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ARTICLE

RULE OF LAW IN CHINA — LEGISLATION REASONING AND ENFORCEMENT OF ANTI-MONOPOLY LAW IN CHINA AND THE WEST

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It is a long debate over whether rule of law is reliable in China, when some Chinese regulations are considered to be decided for political interests rather than the law itself. Furthermore, Chinese court decisions are often criticized for not according with statutes, even though the latter are properly written. The author examines these issues by comparing the legislation reasoning and enforcement of competition law in China, the European Union and the United States, which will not lead to endorsement of or objection to the view that rule of law is properly enforced in China, but it shall be an inevitable responsibility for the Chinese judiciary to demonstrate efforts it has taken.

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INTRODUCTION

This paper will discuss the issue of rule of law in China by studying the Anti-monopoly Law legislation and its enforcement. The Anti-monopoly Law is an ideal platform for this study not only because it is a relatively new branch in Chinese law and designed by Chinese legislators with most updated

mindset, but also because of the involvement of foreign entities.

The study attempts to identify potential barriers for foreign investors caused by Chinese law, and explores why difference of legal objective exists. The author will also discuss future development of Chinese law and whether there is any protection and remedy for foreign investors under the current Chinese law.

It has been a long debate on whether rule of law is reliable in China, when some Chinese regulations are considered to be designed for political interests rather than the law itself. In academic standard, there are two major contrary views on the above matters in the academic circle. On the one hand, foreign scholars believe that law is merely a tool for Chinese government to achieve its political goals, as is so-called "rule by law." On the other hand, Chinese scholars argue that foreign colleagues misunderstand Chinese laws because they do not truly understand Chinese law principles.

Foreign investors became concerned about the Chinese legal environment when the Anti-monopoly Law of China entered into effect in 2008.[1] They believed that this law would put them into a disadvantaged position and would not be used in the original scope of the statute.

The first famous case applying the Anti-monopoly Law tells its own tale. When the Coca Cola failed to acquire the Huiyuan Juice, a reason given by the Ministry of Commerce (MOFCOM) in the decision was "protecting the competitive power of local entities." It is a common consent that protecting local industries is prohibited under international trade arrangements. The Chinese government used anti-trust laws to shield local industries. It would make foreign investors consider more seriously before they decide to acquire any Chinese businesses. The MOFCOM was questioned whether the decision was made according to the law, or was merely a political decision, in spite of the reasonable right that Coca-Cola, a foreign entity, had. Foreign investors questioned the rule of law in China after this case when local protectionism was considered the objective of the enforcement of the Anti-monopoly Law in China in substance.[2]

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[1] *The Anti-monopoly Law* (P.R.C.), art. 57 (2007).

[2] See Anu Bradford, *Chinese Antitrust Law: The New Face of Protectionism?*, Huffington Post, Aug. 10, 2012, at http://www.huffingtonpost.com/anu-bradford/chinese-antitrust-law-the_b_116422.html (last visited Jun. 12, 2012).

Some extreme foreign scholars even concluded that there was no rule of law in China.[3] It was unlikely for a country to have a stable economic development in the past 30 years without legal protection. However, Chinese legal scholars claim that the Chinese law only provides a generally accepted framework only, and it can be challenged when the application of such laws is not generally accepted according to international standards.

Unlike the "closed-door era" before the 1970's, China, with the more robust economy in the present time, cannot ignore the importance of international law development, especially that relating to business and trade, which, to some extent, is governed by international treatment. Chinese government has to consider the interests of foreign organizations and individuals rather than domestic parties only.

When designing the statute and deciding Anti-monopoly Law cases, Chinese law makers and enforcers claimed to have referred to their foreign counterparts.[4] Also the Competition Law in the European Union and the Antitrust Law in the United States, the two largest economic entities in the world with well-established experience in anti-monopoly environment protection, provide an objective standard for measuring Chinese Anti-monopoly Law. By comparing relevant laws and cases of China, Europe and the US, it is easy to distinguish whether China uses laws to achieve political goals, as foreign scholars criticized.

This article is divided into three parts:

The first part focuses on legislation by outlining the reasoning of the Anti-monopoly Law of China (Chapter I), of Europe and the US (Chapter II) and comparing the Chinese Anti-monopoly Law reasoning with that of Western countries at statute level (Chapter III).

The second part examines the application of the Anti-monopoly Law by

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[3] See Mike McConville, *Criminal Justice in China*, Edward Elgar (Cheltenham), at 425–54 (2011).

[4] The National People's Congress of the People's Republic of China, *The Statement of the People's Republic of China Anti-monopoly Law Legislation (Draft)*, at http://www.npc.gov.cn /wxzl/gongbao/2007-10/09/content_5374671.htm (last visited Oct. 31, 2011); *The 5th Meeting of the National People's Congress of the People's Republic of China 10th Conference*, at http://www.npc.gov.cn/wxzl/gongbao/2008-02/23/content_1462462.htm (last visited Oct. 31, 2011).

researching on leading cases of China, especially the application to merger and acquisition issues (Chapter IV), followed by isolating key issues from comparison of relevant cases of European and the United States in merger and acquisition (Chapter V).

In the third part the author further analyzes if the legislation of China and Western countries is not materially different, why there are different outcomes under similar legal objectives, and whether it is the question of rule of law in China by reviewing the enforcement of the Chinese Anti-monopoly Law (Chapter VI).

I. LEGISLATION REASONING OF ANTI-MONOPOLY LAW OF CHINA

A. Introduction — Competition Law as an Indicator for Rule of Law Measurement

It may never be an easy task to measure the concept of rule of law. The test becomes more complicated when a single indicator is not applicable to all countries where individual political environment and legal systems are special in nature.[5]

Even if the simplest definition of rule of law, "the sovereignty or supremacy of law over man"[6] is adopted, there still lacks a universal standard when the law itself is made under cultural and political influence.[7]

Western countries often criticize other countries for having laws inconsistent with the universal value, such as Islamic matrimonial laws, or Chinese laws affected by socialist leadership, without realizing that such inconsistency results from cultural difference instead of rule of law.

For this reason, it is not sufficient to determine rule of law by merely viewing the reasoning of statutes. It is also necessary to observe whether judgments made by the judiciary are in accordance with law or influenced by

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[5] Hilaire A. Barnett, *Constitutional & Administrative Law*, Cavendish Publishing Ltd. (London), at 73–74 (2002).

[6] Id.

[7] Randall P. Peerenboom ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US*, Routledge (London), at 109–11 (2004).

other factors such as political objectives.

It shall not be a good starting point to determine rule of law by public laws, as it highly interacts with domestic political, historical and cultural realities of the country. Because of different understanding of legal reasoning, foreign scholars often simply conclude the Chinese situation as default of rule of law, when the domestic law contradicts to general environment outside the country.

Foreign scholars are commonly found to believe that rule of law does not exist in China, when the Preamble of the China's Constitutional Law ensures the right of leadership of the Chinese Communist Party, for example. Law in China becomes a tool for the Chinese government to achieve its own purposes instead of a system to ensure rights of every individual.[8] The US is often criticized for its rule of law because it still allows people's possession of weapons after school shooting cases,[9] and citizens' possession of weapons is protected by the Second Amendment to the United States Constitution.

