Article

State Interest and the State-Centered Approach to Competition Law in China

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Abstract

There have long been concerns and speculation that China's competition authorities are using the Anti-Monopoly Law (AML) to pursue public interest objectives and prioritizing them over competition. This article explores whether and how public interest factors are relevant to the administrative enforcement of the AML. It shows that, rather than public interest, it is "state interest" and China's state-centered approach to competition law that more aptly explains the AML and its administrative enforcement.

Keywords

China, anti-monopoly law, competition law, administrative enforcement, public interest, state, market

I. Introduction

The question of whether China's competition authorities[1] are using the *Anti-Monopoly Law*[2] (AML) to pursue public interest objectives has been raised since the very early days of the AML. The AML provides for the consideration of factors such as the societal public interest, economic development, and other factors that lie beyond the economic core of efficiency, competition, and consumer welfare upon which competition law has traditionally been focused. However, there is very little guidance in

1. From August 2008 (i.e., when the Anti-Monopoly Law first came into effect) until March 2018, responsibility for the administrative enforcement of the Anti-Monopoly Law was divided among three ministries: the Ministry of Commerce (merger-related enforcement), the National Development and Reform Commission (non-merger price-related enforcement), and the State Administration for Industry and Commerce (non-merger non-price-related enforcement). In March 2018, public enforcement was consolidated into and under one newly established government authority, the State Administration for Market Regulation. Additionally, public enforcement is—and always has been—divided across central level authorities and local level authorities.
2. Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Committee of the National People's Congress, August 30, 2007, effective August 1, 2008) (hereinafter AML).

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the AML and its implementing regulations on their meaning and scope and how they are to be weighed and balanced against the more conventional competition considerations. This has raised concerns that the Chinese competition authorities would favor the pursuit of these objectives—commonly referred to as "public interest" or "noncompetition" objectives—to the detriment of competition. Another worry was that the Chinese competition authorities would protect the activities of China's state-owned enterprises (SOEs) because they would more likely be able to demonstrate that they serve the public interest.

Concerns about the use of public interest considerations have continued to persist, if not amplified, in the public enforcement of the AML. Even though many of the decisions made by the Chinese competition authorities appear to have been predominantly driven by competition considerations and therefore not been criticized greatly, a not insignificant number of cases, especially relating to mergers, have attracted controversy. There are claims that the Chinese competition authorities are pursuing industrial policy aims, undermining intellectual property rights, favoring Chinese companies and in particular SOEs, discriminating against foreign companies, and not properly applying competition principles. Such assertions have tended to arise in cases involving sensitive or important sectors, where the outcome seemed to reach beyond the competition concerns outlined in the decision, or where the outcome in China was different from that reached by non-Chinese competition authorities reviewing the same or similar conduct.

This article engages with this question by examining whether public interest considerations are relevant to the public enforcement of the AML. It will move beyond the speculation and ground the analysis in the text of the AML and its administrative enforcement decisions as well as the equally important but less examined state–market–economy relationship in which competition law exists and is understood. It must be made clear that the aim of this article is not to pass judgment on whether the Chinese competition authorities should refer to public interest factors in their decision-making or whether their approach is appropriate or correct. Rather, this article seeks to find out whether public interest considerations can be, and are, taken into account by the Chinese competition authorities under the AML, and provide context-informed explanations as to why.

This article is structured as follows. Section II will examine the various ways in which the AML allows for the consideration of public interest matters and whether this has been reflected in the decisions made by the Chinese competition authorities. This analysis will be based primarily on the formal text of the AML and the published decisions (such decisions being current as of December 31, 2019). Section III will look at why speculations about the use of public interest in the AML exists. This analysis will show that there is a gap between the form and substance of public enforcement of the AML. Section IV will seek to bridge and explain this gap by proposing an alternative explanation to public interest.

This article will argue that, even though public interest factors have not *formally* played a prominent role in the public enforcement of the AML, they appear to have been influential *in fact*. However, rather than public interest, "state interest" provides a better explanation of the AML and its administrative enforcement outcomes. China adopts an approach to competition law where the state and its interests are paramount, and public enforcement attitudes and outcomes in China reflect this state-centric approach.

II. Public Interest Considerations in the AML: In Form

Under the AML, public interest is relevant to both its substantive prohibitions and its underlying general principles. The importance of public interest to the AML is highlighted in its express objectives. As well as preventing and prohibiting monopolistic conduct, protecting fair market competition, improving economic efficiency, and protecting consumer interest—all of which are aligned with conventional competition objectives—Article 1 also expressly states that protecting the societal public interest and promoting the healthy development of the socialist market economy are objectives of the

AML. Public interest could also arise across the substantive prohibitions relating to agreements, abuses of dominance, and mergers, though apparently not in relation to anticompetitive abuses of administrative power.[3]

On its face, there are a number of ways for public interest to be incorporated into AML analysis and enforcement. In practice, however, public interest factors appear not to have played a formally significant role in the decisions made by the competition authorities to date.[4] The scope of the public interest factors under the AML is also quite indeterminate, with limited guidance provided in the text of the AML and administrative enforcement practice.

1. Public Interest in Mergers

Public interest considerations could be relevant to merger enforcement in at least two different ways. First, the AML provides that the effect of a proposed merger on national economic development is a factor to be considered in merger assessment.[5] This could bring in the consideration and coordination of industrial, economic, and state policies with competition policy.[6] Second, an anticompetitive merger may nonetheless escape prohibition if it can be shown that the merger is in the societal public interest.[7] The Economic Law Division of the Legal Affairs Commission of the National People's Congress notes that such mergers could include those in the national economic lifeline and national security industries and which promote development, employment, technological progress, and international competitiveness.[8] However, there is no further explanation or guidance provided in the AML or its regulations, or by the competition authority, as to when a merger could be considered to be in the societal public interest and whether and how public interest factors might be balanced against competition factors.

