

Competition Policy in China and its Relevance to SMEs

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Abstract Competition policy has great relevance to all the firms in any economy. Even though it is unlikely that small and medium sized enterprises (SMEs) have enough market power to constrain competition through a misuse of such power, they may still face prosecution if they are involved in a boycott of competitors or suppliers, price-fixing, output-restriction and other monopoly agreements. This paper discusses antitrust issues pertaining to SMEs with a focus on China's Anti-Monopoly Law (AML) and its implementation rules. Contrary to the popular view that SMEs benefit from competition laws, evidence shows that they are reluctant to get involved in antitrust litigation against large firms partly because of the high legal costs involved. There is an urgent need to promote an awareness of antitrust compliance in China and to educate SMEs about the need to avoid breaching the new antitrust law and its associated regulations. In the meantime, SMEs should take full advantage of the antitrust laws to fight against abuse of market dominance directed at them, and to gain equal opportunities to market access.

Keywords competition policy, SMEs, China, AML, public interest

1 Introduction

More than one hundred years after the enactment of the Sherman Act in the US, China's Anti-Monopoly Law (AML) was passed in 2007 and became effective since 1 August 2008. Competition policy has great relevance to all the firms in the economy, including small and medium sized enterprises (SMEs).¹ Even though it is unlikely that SMEs would have enough market power to constrain competition through the misuse of such power, they may still face prosecution if they engage in a boycott of competitors or suppliers, price-fixing, output restriction and other monopoly agreements. It has been widely acknowledged that SMEs are the backbone of the economy and that they are necessary to foster competitive market structures. As a result, they have been granted exemptions from the application of antitrust laws in some activities which might be deemed illegal if engaged in by large companies. Meanwhile, complaints against large firms lodged by SMEs are frequently not upheld by antitrust authorities due to economic efficiency considerations. Such concerns have played a central role in decisions made by the US antitrust authorities, and have been increasingly embraced by the EU.

This paper first reviews competition policy in China, the US, and EU, and then discusses the antitrust issues pertaining to SMEs with a focus on China's AML and its implementation rules. This research has important practical and

¹ The terms competition policy and antitrust policy are used interchangeably in this paper.

policy implications as it is important for the Chinese SMEs to understand the new AML and its implementation rules, and their relevance to them. It is also important for China's antitrust enforcement agencies to learn from their overseas counterparts and to develop a culture for encouraging competition in the economy.

2 An Overview of the Competition Policy in China, the US and EU

The competition policy of a country is embodied in its antitrust laws. The goal of antitrust laws in many developed countries is to protect customers against the creation and exercise of market power, and help restore or enhance competition given the existence of state-owned, private or regulated monopolies. Antitrust laws can also be used to mitigate market failure where markets do not efficiently organise production or allocate goods and services to consumers. Competition policy deals with three principal areas—monopoly, restrictive practices, and mergers.

2.1 China

Before 1978, China's state-owned enterprises (SOEs) and collectively owned enterprises dominated the economy. There was no need to promote competition among these enterprises. After more than 10 years of economic reform, the government declared in 1992 that the central goal of China's economic reform was to establish a "socialist market economy". In the 15 years since this declaration, China's economic structures have undergone dramatic changes. In particular, from the late 1990s, apart from certain key industries, the government has largely taken a hands-off approach to SMEs, encouraging them to be privatised.

China's AML came into effect on 1 August 2008. It included provisions governing monopoly agreements, abuse of market dominance and merger control. Two main areas called for such a comprehensive antitrust law. First, administrative monopolies have been subject to extensive criticisms, with demands that more competition needs to be introduced into the industries that are dominated by the state-owned or state-controlled enterprises. Second, many leading multinationals have dominated in many areas in China, such as computer operating systems, internet equipment, cameras, flexible packaging, cosmetics, beer and soft drinks. Their dominant position was acquired either through their own intellectual property, or through mergers and acquisitions. The survival of SMEs in these industries was threatened. Effective antitrust legislation was needed to challenge the acquisition and strengthening of these dominant positions by multinationals, and to monitor their potential anticompetitive conduct.

The antitrust policy of almost all countries has the purpose of protecting competition. However, these days most economists would agree that protecting competition is not the end, and that eventual goal of competition policy should be to increase efficiency, i.e., to maximise the sum of consumer surplus and producer surplus. Under this goal, the overall benefits including the interests of consumers, producers, resource owners, shareholders and other stakeholders will be considered. It is also believed that consumer welfare can only be maximised when total welfare is maximised.

