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# **Syftena i Kinas konkurrenslagstiftning**

-Med utgångspunkt från begreppet socialistisk marknadsekonomi

Magisteruppsats inom konkurrensrätt

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JÖNKÖPING INTERNATIONAL BUSINESS SCHOOL  
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# About the aims of China's Anti-Monopoly Law

-With special reference to the concept of socialist market economy

Master's Thesis within Competition Law

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### Sammanfattning

Kinas första heltäckande konkurrenslagstiftning<sup>1</sup> trädde i kraft den 1 augusti 2008. Trots lång historia av planekonomi har Kina under de senaste decennierna utvecklat en av världens snabbast växande ekonomier. Antagandet av lagen var ett betydande steg mot en mer marknadsbaserad ekonomi. I artikel 1 anges att ett av syftena med lagen är att utveckla en *socialistisk marknadsekonomi*. Begreppet socialistisk marknadsekonomi grundades på 1990-talet och återfinns i flera kinesiska lagar.

Begreppet socialistisk marknadsekonomi saknar definition vilket öppnar upp för det styrande partiet att tolka begreppet i överensstämmelse med deras politiska värderingar. Den kinesiska regeringen kommer förmodligen lägga mer vikt på ”socialistisk” än på ”marknadsekonomi” vid tolkning av begreppet. Begreppet är ett centralt begrepp och kommer att influera hur de övriga syftena i artikel 1 tolkas. De övriga syftena är inte rangordnade och står i tydlig konflikt med varandra. Den kinesiska regeringen kommer att prioritera de syften som är mest fördelaktiga för ett socialistiskt samhälle. Syftet att tillgodose ”statens intresse” innefattar statsägda företag och kommer prioriteras. Även syftet ”ekonomisk effektivitet” kommer prioriteras eftersom Kina har en stark strävan att bli ett rikt land. Konsumenternas intresse kommer inte att prioriteras i dagsläget men eventuellt i framtiden.

En av anledningarna till att syftena är vida och utan inbördes rangordning kan vara att motiven till antagandet av Anti-monopollagstiftningen inte enbart var konkurrensrättsliga. Motiven visar att lagen snarare tjänar som en del i en större ekonomisk utvecklingsplan. Inte heller strävar den kinesiska regeringen efter en *fri* marknad. Istället är målsättningen att skapa en *rättvis* marknad. En rättvis marknad kommer förmodligen att innebära en marknad som är fördelaktig för statsägda företag vilket i sin tur motsätter sig grundstenarna i konkurrensrätt. De konkurrensrättsliga principerna härstammar från sofistikerade marknadsekonomier och Kina avser att tolka dessa ur ett socialistiskt perspektiv. Lagen innehåller de konkurrensrättsliga grundstenarna men specifikt för lagen är avsnittet som behandlar administrativa monopol. Det kan te sig tvetydigt att förbjuda administrativa monopol utan att stadga några påföljande sanktioner för överträdelse.

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<sup>1</sup> Anti-Monopoly Law of the People's Republic of China.

Även de grundläggande elementen för att etablera en effektiv konkurrens, saknas i Kina. Lagen kan inte ses som objektiv eller rättssäker och de kontrollerade tillsynsmyndigheterna har inte separerade tillsynsområden. I dagsläget finns inte heller någon speciell konkurrensdomstol upprättad. Andra faktorer som kan påverka konkurrenslagen negativt är Kinas historia och kultur som färgas av socialistiska värderingar. Kina behöver tid för att kunna utveckla en effektiv konkurrensmiljö.

Sammantaget kan sägas att det inte är någon tillfällighet att begreppet socialistisk marknadsekonomi är odefinierat. Begreppet innefattar en strävan efter utveckling av det socialistiska samhället med stark ekonomisk utveckling. Mer specifika mål och riktlinjer kan den kinesiska regeringen utveckla när tiden kräver det. Ur ett kinesiskt perspektiv, kommer syftena i artikel 1 att uppfyllas eftersom det odefinierade begreppet öppnar upp för olika tolkningar. Med utgångspunkt från en sofistikerad marknadsekonomi kommer lagen inte uppfylla sitt syfte eftersom ingen effektiv konkurrens är etablerad.

## Master's Thesis in Competition Law

Title:	About the aims of China's Anti-Monopoly Law -With special reference to the concept of socialist market economy
Author:	Elisabeth Alsnäs, Petra Wilhelmsson
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Date:	2009-01-16
Subject terms:	Antimonopoly law, competition law, competition policy, market economy, planned economy, socialist market economy

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### Abstract

China's first comprehensive competition law, the Anti-monopoly law of the People's Republic of China (AML), was enacted on August 1, 2008. Despite a long history of planned economy, the Chinese economy has developed into one of the fastest growing economies in the world during the last decades. The adoption of the law was a crucial step towards a more market-based economy. Article 1 of the AML states that one of the aims to achieve with this law is to develop a *socialist market economy*. The notion was founded in the 1990s and can be found in several other Chinese legislations.

The concept has no prominent definition and can be interpreted in many different ways, which opens up for the ruling Party to interpret the notion in accordance with their political beliefs. The central government will probably put most emphasis on the word "socialist" instead of "market economy" when interpreting the concept. The concept is of central meaning and will affect the interpretation of the other aims stated in article 1. The other aims are not ranked in any hierarchical order and are in conflict with each other. The central government will give priority to the aims which are beneficial for a socialist society. The aim to promote public interest, which includes state owned enterprises, will be strongly favored. Also the aim economic efficiency will be prioritized since China strives to become a rich country. Consumer welfare will not be highlighted but might be more important in the future.

One reason that the aims are vague and not put in any hierarchical order could be that the objectives for adopting AML were not solely of competition reasons. The objectives show that AML is part of a wider economic policy. Neither does the central government strive towards a *free* market. Instead the goal is to establish a *fair* market. A fair market will most probably be a market beneficial for state owned enterprises and can therefore be contradictory to the keystones of competition. Competition principals arise from sophisticated market economies and China aims to apply those principals in the light of socialist ideology. AML covers the general competition provisions but with a specific chapter to regulate administrative monopolies. It can still be seen as contradictory to prohibit administrative monopolies but without any sanctions stipulated for violation of the provisions.

Also the fundamental elements for establish effective competition are missing. The statute cannot be seen as objective or provide legal certainty and the competition authori-

ties do not have divided responsibilities. Neither is any specific competition court established. Other factors that can contribute to an inefficient competition law are China's history and culture, affected by socialist ideology. Time is required in China in order to develop an efficient competition culture.

Altogether, it is no coincident that the notion of socialist market economy is undefined. The notion includes a quest to enhance the socialist society with strong economic development. More specific guidance is determined by the central government when the right time has come. From a Chinese perspective, the aims in article 1 will be achieved since the undefined concepts open up for different interpretations. From a sophisticated point of view, the aims will not be seen as achieved since no effective competition is established.

Dear reader,

the saying by Mao Zedong *“To cross the river, by feeling the stones”* could conclude our exciting journey we have undertaken when analyzing China's development towards a market economy.

To write our Master's Thesis in China and Hong Kong has been an amazing, interesting and sometimes hard job to carry out. We have been deep diving into the history of China, the Chinese politics, the economic situation and of course, the Chinese legal system and its structure. We are fascinated about the remarkable differences one finds in China if comparing to Europe. We have realized that there are not any given or clear answers to find in China, one has to be careful, persistent and very motivated in order to finally find the right way after trying several different tracks.

This Master's Thesis would not have been possible to carry out without the enormous support we have got from so many respected, well-recognized and extremely helpful lawyers in Hong Kong, China and Sweden.

First of all we would like to thank our tutor Mr. Hans Stenberg, Adjunct Professor at Jönköping International Business School, for valuable comments and guidance within competition law and theories. We really appreciate your efforts to learn about China in order to give us outstanding supervision.

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We would also like to thank Mr. Zhan Hao, executive partner at Grandall Legal Group in Beijing, Mr. Diarmuid O'Brien senior associate at Squire and Sanders in Beijing and Mr. Mark Williams Professor at the Hong Kong Polytechnic University in Hong Kong for your extremely friendly and helpful attitudes. We appreciate that all of you have taken the time to meet us for interviews, answer questions and give us guidance. Your valuable points have given our Master's Thesis and analysis a degree of credibility, which we could never have reached without you.

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We truly hope that the two of us will be able to, some day in some way, give back what you all have given us.

Best Regards,

Petra & Elisabeth

# Table of Contents

<b>1</b>	<b>Introduction .....</b>	<b>1</b>
1.1	Background .....	1
1.2	Hypothesis .....	3
1.3	Purpose .....	3
1.4	Method .....	3
1.5	Delimitation .....	4
1.6	Outline .....	5
<b>2</b>	<b>Article 1 of AML .....</b>	<b>6</b>
2.1	Aims in article 1 .....	6
2.2	Different interpretations of “socialist market economy” .....	7
2.2.1	Strong economic development .....	7
2.2.2	Powers to the PRC Government .....	8
2.2.3	Economic liberalization .....	8
2.2.4	Decreasing number of SOEs .....	8
2.3	Development of the concept .....	9
2.3.1	1954: become a socialist society .....	9
2.3.2	1975: gain supreme legitimacy .....	9
2.3.3	1982: socialist modernization .....	10
2.3.4	1993: socialist market economy .....	10
2.4	Analysis chapter 2 .....	11
<b>3</b>	<b>The AML and competition concepts .....</b>	<b>12</b>
3.1	Competition concepts .....	12
3.1.1	A competitive market .....	12
3.1.2	Perfect market definition .....	13
3.1.3	The market in China .....	13
3.1.4	Monopoly .....	14
3.1.5	Monopolies in China .....	14
3.2	The AML .....	15
3.2.1	AML overview .....	15
3.2.2	Specific provision: Administrative Monopoly .....	16
3.2.3	Previous competition laws in China .....	16
3.3	Analysis chapter 3 .....	17
<b>4</b>	<b>Objectives for adopting AML .....</b>	<b>18</b>
4.1	Economic development .....	18
4.2	Requirements from WTO .....	19
4.3	Control administrative monopolies .....	19
4.4	Protect national champions .....	21
4.5	Analysis chapter 4 .....	22
<b>5</b>	<b>Establish Competition: 1<sup>st</sup> Element .....</b>	<b>24</b>
5.1	What a competition law should compass .....	24
5.2	Conflicting aims in article 1 .....	25
5.2.1	Public interest .....	25
5.2.2	Consumer welfare .....	26
5.2.3	Fair competition .....	28
5.2.4	Economic efficiency .....	29



5.3	Analysis chapter 5 .....	29
<b>6</b>	<b>Establish Competition: 2<sup>nd</sup> and 3<sup>rd</sup> Element.....</b>	<b>31</b>
6.1	Uncertainty .....	31
6.2	Competition authorities.....	31
	6.2.1 Three competition authorities in China .....	32
	6.2.2 Agencies are supervising other agencies .....	33
6.3	Development of a policy .....	33
	6.3.1 Industrial policy verses competition policy .....	34
	6.3.2 The policy in China .....	34
6.4	Analysis chapter 6 .....	35
<b>7</b>	<b>Lack of Legal Certainty in China .....</b>	<b>36</b>
7.1	Informal relations.....	36
7.2	Rule of law or rule of man? .....	36
7.3	Analysis chapter 7 .....	37
<b>8</b>	<b>Conclusion.....</b>	<b>39</b>
8.1	Develop the true aims .....	39
8.2	The concept of socialist market economy .....	39
	8.2.1 The true aims in article 1 .....	40
8.3	Achievement of competition goals?.....	41
	8.3.1 Enforcement .....	41
	8.3.2 Elements for effective competition .....	41
8.4	Final words .....	42
<b>9</b>	<b>Further Discussion: The Future Interpretation.....</b>	<b>43</b>
9.1	Current president of China .....	43
9.2	Challenges .....	43
9.3	The fifth generation .....	44
	<b>References .....</b>	<b>45</b>
	<b>Appendix .....</b>	<b>49</b>
	Anti-Monopoly Law of the People's Republic of China .....	49

## List of abbreviations

AMC	Anti-Monopoly Commission
AMEA	Anti-Monopoly Enforcement Agency
AML	Anti-Monopoly Law
APEC	Asia-Pacific Economic Cooperation
CCP	Chinese Communist Party
EC	European Community
EIU	Economic Intelligence Unit
EU	European Union
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
MES	Modern Enterprises System
MOFCOM	Ministry of Commerce of the People's Republic of China
NCRC	National Development and Reform Commission
NPC	National People's Congress
OECD	Organization for Economic Co-operation and Development
PRC	People's Republic of China
SAIC	State Administration of Industry and Commerce
SOE	State Owned Enterprise
TFP	Total Factor Productivity
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
WTO	World Trade Organization

# 1 Introduction

This Master's Thesis is an analysis of China's first comprehensive competition law, the Anti-monopoly law<sup>2</sup> (AML). The aim of AML is to develop a *socialist market economy* which is a concept that not comprises of any prominent definition and can therefore not be clearly defined. The vague expression gives substance to the topic chosen; to analyze the aims of AML in the light of a socialist market economy.

The first chapter provides with background to the topic, hypothesis, purpose and what methods are used for research. The delimitation and outline of the thesis are also laid down.

## 1.1 Background

China has a long history of planned economy where the national economy is regulated by administrative management. On August 1 2008, the government of the People's Republic of China (PRC) made a remarkable progress towards a more market-based economy, where market mechanism regulate the allocation of resources and economic development, by adopting China's first comprehensive competition statute.<sup>3</sup>

Article 1 of AML states:

“The law is enacted for the purpose of preventing and restricting monopolistic conduct, protect fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of a socialist market economy.”

AML draws heavily on the provisions stipulated in the European Community (EC) treaty<sup>4</sup>. The crucial difference in the AML when comparing to the EC Treaty, is article 1 of AML, which states the aim of developing a socialist market economy.

The Chinese leader Deng Xiaoping first introduced the concept of socialist market economy in the 1990s when the leaders of pure communism were hindered and send to prison. A major change in terms of political views was needed and Deng Xiaoping thereby took the lead towards China's remarkable economic development. His idea was to promote a more market-based economy, but with the ambition to keep the communist values. The concept of a socialist market economy supported the power of the ruling communist party, which Deng Xiaoping and the society relied upon.<sup>5</sup>

Ever since the 1990s, the concept of developing a socialist market economy has been commonly used in various Chinese regulations as well as in the Constitution of the

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<sup>2</sup> Anti-Monopoly Law of the People's Republic of China, 2007.

<sup>3</sup> Wang X, *The prospects of Anti-Monopoly legislation in China*, p. 201.

<sup>4</sup> Consolidated versions of the European Union and of the Treaty establishing the European Community, 2006, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf> last visited 2009-01-05.

<sup>5</sup> Lagerqvist T, interview 2008-11-13, Hong Kong.

People's Republic of China<sup>6</sup> (Constitution). Nonetheless, the concept is vague and there is no clear definition to explain the true meaning of what it comprises.<sup>7</sup>

The process towards adoption of AML has been long. In 1994, the PRC Government decided to set up a Working Group to investigate the needs of a comprehensive law.<sup>8</sup> The investigation was a result of an economic reform program, consisted of two departments from the State Council, and concluded to adopt a competition law with the following arguments:

- i. Be a lead to enable China to establish a socialist market economy.
- ii. Develop a legal system that promotes socialist market economy.
- iii. Transform the PRC Governmental function and adapt China to the international practice.<sup>9</sup>

The date for completing the draft was set to 1995, which proved to be far too optimistic. The delay was due to different opinions of the necessity in combination with complexity of adopting a comprehensive competition law suitable for China's special norms. Another reason for delay was that China became a member of the World Trade Organization (WTO) as late as in November 2002, which speeded up the drafting process first after the entry.<sup>10</sup> After the accession to WTO, the Chinese middle class became stronger and foreign investors became more eager to compete with Chinese enterprises to establish foreign brand chain stores and offer services or goods to the Chinese market. The accession further persuaded China that competition and more liberalization could contribute to the development of a market economy.<sup>11</sup> Although, concerns grew whether China was able to comply with the transparency and non-discriminatory requirements set by WTO. The PRC Government promoted administrative monopolies but the frequently occurring liquidations and job losses forced the PRC Government to take action towards application of a comprehensive competition law.<sup>12</sup>

During the drafting of AML, the Working Group received many comments and opinions from several countries and competition experts. As previously mentioned, AML is mainly based upon the EC-treaty but has also elements from German, Japanese, South Korean and United States (US) statutes.<sup>13</sup> The international organizations Asia-Pacific Economic Co-operation (APEC), Organization of Economic Co-operation and Development (OECD), United Nations (UN), United Nations Conference on Trade and Development

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<sup>6</sup> Article 15 of the Constitution of the People's Republic of China, 1982, amended 1993.

<sup>7</sup> O'Brien D, interview 2008-10-17 Beijing, China; Hao Z, interview 2008-10-13, Beijing, China; Lagerquist T, interview 2008-11-13, Hong Kong.

<sup>8</sup> Williams M, *Competition Policy and Law in China, Hong Kong and Taiwan*, 2005, p. 172.

<sup>9</sup> *Ibid.*, p. 173.

<sup>10</sup> *Ibid.*, p. 174-177.

<sup>11</sup> Student R, *China's new anti-monopoly law: addressing foreign competitors and commentators*, p. 515.

<sup>12</sup> Harris H. S, Jr, *Legal implications of a rising China: The making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, p. 173.

<sup>13</sup> Williams M, *Competition Policy and Law in China, Hong Kong and Taiwan*, 2005, p. 174.

(UNCTAD) and the World Bank did also support the drafting.<sup>14</sup> The process took thirteen years, a long period of time, which is not remarkable in China. Deng Xiaoping's expression "crossing the river by feeling the stones" indicates the pragmatic and systematic proceeding. Neither the political system nor the society is able to cope with the dramatic changes and need time to be accepted.<sup>15</sup>

## 1.2 Hypothesis

There are several aims stated in article 1 of AML. The authors believe that the concept of socialist market economy is the overall aim which will strongly influence the other aims. The PRC Government could be able achieve the other aims in AML depending on what the concept of a socialist market economy will include. The interpretation of socialist market economy is therefore crucial.