There have been no publicly known cases where parties have obtained merger approval on the basis that the merger was in the societal public interest. The competition authority also has not directly or substantively examined the impact of a merger on national economic development in its merger decisions. Rather, the competition authority has made brief, passing comments about a merger's negative effect on the future development of an industry in a small number of merger

3. The AML provides that administrative authorities must not abuse their administrative power to eliminate or restrict competition. However, there appears to be no scope for administrative authorities to justify their conduct on the basis of public interest arguments, at least not as stipulated in the AML or its implementing regulations. *See id*. art. 8, ch. 5. A related—but separate—policy initiative to the AML is the Fair Competition Review System. It is a review mechanism implemented by the State Council in 2016. Whereas the AML provides for *ex-post* review of adopted laws and regulations, the Fair Competition Review System provides for *ex-ante* review of government policies, laws, and regulations for their impact on competition, which is conducted on the basis of self-assessment. Policies, laws, and regulations that are anticompetitive may nonetheless be implemented for reasons of national security and public interest if they are indispensable for achieving those objectives. See Opinion on Establishing a Fair Competition Review System in the Construction of a Market System (adopted by the State Council, June 1, 2016).

4. By contrast, the courts in China seem to have been more open and more likely than the Chinese competition authorities to accept arguments as to why conduct should be exempt or why there is a legitimate reason for engaging in the conduct.

5. AML, *supra* note 3, art. 27(5). Other factors that are considered in merger review are (1) market share of the merging parties in the relevant market and their ability to control the market; (2) degree of concentration in the relevant market; (3) the impact of the merger on barriers to entry and technological progress; (4) the impact of the merger on consumers and other relevant undertakings; and (5) other factors affecting market competition as determined by the anti-monopoly enforcement authority: AML, *supra* note 3, art. 27.

6. Economic Law Division of the Legal Affairs Commission of the Standing Committee of the National People's Congress (ed.), The Anti-Monopoly Law of the People's Republic of China: Explanation of the Articles, Legislative Reasons, and Related Regulations 180 (2007).

7. AML, *supra* note 3, art. 28.

8. Economic Law Division of the Legal Affairs Commission of the Standing Committee of the National People's Congress, *supra* note 6, 186.

decisions.[9] It has also examined, as a separate merger factor, industry characteristics and development trends in a couple of decisions.[10] In these cases, the competition authority viewed the industry characteristics and development trends as being able to alleviate some competition concerns, though not enough to warrant the unconditional approval of a merger. As such, overall, it appears that public interest has only played—at least formally—a tangential role in merger review under the AML, and the competition authority has largely relied on the other merger factors articulated in Article 27 of the AML, which relate to conventional competition considerations such as market shares and concentration and barriers to entry, in making its decisions.

2. Public Interest in Anticompetitive Agreements

Public interest may also be taken into account in the exemption of agreements that would otherwise breach the AML. Article 15 provides that an agreement may be exempt from Articles 13 (horizontal agreements) and 14 (vertical agreements) of the AML if, *inter alia*, the agreement is entered into for one of the following objectives:

- to improve technology or research and develop new products;
- to improve product quality, lower costs, enhance efficiency, unify product specifications and standards, or implement specialized division of labor;
- to improve the operational efficiency and competitiveness of small and medium-sized businesses;
- to realize societal public interests such as energy conservation, environmental protection, and disaster relief;
- in economic downturns, to mitigate severe decreases in sales volume or significant excess capacity; or
- to protect legitimate interests in foreign trade and economic cooperation.[11]

Most of these grounds for exemption relate to the public interest as they sit outside conventional competition concerns. The current and former regulations adopted under the AML do not provide additional guidance on any of these grounds of exemption. Although the National Development and Reform Commission (one of the three Chinese competition authorities prior to March 2018) released a draft guideline on the exemption of anticompetitive agreements for public comment in May 2016,[12] that draft focused largely on the procedural aspects of applying for an exemption and did not provide substantive guidance. Further, it is not known whether a guideline on exemptions will indeed eventually be adopted.

To date, there are no publicly known cases where the Chinese competition authorities have granted an exemption for an anticompetitive agreement pursuant to Article 15 of the AML, whether that exemption is based on public interest or not. There appears to have been no *ex-ante* applications for exemption made to date, and parties have not been successful in arguing for exemption during the course of an investigation. There have been only a small number of cases where investigated parties

9. *Coca-Cola/Huiyuan*; *PEVE Joint Venture*; *P3 Shipping Alliance*.
10. *MediaTek/MStar Semiconductor*; *ASE/SPIL*.
11. Additional grounds for exemption may be also stipulated in other laws or State Council regulations: AML, *supra* note 3, art. 15(7). For objectives other than protecting the legitimate interests in foreign trade and economic cooperation, to gain the benefit of exemption, the parties to the agreement must also show that the agreement will not substantially restrict competition in the relevant market and consumers will be able to share in its derived benefits.
12. State Council Anti-Monopoly Commission Guideline on General Conditions and Procedures for the Exemption of Monopoly Agreements (Consultation Draft), National Development and Reform Commission (May 12, 2016), http://www.ndrc.gov.cn/gzdt/201605/t20160512_801562.html.

made arguments as to why their agreement satisfied the requirements for exemption under Article 15 and/or where the competition authority considered whether an agreement was exempt.[13] Article 15 has been invoked and discussed both as a general matter[14] and by reference to a specific ground of exemption. The grounds for exemption raised and/or discussed in the decisions have covered both public interest (improving the efficiency and competitiveness of small and medium-sized businesses, environmental protection, and mitigating economic downturn)[15] and competition (improving product quality and/or techniques, lowering costs, and enhancing efficiency)[16] grounds. The competition authorities have rejected the parties' arguments for exemption for two main reasons. In some cases, the competition authorities found that the agreement had not in fact been made for the claimed objectives or had achieved them[17] or that the parties failed to provide sufficient evidence to support their claim.[18] In other cases, consistent with the requirement in Article 15 of the AML that, for all but one of the grounds of exemption, the parties must also prove that the agreement would not substantially restrict competition, the competition authorities found that the agreement had restricted competition and damaged the interests of other parties such as customers and consumers.[19] However, in at least one case, the competition authority took into account the parties' intention to improve safety management of the product involved and the resulting societal benefit in deciding to grant lenient treatment in relation to the penalty, though not exemption.[20]

