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ADMINISTRATIVE MONOPOLY AND CHINA'S NEW ANTI-MONOPOLY LAW: LESSONS FROM EUROPE'S STATE AID DOCTRINE

INTRODUCTION

On August 1, 2008, China's Anti-Monopoly Law (AML), its first comprehensive anti-monopoly legislation, came into effect.¹ Observers guardedly hope the AML will serve as a crucial legal foundation for the sustained development of China's thriving market economy.² Much as American antitrust law is "the Magna Carta of [United States] free enterprise"³ and European Community competition law helped provide the economic basis for the ongoing political unification of Europe,⁴ the AML may similarly cement the role of the free market in post-reform China.⁵

One of the most exciting parts of the AML is Chapter V, "Abuse of Administrative Power to Eliminate or Restrict Competition."⁶ This chapter is aimed at preventing government agencies and organs from using their power to interfere in competition, particularly regarding interprovincial and interregional business.⁷ Economists typically call such government

1. Zhonghua Renmin Gongheguo Fan Longduan Fa [Anti-Monopoly Law] (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), translated in LAWINFOCHINA (last visited Mar. 11, 2010) (P.R.C.) [hereinafter AML], available at <http://www.lawinfochina.com/law/display.asp?db=1&id=6351&keyword=>.

2. See, e.g., Salil K. Mehra & Meng Yanbei, *Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law*, 49 VA. J. INT'L L. 379, 383 (2008).

3. United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

4. See Michael Burgess, *Introduction: Federalism and Building the European Union*, 26 PUBLICS 1, 1-3 (1996).

5. Guo Xiaoyu, *Jingji Xianfa, Jian zhi Longduan Xingwei [The Economic Constitution, A Sword Pointed at Monopoly Behavior]*, FAZHI RIBAO [LEGAL DAILY], Aug. 26, 2007, available at <http://www.competitionlaw.cn/show.aspx?cid=13&id=2094>.

6. See AML, *supra* note 1, ch. V.

7. Portions of Chapter V of the AML are excerpted below:

Article 32: No administrative organ or organization empowered by a law or administrative regulation to administer public affairs may abuse its administrative power to force or use a disguised form to force any entities or individuals to deal, purchase, or use the commodities provided by the business operators designated by such an administrative organ or organization.

Article 33: No administrative organ or organization empowered by a law or administrative regulation to administer public affairs may abuse its administrative power to block the inter-region free trading of commodity by taking the following measures:

1. Setting discriminatory charges, implementing discriminatory charge rates, or fixing discriminatory prices for non-local commodities;

2. Imposing technical requirements or inspection standards on non-local commodities that are different from those on their local counterparts, or taking discriminatory technical

interference an “administrative monopoly.”⁸ Given China’s history of state presence in nearly every facet of the economy,⁹ Chapter V of the AML has the potential to bring monumental changes to the nature of the Chinese economy and even political system. Yet as with any fundamental economic transformation, the way ahead is unclear. China’s judicial system is improving, but is still inexperienced in competition law,¹⁰ and drawing a definitive line between proper state economic intervention and illegal state interference is inherently difficult.

This Note will look to the European Community doctrine of State Aid¹¹ to suggest a path for implementation of the AML’s administrative monopoly provisions. Some of the suggestions are very unlikely to be implemented given China’s current economic and political situation,¹² but are offered for consideration of China’s long-term legal and economic development. Part I will discuss economic and political consequences of administrative monopolies, followed by a focus on administrative monopolies in China specifically. Part II then addresses the history and

measures, such as repeated inspections or repeated certifications on non-local commodities, so as to restrict the entry of non-local commodities into the local market;

3. Adopting the administrative licensing aimed at non-local commodities, so as to restrict the entry of non-local commodities into the local market;

4. Setting up barriers or adopting any other means to block either the entry of non-local commodities or the exit of local commodities; or

5. Other activities that may block the inter-region free trading of commodity.

[Articles 34 & 35 prohibit local protectionism.]

[Articles 36 & 37 omitted.]

See id.

8. *See* Yong Guo & Angang Hu, *The Administrative Monopoly in China’s Economic Transition*, 37 COMMUNIST AND POST-COMMUNIST STUD. 265 (2004). Although the term would seem to indicate an actual monopoly, the term “administrative monopoly” is much broader and includes most rent-seeking behavior by the government. Rent seeking may be defined as “activities using scarce resources to capture an artificially created transfer from the political process, which is in excess of those a competitive marketplace would allow, but less than the damage that it brings to the others.” *Id.* at 268 (citing GORDEN TULLOCK, RENT SEEKING (1999)).

9. *See* Rupert N. W. Hodder, *China’s Industry—Horizontal Linkages in Shanghai*, 15 TRANSACTIONS INST. BRIT. GEOGRAPHERS 487, 487–89 (1990).

10. Bruce Owen et al., summarize some of the major problems with China’s judiciary:

Until recently, a large portion of Chinese judges were selected from retired military officers. Those judges generally have no formal legal training or experience, and are ill-equipped to handle complicated cases. Although the overall quality of Chinese judges has improved in recent years, it remains doubtful whether Chinese judges—most of whom are not trained in economics or experienced in business—will be competent to handle antitrust cases brought under the AML.

Bruce M. Owen et al., *China’s Competition Policy Reforms: The Anti-monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 242 (2008).

11. *See infra* notes 111–20 and accompanying text.

12. *See infra* notes 63–68 and accompanying text.

political context of competition law in China, followed by a history and outline of China's new AML. Part III is a history and outline of European competition law and its enforcement, with a focus on Europe's State Aid doctrine.¹³ Part IV compares the situations of Europe and China and ultimately suggests areas where European competition law could instruct implementation of the AML and its enforcement mechanisms.

I. ADMINISTRATIVE MONOPOLIES

A. *The Problem of Administrative Monopolies Generally*

Possibly without exception, every country with a functioning government has administrative monopolies,¹⁴ ranging from local trash pickup to a national electric grid. The problem of administrative monopolies ("abuse of administrative power," to use the language of the AML¹⁵) arises when government uses its power to control markets through legislation, regulations, or use of administrative organs to seek above-market rents.¹⁶ Economic theory generally holds that administrative monopolies, like other monopolies, hamper overall social welfare with increased prices, reduced output, and reduced competition.¹⁷ In addition, administrative monopolies are often geographically protectionist, disrupting trade and potentially weakening the political unity of the broader unit (the nation, in the case of China or the United States, or the European Union in Europe's case).¹⁸

B. *The Origin and Problem of Administrative Monopolies in China*

Administrative monopolies are associated with a number of problems, explained below. Aside from the economic deficiencies associated with

13. See *infra* notes 111–20 and accompanying text.

14. "Administrative monopoly," for the purposes of this Note, can be loosely defined as a monopoly the economic power of which is maintained at least in part by official administrative or regulatory power. For a discussion of the definition of administrative monopoly, see MARK WILLIAMS, *COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN* 158 (Cambridge Univ. Press) (2005).

15. See AML, *supra* note 1, ch. V.

16. See *supra* note 14.

17. See Yong Guo & Angang Hu, *supra* note 8, at 275–78. Competition, in turn, is generally considered economically beneficial because it (1) tends to allocate resources according to consumer preference, (2) encourages producers to meet the dynamic preferences of consumers, and (3) keeps sellers' prices down by the constant threat of consumers switching to other, lower cost sellers. D. G. GOYDER, *EEC COMPETITION LAW* 8–9 (1988).

18. Yong Guo & Angang Hu, *supra* note 8, at 275–78.

monopolies generally, the localized and political nature of such entities tends to undermine the regulatory process, and also tends to create problematic regulations, such as trade restrictions, because single entities are vested with the conflicting goals of market participation and regulatory power.¹⁹ This mish-mash of market participation and regulatory responsibility is a result of China's rapid transition from a command economy to a market-led economy in pursuit of the overriding policy goal of economic growth.²⁰

China's post-1978 economic reforms resulted in a great deal of decentralization.²¹ In the pre-1978 Maoist era, the economy was nearly entirely state-planned.²² By its nature, a centrally planned economy is a market heavy with state-owned enterprises (SOEs), many of which are administrative monopolies.²³ Thus, China has had administrative monopolies not only in the traditional sectors such as utilities, transportation, and telecommunications,²⁴ but also in sectors where the role of government is traditionally far more circumscribed in free-market economies, including entertainment and tourism.²⁵ After coming to power in 1978, Deng Xiaoping²⁶ radically altered China's economic system to focus on growth through marketization and free enterprise instead of state control.²⁷ Concurrently with these free market reforms, Beijing devolved

19. *Id.* at 270.