The second type of goal of antitrust in practice is to increase the welfare of consumers, which means that any antitrust action should result in net consumer gains. When dealing with a merger, antitrust authorities need to ensure that consumers can share some part of the efficiency gains, such as enjoying lower prices or better quality products.²

The third welfare goal of antitrust was developed in the Canadian Jurisdiction in the case *Commissioner of Competition v. Superior Propane Inc.(2000) 7 CPR (4th) 385 Comp. Trib.*³ It is also known as the balancing weights standard. This welfare standard seeks to “determine the weight to be given to the loss of consumer surplus that results from the conduct in question, such as a merger, having an overall neutral effect on social welfare, and then seeks to compare this weight with some subjective social expectation of what ‘true’ social weighting should be given”.⁴ However, Ross and Winter (2005) noted that the balancing weights goal is not feasible because of the lack of information and the interpretation problem.⁵ Therefore, this approach is unlikely to be adopted by a developing country where the antitrust authorities have little antitrust experience,⁶ which is also the case for China.

China’s AML states that “this law is enacted for the purposes of prohibiting monopolistic conduct, safeguarding the order of market competition, protecting the legitimate rights and interests of consumers and public interests and ensuring the healthy development of the socialist market economy”. This objective has been criticised for its lack of focus on economic efficiency as the primary goal of competition. Although competition policy in virtually every country has to seek non-efficiency objectives as can be seen later in this paper, it is better not to incorporate these goals in the antitrust legislation itself. Otherwise, the

² Round, D. K. & Zuo, Z., *The Welfare Goal of Antitrust Laws in Asia: for Whom Should the Law Toil?* 22 Asian-Pacific Economic Literature, 31-56(2008).

³ Id.

⁴ Id.

⁵ Ross, T. W., & Winter, R. A., *The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments*, 72 Antitrust Law Journal, 471-503 (2005).

⁶ See Round and Zuo, fn. 2.

enforcement agencies have to face “contradictory instructions”, or “too much discretion” and “legislative power will be delegated to the bureaucracy”.⁷ The multiple-objective nature of China’s AML thus leaves some uncertainty for antitrust decisions in relation to SMEs.

The enforcement of the AML is undertaken by the National Development and Reform Commission (NDRC), the State Administration of Industry and Commerce, and the Ministry of Commerce (MOFCOM), which respectively are responsible for price-related restrictive agreements and abusive conduct, non-price related market manipulation including the acts of abusing administrative power, and excessive concentration of enterprises.

2.2 The US

Monopoly conduct by the large trusts in the US in the late nineteenth century, that were thought to have the potential to hurt consumers and small businesses, led to the Sherman Act of 1890, which prohibited both unilateral monopoly and collusion in broad terms. Motta (2004) noted that price wars were common due to the periodic and persistent economic crises (1873–78 and 1883–86).⁸ To respond to price wars and market instability, cartels and trusts were organised to help firms maintain high prices and margins. Consumers became the direct victims. Farmers and small businesses were also affected, facing the threat of being driven out of business. Sympathy for farmers and small businesses led to the creation of antitrust laws in many states as well as the new federal law, the Sherman Act.⁹ This reaction shows that politicians at that time realised the serious social consequences of anti-competitive behaviour.

The Sherman Act was not very strictly enforced until 1897, when the Supreme Court ruled that a trust of 18 railways¹⁰ that fixed freight charges for the transport of goods was illegal.¹¹ Also, in the *Addyston Pipe and Steel* decision,¹² the court clearly rejected the argument that price fixing was used as a way to prevent unhealthy competition. The judge took the view that the court was in no position to decide which price agreements were reasonable and which were not.¹³ Thus, the ban on price agreements became a strong precedent which

⁷ Owen, B.M., Sun, S. & Zheng, W., *Antitrust in China: The Problem of Incentive Compatibility*, 1 *Journal of Competition Law and Economics*, 123-148(2005).

⁸ Motta, M., *Competition Policy: Theory and Practice*. Cambridge University Press, Cambridge (2004).

⁹ Id.

¹⁰ *US v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

¹¹ See Motta, fn. 8.

¹² *Addyston pipe & Steel Co. v. US*, 175 US. 211 (1899).

¹³ See Motta, fn. 8.

is still the norm today in most countries. In the *Standard Oil*¹⁴ and *American Tobacco*¹⁵ cases, predatory pricing and engaging in price wars to eliminate competition were condemned and disallowed. In *Standard Oil*, the “rule of reason” was introduced, which means that only restraints of trade that were unreasonable were considered violations of the Sherman Act. Since then the test of “reasonableness” has given defendants the opportunity to justify their challenged activities as being reasonable because they do not substantially damage existing competitive conditions.¹⁶ This implies that antitrust laws do not protect SMEs per se.

A merger between two firms could potentially restrain competition, yet the rule of reason approach is always applied to mergers and as a result, many proposed mergers have been approved under the Clayton Act, which came in effect in 1914, extending the Sherman Act’s reach.¹⁷ During the period between the two world wars, antitrust policy was relaxed.¹⁸ A new period of intense antitrust activity occurred from the *Socony–Vacuum Oil*¹⁹ decision in 1940 to the mid-1970s. The 1968 Department of Justice (DOJ) Merger Guidelines were consistent with the tight precedents that the Supreme Court had set, in which efficiency claims were regarded as unreliable. Market structure was the focus of the DOJ’s merger policy, with a philosophy that the conduct of the individual firms in a market was determined by the structure of that market. As a result, much consideration was given to concentration levels in the Guidelines, and mergers above certain concentration threshold levels would most likely be challenged.