3. Public Interest in Abuse of Dominance

Additionally, public interest may be relevant in abuse of dominance. Under the AML, abuse of dominance conduct[21] may be excused if there is a legitimate reason for engaging in the conduct.[22] While the specific examples of what may be considered to be a legitimate reason provided in the *Interim Regulation on Prohibiting Abuse of Dominance Conduct* do not expressly relate to public interest matters,[23] the regulation does stipulate that a factor in determining whether there is a legitimate reason is the impact of the conduct on societal public interest,[24] though there is no guidance provided in the law or regulations as to what this would entail. Similarly, the effect of conduct on societal public interest and economic development, along with economic efficiency, were relevant to whether there was a legitimate reason under the regulations that were previously in force.[25]

13. It is far more common for parties to argue for a reduction or elimination of their penalty.
14. *Lianyungang Ready-Mix Concrete Cartel*, *Yongzhou New Car Insurance Cartel*, *Changde New Car Insurance Cartel*, *Chenzhou New Car Insurance Cartel*, *Zhangjiajie New Car Insurance Cartel*, *Mayang Miao Autonomous County Shale Brick Cartel*, *Panyu Animation Expo Cartel*.
15. *Zhejiang New Car Insurance Cartel*, *Shangyu Commercial Concrete Cartel*, *Anyang Used Car Service Fees*, *Yunyang Sintered Brick Cartel*, *Yongding Bottled LPG Cartel*.
16. *Liaoning Cement Clinker Cartel*, *Cixi Energy Saving Testing Cartel*, *Yongding Bottled LPG Cartel*.
17. *Zhejiang New Car Insurance Cartel*, *Mayang Miao Autonomous County Shale Brick Cartel, Cixi Energy Saving Testing Cartel*, *Yunyang Sintered Brick Cartel*.
18. *Anyang Used Car Service Fees Cartel*.
19. *Lianyungang Ready-Mix Concrete Cartel*, *Yongzhou New Car Insurance Cartel*, *Changde New Car Insurance Cartel*, *Chenzhou New Car Insurance Cartel*, *Zhangjiajie New Car Insurance, Mayang Miao Autonomous County Shale Brick Cartel*, *Yongding Bottled LPG Cartel*.
20. *Yongding Bottled LPG Cartel*.
21. Other than selling at unfairly high prices or buying at unfairly low prices.
22. AML, *supra* note 3, art. 17.
23. Interim Regulation on Prohibiting Abuse of Dominance Conduct (adopted by the State Administration for Market Regulation, June 26, 2019, effective September 1, 2019), arts. 15–19.
24. *Id*., art. 20.
25. Regulation of the Administration for Industry and Commerce on the Prohibition of Abuse of Dominance Conduct (adopted by the State Administration for Industry and Commerce, December 31, 2010, no longer in effect) art. 8.

Again, there are no published administrative enforcement decisions where the investigated parties successfully established that they had legitimate reasons for engaging in conduct that would have otherwise been an abuse of dominance. Most of the reasons that have been put forward by investigated parties have not been based on public interest but on their own interests (such as reducing operating risks, losses, and pressures),[26] which the competition authorities have not accepted as constituting legitimate reasons under Article 17 of the AML.[27] They have also rejected the public interest–related reasons that parties have argued, which have included ensuring the safety of a supplied product and service[28] and promoting a healthy and environmentally friendly product.[29] In these cases, the competition authority instead found that the conduct had not been essential to the reason, was not a common business practice, had no legal or policy basis, was involuntarily imposed on the counterparties, or was anticompetitive.

4. Public Interest and SOEs

More generally, the application of the AML to SOEs could give rise to public interest considerations in several ways. SOEs are politically and economically important entities in China and they help the state implement and achieve policy goals,[30] and their operations could therefore potentially attract public interest matters. In theory, SOEs may therefore be more likely to raise public interest arguments and be successful in doing so. Additionally, Article 7(1) of the AML clearly provides that the state will protect the lawful activities of SOEs that have controlling positions in national economic lifeline and national security industries and of state-granted monopolies.[31] Not only do these industries relate to basic infrastructure and services which directly affect the public, but also the state's control over these industries—which are considered to be strategic or important to the Chinese government and are dominated by SOEs—is regarded as important to economic development and political stability in China.[32] As a result, it was thought possible that public interest considerations might lead to SOEs being effectively exempt from the AML or afforded favorable treatment due to the prioritization of industrial policy or other noncompetition considerations over competition concerns where SOEs are involved.[33]

It seems that public interest considerations have not played a significant role in investigations and reviews involving SOEs, at least not on the face of the published administrative decisions themselves.

26. *Chongqing Gas Unreasonable Conditions*, *Dongfang Water Unreasonable Conditions*, *Qingdao Xinao Xincheng Gas Unreasonable Conditions*, *Alxa Zuoqi Water Unreasonable Conditions*, *Chifeng Salt Differential Treatment*, *Urumqi Water Exclusive Dealing*, *Eastman Exclusive Dealing*, *Qualcomm Abuse of Dominance.*
27. Other reasons raised as being legitimate reasons have been that the conduct complied with or was required by legal and/or policy requirements and obligations (*Urumqi Water Exclusive Dealing*, *Suqian Yinkong Water Exclusive Dealing*, *Chongqing Qingyang Refusal to Deal*, *Chifeng Salt Differential Treatment*) or was voluntarily entered into by their counterparties (*Dongfang Water Unreasonable Conditions*, *Urumqi Water Exclusive Dealing*, *Suqian Yinkong Water Exclusive Dealing*, *Huayan Water Unreasonable Conditions*, *Tianjin Water Unreasonable Conditions*, *Qualcomm Abuse of Dominance*).
28. *Yiyuan Purified Water Unreasonable Conditions*, *Suqian Yinkong Water Exclusive Dealing*, *Tetra Pak Abuse of Dominance*, *Suqian Petro China Kunlun Gas Exclusive Dealing*.
29. *Chlorpheniramine Abuse of Dominance*.
30. *See* Wendy Ng, The Political Economy of Competition Law in China 101–109, 128–34 (2018).
31. Article 7(1) of the AML also goes on to provide that the state will supervise and control their conduct and prices in accordance with the law, protect consumer interest, and promote technological progress.
32. Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 Antitrust L.J. 73, 98 (2008).
33. Deborah Healey, *An Anti-Monopoly Law for China: Weapon or Mirage?*, 16 Competition & Consumer L.J. 220, 228–29 (2008); Thomas R Howell et al, *China's New Anti-Monopoly Law: A Perspective from the United States*, 18(1) Pacific Rim L. & Pol'y J. 53, 82–83 (2009); Nathan Bush, *Constraints on Convergence in Chinese Antitrust*, 54 Antitrust Bulletin 87, 113–14 (2009); Eleanor M. Fox, *An Anti-Monopoly Law for China – Scaling the Walls of Government Restraints*, 75 Antitrust L.J. 173, 192–93 (2008); Stephen Harris Jr et al., Anti-Monopoly Law and Practice in China 195–97 (2011).

