PART I

Introducing the Anti-monopoly Law
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Competition Law in China and the Importance of Context

1.1 Introduction

In December 1978, the Communist Party of China (CPC) made the critical decision to shift its focus from ‘class struggle’ to ‘economic development’.

Since then, China has adopted incremental and far-reaching reforms to shift its centrally-planned economy to one that is market-based, open up its economy to foreign investment and participate in global markets. China’s entry into the World Trade Organization (WTO) on 11 December 2001 marked its formal integration into the global economic system.

China’s economic growth has been hailed as remarkable not only for the high, sustained rate at which it has been achieved, but also because it has been achieved with a relatively weak legal system and underdeveloped financial markets, institutions thought to be critical to economic development.

When China first embarked on economic reforms and opening up, its legal system was virtually non-existent, having been effectively abolished during the Cultural Revolution. Since the mid-1990s, China has attached increasing importance to the rule of law and to establishing and improving its laws and legal institutions in order to promote and support economic reforms and the development of a
market economy. As part of those law-making efforts, China enacted its first comprehensive competition law in 2007 – the Anti-monopoly Law (AML). The AML regulates anticompetitive agreements (referred to as ‘monopoly agreements’), abuses of dominant market positions, and mergers (referred to as ‘concentrations of undertakings’), which are together defined as monopolistic conduct. There are also some provisions in the AML that have been tailored to address China-specific matters such as administrative monopoly, which is the abuse of administrative power to restrict competition and includes exercises of administrative power that impede the free flow of goods within China’s internal market or competition in or market entry into particular industries or sectors.

1.2 Evaluations of the Anti-monopoly Law to Date

The development, adoption and subsequent implementation and enforcement of the AML has garnered substantial attention and commentary from academics, lawyers, government officials, economists, businesses and media outlets in China and beyond. Drafts produced, investigations launched and decisions made in relation to the AML have been carefully scrutinised and considered.

Generally speaking, the AML is regarded as a modern competition law that is largely consistent in form and substance with prevailing international competition law norms, and in particular the competition laws of the European Union and Germany. Commentators note that many

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6 Anti-monopoly Law, ch. II.

7 Anti-monopoly Law, ch. III.

8 Anti-monopoly Law, ch. IV.

9 Anti-monopoly Law, art. 3.


substantive provisions in the AML are similar to provisions in European Union competition law, and that a number of legal doctrines from United States antitrust law have also been reflected in the AML.\textsuperscript{12} Many commentators observe that decisions made under the AML are increasingly framed in language that is identifiable as and consistent with what they regard as standard antitrust economic theories of harm and legal doctrines and approaches that are adopted in the United States, Europe and other mature competition law jurisdictions.\textsuperscript{13} They also note that AML decisions, especially merger decisions, reflect growing analytical depth and sophistication.\textsuperscript{14}

Nonetheless, the AML and its enforcement have attracted some criticism. Commentators voice concerns that so-called ‘non-competition factors’ are influencing the outcomes of investigations and reviews taken by the Chinese competition agencies. They are also worried that the AML is not being applied equally to state-owned enterprises (SOEs) and is being enforced in a manner that discriminates against foreign companies. Another key complaint is the lack of transparency and due process in the


investigation process. Critics are also concerned about the effectiveness of the administrative enforcement structure.

1.2.1 Consideration of Non-Competition Factors

The inclusion of ‘public interest’ and ‘the healthy development of the socialist market economy’ as express objectives of the AML has been viewed as problematic by many commentators.\(^{15}\) They regard these objectives as being inappropriate for competition law and contrary to international competition law norms.\(^{16}\) In their view, the objectives of competition law should be limited to enhancing economic efficiency and consumer welfare, and conduct should be assessed by reference to its impact on competition only. Other objectives or considerations such as matters related to industrial policy or foreign investment policy, referred to as ‘non-competition’ matters, lie outside the realm of competition law and policy and are better addressed in other laws and policies.\(^{17}\) These objectives are also considered too vague, which critics argue allows the AML to be enforced in a manner such that non-competition objectives such as industrial policy, the interests of SOEs or stability concerns might take precedence over competition concerns such as consumer welfare and efficiency.\(^{18}\) In addition, other provisions

15 Anti-monopoly Law, art. 1.
of the AML provide for the consideration of industrial policy, economic development and social factors.19

