THE PEOPLE'S REPUBLIC OF CHINA ENACTS ITS FIRST COMPREHENSIVE ANTITRUST LAW: TRYING TO PREDICT THE UNPREDICTABLE

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I. INTRODUCTION

In August of 2008, the global spotlight will shine on the People's Republic of China. In the early days of that month, Beijing will begin hosting the 2008 Summer Olympic Games. On another note, shortly prior to the initiation of the 2008 Summer Olympic Games, China's first comprehensive antitrust law will become effective. The new Anti-Monopoly Law's impact on entities doing business in China, particularly for those involved or considering involvement in mergers and acquisitions, is considerable and, at this point in time, almost unpredictable. Significantly, the window of opportunity to act prior to the date on which the Anti-Monopoly Law becomes effective—August 1, 2008—will be less than a year. Therefore, it is vital for business entities, who are doing or intend to do business in China, to familiarize themselves with the antitrust law's provisions and have an understanding of the historic context in which it was enacted.

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After over a decade of heated debate, China at last enacted its first comprehensive and unified antitrust law, titled "The Anti-Monopoly Law of the People's Republic of China," on August 30, 2007.[1] Prior to that date, China, one of the world's largest economies, was remarkably without a comprehensive antitrust law. The Anti-Monopoly Law, like most countries' antitrust laws, covers the traditional topics, including restrictive agreements,[2] abuse of dominant market position,[3] and mergers and acquisitions.[4] In addition, unlike many antitrust laws, the Anti-Monopoly Law also covers anticompetitive behavior by regional and local administrative government agencies.[5] While the enactment of the Anti-Monopoly Law has received much international applause,[6] there are some members of the international community that remain skeptical as to whether the Anti-Monopoly Law will be successful in promoting the free market competition policies underlying antitrust law.[7] As will be explained in this article, due to the Anti-Monopoly Law's broad-empowering language and undefined terms, much will depend on the Chinese government's enforcement of the Anti-Monopoly Law through the agencies created therein.

This article focuses on three main topics. Section II of this article will discuss the history of the development of antitrust law in China and compare that history to the evolution of antitrust laws in the United States. Understanding China's unique history of antitrust law will provide assistance in predicting the Anti-Monopoly Law's future application and en-

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1. The Anti-Monopoly Law of the People's Republic of China, *translated by* DLA Piper (2007) (hereinafter "Anti-Monopoly Law"), *available at* http://www.dlapiper.com/files/upload/China_AML_Translation_Alert_.html; *see also* Paul Jones, *China's New Anti-Monopoly Law: An Economic Constitution for the New Market Economy*, 3 CHINA L. REP. 3 (Sept. 2007).

2. Anti-Monopoly Law, ch. II (Monopoly Agreements).

3. Anti-Monopoly Law, ch. III (Abuse of Dominant Market Position).

4. Anti-Monopoly Law, ch. IV (Concentration of Undertakings).

5. Anti-Monopoly Law, ch. V (Prohibition of Abuse of Administrative Powers to Restrict Competition).

6. *See* Andrew Batson and Jason Leow, *Beijing's Antitrust Plan Raises Questions*, WALL ST. J., Aug. 30, 2007, at A6; Keith Bradsher, *Beijing Seeks New Scrutiny of Investments by Outsiders*, N.Y. TIMES, Aug. 28, 2007, *available at* http://www.nytimes.com/2007/08/28/business/worldbusiness/28monopoly.html.

7. *Id.*

forcement. Section III of this article will analyze the provisions of the Anti-Monopoly Law, including the provisions creating and empowering the new administrative agencies charged with implementing the Anti-Monopoly Law and enforcing its prohibitions. In Section III, based on China's antitrust law history and the Anti-Monopoly Law's provisions, this article will posit some observations and predications as to the Anti-Monopoly Law's future application and enforcement, as well as discuss both the positive and negative aspects of the law with regard to promoting free competition. Currently, much uncertainty exists because the enacted Anti-Monopoly Law is still subject to amendment and related-forthcoming regulations, and the law itself, with its broad provisions and undefined terms, leaves much open to the interpretation and discretion of the controlling government bodies, administrative agencies and judicial system. Thus, in Sections IV and V, while the only certainty is that it will not be business as usual, this article will nonetheless attempt to predict the implications of doing business in China after the Anti-Monopoly Law's August 1, 2008 effective date.

II.
THE HISTORY OF CHINA'S ANTI-MONOPOLY LAW

An inherent conflict exists between antitrust laws—typically based on free market policies—and a socialist and regional market economy as exists in China. The history of the development of China's antitrust law illustrates this struggle. Indeed, China's Anti-Monopoly Law still reflects this tension, which must now be played out.

Beginning in the 1960's, individuals such as Deng Xiaopeng began calling for free markets for farmers to address the problems and famines caused by Mao Zedong's "Great Leap Forward" policies.[8] As a result of his outcry for free markets for farmers, Deng was labeled as a capitalist, placed under house arrest, and subsequently exiled.[9] However, two years after Mao's death in 1976, Deng and his supporters acquired

8. H. Stephen Harris, Jr., *The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, 7 CHI. J. INT'L L. 169, 172 (Summer 2006) (discussing in detail the context and history behind the drafting of China's Anti-Monopoly Law).

9. *Id.*

power and began promulgating free market policies, which included "abolish[ing] rural agricultural communes,. . . allowing urban Chinese to open small businesses and purchase commercial goods[,]. . . and open[ing] China to foreign investments, albeit with required participation and control by Chinese joint venture partners."[10] China acquired immediate returns from these free market policies. For example, by 1984, China finally became "self-sufficient in food for the first time in modern history."[11] Nevertheless, the entrenched socialist and largely regional market economy presented fortified barriers against the development of free market policies nationwide.[12] Thus, in the 1980's, China still remained a far distance away from enacting its first comprehensive antitrust law.

The enactment of laws promoting free market policies followed the call for the transformation of "China's centrally planned economy, dominated by state-owned enterprises, to a system that embodies free-market characteristics but retains certain socialist attributes."[13] For example, in 1988, China enacted the Enterprise Act with the hope of reducing factories' dependencies on state support and imposing the threat of bankruptcy for factories that could not effectively compete in the market. However, as commentators have noted, "[s]ince the advent of the Enterprise Act,. . . it is broadly agreed that entrenched government monopolies and local and regional protectionism have hampered any wholesale transition to market competition."[14] Further, state-operated enterprises "have continued to hamper China's economic growth," and "many of the largest and most profitable [state-operated enterprises] have been retained in state hands and represent a substantial share of the Chinese economy."[15]

Accordingly, Chinese officials did not begin to discuss seriously laws specifically focusing on traditional antitrust topics

10. *Id.* at 172-73 (citing RICHARD EVANS, DENG XIAOPING AND THE MAKING OF MODERN CHINA (Penguin 1995)).

11. *Id.* at 172.

12. *Id.* at 173.

13. *Id.*

14. *Id.* at 173.

15. *Id.* at 174 (citing DALI L. YANG, REMAKING THE CHINESE LEVIATHAN, MARKET TRANSITION AND THE POLITICS OF GOVERNANCE IN CHINA 31-37 (Stanford 2004)).

until approximately the mid-1980's.[16] "As early as 1988, lawmakers considered incorporating standard antitrust principles into what would then become the Anti-Unfair Competition Law of 1993 ('UCL'). Indeed, Articles 6 and 7 of the UCL expressly and broadly prohibit public and private monopolists from 'forcing' purchases of commodities or 'prohibit[ing]' competition from other enterprises."[17] In addition, Articles 11 and 15 prohibit sale prices below costs to drive competition out and foster collusion, respectively. Nonetheless, the antitrust provisions in the UCL proved to be a law without teeth. The enacted antitrust provisions lack substance and have been rarely enforced, largely due in part to disagreements over which government agencies would bear the responsibility of enforcing the provisions. Further, the prohibition of counterfeit goods, rather than monopolistic behavior, became the main concern of the UCL.

China took the first significant step towards the drafting of the Anti-Monopoly Law in the early-1990's when a group was established to examine the antitrust laws of other jurisdictions—including the United States, Germany, Japan, Australia, and South Korea—and to draft an antitrust law tailored for the needs and realities of China. This group was formed from members of China's State Economic and Trade Commission and State Administration for Industry and Commerce. However, in conflict with this significant step, China enacted the Price Law in 1997. The Price Law authorized local administrative agencies to control prices for the purpose of serving the socialist market economy. Notably, the Price Law contained some provisions that promoted free competition. For example, Article 14 of the Price Law prohibited undertakings from colluding with others in manipulating market prices. Nevertheless, this is an epitomic illustration of the inherent tension between the purposes underlying antitrust law and the policies of a socialist market economy.