20. Barry Naughton, *Deng Xiaoping: The Economist*, 135 CHINA Q. (SPECIAL ISSUE) 491, 492 (1993).

21. See YONGNIAN ZHENG, *DE FACTO FEDERALISM IN CHINA: REFORMS AND DYNAMICS OF CENTRAL-LOCAL RELATIONS*, vii (2007).

22. See Hodder, *supra* note 9, at 487–89.

23. See *supra* note 19.

24. See Saibal Dasgupta, *China Launches First-Ever Private Railways*, TIMES OF INDIA, Oct. 4, 2009, available at <http://timesofindia.indiatimes.com/world/china/China-launches-first-ever-private-railways/articleshow/5087076.cms>; Jing Yang, *China's Wind Farms Come With a Catch: Coal Plants*, WALL ST. J., Sept. 28, 2009, at A17, available at <http://online.wsj.com/article/SB125409730711245037.html>. Such industries are often "natural monopolies"; Market Avenue, *Cracking the Monopoly in China's Telecommunication Industry*, http://www.marketavenue.cn/upload/articles/ARTICLES_1438.htm (last visited Oct. 23, 2009); see PHILLIP AREEDA ET AL., *ANTITRUST ANALYSIS* 23 (6th ed. 2004).

25. See Yong Guo & Angang Hu, *supra* note 8, at 274.

26. Mao Zedong's death in 1976 signaled the end of China's most radical period of ideological governance and significant upheaval, the Great Proletariat Cultural Revolution. Following Mao's death, China entered a period of relative calm and political uncertainty. Deng Xiaoping, then First Vice-premier of the State Council, politically outmaneuvered other Communist Party leaders to wrest power from Mao's appointed successor, Hua Guofeng in late 1978. At the Third Plenum of the Central Committee in December 1978, Deng Xiaoping announced the Four Modernizations, generally considered the beginning of China's Reform and Opening Up (*gaige kaifang*). Naughton, *supra* note 20, at 499–501.

27. *Id.* at 492.

control of much of the economy to local and provincial governments.²⁸ Local and provincial governments' incomes shifted from disbursements from the central government in Beijing to local sources, including local SOEs.²⁹

The economic reforms have been wildly successful in bringing hundreds of millions out of poverty,³⁰ but local control and financing has created opportunities for the creation and abuse of administrative monopolies and incentives for local protectionism.³¹ One example of local protectionism includes charging higher fees in Shanghai for cars produced outside the city.³² Additionally, local control of income sources weakens Beijing's regulatory measures, as local governments often fund their own judges and other regulatory bodies;³³ and where regulatory power still rests with Beijing, local officials would often rather take the mild risk of punishment from Beijing than forego income derived from local SOEs.³⁴ Other forms of Chinese administrative monopolies include industrial trade barriers and administrative companies.³⁵ Examples of industrial trade barriers include government departments responsible for a certain industry or trade associations using their regulatory power to block new entrants.³⁶ This is essentially a form of regulatory capture that creates an administrative monopoly.³⁷ China also has a number of "administrative companies," which are companies that have both the power to regulate an industry and engage in that industry itself.³⁸ Existence of such administrative companies is a result of government reform failing to keep pace with China's broader reforms.³⁹ Likely consequences of such a

28. C. FRED BERGSTEN ET AL., CHINA'S RISE: CHALLENGES AND OPPORTUNITIES 76–77 (2008).

29. *Id.* at 76 (citing ZHENG YONGNIAN, DE FACTO FEDERALISM IN CHINA: REFORMS AND DYNAMICS OF CENTRAL-LOCAL RELATIONS (2007)).

30. See World Bank, PovcalNet, <http://iresearch.worldbank.org/PovcalNet/jsp/index.jsp> (last visited Jan. 13, 2010); see also World Bank, Overview: Understanding, Measuring and Overcoming Poverty, <http://go.worldbank.org/RQBDC TUXW0> (last visited Nov. 4, 2009).

31. See Yong Guo & Angang Hu, *supra* note 8, at 273.

32. R. Hewitt Pate, *What I Heard in the Great Hall of the People—Realistic Expectations of Chinese Antitrust*, 75 ANTITRUST L.J. 195, 203 (2008).

33. *Id.*

34. BERGSTEN ET AL., *supra* note 28, at 77 (citing Gong Ting, *Corruption and Local Governance: The Double Identity of Chinese Local Governments in Market Reform*, 19 PAC. REV. 85 (2006), and Hehui Jin et al., *Regional Decentralization and Fiscal Incentives: Federalism, Chinese Style* (Stanford Univ., Dep't of Econ., Working Paper No. 99013, 1999)).

35. CHAOWU JIN & WEI LUO, COMPETITION LAW IN CHINA 97–98 (2002).

36. *See id.*

37. *See source cited infra* note 140.

38. *See generally* Bing Song, *Competition Policy in a Transitional Economy: The Case of China*, 31 STAN. J. INT'L L. 387, 406–08 (1995).

39. *See* CHAOWU JIN & WEI LUO, *supra* note 35, at 97–98; *see also* Chenxia Shi & Dong Kaijun,

combination of market participation and regulatory power are some of the problems associated with regulatory capture⁴⁰—an administrative company will have the conflicting goals of earning profits in the market and regulating the market for the benefit of consumers, the economy, and the state as a whole. The AML’s administrative monopoly provisions are an attempt to reassert central control,⁴¹ tear down barriers to economic growth, protect consumers, and regulate competition.⁴² They are also a necessary part of the AML’s general goal of establishing a comprehensive competition law to replace China’s former piecemeal competition regime.

II. COMPETITION LAW IN CHINA AND THE AML

A. History of China’s Competition Legislation and the AML

Before beginning the outline of the AML, it is worth noting one commentator’s perspective on the primary purpose of China’s AML in contrast to competition laws in other countries:

[E]xcessive [government] intervention still widely exists all over the country and is by far the top threat to competition. The primary mission of the AML is to correct governmental distortion rather than limit private restrictive practices. That also explains why it contains a special chapter addressing “administrative monopoly” or State restraint on trade.

Therefore, one has to bear in mind that the AML is not merely designed to restore competition but also to take affirmative actions to “create” competition. This unique feature distinguishes it from competition laws in most other jurisdictions.⁴³

The AML promises to significantly improve a competition law regime hindered by a history of piecemeal and often unenforced legislation, as

The Proposed Antitrust Law and the Problem of Administrative Monopolies in China, 12 TRADE PRACS. L.J. 106, 109 (2004).

40. See *infra* note 140.

41. The AML may also be viewed as part of a broader push to reassert central control of China generally and as a means of improving perceptions of local regulatory enforcement and provision of social services. See BERGSTEN ET AL., *supra* note 28, at 77.

42. As discussed elsewhere in the article, the actual makeup and degree of independence of the AML’s so-called “anti-monopoly authority” is far from clear at this stage. See Yujia Wang, *Fan Xingzheng Longduan Nengfou Pobing* [Could the Anti-Administrative Monopoly Measures be a Breakthrough?], XIN CAIJING, Sept. 2008 at 98–99.

43. Yong Huang, *Pursuing the Second Best: The History, Momentum, and Remaining Issues of China’s Anti-Monopoly Law*, 75 ANTITRUST L.J. 117, 120 (2008).

well as overlapping and unclear enforcement agencies.⁴⁴ The 1993 Anti-Unfair Competition Law⁴⁵ was the most important early effort at a competition law, including prohibitions on tying,⁴⁶ predatory pricing,⁴⁷ and bid-rigging,⁴⁸ as well as a small provision prohibiting government abuse of administrative power.⁴⁹ Other competition provisions can be found in laws such as the Commercial Banking Law,⁵⁰ the Price Law,⁵¹ the Procurement and Bidding Law,⁵² and the Patent Law,⁵³ and a variety of administrative

44. Chenxia Shi and Dong Kaijun cite three main reasons for ineffective regulation of monopolies and competition:

1. The Lack of uniformity. Scattered provisions on monopolies give only limited support to the authority of the legal provisions.
2. A lack of concrete enforcement measures against monopolistic practices. The Anti-Unfair Competition Law has only a few articles dealing with monopolistic acts. They are generally in broad terms and no specific enforcement measures are set down in the Law.
3. A weak enforcement authority. The State Administration for Industry and Commerce (SAIC) above the county level is currently the enforcement authority of unfair competition law and antimonopoly regulations. The SAIC's enforcement system is essentially an internal mechanism within the state administration system, and, in the exercise of enforcement functions, it relies on the cooperation of government departments and local governments. The competence of SAIC and the resources available to it to enforce the law have therefore been constantly challenged.

Chenxia Shi & Dong Kaijun, *supra* note 39, at 108 (citations omitted).