A number of commentators believe that non-competition factors have influenced AML enforcement outcomes. For merger enforcement, this issue has generally arisen in situations where a decision reached by China’s Ministry of Commerce (MOFCOM) was different to that reached by other competition authorities reviewing the same merger, or where the conditions imposed by the MOFCOM on a merger appeared, in their opinion, not to be directed at addressing the stated competition concerns. Mergers involving products considered important to Chinese economic development or stability, well-known Chinese brands, intellectual property or sensitive or strategic industries also tend to raise such concerns. In such cases, commentators have speculated that non-competition considerations were the reason for the divergent outcomes or perceived disconnect between the stated competition concerns and the conditions imposed.20 Similarly, concerns that the AML was being enforced to achieve non-competition policy goals have been voiced in non-merger investigations where foreign companies were investigated and/or sanctioned. Some commentators criticised the competition agencies for pursuing industrial policy and/or protectionist goals in these cases, and for setting price controls.21


19 Anti-monopoly Law, arts. 4, 27, 28.


1.2.2 Protection of State-owned Enterprises

When the AML was first enacted, there were concerns that SOEs would be exempt from or enjoy special treatment under the AML. Commentators were worried that Article 7 of the AML, which recognises and protects the state’s controlling position in national economic lifeline, national security and state-granted monopoly industries and confirms that businesses in these industries must not abuse their dominance, would give enforcement authorities too much discretion in the way that the AML is applied (or not) to SOEs. For example, it might justify the exemption of SOEs from the operation of the AML, or the prioritisation of industrial policies or other non-competition considerations over competition concerns where SOEs are involved.

Some of these concerns have been put to rest since the AML came into effect. The AML has been enforced against SOEs, allaying concerns that SOEs were exempt from its operation. However, commentators remain critical of the low level of AML enforcement against SOEs. They believe that the AML has been applied leniently or weakly against SOEs. For example, some authors point out that, although many mergers involving SOEs have been undertaken since the AML came into effect, a number of which would have reached the notification thresholds, only a few of them have been notified to the MOFCOM.


There are suggestions that investigations involving SOEs may be insufficiently investigated and that rather than sanctioning SOEs for engaging in anti-competitive conduct, the competition authorities are accepting commitments and terminating investigations instead. There are also concerns that non-competition matters, such as creating and building national champions, broader SOE reforms and industrial policy, have influenced AML outcomes where SOEs are involved.

1.2.3 Discrimination against Foreign Companies

Concerns that the AML would be enforced against foreign companies in a discriminatory manner persisted throughout the drafting process and into enforcement. These concerns initially stemmed from what some commentators considered to be the protectionist rhetoric surrounding the drafting of the AML. Further, the insertion of Article 31 into the AML, which provides that acquisitions of Chinese companies by foreign investors are subject to both anti-monopoly review and national security review, also caused alarm among foreign commentators. Many of them believed that the inclusion of Article 31, against a backdrop of growing concerns purportedly held by the public and the Chinese government regarding foreign investment in China, for review, and with no consequences for such non-compliance.25


increased the risk that national security concerns would seep into the anti-monopoly review process. In their view, national security concerns – the definition of which includes national economic interests in China – are political in nature and irrelevant to competition review.

Criticisms that foreign companies are unfairly targeted by the Chinese competition authorities have intensified in enforcement. In relation to merger enforcement, commentators highlight that most conditionally approved or prohibited mergers have involved mergers between foreign companies and that no purely domestic mergers have been subject to conditions or prohibited. They also observe that purely domestic mergers are notified much less frequently than mergers involving foreign companies. The US–China Economic and Security Review Commission argues that this effectively exempts such domestic mergers from the AML, which in turn disadvantages foreign companies because they are exposed to greater scrutiny and uncertainty and incur additional costs associated with anti-monopoly review. Commentators also believe that some merger decisions have been motivated by protectionist, foreign investment or industrial policy concerns, such as promoting national champions. In particular, the decision to prohibit the Coca-Cola/Huiyuan merger, whereby Coca-Cola proposed to acquire a well-known


Chinese fruit juice brand, attracted substantial criticism for its perceived motivation of economic protectionism. Commentators are also critical of non-merger enforcement activities and believe that these have disproportionately targeted and impacted on foreign companies. While they acknowledge that domestic companies have been investigated and sanctioned for breaching the AML, they believe that domestic companies face lighter penalties than foreign companies and are not probed for similar violations in industry-specific investigations. There is also a view that foreign companies have been disproportionately targeted in high-profile investigations, with the aim of reducing prices for goods sold to Chinese consumers. Further, US commentators have been especially concerned that the AML is being used to pressure foreign companies to license their intellectual property on terms that are favourable to Chinese licensees and to reduce their

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