This tension between China's socialist market economy and the purposes underlying antitrust law was somewhat resolved in favor of the latter when, after nearly fifteen years of

16. *See id.* at 174.
17. *Id.* at 174-75.

negotiation,[18] China became the 143rd member of the World Trade Organization ("WTO") on December 11, 2001.[19] Significantly, in order to become a member of the WTO, China agreed to several free competition policies, including:

> China will provide non-discriminatory treatment to all WTO Members. All foreign individuals and enterprises, including those not invested or registered in China, will be accorded treatment no less favorable than that accorded to enterprises in China with respect to the right to trade.
>
> China will eliminate dual pricing practices as well as differences in treatment accorded to goods produced for sale in China in comparison to those produced for export. Price controls will not be used for purposes of affording protection to domestic industries or services providers.
>
> The WTO Agreement will be implemented by China in an effective and uniform manner by revising its existing domestic laws and enacting new legislation fully in compliance with the WTO Agreement.[20]

These conditions addressed the WTO members' concern that "China would face serious difficulties in complying with the WTO's requirements of transparency and nondiscrimination."[21] Further, in preparation for its accession to the WTO and in response to the concerns of many in the international community, China agreed that it would draft a comprehensive antitrust law.[22]

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18. *WTO Successfully Concludes Negotiations on China's Entry*, WTO NEWS (Sept. 17, 2001), *available at* http://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

19. *Protocols of Accession for New Members Since 1995, including Commitments in Goods and Services*, WTO NEWS (July 27, 2007), *available at* http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm.

20. WTO NEWS, *supra* note 18.

21. Harris, Jr., *supra* note 8, at 176 (citing Lindsay Wilson, *Investors Beware: The WTO Will Not Cure All Ills with China*, 2003 COLUM. BUS. L. REV. 1007, 1020 (2003)).

22. BRUCE M. OWEN, SU SUN & WENTONG ZHENG, STANFORD'S INS. FOR ECON. POL'Y RESEARCH, CHINA'S COMPETITION POLICY REFORMS: THE ANTIMONOPOLY LAW AND BEYOND 24 (2007) *available at* http://siepr.stanford.edu/Papers/pdf/06-32.pdf; Harris, Jr., *supra* note 8, at 176-77 (citing *Beijing Amends Laws to Prepare for WTO Entry*, XINHUA NEWS AGENCY, pt. 3 (Mar. 7,

The initial attempts at creating a comprehensive antitrust law proved to be unsuccessful. For example, in 2003, China's Ministry of Commerce and State Administration of Industry and Commerce promulgated the Provisional Merger and Acquisitions Rules.[23] Several months later, China's National Development and Reform Commission disseminated the Provisional Rules on the Prohibition of Monopoly Pricing.[24] These Rules prohibit:

> [T]he abuse of "market dominance" and infers dominance through "market share in the relevant market, substitutability of relevant goods, and ease of new entry." The Rules also prohibit price coordination, supply restriction, bid rigging, vertical price restraint, below-cost-pricing and price discrimination as abuses of dominance. Finally, the Rules prohibit government agencies from "illegally intervening" in market price determinations.[25]

Although the Rules' prohibitions appeared to be a significant step towards China's development of a comprehensive antitrust law, they have largely been ineffectively implemented and not enforced because the Rules lack a "clear and credible enforcement mechanism."[26]

The process of drafting and enacting a comprehensive and unified antitrust law tailored to China accelerated after the promulgated Provisional Rules proved ineffective. Beginning in 2003, China's State Council Legislative Affairs Office started to review drafts of the Anti-Monopoly Law, which were created by the State Economic and Trade Commission.[27] The drafts of the Anti-Monopoly Law covered the traditional anti-

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2001)); *see also* U.S. Department of State, *2006 Investment Climate Statement for China, available at* http://www.state.gov/e/eeb/ifd/2006/61971.htm.

23. Harris, Jr., *supra* note 8, at 177.

24. Owen, *supra* note 22, at 6 (citing Rules on Prohibiting Regional Blockades in Market Economic Activities, *available at* http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027985.html (last visited March 28, 2007)).

25. *Id.*

26. *Id.*

27. Dai Yan, *Anti-Monopoly Law Tops the Agenda*, CHINA DAILY, June 23, 2004, *available at* http://www.chinadaily.com.cn/english/doc/2004-06/23/content_341733.htm; *see* 2006 Investment Climate Statement for China, *supra* note 22.

trust law topics of prohibiting "collusion among businesses, abuse of market dominance, and excessive concentration."[28] However, several aspects of these drafts still caused concern for many in the international community. For example, each draft varied on the scope of prohibitions for abuses of administrative monopolies.[29] In addition, contrary to the norm of antitrust law in most jurisdictions, the earlier drafts of the Anti-Monopoly Law generally prohibited monopolies but without specifying any abusive or anticompetitive behavior on the part of the monopolies. Further, the drafts of the Anti-Monopoly Law, reflecting the disagreement of Chinese officials, placed the authority to enforce the law in various government agencies.[30]

To address these concerns, China—much to its credit—invited suggestions and criticism of the Anti-Monopoly Law drafts from the members of the international community, including academics and experts from the United States (including the United States Department of Justice, the Federal Trade Commission and the American Bar Association), Germany, Japan, South Korea, Russia, and the International Bar Association. In 2005 alone, China received suggestions from international experts at the International Seminar on Anti-Monopoly Legislation in Beijing and at the Industry Panel Discussion on China's Draft Anti-Monopoly Laws in New York.[31] These events took place in May and November of 2005, respectively. At the International Seminar on Anti-Monopoly Legislation, William Blumenthal, General Counsel of the United States Federal Trade Commission, presented his views and concerns about the Anti-Monopoly Law drafts to China's Legislative Affairs Office of the State Council.[32] In addition, in May 2006, the United States Department of Justice voiced its concerns

28. Harris, Jr., *supra* note 8, at 178.

29. U.S. EMBASSY IN CHINA, 2002 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS: CHINA (2002), *available at* http://www.usembassy-china.org.cn/econ/nte-china.html; Harris, Jr., *supra* note 8, at 187-88.

30. *See* September 2002 Anti-Monopoly Law Draft, at 11 (copy on file with the authors); Harris, Jr., *supra* note 8, at 178-79.

31. Harris, Jr., *supra* note 8, at 181-83.

32. William Blumenthal, Presentation to the International Symposium on the Draft Anti-Monopoly Law of the People's Republic of China, at 1 (May 23-4, 2005), *available at* http://www.ftc.gov/speeches/blumenthal/20050523SCLAOFinal.pdf.

and recommended suggestions at the International Seminar on Review of Antimonopoly Law in Hangzhou, China,[33] and in October 2006, Pamela Jones Harbour, a Commissioner of the United States Federal Trade Commission, gave her recommendations at the NYSBA International Law and Practice Session in Shanghai.[34]

Most of the international concern was with regard to the potential for discrimination against foreign business entities and investors; the continued protectionism of state-owned enterprises; the overly-broad standards of certain provisions; the need to address the administrative abuses, i.e., administrative monopolies; and several general provisions dealing with national security and economy.[35] FTC Commissioner Harbour's remarks at the NYC International Law and Practice Section held in Shanghai voiced these concerns:

> I strongly endorse the provisions of the draft law that could be used to prohibit public restraints on competition imposed by government entities or pursuant to government regulation. Without such authority, the new competition agency may not be able effectively to address a major, durable source of anticompetitive conduct that could harm the Chinese economy and consumers. . . .
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> . . . .
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> The draft Anti-Monopoly Law presumes a dominant market position based on the market share of a single firm or the combined market shares of two or three firms. Without further analysis, such presumptions can yield an erroneous conclusion. . . .
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> . . . .

33. Gerald F. Masoudi, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Remarks Presented to the International Seminar on Review of Antimonopoly Law on Key Issues Regarding China's Antimonopoly Law Legislation (May 19, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/217612.htm.

34. Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, Remarks at NYSBA International Law and Practice Section on the Adoption of Trade Regulations in China, Scope and Effect: An American's View (October 20, 2006) *available at* http://www.ftc.gov/speeches/harbour/061020nysbaintl lawpractice section.pdf.

35. *See generally* U.S. EMBASSY IN CHINA, *supra* note 29; Harris, Jr., *supra* note 8, at 187-88; Harbour, *supra* note 34, at 1-9.