Supported by the theory of contestable markets,²⁰ a more lenient approach to merger control was adopted in the 1980s. In addition, the critiques from the Chicago School and the fact that US firms had lost competitive advantages abroad, directed attention to the efficiency effects of business practices.²¹ This was reflected in the 1982 Merger Guidelines, which abandoned most constraints, in keeping with the economic philosophy advocated by the Chicago School.

¹⁴ *Standard Oil of New Jersey v. US*, 221 US 1 (1911).

¹⁵ *US v. American Tobacco*, 221 US 106 (1911).

¹⁶ Joelson, M.R., *An International Antitrust Primer: A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy*. 3rd ed., Kluwer Law International, The Hague (2006).

¹⁷ Mueller, D.C., *Merger Policy in the United States: A Reconsideration*, 12 *Review of Industrial Organisation*, 655–685 (1997).

¹⁸ See Motta, fn. 8.

¹⁹ *US v. Socony–Vacuum Oil Co., Inc. et al.* 310 US 150 (1940).

²⁰ See Baumol, W.J., Panzar, J.C. & Willig, R.D., *Contestable Markets and the Theory of Industry Structure*. Harcourt Brace Jovanovich, San Diego (1982).

²¹ See Motta, fn. 8.

Coordinated behaviour as described by Stigler's (1964) collusion theory was also addressed in the 1982 Merger Guidelines.²² Although market concentration data were still important, there was a "need for evidence of harm or potential harm to competition before a merger will be challenged".²³ The 1984 revisions to the 1982 Guidelines moved further away from reliance on market concentration. A merger would not be challenged solely on the basis of concentration and market share data. During the 1990s and early 2000s, the US Government changed little in its antitrust policies. The increasing debate on efficiency led to the 1997 Merger Guidelines which explicitly stated that efficiencies could increase the competitiveness of firms by increasing their incentives and abilities to compete.²⁴

Foer (2001) claimed that the rise of the Chicago School distanced the relationship between small businesses and antitrust enforcers partly because of the emphasis on efficiency that is usually associated with big firms and concentration.²⁵ Predatory pricing claims that could be used to assist small businesses were also dismissed by the Chicago School. It has been made particularly difficult for plaintiffs to prove the existence of such behaviour in court since the 1993 case *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*²⁶

2.3 EU

On the other side of the Atlantic, Europeans traditionally have taken a different attitude towards economic concentration, and consequently their approach for dealing with cartel activities has differed.²⁷ During the second half of the nineteenth century and the first half of the twentieth century, cartel activities were commonly seen in many parts of commercial life in some European countries. Cartels were tolerated and sometimes encouraged by governments, especially after the great depression. The German economy especially was characterised by cartelisation, especially in the heavy industries. Even in the UK

²² Stigler, G.J., *A Theory of Oligopoly*, 72 *Journal of Political Economy*, 44–61(1964).

²³ US Department of Justice, *Explanation and Summary of the Merger Guidelines* at 3, reprinted in *Trade Reg. Rep (CCH) No. 546* at 58 (June 16, 1982).

²⁴ Kolasky, W. & Dick, A., *The Merger of Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*. Wilmer Cutler Pickering Hale and Dorr Antitrust Series, Working Paper 31 (2003), available at <http://law.bepress.com/wilmer/papers/art31> (last visited May 10, 2010).

²⁵ Foer, A.A., *Small Business and Antitrust*, 16 *Small Business Economics*, 3-20 (2001).

²⁶ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* (92-466), 509 US 209 (1993).

²⁷ Harding, C. & Joshua, J., *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency*. Oxford University Press: New York (2003).

policy shifted towards pro-cartelisation from pro-free trade, encouraging cartelisation in the coal mining and cotton industries,²⁸ thereby creating an unfriendly business environment for SMEs.

After World War Two, decartelization was introduced in occupied Germany and price-fixing was banned by the allied decartelisation laws. Germany passed a competition law in 1957 to restrict the concentration of economic power. The establishment of the European Economic Community in the late 1950s implied conflicting goals between the common market and the business cartels. Because of the strong American anti-cartel commitment, significant provisions against cartels were included in the Treaty of Paris that created the European Coal and Steel Community (ECSC).²⁹ Article 65 in the Treaty prohibited agreements and concerted practices between firms or associations of firms to directly or indirectly prevent, restrict or distort normal competition within the Common Market. This provision is reflected by Article 101 of the Treaty on the Functioning of the European Union (TFEU) (Article 81 in the EC Treaty). Article 66 of the Treaty of Paris deals with the abuse of market power, which is carried through to Article 102 of the TFEU (Article 82 of the EC Treaty).

