

Herbert Smith

“Competition about competition”

The implications of jurisdictional ambiguity under the Anti Monopoly Law

Graeme Johnston
Managing Partner, Shanghai, Herbert Smith LLP
December 2008

The legacy (pre-AML) institutional set-up

Key statute

Institution

Price Law

NDRC

Essence of relevant jurisdiction: “everything about price”

Inc. price regulation, over-pricing, predatory pricing, price-fixing etc.

Anti-Unfair Competition Law (AUCL)

SAIC

Essence of relevant jurisdiction: unfair competitive acts

Inc. restrictive agreement and abuse of dominance concepts

M&A Rules applicable to foreign investors

MOFCOM

Essence of relevant jurisdiction: control of non-Chinese M&A activity

Inc. provision for approval of M&A on competition grounds

The AML provisions on institutions

Two tier structure:

1. **A co-ordination committee**
2. **Enforcement authority “to be designated”**

The co-ordinating committee's role

Composition and working rules to be established by State Council

Responsibility is for “organising, co-ordinating and guiding”

Functions include:

1. reviewing and drafting competition policies
2. organising “investigation and assessment of competitive situations” and publishing reports on such matters
3. preparing “anti-monopoly guidelines”
4. co-ordinating anti-monopoly administrative enforcement
5. such other functions as the State Council may assign

AML, article 9

The enforcement authorities

AML leaves open the possibility of a single authority or multiple authorities.

Much debate on this subject both before and after enactment of the AML in August 2007.

Background of competition for authority in this area for many years between MOFCOM, SAIC and NDRC.

Basic set-up resolved only around the time that the AML came into force: see the State Council Notices of July and August 2008 (relevant parts extracted on the following slides).

The basic post-AML institutional set-up

(1) SAIC

Extracts from State Council Notice issued on 23 July 2008 on the main functions, internal institutions & staffing of SAIC.

Functions of SAIC

“SAIC shall be responsible for the anti-monopoly enforcement work regarding monopolistic agreements, abuse of dominant market position, abuse of administrative power to eliminate or restrict competition (except price monopoly); and investigating illegal economic activities like unfair competition, commercial bribery, smuggling, selling smuggling goods, etc.” (Part 2, article 6)

Internal institutions

“The [SAIC Anti Monopoly and Anti Unfair Competition Enforcement Bureau] 1) has responsibility for the formulation of rules, regulations and practice directions for preventing monopoly and unfair competition, 2) leads the anti monopoly enforcement work, 3) investigates illegal economic activities in the market like unfair competition, commercial bribery, smuggling, selling smuggling goods, etc., 4) supervises the investigation of large and representative cases.” (Part 3, article 3)

The basic post-AML institutional set-up

(2) NDRC

Extracts from State Council Notice issued on 21 August 2008 on the main functions, internal institutions & staffing of the NDRC.

“To summarise and analyse the fiscal and financial situation, participate in the formulation of fiscal, monetary and land policies, and formulate and implement price policies; to analyse the effects of implementing fiscal, financial, land policies, and supervise and inspect the implementation of price policies; to set and adjust the prices of important commodities and fees regulated by the state; to control and monitor the illegal price behavior and the price monopoly; to control the total size of China's foreign debts, optimize its mix, and maintain the balance of international payments.” (Para 2, article 3)

“The [NDRC's] Department of Price Supervision shall be responsible for drafting administrative laws and regulations of price supervision; guiding price supervision and inspection; organizing price inspections; handling illegal activities and cases related to commodity price, service price and fee collection by national authorities; investigating price monopoly activities; handling reconsideration cases and appeals concerning the punishment of price violations.” (Part 3, article 23)

The basic post-AML institutional set-up

(3) MOFCOM

Extracts from State Council Notice issued on 23 August 2008 on the main functions, internal institutions & staffing of the NDRC.