> The draft Anti-Monopoly Law prohibits a firm with a dominant market position from engaging in certain specified conduct. . . . These provisions. . . are deficient because they fail to distinguish clearly legitimate competitive conduct from that which injures competition. . . .
>
> An example of prohibited conduct in the draft law that raises these concerns is the prohibition of "unfair" high pricing. . . . Risky investments in innovation are often undertaken only because of the prospect of receiving a large return from a major technological breakthrough or a popular new consumer product.[36]

The American Embassy in China also addressed the need for China to proscribe anticompetitive practices, particularly the discrimination against foreign enterprises and the prevalent regional protectionism:

> Anticompetitive practices in China take several forms. In some cases, industrial conglomerates operating as monopolies or near monopolies (such as China Telecom) have been authorized to fix prices, allocate contracts, and in other ways restrict competition among domestic and foreign suppliers. Regional protectionism by provincial or local authorities often blocks efficient distribution of goods and services inside of China. Such practices may restrict market access for certain imported products, raise production costs, and restrict market opportunities for foreign-invested enterprises in China.[37]

For the most part, the international criticism and suggestions were well-received. This is illustrated by the enacted Anti-Monopoly Law's incorporation of many, but not all, of the international community's proffered suggestions. Thus, the enacted version of the Anti-Monopoly Law does not contain much of the criticized discriminatory clauses,[38] and includes a chapter specifically prohibiting administrative

36. Harbour, *supra* note 34, at 2-7.

37. U.S. EMBASSY IN CHINA, *supra* note 29.

38. *See generally* Anti-Monopoly Law.

abuses.[39] As FTC Commissioner Harbour further noted, the "successive drafts of the Anti-Monopoly Law that the Chinese government has shared with us indicate that the drafters have benefited from external advice."[40] However, she further remarked that "there are still provisions that would benefit from further modification."[41] Thus, as will be further discussed subsequently, there are still several aspects of the enacted Anti-Monopoly Law that still give cause for concern, particularly the law's open-ended provisions and its broad and undefined terms.

Finally, on August 30, 2007, after nearly fifteen years of vigorous debate and open discussion, China's 10th National People's Congress enacted the Anti-Monopoly Law during its 29th session. The comprehensive Anti-Monopoly Law will become effective on August 1, 2008. As this article will subsequently discuss, because of the uncertainty surrounding the Anti-Monopoly Law's implementation and enforcement, business entities have a narrow window of time to act without having to satisfy its broad provisions and undefined terms. While this uncertainty is a cause for concern, the Anti-Monopoly Law should nonetheless be generally applauded as a significant step towards promoting free competition in one of the world's largest economies.

III.
THE ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA

The enacted Anti-Monopoly Law consists of fifty-seven articles within eight chapters.[42] Chapter I lists the general provisions of the law, including several key definitions and lays out the objectives of the new government agencies entrusted to implement the antitrust law.[43] Chapters II through IV of the Anti-Monopoly Law cover the traditional antitrust law topics. Chapter II addresses monopoly agreements.[44] Two Articles in

39. Anti-Monopoly Law, ch. V (Abuse of Administrative Powers to Eliminate or Restrict Competition).

40. Harbour, *supra* note 34, at 3.

41. *Id.*

42. *See generally* Anti-Monopoly Law.

43. Anti-Monopoly Law, ch. I (General Principles).

44. Anti-Monopoly Law, ch. II (Monopoly Agreements).

this Chapter explicitly proscribe certain types of horizontal and vertical agreements between business entities. In Chapter III, the Anti-Monopoly Law addresses abuses of dominant market position.[45] Controls on concentrations—mergers and acquisitions—are provided in Chapter IV.[46] Responding to the concerns of many in the international community, Chapter V of the Anti-Monopoly Law uniquely deals entirely with abuses of government power, both local and regional, and administrative monopolies.[47]

The remaining chapters deal with the investigation procedures and penalties. For the most part, Chapter VI provides the investigative powers of the new government agencies charged with implementing the Anti-Monopoly Law.[48] Chapter VII sets out the legal liabilities for violating the provisions of the Anti-Monopoly Law and the penalties for obstructing an investigation authorized by the Anti-Monopoly Law.[49] Chapter VIII consists of supplementary provisions that exempt certain conduct with regard to agriculture and the protection of intellectual property rights. The final article of the Anti-Monopoly Law, Article 57, provides: "This law shall be effective as of August 1, 2008."[50]

A. *Chapter I: General Provisions*

The first two articles of the Anti-Monopoly Law state the purpose of the law and its jurisdictional reach. Article I states the general purpose of the Anti-Monopoly Law:

> This Law is formulated for the purposes of preventing and prohibiting monopolistic conducts, protecting fair market competition, improving the operational efficiency of the economy, safeguarding the consumers' welfare and public interests of the so-

45. Anti-Monopoly Law, ch. III (Abuse of Dominant Market Position).

46. Anti-Monopoly Law, ch. IV (Concentration of Undertakings).

47. Anti-Monopoly Law, ch. V (Abuse of Administrative Powers to Eliminate or Restrict Competition).

48. Anti-Monopoly Law, ch. VI (Investigation of Suspect Monopolistic Conduct).

49. Anti-Monopoly Law, ch. VII (Legal Liability).

50. Anti-Monopoly Law, ch. VIII, art. 57 (Supplementary Provisions).

ciety, and promoting the healthy development of the socialist market economy.[51]

Most of the stated purposes are aligned with the general policies underlying traditional antitrust law. However, as will be discussed later, the last overriding clause—"promoting the healthy development of the socialist economy"—has received criticism for being inherently in conflict with basic antitrust policies. Article 2, which sets out the jurisdictional reach of the Anti-Monopoly Law, states the law is applicable to "monopolistic conducts"[52] within the territory of China and, significantly, "also. . . to monopolistic conducts outside the territory of. . . China that causes the effect of eliminating or restricting competition in the domestic market of. . . China."[53] Thus, the Anti-Monopoly requires monopolistic conducts to have a nexus—albeit a loose one—with China's domestic market in order to fall within the reach of the law's jurisdiction. Notably, during the drafting process, the international community strongly recommended that the law apply to anticompetitive conduct that had a nexus with China's market.[54]

Article 3 defines "monopolistic conduct" as three general activities, the traditional antitrust topics: "(1) Monopoly agreements among undertakings; (2) Abuse of dominant market position taken by undertakings; and (3) Concentration of undertakings that have or may have the effect of eliminating or restricting competition."[55] Article 12 defines "undertakings" as "natural persons, legal persons and other organizations that engage in the production or operation of commodities, or provision of services."[56]

Article 4 reiterates the purposes stated in Article 1.[57] Articles 5, 6, 8, and 11 generally state the Anti-Monopoly Law's prohibitions, which are further explained subsequently in the Law.[58] Article 7 is perhaps the most interesting article in Chapter I. That article states:

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51. Anti-Monopoly Law, ch. I, art. 1 (General Principles).
52. Anti-Monopoly Law, ch. I, art. 2 (General Principles).
53. *Id.*
54. *See, e.g.*, Masoudi, *supra* note 33.
55. Anti-Monopoly Law, ch. I, art. 3 (General Principles).
56. Anti-Monopoly Law, ch. I, art. 12 (General Principles).
57. Anti-Monopoly Law, ch. I, art. 4 (General Principles).
58. Anti-Monopoly Law, ch. I, arts. 5, 6, 8, 11 (General Principles).

> The State protects the lawful operation activities of undertakings who engage in industries controlled by the State-owned economy that have a vital bearing on the lifeline of the national economy and national security and industries that implement exclusive operation and sales in accordance with the laws. The State supervises and controls the operation of undertakings and the prices of their commodities and services in accordance with the laws in order to protect the consumers' welfare and promote technological improvement.[59]

The exact meaning of this broad article is unclear. Assumingly, it appears to protect State-owned enterprises that have a significant affect on the national economy, security, and technological advancement. However, Article 7, unlike prior drafts of the statute, does direct relevant State-owned undertakings to "operate in accordance with the laws, in good faith, in a strict self-disciplinary manner, accept public supervision and shall not harm the consumers' welfare by using their dominant position or exclusive dealing position."[60] This final provision nevertheless creates some doubt as to the Enforcement Authority's role in policing state-owned enterprises using anticompetitive practices.

Articles 9 and 10 establish the new to-be-formed or appointed agencies charged with implementing the Anti-Monopoly Law. Article 9 directs the State Council to establish an Anti-Monopoly Committee with the following responsibilities:

(1) Researching and drafting the relevant competition policies;

(2) Organizing the investigation and assessment of the overall competition status in the market and publicizing assessment reports;

(3) Formulating and publicizing anti-monopoly guidelines;

(4) Coordinating the anti-monopoly administrative enforcement; and

(5) Any other duties as stipulated by the State Council.[61]

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59. Anti-Monopoly Law, ch. I, art. 7 (General Principles).