The foundational default of arguments above is that the Communist-Party-Leading Constitution in China and right to keep and bear arms under the United States Constitution Second Amendment is not a question of rule of law,[10] but the legislation reasoning of the statutes.

The original meaning of rule of law is "the sovereignty or supremacy of law over man."[11] When Chinese courts make decisions for the interests of the Chinese Communist Party, or when American courts do not prohibit gun selling although heavy arm crimes are rampant, there is no default of rule of law as the court simply enforces the law according to its sovereignty or supremacy. It may not be easy for foreign people to accept ideas of these domestic laws.

Comparably, international business laws, such as competition policy or intelligent property laws, shall be a preferred platform for determining

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[8] See Lowell Barrington Michael, *Comparative Politics: Structure and Choice*, Cengage Learning, at 214 (2009).

[9] J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 254 –323 (2009.

[10] Brannon P. Denning, *Can the Simple Cite Be Trusted? Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 Cumb. L. Rev. 961–1004 (1996).

[11] Id.

legislation and enforcement of laws, as all countries perform business activities in accordance with the same principles, which relatively reduces involvement of political factors.

As Michal Gal described the international competition environment, "no country is an island, entire of itself."[12] No country may isolate itself. The legislative and judiciary entities cannot design and enforce competition laws without considering the interests and attitude of foreign individuals. As attracting foreign investment is one of the pillars of the Chinese government's "modernization policy,"[13] foreign investors are essential stakeholders for deciding the Chinese market legal environment.

Thomas Bingham listed eight sub-rules to describe rule of law: (1) The law must be accessible and so far as possible intelligible, clear and predictable; (2) questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion; (3) the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation; (4) the law must afford adequate protection of fundamental human rights; (5) means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve; (6) ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers; (7) adjudicative procedures provided by the state should be fair; and (8) the existing principle of rule of law requires compliance by the state with its obligations under international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.[14]

Except the first rule which covers both legislative and judiciary issues,

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[12] Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 Fordham Int'l L.J. 1 (2009).

[13] Dongtao Zou & Ouyang Rihui, *China: 30 Years of Reform of Ownership (1978–2008)*, ch. 2, Social Sciences Academic Press (Beijing), 2008.

[14] Thomas Bingham, *"The Rule of Law" Text Script*, Center for Public Law, Cambridge University, at http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php (last visited Mar. 12, 2013); see also Thomas Bingham, *Rule of Law*, Penguin Books Limited, 2011.

rule of law shall be mainly a matter of fairness of judiciary to everyone under a clear law, which conforms to human right and international universal value. It is relatively rare for a country to design a law obviously contradicting the latter, including the Chinese Anti-monopoly Law. This study therefore mainly focuses on the issue of enforcement.

Although rule of law is a question of how courts make judgments, to find the answer, it is necessary to look deep into the legislation in order to understand and determine how judgments are made. The author will study in this way the case of Chinese Anti-monopoly Law contradicting to the general practice in the world.

The Chinese Anti-monopoly Law is an ideal standard for determining rule of law in China not only because it is a kind of international private laws sharing the same value with other jurisdictions, but also it is a relatively new subject in Chinese law which came into force in 2008.[15] A new business law shall be less affected by historical and political traditions than laws in other areas.

Part I discusses the common mistake of confusion between legislation default and rule of law, consisting of Chapter I and II. The author will compare the statutes to find out whether there is any contradiction between statutes of competition law in China and the Western countries. Part II, consisting of Chapter III and IV, focuses on court decisions. Later chapters will explore the reasons of the problems and solutions.

By this structure, problems identified, if any, will fall into one of the categories: As a problem of legislation default if Chinese Anti-monopoly Law is not well established, or a problem of rule of law if the statute is properly enacted but the court does not follow the statute, or a problem of failure to keep to the standard by both the legislative and the judiciary.

B. Legislation Background of the Chinese Anti-monopoly Law

In the first few decades of the People's Republic of China (PRC), monopoly was not considered as a problem, and it was even taken for granted under the planned economy. The Chinese government adopted a structure in

[15] *The Anti-monopoly Law* (2007) (P.R.C.), art. 57.

the opposite direction to open competition environment by enhancing the market share of large state-owned enterprises and reducing proportion of private-owned entities.

The situation became more extreme in the mid-1950s under the *Public-Private Joint Management Policy* ("the PPJM Policy"), when the *Interim Act for Public-Private Joint Management of Enterprises* ("the PPJME Act") was adopted in 1954, and the Public-Private Joint Management Movement happened in 1956. The primary objective of the PPJM Policy was to achieve equalitarianism. Therefore, the huge fortress of the barons with private-owned enterprises should not be allowed.

The initial stage of enforcing the PPJM Policy was introducing state ownership into private-owned companies in 1949 under the PPJME Act in August 1954.

Policies in the early stage were relatively moderate. Under the 1954 Act, albeit the government shared part of the ownership,[16] managed[17] and discussed appointment of senior management[18] of companies, the 1954 Act explicitly recognized and protected the right of shareholders,[19] and accepted investment from private funds into Public-Private Joint Management entities.[20]

The circumstance dynamically changed in 1956. In order to achieve the goal of equalization of wealth under communism as soon as possible, owners of private business entities transfer their right for receiving 5% annual dividends of companies under the "Public-Private Joint Management Policy in All Industries." announced by Mao Zedong, the chairman of the P.R.C. on 16 January 1956.[21]

The Chinese government even revoked this arrangement by obtaining the right of all shares in 1966, after merely paying 5% annual dividends, ten times, i.e. 50% of the total cost, when the Cultural Revolution caused

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[16] *The Interim Act for Public-Private Joint Management of Enterprises* (1954) (P.R.C.).

[17] Id. 9.

[18] Id. 11.

[19] Id. 3.

[20] Id. 7.

[21] Net Ease, Made in China, *Public-Private Joint Management (1956)*, at http://news.163.com/09/0729/17/5FDIP8U600013HPO.html (last visited Jan. 1, 2012).

extreme political environment.[22]

The PPJM Policy itself was regarded as unreasonable. The management personnel assigned to represent the government did not have sufficient professional knowledge and skills. Also the policy had negative impact on enterprisers when their profits and shares were transferred to the government. Some owners of companies suffered losses even regarded the PPJM Policy as a channel to terminate their business and recovered part of their costs.

After completion of the PPJM Policy, all entities in China primarily belonged to the government. Competition law was futile when monopoly by the government was regarded as a matter of course under the communism doctrine.

The situation changed after Mao's death, when the then economic policy nearly destroyed the economy of China,[23] including but not limited to the PPJM Policy. Competition emerged when private entities became a component in Chinese market again after the reform and opening-up policy was adopted in 1978. A series of foundational business laws were passed and enforced in the 20th and 21st centuries to meet new challenges, such as the Property Law in 2007,[24] which recognizes individual rights to private assets, which had not been recognized under Communism. The legislation of competition law was an essential component for Chinese law development which allows private sectors to participate in the Chinese market.