The current TFEU deals with competition issues in Articles 101 to 109. The major provisions are contained in Articles 101 and 102. Article 101 lists the practices that are prohibited, including fixing prices and limiting or controlling production, markets, technical development, etc. Article 102 states that “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States”. The principle underlying this Article is that a firm in a dominant position should not eliminate or distort competition. However, the Commission has long held the view that cooperation among SMEs may be desirable and that arrangements between SMEs should be exempted from application of the competition rules by the de minimis rule. The Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (2001/C 368/07) acknowledges that “agreements between small and medium-sized undertakings... are rarely capable of appreciably affecting trade between member states”.³⁰

²⁸ Resch, A., *Phases of Competition Policy in Europe*. Institute of European Studies, UC, Berkeley (2005). Available at <http://www.escholarship.org/uc/item/7wr2g49j?display=all> (last visited December 10, 2010).

²⁹ Id.

³⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:368:0013:0015:EN:PDF> (last visited February 1, 2011).

The European Court of Justice, in two leading cases, *Continental Can*³¹ and *Philip Morris*³² provided the basis for establishing merger control in the EC before the introduction of Merger Regulations 4064/89.³³ The first case established that the strengthening of a dominant position through merger could be seen as an abuse and should be prohibited under Article 102. The second case recognised that the acquisition of a minority shareholding in a competitor could be caught by Article 101 (then Article 85) if increased concentration occurred. A new Merger Regulation came into force on 1 May 2004 (139/2004), replacing Regulation 4064/89. The power of the Commission has been greatly increased in this new law. In all cases that fall under the scope of application of Articles of 101 and 102, Member States' national laws do not apply. A new substantive test (or "significant impediment to effective competition" (SIEC) test) was introduced in Article 2(3), replacing the dominance test. This new test has brought the regulation closer to the substantial lessening of competition test used in other jurisdictions.³⁴

Historically efficiency was not given much consideration in the EU. However, in the Guidelines on the Assessment of Horizontal Mergers issued by the Commission, efficiency claims will be considered as a likely effect in a merger, consistent with the approach of the US antitrust authorities.³⁵

Competition decision-makers clearly rely heavily on economic reasoning and evidence. The shift of the methodology in the industrial organisation literature reflects the change of economists' views on competition in oligopoly markets, and, in turn, has shaped governments' competition policies. It seems that the competition policies of the US and EU (and, in fact, those of many other developed economies) have converged in many respects such as the efficiency consideration, which have significant implications for SMEs. In the next section, issues relevant to SMEs will be spelt out and discussed, mainly in China's context.

3 The Relevance of Antitrust Laws to SMEs

There are various definitions for SMEs across countries. In China, the current 2003 definitions for SMEs depend on the industry categories (Table 1). It is

³¹ Case 6/72 *Continental Can v Commission* (1973) ECR 215.

³² Joint Cases 142 and 156/84, *British American Tobacco and Reynolds v. Commission* (1987) ECR 4487.

³³ See Joelson, fn. 16.

³⁴ Christiansen, A., *The Reform of EU Merger Control – Fundamental Reversal or Mere Refinement?* Faculty of Economics and Business Administration, University of Marburg (2006). Available at SSRN: <http://ssrn.com/abstract=898845> (last visited May 12, 2010).

³⁵ See Joelson, fn. 16.

worth noting that SMEs in China can include relatively large firms with up to 3,000 employees compared with those in other countries, and therefore there exists much greater relevance of antitrust laws to SMEs.

Table 1: Definitions of SMEs in China

Industries	SMEs meet one or more of the following conditions.		
	Number of employees	Sales revenue (10,000 yuan)	Total assets (10,000 yuan)
Manufacturing	< 2,000	<30,000	<40,000
Construction	<3,000	<30,000	<40,000
Wholesale trade	<200	<30,000	
Retail trade	<500	<15,000	
Transport	<3,000	<30,000	
Post	<1,000	<30,000	
Accommodation and restaurants	<800	<15,000	

Source: *National Economic and Trade Committee SMEs no. 143, 2003.*

Based on these criteria, 99% of the country's 10.3 million companies are SMEs, accounting for more than 80 percent of urban employment, and producing 60 percent of China's GDP.³⁶ In the OECD countries, SMEs account for more than 95% of firms and 60-70% of employment.³⁷ Schaper (2010) summarised the following features of small businesses that differentiate them from large firms.³⁸ Medium-sized firms may also possess most of these features:

- Geographically constrained with the vast majority having only one working location
- Sell a very limited range of goods and services
- Have limited market share
- Depend on a handful of clients
- Bear disproportionately more expensive regulatory compliance costs
- Suffer from information asymmetry
- Less likely to access established suppliers
- Usually unincorporated
- Possess limited financial resources

³⁶ Zhong, N. & Zhang, J. *Smaller Firms to Benefit from New Definition of SMEs*. China Daily, 27 October (2010). Available at http://www.chinadaily.com.cn/business/2010-10/27/content_11463340.htm (last visited September 20, 2010).