60. *Id.*

61. Anti-Monopoly Law, ch. I, art. 9 (General Principles).

The article does not outline the structure and composition of the Committee. The same is true for the enforcement agency created by Article 10:

> The authority responsible for the anti-monopoly enforcement duties as appointed by the State Council (hereinafter referred to as the "State Council Anti-Monopoly Enforcement Authority") shall be responsible for anti-monopoly enforcement in accordance with this Law.
>
> The State Council Anti-Monopoly Enforcement Authority may, if necessary, empower the corresponding authorities of the People's Governments of the provinces, autonomous regions and municipalities to be responsible for the relevant anti-monopoly enforcement in accordance with this Law.[62]

As a result of the Anti-Monopoly Law's broad and vague terms, the new Anti-Monopoly Committee and Enforcement Authority will both be vital to the successful implementation of the law.

The final article of Chapter 1, Article 12, is devoted to defining the "undertakings" and the "relevant market" as used in the law. The term "undertakings" is defined as "the natural persons, legal persons and other organizations that engage in the production or operation of commodities, or provision of services."[63] Article 12 traditionally defines the "relevant market" as "the scope of commodities and geographical area in which the undertakings compete against each other during a certain period of time with respect to specific commodities or services (hereinafter referred to as the 'commodities')."[64]

B. *Chapter II: Monopoly Agreements*

Chapter II of the Anti-Monopoly Law addresses anti-competitive agreements, both vertical and horizontal, between undertakings. Several standard horizontal agreements are explicitly prohibited:

(1) Fixing or changing the price of commodities;

(2) Restricting the output or sales for commodities;

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62. Anti-Monopoly Law, ch. I, art. 10 (General Principles).

63. Anti-Monopoly Law, ch. I, art. 12 (General Principles).

64. *Id.*

(3) Dividing the sales market or raw materials purchasing market;

(4) Restricting the purchase of new technology or new facilities, or restricting the development of new technology or new products;

(5) Boycotting transactions jointly; and

(6) Any other monopoly agreements as determined by the State Council Anti-Monopoly Enforcement Authority.[65]

Bid rigging is not specifically addressed but could be covered by the general price fixing prohibition. In addition, the Law explicitly proscribes certain types of standard vertical agreements:

(1) Fixing the resale price of commodities to a third party;

(2) Restricting the minimum resale price of commodities to a third party; and

(3) Any other monopoly agreements as determined by the State Council Anti-Monopoly Enforcement Authority.[66]

As with the other articles in the Law, the catch-all provisions in the above articles will expose other agreements not explicitly listed to the Anti-Monopoly Enforcement Authority. Maximum resale price maintenance was included in earlier drafts of the statute but cut from the final version.

Equally significantly, despite the typical per se illegal nature of most of the conduct prohibited, Article 15 lists several broad exemptions, depending upon the purpose of the agreements at issue:

(1) For improving technology, researching and developing new products;

(2) For upgrading product quality, reducing costs, improving efficiency, unifying product specifications and standards, or implementing division work based on specialization;

(3) For improving the operational efficiency and enhancing the competitiveness of small and medium-sized undertakings;

(4) For serving public interests such as conservation of energy, protection of the environment, provision of disaster relief, etc.;

65. Anti-Monopoly Law, ch. II, art. 13 (Monopoly Agreements).
66. Anti-Monopoly Law, ch. II, art. 14 (Monopoly Agreements).

(5) For mitigating a serious decrease in sales volume or excessive overstock from production during the economic recession;

(6) For protecting the legitimate interests of foreign trade and foreign economic cooperation; or

(7) Any other circumstances as stipulated by the laws and the State Council.[67]

Further, in order to qualify for exemptions (1) through (5), the undertakings must "also prove that the agreements reached will not seriously restrict competition in the relevant market and the consumers are able to share the benefits derived therefrom."[68] The final article of Chapter II prohibits industry associations from organizing undertakings "to engage in any monopolistic conduct prohibited by this chapter."[69]

C. *Chapter III: Abuse of Dominant Market Position*

Chapter III prohibits abusive behavior by undertakings with a dominant market position, which is defined as "the market position that is held by undertakings in the relevant market which is capable of controlling the price and quantity of the commodities or other trading conditions, or can block or affect the entry of other undertakings in the relevant market."[70] An undertaking is presumed to have a dominant market position if:

(1) The market share of one undertaking accounts for 1/2 or more of the relevant market;

(2) The joint market share of two undertakings accounts for 2/3 or more of the relevant market; or

(3) The joint market share of three undertakings accounts for 3/4 or more of the relevant market.

In circumstances falling within items (2) or (3) of the preceding paragraph, where an undertaking has less than 1/10 of the market share, it shall not be presumed that such undertaking has the dominant market position.[71]

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67. Anti-Monopoly Law, ch. II, art. 15 (Monopoly Agreements).

68. *Id.*

69. Anti-Monopoly Law, ch. II, art. 16 (Monopoly Agreements).

70. Anti-Monopoly Law, ch. III, art. 17 (Abuse of Dominant Market Position).

71. Anti-Monopoly Law, ch. III, art. 19 (Abuse of Dominant Market Position).

An undertaking presumed to have a dominant market position in the above circumstances can rebut the presumption by proffering evidence to the contrary. In determining whether an undertaking has a dominant market position, the Law directs the Anti-Monopoly Enforcement Authority to examine a non-exhaustive list of factors:

(1) The market share of that undertaking and the competition status in the relevant market;

(2) The ability of that undertaking to control the sales market or the raw materials purchasing market;

(3) The financial power and technical conditions of that undertaking;

(4) The degree of reliance of other undertakings on that undertaking in a transaction;

(5) The degree of difficulty of other undertakings to enter into the relevant market; and

(6) Other relevant factors in determining the dominant market position of that undertaking.[72]

Undertakings with a dominant market position are explicitly prohibited from abusing that position by engaging in the following specific conduct:

(1) Selling commodities at unfairly high prices or buying commodities at unfairly low prices;

(2) Selling commodities at prices below cost without justified reasons;

(3) Refusing to deal with another party to the transaction without justified reasons;

(4) Limiting another party to the transaction to trade exclusively with them or with their designated undertakings without justified reasons;

(5) Tying products or imposing other supplementary unreasonable trading conditions in the transaction without justified reasons;

(6) Implementing discriminatory treatment on transaction prices and other trading conditions with parties to the transaction of equal standing without justified reasons; or

72. Anti-Monopoly Law, ch. III, art. 18 (Abuse of Dominant Market Position).

(7) Any other behavior that abuses the dominant market position as determined by the State Council Anti-Monopoly Enforcement Authority.[73]

Again, this last catch-all provision empowers the Anti-Monopoly Enforcement Authority with broad discretion in investigating abusive behavior not explicitly listed in the law.

D. *Chapter IV: Concentration of Undertakings*

Chapter IV of the Anti-Monopoly Law, which deals with mergers and acquisitions, is much more elaborate and substantive than the preceding chapters. The term "concentration" refers to: "(1) Consolidation of undertakings; (2) Acquisition of control of other undertakings through acquisition of shares or assets; or (3) Acquisition of control of undertakings or capability of exercising decisive influence over other undertakings by contract or other means."[74] Concentrations that reach a certain threshold level are required to notify the Anti-Monopoly Enforcement Authority and acquire prior approval before consummation.[75]

Undertakings do not have to submit prior notification to the Authority if the concentration falls within one of two circumstances:

(1) One undertaking involved in the concentration possesses more than 50% of the voting shares or assets of every other undertaking; or

(2) The same undertaking that does not participate in the concentration possesses more than 50% of the voting shares or assets of every undertaking that participate in the concentration.[76]

The notification filed with the Anti-Monopoly Enforcement Authority must include an anticipated date for the implementation of the concentration and the involved undertakings' names, domiciles, and scope of business operation. In addition to a notification letter, undertakings that are required to acquire prior approval must also submit the following documents: (1) a description of the effects of concentra-

73. Anti-Monopoly Law, ch. III, art. 17 (Abuse of Dominant Market Position).

74. Anti-Monopoly Law, ch. IV, art. 20 (Concentration of Undertakings).

75. Anti-Monopoly Law, ch. IV, art. 21 (Concentration of Undertakings).

76. Anti-Monopoly Law, ch. IV, art. 22 (Concentration of Undertakings).

tion on the competition status in the relevant market; (2) a concentration agreement, i.e., the actual merger or acquisition agreement between the involved undertakings; and (3) a financial accounting report of the undertakings that participate in the concentration for the previous accounting year, which is audited by an outside accounting firm.[77] Further, the Law broadly empowers the Anti-Monopoly Enforcement Authority with the authority to require undertakings to submit "other documents and information."[78]

After the Anti-Monopoly Enforcement Authority receives the notification and requisite documents, Article 27 directs it to consider several factors in examining the concentration:

(1) The market share in the relevant market of the undertakings participating in the concentration and their ability to control the market;

(2) The degree of concentration in the relevant market;

(3) The effect of the proposed concentration over the market entry and the advancement of technology;

(4) The effect of the proposed concentration over consumers and other related undertakings.