However, state-owned enterprises were still in absolute advantageous position in the market. In 2008, the Chinese Anti-monopoly Law came into effect. According to the List of Top 500 Chinese Enterprises,[25] 331 were state-owned ones and all the top 14[26] were owned by the state in terms of

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[22] The United Front Work Department of the CPC Central Committee and the Ministry of Commerce of the P.R.C., *Notice of Solutions for Demanding and Occupying Forcibly Enterprises and Properties under the Public-Private Joint Management Policy*, Feb. 25, 1983, at http://www.law110.com/law/lishi/28046.htm (last visited Jan. 3, 2012).

[23] See Jisheng Yang, *Tombstone: The Great Chinese Famine in 1960s*, Cosmos Books (Hong Kong), 2008.

[24] The Property Law, art. 247 (P.R.C.).

[25] People's Daily Online, *Proportion of Public-Owned Companies in Top 500 Declines* (Sept. 1, 2008), at http://mnc.people.com.cn/GB/7756923.html (last visited Jan. 5, 2012).

[26] Xinhua News Agency, *The 2008 Complete List of Top 500 Enterprises of China* (Aug. 30, 2008), at http://news.xinhuanet.com/fortune/2008-08/30/content_9740507.htm (last visited Jan. 5, 2012).

turnover. The problem of domination by state-owned enterprises also exists in some industries, especially those with "notional security concerns," such as energy, telecommunication and banking.[27] Monopoly by public entities was one of the key special natures in the Chinese competition environment which became an issue for legislators to consider when making the Anti-monopoly Law.

C. Statutes of the Chinese Anti-monopoly Law

The only statute of the Chinese Anti-monopoly Law is the 2008 Anti-monopoly Law. It consists of 8 chapters,[28] namely,

I. General Provision (Articles 1–12)
II. Monopoly Agreement (Articles 13–16)
III. Abuse of Dominant Market Position (Articles 17–19)
IV. Concentration of Undertakings (Articles 20–31)
V. Abuse of Administrative Power to Eliminate or Restrict Competition (Articles 32–37)
VI. Investigation into Suspected Monopolistic Conducts (Articles 38–45)
VII. Legal Liabilities (Articles 46–54)
VIII. Supplementary Provisions (Articles 55–57)

In the first chapter, the Statute outlines the objective[29] and the scope[30] of the Anti-monopoly Law. It should be noted that Article 7 and Chapter V, to be discussed in the next chapter of this paper, act as an inter-related dilemma. On the one hand, Article 7 maintains "the industries which are under the control of the state-owned economic sector and having a bearing on the lifeline of national economy and national security and the industries which exercise monopoly over the production and sale of certain commodities according to law, the state shall protect the lawful business operations of undertakings in these industries."[31] On the other hand, Chapter V excludes privileges of state-owned entities and administrative sectors if their

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[27] Xinhua News Agency, *The Chinese Communist Party's Exploration of Development and Reform of State-Owned Enterprises* (Sept. 14, 2011), at http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/energy/2011-09/14/c_122033923.htm (last visited Jan. 7, 2012).

[28] The full text of the Law is in Appendix I.

[29] The Anti-monopoly Law (2007) (P.R.C.), art. 1.

[30] Id. 2–11.

[31] Id. 7.

businesses are not within the scope of the lifeline of national economy and national security.

The second chapter provides definition[32] and possible defenses[33] of monopoly agreement.

The third chapter defines abuse of dominant market position.[34]

In the fourth chapter, the statute defines concentration of undertakings as (1) merger of undertakings; (2) control over other undertakings gained by an undertaking through acquiring their shares or assets; and (3) control over other undertakings or the ability capable of exerting a decisive influence on the same gained by an undertaking through signing contracts or other means.[35] The chapter provides for business entities' declaration to the authority for enforcing the Anti-monopoly Law[36] and procedures.[37]

The fifth chapter, "Abuse of Administrative Power to Eliminate or Restrict Competition,"[38] as stated above, is a provision for the special circumstance in China, as the government and state-owned enterprises dominate some industries in the country because of historical reasons. It may be difficult, or even impossible, for individual investors to compete in the market if governmental entities are not restricted in making use of their administrative power.

The sixth chapter lists the power, procedures and methods of how the anti-monopoly authority investigates cases of suspected monopolistic conducts.[39]

The seventh chapter states liabilities on suspected monopolistic conducts, including cancellation of registration,[40] fine[41] and civil liabilities.[42] This

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[32] Id. 13, 14 and 16.

[33] Id. 15.

[34] Id. 17–19.

[35] Id. 20.

[36] Id. 21–22.

[37] Id. 23–31.

[38] Id. 32–37.

[39] Id. 38–45.

[40] Id. s46.

[41] Id. s46–49.

[42] Id. s50.

chapter also provides for liabilities on misconduct of administration sectors and investigators,[43] additional liabilities on defendants refusing to provide related materials and information[44] and appeal procedures.[45]

The eighth chapter, the supplement provisions, defines extension of the Anti-monopoly Law to intelligent properties[46] and agricultural production,[47] followed by the effective date.[48]

D. Reasoning of the Chinese Anti-monopoly Law

The foundational reasoning of the Chinese Anti-monopoly Law, as Michal Gal views on international competition law,[49] is the common concern of monopoly as legislators in other jurisdictions, thus prohibiting anti-competition behaviors, and additional contents to fulfill domestic needs in the unique environment in China.

There are three primary reasons why the Chinese government adopted the Anti-monopoly Law, in responding to the market-oriented economy since the enforcement of the opening-up policy. First, anti-competition actions such as monopoly agreement, abuse of dominant market position, over-concentration of undertakings and abuse of administrative power by government officials, covered by the four main chapters of the Anti-monopoly Law, have become concerns of stakeholders in Chinese market. Second, globalization may cause monopoly. Enterprises become sizeable after merger and acquisition activities and that may result in domination. Third, the statute provides governmental departments and participants in the market with a clear guideline to understand how to maintain fair competition and to define individual rights in the market.[50]

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[43] Id. s51 and 54.

[44] Id. 52.

[45] Id. 53.

[46] Id. 54.

[47] Id. 55.

[48] Id. s56.

[49] See fn. 12.

[50] CAO Kangtai (Director of the Legislative Affairs Office of the State Council of the P.R.C.), *Explanation of the Anti-monopoly Law (Draft)*, Presentation in the 22nd Meeting of the 10th Standing Committee of the National People's Congress (Feb. 24, 2006), Preamble.

The government also highlights four considerations for the anti-monopoly legislation. First, the Law shall prohibit anti-competition behaviors generally unaccepted by the international community, subject to the special circumstance in China when the country is still in a developing status. Second, the Law shall enhance competition among market participants, in accordance to the policy of the central government. Third, competition shall be a tool for market competition development but the country's interests and citizens' essential living materials shall not be harmed. Fourth, the current law is subject to further development because the Chinese government is not experienced in this area.[51]

It may not be so meaningful to comment objectivity and efficiency of the Chinese Anti-monopoly Law at statute level, and to what extent the Law is subject to domestic conditions as listed in the above considerations, without referring to the international law.