45. Zhonghua Renmin Gongheguo Fan Bu Zhengdang Jingji Fa [Anti-Unfair Competition Law] (promulgated by the Standing Comm. of the Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993), translated in LAWINFOCHINA (last visited Mar. 11, 2010) (P.R.C.) [hereinafter Anti-Unfair Competition Law], available at <http://www.lawinfochina.com/law/display.asp?db=1&id=648&keyword=>. The primary enforcement bodies of for the Anti-Unfair Competition Law are the AICs. *Id.*

46. See Anti-Unfair Competition Law, *supra* note 45, art. 12.

47. See *id.* art. 11.

48. See *id.* art. 15.

49. See *id.* art. 12.

50. See Article 9 of Zhonghua Renmin Gongheguo Shangye Yinhang Fa [Law of Commercial Banking] (promulgated by the Standing Comm. of the Nat'l People's Cong., May 10, 1995, effective July 1, 1995), translated in LAWINFOCHINA (last visited Mar. 11, 2010) (P.R.C.), available at <http://www.lawinfochina.com/law/display.asp?db=1&id=456&keyword=>.

51. See Article 14 of Zhonghua Renmin Gongheguo Shangye Yinhang Fa [Price Law] (promulgated by the Standing Comm. of the Nat'l People's Cong., Dec. 29, 1997, effective May 1, 1998), translated in LAWINFOCHINA (last visited Mar. 11, 2010) (P.R.C.), available at <http://www.lawinfochina.com/law/display.asp?db=1&id=76&keyword=>. The Price Law covers price competition, pricing behavior, predatory pricing, and price discrimination. *Id.*

52. See Article 32 of Zhongguo Renmin Gongheguo Zhaobiao Toubiao Fa [Procurement and Bidding Law] (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 30, 1999, effective Jan. 1, 2000), translated in LAWINFOCHINA (last visited Mar. 11, 2010) (P.R.C.), available at <http://www.lawinfochina.com/law/display.asp?db=1&id=1014&keyword=>. The Procurement and Bidding Law covers collusive bidding and transparency in the bidding process. *Id.*

53. See Article 48 of Zhongguo Renmin Gongheguo Zhuanli Fa (2008 xiuzheng) [Patent Law] (adopted by the Standing Comm. of the Nat'l People's Cong., Mar. 12, 1984, effective Apr. 1, 1985), translated in LAWINFOCHINA (last visited Mar. 11, 2010) (P.R.C.), available at <http://www.lawinfochina.com/law/display.asp?db=1&id=38&keyword=>.

rules issued by administrative agencies, often as interpretations of previous law.⁵⁴

In light of the fragmented and vague laws and regulations listed above, the Chinese government has had its sights on a comprehensive competition law since as early as 1987.⁵⁵ In 1994, the State Economic and Trade Commission (SETC)⁵⁶ and State Administration of Industry and Commerce (SAIC)⁵⁷ began work on the AML.⁵⁸ After the project sat on the backburner for years, the National People's Congress Standing Committee announced its revitalization "[a]fter China's accession to the World Trade Organization (WTO) in 2002," and a number of drafts were circulated between 2002 and 2004.⁵⁹ Despite the concerns of foreign onlookers regarding the AML's hurdles for mergers involving foreign businesses acquiring Chinese companies, the issue of administrative monopolies was the most contested within China.⁶⁰ As a result of the variety of interests and viewpoints involved, the final version was repeatedly delayed before passage in August 2007.⁶¹

54. Bruce Owen et al., *supra* note 10, at 233–35.

55. Chenxia Shi & Dong Kaijun, *supra* note 39, at 107.

56. SETC became the Ministry of Commerce (MOFCOM) in 2003. *See* Owen et al., *supra* note 10, at 236.

57. The SAIC, an administrative body directly under China's State Council has duties:

1. To crackdown [sic] on speculation, if the circumstances of a speculation case are so serious as to be punishable according to the criminal code, such a case should be referred to the prosecuting organ;

2. To administrate sales contracts, contracts for placing orders for processing materials . . . mediating and arbitrating disputes, for the management of purchasing and marketing personnel from other places;

3. To manage marketplace transactions in order to protect fair trading and clamp down black market activities;

4. To administer the registration of industrial and commercial enterprises, inspect and deter activities that violate the policies and regulatory provisions of the state, and crackdown [sic] unlicensed business operations; and

5. To administer trademarks.

CHAOWU JIN & WEI LUO, *supra* note 35, at 174 (footnotes omitted). According to Jin and Luo, as of 2002, "AICs [administrations of industry and commerce—the branches of the SAIC below the national level] serve as the major organs in enforcing competition law, while other state organs serve as auxiliaries." *Id.* at 175.

58. *See* Yong Huang, *supra* note 43, at 118–19.

59. *Id.* at 119; Pate, *supra* note 32, at 197–98.

60. *See* Eleanor M. Fox, *An Anti-Monopoly Law for China- Scaling the Walls of Government Restraints*, 75 ANTITRUST L.J. 173, 175 (2008) ("Earlier drafts of the AML included tougher controls on administrative monopoly. These were controversial and were ultimately weakened in a compromise . . ."); H. Stephen Harris, Jr. & Kathy Lijun Yang, *China: Latest Developments in Anti-Monopoly Law Legislation*, ANTITRUST, Spring 2005, at 90.

61. Chinese legislators and scholars debated whether China even needed a competition law, as many viewed the problem to be small domestic businesses' ability to compete with large

B. Political Context of the AML's Passage

The AML has been in the works for well over a decade.⁶² Its concrete emergence over the past two years, however, is not only a reflection of the central government policies outlined above and their tension with local interests, but is also the product of an ongoing debate within the central government.⁶³ This debate arose within China's top political circles over the direction of China's economy following the export-led boom of the 1990s and early 2000s.⁶⁴ It broadly pits a "liberal" or "reformist" camp stressing free markets and rapid economic development against "new left" critics of neoclassical economics and weakening social services.⁶⁵ Compounding the debate is the variety of interests engaged in China's policy debates.⁶⁶ These interests had a significant impact on the final draft of the AML.⁶⁷ It is possible that part of the reason the administrative monopoly provisions were so contentious is the political power and opposition of the giant central government monopolies—particularly the national railroad, petrochemicals, and telecommunications.⁶⁸ It would be unfair, however, to portray the AML as purely the product of political struggle between subsets of the Communist Party leadership, different branches of government, and special interests. To no small degree, the AML's drafters sought input from domestic legal experts and foreign legal scholars.⁶⁹ The result is a law that, despite its significant flaws, is a step forward in the development of China's legal regime.

multinationals. See Yong Huang, *supra* note 43, at 118.

62. See *supra* note 59 and accompanying text.

63. See BERGSTEN ET AL., *supra* note 28, at 33.

64. See *id.* at 33–40.

65. For an in-depth discussion of China's policy debates, see generally *id.* See also Kelvin Chikin Cheung, *Modernity, History, and the Negotiation of Chinese Identity: Revisiting the Liberals/New Left Debate*, in CHINA IN SEARCH OF A HARMONIOUS SOCIETY (Sujian Guo & Baogang Guo eds., 2008). According to Cheung, "the Liberals argue for further political and economic reform to weaken the link between the state and market." *Id.* at 171. The Liberals believe that many of China's social ills, including widening inequality and rampant corruption, are a result of economic reform outpacing political reform. *Id.* The "New Left," on the other hand, believe market liberalization is the root of China's current social and governance problems, and should be rolled back, particularly the rapid privatization of SOEs. *Id.*

66. See *infra* note 67.

67. See Hongqing Duan & Qian Hu, *New Antitrust Law Spares Government Monopolies*, CAIJING, Sept. 3, 2007, available at <http://english.caijing.com.cn/2007-09-03/100028916.html>.

68. The strenuous assertions that the AML does not apply to such monopolies by commentators and drafters can be seen as reassurances to those parties that their interests will be protected. See Yujia Wang, *supra* note 42, at 98; see also Cuiqin Wang, *Difang Xingzhengxing Dui Shichang Longduan de Chengyin Zhili* [Contributing Factors and Governance For Local Administrative Market Monopolies], MODERN ECONOMIC RESEARCH (Chinese: XIANDAI JINGJI TANTAO) 7th issue 2008, at 79.