(5) The effect of the proposed concentration over the development of the national economy; and

(6) Other factors that affect market competition as determined by the State Council Anti-Monopoly Enforcement Authority.[79]

If it chooses to prohibit a concentration based on these factors, the Law provides that the Enforcement Authority shall publicize its decision "in a timely manner."[80]

Even if the Enforcement Authority concludes that the concentration has the effect of eliminating or restricting competition, the concentration can nonetheless be authorized if "the undertakings can prove that the positive effects of such concentration significantly outweigh the negative effects."[81] Further, if the "concentration satisfies the public interest, the State Council Anti-Monopoly Enforcement Authority may

77. Anti-Monopoly Law, ch. IV, art. 23 (Concentration of Undertakings).
78. *Id.*
79. Anti-Monopoly Law, ch. IV, art. 27 (Concentration of Undertakings).
80. Anti-Monopoly Law, ch. IV, art. 30 (Concentration of Undertakings).
81. Anti-Monopoly Law, ch. IV, art. 28 (Concentration of Undertakings).

make a decision not to prohibit the concentration."[82] Likewise, the Enforcement Authority is also empowered "to attach restrictive conditions" to concentrations not prohibited by the Anti-Monopoly Law in order "to reduce the negative effects caused by the concentration over competition."[83] These provisions illustrate the Enforcement Authority's powerful discretion, particularly in determining whether to approve a concentration or require modification of it.

Unlike the preceding chapters on abuse of dominant market positions and monopolistic agreements, Chapter IV specifically sets tight time requirements during which the Anti-Monopoly Enforcement Authority must act to prevent the implementation of a concentration. Article 25 provides that the "Enforcement Authority shall, within 30 days of receiving the documents and information submitted by the undertakings in accordance with Article 23 of this Law, conduct a preliminary review of the notified concentration of undertakings, and make a decision as to whether to conduct a further review."[84] The Anti-Monopoly Law requires the Enforcement Authority to inform the undertakings in writing of its preliminary decision.[85] Otherwise, the law authorizes the undertakings to implement the concentration.[86]

If the Enforcement Authority decides that further review is necessary, the Anti-Monopoly Law provides that, absent certain circumstances, "it shall finish the review within 90 days" from the date of that decision.[87] Further, the Enforcement Authority is required to notify the undertakings of their final decision in writing.[88] "Where it makes a decision to prohibit the concentration of undertakings, it shall give an explanation of the reasons."[89] The Law does provide three circumstances under which the Enforcement Authority can extend the 90 day review period, but the extension cannot exceed 60 days:

(1) Where the undertakings agree to extend the review period;

82. *Id.*
83. Anti-Monopoly Law, ch. IV, art. 29 (Concentration of Undertakings).
84. Anti-Monopoly Law, ch. IV, art. 25 (Concentration of Undertakings).
85. *Id.*
86. *Id.*
87. Anti-Monopoly Law, ch. IV, art. 26 (Concentration of Undertakings).
88. *Id.*
89. *Id.*

(2) Where the documents and information submitted by the undertakings are inaccurate and need further verification; or

(3) Where the relevant circumstances have significantly changed after the notification by the undertakings.[90]

If the Enforcement Authority does not complete its review within the expiration of the 60-day extension, then the undertakings may implement the concentration.[91]

While the preceding articles apply to both foreign and domestic undertakings, Article 31—the final article of Chapter IV—applies only to foreign undertakings. When a foreign undertaking seeks to acquire a Chinese-based undertaking, it can be subjected to further review. Article 31 provides for review of acquisitions raising "national security" concerns:

> Where national security is involved in the case of acquisition of domestic enterprises by foreign capital or the participation by foreign capital in the concentration of undertakings by other means, in addition to a review on the concentration in accordance with this Law, a review on national security shall also be conducted in accordance with the relevant laws and regulations.[92]

The law is not clear on whether the Anti-Monopoly Enforcement Authority or another agency would conduct the national security review. Presumably, based on the provision that "a review on national security. . . conducted in accordance with the relevant laws and regulations," the Anti-Monopoly Law authorizes review by other already established national security agencies based on factors not stated in the Law. Not surprisingly, Article 31 has raised concern among foreign undertakings.[93]

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90. *Id.*

91. *Id.*

92. Anti-Monopoly Law, ch. IV, art. 31 (Concentratino of Undertakings).

93. Jones, *supra* note 1 (citing Keith Bradsher, *Beijing Seeks New Scrutiny of Investments by Outsiders*, N.Y. TIMES, Aug. 28, 2007).

E. *Chapter V: Abuse of Administrative Power to Eliminate or Restrict Competition*

China's Anti-Monopoly contains a unique and historic chapter devoted entirely to the abuses of administrative power that eliminate or restrict free competition. Chapter V prohibits its administrative agencies from abusing their power by requiring undertakings from purchasing "only the commodities. . . designated by them,"[94] compelling "undertakings to engage in the monopolistic activities stipulated by this Law,"[95] and from enacting regional "provisions that eliminate or restrict competition."[96] In addition, Chapter V proscribes administrative agencies from engaging in local and regional discrimination, a problem currently prevalent in China. Specifically, Chapter V's Article 33 forbids administrative agencies from impeding "free circulation between different regions" of China by:

(1) Setting discriminatory charging items, implementing discriminatory charging standards or discriminatory prices for commodities from other regions;

(2) Setting technical requirements or inspection standards for commodities from other regions which are different from the like commodities from the local region, or taking discriminatory measures such as repeated inspection or repeated certification for commodities from other regions to restrict their entry into the local market;

(3) Taking administrative licensing procedures specifically targeting the commodities from other regions to restrict their entry into the local market;

(4) Setting up checkpoints on the roads or using other means to restrict the entry of commodities from other regions or restrict the exit of commodities from the local region; and

(5) Other behaviors preventing the free circulation of the commodities between different regions.[97]

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94. Anti-Monopoly Law, ch. V, art. 32 (Abuse of Administrative Powers to Eliminate or Restrict Competition).

95. Anti-Monopoly Law, ch. V, art. 36 (Abuse of Administrative Powers to Eliminate or Restrict Competition).

96. Anti-Monopoly Law, ch. V, art. 37 (Abuse of Administrative Powers to Eliminate or Restrict Competition).

97. Anti-Monopoly Law, ch. V, art. 33 (Abuse of Administrative Powers to Eliminate or Restrict Competition).

Article 34 also explicitly addresses local and regional discrimination in bidding activities "by such means as setting up a discriminatory quality requirements, assessment standards or not publicizing information in accordance with the laws."[98] Administrative agencies are further prohibited from abusing their power "to eliminate or restrict the investment or establishment of branches in the local region by undertakings from other regions" by treating them differently than local undertakings.[99]

F. *Chapter VI: Investigation of Suspected Monopolistic Conduct*

Chapter VI of the Anti-Monopoly Law directs the new Anti-Monopoly Enforcement Authority to investigate any monopolistic conduct in violation of the Law. In order to encourage the reporting of anticompetitive conduct, the Anti-Monopoly Law directs the Enforcement Authority to keep the confidentiality of informants in order to promote the reporting of anticompetitive conduct.[100] Once an investigation of an undertaking is initiated, the Enforcement Authority is authorized to use intrusive measures in its investigation.

Article 39 provides the Enforcement Authority with powerful measures to implement its investigations, including:

(1) Entering the business premises or other relevant premises of the undertakings that are under investigation. . . ;

(2) Questioning the undertakings, interested parties or other relevant entities or individuals that are under investigation, and requiring them to explain the relevant situation;

(3) Examining and copying the documents and information such as the relevant vouchers, agreements, accounting books, business correspondence and electronic data of the undertakings, interested parties or other relevant entities or individuals that are under investigation;

(4) Sealing up and distraining relevant evidence; or

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98. Anti-Monopoly Law, ch. V, art. 34 (Abuse of Administrative Powers to Eliminate or Restrict Competition).

99. Anti-Monopoly Law, ch. V, art. 35 (Abuse of Administrative Powers to Eliminate or Restrict Competition).

100. Anti-Monopoly Law, ch. VI, art. 38 (Investigation of Suspect Monopolistic Conduct).

(5) Inquiring into the bank accounts of undertakings.[101]

Although Article 39 allows the Enforcement Authority to acquire extensive records of an undertaking under investigation, before such measures can be used, it also requires approval from the individual in charge of the Enforcement Authority.[102] Further, Chapter VI requires the Enforcement Authority to "keep the confidentiality of the commercial secrets obtained in the course of their enforcement,"[103] to provide written notice to the undertakings under investigation,[104] and to maintain a written record of the investigation.[105] Articles 43 and 44 also protect the interests of undertakings under investigation by providing interested parties with "the right to state their opinions"[106] and by directing the Enforcement Authority to publicize its decisions,[107] respectively.

