AUGUST 2008

THE CHINA ANTI-MONOPOLY LAW BECOMES EFFECTIVE

After 14 years of consultation, deliberation, and delays, China finally adopted a new Anti-Monopoly Law ("AML") on August 30, 2007, which became effective on August 1, 2008. The first comprehensive antitrust law in China, it presents serious compliance challenges and risks for Chinese and non-Chinese companies alike.

This *Commentary* summarizes the AML and its accompanying recently issued merger thresholds, discusses the structure and responsibilities of its enforcement agencies, and explains the latest developments regarding antitrust litigation under the AML in the Chinese courts.

OVERVIEW

The new AML is a tremendous leap forward for China, bringing it squarely into the modern world of antitrust and competition law. It is based loosely on various European models with input from U.S. law, its general structure including four substantive sections that: (1) prohibit certain types of agreements unless they fall within specified exemptions; (2) prohibit certain behavior classified as abuse of dominant market position, providing a framework for determining when dominance exists; (3) establish a broad merger review scheme; and (4) prohibit abuses of government administrative powers restraining competition. The law also sets forth penalties for noncompliance and some miscellaneous provisions, including one that prohibits undefined "abuses" of intellectual property rights.

The law creates two new agencies: the Anti-Monopoly Commission ("AMC"), a policy body under the State Council, the highest-ranking executive body in the Chinese government; and the Anti-Monopoly Enforcement Authority ("AMEA"), which will be responsible for day-to-day enforcement of the law. The AMEA will include offices from at least three existing agencies: the State Administration for Industry and Commerce ("SAIC"), the National Development and Reform Commission ("NDRC"), and the Ministry of Commerce ("MOFCOM").

Many aspects of the law remain to be clarified by detailed implementing regulations or guidelines and actual enforcement experience in both administrative

agencies and courts. As of this writing, only one such implementing regulation has been promulgated: the Regulation on Notification Thresholds for Concentrations of Undertakings ("Regulation"), which sets forth thresholds for mandatory filing of notifications of proposed mergers and acquisitions.

On its face, the law is largely consistent with the antitrust laws of other major jurisdictions, but there are some provisions indicating that uniquely Chinese concepts of law and policy may bear on the interpretation and enforcement of the law. Both Chinese and international observers will be following developments closely to see how China chooses to enforce this important new law, including the relative treatment of foreign multinationals and indigenous Chinese entities.

I. SUBSTANTIVE PROVISIONS

PROHIBITION OF MONOPOLY AGREEMENTS

The AML uses the term "monopoly agreements" to describe both "horizontal" and "vertical" agreements that eliminate or restrict competition.

Horizontal Agreements. Article 13 of the AML prohibits agreements between competitors to fix, maintain, or change prices; limit output or sales; allocate markets; restrict the acquisition or development of new technology; or engage in joint boycotts. This list of prohibited concerted conduct among competitors largely comports with international practice.

However, some observers have expressed concern that prohibiting agreements that "limit the purchase of new technology" may restrict the ability of intellectual property rights owners to license their IP rights on terms that may seem reasonable to them but not to potential Chinese licensees or the Chinese government. This prohibition might look unusual to U.S. antitrust practitioners, but the Chinese legislators appear to have referenced Article 81(1)(b) of the EC Treaty, which prohibits agreements that limit or control production, markets, *technical developments*, or investment.

Vertical Agreements. Article 14 of the AML prohibits certain vertical agreements, including resale price maintenance, either by fixing the resale price or by imposing a minimum resale price. The AML does not expressly prohibit any other types of vertical restraints except for certain unjustified tying arrangements, price discrimination, and other restrictive trade practices, which are prohibited as abuses of dominant market position when carried out by dominant firms.

These horizontal and vertical restrictions are not exhaustive, because a catch-all clause reserves to the AMEA the power and discretion to designate other "monopoly agreements" under this category.

Broad Exemptions for Agreements. There is no distinction in the AML between conduct that is "hard core" or *per se* illegal and conduct that is subject to a rule-of-reason analysis. All horizontal and vertical agreements caught under Articles 13 and 14 may be exempted under Article 15 if they satisfy its exemptions.

For example, monopoly agreements can be exempted if they have the purpose (even if not the effect) of improving techniques or research and development, upgrading quality, unifying product models and standards, improving the competitiveness of small and medium-sized enterprises ("SMEs"), mitigating a severe decrease in sales volume during a recession, or protecting legitimate interests of international trade and foreign economic cooperation, among other enumerated justifications. Some listed purposes seem to have no connection with competition and leave room for preferential treatment of domestic cartels or national champions where such protection is perceived necessary for China to compete on the global stage.