69. See *infra* note 172. See also Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*,

C. Outline of the Monopoly Law and Its Administrative Monopoly Provisions

The AML is composed of eight chapters, most of which are beyond the scope of this Note.⁷⁰ This Note is primarily concerned with Chapter V, “Abuse of Administrative Power to Eliminate or Restrict Competition,” and other articles of the law dealing with enforcement and exceptions.⁷¹ It should also be noted that the AML is only a broad, initial outline law.⁷² Implementing regulations are expected, but thus far few have been formally promulgated.⁷³ It is expected that many of the more controversial issues have been left for the implementing regulations.⁷⁴

Chapter V begins with a series of negative duties, starting with Article 32, which prohibits government agencies and organs from granting monopolies.⁷⁵ Article 33 prohibits protectionism and unequal treatment of local and outside goods.⁷⁶ Article 34 prohibits protectionist bidding procedures.⁷⁷ Article 35 prohibits unequal treatment of outside businesses.⁷⁸ Article 36 prohibits government agencies from forcing businesses to engage in “monopolistic activities.”⁷⁹ Article 37 is a catch-all provision prohibiting government agencies from “eliminating or restricting competition.”⁸⁰

75 ANTITRUST L.J. 133, 134 (2008) (“The competition enforcement agencies of other countries, in particular the U.S. Department of Justice, the U.S. Federal Trade Commission, and the European Commission contributed significant assistance.”).

70. See AML, *supra* note 1. Chapter I contains “General provisions,” Chapter II covers “Monopoly Agreements,” Chapter III covers “Abuse of Dominant Market Position,” Chapter IV covers “Concentration of Business Operators,” Chapter V covers “Abuse of Administrative Power to Eliminate or Restrict Competition,” Chapter VI covers “Investigation into Suspicious Monopolistic Conduct,” Chapter VII covers “Legal Liabilities,” and Chapter VIII contains “Supplementary Provisions.” *Id.*

71. See AML, *supra* note 1.

72. See Yong Huang, *supra* note 43, at 125–28.

73. At the time of this writing, only the draft regulations covering thresholds for mergers and acquisitions, and draft regulations for procedures from MOFCOM, the NDRC, and SAIC have been released.

74. Yong Huang, *supra* note 43, at 127.

75. See AML, *supra* note 1, art. 32.

76. See *id.* art. 33.

77. See *id.* art. 34.

78. See *id.* art. 35.

79. See *id.* art. 36. Monopolistic conduct is broadly defined in Article 3 of the AML. See *id.* art. 3.

80. See *id.* art. 37.

The AML also includes provisions creating two enforcement authorities: the Anti-monopoly Commission,⁸¹ and the Anti-monopoly Law Enforcement Agency.⁸² This appears to be a two-tiered system, whereby the Anti-monopoly Commission creates general competition policy and coordinates enforcement, and the Anti-monopoly Law Enforcement Agency carries out specific enforcement matters.⁸³ The Anti-monopoly Commission was created shortly before the enactment of the AML as an independent body under the State Council.⁸⁴ The identity of the Anti-monopoly Law Enforcement Agency, however, is unclear. The AML does not indicate whether the Anti-monopoly Law Enforcement Agency will be an independent body under the State Council,⁸⁵ or part of another agency; or separate and subordinate to the competition regulation within MOFCOM,⁸⁶ the NDRC,⁸⁷ and the SAIC. The notice creating the Anti-monopoly Commission⁸⁸ suggests that the Anti-monopoly Law

81.

The State Council shall establish an Anti-monopoly Commission, which is responsible for organizing, coordinating and guiding the anti-monopoly work and performs the following functions:

1. Studying and drafting relevant competition policies;
2. Organizing the investigation and assessment of overall competition situations, and releasing an assessment report;
3. Formulating and releasing anti-monopoly guidelines;
4. Coordinating the anti-monopoly administrative law enforcement; and
5. Other functions assigned by the State Council.

The composition and working rules of the Anti-monopoly Committee shall be established by the State Council.

See AML, *supra* note 1, art. 9. The Chinese word “weiyuanhui” can be translated as either Commission or Committee.

82. See *id.* art. 10. The Chinese word “jigou” can be translated as either Agency or Authority.

83. Mehra & Meng Yanbei, *supra* note 2, at 406–07.

84. Guowuyuan bangongting guanyu guowuyuan fan longduan weiyuanhui zhuti zhize he zucheng renyuan de tongzhi [Notice of the General Office of the State Council on the Main Functions and Members of the Anti-monopoly Commission of the State Council] (promulgated by the State Council, July 28, 2008, effective July 28, 2008), translated in LAWINFOCHINA (last visited Mar. 11, 2010) (P.R.C.) [hereinafter Notice], available at <http://www.lawinfochina.com/law/display.asp?db=1&id=7190&keyword=>.

85. The “Guówùyuàn.” See XIN ZHANG, IMPLEMENTATION OF THE WTO AGREEMENTS IN CHINA 24 (2005). This is China’s top administrative authority. *Id.* The State Council is subordinate to the National People’s Congress (Quanguo Renmin Daobiao Dahui), which is the legislative organ and officially the most powerful organ of government. *Id.* This structure is replicated at the provincial, municipal, county, and town levels. *Id.* at 25. In theory, these lower-level organs are completely subordinate to their central government counterparts, but in practice the local level governments often ignore the central government. *Id.* at 26.

86. The Ministry of Commerce (Shangwu Bu). See *supra* note 56.

87. The National Development and Reform Commission. See Yong Huang, *supra* note 43, at 125–26.

88. See Notice, *supra* note 84.

Enforcement Agency will be part of MOFCOM, but the language is somewhat vague.⁸⁹ Thus far, it seems that enforcement authority has remained with the three agencies above, with the power to enforce AML provisions regarding administrative monopoly in the hands of the SAIC.

Article 51 is the primary enforcement provision for Chapter V. Instead of directly granting either of the to-be-established enforcement authorities the power to punish government organs for violating the AML, this power and the authority to remedy their behavior rests with those organs' superior agencies in the government.⁹⁰ The Anti-monopoly Law Enforcement Agency may only make suggestions for enforcement to the superior agencies of a possible administrative violator of the AML.⁹¹ Article 51 also provides that in the event of a conflict between the AML and other laws or regulations governing the government organ, the other regulations prevail.⁹² This potentially limits the effectiveness of the AML, as special regulations could be implemented to evade a prohibition in the AML.

Article 7 is perhaps the most powerful exclusion in the AML. It provides in part:

With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries lawfully enjoying exclusive production and sales, the State shall protect these lawful business operations conducted by the business operators therein, and shall supervise and control these business operations and the prices of these commodities and services provided by these business operators, so as to protect the consumer interests and facilitate technological advancements.⁹³

89. "The Ministry of Commerce shall undertake the specific work of the Anti-monopoly Commission . . ." See Notice, *supra* note 84.

90. See AML, *supra* note 1, art. 51.

91. See *id.*

92. I translate the relevant part of Article 51 to read: "Where there are other laws or administrative regulations dealing with abuse of administrative power and behavior eliminating or restricting competition by administrative organs or organizations empowered to manage public affairs, such other laws shall govern." This provision not only gives veto power to other laws that prohibit anticompetitive behavior, but to any law that expressly allows anticompetitive behavior. *Id.*

93. See AML, *supra* note 1, art. 7. This exception is extremely powerful in shielding many of China's SOEs.

Eighty percent of the assets controlled by SOEs in 2006 were concentrated in eight "strategic sectors," such as petroleum and electricity generation. SOEs accounted for almost all of the production of petroleum, natural gas, and ethylene, provided all of the basic

A possible effect of this article is to exclude any state-owned entity that can be plausibly considered to be operating in a very important economic sector as long as its exclusion could conceivably protect consumers or aid technological development. Such an exclusion, if interpreted broadly, would be sweeping and would leave a gaping hole in the effectiveness of the AML.

D. Assessment of the AML and Issues in Enforcing Its Administrative Monopoly Provisions

The provisions prohibiting abusive behavior by government organs are not detailed and will need clarification either through further regulations or interpretation by the to-be-created anti-monopoly authorities. As a possible means for future interpretation of the AML, I look to European Community competition law for guidance in areas with which China's anti-monopoly law will surely grapple in the coming years, particularly Europe's rules dividing the state and private sectors.

First, commentators generally encourage the creation of a transparent and independent anti-monopoly authority.⁹⁴ Currently, it appears the large agencies with authority over competition—including SAIC, MOFCOM, and the National Development & Reform Commission (NDRC)—are sharing responsibility for enforcing the provisions of the AML.⁹⁵ Their power structures create a web spread throughout numerous regulatory bodies and government agencies, creating a high likelihood for conflicts of interest.⁹⁶ For example, MOFCOM is charged with promoting foreign direct investment (FDI),⁹⁷ a goal that could conflict with the AML's review of anticompetitive conduct.⁹⁸ This division of power creates a

telecommunication services, generated approximately 55 percent of electricity, and flew about 82 percent of passengers and cargo through the country's air transportation system.