AML is similar to the competition articles in the EC-treaty. But the enforcement of AML will not be comparable or obtain the same results as when enforcing the EC-treaty. The difference is due to three factors:

First, there is one major difference stated in the aims. The overall aim in AML, to develop a socialist market economy, does not comprise of any prominent definition. Second, the EC-treaty is enforced in a *sophisticated* market economy. The competition provisions mirrors the true aims of the European Union (EU). AML is to be enforced in a nation with a long history of strong communism and planned economy and has the aim to develop a *socialist* market economy. Third, the EU has a sound legal system. The Chinese legal system has been widely discussed and is missing several crucial elements.

## 1.3 Purpose

Based upon the hypothesis, the purpose of this thesis is to:

- Analyze the aims stated in article 1 of AML in the perspective of the concept of a socialist market economy and examine if they are all to be achieved.

In order to conclude this purpose, it will also be necessary to examine:

- The objectives for adopting the Antimonopoly law.
- Chinas view on competition concepts developed in sophisticated market economies.
- The legal and cultural aspects specific for China.

## 1.4 Method

This is not a traditional Master's Thesis within competition law. This is an analysis of a country without a sole legal system, which is taking a step from planned economy towards a more market-based economy. Competition concepts are not established in the Chinese

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<sup>14</sup> Harris H. S, Jr, *Legal implications of a rising China: The making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, p. 173.

<sup>15</sup> Lagerqvist T, interview 2008-11-13, Hong Kong.

society and there is lack of transparency and lack of the availability of legal sources. The PRC Government has not published any guidelines or regulations as how to apply the law and no case law has been developed.<sup>16</sup> The specific circumstances in China make it impossible to label this thesis for an ordinary thesis within competition law.

Two legal methods are used; the traditional legal method and the comparative legal method. The traditional legal method will be used when studying AML and foreign legislation. Parts of the thesis will apply the comparative legal method. When using a comparative approach, the authors have to compare at least two different jurisdictions. Since the adopted AML draws heavily on the articles 81-86 in the EC-treaty, a comparative approach will be employed when examining general principles established in competition laws. The comparative approach is used as a tool in order to highlight the crucial differences in the AML with regards to sophisticated competition laws such as in the European Union (EU). Comparisons will be made between Europe's sophisticated market economy and China's ambition to establish a socialist market economy. This Master's Thesis considers the aims of AML but will also refer to cultural and legal aspects specific for China. Article 1 is the focus for this thesis but also a brief overview of the law will be given in order to point out the characteristics of the law.

The traditional legal method based on primary sources and case law will be used as far as possible, but the authors will have to rely on secondary sources in many cases. The available sources to use in this analysis are the statute itself, translated texts from Mandarin to English and written books and articles by scholars and lawyers in English. Due to the undefined concept of a socialist market economy, the authors will base the analysis on speculations, interviews and statements by professionals and well-known professors. In addition to traditional library materials, the authors found it necessary to be based in Hong Kong during the progression of the thesis. A number of trips to Mainland China have been undertaken in order to conduct interviews with lawyers and experts in the field. It is noted that there are major differences in the opinion about the Chinese legal system and how the legal work is carried out by the PRC Government, depending on asking a local Chinese lawyer or a foreign lawyer trained in a country with a more developed legal system such as in EU or the US. The authors have therefore conducted interviews with both Chinese experts and foreign experts in both China and Hong Kong and have also attended a seminar in Beijing where representatives from the Ministry of Commerce discussed the AML.

Whether or not an analysis of foreign jurisprudence can be successful is widely discussed by scholars. The authors are aware of the discussions and believe that an understanding of the Chinese culture and legal system is necessary to carry out this thesis. The authors do also think that competition law has a massive international scope and that the draft AML is very similar to the EC-treaty provisions. The authors believe they have enough knowledge and relevant background in order to carry out an analysis within this subject at a Master's Thesis level.

### **1.5 Delimitation**

This Master's Thesis will not include any analysis of any foreign competition law. Comparisons to general principles established in the EC-treaty will be made, but only in order to

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<sup>16</sup> No case law is available when the authors begin the project in August 2008. Later during the autumn, the authors find a few published cases but nothing which concerns this analysis.

reinforce important points in the AML provision. The authors are aware of the influence that other nation's competition laws have had on the drafting of AML, but this thesis will not concern any of this. Previous enacted laws with elements of competition will be briefly mentioned merely to give the reader an insight to the background and drafting of AML. The Chinese legal system will be analyzed in order to examine how the interpretation and enforcement of the aims of AML might turn out but for no other purpose. It falls outside the scope to include any detailed political, social or economical impacts even though references will be made.

### **1.6 Outline**

The second chapter explains the conflicting aims in article 1 of AML and the undefined concept of a socialist market economy. Several different interpretations of the concept will be provided in order to give the reader an understanding of how vague the concept is. The background to the concept is explained and how the history might influence the interpretation of the concept.

The third chapter lays down general competition concepts and China's view on competition concepts, developed in sophisticated market economies. This is done in order to highlight the differences in China when comparing to Europe. An overview of AML and provisions specific for this law will be given. Also earlier enacted laws with elements of competition and result of those will be explained.

The fourth chapter lays down the true objectives for adopting AML. This gives the reader an insight to the fact that AML might have been adopted for other reasons than just pure competition reasons and that the adoption of AML could be part of a plan for a wider economic development, which will influence the enforcement and interpretation of the concept socialist market economy.

The fifth chapter states the first element for establishment of effective competition which is the competition statute itself. It explains what a competition law shall comprise and how the conflicting aims in article 1 of AML will be prioritized and favored before each other depending on how the PRC Government interprets the aim of a socialist market economy.

The sixth chapter states the second and third elements for establishment of effective competition: fair procedures and enforcement. It explains the lack of knowledge in the Chinese courts, how the competition authorities shall act and how the three different competition authorities can give rise to inconsistent interpretation of the law. It also explains the problem China is facing when it comes to develop a policy in accordance with AML.

The seventh chapter explains lack of legal certainty in China. Lack of rule of law, unpredictability and informal relations are characteristic for the Chinese legal system and are highlighted here. Those factors will have a negative effect on the enforcement of AML.

The eighth chapter comprises of the final analysis of how the concept socialist market economy most probably will be interpreted, how it will affect the other aims stated in article 1 of AML and how the aims will be achieved.

The ninth chapter consists of a discussion part where the future is analyzed and how the interpretation might change when the next generation takes over the ruling power in China.

## 2 Article 1 of AML

Article 1 of the AML lays down the purposes of the law and what it strives to achieve. There are several aims in article 1 which are not ranked in any hierarchical order. This gives rise to questions if the aims have the same importance, if some aims are to be achieved in the future and other aims to be achieved in present time. The aim of developing a socialist market economy is a central notion both in article 1 of the AML but also in several other Chinese regulations. The fact that the concept is undefined opens up for a likelihood that the concept will give rise to different focal aims due to present political views.<sup>17</sup> How the concept of socialist market economy can be interpreted and what impact it might have on the other aims will therefore further be examined in this chapter.

### 2.1 Aims in article 1

The aim of developing a socialist market economy will have a major impact when enforcing the other aims stated in article 1 of AML. The article states six different aims the law seeks to achieve:

- i. Preventing and prohibiting monopolistic conduct
- ii. Protecting fair market competition
- iii. Promoting economic efficiency
- iv. Safeguarding the interest of consumers
- v. Safeguarding the public interests
- vi. Promoting the healthy development of a socialist market economy

Some of the aims stated in article 1 of AML are truly conflicting.<sup>18</sup> However, contradictory aims are not remarkable for AML and have been subject for discussion in other countries as well as in the EU. What differs is that AML is standing before more complexity subject to a more detailed legislation, which forces the Chinese enforcement agencies to focus more on pure wording. Nathan Bush, Counsel in the adversarial department at O'Melveny & Myers' in Beijing, believes the many aims listed in article 1 reflect disagreements within the PRC Government and academic institution to establish a proper role of the law.<sup>19</sup>

Even though no guidelines are given as how to interpret the aims, the aim of socialist market economy has to be given extensive impact.<sup>20</sup> It is important to mention that *socialist* market economy is not to be associated with *social* market economy stated in the proposed Lisbon Treaty of the European Community.<sup>21</sup> The concept of socialist market economy

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<sup>17</sup> Williams M, interview 2008-11-18, Hong Kong.

<sup>18</sup> Ibid.

<sup>19</sup> Bush N, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, available at [www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf](http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf) last visited 2008-10-31.

<sup>20</sup> Lagerqvist T, interview, 2008-11-13, Hong Kong.

<sup>21</sup> Result from the amendments introduced by the Treaty of Lisbon, signed on 13 December 2007 in Lisbon. The Lisbon Treaty is still in the process of being ratified by the Member States, in accordance with their respective constitutional requirements. See article 3(3) of the Consolidated Version of the European Union 2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF> last visited 2008-12-05



arises from Chinese history of communism. The values and core objectives associated with this concept will be examined further on in this chapter.

The aim of developing a socialist market economy is nowadays found in various Chinese legislations. It is of central meaning, which also follows from the preamble of the Constitution:

“Both the victory of China's new-democratic revolution and the successes of its socialist cause have been achieved by the Chinese people of all nationalities under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, and by upholding truth, correcting errors and overcoming numerous difficulties and hardships. China will stay in the primary stage of socialism for a long period of time. The basic task of the nation is to concentrate its efforts on socialist modernization by following the road of Chinese-style socialism. Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, and the important thought of the "Three Represents," the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship, follow the socialist road, persist in reform and opening-up, steadily improve socialist institutions, develop a socialist market economy, advance socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize industry, agriculture, national defense and science and technology step by step, promote the co-ordinate development of the material, political and spiritual civilizations to turn China into a powerful and prosperous socialist country with a high level of culture and democracy.”<sup>22</sup>

The Constitution lays down the Chinese vision of developing a socialist market economy and can serve as an example as how vague and broad the notion actually is.

## 2.2 Different interpretations of “socialist market economy”

There is no prominent definition of the concept socialist market economy. The vague notion opens up for wide interpretations and depending on whom to ask, everyone seems to have a different opinion regarding the concept. To give an idea of how wide and various the interpretation might turn out, some of the most well known and recognized lawyers and experts have given their own opinion on how to define the concept.

### 2.2.1 Strong economic development

Mr. Zhan Hao, executive partner at Grandall Legal Group in Beijing, believes that no one can say what the term socialist market economy means in practice, but it includes strong economic development. An example of economic development is that the PRC Government still promotes state owned enterprises (SOEs), but the number has decreased after realizing the need to limit the scope of SOEs to include certain “strategic” sectors,<sup>23</sup> discussed in chapter four. Mr. Zhan Hao is of the opinion that China is far away from being a social economy as the EU since China has very different objectives comparing to the EU. The focal objectives within the EU are welfare, taxation, education, and hospitals.<sup>24</sup>

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<sup>22</sup> Paragraph 7 of the preamble of the Constitution of the People’s Republic of China, 1982, amended 1993.

<sup>23</sup> SOEs do usually have a strong and dominant position on the market and more often even a monopoly within that sector which prohibits competition. When the PRC Government chooses to limit the number to include only certain beneficial sectors, this could be seen as a led towards a more open market economy but also a strategic step towards economic efficiency.

<sup>24</sup> Hao Z, interview, 2008-10-13, Beijing, China.

Mr. Diarmuid O' Brien, senior associate at Squire and Sanders in Beijing, also believes the notion could be an expression solely for economic development. Even though the notion is mentioned in several provisions, including AML, he does not believe there is any important meaning behind the expression but filling the provisions.<sup>25</sup>

### **2.2.2 Powers to the PRC Government**

Mr. Arvid Virmani from the Indian Council for research on international economic relations has commented on the concept of socialist market economy. He believes that the PRC Government refuses to release their strong powers, ignores economic policies from Western Countries and finds private domestic companies objectionable. Any company with the ability to prevent the power of the PRC Government will meet resistance if they are not closely tied to their powers.<sup>26</sup>

### **2.2.3 Economic liberalization**

The Economist Intelligence Unit<sup>27</sup> (EIU) has analyzed the Chinese political and economic market, which also can give an idea how the current leaders will interpret and include in the concept of a socialist market economy. The PRC Government claims that under the current leadership of President Hu, more focus is on economic liberalization by benefiting the citizens if comparing to previous leaders.<sup>28</sup> President Hu emphasizes a harmonious society by more welfare to social groups that have been left aside during the last 25 years of urban development.<sup>29</sup> One concrete example is that the government budget for 2009 has large sanctions to health and education.<sup>30</sup> China focuses on catching up economically with more developed countries which is possible only according to the powerful and controlling PRC Government,<sup>31</sup> further discussed in chapter four. EIU believes that the current leaders actually have recognized private enterprises as an important element to economic growth but the role of SOEs will remain strong.<sup>32</sup>

### **2.2.4 Decreasing number of SOEs**

Fei Deng and Gregory K Leonard, from NERA Economic Consulting, highlighted the fact that SOEs have decreased in accordance to the aim of developing a socialist market economy. The decrease of SOEs is a fact and therefore one cannot argue that promotion of SOEs is of *sole* characteristics for a socialist market economy. The existence of powerful SOEs in the Chinese market is a result of a history of a planned economy but also from the goal of developing a socialist market economy. After the adoption of the Company Law<sup>33</sup>

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<sup>25</sup> O'Brien D, interview, 2008-10-17, Beijing, China.

<sup>26</sup> Virmani A, *China's socialist market economy: lesson of success*, p. 21, available at <http://www.icrier.org/pdf/Wp178China.pdf> last visited 06-10-2008.

<sup>27</sup> Specialized publisher serving companies establishing and managing operations across national borders.

<sup>28</sup> The Economist Intelligence Unit, *Country Forecast, China*, p. 11.

<sup>29</sup> *Ibid.*, p. 6.

<sup>30</sup> *Ibid.*, preamble.

<sup>31</sup> *Ibid.*, p. 35.

<sup>32</sup> *Ibid.*, p. 16.

<sup>33</sup> Company Law of the People's Republic of China, 1993.

in 1993, SOEs were suddenly regarded as corporations which allowed them to be sold to non-government entities. Thereby, the PRC Government could recapitalize to create more profits for SOE managers and the government itself as the owner. Therefore, between 2000 and 2004, the number of SOEs decreased<sup>34</sup> but the PRC Government was still in control of larger and more profitable SOEs. Administrative mergers created large and profitable SOEs while smaller and non-profitable enterprises were sold or shut down. The PRC Government did only focus on ownership of telecommunication, transportation, energy and banking.<sup>35</sup> Since the SOEs generates in large profits for the PRC Government, there is a prominent risk that administrative mergers will continue to be favored which prevents competition.<sup>36</sup> The new structure of decreasing SOEs and increasing national champions<sup>37</sup> might therefore be included in the aim of developing a socialist market economy.

## **2.3 Development of the concept**

The concept of a socialist market economy has a long history in China and is reflecting the true views of the PRC Government. The legal and constitutional development in China reveals how the vision of a socialist market economy first was developed. The concept has grown from the vision of being a socialist society, to the PRC Governments goal to gain supreme legitimacy, to socialist modernization and finally in the 1990s when the primary goal is to develop a socialist market economy. The long transitional time of development will most surely influence how the PRC Government defines the concept and how the aims are interpreted.

### **2.3.1 1954: become a socialist society**

The People's Republic of China was founded in 1949. The first constitution was accomplished in 1954 based on the Soviet Union constitution with the aim to become a socialist society. The PRC Government followed the Soviet legal system and legal experience accurately which prevented a sound legal system. On paper there was a hierarchy of courts from the People's Courts at local level to the Supreme Court in Beijing. Although, this was simply formality since judgment was already made by the first instance.<sup>38</sup>

### **2.3.2 1975: gain supreme legitimacy**

Under the ruling of Mao Zedong, the primary goal was to gain supreme legitimacy as a result from the Cultural Revolution in 1966-76 and later, the 1975 Constitution. Mao Zedong reduced the number of articles dramatically in this constitution and incorporated expressions as Marxism and Leninism which resulted in lack of respect for the legal system. Laws and legal system was repealed and China was almost considered a lawless county.<sup>39</sup> The

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<sup>34</sup> Percentage of large-scale industrial output accounted for by PRC Government-controlled corporations declined from 47-35 percent during 2000-2004, *China Statistical Yearbook 2005*, discussed in *Incentives and China's new anti-monopoly law*, p. 75, by Fei Deng and Gregory K. Leonard.

<sup>35</sup> Percentage of large-scale industrial output accounted for by share-issuing corporations increased from 31-45 percent during 2000-2004, *China Statistical Yearbook 2005*, discussed in *Incentives and China's new anti-monopoly law*, p. 75, by Fei Deng and Gregory K. Leonard.

<sup>36</sup> Deng F & Leonard G K., *Incentives and China's new anti-monopoly law*, p. 75.

<sup>37</sup> National champions are the most beneficial and largest enterprises on the market.

<sup>38</sup> Cohen J A & Hsu C. S, *Understanding China's Legal System*, 2003, p. 36.

<sup>39</sup> Keyuan Z, *China's Legal Reform: towards the Rule of Law*, 2006, p. 29.

