

China's Anti-Monopoly Law: The Next Challenges

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The Next Challenges

- Lessons Learned
- Transition from Command Economy to Market Economy
- Competing Policies
- Infrastructure

Lessons Learned

- Basic Structure of AML Sound
- Areas of Concern

Basic Structure

- Legislation enunciates general principles
- Implementing regulations & enforcement to develop specifics
- Differentiation between agreements among competitors and among undertakings at different levels of an industry
- Principle of “purpose or effect of eliminating or restricting competition” as test for violation
- Limited number of specific prohibitions
 - Per se offensive horizontal agreements
 - Resale price agreements
- Treatment of intellectual property – Art. 55

Areas of Concern

- Treatment of Dominant Market Position
 - Definition - Arts. 18(4), 19
 - Standards of Conduct - Art. 17
- Merger Control
 - Notification thresholds - Art. 21
 - Analytic method – Arts. 5, 27
- Exemptions
 - Nature, scope & duration
 - Cannot be justified on ground of fostering competition
 - Non-competition factors
 - Cost-benefit analysis – Art. 15 qualifying language
 - Interpret narrowly, to minimize distortions in the marketplace
- Remedies
 - Goal of restoring competition, not just punishing offenders
 - Minimum percentage of turnover
 - Leniency

Transitional Economy

- SOEs and Administrative Monopolies
- U.S. State Action Doctrine v. Commerce Clause

SOEs and Administrative Monopolies

- Art. 7 “industries dominated by the state-owned economy”
- Art. 8 “shall not abuse administrative powers”
- Chap. V “Abuse of administrative powers to eliminate [or] restrict competition”
- Art. 51 legal liability

State Action Doctrine v. Commerce Clause

- Articles of Confederation Art. II
- U.S. Constitution
 - Commerce Clause
 - “Dormant Commerce Clause” prohibits “economic protectionism”
 - 10th Amendment
- Sherman Act
 - *Parker v. Brown*, 317 U.S. 341, 351, 359-60 (1943)
 - *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978).
 - *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40, 46-47 (1985)
 - *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991)
- Local Government Antitrust Act of 1984, 15 U.S.C. §§
34-36

Competing Policies

- Industrial policy
 - Art. 4 - “perfect macroeconomic control”
 - Art. 7 - in industries “involving national economic security” the state “supervises and regulates” “business conduct and pricing”
 - Art. 15 - “foreign trade and economic cooperation”
- National security
 - Art. 7 - industries “involving national security”
 - Art. 31 - concentrations involving foreign investors that implicates national security
- Social Policy
 - Art. 15 - “small and medium sized undertakings” “energy conservation, environmental protection, disaster relief”

Infrastructure

- Procedural challenges
 - Rules for the process by which
 - future rules will be developed
 - enforcers will implement the law
 - Transparency
 - Insulation from political influence
- Institutional
 - Enforcement mechanisms
 - Enforcement resources
 - Advocacy function
- Societal
 - “Culture of competition”
 - Independent judiciary

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Thank you

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