Owen et al., *supra* note 10, at 243–44 (citing Liao Wang, *Breaking Up Monopolies Key to the Restructuring of SOEs*, LIAOWANG, Dec. 13, 2006, available at http://news.xinhuanet.com/politics/2006-12/13/content_5480196.htm).

94. See, e.g., Yong Huang, *supra* note 43, at 125. But see Mehra & Meng Yanbei, *supra* note 2, at 406.

95. Campbell Davidson et al., Focus: SAIC Rules on Implementing the Anti-Monopoly Law (July 3, 2009), <http://www.aar.com.au/pubs/asia/foasiajul09.htm>.

96. Peter J. Wang et al., *Structure and Responsibilities of Enforcement Agencies Under China Anti-Monopoly Law Clarified*, JONES DAY COMMENTARIES, July 2008, http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S5372.

97. Ministry of Commerce of the People's Republic of China Department of Foreign Investment Administration, Outline of MOFCOM's internal structure [in Chinese], <http://wzs.mofcom.gov.cn/aarticle/gywm/200203/20020300003758.html> (last visited Nov. 7, 2009).

98. See *supra* note 96.

possibility for debilitating turf wars.⁹⁹ Problems aside, some commentators believe that an independent anti-monopoly enforcement agency is unrealistic given the interests of the existing administrative players.¹⁰⁰ They hold that the ideal alternative is for the Anti-monopoly Commission to coordinate and delegate power among the existing agencies, and act as final arbiter of policy in the event of conflicting legal standards.¹⁰¹

The second major enforcement problem concerns Article 51. One commentator states the problem well:

First, any administrative restriction on competition usually reflects treatment in favor of the State-owned entity, and behind that favoritism there always exists significant economic benefit for local, government-owned businesses Second [I]t is not likely that [the so-called “higher-level agency”] would have an experienced understanding of competition law or policy.¹⁰²

Other commentators have said the enforcement provisions are “so weak that the prohibitory language may be mere aspiration.”¹⁰³ On the bright side, the anti-monopoly authorities may have a role as surveillance, if not regulatory, bodies, and may be able to bring pressure to bear through indirect political means.¹⁰⁴

A third enforcement issue is the Chinese judiciary’s lack of experience in antitrust matters.¹⁰⁵ Moreover, the Chinese legal culture may not fully appreciate the importance of competition.¹⁰⁶ As one commentator put it, “China will need to engender a competition culture, so that when judges and officials balance competing interests such as national security and development, they also have an appreciation for the value of economic competition.”¹⁰⁷

99. See Xiaoye Wang, *supra* note 69, at 144–45.

100. See Mehra & Meng Yanbei, *supra* note 2, at 408.

101. *Id.*

102. Xiaoye Wang, *supra* note 69, at 149. This statement also adds to an understanding of the exceptions created in Article 51, and why they are so debilitating to the AML’s enforcement power.

103. See, e.g., Fox, *supra* note 60, at 177.

104.

[T]he anti-monopoly authorities have the chance to play a strong surveillance role, perhaps to use advocacy powers to catalogue and publish the (surely) thousands of illegal market-blocking restraints they may observe, to make proposals for remedies with teeth to the disciplining authority, and to tally up, publicly, the costs of the offenses to China.

Id.

105. Pate, *supra* note 32, at 208; see also Mehra & Meng Yanbei, *supra* note 2, at 410.

106. Mehra & Meng Yanbei, *supra* note 2, at 410.

107. *Id.*

III. EUROPEAN COMPETITION LAW AND ITS POTENTIAL APPLICATION IN CHINA

A. *European and U.S. Competition Law Generally*

Because China's economic, political, and legal situations are so different from either the U.S. or the European Union, the goals of China's competition law differ accordingly. In the U.S., the core normative goals of competition law are benefits to the consumer and economic efficiency.¹⁰⁸ In Europe, a much heavier emphasis is placed on unifying the disparate economies and polities of the continent, though economic efficiency has certainly played a leading role in the past few years.¹⁰⁹ In China, the AML is part of an attempt to ensure national stability through continued economic growth,¹¹⁰ but the Chinese government's focus in recent years on building a "harmonious society" demonstrates that maintaining employment and political stability are also at the forefront of policymakers' minds.¹¹¹ Thus, where a U.S. court would disregard the job losses resulting from a merger if consumers benefitted with lower prices or if the merger created significant economic efficiencies, a Chinese court might prohibit the merger for the sake of social "harmony."¹¹² As a result, the U.S. body of antitrust law would not be an ideal model for China to follow, given its objectives in implementing the AML.

There are also other reasons why it is not entirely sensible for China to follow the U.S. antitrust framework. First, the United States system would be difficult to adapt to fit the problem of China's administrative monopolies. Doctrines such as "*Noerr-Pennington Immunity*,"¹¹³ and state

108. See, e.g., *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979); see also *id.* at 22.

109. See ERIKA SZYSZCZAK, *THE REGULATION OF THE STATE IN COMPETITIVE MARKETS IN THE EU* 3-4 (2007).

110. See Pate, *supra* note 32, at 200.

111. Hu Jintao (China's main leader, holding the positions of General Secretary of the Communist Party of China, President of the People's Republic of China, and Chairman of the Central Military Commission of the People's Republic of China) stressed the catch phrase "harmonious society" upon coming to power earlier this decade. This goal has been interpreted as a departure from the previous strategy focused on rapid economic development and less stress on social issues. See SUJIAN GUO & BAGOGANG GUO EDS., *CHINA IN SEARCH OF A HARMONIOUS SOCIETY* 1-3 (2008).

112. See SUJIAN GUO & BAGOGANG GUO, *supra* note 111, at 1-3; Owen et al., *supra* note 10, at 250; Pate, *supra* note 32, at 201.

113. "[T]he principle that genuine efforts to persuade the government to adopt a particular course of action are not subject to antitrust scrutiny, no matter how anticompetitive the action sought." Marina Lao, *Reforming the Noerr-Pennington Antitrust Immunity Doctrine*, 55 RUTGERS L. REV. 965, 966 (2003).

action¹¹⁴ serve to carve out exceptions whereby the state is generally allowed to engage in anticompetitive behavior.¹¹⁵ Second, the AML's provisions against local protectionism¹¹⁶ are already far clearer and more direct than most legal interpretations of the Commerce Clause.¹¹⁷

European Community competition law provides far more guidance for China. Unlike the United States, European Community competition law is more deeply rooted in problems of government influence on the market ("state aid" in the European competition law context), regional protectionism, and balanced geographic development,¹¹⁸ which are some of the problems Chapter V of the AML is intended to attack.¹¹⁹ Moreover, European law, unlike United States law with regard to U.S. states, allows fines against Member States for violations of competition law.¹²⁰ As stated by a commentator, "[the U.S. state action] doctrine establishes an immunity for the States regarding the antitrust laws, whereas the [European] Community case law has the opposite aim: to determine under what conditions the competition rules may be applied to public action."¹²¹ China's situation is therefore similar to Europe's; just as Europe's competition regime calls for a blanket prohibition on anticompetitive state interference in the market, so does the AML.¹²² Additionally, both provide exceptions to the blanket rule. In the U.S., on the other hand, the state is allowed to interfere anti-competitively in the market,¹²³ subject to some exceptions such as for sham proceedings¹²⁴ or Commerce Clause violations.¹²⁵

114. See *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.").

115. See *supra* notes 113, 114.

116. See AML, *supra* note 1, arts. 33–35.

117. See Xiaoye Wang, *supra* note 69, at 149; see also Fox, *supra* note 60, at 190.

118. See Claus-Dieter Ehlermann, *State Aids Under European Community Competition Law*, 18 *FORDHAM INT'L L.J.* 410, 414–16 (1994); Fox, *supra* note 60, at 186 ("[In the early 1950s,] Europe faced a dense web of nationalistic measures and privileged state-owned monopolies that isolated each state from the others. Europe needed proactive economic law.").

119. See Owen et al., *supra* note 10, at 255.

120. Fox, *supra* note 60, at 187.

121. JULIO BAQUERO CRUZ, *BETWEEN COMPETITION AND FREE MOVEMENT: THE ECONOMIC CONSTITUTIONAL LAW OF THE EUROPEAN COMMUNITY* 127–28 (2002).