Marxism-Leninism description of communism is dictatorship of the Proletarian, which is developed in China as a single party ruling of the Chinese Communist Party (CCP).<sup>40</sup>

The 1979 Constitution, under the leadership of Hua Guofeng, aimed to repair the damages from the 1975 Constitution,<sup>41</sup> with more respect for the legal system. The constitution from 1979 was based on the constitution from 1975 but could not cope with the dramatic economic development and social needs after Mao Zedong's death. Therefore it was later replaced by another constitution in 1982 lead by Deng Xiaoping.<sup>42</sup>

### **2.3.3 1982: socialist modernization**

Deng Xiaoping had the key role towards the rapid economic development during the last decades. He emphasized the needs of a sound legal system by promoting the needs of laws and long-term stability. He also adopted the open-door policy which aimed to open up China to the outside world.<sup>43</sup> The new constitution in 1982, called the Deng Xiaoping Constitution, sets the goals for new policies of economic reform and had socialist modernization as a fundamental task.<sup>44</sup> This constitution is still the most successful and has in later years only been subject to amendments to correspond with the economic reform program.<sup>45</sup>

### **2.3.4 1993: socialist market economy**

The first amendment in 1988 aimed to legitimate private economy. Further amendments were required in 1993 after Deng Xiaoping's travel to South China in 1992 when the notion of socialist market economy was established. Deng Xiaoping held: <sup>46</sup>

“...the planned economy is not equivalent to socialism, and capitalism also has plans; the market economy is no equivalent to capitalism, and socialism also has markets”<sup>47</sup>

Consequently, the amendment in 1993 introduced the concept of socialist market economy in China.<sup>48</sup> The noteworthy amendment in 1999 stressed the legal development when the constitution incorporated the expression;

“...governing the country in accordance with the law and recognition of the private sector as an important component of national economy”<sup>49</sup>

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<sup>40</sup> Virmani A, *China's socialist market economy: lesson of success*, p. 4, available at <http://www.icrier.org/pdf/Wp178China.pdf> last visited 06-10-2008.

<sup>41</sup> Keyuan Z, *China's Legal Reform: towards the Rule of Law*, 2006, p. 29.

<sup>42</sup> Ibid., p. 3.

<sup>43</sup> Ibid., p. 31-32.

<sup>44</sup> Ibid. p. 3.

<sup>45</sup> Ibid., p. 30, 33

<sup>46</sup> Ibid., p. 33- 34.

<sup>47</sup> Deng Xiaoping, Main Points of Talks in Wuchanf, Shenzhen, Zhuhai and Shanghai, 18 January-21 February 1992.

<sup>48</sup> Keyuan Z, *China's Legal Reform: towards the Rule of Law*, 2006, p. 3.

<sup>49</sup> See 1999 Amendment to the constitution of the People's Republic of China, available at People's Daily, 30 March 1999.

With this expression, China took a more distinct step forward to apply a sole legal system.<sup>50</sup>

Deng Xiaoping contributed to the dramatic economic development, first by the 1982 Constitution but later on the constitutional amendments in 1999 which was strongly influenced by his theories of combining Marxism, Leninism and theories from Mao Zedong. But Deng Xiaoping had his weaknesses based on believes in Marxism which lead to lack of understanding the importance of laws. In his opinion, law was an instrument to uphold social order and maximize economic development even though he was well aware of the fact that the Culture Revolution was a result of a lawless country. He never believed in separate political powers which still influence the current legal system in China.<sup>51</sup>

## 2.4 Analysis chapter 2

It is no doubt that the aim of developing a socialist market economy constitutes the underlying and true view of the central government. It might never be given any prominent definition but has certainly a central meaning since it is recognized in several legislations. The concept of a socialist market economy could be a way for the PRC Government to find balance between satisfying investors and uphold trust from the people without losing power.

The aim of a healthy development of a socialist market economy should not be seen as one specific goal to achieve, it should rather be seen as an umbrella for the other aims which have to be interpreted in accordance to this concept. It is no coincidence that the concept of a socialist market economy is left vague and broad. A vague concept opens up for different interpretations which can change over time according to present political goals. With a vague concept, the PRC Government cannot directly fail to interpret the law. Also the other aims stated in article 1, which strongly depends on the interpretation of the concept, becomes wider since they have to be achieved in the light of a socialist market economy.

The aim of developing a socialist market economy origin from strong Chinese beliefs, both political and cultural. Chinese history and previous Chinese leaders might therefore influence the PRC Government when interpreting the concept. The concept will therefore be interpreted suitable to the present political goals in the light of socialist ideology.

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<sup>50</sup> Keyuan Z, *China's Legal Reform: towards the Rule of Law*, 2006, p. 53.

<sup>51</sup> *Ibid.*, p. 41.

### 3 The AML and competition concepts

The function of regulating competition and the close connection between competition laws and economy is crucial in order to understand why China has chosen to adopt AML and strive towards a market-based economy.

This chapter will explain basic competition terms and give an idea of China's standpoint in order to understand the PRC Government's opinion on competition and competition concepts developed in sophisticated market economies. An overview of AML and the provisions specific for this law will be given and previous enacted competition laws, which haven't yield effect in China, will be highlighted.

#### 3.1 Competition concepts

Legal rules in general make sense because they represent principles of fairness. Competition rules are different in a way since they are justified by economic reasons.<sup>52</sup> Competition is regulated by states that believe in a market economy. A market economy is built upon a free market where competition between enterprises should bring the greatest benefits to society in terms of efficiency, low prices and innovation. Thereby not said that a free market allows unbridle competition in all sectors. All states have their own opinion on how regulated competition shall be and what sectors that should be supplemented by a social component and government control.<sup>53</sup> In contrast to a market economy is planned economy, where the government fixes the prices and the production.<sup>54</sup> China has a long history of a planned economy.

##### 3.1.1 A competitive market

As the definition of competition indicates, it aims to exclude inefficient competitors in the market in preference to more efficient ones. A competitive market will become an efficient market where consumer welfare can be established.<sup>55</sup>

An example can illustrate how competition laws have to regulate the market and ensure it remains efficient:

Company X and Company Y produces similar products to the same cost (10 Euros per entity) on the same geographical market. Company X sells the product to the customer for 60 Euros whereas Company Y sells the same product for 20 Euros. On a competitive market with well-implemented competition regulations, the customers will more likely buy the product from Company Y. Company Y increases their incomes and can thereby grow and become even more efficient.

A competitive market will attract other producers, which will enhance the efficiency and reduce costs for the customers. Another important factor for competitors to enter and exit the market is that there are sufficient barriers to enter. In the example given above, the market itself will control that the price is set on a competitive level i.e. no overprices can be charged. To ensure that the market remains competitive, it has to be regulated by competi-

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<sup>52</sup> Willis P. R, *Introduction to EU Competition Law*, 2005, p. 1.

<sup>53</sup> Jones A & Sufrin B, *EC Competition Law, Text, Cases, and Materials*, 2004, p. 1.

<sup>54</sup> Definition of planned economy available at [http://glossary.reuters.com/index.php/Planned\\_Economy](http://glossary.reuters.com/index.php/Planned_Economy) last visited 2008-11-12.

<sup>55</sup> Westin J, *Europeisk konkurrensrätt*, 2007, p. 15.

tion laws. If the companies in the above mentioned scenario would go together and discuss prices on beforehand, they could agree at a price on 40 Euros per unit and thereby make larger profits than a competitive price. The customers would have nowhere else to turn but to buy from overcharging companies.

### 3.1.2 Perfect market definition

On a perfect market, the sellers have no influence on the price and are to be seen as *price-takers* instead of *price makers*. The price charged would never exceed the marginal cost.<sup>56</sup> Perfect market competition, also referred to as *pure competition*, can be described as where;

“all firms sell an identical product, all firms are price takers, all firms have a relatively small market share, buyers know the nature of the product being sold and the prices charged by each firm and the industry is characterized by freedom of entry and exit.”<sup>57</sup>

There is no perfect market in reality but the internet site E-bay can serve as an approximation for fulfilling most of the criteria's: the market is open for everyone, it is easy accessed, no one has the bigger market share, identical products can be found and there are many sellers and buyers.<sup>58</sup>

### 3.1.3 The market in China

The market in China prevails of price makers which are dominant SOEs. The SOEs have large market shares and are usually the single producer of the product. The market is not open to other private enterprises which mean no freedom to enter or exit the market.<sup>59</sup> Further, the definition of barriers to enter has a different meaning when the PRC Government interprets the concept. The PRC Government strives to reduce the barriers to enter which are preventing the SOEs growth and development of a socialist market economy.<sup>60</sup>

The primary goal of the PRC Government is not to achieve anything like a perfect market,<sup>61</sup> which is the primary goal in the EU. Neither does the PRC Government strive towards adoption of economic policies from sophisticated market economies. The ambition is rather to achieve government lead capitalism.<sup>62</sup> In some parts of the market, the PRC Government wants to strive towards a more competitive environment and regulate monopolies held by the foreign enterprises.<sup>63</sup> Still, the major part of the SOEs and the monopolies are not to be removed.<sup>64</sup>

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<sup>56</sup> Jones A & Sufrin B, *EC Competition Law, Text, Cases, and Materials*, 2004, p. 6.

<sup>57</sup> Definition of perfect market available at <http://en.allexperts.com/q/Human-Resources-2866/2008/3/competition.htm> last visited 2008-09-08.

<sup>58</sup> Garside C, interview 2008-07-15, Harrogate, United Kingdom.

<sup>59</sup> Ibid.

<sup>60</sup> Lagerqvist T, interview 2008-11-13, Hong Kong.

<sup>61</sup> Ibid.

<sup>62</sup> Williams M, interview 2008-11-18, Hong Kong.

<sup>63</sup> Lagerqvist T, interview 2008-11-13, Hong Kong.

<sup>64</sup> O'Brien D, interview 2008-10-17, Beijing, China.

### 3.1.4 Monopoly

The contrary to a perfect market is a market predominated by monopoly. Monopolies can be created by the government but can also be natural. Characteristic for a monopoly is a market with only one seller and many buyers. Since the seller is the single producer of a product or service, he or she thereby owns all or almost the entire market share.<sup>65</sup> Such market can be created due to barriers for competitors to enter the market,<sup>66</sup> either legal barriers or other trade barriers. A market without competitors permits the single seller to charge a higher price and delimit the quality of the products sold,<sup>67</sup> since the buyers have no other options. In some situations the buyers demand and other similar products available on the market can still affect the market.<sup>68</sup> The customers might choose not to buy the product at all or replace it with a similar product if the price is set far above a competitive price.

A market, which partly can be identified as monopolistic, is the international oil and gas market where identical products are sold with a limited number of sellers. The sellers are thereby in a position of controlling the market and the price by decreasing supply.<sup>69</sup>

### 3.1.5 Monopolies in China

The largest SOEs operating on the Chinese market has monopolies. They receive funds and support directly from the PRC Government,<sup>70</sup> but there is still a large number which operates with big losses year after year.<sup>71</sup> Other markets characterized by monopoly are the railway, petroleum, tobacco, salt and power industries.<sup>72</sup> The Chinese telecommunication is one sector with long history of monopoly even though the PRC Government nowadays claims there will be progress to open up the market.<sup>73</sup> Further, many of the enterprises cannot be defined or categorized in China. There are dozens of different ownership models which could be one of the reasons for the long drafting of AML. China had to consider two aspects when compassing the law; first, responsibility has to be taken for the state-owned assets and second, the actual need for the legislation.<sup>74</sup>

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<sup>65</sup> Definition of monopoly downloaded from <http://financial-dictionary.thefreedictionary.com/monopoly> last visit 2008-09-08.

<sup>66</sup> Jones A & Sufrin B, *EC Competition Law, Text, Cases, and Materials*, 2004, p. 8.

<sup>67</sup> Marshall C, *Market Competition Perfect and Monopolistic Competition*, available at <http://www.articlesbase.com/sales-articles/market-competition-perfect-and-monopolistic-competition-406576.html> last visit 2009-01-05.

<sup>68</sup> Jones A & Sufrin B, *EC Competition Law, Text, Cases, and Materials*, 2004, p. 8.

<sup>69</sup> Marshall C, *Market Competition Perfect and Monopolistic Competition*, available at <http://www.articlesbase.com/sales-articles/market-competition-perfect-and-monopolistic-competition-406576.html> last visited 2009-01-05.

<sup>70</sup> Hoffmann W. J & Enright M, *China into the future*, 2007, p. 93.

<sup>71</sup> *Ibid.*, p. 89.

<sup>72</sup> Xinzhen L, *Do Not Pass Go: targeting Monopolies*, available at [http://www.bjreview.com.cn/quotes/txt/2008-05/29/content\\_123676.htm](http://www.bjreview.com.cn/quotes/txt/2008-05/29/content_123676.htm) last visited 2009-01-05.

<sup>73</sup> O'Brien D, interview 2008-10-17, Beijing, China.

<sup>74</sup> Hoffmann W. J & Enright M, *China into the future*, 2007, p. 92.



## 3.2 The AML

Most competition statutes in sophisticated market economies are general in nature which leave room for interpretation depending on economic policy but they are also dependent on the courts applying a concept of fairness. Consequently, interpretation of antitrust lurks in guidelines, interpretation regulations and case law.<sup>75</sup>

Since AML is based upon competition laws from countries with sophisticated market economies it also comprises of general expressions. AML covers the key principals of competition but has adopted several catch all provisions with vague expressions open for interpretation e.g. protecting public interest and national security which might have the effect of preventing competitive behavior.<sup>76</sup>

### 3.2.1 AML overview

AML consists of eight chapters. The first chapter describes general provisions, objectives and definitions.

The second chapter deals with monopolistic agreements. The chapter contains provisions allowing monopolistic agreements that is beneficial to e.g. technological development, environmental protection and promotion of medium- and small size enterprises' competitiveness. The monopolistic agreement should also benefit consumers and not substantially restrict competition in the relevant market.

The third chapter describes abuse of dominant market positions, what conducts that are prohibited and under what circumstances a business operation may be presumed to have a dominant position. This chapter follows the EU competition law by deciding first if the operator has a dominant position and then, whether it has abused its dominance. AML only prohibits conduct which are made without justification which is similar to the US rule of reason doctrine.

Chapter four describes concentrations of business operators, which are mergers and acquisitions, and the review process if reaching thresholds prescribed by the State Council. Unlike previous merger review rules, this law applies to both foreign and domestic enterprises.

The fifth chapter deals with abuse of administrative power to eliminate or restrict competition. This is a very specific provision for AML if comparing to other competition statutes. The aim is to protect local companies and restrict the power of SOEs. AML protects SOEs that are vital for national security and economic development in order to protect consumer interests which might be a challenging balance to find.<sup>77</sup>

Chapter six describes the investigation procedure by the authorities.

Chapter seven describes the legal liability and penalties for breaching the law. Penalties can be reduced if the business operation confesses and provides important evidence to the enforcement agency.

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<sup>75</sup> Bush N, *Anticipating Chinese Antitrust Policy*, p. 46, 47.

<sup>76</sup> Ibid., p. 47.

<sup>77</sup> Ibid., p. 48.

The final chapter contains supplementary provisions describing what the law does not apply to. AML does not apply to intellectual property rights according to other relevant administrative regulations on intellectual property rights. The law does neither apply to actions of agriculture producers and rural economic activities such as production, processing, sales, transportation, and storage of agriculture products.

### 3.2.2 Specific provision: Administrative Monopoly

If comparing AML to other competition laws the prohibition of administrative monopolies is unique for AML. Administrative monopolies are an essential problem for a competitive market.<sup>78</sup> The prohibition seeks to regulate the strong governmental power which is a vital concern in order to create a competitive environment in China.<sup>79</sup>

Chapter five in AML constitutes of six articles and states that the prohibition seeks to regulate and prevent administrative monopolies. Article 32 reads:

“Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power, restrict or restrict in a disguised form entities and individuals to operate, purchase or use the commodities provided by business operators designated by it.”

Focus is on ”regional blockage”,<sup>80</sup> which arises from Maoism policy of local protectionism.<sup>81</sup> Regional blockage refers to barriers created by local governance. Article 33 reads:

“Any administrative organ or organization empowered by a law or an administrative regulation to administer public affairs may not have any of the following conducts by abusing its administrative power to block free circulation of commodities between regions...”

The articles are detailed to limit the powers of the government, especially corrupt conduct from officials forcing local enterprises to buy products from designated vendors and operation conditions.<sup>82</sup>

### 3.2.3 Previous competition laws in China

China has a long history of a planned economy with several monopolized sectors but the Chinese market has not been completely unregulated. Earlier legislations have been adopted to control elements of competition on the Chinese market, e.g. the Anti-Unfair Competition Law<sup>83</sup> and the Price Law<sup>84</sup> but have not yield the effect of being comprehensive.<sup>85</sup> The Anti-Unfair competition law was primarily regulating product liability more than

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<sup>78</sup> Hogan & Hartson, *China's Anti-Monopoly Law*, available at [https://www.amcham-china.org.cn/amcham/upload/wysiwyg/ChinaUpdate\\_AntiMonopoly\\_17Oct07%5B1%5D.pdf](https://www.amcham-china.org.cn/amcham/upload/wysiwyg/ChinaUpdate_AntiMonopoly_17Oct07%5B1%5D.pdf) last visited 2008-10-07.

<sup>79</sup> Wang X, *Highlights of China's new Anti-Monopoly Law*, p 149, available at [http://www.iolaw.org.cn/pdf/paper/2008/Highlights\\_of\\_China.pdf](http://www.iolaw.org.cn/pdf/paper/2008/Highlights_of_China.pdf), last visited 2008-10-07.

<sup>80</sup> Deng F & Leonard G K., *Incentives and China's new anti-monopoly law*, p. 74.

<sup>81</sup> Williams M, *Competition Policy and Law in China, Hong Kong and Taiwan*, 2005, p. 141.

<sup>82</sup> Hoffmann W. J, Enright M. J, *China into the future, making sense of the world's most dynamic economy*, 2007, p. 94.

<sup>83</sup> Anti-unfair competition law of the People's Republic of China, 1993.

<sup>84</sup> Pricing Law of the People's Republic of China, 1997.