The final article of Chapter VI—Article 45—provides the Enforcement Authority with discretion to suspend an investigation "where the undertakings under investigation commit to adopt concrete measures to eliminate the effect of such monopolistic conduct" within a certain time limit.[108] When such a suspension of an investigation is granted, the undertakings under investigation remain under the supervision and monitoring of the Enforcement Authority.[109] A suspended investigation can be resumed under any of the following three circumstances:

(1) Where the undertakings fail to perform the commitment;

(2) Where the facts on which the decision to suspend the investigation are based have undergone significant changes; or

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101. Anti-Monopoly Law, ch. VI, art. 39 (Investigation of Suspect Monopolistic Conduct).

102. *Id.*

103. Anti-Monopoly Law, ch. VI, art. 41 (Investigation of Suspect Monopolistic Conduct).

104. Anti-Monopoly Law, ch. VI, art. 40 (Investigation of Suspect Monopolistic Conduct).

105. *Id.*

106. Anti-Monopoly Law, ch. VI, art. 43 (Investigation of Suspect Monopolistic Conduct).

107. Anti-Monopoly Law, ch. VI, art. 44 (Investigation of Suspect Monopolistic Conduct).

108. Anti-Monopoly Law, ch. VI, art. 45 (Investigation of Suspect Monopolistic Conduct).

109. *Id.*

(3) Where the decision to suspend investigation was based on the incomplete or untrue information given by the undertakings.[110]

If the undertakings under investigation fulfill their commitments and the above circumstances do not occur, then the Enforcement Authority is authorized to finally terminate the investigation. However, if the investigation is resumed and it is determined that the undertakings violated the Anti-Monopoly Law, the Enforcement Authority can severely punish the undertakings under the articles of Chapter VII.

G. *Chapter VII: Legal Liability*

1. *Legal Liabilities for Undertakings Found to be in Violation of the Anti-Monopoly Law*

The legal penalties for violating the Anti-Monopoly Law range from hefty fines to criminal prosecution, depending upon which article the individual or undertaking violated and the degree and duration of the violation. Chapter VII lists the possible punishments for monopoly agreements,[111] abuse of a dominant market position,[112] illegal concentrations and trade associations,[113] abuse of administrative power (including for individuals in Anti-Monopoly Committee and Anti-Monopoly Enforcement Authority),[114] and obstruction of an investigation.[115] In addition, Chapter VII provides for the procedure undertakings must use to challenge a ruling by the Enforcement Authority that a violation occurred;[116] however, as will be discussed later, a challenge of the Enforcement Agency's action may prove to be costly and fruitless.

Under Article 46, if an investigation concludes with a finding that an undertaking was or is involved in a trade agreement in violation of the Law, then the Enforcement Authority can "confiscate the illegal gains and impose a fine of 1% to 10% of the total turnover for the previous year."[117] In addi-

110. *Id.*
111. Anti-Monopoly Law, ch. VII, art. 46 (Legal Liability).
112. Anti-Monopoly Law, ch. VII, art. 47 (Legal Liability).
113. Anti-Monopoly Law, ch. VII, arts. 46, 48 (Legal Liability).
114. Anti-Monopoly Law, ch. VII, art. 51 (Legal Liability).
115. Anti-Monopoly Law, ch. VII, art. 52 (Legal Liability).
116. Anti-Monopoly Law, ch. VII, art. 53 (Legal Liability).
117. Anti-Monopoly Law, ch. VII, art. 46 (Legal Liability).

tion, Article 46 provides the legal penalty for trade associations that violate the Anti-Monopoly Law: a fine of less than RMB[118] 500,000.[119] In "serious circumstances," the Enforcement Authority may revoke the trade association's registration.[120] Article 46 also allows the Enforcement Authority to use its discretion in mitigating the legal penalties for cooperating undertakings:

> Where undertakings voluntarily report the relevant information concerning the conclusion of monopoly agreements to the Anti-Monopoly Enforcement Authority and provide important evidence, the Anti-Monopoly Enforcement Authority may, in accordance with the circumstances, mitigate or exempt the punishment of such undertakings involved in the monopoly agreement.[121]

This amnesty provision of the Anti-Monopoly Law seeks to encourage undertakings to report violations.

The Anti-Monopoly Law also authorizes the Enforcement Authority to take several actions if it concludes that an undertaking is abusing its dominant market position.[122] Article 47 empowers the Enforcement Authority to order the undertaking to cease the illegal conduct.[123] Further, the Enforcement Authority can confiscate the illegal gains—presumably in their entirety—as well as "impose a fine of 1% to 10% of the total turnover for the previous year."

Article 48 states the legal penalties for implementing an unauthorized concentration. The article provides that the Enforcement Authority may order the undertakings involved "to stop implementing the concentration, dispose of stocks or assets within a stipulated period, assign the business within a stipulated period and adopt other necessary measures to resume the status before the concentration, and may impose a fine below RMB 500,000."[124]

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118. Renminbi is also abbreviated as CNY. Exchange rates for RMB *available at* http://www.china.org.cn/english/TR-e/43805.htm.

119. Anti-Monopoly Law, ch. VII, art. 46 (Legal Liability).

120. *Id.*

121. *Id.*

122. Anti-Monopoly Law, ch. VII, art. 47 (Legal Liability).

123. *Id.*

124. Anti-Monopoly Law, ch. VII, art. 48 (Legal Liability).

The Anti-Monopoly Law affords the Enforcement Authority broad discretion in determining the severity of the legal penalty to be imposed under Articles 46, 47, and 48. Article 49 of Chapter VII provides:

> With respect to the fines specified in Articles 46, 47 and 48 of this Law, the Anti-Monopoly Enforcement Authority shall consider factors such as the nature, degree and duration of the illegal conduct in determining the specific amount of the fines.[125]

Other than the several broad factors stated above, the Anti-Monopoly Law offers no further guidance to the Enforcement Authority in calculating the amount to fine an undertaking. Thus, at this time, the severity of the penalties for undertakings found to be in violation of the law is unsettled.

Article 50, perhaps the most significant, discusses the legal civil liability for undertakings found to be in violation of the Anti-Monopoly Law. Article 50 generally states: "Where undertakings implement monopolistic conduct and cause losses to others, the undertakings shall bear civil liability in accordance with the laws."[126] On its face, Article 50 appears to create a private cause of action by injured parties against undertakings (e.g., "shall bear civil liability") that violate any chapter of the Anti-Monopoly Law. However, this proposition is not by any means a certainty. Article 50 leaves many important questions unanswered. For example, where should private actions be filed, are only directly injured plaintiffs entitled to the private right of action, what would be the measure of damages, and are costs and fees recoverable for a successful lawsuit as under the antitrust laws of the United States? These questions will hopefully be addressed by forthcoming regulations, rules and judicial interpretations. The real meaning of Article 50 has already been the subject of recent debate, even among government officials. Therefore, time is needed to reveal its true meaning.

Currently, the implication of Article 50 is a topic of hot debate amongst interpreters of the Anti-Monopoly Law. It is likely that China's highest court, the Supreme People's Court, will shed some light on Article 50's meaning in the near fu-

125. Anti-Monopoly Law, ch. VII, art. 49 (Legal Liability).
126. Anti-Monopoly Law, ch. VII, art. 50 (Legal Liability).

ture. Generally, the Supreme People's Court issues judicial interpretations for most of China's important laws. While these judicial interpretations are not legally binding, in practice, most courts in China will at least consider the Supreme People's Court's judicial interpretation as guidance.

2. *Legal Liabilities for Abuse of Administrative Power to Restrict or Eliminate Competition*

Similar to the legal liabilities for private undertakings violating the Anti-Monopoly Law's provisions, the legal penalty for abuse of administrative power to restrict or eliminate competition is equally unclear. Inexplicably, the Anti-Monopoly Law does not empower the Enforcement Authority to punish administrative agencies that violate the Law.[127] Rather, Enforcement Authority may only "put forward a proposal for handling the matter" to the administrative agency's "higher-level authority."[128] Without any further specificity, Article 51 provides that "the higher-level authority shall order the rectification thereof; and shall impose punishment on the persons directly in charge and other directly responsible persons in accordance with the laws."[129] The remaining provision of Article 51 appear to exempt abuses by administrative agencies in violation of the Anti-Monopoly Law where other laws and administrative regulations allow such conduct: "Where the laws and administrative regulations provide otherwise for the abuse of administrative power to implement conduct to eliminate or restrict competition by administrative agencies and organizations empowered by laws and regulations to exercise the duties of managing public affairs, such provisions shall prevail."[130] Thus, where there is a conflict between another law and the Anti-Monopoly Law, the latter is seemingly preempted when the conflict is over the legality of an abuse of administrative power to eliminate or restrict trade. This provision will no doubt be subject to considerable debate in the future.