³⁷ OECD, *Small and Medium-Sized Enterprises: Local Strength, Global Reach*. OECD Observer, June, 1-7 (2000).

³⁸ Schaper, M.T., *Competition Law, Enforcement and the Australian Small Business Sector*, 17 Small Enterprise Research, 7-18 (2010).

- Have limited access to skilled advice

3.1 Antitrust Laws Ensure Equitable Opportunities for SMEs

SMEs deserve some special treatment, not only because they act as an impetus for economic growth in many economies including China, but also because their inherent characteristics (as summarised above) suggest that they are most likely to lack financial strength, meaning that they could be easily driven out of the market by their large rivals. It is not uncommon that vertical agreements lead to large firms controlling raw materials and more than one level of the supply chain, forcing SMEs to rely on them for supply.³⁹ Foer (2001) noted that antitrust enforcement restrains market power on both the supply and buying side, thereby keeping down the prices of goods and services that small businesses depend on and protecting small businesses from being crushed by the need to sell to much more powerful buyers.⁴⁰ Constraining the abuse of market power by dominant firms not only benefits consumers, but also ensures that SMEs have equal opportunities to participate in the economy.

In many countries including the EU, agreements between competitors whose market share is small are in the main unlikely to be prosecuted. This is so also because antitrust agencies have limited resources and have to narrow the focus of their investigations. China's AML (Article 15(3)) explicitly exempts an agreement from antitrust if it is for the purpose of enhancing the efficiency and reinforcing the competitiveness of SMEs. Further implicit antitrust immunity for SMEs can be found in Article 19 in which market share *de minimis* is set to determine whether a business might be in a dominant position:

- (1) A business operator accounts for 1/2 of the market share;
- (2) Two business operators account for 2/3 of the market share;
- (3) Three business operators account for 3/4 of the market share.

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

In addition, there is no need to notify the antitrust authorities if the turnover of the undertakings involving concentration does not meet the notification thresholds published by the Chinese State Council on 3 August 2008⁴¹.The

³⁹ Kampel, K., *The Role of South African Competition Law in Supporting SMEs* (2004). Available at <http://www.competition-regulation.org.uk/conferences/southafrica04/kampel.pdf> (last visited September 30, 2010).

⁴⁰ See Foer, fn. 25.

⁴¹ The thresholds are: the combined worldwide turnover of all undertakings involved in the last financial year exceeds 10 billion *yuan*, and at least two undertakings' turnover in China each exceeds 400 million *yuan*; or the combined China-wide turnover of all undertakings

existence of the AML gives SMEs the option to sue the big players that exhibit anti-competitive behaviour, thereby making themselves better off compared to the situation that would apply in the absence of a competition law.⁴²

SMEs are most likely to be adversely affected by a concentration. China's Anti-Monopoly Bureau of MOFCOM blocked the proposed takeover of *Huiyuan* Juice by Coca-Cola in 2009.⁴³ One of the reasons for this decision was that the domestic small juice makers would be negatively impacted by the acquisition. This might be true if the relevant market only contained pure and high concentration fruit and vegetable juices, in which *Huiyuan* had a market share of more than 40 per cent by the end of 2008. Although Coca-Cola had a very low share in this market, the combined market share after takeover could exceed 50 per cent, posing a potential threat to the survival of other SMEs in this market. Even if the relevant market also includes low concentration fruit and vegetable juice drinks, which means the two merged companies together would have a market share of less than 20 per cent, Coca-Cola could still quickly expand its market share using *Huiyuan*'s existing distributors and sales offices and its dominant status in the carbonated drink market (more than 50 per cent) through tying, bundling or other forms of exclusive dealing. Consequently, entry into the fruit and vegetable juice market would become more difficult. The decision to block the takeover demonstrates that a significant weight has been given to SMEs by Chinese antitrust authorities in formulating an antitrust decision.

3.2 SMEs May Have Different Perceptions

In contrast, the Federation of Hong Kong Industries (2007) presented an interesting view in its discussion of whether Hong Kong needs a competition law:

Contrary to the popular belief that introducing a cross-sector competition law would benefit SMEs, there is evidence that the law would provide a convenient avenue for large corporations to sue their smaller counterparts for anti-competition. Since many SMEs cannot afford to pay the huge legal

involved in the last financial year exceeds 2 billion yuan, and at least two undertakings' turnover in China each exceeds 400 million yuan.

⁴² Lin, P. & Chen, K.Y., *Fair Competition Under Laissez-Faireism: Policy Options for Hong Kong*. Lingnan University of Hong Kong (2008). Available at <http://www.ln.edu.hk/econ/staff/plin/Fair%20Competition%20under%20Laissex%20Faireism.pdf>. (last visited December 12, 2010).