Comparison with international law is more critical. Law makers claim that they have taken relevant contents of international law into account when designing the law. Foreign investors act as participants in the Chinese market. Their interest is highly affected by the Law. An analysis of the statute will be provided in Chapter II after reviewing the competition policy in the European Union and the United States.

II. LEGISLATION REASONING OF COMPETITION LAWS OF THE EU AND THE US

A. Introduction — Grounds of Using Competition Rules in Europe and the US When Evaluating Chinese Anti-monopoly Law

The reason that the author compares the EU Competition Law and the US Antitrust Law while studying the Chinese Anti-monopoly Law is that Chinese law makers referred foreign laws for drafting the statute, and that foreign laws provide units of measurement to assess whether the Law matches the usual practice of the world.

Objectively, it may be abstract to ask whether the Anti-monopoly Law of China conforms to rule of law. It shall be a solid ground to conclude that the

[51] Id. Part 1.

Chinese law is reasonable or not if it obtains any unusual element in comparison with the European or American law.

Subjectively, it shall not be sufficient even if all Chinese people are satisfied with its Anti-monopoly Law, when foreign investors are stakeholders of Chinese market who actively participate in business activities. It is not sufficient for Chinese legislators to introduce laws that merely consider Chinese business people without any regards to foreigners whose interests are affected by the Chinese law. The best way to comfort foreign investors shall be that the Chinese laws correspond with laws of their homeland that they are familiar with.

Using European and American laws to examine the Chinese Anti-monopoly Law will provide stakeholders of Chinese law ideas of how a well-established competition law system shall be, and will fulfill the above two reasons.

The economic powers of the European Union and the United States, the first two largest economic entities in terms of gross domestic product (GDP) in 2011,[52] which represent 19.50%[53] and 19.05%[54] respectively in the world, enable them to be the most powerful jurisdictions in the aspect of economic laws.

Not surprisingly, the European Union and the United States are the two largest business partners of China, who contributed 14.45%[55] and 11.33%[56] of total turnover of import and export of China in 2011.

From both the law and economy point of view, the European Competition

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[52] The Central Intelligence Agency (CIA), *The World Factbook — Country Comparison: GDP (Purchasing Power Parity)*, at https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html (last visited Mar. 12, 2012).

[53] Id. USD 15,390,000,000,000 (EU GDP) / USD 78,935,831,010,000 (World GDP) = 19.50%.

[54] Id. USD 15,040,000,000,000 (US GDP) / USD 78,935,831,010,000 (World GDP) = 19.05%.

[55] In thousand USD: (567,212,833 + 211,193,001) / (3,642,058,581 + 1,743,458,742) = 14.45%, see The General Administration of Customs of the P.R.C., *Import and Export Statistics of China by Countries (Regions)*, Dec. 2011, at http://www.customs.gov.cn/publish/portal0/tab44602/module108994/info348295.htm (last visited Mar. 12, 2012).

[56] Id. In thousand USD: (446,646,663 + 122,153,945) / (3,642,058,581 + 1,743,458,742) = 11.33%.

Law and the US Antitrust Law are the best references for assessing the Chinese Anti-monopoly Law. It would not be sufficient to ignore anyone of them in order to reach an all-round conclusion.

B. Background of European Competition Law

The Rules in the Competition Sections, which enhance a fair competition environment among European countries, are part of the European Union Treaties (EU Treaties),[57] which are the foundational legal basis of laws in the European Union.[58]

Because of its special nature, the European Union (EU) Law is always a typical example in the discussion of conflicts and interactions between international law and domestic law, as enforcement of the EU Law, an international treaty, may negate sovereignty of individual countries.[59] Concerns and solutions of this conflict in Europe will be discussed in later chapters, as this experience may provide a reference to law makers of China concerning the relationship between domestic laws, Chinese Anti-monopoly Law for example, and the global economic environment.

The anti-monopoly provisions in the European treaties were introduced in The Treaty establishing the European Coal and Steel Community (ECSC, or called the Treaty of Paris of 1951) and enforced in 1952 because of pure economic concern but not for political reason. The participants of the agreement decided to prevent dominating production of coal and steel as what it did before the Second World War, by the "Agreement and Concentration" in Articles 65 and 66 of ECSC, when they believed that it was one of the reasons contributing to the outbreak of the War.[60] Remedies may be available when actions of member states "might have noticeable

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[57] Vivien Rose & Peter Roth eds., *Bellamy & Child: European Community Law of Competition: Second Cumulative Supplement*, 6th edition, Oxford University Press (Oxford, N.Y.), at 2–9 (2012).

[58] The European Union, *EU Treaties*, at http://europa.eu/about-eu/basic-information/decision-making/treaties/index_en.htm (last visited Mar. 12, 2012).

[59] See A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law*, 15th Edition, Pearson Education Limited (Essex), at 409–11 (2011).

[60] See Anestis S. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge University Press (Cambridge), at 12–13 (2010).

repercussions on the conditions of competition in the coal and steel industries," according to the "Impairments of the Conditions of Competition" in Article 68.[61]

The scope of the "Agreement and Concentration" Section expands in the Treaty, establishing the European Economic Community (TEC, or the Treaty of Rome 1957), effective in 1958. The "Rules of Governing Competition" Section, Articles 85 to 94, is the major fountainhead of current competition rules in the European Union.

The basic difference between the Treaty of Paris and the Treaty of Rome is that subject matters prohibited in domination are not merely limited to coal and steel,[62] but extended to "any agreements between undertakings, decisions by associations of undertakings and any concerted practices which may affect trade between Member States (with the common market)."[63]

Other than price fixing, restriction or control of productions and market sharing, three conditions covered by the Treaty of Paris, the Treaty of Rome also extends its power to anti-competition acts by unequal terms of transaction and uncorrected subject of the conclusion of a contract.[64]

New provisions in the Treaty of Rome also prohibit enterprises from taking improper advantage of a dominant position within the Common Market,[65] public enterprises[66] and aids granted by states.[67] Subject to some minority adjustment and reordering of articles, the Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts (Treaty of Amsterdam 1997) took effect in 1999, based on previous provisions.[68]

The current statute authority of the European Union Competition Law consists of a serial of Sections in Treaty on the Functioning of the European

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[61] *Treaty of Paris*, 67(1)–(3) (1951) (Eur.).

[62] Id. 65(1).

[63] *EEC Treaty*, 85(1) (1957) (Eur.).

[64] Id.

[65] Id. 86.

[66] Id. 90.

[67] Id. 92–94.

[68] *Treaty of Amsterdam*, 81–89 (1997) (Eur.).

Union (TFEU, or Treaty of Lisbon 2007), mainly outlined by Articles 3, 14,[69] 119[70] and 346[71][72] and governed by Articles 101–106, Section on Rules Applying to Undertakings.[73] The Section on Aids Granted by States, Articles 107–109,[74] is also an essential component of competition policy.