Some local competition authorities have referred to Article 7(2) of the AML[34] in their investigations of salt and tobacco companies (both of which are state monopolies) as conferring a positive obligation on these companies to act in good faith.[35] However, apart from the reference to Article 7(2) in a few cases, public interest has not arisen in SOE-related investigations in a way that has been materially different to investigations of other companies, nor have SOEs had a greater chance of success in making public interest arguments before the competition authorities. For example, a number of abuse of dominance investigations have specifically involved SOEs providing essential services to the public and state-sanctioned monopolies. In these cases, even if they argued that they had legitimate reasons to engage in the conduct, the competition authority did not accept those arguments, whether or not they were based on public interest considerations or other matters. More generally, despite concerns that SOEs might be effectively exempt from the AML under the guise of public interest, they have been subject to investigations, reviews, and sanctions across the range of conduct relating to abuses of dominance, anticompetitive agreements, and mergers.

III. Public Interest Considerations in the AML: In Substance

Overall, even though there is some scope within the text of the AML to consider public interest factors, they have not—at least not formally—been an important consideration in the public enforcement of the AML. Instead, the administrative enforcement decisions have been generally consistent with conventional competition law analysis and the competition authorities have largely focused on core competition-related concerns in their formal decision-making. In mergers, for example, the competition authority has relied on market shares, market concentration, market entry, and analytical tools and theories of competitive harm that are commonly adopted by other competition authorities to assess the competitive impact of a merger. In abuse of dominance cases, the Chinese competition authorities have looked at market shares, ability to control the market, market entry, and dependence of customers to assess whether a company has a position of market dominance, and will typically assess the impact of conduct on competition before deciding whether the dominant party has breached the AML. Therefore, the general trend in public enforcement is that, from the text of the AML decisions at least, decisions are based primarily on quite standard competition considerations and analysis.

Nonetheless, there has been, and continues to be, considerable speculation that public interest does *in fact* underlie some AML enforcement decisions, especially in relation to mergers. There are at least several reasons why such speculation exists, which will be discussed below. Further, such speculation is exacerbated by the lack of transparency in administrative decision-making in China. Only a limited number of the administrative decisions made under the AML are publicly available, and the published decisions themselves tend to be relatively brief and present facts and conclusions rather than provide reasons or evaluate arguments, so the information they provide into the decision-making and reasoning process is very limited.

First, there are some clear differences between the enforcement practices of the Chinese competition authorities and those of the competition authorities in Western and developed economies and as reflected in international competition law norms. Such divergences are most apparent in merger enforcement, and in particular, remedies. Unlike other jurisdictions, China does not have a strong preference for structural remedies over behavioral remedies; it only requires that the remedy be sufficient to eliminate the anticompetitive effects of the merger, be operational in practice, and be

34. Article 7(2) of the AML provides that SOEs with controlling positions in national economic lifeline and national security industries and state-granted monopolies must, *inter alia*, conduct their business according to law, act in good faith, and observe strict discipline.

35. *Wuchang Salt Tying*, *Fushun Tobacco Tying*, *Chifeng Salt Discriminatory Treatment*, *Yongzhou Salt Tying*.

capable of addressing the competition problem in a timely manner.[36] In fact, behavioral remedies have been imposed more often than structural remedies in both horizontal and nonhorizontal mergers in China. In some cases, this approach has resulted in the remedies required by the Chinese competition authority being quite different from those imposed by other competition authorities reviewing the same merger.[37] Some of the behavioral remedies required in China have also been seen as unconventional. For example, the Chinese competition authority has required long-term hold separate remedies as standalone remedies and therefore prevented the merging parties from combining their business operations fully,[38] and it has also not infrequently required that the merged entity continue to supply or provide access to a product, asset, or information to customers, in some cases on particular terms and conditions.[39] While these divergences may be explained by the differences in competition and market dynamics in the various jurisdictions, another plausible explanation is that they are due to other factors relating to, for example, industrial policy.

Second, the objectives underlying the Chinese competition authorities' investigations and reviews seem to not only cover economic efficiency, consumer welfare, and the protection of competition but also other concurrent aims. This can be seen in the types of cases that the competition authorities have pursued. Many of the public enforcement cases across mergers, abuse of dominance, and anticompetitive agreements occur in sensitive, important, or strategic industries. For example, ensuring the supply of products and services has been a key concern in mergers involving these industries.[40] Most of the abuse of dominance investigations have involved companies operating in the water, gas, power, telecommunications, salt, and pharmaceutical industries[41]—all of which involve the supply of important goods and services to the public—and the automobile industry and various foods and consumer goods have been the subject of cartel and resale price maintenance investigations.[42] Sectors that are important to Chinese industrial policy such as agriculture, construction, technology, shipping, and health have been highlighted in merger enforcement and cartel investigations.[43] Intellectual property rights have also attracted scrutiny from competition authorities.[44] These cases suggest that, alongside competition aims and concerns, the competition authorities seem to be using the AML to address and achieve other objectives.