⁴³ Sun, J., *The Implementation of China's Anti-Monopoly Law: A Case on Coca-Cola's Abortive Acquisition of Huiyuan Juice*, 6 *Frontiers of Law in China*, 117-130 (2011).

costs involved, not to mention the time and energy required of management in such lawsuits, large corporations could eliminate competitors in the courtrooms without having to competing with them in the market place.⁴⁴

Possibly due to the high legal costs, the Office of Fair Trading (OFT) of UK indicates that about 25 per cent of SMEs in the UK claim that they are the victims of unfair practices such as price-fixing and bid-rigging, but only 22 per cent would report price-fixing agreements between competitors and only 9 per cent would report an instance of predatory pricing.⁴⁵ The OFT Chairman thus urged SMEs to turn to the competition authorities for help:

Practices such as price-fixing and bid-rigging harm the competitiveness of our economy. SMEs have rights and obligations under competition law and can work more with the OFT to identify and stop anti-competitive behaviour. We must ensure that SMEs are informed about—and in turn inform—our work.⁴⁶

A similar story that antitrust does not offer effective protection from the misuse of market power can also be found in Australia⁴⁷ and the US.⁴⁸ It is believed that the theoretical benefit for small businesses is not always realised partly due to the underfunding of the enforcement agencies.⁴⁹ This is also because not enough attention has been paid to small businesses. It is no exception that China's new antitrust enforcement agencies have limited resources and little experience in dealing with antitrust cases and therefore, there is much work for China's SMEs to do to influence the decisions of the antitrust authorities. In the Coca-Cola-Huiyuan case, it is believed that the strong opposition from other juice firms was one of the driving forces that led to a final decision favourable to SMEs.

⁴⁴ Federation of Hong Kong Industries. *Public Consultation on the Way Forward for Competition Policy in Hong Kong*. Submission to the Hong Kong Economic Development and Labour Bureau (2007). Available at http://www.industryhk.com/textonly/tc_chi/news/news_sp/files/070205.pdf (last visited October 10, 2010).

⁴⁵ OFT, *OFT Urges SMEs to Report Anti-competitive Practices*. The Office of Fair Trading, Press Release, 21 July (2005). Available at <http://www.oft.gov.uk/news-and-updates/press/2005/129-05> (last visited January 25, 2011).

⁴⁶ Id.

⁴⁷ See Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*. The Senate Economic References Committee, Canberra: Senate Printing Unit (2004).

⁴⁸ See Foer, fn. 25.

⁴⁹ Id.

3.3 China's AML Does Not Protect SMEs Per Se

3.3.1 SMEs May Not Be Protected Due to Efficiency Considerations

The enforcement of antitrust laws may not always accord with the interests of SMEs. In many instances, large firms are more efficient and can afford the funds needed for innovation, thereby bringing down prices, improving the quality of existing products and possibly offering new products for consumers. It is acknowledged by the EU that agreements may restrict competition, but may also improve the quality of existing products and have the potential to develop new products or new services.⁵⁰ Article 15 of China's AML clearly states that any agreement with the following purposes shall be exempted from the application of articles 13 and 14 that prohibit monopoly agreements.

- (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 labour division;
- (3) For the purpose of enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized 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.

The exemption clauses appear to be quite generous, implying that large firms meeting certain criteria have a good chance of being granted antitrust immunity. In these clauses, efficiency has been given substantial consideration. There are three types of efficiency: allocative, dynamic and productive. Allocative efficiency is achieved when a firm employs the optimal level of resources using the most efficient technology, produces an output level that is socially desirable, and where the price of the product equals the firm's marginal cost. A monopoly agreement or a merger could result in allocative inefficiency and a deadweight loss. Dynamic efficiency involves introducing new products or adopting new processes of production. Productive efficiency relates to the most efficient use of the resources and production methods currently available to the firm. As a result, a given output can be achieved with least cost.

⁵⁰ See http://ec.europa.eu/competition/publications/consumer_en.pdf (last visited December 20, 2010).

The antitrust treatment of these three efficiencies is controversial. Given the important role played by the application of new production methods and equipment in the productive growth of industrial countries, some economists argue that dynamic efficiency should be given the highest priority, followed by productive efficiency. As a result, allocative efficiency is said to be of less policy importance.⁵¹ Bork takes the view that “the whole task of antitrust” is to “improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare”.⁵² To most economists, competition policy should seek to promote competition and to control abuses of market power by firms, and ultimately aims to increase efficiency, promote innovation, and improve consumer choice.⁵³ Many developed economies’ antitrust authorities have embraced these economic ideas in their decision-making. As a result, in the airlines industry, many airline mergers and alliances have gone unchallenged despite the opposition from smaller airlines.