122. See AML, *supra* note 1, ch. V.

123. See *Parker v. Brown*, 317 U.S. 341, 351 (1943).

124. See *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972).

125. See Xiaoye Wang, *supra* note 69, at 149.

B. European Union Competition Law History

It is possible to view the modern European Union as a progression of treaties primarily concerned with ensuring free and fair competition.¹²⁶ Early European Community policy grew slowly, and much of the focus on state restraints was sector-specific.¹²⁷ The unanticipated economic difficulties of the 1970s prompted many EC Member States to ignore the EC Law's state aid restrictions¹²⁸ (outlined below) and provide economic aid to specific industries.¹²⁹ As a result, up through the 1980s enforcement was fairly lax in deference to the political sovereignty of other European Community Member States.¹³⁰ In the 1980s, however, political sensibilities shifted in a pro-market direction, and the groundwork for a more economics-focused jurisprudence was established.¹³¹

C. European Union Competition Law Prohibitions on State Restraints

One commentator lays out four primary means by which the modern European Community prevents Member States from unfairly restricting competition or subsidizing domestic enterprises and state-controlled enterprises.¹³²

First, the Treaty of Rome (EC Treaty), which established the European Community in 1957,¹³³ is the initial means by which the European

126. The 1951 Treaty of Paris established the European Coal and Steel Community among the Federal Republic of Germany (West Germany), France, Italy, the Netherlands, Belgium, and Luxembourg, moving the power over the coal and steel industries from sovereign states to international institutions. GOYDER, *supra* note 17, at 20. The April 1956 Spaak Report, spurred by the 1955 Messina Conference, laid out the objective of a European Common Market: "to create a vast zone of common economic policy, constituting a powerful unit of production permitting continuous expansion and increased stability and accelerated raising of the standard of living and the development of harmonious relations between its Member States." Intergovernmental Committee on European Integration, *The Brussels Report on the General Common Market* (Apr. 21, 1956), translated in GOYDER, *supra* note 17, at 23 [hereinafter Spaak Report]. Following many of the Spaak Report's recommendations, the six states of the European Coal and Steel Community signed the 1957 Treaty of Rome, creating the European Economic Community (EEC). See Consolidated Version of the Treaty Establishing the European Community, 2002 O.J. (C 325) 33 [hereinafter EC Treaty]. The EEC became the European Community as a result of the 1991 Treaty on European Union. See GOYDER, *supra* note 17, at 21–30; STEPHEN WEATHERILL & PAUL BEAUMONT, *EC LAW: THE ESSENTIAL GUIDE TO THE LEGAL WORKINGS OF THE EUROPEAN COMMUNITY* 2–4 (1993); see also Burgess, *supra* note 4, at 1–3.

127. See Ehlermann, *supra* note 118, at 414–15.

128. See *infra* notes 131–51 and accompanying text.

129. GOYDER, *supra* note 17, at 372–73.

130. SZYSZCZAK, *supra* note 109, at 2.

131. Ehlermann, *supra* note 118, at 416–18; SZYSZCZAK, *supra* note 109, at 2.

132. Fox, *supra* note 60, at 185–87; see *infra* notes 133–47 and accompanying text.

133. See EC Treaty, *supra* note 126.

Community prohibits protectionist state behavior. Articles 28 and 29 very simply prohibit all restrictions on trade between Member States.¹³⁴

Second, Article 86 of the EC Treaty places state-owned or controlled enterprises under the general European competition law except insofar as the enterprise is carrying out a public service.¹³⁵ Third, Articles, 10, 31, 81, 82, and 86 all work to prohibit Member States from ordering or authorizing state-owned or controlled enterprises *as well as* private firms to engage in anticompetitive behavior as outlined in the EC Treaty.¹³⁶ Article 10 charges Member States with fulfilling all EC Treaty obligations.¹³⁷ Article 31 prohibits Member States from allowing state-run monopolies that are essentially commercial to discriminate against other Member States.¹³⁸ Articles 81 and 82 prohibit a number of private anticompetitive behaviors that may affect commerce between Member States.¹³⁹ Taken together, these provisions not only prevent local protectionism and abuse of government power, they alleviate the worst of the problems associated with “regulatory capture.”¹⁴⁰

134.

Article 28: Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 29: Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

EC Treaty, *supra* note 126, arts. 28, 29.

135. EC Treaty Article 86 states:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

See EC Treaty, *supra* note 126, art. 86.

136. Fox, *supra* note 60, at 186–87 (2008); José Luis Buendia Sierra, *Article 86—Exclusive Rights and Other Anti-Competitive State Measures*, in *THE EC LAW OF COMPETITION* 596–97 (Jonathan Faull & Ali Nikpay eds., 2d ed. 2007).

137. *See* EC Treaty, *supra* note 126, art. 10.

138. *See id.* art. 31.

139. *See id.* arts. 81, 82.

140. Regulatory capture is a situation where regulators serve the interests of parties they are assigned to regulate at the expense of the goals of the regulations the regulators are assigned up implement. *See* Toni Makkai & John Braithwaite, *In and Out of the Revolving Door: Making Sense of Regulatory Capture*, 12 J. PUB. POL’Y 61, 61–62 (1992).

Last, the European Union's "State Aids" doctrine, outlined in Article 87 of the EC Treaty,¹⁴¹ is a unique prohibition on subsidies and other aid from Member States to businesses.¹⁴² Case law provides four requisite elements to identify state aid.¹⁴³ The first element is "transfer of state resources," meaning "intervention by the state or through state resources."¹⁴⁴ The second element is "economic advantage," meaning "[t]he measure must confer an advantage on the recipient."¹⁴⁵ The third element is "distortion of competition," such that the measure "distort[s] or threaten[s] to distort competition."¹⁴⁶ The last element is the "effect on trade": "The measure must be liable to [negatively] affect trade between member states."¹⁴⁷

Article 87 of the EC Treaty creates a number of block exemptions from the State aids prohibitions.¹⁴⁸ Among these exemptions are aids of a social character to help individual consumers, aids to make good damage resulting from natural disasters or other exceptional occurrences, aids for economic development in underdeveloped or disadvantaged regions, and aid to assist the development of certain economic activities.¹⁴⁹ As a general principle, the European Commission¹⁵⁰ tries to weigh the anti-competitive effects due to the State aid against the aid's possible benefits to the goals of the European Community—such as development, research, employment, and the environment.¹⁵¹

D. European Competition Law Enforcement

Article 85 of the EC grants the power to enforce Articles 81 and 82 to the European Commission¹⁵² (the executive branch of the European Union), and under Article 88(1), the Commission must "keep under

141. See EC Treaty, *supra* note 126, art. 87.

142. CONOR QUIGLEY & ANTHONY M. COLLINS, EC STATE AID LAW AND POLICY 3 (2003).

143. Hans W. Friederszick et al., *European State Aid Control: An Economic Framework*, in HANDBOOK OF ANTITRUST ECONOMICS 627 (Paolo Buccirossi ed., 2008) (citing Judgment of the European Court of Justice of July 24, 2003, Case C-280/00, *Altmark Trans GmbH v. Nahverkehrsgesellschaft Altmark GmbH*, 2003 E.C.R. I-7747, ¶ 75).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. See EC Treaty, *supra* note 126, art. 87.

149. Friederszick et al., *supra* note 143, at 627.

150. See *infra* note 152.

151. Maria Rehbinder, *Recent Developments in Commission State Aid Policy and Practice*, in THE LAW OF STATE AID IN THE EUROPEAN UNION 118–19 (Andrea Biondi et al. eds., 2004).

152. See EC Treaty, *supra* note 126, art. 85. Article 211 of the EC Treaty lays out the general responsibilities of the Commission. See *id.* art. 211.

constant review” all existing aid.¹⁵³ The Commission, through its Directorate General for Competition (formerly DG IV),¹⁵⁴ has a duty to investigate suspected competition law infringement on its own, at the request of Member States, or at the request of individual complainants with a legitimate interest.¹⁵⁵ Since 2004, Member States’ courts, competition authorities, and the Commission also have the power to enforce Articles 81 and 82.¹⁵⁶ The result is a fairly open enforcement system, allowing administrative enforcement of competition law at various levels, and helping to ensure that problems are identified and dealt with.¹⁵⁷

IV. COMPARISON OF CHINA AND EUROPE AND EUROPEAN LESSONS FOR CHINA

As with the United States, Europe’s competition regime is a product of its history and political goals and was shaped over a period of decades as goals and circumstances changed.¹⁵⁸ So the initial lesson is that China’s competition regime must be tailored to the changing circumstances of China. That is, the competition law should emphasize unifying the national economy, drawing clear lines between public and private

153. *See id.* art. 88(1).