Third, there is a perception that public enforcement may be biased against foreign companies and favorable toward Chinese companies, especially SOEs.[45] As of December 31, 2019, only four of the

36. Ministry of Commerce Anti-Monopoly Bureau, Head of the Ministry of Commerce Anti-Monopoly Bureau's Interpretation of the "Regulation on the Imposition of Restrictive Conditions on Concentrations of Business Operators (Trial)" (December 17, 2014), http://fldj.mofcom.gov.cn/article/j/201412/20141200835988.shtml.
37. Cunzhen Huang & Fei Deng, *Convergence with Chinese Characteristics? A Cross-Jurisdictional Comparative Study of Recent Merger Enforcement in China*, 31(2) Antitrust 44 (2017); Mark Furse, *Evidencing the Goals of Competition Law in the People's Republic of China: Inside the Merger Laboratory* 41(1) World Competition 129 (2018).
38. *Seagate/Samsung*, *Western Digital/Hitachi*, *Marubeni/Gavilon*, *MediaTek/MStar Semiconductor*, *ASE/SPIL*, *Cargotech/TTS*, *II-VI Incorporated/Finisar*.
39. *General Motors/Delphi*, *Henkel/Tiande*, *Uralkali/Silvinit*, *Glencore/Xstrata*, *NiMH battery joint venture*, *Thermo Fisher/Life*, *Microsoft/Nokia*, *Google/Motorola Mobility*, *ARM joint venture*, *Dow/DuPont*, *HP/Samsung Printing*, *Bayer/Monsanto*, *UTC/Rockwell*, *Essilor/Luxottica*, *Linde/Praxair*, *KLA/Orbotech*, *II-VI Incorporated/Finisar*.
40. *See*, *e.g., Uralkali/Silvinit*, *Glencore/Xstrata*.
41. *See*, *e.g., Dongfang Water Unreasonable Conditions*, *Suqian Petro China Kunlun Gas Exclusive Dealing*, *State Grid Nanjing Lishui Power Unreasonable Conditions*, *China Telecom/China Unicom Abuse of Dominance*, *Chifeng Salt Discriminatory Treatment*, *Chongqing Qingyang Pharmaceutical Refusal to Supply*.
42. *See*, *e.g., Shanghai Chrysler Cartel and RPM*, *Guangxi Rice Noodle Cartel*, *Lens Manufacturers RPM*.
43. *See*, *e.g., Uralkali/Silvinit*, *Guangdong Sea Sand Cartel*, *KLA-Tencor/Orbotech*, *P3 Shipping Alliance*, *Estazolam Tablet Cartel*.
44. *See*, *e.g., Microsoft/Nokia*, *Qualcomm Abuse of Dominance*.
45. *See*, *e.g.,* US Chamber of Commerce, Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy (2014); European Union Chamber of Commerce in

forty-six mergers that were approved subject to conditions or prohibited involved at least one Chinese company,[46] and all purely domestic mergers (i.e., mergers between Chinese companies only) that were notified and approved were approved unconditionally. Additionally, almost half of the mergers notified to the competition authority for review were mergers between non-Chinese companies only and a substantial majority of all completed merger reviews involved at least one non-Chinese party.[47] One of the most controversial merger decisions to date is the March 2009 decision of the Ministry of Commerce (the competition authority responsible for mergers prior to March 2018) to prohibit Coca Cola's attempted acquisition of Huiyuan, a Chinese fruit juice brand. That decision was widely criticized as being driven by economic protectionism, even though the Ministry of Commerce had relied on the portfolio effects theory—a theory of harm similarly used by the European Commission and Australian competition authority in some of their reviewed mergers—in reaching its decision.[48] Further, merger enforcement involving SOEs appears to be disproportionately low, as the actual level of SOE-related merger activity and the relatively low merger notification thresholds in China would suggest that more mergers involving SOEs would at least be notified to, if not then approved or prohibited by, the competition authority. For example, only one of the forty-six conditionally approved or prohibited mergers involved an SOE, even though about half the domestic-to-domestic mergers notified for anti-monopoly review involved at least one SOE.[49] Some SOEs, however, have been investigated and fined for not complying with the merger notification requirements.

Non-Chinese companies have also received the largest fines for breaching the AML. To date, eight of the ten highest fines levied on individual companies have been imposed on non-Chinese companies, with the fine imposed on Qualcomm (RMB 6.088 billion for abuse of dominance) far eclipsing the largest fine imposed on a Chinese company, that being Moutai, who was subject to a fine of RMB 247 million for resale price maintenance.[50] Further, many of the investigations that have been suspended or terminated following the offering and performance of commitments have related to SOEs, with most of these investigations resulting in no fines. By contrast, a number of cases where private companies made commitments during the course of investigations still resulted in the company being subject to

China, European Chamber Releases Statement on China AML-Related Investigations (Press Release, Aug. 13, 2014); Deng Fei & Gregory K. Leonard, *The Role of China's Unique Economic Characteristics in Antitrust Enforcement*, *in* China's Anti-Monopoly Law: The First Five Years 59, 63–64 (Adrian Emch & David Stallibrass eds., 2013); Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 Penn. J. Int'l L. 643, 710–15 (2010); Xiaoye Wang & Adrian Emch, *Five Years of Implementation of China's Anti-Monopoly Law—Achievements and Challenges*, 1 J. Antitrust Enforcement 247, 267–68 (2013).

46. *Coca-Cola/Huiyuan*; *General Electric/Shenhua joint venture*; *Corun PEVE Battery joint venture*; *Royal DSM/Zhejiang Garden Biochemical High-Tech joint venture*.

47. Fei Deng & Cunzhen Huang, *A Ten-Year Review of Merger Enforcement in China*, The Antitrust Source 1, 2–4 (Aug. 2018).