C. European Competition Law

1. The EC Treaty. — The main source of the European Competition Law is stated in Articles 101–106 of the Section on Rules Applying to Undertakings in the TFEU, in particular Articles 101, 102 and 106.[75]

Article 3 tells the objective of the whole competition rule, as to be discussed in later part of this chapter. Article 14 also provides for a general objective of the European Community Law that it shall "place occupied by services of general economic interests in the shared values of the Union as well as their role in promoting social and territorial cohesion."[76]

Other than the general objective of economic policies, Article 119 stipulates four guiding principles, which are stable prices, sound public finances and monetary conditions and a sustainable balance of payments.[77]

Article 346 states that when enforcing the Treaty, "no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security, and any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war materials."[78]

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[69] Ex-16.

[70] Ex-4.

[71] Ex-296.

[72] The European Commission, *EU Competition Law: Rules Applicable to Antitrust Enforcement, Volume I: General Rules*, B5–6 (Brussels, 2011).

[73] *Treaty of Lisbon* was effective in 2010 after it was passed in 2007. The Rules on Competition law Section was formerly called Article 81–89 in the *Treaty Establishing the European Community* (TEC).

[74] Ex-87-89.

[75] See fn. 68.

[76] *Treaty of Lisbon*, 14 (2007) (Eur.).

[77] Ex-119.

[78] *Treaty of Lisbon*, 349 (2007) (Eur.).

Article 101 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object an effect of prevention, restriction or distortion of competition within the common market."[79] Any agreements or decisions prohibited pursuant to this scope shall be automatically void.[80]

However, the Article also provides for exceptions that any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, or any concerted practice or category of concerted practices may not be covered if it contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, provided that it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or afford such undertakings the possibility of eliminating competition in respect of a substantial part of products in question.[81]

Article 102 prohibits "any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it… as incompatible with the internal market in so far as it may affect trade between Member States."[82]

The objective of Article 102 is so similar to that of Article 101, except that Article 102 aims at unilateral conduct by undertakings, while Article 101 focuses on corporations.[83] Moreover, there is no equivalent exemption provided for by Article 102 as by Article 101.[84]

Articles 103–106 may be regarded as supplements to Articles 101 and 102. Article 103 states that the Council shall lay down appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102, on the basis of a proposal from the Commission and after consulting the

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[79] Id. 101(1).

[80] Id. 101(2).

[81] Id. 101(3).

[82] Id. 102.

[83] See fn. 57 at 14.

[84] Id.

European Parliament.[85]

Article 104 states that "the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102."[86] However, when all areas of economy have been covered by Regulation 1/2003, the function of Article 104 is now replaced.[87]

Article 105 states that the Council shall ensure the application of the principles laid down in Articles 101 and 102, and provides investigation mechanism for infringement of these principles.[88]

As a federation, it is necessary for the Commission to ensure that individual countries' domestic law does not contradict the EU Competition Rules by adopting Article 106.[89]

Articles 107–109, "State Aid," focus on the obligation level of the competition law instead of the individual level.[90]

The competition rule does not limit its power to maintaining a fair environment of the common market by controlling private sectors, but also member states, as it may harm fairness of competition if domestic governments intervening in the market.[91]

Peter Roth and Vivien Rose break down Article 107(1) into the following five elements in order to constitute a state aid charge: (1) an advantage, (2) granted by a member state or through state resource, (3) favoring certain undertakings or the production of certain goods, (4) distorting competition, and (5) affecting inter-state trade.[92]

The state aid issue is a core concern for discussions in the coming chapters, as the main criticism of foreign countries about the Chinese

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[85] *Treaty of Lisbon***,** 103 (2007) (Eur.)

[86] Id. 104.

[87] *Council Regulation* (EC) No. 1/2003 (Eur.); see also fn. 57 at 15.

[88] *Treaty of Lisbon*, 105 (2007) (Eur.)

[89] Id. 106.

[90] Id. 107–09.

[91] See fn. 57 at 1497.

[92] Id. 1504.

government is that the latter enhances advantage of domestic enterprises by using the Anti-monopoly Law.

2. The EU Modernization Regulation of 2003. — For establishing a system to ensure competition in the common market is not distorted, the European Union issued the "Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty" (Regulation 1/2003), for the purpose of enhancing enforcement of Articles 81 and 82 (current 102 and 102) of the EU Treaty.[93]

Regulation 1/2003 is a regime for the special structure of European law as it is an international agreement applying to individual countries. It conveys part of the enforcement rules and procedures from the central Commission to courts of individual countries.[94]

Regulation 1/2003 divides duties of enforcing competition law into two tiers: The Commission focuses on the important fight against cartels and other serious violations of antitrust rules,[95] while national competition authorities and courts are empowered to apply EC competition rules in their entirety.[96] The latter are required to apply EC antitrust rules to cases that affect trade between member states.[97]

In order to enhance cooperation between entities in these two tiers, the European Competition Network (ECN) is established in-between the Commission and competition law authorities in individual countries,[98] as a communication forum by (1) informing each other of new cases and envisaged enforcement decisions; (2) coordinating investigations, where necessary; (3) helping each other with investigations; (4) exchanging evidence and other information; and (5) discussing various issues of common interests.[99]

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[93] *Council Regulation* (EC) No. 1/2003, 1–2 (Eur.).

[94] Id; see also fn. 57 at 35–37.

[95] *Council Regulation* (EC) No. 1/2003, 3 (Eur.).

[96] Id. 4.

[97] Id. 5.

[98] Id. 6–7.

[99] The European Commission, *European Competition Network Overview*, at http://ec.europa.eu/competition/ecn/more_details.html (last visited Mar. 12, 2012).

Another significant change of Regulation 1/2003 is that it imposes a decentralized notification and authorization system to replace those created by Regulation 17 by an enforcement system based on the direct application of Articles 81 and 82 (current Article 101 and 102) EC in their entirety.[100]

> *[U]nder Regulation 1/2003, the Commission, national competition authorities and courts have the power to apply Articles 81 and 82 (current Article 101 and 102) EC in full. In particular, agreements which are caught by Article 81(1) (current Article 101(1)) EC but which satisfy the conditions of Article 81(3) (now Article 101(3)) EC are now directly valid and enforceable, no prior decision to that effect being required. In the context of public enforcement, the conditions of Article 81(3) (Now Article 101(3)) EC are principally being assessed where the provision is invoked as a defense in enforcement cases…*[101] *Neither the case practice of the Commission and the national enforcers, nor the experience reported by the business and legal community, indicate major difficulties with the direct application of Article 81(3) (now Article 101(3)) EC which has been widely welcomed by stakeholders.*[102]

All in all, Regulation 1/2003 redistributes duties and power of enforcing competition law by the European Commission and domestic entities for enhancing effectiveness and efficiency.

3. The EC Merger Regulation of 2004. — An important extension of the competition law issue in the EU Treaty is the enforcement of the European Community's Merger Regulation (Merger Regulation) in 2004 which replaced the old EU Merger Regulation 1990[103] and Article 3(g) of the EU Treaty,[104] which originally stated "the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein… a system ensuring that competition in the internal market is not distorted.[105]

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[100] *Council Regulation* (EC) No. 1/2003, art. 10.

[101] Id. 11.

[102] Id. 12.