154. MARGARET GRAY ET AL., *EU COMPETITION LAW: PROCEDURES AND REMEDIES* 5 (2006).

155. *Id.* at 5–7. The Commission’s procedure for enforcing competition law includes eight stages as follows:

- (1) the initiation of the procedure by a complaint made to the Commission or by the Commission on its own initiative;
- (2) investigation by the Commission (also referred to as the fact-finding stage);
- (3) the statement of objections by the Commission if the investigation has revealed infringements or incompatibilities with the rules of competition;
- (4) the reply to the Commission’s statement of objections by the undertakings concerned;
- (5) hearing, at election of the relevant undertaking;
- (6) consultation with an Advisory Committee on Restrictive Practices and Dominant Positions;
- (7) the adoption by the Commission of the final decision and its publication in the Official Journal; and
- (8) where appropriate, the imposition by that decision of fines or periodic penalty payments.

Id. at 4 (citations omitted).

156. Council Regulation No 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, replaced Regulation 17/62. Sierra, *supra* note 136, at 88. “In applying Articles 81 and 82 . . . national courts are bound by the fundamental principle of the primacy of European Community law and must follow the case law of the European Court of Justice and the Court of First Instance.” GRAY, *supra* note 154, at 118.

157. *See generally* GOYDER, *supra* note 17, at 582–86.

158. *See generally id.* at 8–14.

economic functions, establishing independent judicial enforcement, and clarifying statutory and regulatory authority.

In a number of respects, Europe's policy goals are closely aligned with China's. Europe has traditionally placed a heavy emphasis on breaking down trade barriers to unite the continent's economy and on eliminating unfair state intervention in the markets.¹⁵⁹ Similarly, one of the major goals of the AML is to eliminate local protectionism and encourage trade throughout the nation.¹⁶⁰ Europe's shift towards privatization and pro-market reforms through the 1980s and 90s also mirrors China's shift over that period.¹⁶¹ On a procedural level, the similar judicial mindsets held by civil-law countries could prove an advantage should China wish to adopt European statutes and statutory interpretations. In addition, Europe has slowly and intermittently drifted towards a more central leadership structure,¹⁶² something that the current leadership in Beijing is eager to achieve.¹⁶³ Also, mid-twentieth century Europe and modern China both have explicit policy goals of evening out disparate levels of regional development and a willingness to grant development aid to lagging regions.¹⁶⁴ Last, China and Europe are somewhat wary of a laissez-faire market economy, and place emphasis on high employment and political stability.¹⁶⁵ Because of these commonalities, the European approach to evaluating and removing anticompetitive state presence in the markets is worth further examination by the Chinese government.

There are, of course, immense differences between Europe and China. The leading differences are the non-economic issues faced by mid-twentieth century Europe and modern China. Europe's gradual unification over the past decades was initiated not only by a desire to spur economic development through the creation of a common market, but to create a united front as a counterweight to the Soviet threat.¹⁶⁶ China, on the other hand, faces no existential threats to its national integrity from outside powers. Rather, China's leaders worry about social stability as the greatest

159. See SZYSZCZAK, *supra* note 109, at 3–9; see also Burgess, *supra* note 4, at 1–3.

160. See Pate, *supra* note 32, at 202–04.

161. See SZYSZCZAK, *supra* note 109, at 3; Richard Student, Note, *China's New Anti-monopoly Law: Addressing Foreign Competitors and Commentators*, 17 MINN. J. INT'L L. 503, 505–07 (2008).

162. Burgess, *supra* note 4, at 1–3.

163. BERGSTEN ET AL., *supra* note 28, at 77.

164. See *Fagai Wei: Guojia Zhengzai Yanjiu Zhiding Xin de Xibu Da Kaifa Zhengce* [NDRC: The Nation is Researching Instituting a New "Develop the West" Policy], XINHUA NEWS, June 25, 2009, http://news.xinhuanet.com/fortune/2009-06/25/content_11601574.htm; see also *supra* note 143–49 and accompanying text.

165. See *supra* note 111 and accompanying text.

166. D. WYATT & A. DASHWOOD, EUROPEAN COMMUNITY LAW 1 (1993).

threat to their continued control.¹⁶⁷ The “new left,” in particular, fears that further economic development, such as it has been since 1978, may do more to undermine China’s stability than promote it.¹⁶⁸ As far as government structure, it is significant that Europe’s supranational government is constitutionally far more limited in reach than China’s central government, which allows the Chinese government to more effectively and directly implement policy than could the European Community.¹⁶⁹ Despite the differences in history and policy goals, Europe’s current antitrust regime, both in judicial analysis and enforcement, could serve as a foundation for further development of competition law in China.

A. European Statutory and Judicial Lessons for China

A major flaw in the AML is the lack of a clear distinction between SOEs that are essentially commercial and should be subject to the AML and other administrative organs which serve traditional public functions and should be exempt from it.¹⁷⁰ The AML hints at this in its use of the term “public interests,”¹⁷¹ but this term is still susceptible to a tautological definition: an SOE might qualify as carrying out work in the public interest by virtue of its public ownership.¹⁷² The AML could either expressly include commercial SOEs as a category of “business operators” over which the anti-monopoly authority exerts substantial control, or, preferably, specifically define “public interest” to exclude commercial functions.¹⁷³

The EC Treaty’s Articles 31 and 86 address this problem.¹⁷⁴ First, Article 31 simply states that “commercial” monopolies may not discriminate against businesses from other Member States.¹⁷⁵ Non-

167. See BERGSTEN ET AL., *supra* note 28, at 35–38.

168. See *id.*

169. CLIVE CHURCH, UNDERSTANDING THE EUROPEAN CONSTITUTION: AN INTRODUCTION TO THE EU CONSTITUTIONAL TREATY 35 (2006).

170. See Xiaoye Wang, *Comments on the Anti-Monopoly Law of the People’s Republic of China*, 4 FRONTIERS L. CHINA 343, 368 (2009), available at <http://www.springerlink.com/content/p2hvk6w145r02551/>.

171. See AML, *supra* note 1, arts. 15, 28.

172. See JOINT SUBMISSION OF THE AMERICAN BAR ASSOCIATION’S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW AND PRACTICE ON THE PROPOSED ANTI-MONOPOLY LAW OF THE PEOPLE’S REPUBLIC OF CHINA 23–25, http://www.abanet.org/intlaw/committees/business_regulation/antitrust/abaprcatfinalcombo.pdf.

173. See *id.*

174. See EC Treaty, *supra* note 126, arts. 31 and 86.

175. See *id.* art. 31.

monopolies are covered by the raft of articles tied together by Article 86. Article 86 indicates that “undertakings” may be vested with public functions, but applies the EC Treaty’s rules on competition to the extent that the rules do not interfere with the public functions, and such functions may not interfere with the interests of the European Community at large.¹⁷⁶

The EC Treaty’s means of delineating between private and public functions could be used to strengthen the AML’s weak enforcement provisions in Article 51. At the very least, Article 51 should be revised to allow the AML to prevail over conflicting legislation if the conflicting legislation is directed at non-public function aspects of the legislation’s targeted enterprise or group of enterprises.¹⁷⁷

Application of the European Community’s State Aid doctrine to local and provincial authorities would also benefit Chinese competition and reduce regional protectionism. Application of the fourth element, “the measure must be liable to affect trade between Member States”¹⁷⁸ could be altered by replacing “Member State” with a smaller unit of government, such as the province or even county.

Use of state-aid exemptions similar to those found in the EC Treaty’s Article 87 would also help China achieve the difficult balance of empowering the state to undertake targeted development and other economic policies versus allowing all and any state intervention in the economy. Such exemptions would allow the Chinese central government to put a general ban on government aid to the market, theoretically eliminating much of the more wasteful, inefficient, and corrupt spending, while preserving latitude for economic assistance where the Chinese central government finds appropriate. As above, in the Chinese context the balance of factors would likely be with regard to aid by local governments such as provincial governments, rather than between Member States as in the EC.¹⁷⁹

176. *See id.* art. 86.

177. Eleanor Fox also suggests a number of other changes to Article 51. She suggests that it clarify the identity of the “superior authorities” that can enforce against local abusers of administrative power and the actual enforcement powers of such “superior authorities.” Fox, *supra* note 60, at 190. I interpret this suggestion to create an exception to effectively allow enforcement by the AML when the relevant “superior authority” would lack enforcement capacity, which would indeed be a welcome change.

178. *See* EC Treaty, *supra* note 126, art. 87.

179. Because of the lack of transparency within the Chinese central government, among other political reasons, it is very unlikely that the Anti-monopoly Law Enforcement Agency would publicly hold the Chinese central government accountable for any breach of the AML’s administrative monopoly provisions.