48. *See*, *e.g.,* US Chamber of Commerce, *supra* note 45, at 43–44; Mark Williams, *Foreign Investment in China: Will the Anti-Monopoly Law Be a Barrier or a Facilitator?*, 45 Tex. Int'l L.J. 127, 153–54 (2009); Ping Lin & Jingjing Zhao, *Merger Control Policy under China's Anti-Monopoly Law*, 41 Rev. I.O. 109, 120 (2012); Yong Huang, *Coordination of International Competition Policies: An Anatomy Based on Chinese Reality*, *in* Cooperation, Comity and Competition Policy 229, 240 (Andrew T. Guzman ed., 2011); D. Daniel Sokol, *Merger Control under China's Anti-Monopoly Law*, 10 N.Y.U. J. L. & Bus. 1, 24–25 (2013).

49. Yuni Yan Sobel, *Domestic-to-Domestic Transactions—A Gap in China's Merger Control Regime?*, The Antitrust Source 1, 4 (Feb. 2014); Yuni Yan Sobel, *Domestic-to-Domestic Transactions (2014-2015)—A Narrowing Gap in China's Merger Control Regime*, The Antitrust Source 1, 4 (February 2016).

50. Wang Jian, *Antitrust Fines in China: Past, Present and Future*, *in* Wang Xiaoye: the Pioneer of Competition Law in China 125, 127–29 (Adrian Emch & Wendy Ng eds., 2019).

financial penalties, although typically the fines were reduced as a result of corrective measures having been undertaken by the investigated parties.[51]

As such, it seems that administrative decision-making under the AML may not be fully explicable by sole reference to the competition considerations and the publicly disclosed analysis that appear on the face of the decisions. This suggests that other factors may also be relevant. However, the opaque nature of decision-making under the AML, and in China more generally, means that, once one goes beyond the formal decisions and other public pronouncements made by the competition authorities and other related government bodies, it may be difficult to determine what those other factors may be. "Public interest" as such may not necessarily be the only or the most appropriate explanation for some of the preceding observations.

IV. An Alternate Explanation Grounded in China's Political Economy: "State Interest"

This article argues that, instead of public interest, the notion of "state interest" better captures, explains, and bridges the gap between the formal, competition-focused rationales given in the public enforcement decisions and the substantive nature of the enforcement outcomes under the AML. It also has explanatory power beyond those cases that attract speculation, concern, and criticism that public interest factors may be at play, which are in the minority. The concept of state interest stems from the state-centered approach to competition law that is adopted in China. This approach to competition law is in turn grounded in and reflects China's political economy, which has the state at its core, and expressly draws a clear relationship between competition law and the state. "State interest" therefore offers a more complete and contextually informed way to understand and frame the AML, its implementation, and public enforcement in general.

This section will first examine the relationship between the state, market, and economy, as this forms the basis of understanding competition law in China. The role that competition law plays in this relationship will then be considered. Finally, this section will explain what is meant by China's state-centered approach to competition law and the relevance of state interest.

1. Relationship Between the State, Market, and Economy in China

Over the course of Chinese history, the state and the economy have been, and continue to be, theoretically and factually inseparable.[52] The economy has traditionally been regarded as an inherent and essential aspect of state governance and as a force to be managed and organized in a manner that served the state, who in turn served the people and society.[53] By contrast, in Western capitalist countries, there is a theoretical separation between the state and the economy even though the state might participate in and intervene in the economy in various ways, and the economy is viewed as a force to which the state is exposed.[54]

The close relationship between the state and the economy in China is also reflected—and indeed mandated—in its political-economic system. China is a socialist state, with political, economic, and legal systems that are socialist in nature. There are two key tenets that are fundamental to socialism in China. First, the leadership of the Chinese Communist Party (CCP) is the most essential feature of

51. Wendy Ng, *The Influence of Socialist Principles on the Legal Regulation of Markets in China: The Anti-Monopoly Law*, *in* Socialist Law in Socialist East Asia 351, 366–68 (Hualing Fu et al. eds., 2018).
52. Yongnian Zheng & Yanjie Huang, Market in State: The Political Economy of Domination in China 19, 85–86 (2018).
53. *Id*. at 85.
54. *Id*. at 113.

"socialism with Chinese characteristics."[55] The CCP has control over all aspects of the state and governance, including economic and legal governance.[56] Second, public ownership is the foundation of China's socialist economic system and an important pillar of socialism with Chinese characteristics.[57] This is represented via SOEs, which are regarded as important material and political foundations of socialism with Chinese characteristics.[58] Adherence to these two socialist principles means that the state both directly participates in and supervises and regulates the economy. The state's close involvement in the economy will continue as long as China remains a socialist state.[59]

The introduction of the market system into China's economy has not fundamentally altered this relationship between the state and the economy. China's transition from a command economy to a market-based economy has been incremental and gradual, and the economy remains subject to the state's macroeconomic regulation and control.[60] The leading role of SOEs continues to be protected and recognized, even as market-based reforms are undertaken to improve the operations of SOEs and the sectors and industries dominated by them. Further, the leadership of the CCP has made it clear that, while the market plays a decisive role in allocating resources in the economy, its role in this regard is not comprehensive and there remains space for the state to also play a role in resource allocation. The government's role is also to, *inter alia*, oversee the market, maintain market order, and intervene and remedy market failures.[61] Therefore, while the market has injected another dynamic into China's economy and provides what seems to be a counterbalance to the power of the state in the economy, the state nonetheless has ultimate control and power over the market as it supervises and regulates the market to ensure that it is operating properly and in an orderly manner, in the name of overall economic governance. Yongnian Zheng and Yanjie Huang refer to this relationship between the state and the market in China as being "market in state,"[62] reflecting the centrality and priority of the state in the state–market–economy relation.

