to the enforcement authorities while the Provisional Rules adopts stricter rules that are also comparatively easier to enforce. As the concentration control provisions in the Provisional Rules, with minor changes (such as the enforcement authorities), can still be in force as a special regulation after the enactment of the general antimonopoly law, the dichotomy will likely to continue to enforce different policies toward enterprises depending on the nationality of their investors. The regulations on concentration would attract the most immediate attention from foreign countries and multinational corporations because a large scale multi-jurisdictional merger activities might be impeded or thwarted by the newly minted merger standards stipulated in the Draft.

(a) Scope of Application: the Definition of Concentration

By replacing the term “merger” in an earlier draft with a much more broadly defined “concentration”, the drafters intend to target a wide spectrum of measures that result in enterprise integrations and combinations, including: merger, control through purchase of shares or assets, and agreement to form a control relationship through agency, joint venture or any other method. The Company Law defines a merger very narrowly; a merger occurs when one or more enterprises merges into an existing enterprise or more than two enterprises combine to become a new enterprise. In each case, at least one of the pre-merger enterprises totally loses economic independence. But other measures of concentration, which are more difficult

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214 The Draft, article 25.

215 See article 184 of the P.R.C. Company Law. The Company Law was adopted on Dec 29, 1993 at the 5th meeting of the Standing Committee of the 8th NPC. Amended on Dec 25, 1999 at the 13th meeting of the Standing Committee of the 9th NPC.
to judge, are afforded no clue beyond “control” either in the Draft or in any other law currently in force. For example, so far there is no legal standard to decide what constitutes a “holding” or “controlling” relationship. Some countries set forth a clear standard to assess “control.” For instance, in the German GWB, “control” is explained as “constituted by rights, contracts or any other means” that “confer the possibility of exercising decisive influence on an undertaking” through rights to use assets or composition, voting or decisions of the organs of the undertaking (section 37). In case of acquisition of shares, concentration happens if the shares reach 50% or “25% of the capital or the voting rights of the other undertaking”.

The Provisional Rules, on the other hand, applies even when the foreign investor is not the controlling shareholder after the M&A. As long as there is foreign investment involved in the M&A, it must comply with the requirements of the Provisional Rules, including prohibition on “excessive concentration”, “exclusion of or limitation on competition”\(^\text{216}\) and the substantive requirements contained in article 19 to 22.\(^\text{217}\) Under article 2, foreign investors can directly purchase the stock of a “domestic company”, \(^\text{218}\) establish a foreign investment enterprise that buys the assets of an enterprise seated in China, or directly buy the assets of an enterprise seated in China to establish a foreign investment enterprise.

(b) Obligation to Apply for Approval

The Draft requires business operators to apply for approval for enterprise concentration if certain conditions are met. This means without approval from the competition authorities, a concentration cannot be consummated. This is a stricter rule than those in jurisdictions where the obligation is to notify rather than to apply for ap-

\(^{216}\) Provisional Rules, article 3.

\(^{217}\) Provisional Rules, article 4, “…..where according to the Foreign Investment Industries Guideline…..in industries where Chinese parties must remain the controlling shareholders or comparative controlling shareholders, after enterprises thereof have been merged or acquired, the Chinese parties will remain the controlling or comparative controlling shareholder”.

\(^{218}\) Although the original Chinese phrase used here was “company seated inside China”, the language suggests that is refers to as an enterprise in China without foreign investment before the M&A. See, e.g., article 2 of the Provisional Rules.
A rather common practice in other countries is to impose a waiting period after which the merger can proceed absent of objection from the competition authorities. In the US, Hart-Scott-Rodino Act requires a transaction be delayed for 30 days (or 15 days in the case of cash tender offer). If antitrust agencies take no action, the transaction can be consummated when the waiting period has expired. In the EU, notification of concentration must be made within a week of conclusion of the proposed agreement, announcement of the public bid, or acquisition of a controlling interest. As in Draft, concentration with a Community dimension may not be consummated before obtaining Commission clearance. The Draft allows 90 days for the AMAB to make a decision, but it also allows extension of the review period “under special circumstances”, which may subject to wide interpretation.

The Provisional Rules set out somewhat different rules in applying cases involving foreign investors. Investors are required to notify MOFTEC and SAIC about the intended M&A about certain conditions under article 19. The language of this provision seems not to require approval, but as the two government agencies are in charge of approval and registration of foreign investment enterprises, the M&A cannot be legally consummated without their approval. In fact, from the perspective of enforcement alone, this arrangement is much more effective since a separate independent AMAB does not have the same leverage and power on the M&A participants. The notification obligation arises under one of the four specified circumstances.

220 Article 4 of ECMR
222 MOFETC is in charge of approving establishment and mergers of foreign investment enterprises. SAIC is responsible for registration or changes of registration of foreign investment enterprises. But according to a new restructure plan of the State Council approved in the 10th meeting of the 10th NPC on March 10, 2003, a new Ministry of Commerce has been established which will take over the functions of MOFETC and MOFETEC will soon cease to exist completely.
223 According to Article 19, obligation to notify arises when (1) any participant has a turnover of more than 1.5 billion RMB in the Chinese market in the same year; (2) foreign investors have merged or acquired more than 10 enterprises in domestic related industries within one year; (3) any participants has a market share of 20% in Chinese market; (4) the
Furthermore, even if none of these conditions are met, upon request of domestic competitors, relevant administrative agencies or trade associations, MOFETC and SAIC may require notification from the foreign investors if they believe the M&A gives rise to important considerations such as large market share, or seriously affect market competition, national livelihood and national economic security.\(^{224}\)

Therefore, the notification obligation in an M&A involving foreign investors is triggered by multi-pronged and more easily met conditions.