Efficiency may also be a significant consideration in the merger review process. Article 28 of the AML implicitly mentions this. It states that the concentration may be allowed if it “will bring more positive impact than negative impact on competition, or the concentration is pursuant to public interests”.

In the Coca-Cola-Huiyuan case, MOFCOM considered the possible effect of the acquisition on technological advances and determined that the proposed concentration would damage competition and innovation in the juice market, although there was no quantitative analysis for this claim.

3.3.2 SMEs May Be Prosecuted under the Current AML And Its Implementation Rules

Despite agreeing that SMEs do not normally possess market power and that they should be exempted from competition provisions governing mergers and abuse of market power, Lin and Chen (2008) have pointed out that no firms should be

⁵¹ See Brodley, J.F., *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 New York University Law Review, 1020-1053(1987); Jorde, T.M. & Teece, D.J. *Innovation and Cooperation: Implications for Competition and Antitrust*, 4 The Journal of Economic Perspectives, 75-96 (1990); Jorde, T.M. & Teece, D.J., *Antitrust, Innovation and Competitiveness*, Oxford University Press, New York (1992).

⁵² Bork, R.H., *The Antitrust Paradox*. The Free Press, New York, NY, at 91 (1993).

⁵³ Kadiyali, V., Sudhir, K. & Rao, V.R., *Structural Analysis of Competitive Behavior: New Empirical Industrial Organisation Methods in Marketing*, 18 International Journal of Research in Marketing, 161-186 (2001).

exempted from prohibition of hardcore cartels involving price-fixing, market allocation, production and sales quotas, and bid rigging, as these practices generate more harm than benefit to society.⁵⁴ Also, the effectiveness of the antitrust laws would be diluted if some players were given full immunity.⁵⁵

Several complementary implementation regulations were issued by the NDRC and SAIC and became effective from 1 February 2011. These rules include NDRC's Regulations on Anti-Price Monopoly and Procedural Regulations on Administrative Enforcement of Anti-Price Monopoly, and SAIC's three sets of regulation: Regulations on Prohibiting Monopoly Agreements, Regulations on Prohibiting an Abuse of a Dominant Market Position, and Regulations on Prohibiting an Abuse of Administrative Power. The new regulations spell out the anti-competitive pricing and non-pricing conduct prohibited under the AML and what conduct might constitute an abuse of dominance. Apparently any firms, including SMEs, engaging in any price and non-price agreement, explicitly or tacitly, will be caught by these new implementation rules except those fall within Article 15 of the AML listed in previous section.

Both the AML and these new regulations prohibit industry associations from organising monopoly agreements. This has implications for SMEs as many of them are active members of the associations in China. The NDRC imposed a fine of RMB 500,000 on the Zhejiang Fuyang Paper Mills Association in January 2011 for facilitating price-fixing and output restriction activities, although the vice president of the Association argued that the rise in price was due to an increase in input prices and that the members wanted the Association to stop cut-throat competition in this industry.⁵⁶ This might be the first enforcement of the AML on a price cartel in China and a good lesson for SMEs. As China does not have an antitrust tradition, there is an urgent need for the industry associations and their members to be informed of the relevant laws and regulations. SMEs can be hurt as both buyers and sellers by big firms, but colluding or engaging in exclusive dealing facilitated by an industry association might render them liable to the AML.

As mentioned earlier, SMEs are generally not in a dominant position, nor do they possess the ability to exercise market power. However, SMEs should understand that whether market power is being used depends on how the

⁵⁴ See Lin and Chen, fn. 42.

⁵⁵ Bhatia, G.R., *Small & Medium Enterprises (SMEs) & The Role of The Competition Commission of India*. Luthra & Luthra Law offices, New Delhi (2008). Available at <http://www.luthra.com/pdf/SMEs-and-Role-of-CCI.pdf> (last visited January 10, 2011).

⁵⁶ Guan, P. & Lu, M., *Fuyang Paper Mills Association Fined by RMB500,000*. Dongfang Daily, 5 January (2011). Available at <http://www.p5w.net/news/cjxw/201101/t3384986.htm> (last visited December 12, 2010).

regulators define the relevant market. Market definition involves the delineation of a set of boundaries in both geographic and product spaces. Generally, the more narrowly the market is defined, the more likely a firm or firms will be found to have market power. Firms are thus prone to advocate wider definitions than those adopted by competition authorities.

Vesterdorf (2001) noted that an abuse of dominance may have a relatively local or regional character in the EU and there is no *de minimis* rule if an abuse of market dominance is detected in the defined market.⁵⁷ A SME may produce a niche-product that is not easily copied and produced by other firms. A small service provider may charge high prices at a location where other competitors have difficulty in entering. This will certainly place the SME in a dominant position in that market and accordingly it may be caught by the AML and its implementation rules.