<sup>85</sup> Williams M, *Competition Policy and Law in China, Hong Kong and Taiwan*, 2005, p. 166, 171.

monopoly, cartels or mergers.<sup>86</sup> The Price Law has few provisions regulating competition but the provisions are unworkable and not efficient.<sup>87</sup> In addition, several interim regulations and provisions have been adopted on the area e.g. Restructuring of State-Owned Enterprises by Using Foreign Funds,<sup>88</sup> Mergers and Acquisitions of Domestic Enterprises by Foreign Investors<sup>89</sup> and Prohibition of Monopolistic Pricing Acts<sup>90,91</sup>. None of the regulations have obtained effect considering the lack of coherent strategy on competition and overlapping nature of the regulations.<sup>92</sup> In addition, the legal system in China does not provide with any transparency or certainty which will be further discussed in chapter seven. Lack of efficiency in earlier adopted competition laws could indicate that time is required to build a competition culture in China.<sup>93</sup>

### 3.3 Analysis chapter 3

The PRC Government has not the same approach to competition concepts as sophisticated market economies have such as the EU. The goal in the EU is to establish a social market economy and strive towards a perfect market. The PRC Government does not aim to achieve anything like a perfect market. The PRC Government wants to establish a socialist market economy and strive towards a fair market. The authors believe that the ambition is to achieve a government lead capitalism. The PRC Government wants to regulate dominant positions, primary dominant positions held by foreign enterprises. Still, the major part of the SOEs and the monopolies are not to be removed which can be seen as discriminatory.

China will not fully comply with competition concepts established in sophisticated market economies. China has a long history of monopolies with great supports for SOEs which is contradictory to a competitive environment. Therefore will competition concepts, arising from sophisticated market economies, be interpreted from a Chinese point of view and in the light of socialist market economy.

AML covers general competition policies and regulates all necessary fields. Still there are vague concepts which open up for broad interpretation. The specific provisions regulating administrative monopolies indicate that PRC Government has realized the damage administrative monopolies will have on competition. The fact that China has previously adopted regulations with elements to enhance competition and also provisions prohibiting administrative monopolies without any remarkable effect, give rise to doubts that AML can succeed in establishing a competition culture.

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<sup>86</sup> Student R, *China's new anti-monopoly law: addressing foreign competitors and commentators*, p. 3.

<sup>87</sup> Williams M, *Competition Policy and Law in China, Hong Kong and Taiwan*, 2005, p. 171.

<sup>88</sup> Interim Regulations for Restructuring of State-Owned Enterprises Utilizing Foreign Investment, 2002.

<sup>89</sup> Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign investors, 2003.

<sup>90</sup> Interim Regulation on Prohibition of Monopolistic Pricing Act, 2003.

<sup>91</sup> Williams M, *Competition Policy and Law in China, Hong Kong and Taiwan*, 2005, p. 171.

<sup>92</sup> *Ibid.*, p. 172.

<sup>93</sup> Authors' opinion.

## 4 Objectives for adopting AML

In order to understand the true aims of AML, the objectives for adopting AML have to be studied. The first question to ask is therefore why the PRC Government choose to take such a prominent step towards a regulated competitive market.

This chapter explains how the rapid development in China has affected the adoption of AML and the main objectives for adoption. The selection of objectives is based upon careful consideration and interviews with leading lawyers and competition experts in China. The objectives are presented in order to give an idea of how the PRC Government is going to define the concept of a socialist market economy and how the PRC Government might prioritize between the aims stated in article 1 of AML.

### 4.1 Economic development

China is the third largest destination of foreign direct investment (FDI) and the third largest trading nation in the world. The increasing number of private enterprises on the Chinese market has led to limited powers for the PRC Government to intervene and control the market. As a result the PRC Government has to rely more heavily on market power.<sup>94</sup>

Since 1980 and the open door policy<sup>95</sup> adopted by Deng Xiaoping, the gross domestic product-growth (GDP) increased remarkably and poverty reduction was the largest in history.<sup>96</sup> Also competitiveness and efficiency have increased in China as a result of allowing imports of capital, technology and management know how, FDI and open up for trade have driven the rapid growth in total factor productivity (TFP). 20 years after the adoption of the open door policy, the population living in poverty decreased from 53 to 8 percent.<sup>97</sup> Rapid growth and reduction of poverty result in increased trade and investment.<sup>98</sup>

Most successful is the agriculture reform and rural development. Rural poverty fell from 76 to 12 percent between 1980 and 2001.<sup>99</sup> Also the infrastructure development has played an important role in China's development.<sup>100</sup> In the 1990s, road network increased with 40 percent, water production grew with more than 51 percent and power generation exceeded 300 gig watts which made China the second largest energy producer in the world.<sup>101</sup>

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<sup>94</sup> World Bank, *An experience-sharing program on Development between China and Africa*, p. 10, available at <http://info.worldbank.org/etools/ChinaAfricaKS/docs/Briefing-Notes.pdf> last visited 2008-12-14.

<sup>95</sup> The open door policy is explained in chapter 2.3.3 and is an expression for the new policy introduced by Deng Xiaoping of open up the Chinese market for the outside world.

<sup>96</sup> World Bank, *An experience-sharing program on Development between China and Africa*, p. 1, available at <http://info.worldbank.org/etools/ChinaAfricaKS/docs/Briefing-Notes.pdf> last visited 2008-12-14.

<sup>97</sup> Ravallion M & Chen S, *China's (uneven) Progress against Poverty*, p. 1-42.

<sup>98</sup> World Bank, *An experience sharing program on Development between China and Africa*, p. 1, available at <http://info.worldbank.org/etools/ChinaAfricaKS/docs/Briefing-Notes.pdf> last visited 2008-12-14.

<sup>99</sup> *Ibid.*, p. 4.

<sup>100</sup> *Ibid.*, p. 7.

<sup>101</sup> Bellier M & Zou M, *Private Participation in Infrastructure in China: Issues and Recommendations for the Road, Water and Power Sectors*.

The Chinese economy has become a part of the integration of international economy which proves that China is very much able to compete in the international marketplace.<sup>102</sup>

## 4.2 Requirements from WTO

One objective for adopting the AML is a consequence of China's accession to WTO in 2001. The accession was a result of almost 15 years of negotiations and acceptance of the other 142 already existing member states. China's accession implied several commitments to undertake serious steps in order to open and liberalize its regime to better integrate in the world economy. Commitments were made to offer a more predictable environment for trade and foreign investment. China's membership was seen as a big step towards a more open international market and WTO's Director-General described the moment as historic for the WTO, China and international economic cooperation. The accession to WTO opens up closed sectors which put more pressure on domestic enterprises to compete with foreign enterprises. Foreign enterprises have larger budgets, better production and distribution channels and higher quality goods. Therefore, it is of importance for the Chinese market to prevent anti-competitive behavior.<sup>103</sup>

The Working Party Report of China's accession stipulates all the commitments undertaken. Among others, China agreed to:

“implement the WTO Agreement in an effective and uniform manner by revising its existing domestic laws and enacting new legislation fully in compliance with the WTO Agreement.”<sup>104</sup>

Since China had no comprehensive competition law covering the scope of WTO's requirements, the adoption of a new statute was necessary. China also made commitments to open up most of its markets for goods and services within a set period of time. The different sectors were classified in three categories; encouraged, restricted and prohibited sectors. As for prohibited sectors, China has reserved a right to keep the market exclusive for state trading which among others involve post offices, education, gas and oil, energy and telecom. Agreements were made to open up restricted sectors within a time period differing between two to seven years. Seven years later, in 2008, there are still restricted sectors, which have not yet been opened up. The adoption of a new competition law, AML, in 2008 came therefore perfectly right in time in order for China to show for the WTO that China is still eager to comply with the commitments in the Working Party Report.<sup>105</sup>

## 4.3 Control administrative monopolies

The administrative restrictions on the market constitute large obstacles for effective competition. There are several types of administrative monopolies. Horizontal monopolies refer to local protectionism from regional or local governments. These regional blockages di-

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<sup>102</sup> Wang X, *The prospects of Anti-Monopoly legislation in China*, p. 206.

<sup>103</sup> WTO, *WTO successfully concludes negotiations on China's entry*, available at [http://www.wto.org/english/news\\_e/pres01\\_e/pr243\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr243_e.htm) last visited 2009-01-05.

<sup>104</sup> Ibid.

<sup>105</sup> O'Brien D, interview 2008-10-17, Beijing, China.

vide the market into several narrow markets instead of one unified market which is a crucial problem for effective competition.<sup>106</sup>

Protection of local firms result in higher revenues for the local government since it gains a large share of tax revenue from the local enterprises and seeks therefore to protect competition in their region in order to uphold larger incomes. In addition, the local government does own some of the SOEs which gives enterprises incentives to exclude competition. Another factor contributing to these regional blockages, is that the local governments' officers often have their careers closely connected to success of local enterprises.<sup>107</sup> The Chinese saying, "the Mountains are high and the emperor is far away"<sup>108</sup> indicates the problem of a non-unified market and the strong power of the local government.<sup>109</sup> In 1994, the exports between the Chinese provinces declined from 36.6 to 27.6 percent.<sup>110</sup>

One practical example of how the local government is protecting its territory is shown in the "automobile war". The car Citroën is produced in the Hubei Province. Ever since 1999 has the local government imposed a fee for helping enterprises with special difficulties on purchase of each Santana car with an amount of seventy thousand Yuan. The reason is that Shanghai Municipality produces the Santana cars. This fee was a response to the policy in Shanghai Municipality which imposed a license fee on Santana cars with eight thousand Yuan but twenty thousand Yuan to other cars. This protectionism has consequences for consumers since it affect consumers' ability to choose cars, restricting the production scale and prevent the development of car industry as a whole.<sup>111</sup>

The prohibition of administrative monopolies consists of a whole chapter and indicates a willingness to tackle these fundamental problems.<sup>112</sup> Unfortunately, AML does not focus on administrative monopolies by the *central* government,<sup>113</sup> and the PRC Government is still keen to develop large national champions by administrative merges.<sup>114</sup> It is also noteworthy that no sanctions against administrative monopolies are laid down. Mark Williams, Professor at Hong Kong Polytechnic University in Hong Kong, describes the articles regulating the administrative monopolies as "window dressing". There have been previous regulations trying to curb the problems with administrative monopolies but so far without any effect.<sup>115</sup> A regulation without any sanctions gives rise to question what the true inten-

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<sup>106</sup> Wang X, *The prospects of Anti-Monopoly legislation in China*, p. 210-211.

<sup>107</sup> Deng F & Leonard G K., *Incentives and China's new anti-monopoly law*, p. 74.

<sup>108</sup> Traditional Chinese proverb.

<sup>109</sup> Williams M, *Competition Policy and Law in China, Hong Kong and Taiwan*, 2005, p. 143.

<sup>110</sup> World Bank, *China: internal market development and Regulations*, p. 40, available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1994/12/01/000009265\\_3970311123353/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1994/12/01/000009265_3970311123353/Rendered/PDF/multi0page.pdf) last visited 2009-01-05.

<sup>111</sup> Wang X, *The prospects of Anti-Monopoly legislation in China*, p. 212.

<sup>112</sup> Hogan & Hartson, *China's Anti-Monopoly Law*, available at [https://www.amcham-china.org.cn/amcham/upload/wysiwyg/ChinaUpdate\\_AntiMonopoly\\_17Oct07%5B1%5D.pdf](https://www.amcham-china.org.cn/amcham/upload/wysiwyg/ChinaUpdate_AntiMonopoly_17Oct07%5B1%5D.pdf) last visited 2008-10-07

<sup>113</sup> Deng F & Leonard G K., *Incentives and China's new anti-monopoly law*, p. 74.

<sup>114</sup> Williams M, *Competition Policy and Law in China, Hong Kong and Taiwan*, 2005, p. 211.

<sup>115</sup> Williams M, interview 2008-11-18, Hong Kong.

tions are with the law and how enforcement might turn out. Since there are several administrative monopolies in China, non-existing sanctions could be a way for the PRC Government to avoid lawsuits, and the legislator has therefore decided not to punish any abuse of administrative powers.<sup>116</sup>

#### 4.4 Protect national champions

Another objective for adoption is to ensure the continuing growth of national champions. The PRC Government strives to curb difficulties to form sufficiently economic values from national champions.<sup>117</sup> SOEs had one of the key roles in China's rapid economic development but China's transitional phase is now closer to a market economy and the SOEs does not always meet the economic demands.<sup>118</sup>

Lack of competition on the Chinese market and all sectors dominated by SOEs is a major reason for adopting a comprehensive competition law. Efforts have been undertaken several times in order to reform the control of SOEs and reduce their dominance on the market. Since the drafting in 1990 began, China has implemented various *ad hoc* measures to introduce more competition in sectors dominated by SOEs whereby many SOEs have been broken up into smaller entities. The *ad hoc* methods were successful when it came to breaking up the powerful monopolies, but the market remained uncompetitive. The approach taken is merely to encourage competition within SOEs in most areas, but in certain key sectors the PRC Government has decided to enhance the power of SOEs. The market dominated by SOEs arises from the characteristics determined by the country and the State Council has announced that one of the goals are to foster up to fifty major SOEs until 2010 which is suppose to reach a standard of internationally competitiveness.<sup>119</sup> When promulgating AML, the PRC Government also stated that they are aiming to take absolute control over sectors such as petroleum, gas and telecommunication. For example, in 1993, the PRC Government decided to reform SOEs into modern enterprises system (MES). The reform was called The Third Plenary Session of the 14th Party Central Committee in November 1993 and it proposed:<sup>120</sup>

"It is the inevitable request for market economy to set up modern enterprise system, it is a direction of the SOE reform of China."

An economic strategic plan was introduced, based upon the theory to grab the big ones and let the small enterprises go. An example is the merger of China Petrochemical Corporation, China Oil and Natural Gas Corporation, which strongly enhanced Chinas competitiveness on the international petrochemical market.<sup>121</sup> Another example is in 1999 when the State Council decided to exclude all other actors from the market except for SinoChem and

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<sup>116</sup> CSC staff, *Oil Giant Lawsuit May Gain Sympathy, but Little Else*, available at <http://www.chinastakes.com/story.aspx?id=724>, last visited 2008-10-07.

<sup>117</sup> Williams M, *Competition Policy and Law in China, Hong Kong and Taiwan*, 2005, p. 144.

<sup>118</sup> Wang X, *The prospects of Anti-Monopoly legislation in China*, p. 204.

<sup>119</sup> Owen B M & Sun S & Zheng W, *China's Competition Policy Reforms: The Antimonopoly Law and Beyond*, p. 14-15, available at <http://siepr.stanford.edu/Papers/pdf/06-32.pdf> last visited 2009-01-05.

<sup>120</sup> Dayong Z, *The SOE reform in China*, available at [http://www.law-lib.com/lw/lw\\_view.asp?no=2165&page=2](http://www.law-lib.com/lw/lw_view.asp?no=2165&page=2) last visited 2008-10-29.

<sup>121</sup> Ibid.

PetroChina and forced all the domestic oil producers in China to sell their products to those two SOEs. Both SinoChem and PetroChina are given subsidies from the PRC Government due to national petroleum security in order to ensure import. China is the world second largest oil consumer market and is strongly dependent on oil import from foreign countries. Consequently, one third of 663 private petroleum companies were closed down whereas PetroChina has made one of the greatest profits in China.<sup>122</sup>

Maintaining strong control over strategic sectors on the one hand and promulgate a comprehensive competition law on the other hand seem to be contradictory. But SOEs in itself should not be seen contradictory to the theory of competition; it is the monopoly within a certain sector and discriminatory treatment which not can be classified as market economy behavior.

SOEs do not have the same competitive strength comparing to private owned companies. SOEs have to rely on the PRC Government and the PRC Government has to rely on SOEs which makes their relationship complicated. At present, the PRC Government has no right to interfere with the management but it still needs SOEs to perform good in order to continue to play a central role for social security and to increase the PRC Government's revenue. SOEs have to rely on the PRC Government in order to obtain loans and orders in governmental projects.<sup>123</sup>

Several reforms of SOEs have been taken place in China in order to manage SOEs better. The main problem with SOEs is the low profits and ineffective management. The reasons for keeping SOEs on the market are mainly to ensure state control in strategically economic departments and to prevent natural monopoly from intervene with the market,<sup>124</sup> where AML could regulate the control. Still, one should not forget that these are all non-commercial aims, which could be seen as contradictory to the theory of competition.

The adoption of AML is not the only way to deal with the problem of SOEs. The PRC Government is the owner of SOEs and could therefore break up or re-organize its management and structure. A decision to break up SOEs as the PRC Government did in for example the telecommunication industry would be another way to deal with the problem. Since the PRC Government also regulates market entry, a solution to enhance competition could be to open up the barriers to entry the market which could be done without adoption of a new competition statute.<sup>125</sup>

## 4.5 Analysis chapter 4

The objectives show that enforcement and interpretation of the notion socialist market economy will be strongly colored by socialist ideology. Even though China has become part of the international marketplace, market competition is still lacking. Since the market itself cannot uphold competition which contributes to anti-competitive conduct, the adop-

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<sup>122</sup> CFC-staff, *Oil Giant Lawsuit May Gain Sympathy, but Little Else*, available at [http://www.marketavenue.cn/upload/articles/ARTICLES\\_1953.htm](http://www.marketavenue.cn/upload/articles/ARTICLES_1953.htm) last visited 2008-12-15.

<sup>123</sup> Dayong Z, *The SOE reform in China*, available at [http://www.law-lib.com/lw/lw\\_view.asp?no=2165&page=2](http://www.law-lib.com/lw/lw_view.asp?no=2165&page=2) last visited 2008-10-29.

<sup>124</sup> Ibid.

<sup>125</sup> Owen B M & Sun S & Zheng W, *China's Competition Policy Reforms: The Antimonopoly Law and Beyond*, p. 18, 19, available at <http://siepr.stanford.edu/Papers/pdf/06-32.pdf> last visited 2009-01-05.



## Objectives for adopting AML

tion of AML is supposed to be the key to find this mechanism. The objectives for adopting AML are wider than just to regulate and increase competition. Since the PRC Government does not strive to establish a perfect market, the objectives for adoption are therefore influenced by other factors.

The economic development and pressure from foreign countries seems to be the two major reasons for adoption. One argument is that the Chinese economy is far ahead if comparing to the legal development and adoption of a competition law is a step forward to catch up and create a more balanced environment. AML seems to be a tool to achieve economic objectives and economic development strategies beneficial for China. Therefore the statute itself is not the central focus of the PRC Government but it constitutes of a wider economic policy.