However, businesses seeking to use such exemptions to escape liability under Chapter II of the AML bear the burden of proving that the agreement: (1) is for one of the listed purposes in Article 15; (2) will not substantially restrict competition in the relevant market; and (3) will enable the consumers to share the benefits derived from the agreement. These factors appear to be modeled after EU law, but without the element of indispensability, which potentially makes resort to the exemptions too easy.

Detailed guidance in the implementing regulations will be needed to avoid creating so much room for competitors to claim exemptions that the law either will be rendered ineffective or will require the regular exercise of administrative discretion, rendering enforcement arbitrary and unpredictable.

PROHIBITION OF ABUSES OF DOMINANT POSITION

Dominance. Dominant market position is defined in the AML as the ability to control the price or output of products or other trading conditions in the relevant market or to block or affect the entry of other undertakings into the relevant market. Under Article 19, dominance is presumed if: (1) one of the entities has ≥50 percent market share; (2) two entities have ≥66–2/3 percent joint market share; or (3) three entities have ≥75 percent joint market share, although it excepts entities with under 10 percent share. This provision arguably raised the most concern by commentators during the drafting process. In particular, the AML does not appear to require that collectively dominant firms (*e.g.,* one of three companies with a combined 80 percent market share) act together in order to bear liability for prohibited abuses of their dominant position.

The law as enacted includes a paragraph in Article 19 that allows a firm that is presumed to be dominant under these market share tests to present countervailing evidence to rebut the presumption. Article 18 prescribes a number of factors to be considered when determining dominant market position, including market share, competition condition in the relevant market, ability to control the sales market or raw material purchase market, the financial status and technical conditions of the business operator, and ease of entry. The standard of proof under which these countervailing factors will be assessed is not defined.

Abuses of Dominance. Article 17 of the AML provides a non-exhaustive list of abuses that dominant firms are expressly prohibited from engaging in, including:

- Selling at unfairly high or buying at unfairly low prices;
- Selling below cost without justification;
- Refusing to deal without justification;
- Exclusive dealing without justification;
- Tying or imposing other unreasonable trading conditions without justification; and
- Price discrimination without justification.

Some of these categories of conduct are not found in many other major jurisdictions' laws or are invoked only in extremely rare circumstances, such as "selling at unfairly high prices or buying at unfairly low prices." This provision appears to reflect a desire by the government, or elements within the government, to continue to regulate pricing, even in unregulated markets. It is far broader than typical prohibitions on, for example, predatory pricing under U.S. law, where a plaintiff must prove that the challenged prices are below a measure of cost and that the price-cutting firms will be able to recoup the costs of predation. The AML provides no guidance as to how a price will be determined to be "unfair," or whether a defendant will be permitted to present economic evidence of the likely competitive effects (or absence thereof) of pricing that is alleged to be unfair.

PROHIBITION OF ABUSES OF IP RIGHTS

Article 55 of the AML. Article 55, the provision prohibiting abuses of IP rights, is contained in Chapter VIII, titled "Supplementary Provisions," rather than in Chapter III, which contains the provisions on abuses of a dominant market position. Consequently, it appears possible that a company could violate this provision without being found dominant. Article 55 reads:

> This law is not applicable to conducts by business operators to exercise their intellectual property rights in accordance with the IP laws and relevant administrative regulations; however, this law is applicable to the conduct of business operators to eliminate or restrict market competition by *abusing* intellectual property rights.

This very general language appears to present a concept similar to patent misuse under U.S. law, where, for example, a patent holder would not be permitted to seek to leverage its lawful monopoly IP rights to extend them beyond the proper scope of the patent. (The Chinese characters used in the law can be translated as either "abuse" or "misuse.") However, under U.S. law, patent misuse is merely a defense to a claim of patent infringement, not an affirmative claim or antitrust violation as in the AML.

The law provides no clue as to how to draw the line between "legitimate exercise" and "abuses" of IP rights. It is not clear how this provision will be read in conjunction with the abuse-of-dominance provision that prohibits "refusing to trade with relative trading parties without any justification." Will a mere refusal to license IP rights constitute abuse? Will the IP abuse provision be used to impose compulsory licenses of patents and other IP rights? Answers to these questions will be critically important to IP owners who invest in or sell within China.

Many multinational companies have expressed concerns that Chinese antitrust enforcers may be pressured by domestic industry to use this provision to circumscribe the rights of foreign IP rights holders from enforcing their IP rights against Chinese competitors.