Even more notable is article 21\(^{225}\) on M&A conducted outside China. This provision is obviously out of tune with the application scope of the Provisional Rules, but it accords with the extraterritoriality principle in the Draft, which stipulates that the law shall apply to behavior outside the territory of China that violates the provisions of the law and limits or affects market competition in China.\(^{226}\)

As regards the territorial scope of the merger regulations, as mentioned earlier, article 2 of the Draft contains a provision to recognize the extraterritorial application of the law. The Provisional Rules sets out special provisions on M&A abroad, which are different from the general rules in the Draft. Even under the same Provisional rules, article 21 on extraterritorial mergers contains slightly different standard from article 19 on mergers inside China. Since procedural rules for approval set in article 20 only applies when any of the circumstances specified in article 19 in a merger with or acquisition of do-

\(^{224}\) Id.

\(^{225}\) According to article 21 of the Provisional Rules, participants must submit their proposed merger plan to MOFTEC and SAIC for review before publicizing the plan or at the same time they notify the authorities in their residing countries, if any of the following conditions are met: (1) any participant has total assets of more than 3 billion RMB in China; (2) any participant has a turnover of more than 1.5 billion RMB in the Chinese market in the same year; (3) any participant together with its affiliated enterprises has a market share of 20% in Chinese market; (4) the extraterritorial M&A will enable any participant and its affiliated enterprises to obtain a market share of 25%; and (5) because of the extraterritorial M&A, any participant will hold shares directly or indirectly in 15 foreign investment enterprises in related domestic industries.

\(^{226}\) Provisional Rules, article 2.
measures enterprises by foreign investors”, it does not apply to mergers abroad. This is important because this structure in effect only spells out the threshold to trigger the notification obligation, with no other corresponding provisions on related substantive or procedural matters, such as required filing information, review period and consequences for failure to notify, which are necessary to meaningfully effectuate control on foreign merger. One could argue that the general provisions in the Draft, once adopted, can be applicable to extraterritorial merger by virtue of absence of special rules. But tensions will ensue for two reasons. First, the problem of different enforcement institutions must be solved first. MOFTEC and SAIC as the merger control institutions are not strictly competition institutions, which under the Draft is to be established under the State Council. Without proper harmonization, the rules enforced by the AMAB cannot apply to merger participants who are supposed to notify MOFTEC and SAIC. Second, it would also create an anomaly, in which M&A involving foreign investors in China apply specially tailored rules, while those happening outside China, which bore more special features, would be treated not different from purely domestic mergers. Control of extraterritorial merger, as embodied only in article 21, is thus far from complete or successful.

(c) Approval

If any of three conditions under article 29 is found, a concentration will not be permitted: (1) eliminating or limiting market competition; (2) hindering the healthy development of the national economy; and (3) damaging the public interests. To determine whether the proposed transaction eliminates or limit market competition, one should define a relevant market (i.e. product and geographic market). But for the other two requirements, how to define a relevant market would practically determine the outcome of substantive merger review. As seen in US Merger Guidelines, the determination of a relevant market requires highly sophisticated economic analysis. It remains to be seen how AMAB defines a relevant market. Standards for substantive merger review in the Draft depart from the EC/German Merger Regulations. These regulations adopt the criterion called “dominant position”. EC Merger Regulation prohibits any proposed merger “which creates or strengthens a dominant position as a result of which effective competition would be
significantly impeded in the common market or in a substantial part of it.\textsuperscript{227} The Draft standard as in the first condition “eliminating or limiting market competition” would appear to be more similar to the US standard, which states that the effect of the proposed acquisition “may be substantially to lessen competition, or to tend to create a monopoly”.\textsuperscript{228} The rationale behind this standard is unclear but since the previous draft followed “dominant position” standard, the drafters must have fully understood what different standards mean for merger review. According to U.S. Merger Guidelines, the US enforcement agencies are concerned with merger transactions that would enhance the likelihood of collusion, actual or tacit. Although the “unilateral effects doctrine,” heavily influenced by the so-called “Post-Chicago School”,\textsuperscript{229} was added in its 1992 revision, the predominant concern US agencies have over merger activities is a collusive (cartel-like) anticompetitive behavior after consummation of the merger.\textsuperscript{230}

As explained in the previous section, “dominant position” test tends to take into account not only price/output effects as in the US, but also many other factors that could affect the structure of the market and competitive process in the post-merger. As seen in the recent GE/Honeywell case,\textsuperscript{231} different standards among countries con-

\textsuperscript{227} EC Merger Regulation art. 2, P 3.

\textsuperscript{228} Clayton Act Article 7.


cerned might create significant tensions and lead to diminishing international business transactions.