[103] Lars-Hendrik, *Roller & Miguel de la Mano, The Impact of the New Substantive Test in European Merger Control*, Jan. 22, 2006.

[104] The European Union, *Council Regulation* (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings (the EC Merger Regulation), Preamble 2 (Eur.).

[105] *Treaty of Nice*, 1(g) (2001) (Eur.).

Please note that the Merger Regulation does not prohibit all horizontal merger activities, but emphasizes dealing with issues of concentration and effective competition.

In Article 1, the Regulation provides definition of concentration and the scale of dimension and turnover.[106] Articles 2 and 3 state whether merger activities are regarded as a result of creation or strengthening of a dominant position.

The scope of dimension in the European Competition Law focuses on economic size only rather than market share, or effect caused by concentration.[107]

There are two sets of tests for assessing whether an entity is in community dimension because of concentration.

The first one, the so-called "original test,"[108] defines community dimension as:

> *(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5,000 million; and*
>
> *(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.*[109]

An entity may fall into the scope of community dimension even though it does not meet the definition in Article 2 if it fulfills the so-called "alternative test"[110] under Article 3:

> *(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2,500 million;*
>
> *(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;*
>
> *(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and*

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[106] See fn. 104, art. 1(2)(3), 5.

[107] See fn. 57 at 663.

[108] See fn. 57 at 664.

[109] See fn. 104, art. 1(2).

[110] See fn. 57 at 664.

> *(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.*[111]

In terms of dominant position requirement in the 2004 Act, the European Commission adopted a new Significant Impediment of Effective Competition Test (SIEC Test) to replace the old two-tier test in the 1990 Act.[112][113]

In the old test, it is arguable that dominant position is only sufficient for merger control.[114] In order to make it clear, the new SIEC test which is compatible with the common market shall look at whether it significantly impedes effective competition in the common market or in a substantial part of it.[115]

Article 4 provides a serial of prior notification exceptions and the Commission may grant post-notification exceptions under certain circumstances under Articles 9 and 22.[116]

D. Reasoning of European Competition Law

The objective of enhancing competition is outlined in Articles 3 and 14 of the TFEU, which state that:

> *[T]he Union shall have exclusive competence in the following areas… the establishing of the competition rules necessary for the functioning of the internal market… shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.*[117] *…the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions,*

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[111] See fn. 104, art. 1(2).

[112] John Vickers, *How to Reform the EC Merger Test? A Speech at the EC/IBA Merger Control Conference*, Brussels 1–3, Nov. 8, 2002.

[113] See fn. 103.

[114] Id.

[115] Id.

[116] See fn. 57 at 635.

[117] *Treaty of Lisbon*, 3 (2007) (Eur.).

particularly economic and financial conditions, which enable them to fulfill their missions.[118]

As laws on competition policy of other jurisdictions, it shall be too general to merely disturb the objective of the *EU Competition Law* as establishing the system of competition in the common market is not distorted.[119][120]

Peter Roth and Vivien Rose highlight reasons why the European Union introduces competition law in two aspects. First, fair competition shall be the best means to secure economic efficiently, by efficiently allocating resources and productions. Secondly, a healthy economic development environment shall enhance welfare of consumers and employment.[121] In April 2004, Wim Kok listed three purposes of the competition rules in the Lisbon Agenda, namely, (1) promoting the knowledge-based society, (2) fostering the internal market, and (3) promoting a favorable business climate.

Roth and Rose further suggest that market integration, which will "abolish all national barriers to intra-Community trade and create a single Community market in which the conditions prevailing in a national market are reproduced on a Community scale,"[122] to be one of the objectives of the competition law, by referring to court decisions.[123]

The authors also conclude from court decisions that the law shall ensure customers' rights to buy goods from the cheapest channel in the European Community, as if goods are imported free from another member state with the lowest price under the "parallel trading" principle.[124] Courts consider acts preventing such free movement of goods as violating the competition law.[125]

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[118] Id. 14.

[119] Id. 2.

[120] See fn. 57 at 40.

[121] Id. 40.

[122] Id. 41–42.

[123] Id; see also *56 & 58/64 Consten and Grundig v. Commission*, [1966] ECR 299, 340, [1966] CMLR 418, 471 (Eur.).

[124] Id. 42–43; see also *T-83/91 Tetra Pak v. Commission* [1994] ECR II-755 (Eur.), at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61991A0083:EN:NOT (last visited Apr. 7, 2012).

[125] Id. 43; see also *Volkswagen v. Commission*, [2000] ECR II-2707 (Eur.).

The last major objective Roth and Rose highlight is liberalization of markets, which aims at the issue that state-owned undertakings often obtain a monopoly position in industries such as telecommunications, energy or airport.[126]

The analysis of Roth and Rose summarizes the wide picture of *European Competition Law*, reasoning from the speech of key personnel designing the Treaty and precedents. They criticize the objectives stated by the European Union. Nonetheless, some of their six reasons are so similar to competition rules in other jurisdictions, which will be discussed in following chapters.

Among these six purposes, Roger van den Bergh & Peter Camesasca[127] and Robert Bloch & others[128] suggest that the competition rule in the European Union provide much protection on customer interests, in higher priority than economic efficiency.

First, the rule explicitly states in Article 101:

> *The concept of "fair share" implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under (ex) Article 81(1). In line with the overall objective of (ex) Article 81 to prevent anti-competitive agreements, the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement. If such consumers are worse off following the agreement, the second condition of (ex) Article 81(3) is not fulfilled.*[129]

An agreement is not allowed even if it causes Pareto or Kaldor-Hicks efficiency if customers are not well-off.[130]

Second, Robert Bloch & Others refers to the Freiburg Schule principle by

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[126] Id.

[127] Roger van den Bergh & Peter D. Camesasca, *European Competition Law and Economics: A Comparative Perspective*, 2nd edition, Sweet & Maxwell (Andover), at 39, 41–43 (2006).

[128] Robert E. Bloch, Hans-Georg Kamann, Jay S. Brown & Jens Peter Schmidt, *A Comparative Analysis of Article 82 and Section 2 of the Sherman Act*, Mayer, Brown, Rowe & Maw LLP for the International Bar Association 9th Annual Competition Conference, Oct. 21–22, 2005, European University Institute, Fiesole, Italy.

[129] See fn. 72, D–7. Note that the rule adopted the former code, Article 81 instead of Article 101, as it was written in 2004; see also fn. 125 at 43.

[130] See fn. 127, 43.

von Hayek, that "the competitive process is not only a means to achieve economic efficiency but an end in itself. It considers individual freedom as the primary objective of competition policy, and views dominant firms as tending to weaken the competitive process and the economic freedom of other market participants," when examined the reason of Article 102.[131]

A further discussion of priority on economic efficiency and customer protection of the competition rule in Europe, the United States and China will be provided in the next chapter.

Roger van den Bergh & Peter Camesasca agree that the aim to ensure market integration by breaking down the boundaries among member states,[132] as what Roth and Rose has concluded from the *Grundig* case, is a basic ground of *European Competition Law*. It shall be a unique nature of laws of the European Union[133] compared with those of a single country. However, Bergh & Camesasca questioned whether market integration was still a major objective of European Competition Rule after the decision of the Adalat case.[134]

With regard to the European Community's Merger Regulation, it is interesting that the Regulation explicitly states that it prohibits a merger activity even if the parties claim that such action may improve economic efficiency if it may harm customer interests.

