China's New Anti-Monopoly Law

Luke Lechtenberg

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Overview

China passed its first anti-trust (anti-competition) statute in 2008. It is called the Anti-Monopoly Law (AML), and it was debated and worked on for two decades before it was passed and made into law. The AML targets three broad categories of monopolistic behavior: monopoly agreements, abuse of dominance, and anti-competitive concentrations (121). Exceptions are made for industries that are controlled by the state-owned economy and that are critical to the wellbeing of the national economy and national security, as well as industries in which ‘exclusive operation and exclusive sales are the norm of business in accordance with the law (252). Before the AMLs passage, antitrust provisions were spread across nearly 40 separate laws (121).

Enforcement

(121) The AML emphasizes administrative enforcement over judicial enforcement, and the agencies are divided primarily into two groups: the Anti-Monopoly Commission of the State Council and the Anti-Monopoly Enforcement Authority. The Anti-Monopoly Commission has legislative-type powers, capable of drafting competition policies, releasing assessment reports, and formulating competition guidelines. The Anti-Monopoly Enforcement Authority is the umbrella agency for the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM), which is responsible of merger review, the Department of Price Supervision, which is responsible for enforcing pricing and disbanding cartels, and the Anti-Unfair Competition Enforcement Bureau which is charged with monitoring non-price related abuse.
(122) The AML provides for several means of enforcement of the law, such as fines, sanctions, and criminal charges. If a business owner discloses a monopoly agreement, he is granted leniency when punishment is imposed for the monopolistic behavior. (123) The main mechanism of enforcement is fines. When business reach and fulfill a monopoly agreement, or when a business abuses its dominate market position, the administering agencies may impose fines between 1% and 10% of the previous year’s sales revenue. When imposing fines, the agency is supposed to consider the nature, extent, and duration of the violation. If someone obstructs an investigation, they can face fines or criminal charges. For government officials that abuse their power, disciplinary sanctions and criminal charges can be filed by the enforcement agencies.

Mergers

(124) Before the beginning of a merger transaction, the merging companies must give the Chinese administering authorities notification. Before this notification, informal discussion with the authorities is encouraged, in the hopes that the merger review process is more transparent and the certainty of granting the merger can bolster the businesses’ confidence in conducting the concentration.

The merging parties are required to prove that the merger will not adversely affect competition. This raises several concerns, such as cost, bias, and rent-seeking. It can be very cumbersome and costly for a business to gather the requisite data on the market structure and impacts on the market structure resulting from the concentration. Furthermore, when entities are paid to conduct market studies and analysis, this raises doubts as to their credibility and independence. In addition, there are no concrete rules specifying the weight such studies and
documents have in the merger review process. This creates a prime environment for rent-seeking and lobbying

**Mergers – Standard of Review**

(125) The focus of review is the potential effect of a concentration. What would prevent a merger is if MOFCOM thought that a concentration has, or would likely have, the effect of eliminating or restricting competition. There are, however, two exceptions to this rule: if the beneficial effects would exceed the adverse effects, or if the merger advances the public interests. Examples of such situations are achieving energy savings, protecting the environment, a mitigation of a severe decrease in sales volume or excessive overstock during an economic recession, and to safeguard the interests in foreign trade (254).  

(125) The definition of market used in this analysis is broad. In the United States and Europe, the focus of the inquiry is on the specific product market in question. In China, the definition takes on a product dimension and a geographic dimension. The factors considered for the product market are the product’s characteristics, prices, and intended use. The geographic market is defined as the scope of the geographic area in which consumers can acquire the commodity.

**Nationalism as a decision-making factor?**

(127) There are two recent merger decisions made by MOFCOM that raise strong suspicions of nationalism as a driving factor in MOFCOM’s denials and restrictions of mergers. The two mergers were InBev/Anheuser-Busch and Coca-Cola/Huiyuan. The acquisition of Anheuser-Busch by InBev was allowed, but it was conditional.  

(128) The conditions were that InBev could not increase its shareholdings in three other Chinese brewing companies, and Anheuser could not increase its shareholdings of Tsingtao Beer. Their reasoning contained very
little by way of a market analysis of the impacts of the merger, and instead was based on broad statements regarding the massive scale of the merger and the high market share the post-merger company would possess. In the United States and Europe, a merger would be cleared if it was found to not be anticompetitive. The driving decision in this merger case seemed to be MOFCOM’s concern that foreign firms might gain control over Chinese firms and the famous Chinese brand Tsingtao.

The more troubling of the two decisions was MOFCOM’s block of Coca-Cola’s purchase of Huiyuan (China’s largest juice manufacturer). The reasons MOFCOM blocked the merger were as follows: 1) Coca-Cola would have been able to leverage its dominate market position in the carbonated beverages market within the fruit juice market, harming competition and consumers. 2) Coca-Cola would have effective control over the juice market through two well-known brands, Minute Maid and Huiyuan, increasing the barriers to entry in the market. 3) The merger would have decreased mid and small-sized firms to compete and innovate, which would impact competition negatively and develop an unhealthy market structure. The consensus among antitrust experts outside of China at the time of this decision was that the block was primarily nationalistic and the deal would not have harmed competition. MOFCOM, on the other hand, insists that nationalism was not a basis for the decision.

**Abuse of Dominant Position**

(132) A big difference among anticompetition laws around the world is their definition of dominance. Under the AML, there is a presumption of dominance, that may be rebutted, if one enterprise accounts for half or more of the relevant market, or if two enterprises have a joint market share accounts for more than two thirds of the relevant market, or if three enterprises account for a joint market share of more than three quarters of the relevant market. (255) this is
in contract to the European process, which makes a determination on a case-by-case basis. The presumption of dominance is intended to ease the work of enforcement agencies, but overlooks three key variables: 1) it is often difficult to calculate the relevant market share, 2) the number of competitors can vary substantially according to the nature of the goods and services in question and how they are defined, and 3) a market economy can be extremely dynamic (255).

Services in the Public Interest

Article 7 of the AML says, “with respect to industries that are controlled by the state-owned economy and that are critical to the wellbeing of the national economy and national security, as well as industries in which exclusive operation and exclusive sales are the norm of business in accordance with the law, the State shall protect the lawful business activities of the undertakings in such industries.” This provision is similar to those governing European anti-trust law, which creates special or exclusive rights for businesses that are not normally conducted under free market principles. In order to fit anticompetition rules to services such as postal delivery, electric supply, public transportation, social and health services, etc., the rules would have to be altered to the point of becoming inapplicable.

Abuse of Administrative Power

A distinctive feature of the AML is its explicit prohibition of administrative monopolies. Chapter 5, Articles 32 to 37 require administrative agencies and organizations who administer public affairs to refrain from using their governmental power to 1) require organization or individuals to deal in, purchase, or use the commodities supplied by the undertakings designated by them, 2) hinder the free flow of commodities among different regions, 3) exclude or restrict the participation of undertakings from other regions in local bidding activities by means such as
prescribing discriminatory qualification requirements or standards or by not publishing information according to law, 4) exclude or restrict investment in their region by undertakings from other regions, by applying means such as treatment not equal to what local undertakings are entitled to, 5) compel undertakings to engage in any monopolistic conduct, and 6) make regulations that contain provisions eliminating or restricting competition.