Although the first standard in the Draft is similar to that of the US, the other two elements—(1) hindering the healthy development of the national economy; (2) damaging the public interests—is likely to create a great deal of uncertainty with respect to the merger review of the AMAB. Clearly only the first element is based on competition ground, while the other two are socioeconomic considerations. “Public interests”, used as a Chinese legal term, is a catchall routinely subject to wide interpretations to the fullest possible degree. The likelihood that China will clash on merger policies with the countries concerned is much greater. Some other countries such as Germany, Korea and Japan allow a proposed merger based on non-competition grounds. For instance, Article 42 of GWB states that the government shall authorize a concentration prohibited by the FCO if the restraint of competition is outweighed by the "advantages to the economy as a whole following from the concentration, or if the concentration is justified by an overriding public interest”. Yet in those countries non-competition elements can play only as “an exception”--not as an element with an equal weight to competition element and in a extremely rare cases.

Under the Provisional Rules, more clear standards are employed although they will still need substantial interpretation in enforcement. For M&A involving foreign investors both inside and outside China, the authorities must base their decision on determination on whether the propose M&A will “result in excessive concentration”, “hamper fair competition” or “harm the interests of consumers”, none of which are given any explanation. When antimonopoly concerns arise, MOFTEC and SAIC may separately or jointly hold public hearings and make a decision within 90 days upon receipt of all required information (not specified by the Provisional Rules). No extension of the review period is allowed.

The Draft authorizes AMAB to grant “special approval” when a concentration found to eliminate or limit competition within a specified area is advantageous to the national economy and the public interests. Compared with the GWB, it does not explicitly recognize

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232 Provisional Rules, articles 20 and 21.
233 The Draft, article 30.
the considerations of advantages of increased competition resulting from the concentration. One might argue it falls into the broader categories of “national economy” or “public interests”. But as under the criteria to appraise concentration in article 29 “national economy” and “public interests” are parallel and separate considerations to “market competition”, it is hard to incorporate the latter to either of the former two. The fact that the “competition” factor is not included in the exemption provision seems to deliberately exclude it from being considered.

By contrast, the Provisional Rules provides a clearer and close-ended exemption checklist under article 22. Any participants in M&A may apply to MOFTEC and SAIC for “review exemption” if the intended M&A falls into any of the categories. Interestingly, not only the “improvements of competition condition” is listed, the other factors the authorities may consider in granting an exemption are much more narrowly defined.

(d) Sanctions

According to Article 46 in the Draft, when a business operator violates article 26 by carrying out a concentration without prior approval, the AMAB can order the parties to terminate the concentration, revert to the original business operations within a deadline or to pay a fine from RMB 100 thousand to RMB 10 million. As article 26 also imposes the obligation to notify, this sanction can be understood as to apply to either failure to notify or consummation of a concentration despite of a prohibition by the AMAB. Compared with other provision on sanctions where termination of violation and a fine may be imposed, the term “or” used here suggests that a fine can be used separately as an alternative to dissolution. A fine may particularly be preferred because it is understandably easier to enforce than dissolution either by AMAB or the court upon application by the AMAB, which will undermine the deterrence effect of the sanction, especially to the larger concentrations.

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234 Parties can apply for exemption if the concentration (1) may lead to improvements of conditions of market competition; (2) restructures enterprises with loss and ensures employment; (3) introduces advanced technology and management and enhances international competitiveness of the enterprises; (4) may improve the environment.
No remedy or sanction is set out by the Provisional Rules for merger control provision in articles 19-22. Realistically this is not a problem for most mergers inside China covered by this regulation. The required application and review for merger control reasons is part of the approval and registration process\textsuperscript{235} for foreign investment enterprises. Without approval from MOFEC and SAIC, no M&A can be legally consummated and protected. There is still a loophole, however, which may arise if a merger is consummated without review due to the failure to notify the authorities by the participants. This is possible because among the standards used to trigger the obligation to notify, some are susceptible to different application. For example, the participants and the authorities may disagree on whether the market share standard has been met. When an M&A has been consummated which the authorities believe should have been subject to prior scrutiny, uncertainty arises as to whether and how to impose sanctions. In addition, for M&A realized abroad under article 21, MOFTEC and SAIC have no regulatory power to enforce merger control. The only factor that may induce voluntary compliance is at least one of the participants under article 21 has substantial business inside China. Their overall stake in Chinese market may help to encourage compliance with Chinese law and avoid confrontation with government agencies.

6. Enforcement Mechanism

One of the most difficult issues in drafting the antimonopoly law is to establish a competent enforcement institutional system\textsuperscript{236}, which has contributed to the lawmakers’ lingering hesitation to wrap up the work. Relevant provisions in the Draft on institutional arrangements leave many questions to be answered, especially in light of the Chinese legal system as a whole. From the comparative law perspective, the Draft itself provides for relatively strong enforcement tools: unlike Korea and Japan and like the US and Germany, it provides for private citizens to file a civil suit immediately without waiting for the administrative procedures to be finished by the enforcement agency; unlike EU/Germany and like the US, Korea and

\textsuperscript{235} Provisional Rules, article 5.