2. Views on the Role of Competition Law in the State, Market, and Economy in China

This conversation about the relationship between markets and the state in the socialist market economy shapes discussions and views of the role of competition law in China. The Chinese government regards competition law as an essential component of a legal system that is needed to support the functioning of the market economy, providing a basic legal framework to establish competitive market structures,

55. Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Promoting the Governance of the Country According to Law (adopted by the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China, October 23, 2014) pt. 1 (hereinafter CCP Decision on Governance According to Law).
56. *Id*.; Jianfu Chen, Chinese Law: Context and Transformation 121–22, 180–81 (revised and expanded ed, 2015); Randall Peerenboom, China's Long March Toward Rule of Law 214 (2002); Manuél E. Delmestro, *The Communist Party and the Law: An Outline of Formal and Less Formal Linkages Between the Ruling Party and Other Legal Institutions in the People's Republic of China*, 43 Suffolk U. L. Rev. 681, 682–90 (2010).
57. Constitution of the People's Republic of China, arts 6–7; CCP Decision on Governance According to Law, *supra* note 55, pt. 2.
58. *Xi Jinping Emphasises Persistence and Unwavering Party Leadership in SOEs at Nationwide SOE Party Building Conference*, Xinhua News Agency (October 11, 2016), http://news.xinhuanet.com/2016-10/11/c_1119697415.htm.
59. For further discussion, *see* Ng, *supra* note 51, at 351.
60. Constitution of the People's Republic of China, art. 15; Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening Reform (adopted by the Third Plenary Session of the 18th Central Committee of the Communist Party of China, November 12, 2013) art. 14 (hereinafter CCP Decision on Deepening Reform).
61. *Id*; Xi Jinping, An Explanation of Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening Reform, Third Plenary Session of the 18th Central Committee of the Communist Party of China (November 15, 2013).
62. Zheng & Huang, *supra* note 52, at 23.

ensure competitive conduct, and maintain fair and orderly market competition.[63] This view of competition law is consistent with a competition and market-based notion of competition law and is a perspective that is also adopted by many other competition law jurisdictions, including those of Western and developed economies. As noted in the preceding discussion, the majority of AML decisions and their outcomes are generally compatible with orthodox competition analysis and core competition concerns.

Additionally, competition law is considered by China to be an important tool of economic policy used by the state to regulate its market economy.[64] This more instrumental and regulatory view of competition law has been reflected in the Chinese competition authorities' approach to and application of the AML in at least two main ways. In each case, the instrumental and regulatory view did not seem to usurp the traditional competition and market-based approach but largely complemented it.

First, the AML is a means through which competition policy, industrial policy, and other economic policies are coordinated and balanced.[65] This is reflected in Article 4 of the AML, which provides that "the state formulates and implements competition rules compatible with the socialist market economy, perfects macroeconomic control, and develops a unified, open, competitive, and orderly market system," and this article was added to the AML in part to reflect this coordination role.[66] This coordination role is reinforced by the nature of administrative decision-making in China, which is based on consultation and consensus. Before the competition authority makes a decision under the AML, it may need to consult with relevant government departments and other bodies to obtain their comments and views on a particular matter and sign off on the decision.[67] This is an important part of the decision-making process and the competition authority's work, as failure to undertake proper consultation could expose the decision to challenge from within the bureaucracy.[68] Consultation may bring noncompetition concerns into the AML decision-making process because the consulted parties' key concerns may not be related to competition but other matters reflecting their own mandates, which may or may not be consistent with a competition-enhancing outcome. The competition authority will need to find a way to bring about consensus, and one way to do this could be to address (in substance if not in form) the noncompetition concerns in the enforcement outcomes.

This balancing and coordinating of competition with other economic policies and goals have been reflected in a number of AML cases. Industrial policy considerations seem to have influenced the selection and/or outcomes of cases across the spectrum of anticompetitive conduct involving the agriculture, automobile, construction, health, and technology sectors, especially as linked to intellectual property and the development of Chinese technologies and capabilities. The

63. Cao Kangtai, An Explanation of China's Anti-Monopoly Law (Draft), 22nd Session of the Tenth Standing Committee of the National People's Congress (June 14, 2006); Speech Excerpts: Draft of the Anti-Monopoly Law, delivered at the 22nd Session of the Standing Committee of the Tenth National People's Congress (June 27, 2006); Ming Shang, *Antitrust in China—A Constantly Evolving Subject*, 3 Competition L. Int'l 4, 4 (2009).
64. Cao, *supra* note 63.
65. Report of the Law Committee of the National People's Congress on the Revision of the Anti-Monopoly Law of the People's Republic of China (draft), 28th Session of the Standing Committee of the Tenth National People's Congress (June 24, 2007).
66. *Id*.
67. Consultation with relevant government departments is required for merger reviews, whereas for non-merger conduct, the competition authority will need to consult with other government departments in some situations, but it does have some discretion in this regard. See also Measures on the Review of Concentrations Between Business Operators (adopted by the Ministry of Commerce, July 15, 2009) arts. 6–7; *State Council Work Rules* (adopted by the State Council, Mar. 23, 2013) art. 23.
68. Angela Huyue Zhang, *Bureaucratic Politics and China's Anti-Monopoly Law*, 47 Cornell Int'l L.J. 671, 674, 688–99 (2014).

AML has also been enforced in a manner that has supported sector-specific policies in the salt, pharmaceutical, telecommunications, and liquified petroleum gas industries, as well as foreign investment.[69] This view of the AML as a means through which various economic policies are considered, coordinated, and balanced lends support to speculations that the AML was being applied to pursue objectives beyond competition. Additionally, the very nature of SOEs means that competition authorities will likely need to balance and coordinate different policy interests when seeking to enforce the AML against SOEs. SOEs help to carry out policies and achieve policy outcomes on behalf of the state, yet they are also often subject to market forces and competition; competition is therefore but one consideration within the multitude of policy interests relevant to SOEs. This appears to have been reflected in the somewhat constrained application of the AML to SOEs.

Second, Article 4 of the AML also recognizes the state's role in supervising the market, consistent with the notion that the market remains nonetheless within and is subject to the state. A number of cases demonstrate that the AML has been applied to facilitate the state in its supervision, regulation, and macroeconomic control of the market. For example, as part of its monitoring of prices in the auto industry, the competition authority has taken a series of AML investigations into car manufacturers, their local dealers, and auto parts manufacturers for cartel conduct and resale price maintenance.[70] Similarly, the AML has also been used to supervise the prices of pharmaceuticals and infant formula.[71] As already discussed, a majority of the merger conditions required have been behavioral in nature, which has allowed the competition authority to monitor and supervise compliance with the conditions over a long-term period and intervene where necessary to ensure their compliance.