The combination of requirements from the WTO, the pressure and opinion from foreign enterprises and the ambition to attract foreign investors, are other reasons to adopt a competition law. The adoption of AML should also be seen as great achievement of international cooperation. When looking at objectives such as protecting national champions, one can see that China is a nationalistic country which can affect the enforcement of AML in a discriminatory way. National enterprises might be favored in disputes with foreign enterprises and the aim of developing a socialist market economy might also be interpreted in a non-competitive manner. Since the objectives are not exclusively competition arguments, competition aspects and competition principles from sophisticated market economies might not always be prioritized when it comes to enforcement. The authors believe that the objective for adopting AML is a lead to increase the strength and competitiveness of Chinese enterprises towards international competition policy.

## 5 Establish Competition: 1<sup>st</sup> Element

Moving from a planned economy towards a more open market with a competition culture is not done over a night. Awareness has to be created among government agencies, businesses, academia and the general public.<sup>126</sup> Enforcement of the law has to be ensured in all levels. State-level action has to be combined with actions taken on a regional and local level. The essential elements for the establishment of effective competition is established from sophisticated market economies but will serve as guidance as how China will be able to introduce a competitive culture on the market.

This chapter explains the first of three essential elements for establishment of effective competition. The first element concerns the competition law itself and what it should comprise. AML will be scrutinized and eventually missing parts or loopholes which could be problematic when it comes to enforce the aims of the law will be highlighted. The other elements; the adoption of procedures for ascertaining correct handling of each case and the establishment of institutions for enforcement of the rules,<sup>127</sup> will be explained in Chapter 6.

### 5.1 What a competition law should compass

There is a distinction between competition law and competition policy. A competition policy is a broader term adopted in order to describe what measures governments shall take in order to promote efficient competition. Competition laws are rules regulating the actors on the market, seeking to implement a competition policy.<sup>128</sup> With regards to China, AML is the competition law but how it will be enforced depends on what competition policy the PRC Government will develop.

A competition law shall provide a framework ensuring fundamental fairness or enforcement actions. The statute itself should concern transparency, non-discriminatory application of laws, regulations, policies and procedures without reference to the nationality of the parties concerned. The competition law has to provide certainty which can be hard to fulfill in the first period after adoption. Transparency promotes certainty and can be achieved through speeches to the public and issue releases of important decisions and guidelines. Investigations and enforcement functions should be published to the public.<sup>129</sup> A competition law shall be fair and objective in sense which also has to be supplementary proven by the authority. The span of competition laws usually has similar scope due to the international scope of competition and also to fulfill the requirements set by WTO. Competition laws should include remedies for interfering with competitive manners such as price fixing, different kinds of cartels and abuse of dominant positions, monopolies, mergers and other agreements that might hinder competition, both vertical and horizontal.<sup>130</sup>

<sup>126</sup> OECD Global Forum on Competition, *The Roles and Tools of Competition Authorities: Fundamental Considerations BLAC Presentation to the OECD Global Forum on Competition*, available at [www.oecd.org/dataoecd/40/42/2491599.doc](http://www.oecd.org/dataoecd/40/42/2491599.doc), last visited 2008-09-25.

<sup>127</sup> Goyder D. G, *EC Competition law*, 2003, p. 14.

<sup>128</sup> Jones A & Sufrin B, *EC Competition Law, Text, Cases, and Materials*, 2004, p. 1,2.

<sup>129</sup> OECD Global Forum on Competition, *The Roles and Tools of Competition Authorities: Fundamental Considerations BLAC Presentation to the OECD Global Forum on Competition*, available at [www.oecd.org/dataoecd/40/42/2491599.doc](http://www.oecd.org/dataoecd/40/42/2491599.doc), last visited 2008-09-25.

<sup>130</sup> OECD, *Trade and Competition Policy, Working Group set up by Singapore Ministerial*, available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/brief\\_e/brief13\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief13_e.htm) last visited 2008-09-24.

## 5.2 Conflicting aims in article 1

When looking at article 1 of the AML there are several aims stated which could be conflicting with each other. The aims are not ranked in any hierarchical order which give rise to even more uncertainty. Another concern is whether the aims will be interpreted objectively or not. Article 1 of the AML states:

“This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy.”

It is quite doubtful that the PRC Government will be able to strive towards maximization of economic efficiency, protecting public interest and at the same time promote consumer interests without favoring any of the aims. Not surprisingly might the PRC Government chooses to embrace or prevail certain operators which are specifically beneficial for the policy goals in China. It is also possible that some of the aims are to be achieved within the nearest future and some other aims will turn out to be more important after some time depending on what areas that are emphasized in the Chinese politics. It is therefore of vital importance to clarify if any of the aims are more important than others or if any of the purposes are in fundamental conflict.<sup>131</sup>

### 5.2.1 Public interest

One of the aims stated in article 1 is to protect the public interest. The notion public interest gives room for wide interpretation. The authors believe that the notion should be interpreted as promoting the interest of the people. Enterprises which promote public interest generally contribute to consumer welfare for example in terms of transportation, communication, and postal service to enhance welfare of the population.<sup>132</sup>

The notion public interest can be found in several articles in AML. Article 15 states that monopoly agreements can be exempted:

“...for the purpose of achieving *public interests* such as conserving energy, protecting the environment and relieving the victims of a disaster and so on;..” (Italicized by the authors)

Although it is not clarified what enterprises that are regarded as contributing to the public interest and thereby exempted from the scope of the law.

Another example is article 28 where the public interest is exempted from the prohibitions of anti-competitive conduct in the market:

“Where a concentration has or may have effect of eliminating or restricting competition, the Anti-monopoly Authority under the State Council shall make a decision to prohibit the concentration. However, if the business operators concerned can prove that the concentration will bring more positive impact than negative impact on competition, or *the concentration*

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<sup>131</sup> Bush N, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, available at [www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf](http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf) last visited 2008-10-31.

<sup>132</sup> Pappalardo A & Yong H, *Exemptions in Competition Policy Evolution of the EU System and Prospects for China*, available at [http://www.euchinawto.org/index.php?option=com\\_content&task=view&id=191&Itemid=54&lang=eeu](http://www.euchinawto.org/index.php?option=com_content&task=view&id=191&Itemid=54&lang=eeu) last visit 2008-12-19.

*is pursuant to public interests, the Anti-monopoly Authority under the State Council may decide not to prohibit the concentration.*” (Italicized by the authors)

Article 7 of AML indicates that the law will be used in favor of SOEs with public interest as an excuse for anti-competitive behavior:

“...industries controlled by the State-owned economy and concerning the lifeline of *national economy and national security* or the industries implementing *exclusive operation and sales* according to law, the *state protects the lawful business operations* conducted by the business operators therein...” (Italicized by the authors)

According to an article written by Fei Deng and Gregory K Leonard the expression of national economy refers to protection of SOEs in the petroleum industry and national security refers to the high-tech industry. The last category is for the protection of exclusive operation and sales which refers to companies with monopoly without being owned or controlled by the state.<sup>133</sup> SOEs will most likely plead article 7 of the AML to get exempted from monopolistic agreements due to the aim of safeguarding public interest as stated in article 1 of the AML.<sup>134</sup>

Mr. Wang Changbin, Associate Professor at Macao University of Science and Technology, says that public interest is a very broad notion with too many exemptions and many different aspects. The notion opens up for the PRC Government to interpret almost anything within the concept, it serves as a big basket. It is too flexible and Mr. Wang believes that if an enterprise has a reason to be exempted under public interest, it does not matter how anti-competitive its behavior is. He further states that not only the notion public interest but also national security can cause problems since the level for national security is unreasonable high.<sup>135</sup>

Consequently, the practical problem arises when the enforcement agencies are balancing between protecting both consumer interest and the public interest.

## 5.2.2 Consumer welfare

Consumer welfare can be achieved in an environment where the market runs by competition, where consumers have the possibility to choose between different products and qualities.<sup>136</sup> The aim of establishing consumer welfare could be in conflict with the promotion of expanding businesses<sup>137</sup> and monopolies with the purpose to achieve the public interest<sup>138</sup>. Promotion of monopolies is in disfavor of consumers since the number of competitors on

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<sup>133</sup> Deng F & Leonard G K., *Incentives and China's new anti-monopoly law*, p. 74.

<sup>134</sup> Bush N, *China: Anti-Monopoly law*, available at <http://www.globalcompetitionreview.com/reviews/11/sections/45/chapters/432/china-antimonopoly-law/> last visited 2008-12-08.

<sup>135</sup> Wang C, Interview 2008-11-19, Hong Kong.

<sup>136</sup> Wang X, *Highlights of China's new Anti-Monopoly Law*, p. 142, available at [http://www.iolaw.org.cn/pdf/paper/2008/Highlights\\_of\\_China.pdf](http://www.iolaw.org.cn/pdf/paper/2008/Highlights_of_China.pdf) last visited 2008-12-19.

<sup>137</sup> See article 5 of the AML.

<sup>138</sup> See article 28 of the AML.

the market decrease.<sup>139</sup>

As discussed above with regards to article 7, if the SOEs are part of the public interest, they still have to consider the consumer interest. Article 7 continues to read:

“...The state also lawfully regulates and controls their business operations and the prices of their commodities and services so as to *safeguard the interests of consumers* and promote technical progresses.” (Italicized by the authors).

Although consumer interest is recognized there is still a conflict between the interest of consumers and the public interest. Article 5 of AML could be interpreted in disfavor of consumers and reads:

“Business operators may, through fair competition, voluntary alliance, concentrate themselves according to law, expand the scope of business operations, and enhance competitiveness.”

Consumers prefer competition but according to article 5 of AML, promoting expanded business scale, puts the enforcement agencies in difficulties whose interest to protect; business operators or consumers? In addition, exempted anti-competitive conduct according to the public interest in article 28 of the AML might not benefit competition and consequently not the consumers.<sup>140</sup>

Xiaoye Wang gives an example:

“...it may be in the public interest for automobiles to be crashworthy, but competition may lead to more inexpensive and hence less crashworthy automobiles. In this example, the role of the State is to resolve such a conflict for the public good.”<sup>141</sup>

Article 17(1) of AML is another example where the law can be interpreted disfavoring for the interests of consumers. The article states abuse of dominance e.g.

“...selling commodities at unfairly high prices or buying commodities at unfairly low prices.”

The article is similar to article 82(a) of the EC Treaty although it is unclear whether the Chinese enforcement agencies will judge in favor of an industrial policy<sup>142</sup> or if their version of “fairness” might serve as an excuse to set higher prices and discredit consumers by rejecting sound economic analysis.<sup>143</sup>

Consumer welfare can therefore be conflicting with both economic efficiency and public interest depending on what the PRC Governments interprets in the notions especially with regards to the notion of public interest. But if AML can safeguard the interests of majority consumers it should be helpful to the public interest. Mr. Zhan Hao believes that safe-

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<sup>139</sup> Wang X, *Highlights of China's new Anti-Monopoly Law*, p. 142, available at [http://www.iolaw.org.cn/pdf/paper/2008/Highlights\\_of\\_China.pdf](http://www.iolaw.org.cn/pdf/paper/2008/Highlights_of_China.pdf) last visited 2008-12-19.

<sup>140</sup> Wang X, *Highlights of China's new Anti-Monopoly Law*, p. 143, available at [http://www.iolaw.org.cn/pdf/paper/2008/Highlights\\_of\\_China.pdf](http://www.iolaw.org.cn/pdf/paper/2008/Highlights_of_China.pdf) last visit 2008-12-19.

<sup>141</sup> Ibid.

<sup>142</sup> Industrial policy is explained in chapter 6.3.1.

<sup>143</sup> Bush N, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, available at [www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf](http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf) last visited 2008-10-31.

guarding consumer interests is easier to be achieved in a shorter period of time compared to other goals, but its effect might be obvious in the surface.<sup>144</sup>

According to Mark Williams, the Chinese population strongly believes in power and knowledge of the “emperor”. The Chinese people trust the leaders of China and are assure that the PRC Government will act for the people’s best which is of decisive importance for the PRC Government’s role. In comparison, Mark Williams claims that the leaders in China see the people as “insects” with the task to work hard for the country. In addition, China has a serious problem regarding the population. Despite from severe differences between rural areas and urban areas, a serious problem regards pensions. This can affect the economy in the long run and should not be ignored by the ruling Party since it will affect the economic efficiency.<sup>145</sup> With those sayings, one could assume that consumer welfare might not be first prioritized within the conflicting aims.

### 5.2.3 Fair competition

The expression *free* competition as stated in the EC-treaty in comparison to the notion of promoting *fair* competition in AML has been widely discussed during the drafting process. Although, the final draft state that the purpose of AML is to promote *fair* competition.<sup>146</sup>

The EC Treaty states in article 4(1) that the purpose set in article 2 of the EC Treaty will be achieved by economic policies based on an open market with free competition. It is also mentioned in article 157(1) stating that the community shall apply an industrial policy and the action taken by community shall be in “accordance with a system of open and competitive markets”.<sup>147</sup> As a result from lack of a competition culture in China, the legislator of AML choose to use the notion of promoting *fair* competition. The notion of free competition did not go in hand with the fundamental believes from the PRC Government to maintain the central power and promote national champions playing a vital role according to Chinese ideology.<sup>148</sup>

Consequently, the PRC Government does not aim to establish neither free competition nor a perfect market. The PRC Government aims to maintain control in some sectors and wants to promote what they believe is a fair market. What potentially can be included in the notion is up to the PRC Government to decide. Fair competition is for example recognized in article 5 of AML and states:

”Business operators may, through *fair competition*, voluntary alliance, concentrate themselves according to law, expand the scope of business operations, and enhance competitiveness.”  
(Italicized by the authors).

With regards to the overriding goal of developing a socialist market economy, competition will probably be regarded as fair if it is beneficial for the socialist society. Since the public interest seems to be more important to consider than consumer welfare, the PRC Government might think that a fair market is a market which supplies the public interest. Mr.

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<sup>144</sup> Hao Z, e-mail contact, 2008-10-30.

<sup>145</sup> Williams M, interview 2008-11-18, Hong Kong.

<sup>146</sup> Wang C, Interview 2008-11-19, Hong Kong.

<sup>147</sup> A. Jones, B. Sufrin, *EC Competition Law, text cases and materials*, 2004, p. 35.

<sup>148</sup> Wang C, Interview 2008-11-19, Hong Kong.

Zhan Hao believes that fair competition is just an aspect of a healthy development of market economy. He also thinks that the freedom to compete and equality to compete also should be goals of AML. He claims that the Chinese market is far from a market-orientated economy and it is short of freedom and equality to compete in market. From some extent freedom and equality are more important for China than for example economic efficiency.<sup>149</sup>

#### 5.2.4 Economic efficiency

Generally, economic efficiency gain consumer welfare by promoting increased competition in the market. Economic efficiency includes both allocation efficiency and production efficiency. A competitive environment contributes to both production and allocation efficiency which naturally promote consumer welfare by lower prices and higher quality on products. Some people claim that those objectives are mutual.<sup>150</sup>

Mr. Zhan Hao believes that economic efficiency and consumer welfare can be contradictory and that there will be conflicts especially between efficiency and other goals. Efficiency has always been a sensitive issue in terms of competition and the US as well as other authorities have recognized efficiency as the goal not for a long time. During the drafting process of AML there were fierce debates regarding the efficiency goal and eventually experts agreed that efficiency could be a goal in AML for defense reason for monopoly investigation. Mr. Zhan Hao further states that in the pursuing efficiency sometimes other goals have to be sacrificed such as interests of consumers. Sometimes efficiency could improve interests of consumers but sometimes not. As far as the consumer interests are concerned justice is as equally important as efficiency.<sup>151</sup>

China has emphasized the producer interest for over 100 years with no focus on individual welfare. The most essential goal is, and has been so for ages, to become a rich and strong country. For example a rich country has the funds to build up a strong military to hold position in the global perspective. The Chinese saying “the bigger, the better” can illustrate Chinas ambition to develop economic growth.<sup>152</sup>

Economic efficiency does not always equal with public interest either. Improvement of the economic efficiency can be seen as hindering the public interest, especially since the meaning of public interest is not yet clear. But the goals can also be dependent on each other; without efficiency, an economy is not a perfect one, and such deficiency will result in damage to the public interest in the long run.<sup>153</sup>

### 5.3 Analysis chapter 5

The statute itself, which is strongly influenced by the EC-treaty, covers the general competition concepts. But the expressions are vague and the aims stated in article 1 are definitely

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<sup>149</sup> Hao Z, e-mail contact, 2008-10-30.

<sup>150</sup> Wang X, *Highlights of China's new Anti-Monopoly Law*, p. 142, available at [http://www.iolaw.org.cn/pdf/paper/2008/Highlights\\_of\\_China.pdf](http://www.iolaw.org.cn/pdf/paper/2008/Highlights_of_China.pdf) last visited 2008-12-19.

<sup>151</sup> Hao Z, e-mail contact, 2008-10-30.

<sup>152</sup> Williams M, interview 2008-11-18, Hong Kong.

<sup>153</sup> Hao Z, e-mail contact, 2008-10-30.

conflicting with each other. This cannot be seen as fulfilling the requirement of providing transparency and certainty. Lack of hierarchy between the aims in article 1 of AML will lead to the risk that interpretation will be subject to political forces. The prior aim can therefore change over time. Depending on what will be included in the development of a socialist market economy, the notion of public interest opens up for very broad and wide interpretation and can comprise of almost everything.

If looking further into the conflicting aims, the prior aims will be to grow economic efficiency and promote public interest. The authors are of the opinion that public interest is a central expression which contribute to the law's flexibility to gain or prevent efficiency. The vague expressions in article 1 are not a coincidence but a strategy from the legislator to create loopholes to make it possible to exclude or include operators within the expression of public interest. Since national champions are of vital importance for the PRC Government, those enterprises will most probably be excused from anticompetitive behavior due to public interests. The notion of public interest can be used to protect either consumers or certain business operators but will irrespectively prior national champions.