Japan, it provides for criminal prosecution. Notably, the Draft stipulates “social supervision” of anticompetitive behaviors stating that “[the] State encourages, supports and protects social supervision of monopoly by all organizations and individuals.”237 According to article 36 under chapter six on ‘anti-monopoly administration body’, the AMAB of the State Council shall investigate and impose administrative sanctions on illegal monopolistic conduct. Article 53 of the Draft provides affected parties the opportunity of recourse to the court. An interested party can file an application for review of any penalty decision to AMAB, and further appeal to the court. Or the party may choose to appeal to the court directly. At the same time, articles 49 and 50238 provide for private litigation and rights for compensation. In cases involving administrative monopoly, the injured parties will be able to invoke administrative suit against government or its officials. In addition, article 45 and 47 leave possibility open for criminal prosecution for abuse of dominant market position and officials engaging in administrative monopoly. The Draft endeavors to establish the administrative enforcement mechanism by creating an administrative enforcement institution while the other proceedings must rely on pre-existing proceedings not specific to antimonopoly cases.

(a) Administrative Enforcement Agency

The Anti-Monopoly Administration Body of the State Council is expected to play a major role in administering the antimonopoly law. The Draft confers on the AMAB a variety of responsibilities under article 37, including: issue antimonopoly policies and rules; investigate matters relating to antimonopoly provisions under the antimonopoly law; resolve all matters requiring its approval provisions under this law; investigate market competition conditions; investigate and dispose cases which violate the antimonopoly law; maintain reports of offenses etc. But the Draft fails to specify which institution will serve as the AMAB, leaving the issue for a later legislation. Two options have been competing each other during the drafting process: to establish a new agency or authorize SAIC as the

237 The Draft, article 7.
238 These articles are under Chapter 7 on ‘Legal Liabilities’.
enforcement institution. Each option entails difficulties and considerations.

To establish a new government agency would be preferable if the disadvantages of SAIC can be overcome by optimal institutional designing to improve the efficacy of enforcement. In other jurisdictions competition enforcement authorities are afforded different legal safeguards to ensure their independence and authority. Similar measures would be hard, if not totally impossible to imitate in China. Under the current organizational structure of the State Council, only the Auditing Bureau is directly under the Premier, a unique status guaranteed explicitly by the Constitution. A centralized administrative responsibility system requires that the premier assume all responsibility of the work of State Council and ministers assume all responsibility of the work of the ministries and commissions. In each ministry or commission, only the nomination of the head official by the premier is subject to approval by the National People’s Congress (NPC) or its Standing Committee. Even those approvals are essentially procedural and never fail to be granted due to the absence of opposing forces in the NPC. The government officials are selected by a uniform examination requiring no special knowledge or experience. Their appointment, promotion, salary and term of office are

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240 In the US, the Federal Trade Commission is consisted of five commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term. No more than three commissioners can be of the same political party, see http://www.ftc.gov/bios/commissioners.htm. In Japan the Fair Trade Commission charged with similar powers as that of the AMAB, is administratively attached to the Prime Minister. (Chapter VIII Section 27-2). Its members, one chairman and four commissioners, are appointed by the Prime Minister with consent of both Houses (Sec. 29 (2)). The Korea KFTC is under the Prime Minister. In Germany, the Federal Cartel Office (FCO) according to law is an independent higher federal authority (GWB 51(1)). The members of the ten decision divisions of the FCO are servants appointed for life with qualifications to serve as judges or senior civil servants (GWB 51(4)).

241 Constitution, article 91.

242 Constitution, articles 86, 90.

243 Article 62 (5), 67(9).

244 See the Provisional Regulation on the Recruitment of Civil Servants, adopted on June 7, 1994.
subject to internal decision, ultimately with approval of CCP’s personnel department. Under such a system, even if by future legislation, the AMAB is granted special status directly under the Premier, the lack of independence and qualification of its workers will undermine its strength and capability.

The main argument for authorizing SAIC as the AMAB is that it has accumulated certain experience in dealing with antimonopoly cases under LCUC. However, as explained earlier, the lack of independence of SAIC and its branches have caused serious problems even in enforcing the limited antimonopoly provisions under LCUC. In April 2001, a separate ad hoc working group directly under the State Council had to be set up in order to administer the intensified national campaign against administrative monopoly. To charge all the antimonopoly work to SAIC would seem highly unadvisable. In addition, under its current organizational structure, it is also infeasible to transform the SAIC into an independent antimonopoly agency. SAIC is charged with a wide range of functions including enterprise registration, trademark administration, consumer rights protection, advertisement regulation, etc. Only one of its twenty-eight divisions, the Fair Trade Bureau, oversees market order and administers competition policy. SAIC also heads the AICs at the various local levels, which makes it a bureaucracy too gigantic to reform.

Another thorny problem is how many levels of the AMAB would be necessary. Again, it remains an open question. The Draft only states that the AMAB may ‘according to the needs of fulfilling its responsibilities, establish dispatch offices’. It is a common practice to establish multilevel enforcement institutions. However,

245 Tang, supra note 235.
246 State Council, supra note 40.
247 See the functions and organizational structure of SAIC, available at http://www.saic.gov.cn/redshield/jgsz/jgsz1.htm
248 Id.
249 The Draft, article 43.
250 In the U.S., the Federal Trade Commission maintains a regional presence with offices in seven geographical areas across the country. See http://www.ftc.gov/ro/romap2.htm. In Germany, the Federal Ministry of Economics, Federal Cartel Office, together with sixteen state cartel offices enforce antitrust law through administrative proceedings (ABA G-8). The
China’s concern is that one level of local office under the AMAB would not be enough.\textsuperscript{251} The rampant local protectionism and fragmented market set China in a very different situation than most other countries with an open and unified national market. The large number of violations, the majority of which are small and local, requires routine antimonopoly enforcement at grassroots level. In the antimonopoly campaign of 2001, during April to November alone, more than 127,000 cases were recorded all over the country.\textsuperscript{252} On the other hand, too many levels of branches under the AMAB would, just like the AIC’s system, inevitably lead to the dependence of local governments and the anti-monopoly mission would fall prey to administrative interference.\textsuperscript{253}

(b) Judicial Review of AMAB’s Decision

An interested party can to appeal to the court directly for review of any penalty decision rendered by AMAB. As the penalty decision constitute imposing administrative sanctions, by utilizing this provision the interested party invokes the general judicial review system of administrative actions in China.