The SPC Interpretation. The Judicial Interpretation by the Supreme People's Court on Adjudication of Technology Contracts in 2005 lists six behaviors as "illegal monopoly of technology," some of which are prohibited outright and some of which are prohibited when practiced without valid justification. These may shed some light on how courts will distinguish reasonable restraints from "abuses" of IP rights under the AML. For example, prohibiting a technology transferee from filing oppositions against the validity of the rights in the subject technology or imposing additional conditions on filing such oppositions is prohibited under the Interpretation as an "illegal monopoly of technology," and any such clause in license agreements will be deemed void.

MANDATORY PREMERGER NOTIFICATION

The Foreign M&A Regulation. In 2003, before the enactment of the AML, China already had established and administered a merger control regime under the Regulation on Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors ("Foreign M&A Regulation") and its predecessor regulation. This regulation has been enforced by MOFCOM and SAIC, but applied only to mergers and acquisitions by foreign investors, while the new AML applies to domestic M&A as well as foreign M&A.

The AML Merger Review Process. Chapter IV of the AML establishes a mandatory notification system for concentrations that meet filing thresholds that have now been defined in a new regulation, discussed below. The AML defines a "concentration" as a merger of multiple undertakings, one undertaking gaining control over another by means of equity or asset purchase, or one undertaking gaining controlling rights or decisive influence over another through contracts or other means. As of now, no definition of "control" has been provided.

Under Chapter IV of the AML, the parties to a transaction that meets the filing thresholds (see below) must file: a notification; a statement explaining the impact of the concentration on competition; the agreement itself; audited financial and accounting reports of the parties for the preceding fiscal year; and "other documents and materials required by the [AMEA]." After filing these documents, the parties must wait at least 30 days (MOFCOM's current practice is to calculate the period with calendar days) after notification before they can close the transaction. This makes express a requirement that is generally understood but remains unwritten in the merger review practice under the Foreign M&A Regulation as administered by MOFCOM and SAIC. The 30-day period begins to run only when "complete" documents are submitted. Thus, if the AMEA deems the initial submission incomplete, the initial review may take more than 30 days after the filing of the initial submission.

The AMEA may, during this preliminary 30-day review period, decide to initiate further review, which normally must be completed within 90 *additional* days from the date of its decision to undertake further review of the transaction. Moreover, the AMEA may request an extension of up to 60 *additional* days for its review if the parties consent, if the materials submitted by the parties are "inaccurate," or if there are significant changes of circumstances. All of this means that transactions subject to second-stage investigations could require as much as 30 + 90 = 120 days (roughly 16 weeks or four months) for clearance, and perhaps additional time before the 30-day clock begins to run because the AMEA deems the initial filing incomplete, plus potentially another 60-day extension of the 90-day period if the parties' documents or submissions are found to be "inaccurate" or to require "further verification."

Reporting Thresholds Under the New Merger Regulation. Under the Regulation on Notification Thresholds for Concentrations of Undertakings ("Merger Regulation"), released days after the effective date of the AML, prior notification is required for concentrations meeting either of the following thresholds:

- The combined worldwide turnovers of all undertakings involved in the last fiscal year exceed RMB 10 billion (approximately US$1.47 billion), and the China-wide turnovers of at least two undertakings each exceed RMB 400 million (approximately US$58.8 million); or
- The combined China-wide turnovers of all undertakings involved in the last fiscal year exceed RMB 2 billion (approximately US$294 million), and the China-wide turnovers of at least two undertakings each exceed RMB 400 million (approximately US$58.8 million).

The notification thresholds under the Merger Regulation, which removed a controversial market-share-based threshold, are an improvement over the old thresholds in the Foreign M&A Regulation and also over the draft version regulation circulated in March 2008 for public comment. They provide greater certainty for companies and their counsel to assess whether a merger filing in China is required, based on objective standards of worldwide and China-wide turnover.

However, because the Merger Regulation does not require the target (as opposed to the seller undertaking) to have operations or any particular level of sales in China, it still may require notification of many transactions with little, if any, connection with China. In transactions involving three or more entities, a filing would be required even if two of the acquiring undertakings each have China-wide turnovers in excess of RMB 400 million but the acquired business has no sales or presence in China. Even two-party deals that could not affect competition in China may be caught, because MOFCOM has historically interpreted, and presumably will continue to interpret, a "party" to mean the entire group of affiliated companies. Therefore, if an acquiring foreign company and an acquired foreign entity meet the combined China-wide threshold based on exports to China, a filing would be required, even if the acquired subsidiary of the acquired entity has no operations or sales in China, and thus the deal could not affect competition in China.