Moreover, in addition to supervising the conduct of businesses in the market, the AML supervises the conduct of administrative bodies. In addition to anticompetitive agreements, abuses of dominance, and anticompetitive mergers, the AML prohibits administrative authorities from abusing their administrative power to eliminate or restrict competition.[72] This prohibition is directed at government restrictions on competition, which include acts of local protectionism (such as regulations that favor local businesses over those coming from other regions or that prevent the free flow of goods and services between regions) and industry monopoly (e.g., regulations that restrict entry into sectors or favor incumbent businesses). In doing so, the AML helps the state to draw a line between appropriate and inappropriate government regulation of and intervention in market activities and more broadly clarifies the respective roles of the government and market in the economy.[73]

As such, not only is the AML directed at regulating competition in the market sphere, at the same time it is viewed and used as an economic policy tool to help the state manage the economy, as a means of policy coordination and macroeconomic supervision.

69. *See*, *e.g., Wuchang Salt Tying*, *Yongzhou Salt Tying*, *Chongqing Qingyang Pharmaceutical Refusal to Supply*, *Allopurinol Tablet Cartel*, *Yongding Bottled LPG Cartel*, *Wal-Mart/Newheight*.
70. *See*, *e.g., FAW-Volkswagen and Audi Cartel and RPM*, *Dongfeng Nissan Cartel and RPM*, *SAIC General Motors RPM*, *Toyota Lexus RPM*. *See* also *Lu Yanchun: Anti-Monopoly Law Needs to Promote Industry Economic Development* (November 29, 2012), http://auto.sina.com.cn/news/2012-11-29/12241071631.shtml.
71. *See*, *e.g. Estazolam Tablet Cartel*, *Infant Formula RPM*.
72. AML, *supra* note 3, art. 8, ch. 5.
73. The State Council released an opinion in June 2014 on improving the market regulation system and promoting fair competition, in which it called for, *inter alia*, the breaking up of local protectionism and industry monopoly: Some Opinions on Promoting Fair Market Competition and Maintaining Normal Market Order (adopted by the State Council, June 4, 2014). For further discussion, *see* Ng, *supra* note 51, at 377–80.

3. Broader than Public Interest: State Interest Under the State-Centered Approach to Competition Law in China

While this instrumental and supervisory use of the AML may appear to be consistent with a regulatory approach to competition law,[74] this article argues that China actually adopts a state-centered approach to competition law. China's competition law exists within a political economy where the state is at its core and the market and the economy ultimately serve the interests of the state. Consequently, competition law, being a law that regulates and manages the market and the economy, also adopts this state-centric orientation and focuses on serving and furthering the interests of the state. "State interest" is therefore the lodestar for China's state-centered approach to competition law.

The concept of state interest is broad, as it can refer to and encompass any interest, goal, or priority of the state. Conventional competition goals and public interest objectives, along with other aims, can *all* be potential state interests. Accordingly, state interest can be used to help understand the full range of decisions and outcomes under the AML and explain why noncompetition objectives appear to be pursued in some cases but not in others. The difference between administrative decisions that appear to be principally focused on achieving competition objectives and outcomes and those that seem to be driven more by other goals and considerations (such as public interest or market supervision) lies in the different state interests that are implicated and how they are weighed, balanced, and coordinated. Further, the concept of state interest is flexible enough to recognize and accommodate the coexistence of multiple, concurrent objectives and roles of competition law, consistent with the reality of the public enforcement of the AML. For example, as noted above, even though the AML has been viewed and used as an economic policy tool to manage and regulate the market and the economy, that has not necessarily been to the exclusion of the promotion of competition-related objectives.

However, it is important to note that the reference to state interest does not necessarily lead to predictable or transparent outcomes, as it remains hampered by the opacity of administrative decision-making and governance in China. The interests of the state may change from case to case and it is unknown how various state interests may be weighed up and balanced against one another. Nonetheless, this article argues that state interest presents a richer, more nuanced, and more comprehensive means than public interest to understand and explain the gap between the AML on the books and the AML in practice, and the AML more generally, and it is one that is rooted in the reality of the political economy in which China's competition law is understood, implemented, and enforced.

V. Conclusion

China's AML has certainly attracted a lot of attention since it came into effect in August 2008. In particular, the Chinese competition authorities have come under intense scrutiny for seemingly pursuing public interest objectives under the guise of the AML, especially in cases where an application of conventional competition principles and analysis would not have necessarily warranted intervention. This article has demonstrated that there is a basis for such speculation and criticism. Even though the competition authorities have framed their decisions to, on their face, focus on addressing core competition concerns and not in terms of public interest—even in cases where public interest considerations might have seemed relevant—the AML has in fact also been used as a legal instrument of market supervision, regulation, and control and of economic policy coordination. This approach is quite different from how competition law is viewed and applied in Western and developed economies.

74. That is, one that aims to control, order, and influence conduct to accomplish certain aims and views competition law as being instrumental and supervisory: Imelda Maher, *Regulating Competition*, *in* Regulating Law 187, 188 (Christine Parker et al. eds., 2004); Imelda Maher, *The Networked (Agency) Regulation of Competition*, *in* Regulatory Theory: Foundations and Applications 693, 693 (Peter Drahos ed., 2017).

However, instead of viewing these divergent approaches and outcomes as being the result of the competition authorities pursuing public interest objectives, this article has argued that it is better and more helpful to see competition law through China's eyes.

This article has demonstrated that our understanding of how China views competition law needs to be adjusted in light of the fact that it has a different view of the relationship between the state, market, and economy. The state is at the core of this close, entwined, and inseparable relationship, and the market and the economy serve the state's interests. China's competition law adopts the same state-centric orientation, with it being viewed and used as a means to help the state manage and organize the market and the economy in furtherance of its interests. As such, that competition law enforcement philosophies and outcomes in China are different from those resulting from a market-oriented competition law that is often adopted by Western and developed economies should not be surprising once that connection between competition law and the state is drawn. Instead of the competition/public interest dichotomy that typically underlies competition law in many jurisdictions, China's competition law is motivated by the interests of the state, whatever they may be.

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