Judicial review was built into the Chinese legal system in 1989 when administrative \textit{su song} (litigation) was allowed in the Administrative Litigation Law (hereafter ALL)\textsuperscript{254}. According to ALL, any individual or entity whose interests or rights have been deemed infringed by a specific action of an administrative organ (\textit{zu zhi}) or the personnel thereof, can bring a suit before a court according to the law (Article 2). Administrative divisions inside the courts at all

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\textsuperscript{251} Tang, \textit{supra} note 235.


\textsuperscript{253} Tang, \textit{supra} note 235.

\textsuperscript{254} Adopted at the Second Session of the Seventh National People's Congress Standing Committee on April 4, 1989, promulgated by Order No. 16 of the President of the People's Republic of China on April 4, 1989, and effective as of October 1, 1990. Some people also translate it as Administrative Procedural Law.
levels\textsuperscript{255} were set up to exercise jurisdiction on administrative suits (Article 5).

The Chinese judicial review system is ill suited to protect individual rights from abuse of administrative power. The judiciary, despite improvement in recent years, lacks independence and has been under increasing criticism for corruption. The courts are especially powerless in administrative litigation because the current structure of China’s court system and the system for the selection and promotion of judges subject the courts to the influence of local governments in terms of personnel, financial, and material resources, making interference with the courts by local governments inevitable. The special nature of the defendant in administrative litigation has predetermined that interference and obstacles in handling administrative cases will be even much greater than for other types of adjudication. Often the trial of administrative cases is subject to illegal interferences by local governments, local people’s congresses, and local Communist Party committees, compromising fairness in trying and deciding administrative cases according to law.

The difficulty of enforcing court judgments and orders has been a daunting problem and it is especially serious in administrative cases. As the courts lack authority and independence, administrative agencies as defendants often defy their judgments and orders. Methods of enforcement stipulated by ALL such as “fining” and “providing judicial recommendations to administrative agencies”\textsuperscript{256} are far from being effective to solve the enforcement problems.\textsuperscript{257}

Compounding the reality of unequal powers of the litigants in the administrative cases is the inadequate provisions and outdated underlying philosophy of ALL. With respect to important issues such as scope of review, jurisdictions, standing of parties and sanctions,

\textsuperscript{255} Four levels: Basic, intermediate, high and the Supreme Court.

\textsuperscript{256} Report of the Working Group On Revising the ALL, Jan. 2003 (on file with the author).

\textsuperscript{257} In one case, the court found the administrative sanction imposed by the defendant government agency illegal and ordered it to make a new decision in accordance with the law. But the defendant made the same decision again and again, forcing the plaintiffs to go to the court four times. Interview with Professor Ma Huaide, China University of Political Science and Law; member of the Working Group working to revise the ALL, in New Haven, CT. (Jan. 20, 2003).
ALL provides for minimum checks on administrative agencies in exercising their power. \(^{258}\) The public discontent and the defects of current ALL and judicial review system have finally led to a legislative overhaul. A working group organized by the National People’s Congress is finalizing a draft to comprehensively rewrite ALL. But the final product remains to be seen, and some of the problems, such as the lack of independence of the judiciary, will not be solved just by a new ALL.

(c) Private Civil Suit

Article 49 of the Draft provides “if the legal rights and interests of business operators or consumers are damaged by any monopolistic behavior, they can file a petition with the People’s Court.” Articles 50 affords injured parties the right to sue for damages from a business operator who violates the antimonopoly law. The compensation is the actual loss and the forecasted profits, or if such loss difficult to calculate, the profit gained by the violator plus reasonable expenses incurred in investigation and litigation.

The civil suit based on articles 49 and 50 presents two salient features on its face. Firstly, it allows private parties, upon finding anticompetitive actions that are harmful to them, bring a suit in court to recover loss directly. Unlike Korea and Japan, the Draft does not require a decision from the competition law enforcement institution as a prerequisite. Private suits can be initiated totally independent of administrative proceedings. It also appears less restrictive than the German system, which requires specific legislative intent (the violated provision must “serve to protect another”) and that violator “acted willfully or negligently”\(^{259}\). In granting cause of action, Chinese legislation hardly ever requires legislative intent, although it may be considered by the judges in deciding cases. No requirement of willfulness or negligence as in tort actions undoubtedly makes it easier for the private parties to recover loss. Thus the provisions seem to be very permissive of damage actions and more similar to the US system.

\(^{258}\) Id. Interview with Professor Ma Huaide.