In the eyes of economists, one of the foundational reasons why monopoly shall not be allowed is that companies may increase their income in a dominant position in the market, but it will cause a larger damage to customers, which results in a net loss of the whole society.[135]

The Merger Regulation prevents customer losses by prioritizing customer

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[131] See fn. 128, 3.

[132] See fn. 127, 45.

[133] Ian S. Forrester, *European's Civil Religion: Vertical Restraints: Has the New Testament Arrived? Proceedings in Honour of Valentine Korah*, Oct. 13, 2009, at http://www.ucl.ac.uk/laws/conferences/verticals/UCL_verticals_02_forrester.pdf (last visited Apr. 12, 2012).

[134] Id. 46–47, 224–25

[135] See Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics*, 7th edition, Pearson Education, at 369 (2009).

protection over individual firms' interests.

E. Background of the US Antitrust Law

The US antitrust law system developed through the 1890s to the 1950s in response to needs from the market. The Sherman Act of 1890 became the first legislation on antitrust, as the Constitution, *Gibbons v. Ogden* decision and *Interstate Commerce Act* were deemed insufficient by legislators to cover anti-competitive practices.[136]

The Sherman Act provided a written ground for one of the most important precedents on competition policy, *Standard Oil Co. of New Jersey v. United States*[137] in 1911. In according to Section 2 of the Sherman Act, the US Supreme Court ordered the Standard Oil, the enterprise who virtually dominated all the oil refining business of the country, to be divided into 34 unrelated companies[138][139] such as Exxon,[140] Chevron[141] and Buckeye Partners.[142] Nonetheless, it was not sufficient for the Sherman Act to cover all the anti-competition issues. In order to prevent acts outside the scope of the Sherman Act, the US Congress introduced a serial of statutes, in particular, the *Clayton Antitrust Act*, to make up the loopholes. Price fixing, for example.

After the enforcement of the *Celler-Kefauver Act* in 1950, there is no American law directly dealing with competition policies.[143] However, regulations against monopoly behaviors in particular fields are enacted when the market needs so.

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[136] The US Government, *Sherman Anti-Trust Act* (1890), at http://www.ourdocuments.gov/doc.php?flash=true&doc=51 (last visited Apr. 13, 2012).

[137] 221 U.S. 1 (1911).

[138] Id.

[139] http://www.exxonmobil.com/Corporate/history/about_who_history.aspx (last visited Apr. 15, 2012).

[140] Id.

[141] Chevron Corporation, *Company Profile*, at http://www.chevron.com/about/leadership (last visited Apr. 15, 2012).

[142] Buckeye Partners, LP, at http://www.buckeye.com/AboutUs/OrganizationalHistory/tabid/108/Default.aspx (last visited Apr. 15, 2012).

[143] See Phillip Areeda & Louis Kaplow, *Antitrust Analysis: Problems, Text, Cases*, 6th edition, Aspen Publishers (Riverwoods), at 54 (2004).

The *Bank and Savings Association Holding Company and Depository Institution Regulatory Improvements Act* of 2010, or the so-called *Volcker Rule*,[144] is an example for restricting horizontal development of financial institutes.

According to Sections 16, 20, 21 and 31 of the *Glass–Steagall Act* of 1933, financial institutes, such as Morgan Stanley,[145] split their commercial and investment banking into separate entities.[146]

Such restriction was repealed by the *Gramm-Leach-Bliley Act* in 1999,[147] which was criticized as one of the most important causes of the late 2000s economic crisis.[148]

When it was unaffordable for large financial institutes, including Bear Stearns that went bankrupt, the *Bank and Savings Association Holding Company and Depository Institution Regulatory Improvements Act* reintroduced the idea of the *Glass-Steagall Act*,[149] to separate institutes into individual entities by functions.[150] This kind of legislation may be regarded as anti-monopoly rules in specific fields.

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[144] David Cho & Binyamin Appelbaum, *Obama's "Volcker Rule" shifts power away from Geithner*, Washington Post, Jan. 21, 2010, at http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012104935.html (last visited Apr. 17, 2012).

[145] Morgan Stanley 75th Anniversary, at http://www.morganstanley.com/about/company/timeline/index.html#/year/1930 (last visited Apr. 17, 2012).

[146] David Carpenter & Maureen Murphy, *Permissible Securities Activities of Commercial Banks under the Glass-Steagall Act (GSA) and the Gramm-Leach-Bliley Act (GLBA)*, Congressional Research Service Report (R41181), Apr. 12, 2010, at http://assets.opencrs.com/rpts/R41181_20100412.pdf (last visited Apr. 17, 2012).

[147] Id.

[148] Marcus Baram, *Who's Whining Now? Gramm Slammed by Economists: Nation of Whiners' Comments Criticized by Finance Experts in Light of Current Crisis*, ABC News, Sept. 19, 2008, at http://abcnews.go.com/print?id=5835269 (last visited Apr. 18, 2012).

[149] Alison Vekshin & James Sterngold, *War on Wall Street as Congress Sees Returning to Glass-Steagall*, Bloomberg LP, Dec. 27, 2009, at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aeQNTmo2vHpo (last visited Apr. 18, 2012).

[150] Dodd–Frank Wall Street Reform and Consumer Protection Act (US) 2010, Section 601–28; see also The White House, *President Obama Calls for New Restrictions on Size and Scope of Financial Institutions to Rein in Excesses and Protect Taxpayers*, at http://www.whitehouse.gov/the-press-office/president-obama-calls-new-restrictions-size-and-scope-financial-institutions-rein-e (last visited Apr. 18, 2012).

F. The US Antitrust Law

The main statute authority of the *US Antitrust Law* is the *Sherman Antitrust Act of 1890* ("the Sherman Act") and the *Clayton Antitrust Act of 1914* ("the Clayton Act"), with a serial of revisions such as the *Celler-Kefauver Act of 1950*.

1. The Sherman Antitrust Act of 1890. — The Sherman Act consists of seven Sections. The main scope of the Act is outlined in the first two sections.

Section 1 states that entities forming "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several states, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal."[151] The *Miller-Tydings Fair Trade Act of 1937* provides exemptions for Section 1 of the Sherman Act, to certain resale price agreements between a manufacturer and its dealers. However, the exemption was repealed by the *Consumer Goods Pricing Act* in 1975.[152]

Section 2 states that entities that "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among several states, or with foreign nations, shall be deemed guilty of a felony."[153]

Section 3 is an extension of Section 1, applying the law to any territory of the United States or to the District of Columbia.[154]

The remaining four sections are about details of enforcement of the Act.

Section 4 highlights issues about jurisdiction of courts, duty of the United States attorneys and procedures.[155]

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[151] 15 U.S.C. § 1 (1890).

[152] Thomas Wilson, *Antitrust Federalism: The Role of State Law*, at 39, American Bar Association (1988).