The aim of establishing economic efficiency will be an important aim for the PRC Government and there is no doubt it will have precedence before establishment of consumer welfare. But still, the population problems should be of prior importance for the PRC Government in combination with rapid economic growth. An effective competition law is just a small fraction of the economic development and will not be of crucial importance. This can serve as an example as how the PRC Government underscore "socialist" in the notion of socialist market economy. The aim to establish consumer welfare could be a goal which will grow more important in the future but as the situation is today, consumer welfare will not be prioritized. The authors believe that the aim of promoting fair competition cannot directly be seen as conflicting with any of the other aims in article 1 but could possibly give rise to conflicts indirectly depending how fair competition is defined. Further, the notion fair competition could be seen as conflicting with the general keystones of competition. Competition should be free and the most efficient enterprises should gain success on the market.



## 6 Establish Competition: 2<sup>nd</sup> and 3<sup>rd</sup> Element

The second and third element shall establish authorities capable of enforcing the competition law and to uphold competition rules. The maintenance of the competition rules has to be both fair and effective.<sup>154</sup> Fair and effective procedures can be ensured with proper review procedures, separation of powers and transparent court system where the conclusions are to be drawn from relevant facts.<sup>155</sup>

This chapter explains what symbolizes an effective competition authority and how the competition authorities in China have divided responsibilities. It also describes the court system, the coming challenges the authorities might face and what policy that will be developed.

### 6.1 Uncertainty

AML is lacking guidelines as how to apply the law which consequently results in unpredictability. Additionally is the preparatory work of the law not published to the public and newly adopted laws are usually not published at the same time as it becomes effective. Other factors e.g. lack of legal education, general disrespect for laws, lack of legal tradition and supremacy of the CCP constitute to severe lack of legal order.<sup>156</sup> In combination with the courts shortage of competition knowledge and experience, the enforcement procedure of AML has raised many questions.<sup>157</sup>

The Supreme Court in China has decided not to establish specialized competition courts but the IP-law courts will be responsible for hearings of competition cases. The Court will handle both disputes which are brought to court for the first time but also provide hearings for parties dissatisfied with decisions from the AMEA.<sup>158</sup>

### 6.2 Competition authorities

Competition authorities act on a local or regional level and its role is to ensure that laws are followed. A competition authority should fulfill a number of functions. First of all the authority has to be independent and reliable. The competition authority should act upon own initiative or on complaint and shall prosecute violations of infringement of the competition law.<sup>159</sup> The authority has to be autonomous in order to make fair and correct decisions and should have good advocacy knowledge. If the competition authority would fail to act force-

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<sup>154</sup> Goyder D. G, *EC Competition law*, 2003, p. 15.

<sup>155</sup> Williams M, interview 2008-11-18.

<sup>156</sup> Lagerqvist T, *Kina – en rättsstat?*, p 314-315.

<sup>157</sup> Hao Z, *The positive attitude of Chinese Courts towards AML enforcement* available at: <http://www.chinalawandpractice.com/Article/2070494/Channel/7576/The-positive-attitude-of-Chinese-Courts-towards-AML-enforcement.html>, last visited 2009-01-05.

<sup>158</sup> Interactive dialogues, *August 2008 - China's Anti-monopoly Law enters into force*, available at [http://www.interactivedialogues.com/id/index.php?option=com\\_content&task=view&id=83&Itemid=3](http://www.interactivedialogues.com/id/index.php?option=com_content&task=view&id=83&Itemid=3) last visited 2008-11-16.

<sup>159</sup> Wils W. P J, *Principles of European Antitrust Enforcement*, 2005, p. 15.

fully for enforcement and upholding of the statute itself the law can cost more harm than benefits for the country.<sup>160</sup>

### 6.2.1 Three competition authorities in China

The Anti-monopoly Commission (AMC) is established directly under the State Council with the premier task to establish the overall competition policy and guidelines.<sup>161</sup> The administrative office of AMC is located at Ministry of Commerce of the People's Republic of China (MOFCOM),<sup>162</sup> and consists of officials from various PRC Government agencies not necessarily with experience from competition.<sup>163</sup>

There are three competition authorities in China; all wanted to become the single controller of the AML which led to divided responsibilities.<sup>164</sup> The AMC has divided the responsibility for enforcement between the three ministries called the Anti-monopoly Enforcement Agency (AMEA);<sup>165</sup>

- MOFCOM is responsible for merger review control for both domestic and foreign companies.
- State Administration of Industry and Commerce (SAIC) is in charge of non-priced related monopolies and abuse of dominant position and also administrative monopolies.
- National Development and Reform Commission (NDRC) is responsible for price/related monopolies and abuse of dominant position.

Although the responsibilities are divided as above, some experts claim that in reality there are no separations between the ministries which can cause setbacks for the enforcement.<sup>166</sup> The overlapping jurisdiction might cause friction between the ministries, especially between SAIC and NDRC, which might lead to inconsistency in the enforcement.<sup>167</sup> The ministries might all take different views with respect to the aims of the AML and they may also in-

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<sup>160</sup> OECD, *OECD Reviews of Regulatory Reform Regulatory Reform in the United States*, p. 192. <http://massetto.sourceoecd.org/vl=4989620/cl=11/nw=1/rpsv/cgi-bin/fulltextew.pl?prpsv=/ij/oecdthemes/99980096/v1999n7/s1/p1.idx> last visited 2008-11-16.

<sup>161</sup> Interactive dialogues, *August 2008 - China's Anti-monopoly Law enters into force*, available at [http://www.interactivedialogues.com/id/index.php?option=com\\_content&task=view&id=83&Itemid=3](http://www.interactivedialogues.com/id/index.php?option=com_content&task=view&id=83&Itemid=3) last visited 2008-11-16.

<sup>162</sup> White & Case LLP, *China's New Anti-monopoly Law now in force*, available at [http://www.whitecase.com/talking\\_09162008/](http://www.whitecase.com/talking_09162008/) last visited 2008-11-16.

<sup>163</sup> Deng F & Leonard G.K, *Incentives and China's new competition law*, p.73.

<sup>164</sup> O'Brien D, interview 2008-10-17, Beijing, China.

<sup>165</sup> Interactive dialogues, *August 2008- China's new Anti-Monopoly law enters into force*, available at [http://www.interactivedialogues.com/id/index.php?option=com\\_content&task=view&id=83&Itemid=3](http://www.interactivedialogues.com/id/index.php?option=com_content&task=view&id=83&Itemid=3) last visited 2008-11-16.

<sup>166</sup> O'Brien D, interview 2008-10-17, Beijing, China.

<sup>167</sup> Interactive dialogues, *August 2008- China's new Anti-Monopoly law enters into force*, available at [http://www.interactivedialogues.com/id/index.php?option=com\\_content&task=view&id=83&Itemid=3](http://www.interactivedialogues.com/id/index.php?option=com_content&task=view&id=83&Itemid=3) last visited 2008-11-16.

interpret the notions different.<sup>168</sup> This division of authorities is a result of the conflicts when dividing the responsibilities but is supposed to be a balance-preserving compromise. Since the office of AMC is located at MOFCOM the later will with no doubt increase its importance in the enforcement process.<sup>169</sup> There are also conflicts between MOFCOM and SAIC since both agencies have been heavily involved in the drafting process. Before the AML came into force, which divided the jurisdictions, tensions as to what agency to be responsible for enforcement was a fact. Unfortunately the AML did not resolve the issue with the overlapping jurisdictions which still cause tension between the agencies.<sup>170</sup>

### 6.2.2 Agencies are supervising other agencies

Article 51 of the AML states that any government agency on higher level shall supervise other government organizations on a lower level in a dispute concerning administrative monopolies. Article 51 of the AML reads:

“Where any administrative organ or an organization empowered by a law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order it to make correction and impose punishments on the directly liable person(s)-in-charge and other directly liable persons. The anti-monopoly authority may put forward suggestions on handling according to law to the relevant superior authority.”

According to Xiaoye Wang<sup>171</sup>, article 51 could give rise to severe problems since favouring SOEs in general give economic benefit for local government-owned businesses or large powerful SOEs. It will be difficult for government agencies on a higher level to be objective in a dispute between its government organization and a non-state owned operator. Another problem is that agencies on a higher level could be any agency with no experience from competition policy. Different authorities can have diverse opinions on the competition policy which can result in conflicting goals.<sup>172</sup>

### 6.3 Development of a policy

One of the major contradictions in AML will be if an industrial policy or a competition policy shall be applied. The PRC Government can thereby determine whether the enforcement agencies shall focus either on protecting public interest with regards to monopolistic SOEs or choose to protect consumers from monopolistic conduct.<sup>173</sup> The Chinese enforcement agencies are by this mean standing before difficulties to find balance between the aims. The problem is enhanced by the fundamental problem of the agencies insufficient

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<sup>168</sup> Berwin Leighton Paisner LLP, *New Chinese Competition Law comes into force*, available at <http://www.legal500.com/developments/5609> last visit 2008-11-16.

<sup>169</sup> White & Case LLP, *China's New Anti-monopoly Law now in force*, available at [http://www.whitecase.com/talking\\_09162008/](http://www.whitecase.com/talking_09162008/) last visit 2008-11-16.

<sup>170</sup> Deng F & Leonard G.K, *Incentives and China's new competition law*, p.73-74.

<sup>171</sup> Professor of Law, Chinese Academy of Social Sciences. Member of the Expert Advisory Board for Anti-Monopoly Legislation of the State Council and the National People's Congress.

<sup>172</sup> Wang X, *Highlights of China's new Anti-Monopoly Law*, p 149, available at [http://www.iolaw.org.cn/pdf/paper/2008/Highlights\\_of\\_China.pdf](http://www.iolaw.org.cn/pdf/paper/2008/Highlights_of_China.pdf), last visit 2008-10-07.

<sup>173</sup> *Ibid.*, p. 144.

independence from political powers.<sup>174</sup>

### 6.3.1 Industrial policy verses competition policy

Industrial policies are generally used in transitional economies not least in Asia subject to rapid economic growth. An industrial policy generally promotes certain profitable sectors or industries to gain productivity in other sectors.<sup>175</sup> Although the effect is decreased competition an industrial policy is suitable in transitional economies since it coordinates the market.<sup>176</sup>

Competition policy on the other hand focuses on competition with a competition law as the foundation to prevent abuse of dominant positions and ease market entry for competitive enterprises. Competition policy also contributes to the development of a competition culture and the promotion of consumers' interests. First it promotes smaller enterprises to compete on a market on the same conditions as larger enterprises. Later on this leads to a wider choice of products for consumers and promotion of protection of the consumers as well as the producers. The change from the first to the latter stage occurs through different interpretation of the competition law.<sup>177</sup>

### 6.3.2 The policy in China

China promotes national champions which is not unusual for developing economies and can be seen as an effect of an industrial policy. But even if these enterprises have negative impact on the economy as a whole an argument for promoting national champions is that they are more likely to be successful in the global market.<sup>178</sup>

A mix of the two policies is optimal. Industrial policy might bring the same effect for consumers and producers by promoting economic efficiency, first for certain sectors but also for the economy in a broader context. Competition policy focuses on short-term development and industrial policy on long-term development. The focal policy might change over time according to special circumstances in the economy not the least in transitional economies as in China. However, applying both policies might face conflicts especially with regards to foreign enterprises in China. Industrial policy treats foreign enterprises with greater distrust, compared to competition policies, since authorities cannot as easily control them.<sup>179</sup>

With regards to the AML an industrial policy is more reliable to enforcement agencies to gain satisfactory effect.<sup>180</sup>

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<sup>174</sup> Wang X, *Highlights of China's new Anti-Monopoly Law*, p. 144, available at [http://www.iolaw.org.cn/pdf/paper/2008/Highlights\\_of\\_China.pdf](http://www.iolaw.org.cn/pdf/paper/2008/Highlights_of_China.pdf) last visit 2008-12-19.

<sup>175</sup> Brooks D.H, *Industrial Policy: Conflict or Complementary?*, p. 3, available at <http://www.adbi.org/files/rpb24.pdf> last visited 2008-12-23.

<sup>176</sup> *Ibid.*, p. 4.

<sup>177</sup> *Ibid.*, p. 5-6.

<sup>178</sup> *Ibid.*, p. 2,3.

<sup>179</sup> *Ibid.*, p. 6-7.

<sup>180</sup> Brooks D.H, *Industrial Policy: Conflict or Complementary?*, p. 8, available at <http://www.adbi.org/files/rpb24.pdf> last visited 2008-12-23.

## 6.4 Analysis chapter 6

The second and third element for establishment of effective competition will most probably cause difficulties in China. The lack of competition knowledge is one crucial factor. The fact that no special competition court will be established can be seen as unwillingness to actually implement the competition rules properly. The problem might not necessary lie in the question whether China is a capitalistic or socialistic country. To be able to enforce AML or any other law properly one has to consider the question of democracy. Since the judges have strong relations with the PRC Government this means in practice that decisions can never be anything but corresponding to the PRC Government's will. Judges cannot decide for themselves and if they would make a decision which is not corresponding with the views of the PRC Government, the judges would probably lose their job and be replaced by someone with greater belief in the government.

Since AMC lack experience from competition the AMEA might be influenced more by political ideology than competition theory. The problem that enforcement agencies have been involved in the drafting of the AML highlights the problem with non-transparency and strong political powers influencing the enforcement. Political forces in the light of a socialist market economy will most probably result in loopholes for the enforcement agencies to catch operators not following the socialist goal of the PRC Government.

The lack of separation of jurisdiction between competition authorities will result in internal battles as to what authority to be responsible for each case. There is a prominent risk that the three agencies will not apply a unified policy. China is still in a transitional phase characterized by national champions and the powerful and controlling PRC Government. It seems like an industrial policy is promoted in general but can be interpreted either in the light of a competition policy or in the light of promoting certain national champions. The lack of efficient competition authorities will consequently prevent an efficient policy. An inefficient policy could result in confusion and also inconsistent interpretation of the aims in article 1 of AML. This inconsistency will enable the PRC Government to increase the control over the interpretation. AML is standing before difficulties when it comes to efficiency. None of the elements for establishing effective competition can be seen as achieved.

## 7 Lack of Legal Certainty in China

The legal system in China consists of many loopholes and lack of legal certainty which influences enforcement of any law. Those factors have negative effect on the legal system and are a result of a long history of communism and general disrespect of laws and legal institutions.<sup>181</sup> This chapter explains other factors which not are specific for competition law but will strongly influence the enforcement of AML and probably also the interpretation of the concept socialist market economy.

### 7.1 Informal relations

Formal law is an instrument for predictability and enhances business efficiency. In China informal relations, Guanxi, prevent the transparency in the legal system and the march towards a market economy.<sup>182</sup> Some lawyers in China are still subjective building trust on informal relationships.<sup>183</sup> This is a crucial element in the Chinese culture that differs from sophisticated countries and policies.<sup>184</sup> The dominant state and lack of formal structure favors informal relationships since the legal system is protecting the power of the PRC Government instead of having the function of controlling. This emphasizes the importance of establishing influential contacts.<sup>185</sup> Consequently, lawyers, judges etc. become more sensitive to bribes which takes China one more step away from applying rule of law.<sup>186</sup>

### 7.2 Rule of law or rule of man?

In general terms, rule of law is explained as legal institutions underpinning a market economy.<sup>187</sup> The interpretation of rule of law is widely discussed and it is questioned if there is only one type of rule of law.<sup>188</sup> Basically the core meaning of rule of law is to use the law as a tool to control the state and leaders ruling the country, to emphasize the supremacy of laws and the equality of all people before the law.<sup>189</sup>

The striving towards rule of law in China was first expressed in the amendment of the 1999 Constitution. After the collapse in Russia and the Asian financial crisis the Chinese leaders realized the need for rule of law as a shield to protect China from political and economic disaster.<sup>190</sup> Even though Deng Xiaoping reinforced laws and legal system China has been criticized of applying legal order based on rule of man instead of rule of law. This is a result

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<sup>181</sup> Lagerqvist T, interview 2008-11-13, Hong Kong.

<sup>182</sup> Potter P. B, *The Chinese Legal System, Globalization and local legal culture*, 2001, p. 12.

<sup>183</sup> Peerenboom R, *China's long march towards the rule of law*, 2002, p. 15.

<sup>184</sup> Potter P. B, *The Chinese Legal System, Globalization and local legal culture*, 2001, p. 12.

<sup>185</sup> *Ibid.*, p. 13.

<sup>186</sup> Samuels J R, *Effect of China's proposed Anti-Monopoly Law on State Owned Enterprises*, p. 9

<sup>187</sup> Cohen J A & Hsu C. S, *Understanding China's Legal system*, 2003, p. 287.

<sup>188</sup> Peerenboom R, *China's long march towards the rule of law*, 2002, p. 5.

<sup>189</sup> *Ibid.*, p. 2.

<sup>190</sup> *Ibid.*, p. 1-2.

of upholding the dominance of the PRC Government using laws as an instrument to maintain legal legitimacy.<sup>191</sup>

Additionally, there are two different aspect of the concept of rule of law; thick and thin rule of law. The thin concept refers to effective legal system regardless of democracy and society which makes the thick concept more interesting when discussing China. The thick concept emphasizes the political morality, the kind of government and leading powers as well as human rights. There is also a liberal democratic version of rule of law which emphasizes free market capitalism, free human rights and democracy referring to a multiparty system.<sup>192</sup> Those concepts of rule of law refer to the legal system in general terms and are not specific for competition law.

The failure of curbing administrative monopolies in AML is one clear example of lack of proper rule of law. Administrative monopolies promote companies or industries by exclusive purchasing and altered taxes which are essential problems for development of internal trade in China. The problem is not of character of free competition and can therefore not be resolved by a single competition statute.<sup>193</sup> The administrative monopolies will according to Mark Williams not be restricted before China applies a rule of law with proper review procedures, separation of powers, transparent court system etc.<sup>194</sup>

It is questionable if the Chinese way to cope with rule of law complies with the international views and demands of what rule of law shall compass. From China's perspective, with regards to the goal of establishing a socialist market economy, the PRC Government appears to believe in a different interpretation of rule of law.