\(^{259}\) Haley, supra note 143.
Secondly, it does not permit private suits for injunctive relief, but only damages. The US Clayton Act Section 16 authorizes private parties to sue for injunctions. In other civil law jurisdictions such as Germany, Japan and Taiwan, such an option is also available in private actions. Injunctive relief is an alien notion in China’s legal system, which follows the civil law tradition. However, the Draft authorizes AMAB issue “cease and desist” orders. Such orders, when unheeded, are subject to enforcement by the court through application of AMAB.

In the US, some view the private right of action as helpful to increase the efficiency of antitrust enforcement though others are more skeptical. For those proponents, it enlists the participation of parties closest to information and affords a safeguard against lax public enforcement without expanding public enforcement bureaus. In China the formidable mission to combat anticompetitive activities, the shrinking state power and ineffective institutions all make the supplement of public enforcement desirable by mobilizing the public to fight against monopoly. In fact, public discontent has provided main momentum in recent antimonopoly campaigns and public participation has been encouraged and proved instrumental. However, as the experience of some other countries shows, the efficacy of the private action is subject to various contingencies and for a country with a developing legal system as China, many hurdles are to be expected.

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260 GWB Section 33.
262 Taiwan FTL, article 30.
263 The Draft, Articles 44, 45 and 46.
264 The Draft, article 52.
265 Adherents to Chicago School are of the view that private suit has been harmful to the development of antitrust law. For instance, Judge Poser observes that “students of the antitrust laws have been appalled by the wild and woolly antitrust suits that the private bar has brought—and won. It is felt that many of these would not have been brought by a public agency and that, in short, the influence of the private action on the development of antitrust doctrine has been on the whole a pernicious one.” See, RICHARD A. POSNER, ANTITRUST LAW (2nd ed.) 275 (2001).
Certain difficulties are predictable in the use of the private civil actions in China.

The first difficulty faced by plaintiffs in the civil action is the competency of the court. Before the Judges Law in 1995, no uniform credentials were required of judge and even then formal legal training was not a prerequisite. It was not until 2001 that all junior judges are required to pass a national judicial exam to meet minimum qualifications. In addition, most courts are over-loaded by cases. In 1999, the total number of cases across the nation amounted to 6.23 million. By the end of July of 2002, 1.85 million cases had been accumulated to be handled by the 170 thousand judges nationally. The Chinese Civil Procedural Law imposes time limits on trials. Normal civil trial must be completed within six months although the time limit may be extended upon approval. In a word, the capability of the ill-prepared, overworked judges who are under constant pressure to beat time limits in dealing with normally complicated antimonopoly cases is highly doubtful.

Although article 50 seems very permissive of damage actions, the civil suits have to follow the general civil procedural rules and be subject to any constraints thereof. An important uncertainty remains of the ability of private plaintiffs to obtain relief. Article 50 requires the plaintiff to be those whose “rights and interests” have been violated. Article 108 (1) of the Civil Procedural Law sets a substantive test that the plaintiff must show their “direct interest” in the case. Both provisions are similarly vague and general, offering little guidance in setting up standards. In the US, the federal courts have developed rules to narrow the set of plaintiffs who may attack antitrust violations. Such restrictions include proof of injury to “business

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267 According to Article 9(6) of the Judges Law, anyone with college degree other than in law but with “legal knowledge”, after working in the court for two years, can be qualified as a judge.

268 Amendment to article 12 of Judge’s Law, President’s Order 53. (June 30, 2001.)


270 Article 135 of the Civil Procedure Law, April 9, 1991, President’s Order 44. The time limit is renewable for another six months with permission from the head of the court. If still more time is needed, the judge can apply to the higher court for extension.
or property”, allege of “antitrust injury” and proximity to source of harm (limits on standing and recovery by indirect purchasers).271 Such limitations and standards are necessary and needed especially in China as Chinese judges have limited power to interpret law and no precedent system exists, the ambiguity of the provisions’ language will lead to confusion and inconsistency.

Compared with that under the US antitrust system, private actions in civil law countries such as Germany and Japan have been portrayed as ineffective and rarely used.272 Several causes have been attributed to the paucity of civil actions in those countries, most importantly, the lack of class action, discovery system and treble damages.273 In China, unlike Japan and Korea, the class action is allowed generally in civil action274 and so far there is no prohibition to exclude its use in any particular case. But the lack of discovery system will pose a problem to the Chinese private parties in proving their damages. Furthermore, it is exacerbated by the current evidence rules applied in civil suits. In an effort to transform the litigation structure from an inquisitional to a more adversarial system, the 1991 Civil Procedural Law adopted a new principle of “whoever raises the claim, has the burden of producing the evidence”.275 While in the past judges had to conduct the investigation and gather most of the evidence, now the plaintiff will lose the case if he fails to provide sufficient evidence unless the law puts the proof burden on the defendant by explicit stipulations.276 Although the law still requires the judges to gather evidence that the plaintiffs are not able to obtain,277 the heavy workload of the judges make this option impracticable. Without the benefit of a discovery system and often subject to short time limit to present evidence, the plaintiffs in antimonopoly civil cases

271 GELLIHORN & KOVAICIC, supra note 265, at 463.
272 Haley, supra note 143.
273 Id.
274 See article 55 of the Civil Procedural Law and rules 58-64 of the Supreme Court’s Interpretation On the Application of Civil Procedural Law.
275 Article 64 of the Civil Procedural Law.
276 The Supreme People’s Court of China, supra note 273, article 74.
277 Article 64 of the Civil Procedural Law and rule 73 of the Supreme Court’s Interpretation.
are bound to find it extremely difficult, it not impossible, to prove their damages successfully.