Discretionary Review of Nonreportable Transactions. Another article in the Merger Regulation provides that the AMEA shall initiate investigation of a concentration below the above thresholds if there is evidence that the concentration has or is likely to have the effect of restricting or eliminating competition. A news release published by the State Council indicated that this provision is based on the practices in the U.S. and EU and that the evidence requirement will reduce the discretion that enforcement agencies may have otherwise had to investigate nonreportable transactions.

It is not clear what standard of evidence is required for the AMEA to conclude that a concentration is likely to restrict or eliminate competition and therefore require such an investigation. Unfortunately, the Merger Regulation does not provide any time limit for these discretionary reviews. Because the AMEA has the power to unwind transactions found to violate the substantive standard, it is conceivable, and troubling, that the AMEA may have the authority to accumulate evidence and order the reversal of a transaction years after the transaction has closed and companies, personnel, and assets have been integrated.

Substantive Standards for Merger Review. Article 27 directs the AMEA, in reviewing mergers and acquisitions, to consider the following factors, among others: the parties' market shares and market power; market concentration and structure; the "likelihood of elimination or restriction of competition in the relevant market as a result of the proposed concentration"; the effect on consumers and other relevant business operators (which could be read to include competitors, customers, and suppliers); and the "effect on the development of the national economy and public interest."

Consideration of a proposed transaction's effects on "market entry and technological progress" during merger review could raise issues about IP rights as well as other potential barriers to entry. Such provisions reflect the great significance that the Chinese government attaches to IP- and technology-related issues even in the competition law context. Although they are not discriminatory on their face, the fact that the AMEA must consider IP issues when reviewing mergers has raised concerns about potentially excessive regulatory discretion and favoritism towards domestic Chinese industry, especially given that domestic academic and public discourse about the AML during the drafting and legislative process included complaints about and criticisms of alleged abuses of IP rights and high market shares in China by non-Chinese companies in high-technology industries. Those statements, coupled with this provision of the AML, foster continuing concerns that the AMEA may consider exclusive or superior technologies owned by foreign companies to be technical barriers in certain markets.

There is also concern that consideration of the "effect on the development of the national economy and public interest" may result in protection of domestic competitors as well as consumers, although elimination of the language from earlier drafts setting forth the "protection of the lawful interests of business operators" as one of the objectives of the AML suggests that the remaining concerns may be unfounded. But the provision requiring consideration of the effect "on the development of the national economy and public interest" squarely raises the question of whether merger enforcement

will be utilized to support macroeconomic industrial policy or even protectionist goals that would better be dealt with through laws other than the AML.

National Security Review. Article 31 of the AML briefly mentions a separate and widely reported national security review, presumably along the lines of the U.S. CFIUS review under the Exon-Florio Act. However, it does not specify that the AMEA will conduct that national security review as part of the competition analysis of a proposed transaction. Many fear that this separate review could be used to protect domestic competitors rather than to address only bona fide national security issues.

Current Status of the Foreign M&A Regulation. MOFCOM has been enforcing merger control rules under the Foreign M&A Regulation and its predecessor since 2003. No formal rules have been published that expressly provide that the thresholds in the new Regulation supersede or repeal the merger control provision under the Foreign M&A Regulation. However, the AML and the new implementing Regulation are of higher hierarchy than the Foreign M&A Regulation published by MOFCOM. Moreover, as discussed in more detail below, the same agency, MOFCOM, will be responsible for merger reviews under the new Regulation. For these reasons, we expect that the AML and the new thresholds under the Regulation are likely to supersede, at least de facto, the merger control provisions and process under the Foreign M&A Regulation.

PROHIBITION OF ADMINISTRATIVE MONOPOLY

Perhaps most uniquely, Chapter V of the AML, which was intermittently removed from and then included in various drafts of the AML, prohibits "administrative monopoly," *i.e.*, when public and administrative government entities abuse their powers to hinder the workings of free markets. Prohibited abuses of administrative powers to restrict competition include requiring parties to deal with designated entities (usually "local champions," which have sometimes been protected from competition by local governments) and blocking the free flow of commodity among local regions (called "regional blockage") through discriminatory fees, licenses, checkpoints, technical barriers, and governmental approvals.

The AML does not empower the AMEA to stop such administrative monopoly behaviors or impose any legal sanctions on administrative agencies that engage in such restrictive practices. Instead, the AML provides that administrative agencies that abuse their power shall be "admonished" by the "superior authorities," and individuals shall be punished "in accordance with the law" (*i.e.*, laws other than the AML). The AMEA is authorized only to submit its opinions to the "superior authorities."