B. European Enforcement Lessons for China

Europe's enforcement regime would be more difficult to transplant than aspects of the legal code and its interpretation because of China's existing bureaucratic overlap and because of the power struggles that would ensue from a wholesale realignment of administrative responsibilities.¹⁸⁰ Regardless, the current (nebulous) framework outlined by the AML suggests an enforcement mechanism reminiscent of the European Commission and its Director General of Competition.¹⁸¹ China's Anti-monopoly Commission could serve a role similar to that of the European Commission, formulating general competition policy and delegating to its enforcement authority, which in China's case would be the mysterious Anti-monopoly Law Enforcement Agency.¹⁸² If, as it appears, the Anti-monopoly Law Enforcement Agency is not yet created,¹⁸³ it would be easier to follow the European model and create an agency similar to the Director General of Competition, which would carry out tasks delegated by the Anti-monopoly Commission. If, on the other hand, the Anti-monopoly Law Enforcement Agency is part of MOFCOM,¹⁸⁴ it would be ideal for the other existing competition law enforcement powers in SAIC and NDRC to move to MOFCOM, as unrealistic as that might be.¹⁸⁵

C. European Policy Lessons for China

The first major policy lesson from Europe's experience is, despite the urge to correct all market inefficiencies in one fell swoop, such an approach may not be necessary or even advisable. Europe's experience demonstrates that an initial emphasis on open borders and protectionism, with allowances for "inefficient"¹⁸⁶ policies directed at social stability and

180. See Xiaoye Wang, *supra* note 69, at 143–44.

181. "The Directorate General for Competition . . . is responsible for the supervision and enforcement of the rules of competition under the EC Treaty . . ." GRAY ET AL., *supra* note 154, at 5. The Directorate General includes nine sub-directorates, including: (A) Policy and Strategic Support; (B) Energy, Water, Food, and Pharmaceuticals; (C) Information, Communication, and Media; (D) Services; (E) Industry; (F) Consumer Goods; (G) State aid I—aid schemes and fiscal issues; (H) State aid II—manufacturing and services, enforcement; and (R) Strategic Planning and Resources (providing central services). *Id.* at 5–6.

182. See AML, *supra* note 1, arts. 9, 10.

183. This depends on the interpretation of the Notice. See Notice, *supra* note 84; Xiaoye Wang, *supra* note 170, at 368.

184. See Notice, *supra* note 84.

185. See *supra* note 69, at 144–45; see also *supra* note 170, at 371.

186. See generally Friederszick et al., *supra* note 143.

national cohesion, can still have a significant pro-competitive impact.¹⁸⁷ As is apparent even in light of the breakneck development of the Chinese economy, reform measures still require time for widespread acceptance among interested parties, particularly for the government to accept the loss of market power through control of SOEs.¹⁸⁸

Another major theme in the European experience may serve as a warning to China. Much of the accomplishments of European competition law are not wholly attributable to the wise jurisprudence of European jurists or the careful drafting of the continent's legislators. Rather, the development of Europe's laws regarding state restraints is due in large part to a policy shift in Europe throughout the 1980s and '90s whereby huge portions of the European economy were privatized.¹⁸⁹ Just as in China, however, privatization did not mean a complete withdrawal of state interests. Rather, a complex web of regulation and national interests now links the public and private sectors, and European competition law, the State Aid doctrine in particular, has evolved to address these new circumstances.¹⁹⁰ In this regard, Europe's most useful lesson may be that where there is sufficient political will to engage in marketization and privatization, a legal regime to balance the government and private interests may evolve and become workable.¹⁹¹ The mere passage and existence of the AML, let alone the sheer amount of academic commentary the law generated, are confidence-inspiring indications that there is a substantial contingent within the Chinese government dedicated to building competition law.¹⁹²

Whether there exists in China the political will to follow through with the promise of the AML to limit the role of government and allow for competitive markets is one of the biggest questions in China today.¹⁹³ The

187. SZYSZCZAK, *supra* note 109, at 3.

188. Xiaoye Wang, *supra* note 69, at 150.

189. See SZYSZCZAK, *supra* note 109, at 4.

190. *Id.* at 3–4.

[T]he processes of privatization are complex. States use different methods and employ various legal and economic tools to transfer state enterprises to private sector ownership. In particular they are often reluctant to relinquish total control of the enterprise in question. This in turn has created a number of regulatory challenges

Id.

191. See SZYSZCZAK, *supra* note 109, at 255–60.

192. Mehra and Yanbei suggest that the AML is a first step in a process whereby a “competition culture” takes root in China, such that even if enforcement of the AML is weak, the “competition culture” may have spillover effects beneficial to competition and state activity in the markets. Mehra & Meng Yanbei, *supra* note 2, at 383, 423.

193. BERGSTEN ET AL., *supra* note 28, at 33–40.

severely compromised provisions governing administrative monopoly¹⁹⁴ possibly indicates the strength of China's "new left" camp, as well as the unwillingness of those vested with regulatory control to give ground to other or new regulatory agencies. In spite of the setbacks, however, the AML still mustered support for passage with the inclusion of provisions prohibiting abuse of administrative monopolies.

There are still factors that weigh against a wholesale adoption of the European approach to state restraints in competition law. The most obvious is that the European Union is composed of nations, whereas China is a single nation. The European Union's deference to Member States, particularly the EC Treaty's lack of applicability to regulations that do not affect commerce with other Member States,¹⁹⁵ would be an unnecessary accommodation in China. For purposes of national control and central government superiority, China is unlikely to (statutorily) take such a hands-off approach to provincial matters.¹⁹⁶

Europe's enforcement regime could be adopted in part, however. While unlikely today, it is not wholly unreasonable for China's central government to force agencies such as MOFCOM, SAIC, and NDRC to reorganize and consolidate their competition-focused agencies into a separate, independent body.¹⁹⁷ Less likely would be an adoption of Europe's various avenues to enforcement, including direct enforcement by Member States (which would be most analogous to enforcement by provincial authorities in the Chinese context).¹⁹⁸ China's lack of a sophisticated court system¹⁹⁹ means a specialized anti-monopoly court would be advisable.

Europe had a number of advantages in creating its competition law and State Aid doctrine, such as the established place of the rule of law, political environments in Member States conducive to privatization,²⁰⁰ and a supranational central body (the EU Commission) without the same

194. See Owen et al., *supra* note 10, at 261.

195. See, e.g., EC Treaty, *supra* note 126, art. 82.

196. BERGSTEN ET AL., *supra* note 28, at 77.

197. For example, China reorganized much of its bureaucracy in the late 1990s. James Kynge & James Harding, *Beijing Firm in Belief that Bigger Is Better*, FIN. TIMES, Mar. 11, 1998, at 4.

198. Europe only allowed enforcement through Member States' national courts beginning with the revision of the EC Treaty in 2002. See Sierra, *supra* note 136, at 88. Additionally, the goals of the AML and recent central government policies make granting AML enforcement power to the provinces unwise. One of the goals of the AML is to curb use of administrative monopoly as local protectionist measures, and because the central government has generally pursued a policy in recent years of pulling power back to Beijing, granting AML enforcement power to provincial governments would undermine both of those aims.

199. Owen et al., *supra* note 10, at 242.

200. See SZYSZCZAK, *supra* note 109, at 3.

vested interests held by the constituent states in continuing the state restraints.²⁰¹ Regardless, China may implement regulations that will put real teeth in the AML in the next few years.²⁰² The passage of the AML is a sign that China's dithering on the fundamental role of competition in the Chinese economy is coming to a close, and the mere presence of Chapter V, dedicated to limiting state power in the economy,²⁰³ is a sign that, despite compromises, much of the leadership intends to put create firm distinctions between the private sector and public sector. The AML is far more likely to succeed in defeating local administrative monopolies' protectionist measures than administrative monopolies that operate at national levels, such as trade associations or other administrative companies.²⁰⁴ National monopolies are more likely to have political clout, and some drafters have pointedly commented that the AML's administrative monopoly measures were not targeted at the large national monopolies.²⁰⁵

CONCLUSION

Despite its drawbacks, China's new AML is a positive step, particularly because it addresses administrative monopolies, which are one of the more serious impediments to establishing an efficient and competitive market economy in China.²⁰⁶ Europe's similar experiences regulating state intervention in competitive markets could be instructive for China's future judicial interpretations and implementation of enforcement mechanisms.

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201. Many of the administrative monopolies in China are owned by the Chinese central government, such as the State Grid Corporation of China and PetroChina.

202. See Paul Jones, *China's New Anti-Monopoly Law: An Economic Constitution for the New Market Economy?*, 3 CHINA L. REP. 3, 12–13 (2007).

203. See AML, *supra* note 1, ch. V.

204. See Chaowu JIN & WEI LUO, *supra* note 35, at 97–98.

205. See Yujia Wang, *supra* note 42, at 98.

206. See Yong Guo & Angang Hu, *supra* note 8, at 265–66.

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