### 7.3 Analysis chapter 7

The authors believe that informal relations will definitely hinder proper enforcement of AML. The informal relations can lead to that the PRC Government favor one party in a dispute. One can clearly declare China's lack of rule of law (not specific for competition law). China seems to apply rule of man which gives the PRC Government power and supremacy to lead and rule the country due to political beliefs. The lack of rule of law will negatively influence the interpretation of the aims in article 1 of AML and also the enforcement of the law.

China is in a developing stage and time is required to cope with changes and the establishment of a more reliable legal system. Time is required to change the attitude from the leading powers affected by strong traditional believes of a powerful PRC Government. Neither are the Chinese people ready for a sophisticated liberal society without a strong leading hand. These issues discussed above are fundamental in order to apply an effective competition statute and could cause serious implementation and enforcement issues.

Even though the Chinese legal system has developed during the last decades there are fundamental issues as lack of predictability and cultural differences that are characterized by

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<sup>191</sup> Lagerqvist T, *Kina – en rättsstat?*, p 300-301.

<sup>192</sup> Peerenboom R, *China's long march towards the rule of law*, 2002, p. 3.

<sup>193</sup> Williams M, *Competition Policy and Law in China, Hong Kong and Taiwan*, 2005, p. 215- 216.

<sup>194</sup> Williams M, interview 2008-11-18, Hong Kong.

## Lack of Legal Certainty in China

China's special norms which differ widely from sophisticated countries. The Chinese legal structure is far from being sophisticated.



## 8 Conclusion

The purpose of this Master's Thesis was to analyze the aims stated in article 1 of AML in the perspective of the concept of a socialist market economy. This analysis is also based upon a hypothesis to examine if our idea of the China can be proved right. The authors believed that the concept of socialist market economy is the overall aim which strongly influences the other aims. The PRC Government will achieve the other aims in the AML depending on what the concept of a socialist market economy will include. The interpretation of socialist market economy is therefore crucial. The authors also stated that even though enforcement not might turn out as effective as in the EU, the PRC Government will still be able to achieve the goals from a Chinese perspective.

### 8.1 Develop the true aims

The AML took 13 years to draft. It was not because it was a hard or complicated law in itself. AML is not more complex than other competition laws and as shown it is very much based upon the EC-treaty and covers the general competition concepts. So how come the drafting took such a long time? Part of the reason could be that it was rewritten many times and certain articles were discussed and changed back and forth. Several experts and foreign lawyers had the opportunity to comment on the drafting and the authors got the opportunity to meet some of them and listen to their point of view. Still, the drafting process is not a procedure which should have taken 13 years.

The authors do not believe that the delay was a coincidence but carefully planned. The PRC Government had to examine if the country was able to adopt a competition law and introduce competition on the market at the first place. To adopt AML in 1994, when the drafting began, would have been totally impossible due to a number of factors. The theory of competition was practically not even known in China at that time. Except certain well-educated experts, the general Chinese population was unfamiliar with competition on the market. China's long history of planned economy has promoted state owned monopolies for ages. The monopolies could not simply be removed over a night and neither wanted the PRC Government to do so. Transformation from a planned economy towards a more open market takes time. The saying by Deng Xiaoping "*to cross the river by feeling the stones*" indicates that it will take a long time to develop a competition culture in China.

Ten years after the drafting began the theory of a competition was a little bit more well-known in the Chinese society but awareness had still to be created step by step and the PRC Government had to examine if it was even possible to take such a prominent step towards a market economy without losing control. More important, the PRC Government had to examine what they really wanted to achieve when compassing a comprehensive competition law. Was the objective to copy competition laws from sophisticated market economies and strive towards a market economy? No, of course not. The aims of the AML had to be scrutinized in order to suit the special needs for China.

### 8.2 The concept of socialist market economy

The PRC Government could never have stated that the purpose of the law would be to strive towards a healthy development of a *market economy*. The aim of striving towards a development of a *socialist* market economy will enable the PRC Government to keep the traditional Chinese values and uphold their powers.

The fact that the concept of a socialist market economy does not have any prominent definition is neither that a coincidence. The PRC Government has chosen to leave the concept undefined standing as an umbrella over the other aims in article 1 of AML and influence the interpretation of those. This gives the PRC Government flexibility to interpret the concept in accordance with present political views and also enable the PRC Government to change interpretation over time. No one knows better how a socialist market economy is upheld and ruled but the PRC Government which introduced the concept.

The authors agree with Mr. Zhan Hao and Mr. Diarmuid O'Brien that no one can say what the concept really means but it surely includes strong economic development. China strives to catch up economically with the developed countries which is indicated by the terminology market economy. The word socialist can be interpreted as to point out that the PRC Government is dedicated to uphold their strong powers and overlooks economic policies from Western countries. Consequently, when studying the notion of socialist market economy, the word "socialist" will be favored when interpreting the aims. A socialist market economy will therefore be interpreted from a socialist view and strive towards what is beneficial for a socialist society which also will be revealed in the enforcement procedure. SOEs will therefore be favored before foreign enterprises in a dispute. "Market economy" arises from sophisticated market economies and could indicate that China is moving forward and loosening up a little bit of the strong believes in communism and planned economy. Still, "market economy" will be very much shadowed by the word "socialist". The Chinese notion of socialist market economy is a result of a socialist state.

The notion of socialist market economy is similar to the notion social market economy which could be confusing and give imaginations that China is willing to develop a sophisticated market economy which is found in the EU. But there is a major difference between a sophisticated market economy and the aim to establish a socialist market economy. A sophisticated market economy would have limited the powers of the PRC Government which is far away from the leaders' ideology of how the country should be lead. The Chinese economy is not even close to be called a sophisticated market economy. Even though the PRC Government shows a willing to strive towards a more market-based economy to stay competitive on the international market it does not intend to lose the powers of leading China in different directions.

### **8.2.1 The true aims in article 1**

There is no doubt that the aims in article 1 are truly conflicting and vague. Since the concept of socialist market economy will serve as the umbrella for the article this concept also opens up for different interpretations between the other aims and allows the PRC Government to prioritize between them. To clarify, the authors believe that depending on what aim that goes hand in hand with the present interpretation of a healthy development of a socialist market economy, that aim will be the most prioritized. Since most emphasize will be on the word socialist, aims less beneficial for the socialist market economy will be paid poorly attention. Although the aims paid poorly attention can still be claimed to be achieved since a reduced interest in that goal will be more beneficial for a socialist market economy. The result will be that however the focal points regarding the aims are changing, has the PRC Government created a loophole and depending on the interpretation of socialist market economy, the aims can still be claimed to be achieved. The focal points and the interpretation of the aims will most probably change over time since China is in a developing stage and has undergone a remarkable rapid growth. China is a very nationalistic country and the strong Chinese culture will definitely have large impact on the interpretation of the aims.

As to the present situation, the aim of safeguarding public interest will be one of the prior aims to achieve. The authors believe that this aim should be interpreted as promoting the interest of the people but this might not be the same opinion as the PRC Government has. Since national economy refers to SOEs, those will be seen as safeguarding public interest. Once it is declared that one of the prior aims will be to promote public interest, one can also assume that competition will be considered fair if it is beneficial for SOEs. The aim of fair competition can be used disfavoring for foreign enterprises and will be supporting the goal of public interest. The aim of establishing economic efficiency can contribute to fulfillment of other goals as well, which support the authors' belief that economic efficiency also will be prioritized. In the light of socialist ideology, China will not put much emphasize on individual goals such as consumer welfare. The Chinese people have a strong belief in the PRC Government and are assure that they will act for the people's best. The PRC Government on the other hand might not favor the people by promoting consumer welfare but promoting other goals beneficial for the socialist society. Due to the critical population situation in China the authors believe that the PRC Government will have to put more emphasize on this aim in the future.

### **8.3 Achievement of competition goals?**

When studying the general principles of competition law, which all have arisen from sophisticated market economies, one can declare that the PRC Government does not strive to achieve all of those. The values of competition are not highlighted in the AML. The AML comprises of a mix of goals which are strongly conflicting with each other. AML will probably not give the individual a tool to tackle monopolies or breach in competition.

#### **8.3.1 Enforcement**

The objectives for adopting AML were not solely of competition reasons. The objectives show that AML is part of a wider economic policy. The law itself cannot be seen as a reliable competition law. If looking at the EU, efficiency is always highlighted. In comparison, AML does not give a clear guidance for the enforcement in China. The lack of experience from competition might result in that enforcement agencies are influenced by more political ideologies than competition theory. When disputes arise, competition will not be prioritized. SOEs will be favored before a foreign enterprise which is discriminatory. For example the chapter about administrative monopolies is very detailed and carefully described but there are no remedies or sanctions for interfering with the law. The superior authority, which works for the government, will most probably have the same opinion as the interfering party (most probably SOEs) which leads to that no action will be taken. One can argue that the prohibition of administrative monopolies shows a willingness to handle the problem. On the other hand it cannot be seen as if the PRC Government is highly motivated to act according to the law since the prohibition is implemented without any sanctions. The administrative monopolies are the central issue for the establishment of effective competition in China. As well as previous regulations, AML will not be effective at tackling the administrative monopolies. AML will not be effectively enforced.

#### **8.3.2 Elements for effective competition**

Throughout this thesis, we have talked about necessary elements for establish effective competition. The authors are of the opinion that China does not fulfill any of those elements for establishing effective competition. However, the overall goal of establishes effective competition arises from sophisticated market economies. The PRC Government has never expressed any desire of establishing a sophisticated market economy. A comprehen-

sive competition law has been adopted but the true aim of the PRC Government differs from the aims in sophisticated market economies. Therefore, effective competition from a sophisticated market economy's view will not be established. It is thereby not said that the PRC Government will fail to fulfill what they believe are the true aims in article 1.

The aim is not to achieve a perfect market as in the European Union. The aim is rather to achieve government led capitalism. Neither does the PRC Government strives to establish a free market. The goal is to establish a market with *fair* competition. How should one define what fair competition is? What is fair and what is not? The conclusion to draw is that China has its own concepts and ideas of how competition should be regulated. The PRC Government does not try to impose Chinese concepts in Western countries and China does not seem to plan to adopt all the Western competition concepts either. Therefore, when talking about establishing effective competition one has to remember that those elements arise from sophisticated market economies.

### **8.4 Final words**

From a Western point of view, all the aims in article 1 of AML are not achieved. The AML consists of competition concepts developed in sophisticated market economies. In a sophisticated market economy the goal is to establish free competition and the goal of establishing consumer welfare is highlighted. The aim of the PRC Government, to establish a socialist market economy, does not comprise of the same goals as in the EU. In a socialist market economy the goal is to establish fair competition. Thereby one can say that the PRC Government does not intend to fully implement the competition concepts as they are implemented in sophisticated market economies.

The authors believe that stating an aim of developing a socialist market economy in the first article is a way for the PRC Government to keep the socialist views but still take a small step towards opening up the market. The adoption of AML is a lead towards a national goal of developing the economy and improve the Chinese competitiveness on the international market. The undefined notion of a socialist market economy will enable the PRC Government to favor the socialist goals and interpret the other vague aims in different ways. Due to the overall aim of a socialist market economy, the aims will be interpreted beneficial in accordance with current socialist believes. As long as the aims are beneficial for the society, they will be seen as achieved from a Chinese point of view . However, AML will not be an effective competition law, at least not in the nearest future. A lot of time is required to build a competition culture and enforce an effective competition law. On the other hand, AML can turn out to be an effective way for the PRC Government to control the market according to the socialist views.

Finally, after studying Chinese legislation and trying to understand the true aims of the articles there is one final conclusion: Do not read what the law says, look at what it does.

## 9 Further Discussion: The Future Interpretation

The interpretation of the concept of a socialist market economy and the true aims of AML have now been examined. But as stated, the constitutional changes and the economic and legal development in China has been rapid and will continue into the future. The politics have changed as well as present goals and plans to gain economic growth and build a strong and powerful nation. It is thereby quite logical to believe that there will be further changes and developments in China that will influence AML and the Chinese view on competition. This chapter follows up the final analysis and discusses what the future will bring not at least when the coming generation, the fifth generation, takes over the leadership. The fifth generation might as well modify the enforcement of the AML and interpret the concept of a socialist market economy in another way.

### 9.1 Current president of China

Hu Jintao, current president of the People's Republic of China has continued the economic growth especially after China's assessment to the WTO in 2001.<sup>195</sup> Still, his socialistic values are promoted and campaigned for in CCP. His values derives from the believes that the Communist Party can rule a country more efficient as long as it is competent and dissociated from corruption. Hu Jintao's politics indicates more economic nationalism.<sup>196</sup>

Even though China has experienced a dramatically rapid development it has not achieved the greatest quality in comparison to quantity.<sup>197</sup> An example is that China has the largest economy in the world, but per capita, they have just a small fraction compared to the OECD countries. One factor that causes tension and misunderstanding between China and sophisticated economies is different worldviews from leaders. From a Western point of view, China is a threat considering undemocratic governance with strong economy and extensive military powers. Sophisticated countries believe that China also has a responsibility for their extensive air pollution affecting not only China but the entire globe. The PRC Government's believe that the economic growth is of most importance. Besides, China has a reason to be threatened considering the powerful military of the US and their speeches of fostering the PRC Government of China. The US has supported Taiwan and has a navy capable of cutting of China's import, trade and seaborne energy. Considering the legal reform progress in contrast with undemocratic governance, the Chinese leaders have in the past years proved to be patient and open to new ideas and leading the country to different directions.<sup>198</sup>

### 9.2 Challenges

The next challenge will be to obtain a sustainable economy and social development. The questions lie in the regional differences, expectations from the outside world as well as domestic enterprises and challenging political conditions. To notice is also that the last decades of economic development have been, under ruling of one party, kept back from democracy. But what the attitude will be to democracy in the future is an unwritten page.

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<sup>195</sup> Hoffmann W. J & Enright M, *China into the future*, 2007, p. 4.

<sup>196</sup> Ibid., p. 5- 6.

<sup>197</sup> Ibid. p. 7.

<sup>198</sup> Ibid. p. 10- 11.

Another challenge that the future leaders are facing is the fact that China is as big as an entire continent with autonomous countries instead of provinces. The development of technology and transportation have contributed to less differences, but still, the leading powers are too far away to be taken into consideration for regions far away from the leading powers which results in that directives given from the PRC Government are being ignored.<sup>199</sup>

### 9.3 The fifth generation

The future generation is called the fifth generation after Mao Zedong, Deng Xiaoping, Jiang Zemin and the present leader Hu Jintao. The most significant difference between the fourth and the fifth generation will be in their educational and occupational background. The current president Hu Jintao often speaks of strengthening the legal system and also stresses the importance of rule of law. Since Hu Jintao will select the next generation of leaders, it is likely that the next generation will have a more extended legal educational background and that the importance of lawyers will be emphasized.<sup>200</sup> Another trend is that the next generation is expected to have more education from universities abroad, from countries with established democracies. Among the current leaders, none of them have education from foreign universities, but in the list presented in the book *China into the future*<sup>201</sup>, there are people graduated from Soviet Union, North Korea, US and Great Britain which is a result of Deng Xiaoping's open door policy to the outside world. The number of educated Chinese people abroad is still low but the authorities have claimed that they promote Western educated people into politics. This attitude can have essential value to the development towards a more democratic system and the establishment of a socialist market economy. Although, it is a fact that differences in education and professional careers in the PRC Government can contribute to conflicts among the leaders.<sup>202</sup>

The authors believe that the future leaders of China will be able to bring China even further towards a more competitive culture. The fifth generation will continue to focus on efficiency and thereby also establish better welfare. However, the goal will be to establish a socialist market economy which still differs from a sophisticated market economy.

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<sup>199</sup> Hoffmann W. J & Enright M, *China into the future*, 2007, p. 13.

<sup>200</sup> Ibid.p. 236.

<sup>201</sup> See table 7.1, Hoffmann W. J & Enright M, *China into the future*, 2007, p. 220.

<sup>202</sup> Hoffmann W. J & Enright M, *China into the future*, 2007, p. 237-239.

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## **Appendix**

### **Anti-Monopoly Law of the People's Republic of China**

#### **Order of the President of the People's Republic of China**

No.68

The Anti-monopoly Law of the People's Republic of China, which has been adopted at the 29th meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China on August 30, 2007, is hereby promulgated, and shall come into force as of August 1, 2008.

**President of the People's Republic of China: Hu Jintao**

**August 30, 2007**

#### **Anti-monopoly Law of the People's Republic of China**

(Adopted at the 29th meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China on August 30, 2007)

Contents

Chapter I General Provisions

Chapter II Monopoly Agreement

Chapter III Abuse of Market Dominance

Chapter IV Concentration of Business operators

Chapter V Abuse of Administrative Power to Eliminate or Restrict Competition

Chapter VI Investigation into the Suspicious Monopolistic Conducts

Chapter VII Legal Liabilities

Chapter VIII Supplementary Provisions

#### **Chapter I General Provisions**

Article 1 This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy.

Article 2 This Law shall be applicable to monopolistic conducts in economic activities within the People's Republic of China.

This Law shall apply to the conducts outside the territory of the People's Republic of China if they eliminate or have restrictive effect on competition on the domestic market of the PRC.

## Appendix

Article 3 For the purposes of this Law, "monopolistic conducts" are defined as the following:

- (1) monopolistic agreements among business operators;
- (2) abuse of dominant market positions by business operators; and
- (3) concentration of business operators that eliminates or restricts competition or might be eliminating or restricting competition.

Article 4 The State constitutes and carries out competition rules which accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system.

Article 5 Business operators may, through fair competition, voluntary alliance, concentrate themselves according to law, expand the scope of business operations, and enhance competitiveness.

Article 6 Any business with a dominant position may not abuse that dominant position to eliminate, or restrict competition.

Article 7 With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries implementing exclusive operation and sales according to law, the state protects the lawful business operations conducted by the business operators therein. The state also lawfully regulates and controls their business operations and the prices of their commodities and services so as to safeguard the interests of consumers and promote technical progresses.

The business operators as mentioned above shall lawfully operate, be honest and faithful, be strictly self-disciplined, accept social supervision, shall not damage the interests of consumers by virtue of their dominant or exclusive positions.