Because of its political nature and the AMEA's lack of any power to punish the abuses described in this chapter, these provisions may have little practical effect. The first case filed under the AML may, if it proceeds to a decision, shed some light on this issue. On August 1, 2008, the first day the AML came into force, four companies filed the first lawsuit under the new AML against the PRC State Administration for Quality Supervision, Inspection and Quarantine ("AQSIQ") in the Beijing First Intermediate People's Court, alleging that AQSIQ abused its administrative power by requiring consumer product manufacturers to subscribe to Product Identification, Authentication and Tracking System services from a company designated by AQSIQ, a company in which AQSIQ is alleged to have a stake, thus restricting the plaintiff companies' ability to provide competing product verification services. AQSIQ has been negotiating with the plaintiff companies, seeking to obtain withdrawal of the complaint.

PENALTIES AND CIVIL LIABILITY

Chapter VII sets out the penalties that can be imposed for violations of the AML. For violations against monopoly agreements and abuses of dominant position, the AMEA has the power to fine companies between 1 and 10 percent of total annual turnover plus the confiscation of any illegal gains.

Detailed penalty rules in subsequent implementing regulations will be needed to provide guidance on whether the definition of "sales" includes only sales in relevant markets or all sales by a violator and how the level of punishment will be determined. Parties that implement a concentration in violation of the premerger notification provisions are subject to fines of up to RMB 500,000. That amount, standing alone, is likely an insufficient deterrent. However, the AMEA also has the power to order the cessation of implementation, disposal of equity or assets, the transfer of the business, or other measures needed to restore the condition of the parties before the transaction. In imposing fines, the AMEA must take into account the nature, extent, and duration of the violation.

Private Right of Action. As discussed in greater detail in Part III of this *Commentary*, below, Article 50 provides that "Undertakings that cause loss to others as a result of their Monopolistic Conduct shall be liable for civil liabilities in accordance with law."

Leniency. The AML provides that the AMEA "may" reduce or exempt the penalty if a company reports monopoly agreements and provides material evidence to the AMEA on its own initiative. Unfortunately, this article does not specify whether the AMEA is required to grant leniency if the requirements are fulfilled, the specific conditions to be met for leniency, or the corresponding reduction of penalties. Those uncertainties, if not clarified in more detailed enforcement rules, will make it difficult for companies involved in cartels to make decisions about reporting such behavior and thus hinder the intended purposes of leniency programs, including detection of cartels.

INVESTIGATIVE POWERS OF THE ENFORCEMENT AGENCY

Article 39 of the AML grants the AMEA broad powers in connection with enforcement. These include, among other things, the powers to investigate and obtain relevant evidence, including documents, accounting records, electronic data, and bank account records, and the power to conduct on-premise inspection of the place of business and other places. The AMEA does not need a court order for searches, seizures, and other enforcement actions.

A sort of consent-decree approach appears to be provided for by Article 45, which provides that, if persons under investigation agree to take specific measures to eliminate the effects of violations, within a time limit prescribed by the AMEA, the AMEA may suspend the investigation. In such cases, the AMEA will monitor performance of the suspected violators' commitments and may terminate the investigation if it finds the commitments fulfilled. Conversely, the AMEA is required to resume the investigation if the commitments are not fulfilled, if the circumstances that were the basis of the decision to suspend the investigation have changed materially, or if the decision to suspend the investigation was based on incomplete or untrue information provided by the parties under investigation.

REGULATION OF STATE-OWNED ENTERPRISES ("SOES") IMPORTANT TO THE NATIONAL ECONOMY OR NATIONAL SECURITY

Article 7 provides that:

> in industries that implicate national economic vitality and national security, which are controlled by state-owned enterprises, and in industries in which there are legal monopolies, the state shall protect the lawful business activities of those enterprises, supervise and control their conduct and prices of their products and services, protect the interests of consumers, and promote technological progress.

In China, many such key industries are controlled by large SOEs, and during the drafting phases there was much speculation that the law would not cover SOEs at all.

However, the second paragraph of Article 7 prohibits SOEs from abusing their dominant positions or legal monopolies to the detriment of consumers. It remains to be seen whether this article will be used by the AMEA to protect SOEs or rein them in. The published discussion during the second reading by the National People's Congress ("NPC") centered on how to curb monopolistic behaviors of SOEs holding lawful monopoly positions, rather than on protecting those SOEs. Most discussions indicated that telecommunication enterprises and other SOEs in the public-utilities sector were the targets of criticism for behaviors such as charging excessively high prices, providing low-quality services, excising excessive profits, and harming the state and consumers. However, the industries that "implicate national economic vitality and national security" remain to be defined. Although the Chinese public may want to use the new AML to curb the behavior of such public-utility companies, some observers have expressed doubt that the AMEA will have the political strength or will to challenge those conglomerates.