3.3.3 Does “Public Interest” Shield SMEs?

Terms such as “welfare” and “public interest” (or public benefit) have been frequently mentioned in competition statutes. In China’s AML, “public interest” is actually one of the goals stated in Article 1. Article 28 allows an approval to be granted for a proposed concentration that is in accord with the public interest. However, Round and Zuo (2008) warn that care must be taken in interpreting these terms.⁵⁸ Consumer welfare is only part of the public interest and the latter bears a much broader meaning that is open to different interpretations, “especially with respect to the weights to be given to the benefits and costs of possible outcomes and to the distribution of benefits and costs”.⁵⁹ “Public interest” does not necessarily mean the same thing as economic efficiency.⁶⁰ To some regulators, there is a trade-off between them. For example, economic efficiency can be compromised if the “public interest” goal is pursued. It is often up to the regulator and the court to define the meaning of “public interest”. The Australian Competition Tribunal has determined that the term “public benefit” should be given its widest possible meaning.⁶¹ In practice, the Australian Competition and Consumer Commission (ACCC) tends to discount benefits if

⁵⁷ Vesterdorf, P.L., *Competition Policy and SMEs: The Case of Denmark Within the European Union. Trade and Industrial Policy Strategies*, 2001 Annual Forum, Misty Hills, Muldersdrift (2001).

⁵⁸ See Round & Zuo, fn. 2.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See the *Qantas/Air New Zealand* case decision paragraphs 177-185 for a summary of the interpretation of “public benefit”, *Qantas Airways Limited* (2004) ACompT 9, available on ACT website <http://www.act.gov.au> (last visited March 20, 2011).

they are not in a form of direct benefits to consumers.⁶² As a result, “efficiencies in the form of cost savings tend to be discounted by the ACCC if they are not substantially passed through to consumers in the form of lower prices or improved services”.⁶³

Some examples of “public interest” such as “conserving energy, protecting the environment and relieving the victims of a disaster” are given in Article 15 of China’s AML. However, these are only part of the “public interest” and this concept remains ambiguous due to the ambiguous wording used in the AML. For example, Li and Han (2010) noted that some clauses in Articles 27 may have relevance to public interest such as considering “the impact of concentration on entry and innovation”, “the impact on consumers and other business operators”, and “the impact of concentration on national economic development”.⁶⁴ They also inferred the possible meaning of public interest from the decision of the Coca-Cola-Huiyuan Case, which includes: the interests of consumers, the interests of all competitors for fair competition and the interests of the whole industry and the national economy. Further clarification and interpretation may have to be left to the antitrust agencies in the future enforcement of the AML.

The implications of the lack of a systematic and transparent interpretation of the term “public interest” are twofold. On the one hand, it could be taken as an excuse to protect state enterprises and certain monopoly industries. On the other hand, it means that there is a role to play for SMEs in arguing for their own interests. In fact, SMEs are consumers when acquiring inputs for their own production. In addition, to keep markets competitive, ideally a core number of SMEs is needed in the market, or at least potential entry by them should be feasible or possible. These considerations could fall within a broad category of public interest and should be considered by the decision-makers.

On 15 July 2009, MOFCOM enacted the Measures for the Examination of the Concentration of Business Operators (which came into effect on 1 January 2010), explicitly indicating that “MOFCOM may conduct a hearing to carry out the investigation, collect evidence and listen to the opinions of relevant parties during the examination”. Therefore, an SME can file an objection against a proposed merger or request divestiture of part of the assets or business of the participating business operators. An SME may apply for access to licensing

⁶² Fallon, J., *ACCC’s Authorisation Decisions: Interpretation of Public Benefit*, 12 *Agenda*, 335-350 (2005).

⁶³ *Id.*

⁶⁴ Li, X. L. & Han, Y.X., *An Inference of “Public Interest” from the Coca-Cola-Huiyuan Case*, 2 *Forum of Law on SEZ* (2010).

technologies including patents, know-how and other intellectual properties as compensation to mitigate the damage as a result of the concentration. SMEs should take full advantage of the AML and these complementary rules to maximise their own welfare.

4 Conclusion

Any business, no matter what size and no matter what sector it operates in, should have a good understanding of the competition laws of its own country as well as those of the countries it does business with to avoid conduct that is banned by the laws. This paper has reviewed the competition policy of the US, EU and China, with an emphasis on China's AML and its implications for SMEs. Despite a tendency towards the goal of promoting economic efficiency that is advocated by economists and in turn embraced by many countries, it appears that China's AML still focuses on a range of goals including the ambiguous "public interest". Contrary to the popular view that SMEs benefit from the competition laws, worldwide evidence shows that they are reluctant to get involved in antitrust litigations against large firms because of the possible high legal costs and time and energy involved. At the same time, there is also an urgent need to promote an awareness of antitrust compliance in China and educate SMEs on how to avoid breaching the new antitrust regulations. SMEs should take full advantages of the AML and its implementation rules to fight for their own interests and gain equal opportunities for market access.