Reflecting the foresight of the drafters, the Anti-Monopoly law, specifically Article 54, also covers the abuse of power by the enforcement agency charged with its enforcement, the

127. Anti-Monopoly Law, ch. VII, art. 51 (Legal Liability).
128. *Id.*
129. *Id.*
130. *Id.*

Anti-Monopoly Enforcement Authority. Article 54 prohibits "abuse of power, dereliction of duty, acceptance of bribes or disclosure of the commercial secrets obtained in the course of enforcement." In contrast to the vague and perhaps lenient legal penalties for abuse of administrative power by other agencies,[131] Article 54 provides that "[w]here any of the staff of the Anti-Monopoly Enforcement Authority engages in the [aforementioned misconduct]. . . , which constitutes a criminal offence, criminal liability shall be pursued in accordance with the laws."[132] However, if the "act does not constitute a criminal offence, administrative punishment shall be given in accordance with the laws. . . ."[133] The importance of this article cannot be understated, as will be discussed herein.

H. *Chapter VIII: Supplementary Provisions*

The final chapter of the Anti-Monopoly Law contains three articles. The first two grant broad exemptions to certain activities with regard to intellectual property and the agricultural industry. Article 55 attempts to compromise the Anti-Monopoly Law with China's intellectual property laws, which is subordinate to the other is unclear. It provides:

> This law shall not be applicable to undertakings who exercise the intellectual property rights in accordance with the relevant provisions of the intellectual property laws and administrative regulations; however, this Law shall be applicable to those undertakings who abuse the intellectual property rights to eliminate or restrict competition.[134]

This provision is broadly worded; therefore, it remains to be seen how it will be interpreted and implemented. It is unclear what constitutes an "abuse [of] intellectual property rights to eliminate or restrict competition."[135] Article 56 also exempts "the joint or concerted actions implemented in the course of operation activities of the agricultural producers and agricultural economic organizations such as production,

131. *Id.*
132. Anti-Monopoly Law, ch. VII, art. 54 (Legal Liability).
133. *Id.*
134. Anti-Monopoly Law, ch. VIII, art. 55 (Supplementary Provisions).
135. *Id.*

processing, sales, transportation and storage of agricultural products."[136]

Finally, Article 57, the last article in the Anti-Monopoly Law, states: "This Law shall be effective as of August 1, 2008."[137]

IV.
THE ROCKY ROAD AHEAD

While the People's Republic of China has clearly taken a positive and significant step towards free market competition by enacting the Anti-Monopoly Law, whether the Law successfully achieves its stated purposes remains to be seen. The uncertainty of success surrounding the Anti-Monopoly Law can be attributed to three main sources. First, the Anti-Monopoly Law contains both undefined and vaguely defined terms, broad provisions, and several catch-all provisions, all of which create uncertainty. The problems, particularly inconsistent application of the laws, historically prevalent in the judiciary and administrative agencies, only serve to accentuate this uncertainty. Because predictability is desirable for economic growth—which goes hand-in-hand with basic antitrust law—the Anti-Monopoly Law must be consistently interpreted and applied in order to be successfully implemented. Needless to say, future administrative regulations need to address these ambiguities and inconsistencies for the Law to work. Second, little detail has been provided on the strongly empowered agencies charged with implementing the law, including their sizes, structures and compositions. Because the Anti-Monopoly Law affords these agencies broad discretion, the individuals charged with leading the agencies will have an overwhelming influence over the Law's effectiveness. Therefore, it is essential for those seeking to do business in China to ramp up and prepare for the possible consequences of the Law's implementation. The reality is that as of August 1, 2008, business in China will be a different ballgame.

While the Anti-Monopoly Law is comprehensive in coverage, it contains several terms that are either undefined or vaguely defined, and has numerous open-ended provisions.

136. Anti-Monopoly Law, ch. VIII, art. 56 (Supplementary Provisions).
137. Anti-Monopoly Law, ch. VIII, art. 57 (Supplementary Provisions).

For example, the Law fails to define the term "unfairly" high or low pricing.[138] The remarks of FTC Commissioner Pamela Harbour illustrate the problem of undefined terms:

> An example of prohibited conduct in the draft law that raises these concerns is the prohibition of "unfair" high pricing. U.S. competition law does not limit the price that a monopolist is permitted to charge—a monopolist may charge as high a price as the market will tolerate. Risky investments in innovation are often undertaken only because of the prospect of receiving a large return from a major technological breakthrough or a popular new consumer product.[139]

Although the antitrust laws in other jurisdictions, including the United States, contain provisions with equally broad or undefined terms, they can be differentiated from China's Anti-Monopoly Law. For example, many of the undefined legal terms found in the antitrust laws of the United States—such as "restraint of trade"[140] and "monopolize"[141]—lacked the uncertainty posed by the undefined terms in the Anti-Monopoly Law even when first enacted into statutory law. In passing the Sherman Act over a century ago, the United States had at least some common law as a resource.[142] The United States antitrust laws when passed incorporated many of the legal principles—such as the rule of reason—and terms found in some of the court opinions of the day.[143] China, which is a civil law country, lacks this guidance and direction from past opinions of its own judiciary, which is not founded upon a common law or stare decisis judicial system. In contrast, while the antitrust

138. Anti-Monopoly Law, ch. III, art. 17 (Abuse of Dominant Market Position) (prohibiting the abuse of a dominant market position by selling commodities at "unfairly" high or low prices).

139. Harbour, *supra* note 34, at 7.

140. Sherman Act, 15 U.S.C. § 1 (2000).

141. Sherman Act, 15 U.S.C. § 2 (2000).

142. *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271, 278-79 (6th Cir. 1898).

143. Senator John Sherman himself stated that the Sherman Act "does not announce a new principle of law, but applies old and well recognized principles of the common law." 21 CONG. REC. 2456 (1890); *see also* California v. ARC Am. Corp., 490 U.S. 93, 101 n.4 (1989) (quoting Senator Sherman, 21 CONG. REC. 2456 (1890)).

laws of the United States admittedly contain similar legal terms which were undefined in the initial statute itself, persons affected by the laws at the time at least had the advantage of some explanation from pre-enactment court opinions.[144]

Furthermore, the courts in the United States were able to further elaborate on the meaning of the various terms and provisions in post-enactment decisions. That process is still continuing over a century later. Under the common law system, businesses in the United States have been able to rely on these judicial interpretations as guidance. Thus, although the terms in the antitrust laws of the United States are broad and often undefined in the statutes themselves, there is relative consistency and predictability in the way those terms are interpreted. When the federal courts conflict in their interpretation of the antitrust laws and related doctrines, the United States Supreme Court can step in to hopefully clarify or decide on an interpretation that businesses can then follow. Contrastingly, the courts of the People's Republic of China, as noted by the United States Embassy Reports in China, have not been as consistent in enforcing past laws:

> Skepticism about the independence and professionalism of China's court system and the enforceability of court judgments and awards remain high among foreign companies. There is a widespread perception that judges, particularly outside of China's big cities, are more influenced by local political or business pressures than they are by written regulations or signed contracts. Few judges have legal training. This has often caused both foreign and domestic companies to avoid enforcement actions through the Chinese courts.[145]

A cause of this ineffectiveness and inconsistency is due to the fact that the numerous courts in the various provinces of the People's Republic of China apply more of a case-by-case application of the laws in letter and spirit. Judges are not bound by the doctrine of stare decisis or common law principles. There is no published-binding caselaw in China. Such inconsistency in the application of the laws is thus prevalent.

144. *Id.*

145. U.S. EMBASSY IN CHINA, *supra* note 29.

Therefore, even when the Anti-Monopoly Law's vague or undefined terms are finally interpreted and defined by China's courts, including the Supreme People's Court, those interpretations and definitions may very well be unreliable or at least not binding on other courts. With that said, it is commendable that China, with its accession into WTO, has promised to improve the consistency in the courts' interpretations of the law.[146] Whether there is improvement remains to be seen.