TRADE ASSOCIATIONS AND INDUSTRY SELF-DISCIPLINE

The new AML is of two minds in handling trade associations, which traditionally often control the behavior of many Chinese industries, particularly those engaged heavily in export trade. A provision clearly stating that the activities of trade associations shall be governed by the AML had been present in all the drafts submitted to the NPC until it was replaced at the last minute with language in Article 16 stating:

"Industry associations shall not organize the business operators in their industry to engage in the monopolistic conducts prohibited by this Chapter." But Article 11, which was added during the NPC's second reading of the law (out of three), in June 2007, provides that "trade associations shall strengthen self-discipline of the industries, provide guidance for enterprises in their industries to compete lawfully, and protect the order of market competition."

This reflects competing concerns, both of which have politically powerful supporters. On the one hand, trade associations are expected to enhance the overall power and international competitiveness of Chinese industries and may justify export and domestic cartels in the name of responding to competitive pressures from foreign competitors. On the other hand, trade associations are a common instrument for price-fixing, which is understood to raise prices above competitive levels, harming Chinese consumers and businesses. For example, recent price increases set by the Chinese Instant Noodle Association were heavily discussed during the NPC's third review session of the AML, after those price increases were ruled illegal by NDRC, which regulates prices in accordance with the 1998 Price Law.

II. STRUCTURE AND RESPONSIBILITIES OF ENFORCEMENT AGENCIES UNDER THE AML

Under the two-agency regime created by the AML, the AMEA will be responsible for the actual enforcement of the AML, while the AMC will be in charge of formulation of competition policies and guidelines, coordination of enforcement activities, and evaluation of competition conditions in various markets. The AML does not prescribe the structure or components of the AMEA, merely describing it as "the AMEA designated by the State Council." This is understood to be a compromise that maintains the current allocation of powers between existing ministries under the State Council, while also providing a unifying body to coordinate enforcement activities.

Reform and restructuring of the State Council and the ministries under its authority started in March 2008, after the 11th Session of the NPC. Since then, the State Council has been engaged in defining and finalizing the functions of each ministry under its auspices. Under the State Council Restructuring Plan, three ministries—SAIC, NDRC, and MOFCOM—are entrusted with respective AML enforcement functions.

SAIC Restructuring Plan. According to the State Council Restructuring Plan for SAIC ("SAIC Restructuring Plan"), one of the major functions of SAIC will be:

> being responsible for AML enforcement relating to monopoly agreements, abuses of dominant market position, abuse of administrative power to restrict and eliminate competition (excluding monopolistic pricing behavior), and investigating and penalizing unfair competition, commercial bribery, smuggling and other economic related infringements in accordance with law.

A department called "Anti-Monopoly and Anti-Unfair Competition Bureau" (the "Bureau") will be established under SAIC and charged with the above responsibilities. The Bureau evolved from the previously existing Fair Trade Bureau, which was responsible for the enforcement of the 1993 Anti-Unfair Competition Law, and consolidated certain other SAIC enforcement functions arising under other laws. A separate "Consumer Protection Bureau," established under the 1993 Consumer Protection Law, will remain responsible for the protection of consumer rights and enforcement against counterfeit goods.

Nonmerger Enforcement: SAIC and NDRC. The SAIC Restructuring Plan confirmed the widely held expectations that SAIC, NDRC, and MOFCOM will share the enforcement responsibilities of the AML. However, the language in the Plan is far from clear, and it is only an administrative document clarifying the functions of the administrative agencies, rather than a law or regulation. No official Restructuring Plans have yet been published for NDRC or MOFCOM. However, the carving out of "monopolistic pricing behaviors" from the SAIC Restructuring Plan suggests that pricing-related violations under the AML will be supervised by NDRC, which is already responsible for industrial policy and price control in China.

Because most cartels and abuses of dominant market positions arguably will involve pricing behavior, there is likely to be no clear dividing line between "monopolistic pricing behaviors" (intended for NDRC's supervision) and "abuses

of dominance" (intended for SAIC). For example, predatory pricing cases may fall under the jurisdiction of both agencies: NDRC may take the view that predatory pricing is a monopolistic pricing behavior, while SAIC may take the position that it is a form of abuse of dominance. It remains to be seen how this allocation of enforcement functions will play out in practice, where it may be resolved by detailed working rules for the allocation of cases or decided by a higher-level body, such as the AMC.