The responsibilities of MOFCOM include “initiating anti-monopoly investigations into concentration of undertakings; guiding domestic companies' activities in dealing with anti monopoly lawsuit aboard; and conducting international communication and co-operation in competition policies, bilaterally and multilaterally.” (Part 2, article 15)

“The Bureau shall be responsible for initiating the anti monopoly investigations of concentration of undertakings; guiding the domestic companies' activities in dealing with anti monopoly lawsuit aboard; conducting international communication and cooperation of bilateral and multilateral competition policies.” (Part 3, article 11)

“MOFCOM is responsible for the daily work of the Anti-Monopoly Co-ordination Committee provided for in the Anti Monopoly Law.” (Part 5, article 1)

Five main elements of the new set-up

1. NDRC still covers “everything about price”
2. SAIC covers all other behavioural issues (except for “price monopoly”)
3. MOFCOM covers merger issues (no longer just foreign investment cases)
4. MOFCOM also runs the co-ordinating committee
5. MOFCOM also deals with the outside world

Six jurisdictional ambiguities

1. SAIC / NDRC borderline in behavioural cases
2. SAIC / MOFCOM borderline in merger / JV cases
3. Central / local borderline
4. AML authority / court borderline
5. AML authority / sectoral authority borderline
6. The coordination committee / front-line authority borderline

Ambiguity 1: SAIC / NDRC

Key issues:

- Will the dividing line be clarified?
- Will NDRC and SAIC co-ordinate effectively?
- Will the division of power retard development of policy?

Ambiguity 2: SAIC / MOFCOM

Key issues:

- How will SAIC and MOFCOM interpret “control”?
- What will happen if they adopt different interpretations?

Ambiguity 3: central / local

Key issues:

- To what extent will SAIC delegate its powers to local level?
- Will delegation lead to capture of the key behavioural regulator by local government and locally dominant SOEs?
- To what extent will the Co-ordination Committee be willing and able to police this issue?

Ambiguity 4: AML authority / court

Key issues:

- Will the courts seek to supervise the authorities' decisions in a meaningful way? If so, will they limit themselves to procedural / jurisdictional type questions?
- To what extent will private lawsuits be allowed?
- Would intensive judicial involvement be a good thing or bad thing given the realities of the judicial system?

Ambiguity 5: AML / sectoral authorities

Key issues:

Ability and willingness of the AML authorities to:

- Challenge SOEs
- Challenge sectoral authorities even outside the SOE context
- Take action arguably in tension with “industrial policy” goals

Ambiguity 6: committee / front-line

Key issues:

Will the Co-ordination Committee

- seek, and be able, to resolve the other jurisdictional ambiguities?
- interpret its policy- and guideline-setting roles widely so as to lay down a transparent, meaningful substantive competition policy?

If the Committee seeks to be assertive, will the front-line authorities pay any attention?

Implications of these ambiguities

- Apparent inability to resolve the jurisdictional issues in the year between the passage of the AML (August 2007) and its coming into force (August 2008).
- Concerns as to different approaches of SAIC, MOFCOM, NDRC
- Consequences in terms of lack of regulations and clear policies
- Unclear whether there is a game plan to resolve all this, and if so who owns that plan and has the power to make it happen.

Two possible futures for the AML

1. Effective

Efficient, transparent and co-ordinated authorities who (1) have experts making the decisions which matter, (2) publicly articulate reasonably coherent (even if not perfect) policies, (3) issue detailed regulations and guidelines according to which people can arrange their affairs, (4) enforce without fear or favour, consistent with published policy and choose cases according to public interest (not the identity of the target) and (5) are subject to the discipline of external control and commentary on the quality of their decision-making.

2. Dysfunctional

Authorities who (1) do not have a clear substantive policy (or are not prepared to explain it), (2) have to spend excessive energy fighting for turf, (3) decide everything on ad hoc political grounds, so don't see the need for economic expertise, and (4) enforce in a highly discretionary fashion as they see fit, confident that their decisions are beyond challenge.

Two areas where basic clarity is needed

Two areas in which clarity is needed if the AML is going to have a reasonable chance of becoming effective in due course:

1. Jurisdictional - who's in charge?
2. Substantive - what are the basic concrete rules according to which businesses are expected to conduct their affairs?

State of play as at early December 2008:

1. Major gaps – see the preceding slides.
2. Almost non-existent given that every important rule in the AML has potentially all-encompassing exceptions, and there is as yet no guidance as to how the rules and exceptions will be applied.

(Note the obvious linkage between 1. and 2)