The inconsistency in the laws interpretation and application does not end with China's courts. The administrative agencies often contribute to the inconsistency. As the United States Embassy in China has noted:

> [E]xisting laws are ineffective due to poor national coordination and inconsistent local and provincial enforcement.
>
> . . . .
>
> Government bureaucracies have sometimes been accused of selectively applying regulations. China has many strict rules that are usually ignored in practice until a person or entity falls out of official favor. Government authorities can wield their discretionary power to "crack down" on foreign or disfavored investors or make special demands on such investors simply by threatening to wield such power.[147]

The vague or undefined terms in the Anti-Monopoly Law provide government authorities with discretion in interpretation, thereby presenting an opportunity for inconsistent application at best and abuse at worse. Further, the possible allocation of responsibilities among the various government agencies—such as between the Enforcement Authority and the agencies responsible for national security—could make the Anti-Monopoly Law more problematic for undertakings doing business in China. Each agency could have its own interpretation of the rules and issue its own regulations. This presents the possibility of much confusion, which in turn raises costs for undertakings.

Similarly, the broad and open-ended provisions in the Anti-Monopoly present the same problems as the undefined

146. *See id.*
147. *Id.*

or vaguely defined terms. There are several catch-all provisions in the Law that has caused some concern. These provisions allow for much flexibility and therefore opportunities for abuse. In addition, the catch-all prohibitions and exemptions to often generally defined per se illegal cartel behavior leave the list of prohibited activities and factors to be considered by the Enforcement Authority completely open-ended. With regard to these various catch-all provisions, one commenter noted:

> The final prohibition in Article 13 has probably raised some concerns amongst foreign lawyers, and particularly amongst common law lawyers who expect statutes to precisely set out the boundaries of the prohibition.[148]

Further, broad provisions contribute to the unpredictable application of the law. For example, Article I generally provides that the Anti-Monopoly Law "is enacted for the purpose[ ] of. . . promoting the healthy development of the socialist economy."[149] As one commenter stated:

> Although virtually every Chinese law includes this language, the interpretation and enforcement of such laws is rarely grounded in this concept. Nevertheless, the continued inclusion of the term. . . remains worrisome to some because its meaning is unknown and so flexible as to present agencies and courts with a tool for applying the law in ways inconsistent with competition law norms.[150]

Thus, because of China's existing legal and governmental systems, the Anti-Monopoly Law's broad provisions and undefined and vaguely defined terms create much uncertainty and unpredictability for businesses going forward.

This uncertainty and unpredictability is particularly accentuated by the immense discretion afforded to the new agencies charged with implementing the Anti-Monopoly Law. As to the two powerful administrative agencies created by the Law, the Anti-Monopoly Committee and the Anti-Monopoly Enforcement Authority, other than listing their general duties,

148. Jones, *supra* note 1, at 3.
149. Anti-Monopoly Law, ch. I, art. 1 (General Principles).
150. Harris, Jr., *supra* note 8, at 185.

the Anti-Monopoly Law does not provide any further description. Therefore, the size, structure and composition of these administrative agencies is yet unknown. The State Council is presently reviewing those issues. Although the size and structure will greatly affect the success of the Law, the officials appointed to lead the agencies will be even more vital to the Law's success. This is so not only because, as discussed above, the Law contains various open-ended provisions and undefined and vaguely defined terms, but also because of the broad discretion and power the Law affords to the Anti-Monopoly Committee and Enforcement Authority. Further, these agencies receive little guidance and direction from the Anti-Monopoly Law as written. Hopefully, future regulations and related rules will shed more light on these issues. Thus, because so much deference is afforded to the new agencies and, as discussed above, the inconsistent and non-binding nature of judicial review in China, much will depend on the officials selected to lead the agencies. To be successful, these officials will need to be independent and will have to create consistency and clarity in the exercise of their duties. They will need to coordinate with other existing agencies responsible for still existing laws covering some anticompetitive conduct. They will also need to effectively work with other foreign antitrust authorities globally to ensure that illegal cartel conduct, for example, committed by businesses operating in China that impacts other jurisdictions, is eliminated. Finally, they will have to fully and fairly enforce the Law, even with regard to now favored state-owned enterprises, powerful special interest groups, domestic business entities, and trade associations coupled with regional protectionism. If they do not, the Anti-Monopoly Law will fail to achieve its laudable objectives.

V.

PRACTICAL CONSIDERATIONS FOR FUTURE BUSINESS IN CHINA

Due to the unique characteristics of China's history, economy, government and now new Anti-Monopoly Law, it is essential for persons currently engaged in business and those giving thought to doing business in China to proceed with particular caution. For example, several of the Law's provisions are not found in the antitrust laws of other countries, including the United States. Thus, even businesses versed in the antitrust

laws generally will lack familiarity with the implications of those unique provisions. Furthermore, the uncertainty surrounding the Law's eventual implementation emphasizes the importance of careful consideration with regard to future business decisions related to China. The following concluding points highlight the important practical considerations businesses should have in mind when making decisions with regard to the Chinese market:

- First and foremost, a unique window of opportunity exists to complete business transactions without facing the Anti-Monopoly Law's uncertain implementation. That window slams shuts on August 1, 2008,[151] the Law's effective date. After that date, it is possible that the Law's unique provisions, not seen in the antitrust laws of other countries, such as prohibiting "unfairly" high or low prices, as but one example,[152] will remain vague or undefined. It will be a risky gamble to attempt to do business in China without possessing an understanding of the meaning of those prohibitions in practice. Further, the unpredictability of China's judicial review process exacerbates this problem. Therefore, rather than serving as the guinea pigs to the enforcement of the Anti-Monopoly Law, business entities considering or planning to engage in significant business transactions in China should endeavor to complete those transactions by August 1, 2008. If completing a transaction within that timeframe is not possible, then business entities should, at least, give serious thought to watching closely while the Law is further explained and tested before wading into the Law's dangerous waters.
- In turn, after August 1, 2008, the cost of doing business in China will likely increase under the new Law. In light of this increase in costs, business entities must give serious consideration to staying in or entering the Chinese market, i.e., engaging in business transactions within China's borders or business transactions having the effect of eliminating or restricting competition in China's domestic market.[153] This is true for several reasons.

151. Anti-Monopoly Law, ch. VIII, art. 57 (Supplementary Provisions).

152. Anti-Monopoly Law, ch. III, art. 17 (Abuse of Dominant Market Position).

153. Anti-Monopoly Law, ch. I, art. 2 (General Principles).

  - o Generally, unpredictability and delay raise the costs of transactions. Therefore, given the unpredictable nature of the Anti-Monopoly Law, some may find certain transactions in China no longer profitable or worthwhile. Simply stated, it will not be business as usual for the chosen and favored enterprises of the past.
  - o Business transactions affecting yet-to-be-defined "national security" will undergo a unique review process that could prolong the time it takes to complete such transactions, thereby further raising costs. Similarly, non-Chinese companies will receive greater scrutiny when seeking to acquire a Chinese company under the new merger provisions. The level of scrutiny remains unclear; therefore, so does the potential increase in costs if not carefully handled.
  - o Given the possibility of drastic increase in costs, in certain circumstances, businesses may be forced to raise prices or refrain from engaging in certain transactions. However, this conduct may itself trigger the Law's unique prohibitions unless done with due reflection.
- As a result of the broad discretion afforded to the heads of the new administrative agencies created by the Anti-Monopoly Law, it is important for business entities to become acutely familiar with and well versed in the ways of the Chinese government, including its judicial system. This means business entities should closely consult with law firms on the ground in China more than before due to the Law's unique provisions and serious implications.
- Business entities must also take into consideration that after August 1, 2008, the possibility of escaping international criminal cartel enforcement when doing business in the Chinese market will be drastically reduced or possibly eliminated due to the broad jurisdictional reach of the Law and the international cooperation exhibited in its implementation.
- Business entities that currently receive some protection or favoritism from government officials—at the local, regional and national levels—must plan for that protection or favoritism being diminished or possibly even eliminated by the Anti-Monopoly Law as it is written and intended.
- As is the case in most countries, the intellectual property laws and the new antitrust law in China will now intermingle and, at times, may be in conflict with each other. The Anti-Mo-

nopoly Law is vague with regard to the interaction of these two spheres of law. For business entities dealing with significant intellectual property rights, prior to engaging in substantial business in China, it is important to understand the relationship between the two laws and be prepared to handle resulting statutory conflicts.

In closing, the authors note that China has taken an applause-worthy and significant step forward in establishing a more than comprehensive antitrust law. Nevertheless, with the enactment of the Anti-Monopoly Law, much uncertainty has been created for doing business in China. While the Law is intended to effectively promote free market competition, and given China's history of government protected businesses and favored regional and local markets, this will inevitably take time despite the Law's intent. During this trial period of uncertainty, only one thing is definite: doing business in China will never be the same. Thus, whether by accelerating transactions to complete them prior to the Law's effective date or proceeding gingerly into the Chinese market while the Law's vague terms become distilled and tested at the expense of others, it is vital that business entities make careful preparations and plans now for the future implementation of China's Anti-Monopoly Law on August 1, 2008. After that date, business will not be business as usual in the People's Republic of China.