Merger Enforcement: MOFCOM. In contrast to the jurisdictions of SAIC and NDRC, MOFCOM's role within the AMEA is relatively clear, having responsibility for conducting merger reviews. MOFCOM has been enforcing the merger review rules under the Regulation on Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors since 2003, and through that experience has developed a staff familiar with the legal and economic issues that arise in merger reviews. A new department within MOFCOM will be established to perform the functions of AML enforcement. It has also been reported that MOFCOM will act as the secretariat of the AMC and in that capacity be responsible for the daily work of the AMC, which will be composed of the heads of relevant ministries and headed by a vice premier.

Relationship Between AMEA and Industry Regulators. The relationship between AMEAs and industry-specific regulators also is not clear. Previous drafts of the AML expressly made sectoral regulators exclusively responsible for addressing anti-monopoly violations within their own sectors in accordance with other laws and regulations and required them only to report the outcomes of their cases to the AMC. This provision was deleted from the AML as enacted, possibly providing the basis for more centralized oversight by AMEAs.

Looking Ahead. As of this writing, neither the AMC nor the AMEA has been formally established. Organizing these enforcement agencies and staffing them with competent enforcement officials will take more time. The complexity and uncertainty regarding the allocation of enforcement powers among SAIC, NDRC, and MOFCOM will likely pose great difficulties for companies and practitioners as they attempt to ascertain which agency will have jurisdiction over a specific case, especially outside the merger review process. Moreover, just as in some other major jurisdictions, coordination by the agencies on jurisdictional issues is likely to cause delays in case handling, and concurrent enforcement by multiple agencies may result in inconsistent enforcement standards and analysis.

As structured, the departments responsible for actual enforcement of the AML will be set up under the above three existing government ministries, SAIC, NDRC, and MOFCOM. The relatively low hierarchy of these authorities in the Chinese bureaucratic system may render enforcement actions against large state-owned enterprises or local governmental "administrative monopolies" more difficult and may render competition decisions more susceptible to the influence of factors unrelated to competition issues. For example, NDRC also is in charge of industrial policy, while MOFCOM also has simultaneous responsibility for international investment and trade. These functions relating to industrial and trade policies conceivably may conflict or interfere with the roles they will play in enforcing the AML and the realization of pro-competitive goals.

III. ANTITRUST LAWSUITS IN CHINESE COURTS

As noted above, Article 50 of the AML provides that companies that cause losses to others by violating the AML are subject to civil liability. This vague provision leaves open two principal questions about private litigation under the AML: (1) whether private parties can file lawsuits directly with courts without a prior finding of infringement by the AMEA; and (2) whether a specialized antitrust tribunal or another set of courts will have jurisdiction over AML cases. Answers to these questions appear to be provided by the Regulation on Cause of Action in Civil Cases, promulgated by the Supreme People's Court ("SPC") on April 1, 2008 ("SPC Regulation") and the Notice on Study and Adjudication of AML Disputes, published by the SPC on July 28, 2008 ("SPC Notice"), as discussed below.

Categorization of Anti-Monopoly Disputes With IP Disputes

In China, causes of action are organized into categories that provide guidance on whether a Chinese court will accept a complaint and which law will be applied by the court. Among the 10 broad categories and four levels of a total of 361 causes of action, unfair competition and monopoly disputes are included under the broad heading of "IP Disputes," within section 16, entitled "Unfair Competition and Monopoly Disputes," which includes the following causes of action:

- No. 154 counterfeiting disputes;
- No. 155 false advertising;
- No. 156 infringement of trade secret;
- No. 157 dumping;
- No. 158 tying and imposing unreasonable trading conditions;
- No. 159 lottery sales;
- No. 160 commercial slandering;
- No. 161 bid rigging; and
- No. 162 monopoly.

Other than the monopoly disputes (No. 162), other causes of action under section 16 are claims under the 1993 Anti-Unfair Competition Law, which has been used primarily to protect consumers from unfair and deceptive commercial conduct, including sales of counterfeit goods that infringe trademarks.

In China, IP cases are tried in special IP Tribunals. Classifying monopoly disputes under the umbrella group of IP disputes indicates that cases arising under the AML will be tried by the IP Tribunal. In China, not every level of local court has IP Tribunals. IP Tribunals usually reside within intermediate courts, although some sophisticated and experienced first-level local courts also have jurisdiction over such cases, including the Beijing Hai Dian District Court.

JURISDICTION OF THE IP TRIBUNAL OF THE PEOPLE'S COURT

The SPC Notice provided further confirmation that the IP Tribunal will handle civil cases under the AML. The Notice states that the AML has a close relationship with abuses and protection of intellectual property rights and that the AML and the Anti-Unfair Competition Law belong to the field of competition law. Together, the SPC Regulation and the SPC Notice appear to make clear that the IP Tribunal will have jurisdiction over AML cases.