Treble damages as in the US antitrust law serves as an important incentive to bring private suits. In China, although the losing defendant may have to pay the proceeding fees and reasonable investigation fees incurred in investigation by the plaintiffs, the lawyer’s fees, in many cases quite substantial, are not necessarily included. Therefore, there is little incentive for the prospective plaintiff to pursue a case, especially in view with so many other difficulties involved in a civil litigation. In fact, there is no theoretical barrier to the treble damages itself. According to the Law on the Protection of the Rights and Interests of Consumers (hereinafter Consumers’ Law), consumers are entitled to double damages against fraudulent practices of business operators. This provision has proven a powerful incentive, exemplified by a series of highly publicized suits brought by a Wang Hai, who knowingly bought fake products in order to bring civil suits in court. The attitudes towards Wang are divided. The public generally considers him a fighter for consumer rights, while the courts and some scholars are concerned he abused the right granted by law and doesn’t belong to the protected category of “consumers”. In any event, even if the doubt and concern involving the double damages under Consumers’ Law are valid, it would not be a problem in antimonopoly case. If the drafters are concerned that too much monetary incentive may induce frivolous suits, double damages or the discretionary treble damages available under Taiwanese competition law may be considered. The lack of such provisions is therefore an obvious pitfall in the Draft.

(d) Administrative Suit Against The Government

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279 Article 49 “A business operator that practices fraud in providing a commodity or a service must, at the request of the consumer, increase the compensation for losses incurred by such consumer. The amount of the increase in compensation shall be the price of the commodity purchased or the fee for the service received by the consumer.”


281 Taiwan Fair Trade Law, article 32.
It should be noted that article 49 not only allows civil actions among private parties, as in the U.S. and Germany, it also empowers injured parties to invoke administrative litigation when their rights are infringed by government agencies or officials because of administrative monopoly. If the target defendant is a government agency or official as in administrative monopoly cases, the injured private party will have to go through administrative litigation to subject the anticompetitive administrative action to judicial review for remedy.

As explained earlier, the administrative litigation system in China affords plaintiffs very weak help. The injured party in invoking article 49 is bound to find himself particularly helpless in an administrative suit. Regardless all the weaknesses in administrative trial and enforcement, a threshold issues arises as to scope of judicial review which in most cases excludes private parties in court to challenge administrative monopolistic behaviors.

According to ALL, certain administrative actions are precluded from administrative litigation, one of which is ‘administrative rules and regulations, or decisions and orders with general binding force formulated and announced by administrative organs’. According to Chinese legal theory, this is called ‘abstract administrative actions’ as opposed to ‘specific’ administrative actions that is actionable. According to a 1997 Supreme Court Judicial Interpretation, the “decisions and orders with general binding force” exempted from judicial review are those repetitively applicable normative documents towards non-specific parties. Typically administrative monopolistic behaviors are inevitably continuous actions that take the form of normative documents (administrative regulations, rules, circulars, decisions, notices etc) because they are not targeted against specific parties but to continue certain anticompetitive activities, for example, to protect local products from competition from other areas. While such violations damage the interests of many business operators and individuals, they are not subject to judicial review under the current ALL.

282 ALL, article 12.
283 ALL, article 2.
284 Supreme People’s Court, Interpretations on Certain Issues Related to the Administrative Litigation Law, Nov 24, 1999.
285 Id, article 3.
Some plaintiffs may be able to base their suit on suitable “specific action”, such as the imposition of a fine by the government agency for noncompliance with an anticompetitive administrative regulation. Whether the court should grant standing to the parties in such a case has been subject to much debate and is far from settled.\(^{286}\) In practice, some courts have taken such cases. But even in holding the specific action (such as a fine) illegal, the judges always avoid commenting on the legality of the regulation it is based on. They either remain altogether silent on the issue or base their judgment on laws or statutes of higher authority and skip the regulation.\(^{287}\) In both cases, the “abstract action”, i.e., the anticompetitive normative document remains unchallenged. Even in rare cases an individual party wins an administrative suit, it does now serve as a deterrent to administrative monopoly.

(e) Criminal Prosecution

The Draft reveals a preference to leave the issue of criminal sanctions open. Only in two articles are criminal prosecutions mentioned. Noticeably, cartel activities under Chapter 2 are not subject to criminal prosecution. The EU (German) competition law does not provide for criminal prosecution with respect to all anticompetitive behaviors. Yet in such a country as the US, Korea and Japan, cartelization is the primary object to be addressed by the criminal antitrust enforcement.

Each criminal provision only states that if a criminal offence is committed, the offender is to be “prosecuted and penalized accordingly”. It is possible that the drafters are still undecided about what criminal sanctions are to be adopted, given their focus still on the establishment of administrative proceedings. But a more important reason is the division of authorities requires that only the Criminal Code can impose criminal sanctions. The new 1997 Criminal Code adopted the principle that only those explicitly defined by law as criminal acts can be prosecuted and convicted.\(^{288}\) In practice to keep the uniform-

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\(^{286}\) Interview with Gan Wen, Judge of the Supreme People’s Court, Administrative Section, in New Haven, CT. (Mar. 12, 2002).