Article 8 No administrative organ or organization empowered by a law or administrative regulation to administer public affairs may abuse its administrative powers to eliminate or restrict competition.

Article 9 The State Council shall establish the Anti-monopoly Commission, which is in charge of organizing, coordinating, guiding anti-monopoly work, performs the following functions:

- (1) studying and drafting related competition policies;
- (2) organizing the investigation and assessment of overall competition situations in the market, and issuing assessment reports;
- (3) constituting and issuing anti-monopoly guidelines;
- (4) coordinating anti-monopoly administrative law enforcement; and
- (5) other functions as assigned by the State Council.

The State Council shall stipulate composition and working rules of the Anti-monopoly Commission.

Article 10 The anti-monopoly authority designated by the State Council (hereinafter referred to as the Anti-monopoly Authority under the State Council) shall be in charge of anti-monopoly law enforcement in accordance with this Law.

The Anti-monopoly Authority under the State Council) may, when needed, authorize the corresponding authorities in the people's PRC Governments of the provinces, autonomous regions and municipalities directly under the Central PRC Government to take charge of anti-monopoly law enforcement in accordance with this Law.

Article 11 A trade association shall intensify industrial self-discipline, guide business operators to lawfully compete, safeguard the competition order in the market.

Article 12 For the purposes of this Law,

"business operator" refers to a natural person, legal person, or any other organization that is in the engagement of commodities production or operation or service provision, and

"relevant market" refers to the commodity scope or territorial scope within which the business operators compete against each other during a certain period of time for specific commodities or services (hereinafter generally referred to as "commodities").

## **Chapter II Monopoly Agreement**

Article 13 Any of the following monopoly agreements among the competing business operators shall be prohibited:

- (1) fixing or changing prices of commodities;
- (2) limiting the output or sales of commodities;
- (3) dividing the sales market or the raw material procurement market;
- (4) restricting the purchase of new technology or new facilities or the development of new technology or new products;
- (5) making boycott transactions; or
- (6) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.

For the purposes of this Law, "monopoly agreements" refer to agreements, decisions or other concerted actions which eliminate or restrict competition.

Article 14 Any of the following agreements among business operators and their trading parties are prohibited:

- (1) fixing the price of commodities for resale to a third party;
- (2) restricting the minimum price of commodities for resale to a third party; or
- (3) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.

Article 15 An agreement among business operators shall be exempted from application of articles 13 and 14 if it can be proven to be in any of the following circumstances:

## Appendix

- (1) for the purpose of improving technologies, researching and developing new products;
- (2) for the purpose of upgrading product quality, reducing cost, improving efficiency, unifying product specifications or standards, or carrying out professional labor division;
- (3) for the purpose of enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators;
- (4) for the purpose of achieving public interests such as conserving energy, protecting the environment and relieving the victims of a disaster and so on;
- (5) for the purpose of mitigating serious decrease in sales volume or obviously excessive production during economic recessions;
- (6) for the purpose of safeguarding the justifiable interests in the foreign trade or foreign economic cooperation; or
- (7) other circumstances as stipulated by laws and the State Council.

Where a monopoly agreement is in any of the circumstances stipulated in Items 1 through 5 and is exempt from Articles 13 and 14 of this Law, the business operators must additionally prove that the agreement can enable consumers to share the interests derived from the agreement, and will not severely restrict the competition in relevant market.

Article 16 Any trade association may not organize the business operators in its own industry to implement the monopolistic conduct as prohibited by this Chapter.

### **Chapter III Abuse of Market Dominance**

Article 17 A business operator with a dominant market position shall not abuse its dominant market position to conduct following acts:

- (1) selling commodities at unfairly high prices or buying commodities at unfairly low prices;
- (2) selling products at prices below cost without any justifiable cause;
- (3) refusing to trade with a trading party without any justifiable cause;
- (4) requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause;
- (5) tying products or imposing unreasonable trading conditions at the time of trading without any justifiable cause;
- (6) applying dissimilar prices or other transaction terms to counterparties with equal standing;
- (7) other conducts determined as abuse of a dominant position by the Anti-monopoly Authority under the State Council

For the purposes of this Law, "dominant market position" refers to a market position held by a business operator having the capacity to control the price, quantity or other trading conditions of commodities in relevant market, or to hinder or affect any other business operator to enter the relevant market.

## Appendix

Article 18 The dominant market status shall be determined according to the following factors:

- (1) the market share of a business operator in relevant market, and the competition situation of the relevant market;
- (2) the capacity of a business operator to control the sales markets or the raw material procurement market;
- (3) the financial and technical conditions of the business operator;
- (4) the degree of dependence of other business operators upon of the business operator in transactions;
- (5) the degree of difficulty for other business operators to enter the relevant market; and
- (6) other factors related to determine a dominant market position of the said business operator.

Article 19 Where a business operator is under any of the following circumstances, it may be assumed to be have a dominant market position:

- (1) the relevant market share of a business operator accounts for  $1/2$  or above in the relevant market;
- (2) the joint relevant market share of two business operators accounts for  $2/3$  or above; or
- (3) the joint relevant market share of three business operators accounts for  $3/4$  or above.

A business operator with a market share of less than  $1/10$  shall not be presumed as having a dominant market position even if they fall within the scope of second or third item.

Where a business operator who has been presumed to have a dominant market position can otherwise prove that they do not have a dominant market, it shall not be determined as having a dominant market position.

### **Chapter IV Concentration of Business operators**

Article 20 A concentration refers to the following circumstances:

- (1) the merger of business operators;
- (2) acquiring control over other business operators by virtue of acquiring their equities or assets; or
- (3) acquiring control over other business operators or possibility of exercising decisive influence on other business operators by virtue of contact or any other means.

Article 21 Where a concentration reaches the threshold of declaration stipulated by the State Council, a declaration must be lodged in advance with the Anti-monopoly Authority under the State Council, or otherwise the concentration shall not be implemented.

Article 22 Where a concentration is under any of the following circumstances, it may not be declared to the Anti-monopoly Authority under the State Council:

## Appendix

(1) one business operator who is a party to the concentration has the power to exercise more than half the voting rights of every other business operator, whether of the equity or the assets; or

(2) one business operator who is not a party to the concentration has the power to exercise more than half the voting rights of every business operator concerned, whether of the equity or the assets.

Article 23 A business operator shall, when lodge a concentration declaration with the Anti-monopoly Authority under the State Council, submit the following documents and materials:

(1) a declaration paper;

(2) explanations on the effect of the concentration on the relevant market competition;

(3) the agreement of concentration;

(4) the financial reports and accounting reports of the proceeding accounting year of the business operator; and

(5) other documents and materials as stipulated by the Anti-monopoly Authority under the State Council.

Such items shall be embodied in the declaration paper as the name, domicile and business scopes of the business operators involved in the concentration as well as the date of the scheduled concentration and other items as stipulated by the Anti-monopoly Authority under the State Council.

Article 24 Where the documents or materials submitted by a business operator are incomplete, it shall submit the rest of the documents and materials within the time limit stipulated by the Anti-monopoly Authority under the State Council; otherwise, the declaration shall be deemed as not filed.

Article 25 The Anti-monopoly Authority under the State Council shall conduct a preliminary review of the declared concentration of business operators, make a decision whether to conduct further review and notify the business operators in written form within 30 days upon receipt of the documents and materials submitted by the business operators pursuant to Article 23 of this Law. Before such a decision made by the Anti-monopoly Authority under the State Council, the concentration may be not implemented.

Where the Anti-monopoly Authority under the State Council decides not to conduct further review or fails to make a decision at expiry of the stipulated period, the concentration may be implemented.

Article 26 Where the Anti-monopoly Authority under the State Council decides to conduct further review, they shall, within 90 days from the date of decision, complete the review, make a decision on whether to prohibit the concentration, and notify the business operators concerned of the decision in written form. A decision of prohibition shall be attached with reasons therefor. Within the review period the concentration may not be implemented.

Under any of the following circumstances, the Anti-monopoly Authority under the State Council may notify the business operators in written form that the time limit as stipulated in the preceding paragraph may be extended to no more than 60 days:



## Appendix

- (1) the business operators concerned agree to extend the time limit;
- (2) the documents or materials submitted are inaccurate and need further verification;
- (3) things have significantly changed after declaration.

If the Anti-monopoly Authority under the State Council fails to make a decision at expiry of the period, the concentration may be implemented.

Article 27 In the case of the examination on the concentration of business operators, it shall consider the relevant elements as follows:

- (1) the market share of the business operators involved in the relevant market and the controlling power thereof over that market,
- (2) the degree of market concentration in the relevant market,
- (3) the influence of the concentration of business operators on the market access and technological progress,
- (4) the influence of the concentration of business operators on the consumers and other business operators,
- (5) the influence of the concentration of business operators on the national economic development, and
- (6) other elements that may have an effect on the market competition and shall be taken into account as regarded by the Anti-monopoly Authority under the State Council.

Article 28 Where a concentration has or may have effect of eliminating or restricting competition, the Anti-monopoly Authority under the State Council shall make a decision to prohibit the concentration. However, if the business operators concerned can prove that the concentration will bring more positive impact than negative impact on competition, or the concentration is pursuant to public interests, the Anti-monopoly Authority under the State Council may decide not to prohibit the concentration.

Article 29 Where the concentration is not prohibited, the Anti-monopoly Authority under the State Council may decide to attach restrictive conditions for reducing the negative impact of such concentration on competition.

Article 30 Where the Anti-monopoly Authority under the State Council decides to prohibit a concentration or attaches restrictive conditions on concentration, it shall publicize such decisions to the general public in a timely manner.

Article 31 Where a foreign investor merges and acquires a domestic enterprise or participate in concentration by other means, if state security is involved, besides the examination on the concentration in accordance with this Law, the examination on national security shall also be conducted in accordance with the relevant State provisions.

## **Chapter V Abuse of Administrative Power to Eliminate or Restrict Competition**

Article 32 Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power, restrict or

restrict in a disguised form entities and individuals to operate, purchase or use the commodities provided by business operators designated by it.

Article 33 Any administrative organ or organization empowered by a law or an administrative regulation to administer public affairs may not have any of the following conducts by abusing its administrative power to block free circulation of commodities between regions:

- (1) imposing discriminative charge items, discriminative charge standards or discriminative prices upon commodities from outside the locality,
- (2) imposing such technical requirements and inspection standards upon commodities from outside the locality as different from those upon local commodities of the same classification, or taking such discriminative technical measures as repeated inspections or repeated certifications to commodities from outside the locality, so as to restrict them to enter local market,
- (3) exerting administrative licensing specially on commodities from outside the locality so as to restrict them to enter local market,
- (4) setting barriers or taking other measures so as to hamper commodities from outside the locality from entering the local market or local commodities from moving outside the local region, or
- (5) other conducts for the purpose of hampering commodities from free circulation between regions.

Article 34 Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality to participate in local tendering and bidding activities by such means as imposing discriminative qualification requirements or assessment standards or releasing information in an unlawful manner.

Article 35 Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality to invest or set up branches in the locality by imposing unequal treatment thereupon compared to that upon local business operators.

Article 36 Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to force business operators to engage in the monopolistic conducts as prescribed in this Law.

Article 37 Any administrative organ may not abuse its administrative power to set down such provisions in respect of eliminating or restricting competition.

## **Chapter VI Investigation into the Suspicious Monopolistic Conducts**

Article 38 The anti-monopoly authority shall make investigations into suspicious monopolistic conducts in accordance with law.

Any entity or individual may report suspicious monopolistic conducts to the anti-monopoly authority. The anti-monopoly authority shall keep the informer confidential.

## Appendix

Where an informer makes the reporting in written form and provides relevant facts and evidences, the anti-monopoly authority shall make necessary investigation.

Article 39 The anti-monopoly authority may take any of the following measures in investigating suspicious monopolistic conducts:

- (1) conducting the inspection by getting into the business premises of business operators under investigation or by getting into any other relevant place,
- (2) inquiring of the business operators under investigation, interested parties, or other relevant entities or individuals, and requiring them to explain the relevant conditions,
- (3) consulting and duplicating the relevant documents, agreements, account books, business correspondences and electronic data, etc. of the business operators under investigation, interested parties and other relevant entities or individuals,
- (4) seizing and detaining relevant evidence, and
- (5) inquiring about the business operators' bank accounts under investigation.

Before the measures as prescribed in the preceding paragraph are approved, a written report shall be submitted to the chief person(s)-in-charge of the anti-monopoly authority.

Article 40 When inspecting suspicious monopolistic conducts, there shall be at least two law enforcers, and they shall show their law enforcement certificates.

When inquiring about and investigating suspicious monopolistic conducts, law enforcers shall make notes thereon, which shall bear the signatures of the persons under inquiry or investigation.

Article 41 The anti-monopoly authority and functionaries thereof shall be obliged to keep confidential the trade secrets they have access to during the course of the law enforcement.

Article 42 Business operators, interested parties and other relevant entities and individuals under investigation shall show cooperation with the anti-monopoly authority in performing its functions, and may not reject or hamper the investigation by the anti-monopoly authority.

Article 43 Business operators, interested parties under investigation have the right to voice their opinions. The anti-monopoly authority shall verify the facts, reasons and evidences provided by the business operators, interested parties under investigation.

Article 44 Where the anti-monopoly authority deems that a monopolistic conduct is constituted after investigating and verifying a suspicious monopolistic conduct, it shall make a decision on how to deal with the monopolistic conduct, and publicize it.

Article 45 As regards a suspicious monopolistic conduct that the anti-monopoly authority is investigating, if the business operators under investigation promise to eliminate the impact of the conduct by taking specific measures within the time limit prescribed by the anti-monopoly authority, the anti-monopoly authority may decide to suspend the investigation. The decision on suspending the investigation shall specify the specific measures as promised by the business operators under investigation.

Where the anti-monopoly authority decides to suspend the investigation, it shall supervise the implementation of the promise by the relevant business operators. If the business oper-

ators keep their promise, the anti-monopoly authority may decide to terminate the investigation.

However, the anti-monopoly authority shall resume the investigation, where

- (1) the business operators fail to implement the promise,
- (2) significant changes have taken place to the facts based on which the decision on suspending the investigation was made; or
- (3) the decision on suspending the investigation was made based on incomplete or inaccurate information provided by the business operators.

## **Chapter VII Legal Liabilities**

Article 46 Where business operators reach an monopoly agreement and perform it in violation of this Law, the anti-monopoly authority shall order them to cease doing so, and shall confiscate the illegal gains and impose a fine of 1% up to 10% of the sales revenue in the previous year. Where the reached monopoly agreement has not been performed, a fine of less than 500,000 yuan shall be imposed.

Where any business operator voluntarily reports the conditions on reaching the monopoly agreement and provides important evidences to the anti-monopoly authority, it may be imposed a mitigated punishment or exemption from punishment as the case may be.

Where a guild help the achievement of a monopoly agreement by business operators in its own industry in violation of this Law, a fine of less than 500,000 yuan shall be imposed thereupon by the anti-monopoly authority; in case of serious circumstances, the social group registration authority may deregister the guild.

Article 47 Where any business operator abuses its dominant market status in violation of this Law, it shall be ordered to cease doing so. The anti-monopoly authority shall confiscate its illegal gains and impose thereupon a fine of 1% up to 10% of the sales revenue in the previous year.

Article 48 Where any business operator implements concentration in violation of this Law, the anti-monopoly authority shall order it to cease doing so, to dispose of shares or assets, transfer the business or take other necessary measures to restore the market situation before the concentration within a time limit, and may impose a fine of less than 500,000 yuan.

Article 49 The specific amount of the fines as prescribed in Articles 46 through 48 shall be determined in consideration of such factors as the nature, extent and duration of the violations.

Article 50 Where any loss was caused by a business operator's monopolistic conducts to other entities and individuals, the business operator shall assume the civil liabilities.

Article 51 Where any administrative organ or an organization empowered by a law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order it to make correction and impose punishments on the directly liable person(s)-in-charge and other directly liable persons. The anti-monopoly authority may put forward suggestions on handling according to law to the relevant superior authority.

Where it is otherwise provided in a law or administrative regulation for the handling the organization empowered by a law or administrative regulation to administer public affairs who abuses its administrative power to eliminate or restrict competition, such provisions shall prevail.

Article 52 As regards the inspection and investigation by the anti-monopoly authority, if business operators refuse to provide related materials and information, provide fraudulent materials or information, conceal, destroy or remove evidence, or refuse or obstruct investigation in other ways, the anti-monopoly authority shall order them to make rectification, impose a fine of less than 20,000 yuan on individuals, and a fine of less than 200,000 yuan on entities; and in case of serious circumstances, the anti-monopoly authority may impose a fine of 20,000 yuan up to 100,000 yuan on individuals, and a fine of 200,000 yuan up to one million yuan on entities; where a crime is constituted, the relevant business operators shall assume criminal liabilities.

Article 53 Where any party concerned objects to the decision made by the anti-monopoly authority in accordance with Articles 28 and 29 of this Law, it may first apply for an administrative reconsideration; if it objects to the reconsideration decision, it may lodge an administrative lawsuit in accordance with law.

Where any party concerned is dissatisfied with any decision made by the anti-monopoly authority other than the decisions prescribed in the preceding paragraph, it may lodge an application for administrative reconsideration or initiate an administrative lawsuit in accordance with law.

Article 54 Where any functionary of the anti-monopoly authority abuses his/her power, neglects his/her duty, seeks private benefits, or discloses trade secrets he/she has access to during the process of law enforcement, and a crime is constituted, he/she shall be subject to the criminal liability; where no crime is constituted, he/she shall be imposed upon a disciplinary sanction.

## **Chapter VIII Supplementary Provisions**

Article 55 This Law does not govern the conduct of business operators to exercise their intellectual property rights under laws and relevant administrative regulations on intellectual property rights; however, business operators' conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law.

Article 56 This Law does not govern the ally or concerted actions of agricultural producers and rural economic organizations in the economic activities such as production, processing, sales, transportation and storage of agricultural products.

Article 57 This Law shall enter into force as of August 1, 2008.

The Standing Committee of the National People's Congress 2007-08-30