The SPC Notice also notes that antitrust cases are highly complex, involving both economic and legal issues, and that outcomes of antitrust cases will have significant influence both on the enterprises concerned and the industry involved. The Notice goes on to exhort local courts to prepare to handle these cases and to report new issues to the SPC. Based on the tone and content of the Notice, it appears that the SPC is instructing the Chinese courts to take a relatively cautious approach to lawsuits under the AML.

SUBSTANTIVE AND PROCEDURAL REQUIREMENTS FOR CIVIL LAWSUITS

The SPC Notice states that courts shall accept and adjudicate cases filed under the AML, as long as the case satisfies the requirements of Article 108 of the Civil Procedure Law and the applicable provisions of the AML. Article 108 of the Civil Procedure Law prescribes the fundamental elements of any cognizable civil case, which are as follows: (1) the plaintiff must be a citizen, legal person, or other entity that has an interest in the case; (2) the defendant must be identified specifically; (3) the claims, facts, and arguments must be specific; and (4) the case must be a civil case within the scope of the jurisdiction of the courts generally and within the jurisdiction of the specific court in which the lawsuit is filed.

It appears from the SPC Notice that private parties can directly bring damages claims in court without a prior finding of infringement by the AMEA, since such a prerequisite is not required by either the Civil Procedure Law or the AML. The early cases under the AML will provide more guidance on the specific types of plaintiffs that will have standing, the types of parties that may be properly named as defendants, and the particular elements of claims that must be pled to state a claim under the AML.

ADMINISTRATIVE LAWSUITS AND JUDICIAL REVIEW OF AMEA DECISIONS

Where the interested parties are dissatisfied with AMEA decisions under the AML, they may lodge administrative lawsuits to challenge the decision. Article 53 of the AML provides that AMEA decisions to prohibit or permit concentrations, or to impose conditions on concentrations (*i.e.*, merger decisions), shall be first subject to administrative reconsideration by the AMEA before lawsuits can be filed challenging the decisions. In contrast, when challenging other decisions by the AMEA (*i.e.*, decisions on unlawful agreements and abuses of a dominant market position), the parties may choose either to apply for administrative reconsideration or to immediately file an administrative lawsuit with the courts. Administrative suits are to be handled by the Administrative Disputes Tribunal in accordance with Administrative Litigation Procedure Law and other relevant laws.

Pursuant to the Administrative Reconsideration Law, decisions by the ministries under the State Council shall be reconsidered by the ministry that issued the decision. If the parties are dissatisfied with the reconsideration decision, they may apply for a final administrative order by the State Council or file an administrative suit under the court. Since the AML is mainly to be enforced by MOFCOM, SAIC, and NDRC, as constituents of the AMEA, and since these agencies are ministries under the State Council, the decisions of those enforcement authorities are subject to reconsideration by the same agency that rendered the original decision.

The time limit for administrative reconsideration is 60 days after acceptance of application for administrative reconsideration, with a possible extension of an additional 30 days for complicated cases. For example, parties must undergo a 60- or 90-day administrative reconsideration by MOFCOM before filing a court suit to challenge a merger decision by MOFCOM. As noted above, for other decisions under the AML, the administrative reconsideration procedure is optional.

CONCLUSION

Many of the AML's provisions intentionally utilize broad or vague language, which is intended to be filled in by implementing regulations while allowing ample room for discretionary enforcement and subsequent updating of such regulations. However, this reduces predictability, particularly in a civil law system such as China's that does not rely on case-law precedents. Many outsiders fear that Chinese anti-monopoly enforcers will be pressured to apply the new AML unfairly—*e.g.,* against foreign multinationals and IP rights holders, in favor of domestic protectionism. Certainly, the law provides at least some room for the enforcers to do so.

With the increasing importance of the Chinese economy, the increasing interdependency of the world's markets, and the internationalization of antitrust law enforcement, the AML will have a far-reaching influence. Only time will tell how China and its new anti-monopoly authorities will choose to enforce the AML, including whether it will be applied equally to foreign and domestic enterprises. Due to the lack of independence of the AMEA and the legal infrastructure in China, political and noncompetition-based legal considerations, including trade and industrial policy, must be factored into any predictions about the near-term enforcement of the AML.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Peter J. Wang
86.21.2201.8040
pjwang@jonesday.com

H. Stephen Harris Jr.
1.404.581.8197
sharris@jonesday.com

Yizhe Zhang
86.10.5866.1111
yzhang@jonesday.com