\(^{287}\) Id.

\(^{288}\) The Criminal Code, article 3.
ity of criminal law, amendments of the Criminal Code\(^\text{289}\) have been made to add or revise clearly defined criminal acts. NPC and its Standing Committee also issued special decisions or decrees\(^\text{290}\) to clarify or interpret certain provisions of the Criminal Code. No statute has been allowed to impose any criminal sanctions, so it is impossible to include criminal provision in the antimonopoly law, like the practice in Taiwan.\(^\text{291}\)

Article 47 provides prosecutions of responsible government officials in administrative monopoly. This provision does not address antimonopoly criminal sanctions directly. Rather, it targets those criminal offences connected with abuse of power in public office that have motivated the officials’ engagement or support of anticompetitive activities. The existing crimes include, for example, acceptance of bribery\(^\text{292}\) and malpractice in office.\(^\text{293}\)

Article 45 states that abuse of dominant market position may be subject to criminal prosecution. As such specific language is not included in sanctions on restrictive agreement or unauthorized concentrations, the Draft excludes those other anticompetitive activities from criminal sanctions. In contrast with article 47, no existing crime covers abuse of dominant market position. In order to put this provision into application, a new crime and corresponding penalties will have to be added to the current criminal law, before which this provision will remain toothless.

The Draft envisages the criminal prosecution to be independent of the administrative proceedings. The current criminal system also requires the prosecution will be conducted by the Prosecutor’s Offices, which are charged with exclusive authority to prosecute crime in China. Unlike Japan and Korea, the prosecutor’s decision to prosecute will not be contingent on decisions of the administrative authorities. Depending on the specific cases, investigation is conducted by the procuracy or the police. Like the court, the

\(^{289}\) Amendments were passed on Dec. 12, 1999; Aug. 31, 2001; Dec. 29, 2001; and Dec. 28, 2002.

\(^{290}\) For example, NPC Standing Committee’s Decision Concerning Punishment of Criminal Offenses Involving Fraudulent Purchase. (Dec. 20, 1998.)

\(^{291}\) Taiwan Fair Trade Law, articles 35 and 37.

\(^{292}\) Criminal Code, article 385.

\(^{293}\) Criminal Code, chapter 9.
procuracy and the police are short of expertise and experience in antimonopoly cases. Considering the open-ended provision, narrow application of criminal sanction and low enforcement capability, it is foreseeable the criminal sanctions will take a long time to develop and remain rarely used after the adoption of the antimonopoly law.

V. CONCLUSION

The Draft reflects the strong desire of the Chinese government for an economic constitution denoting the ideal of a competitive market. To meet the extraordinary challenges that China is confronting in the process, the Chinese government introduces idiosyncratic provisions in the Draft. The provisions on administrative monopoly are the prime example. Pitting AMAB against other government entities and prosecuting government officials is an innovation. Similarly, the inclusion of socioeconomic standards in merger review symbolizes an ambitious resolve to balance the market system with collective values. The determination of the Chinese government to realize an effective competitive market is also well reflected in its multiple enforcement instruments. Excepting perhaps only the US, China provides for the most diverse enforcement tools such as an unlimited civil suit and criminal prosecution. From the comparative perspective, among the three East Asian economic tycoons (China, Japan and Korea), the legal text of the Draft puts China in the top seat in terms of the availability of enforcement tools. Furthermore, exemptions to the basic obligations are rarely allowed in the Draft relative to the competition laws of other jurisdictions.

However, the body of China's competition law is part of the whole Chinese legal dispensation. Without an adequate legal infrastructure, as has been illustrated, the ambitious initiatives for an effective competitive market might fall into disrepute. Most notably, since enforcement actions against administrative monopoly will often conflict with industrial policies enforced by other government agencies, the aspirations for vigorous enforcement of competition law will be greatly circumscribed. As a result, for a country like China whose primary objective is economic development, a consistent and coherent competition policy is hard to come by. In this respect, private enforcement should deserve particular attention. Unlike countries such as Korea and Japan, China allows for individuals to get direct access to a court when a cause of action arises. Nonetheless, successful pri-
vate enforcement of competition law might be greatly hampered by lack of a sophisticated legal mechanism for gathering evidence and of pecuniary incentives such as treble damages offered by the US. No less importantly, as explained in cartel regulations and merger review, the Draft accords AMAB too much discretion in eradicating anticompetitive behaviors.

Notwithstanding the foregoing shortcomings for effective enforcement of China’s competition law, the Chinese government should be commended for its attempts to synthesize a long-standing dichotomy between deregulation and competition policy against private anticompetitive behaviors. It is a matter of policy in each jurisdiction how to curb administrative behaviors that in many cases legalize large-scale and gross violation of the spirits of competition law. Yet, there is no question that the Chinese model that integrates the programs that address public and private anticompetitive behaviors is the most direct way of realizing competitive market. This synthesis is predominantly driven by extraordinary circumstances in China is in, but it may incidentally provide “a third way” of framing competition law that requires serious consideration particularly for developing countries in which legal and administrative monopolies are rampant. The future task is upon China to build up a systemic integration that allows the competition law to effectively implement deregulation.
Appendix

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