[153] 15 U.S.C. § 2 (1890).

[154] Id. § 3.

[155] Id. § 4.

Section 5 states that additional parties may be summoned by the court for any proceedings under Section 4.[156]

Section 6 empowers the court to forfeit any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in Section 1 of this title, and being in the course of transportation from one state to another, or to a foreign country.[157]

Section 6(a) excludes conducts involving trade or commerce (other than import trade or import commerce) with foreign nations from the Act, unless

> *"(1) such conduct has a direct, substantial, and reasonably foreseeable effect — (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and*
>
> *(2) such effect gives rise to a claim under the provisions of Sections 1 to 7 of this title, other than this Section."*

If Sections 1 to 7 of this title apply to such conducts only because of the operation of paragraph (1)(B), then Sections 1 to 7 of this title shall apply to such conducts only for injury to export business in the United States.[158]

Section 7 defines "person" or "persons" in this Act as "shall be deemed to include corporations and associations existing under or authorized by the laws of the United States, the laws of any of the Territories, the laws of any state, or the laws of any foreign country."[159]

2. The Clayton Antitrust Act of 1914. — The Clayton Act provides further instructions for specified conducts in antitrust law. The main sections of the Clayton Act are Articles 2, 3, 7 and 8.

Section 2 covers price discrimination, which states:

> *[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in*

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[156] Id. § 5.

[157] Id. § 6.

[158] Id. § 7.

[159] Id. § 8.

commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce.[160]

A merit of the Act is that it explicitly lays the burden of proof on defendants in price discrimination charges.[161]

Section 3, the so-called exclusive dealing,[162] prohibits partners from dealing with a buyer or seller who is a competitor, "where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[163]

Section 7 controls acquisition by one corporation of stock of another, shall be the component of the Clayton Act.[164]

Two acquisition activities are prohibited by Section 7:

(1) engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly, or

(2) acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets,

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[160] 15 USC § 13a (1914).

[161] Id. §13b.

[162] The Law Information Institute, *The Clayton Antitrust Act of 1914*, at http://www.law.cornell.edu/wex/clayton_antitrust_act (last visited May 18, 2012).

[163] 15 USC § 14 (1914).

[164] See fn. 162.

or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."[165]

However, the statute provides the following exemptions:

Persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition… or shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired" are not prohibited by the section.[166]

Article 8 prohibits a person from serving as a director or officer in any of the two corporations if engaged in whole or in part in commerce; and by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them will constitute a violation of any of the antitrust laws.[167]

Such provision may prevent monopoly behaviors in substance when companies, as individual legal entities, may commit conspiracy when they are controlled by the same person.

An amendment, the *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, provides details of how the Federal Trade Commission enforces control over merger and acquisition.

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[165] 15 USC § 18 (1914).

[166] Id.

[167] Id. § 19.

3. Other Legislations. — Other than the Clayton Act, the *Federal Trade Commission Act*, legislated in 1914, sets up a civil obligation[168] that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[169]

The Celler-Kefauver Act of 1950 is an anti-merger provision of the acquisition control in Clayton Act, Section 7. When the Clayton Act only prohibits purchase of shares from the rivals with anti-competition purposes, businessmen may target the critical assets of their competitors instead in order to dominate the market by obtaining the real productivity. *The Celler-Kefauver Act* closes this loophole in 1950.[170]

G. Reasoning of the US Antitrust Law

The goals of the US antitrust legislation listed by Phillip Areeda and others, as those in China and Europe, are quite general as follows: (1) efficiency, including customer interests in lower price; (2) the political and social values of dispersed control over economic resources; (3) multiple choices for producers and consumers free of the arbitrary dictates of monopolies or cartels; (4) equal opportunity; and (5) "fairness" in economic dealings.[171]

Debates over legislations after the Sherman Act and the Clayton Act are interesting. There were two contrary ideas about the goal of the US Antitrust Law among American scholars in the 20th century, namely, the Harvard Approach and the Chicago Approach.[172]

The Harvard Approach, developed since 1939 by Edward Mason,[173] dominated the competition policy development until the 1970s.[174] A sufficient consequence of the Harvard Approach at the statute level is that it

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[168] West's Encyclopedia of American Law, *Antitrust Law*, at http://iris.nyit.edu/~shartman /mba0101/trust.htm (last visited May 10, 2012).

[169] Id. 15 USC § 45 (1914).

[170] Id.; see also fn. 54, 143, 168.

[171] See fn. 49, 143.

[172] See fn. 54–56, 127.

[173] Id. 68.

[174] Id. 67.

is the ground for spelling out the Clayton Act Article 7 by Article 17.[175]

The core idea of the Harvard Approach is summarized as the structure-conduct-performance paradigm.[176] Edward Mason suggested that how much customers benefited from market performance depended on conducts of sellers and buyers, while the latter was determined by the structure of the relevant market, such as number of buyers and sellers, barriers to entry of new firms and degree of product differentiation.[177]

As Edward Mason stated in the end of his article in 1939:

> *"The effect of differences in price responses on the distribution of economic resources among different uses. This is the traditional monopoly problem. A monopoly position is supposed to lead to restriction of output and of investment in the monopolized area below that which is desirable and attainable with a greater degree of competition. A whole range of problems, therefore, centers around the effect of price policies and price relationships on the distribution of economic resources as between various uses."*[178]

This approach is further extended by Carl Kaysen and Donald F. Turner in 1971, which highlighted the following four objectives of antitrust law: (1) to achieve favorable economic results; (2) to create and maintain competitive processes; (3) to prescribe norms of fair conduct; and (4) to restrict the growth of large firms.[179]

The Chicago Approach, which was developed since the 1950s, upholds a contrary view. Scholars from the University of Chicago do not regard maximization of profits as a prohibitive act, but merely a competitive conduct. Since markets are eventually capable of correcting imperfections by themselves, governments need not intervene in the market just because enterprises become too large.[180]

The merger control policy is one of the strongest conflicts between the

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[175] Id. 75–76.

[176] Id. 68.

[177] Id.; see also Edward Mason, *Price and Production Policies of Large Scale Enterprises*, 29 Am. Econ. Rev. 61–74 (1939).

[178] See Mason, fn. 175 at 73.

[179] See fn. 74, 127.

[180] Id. 79.

Harvard Approach and the Chicago Approach. Unlike the Harvard Approach, Chicago scholars do not have a negative view on large firms, as large firms generally have higher efficiency. Customers shall benefit in the end when firms with higher efficiency make use of resources in a better way to satisfy customers' needs.[181]

Albeit the Harvard and Chicago approaches were introduced after enforcement of major American antitrust statutes, in particular the Sherman Act of 1890 and Clayton Act of 1914, they played a critical role in decision making by courts in the second half of the 20th century. This will be discussed in the coming chapters.

The conclusion provided by Mark Cooper is clear about the goal of the US antitrust law. "The purpose of antitrust is not to pick or punish winners. It is to ensure that the contest is fair, because only a fair contest elicits effort that gets maximum progress."[182]

III. STATUTORY COMPARISION OF THE COMPETITION LAWS OF CHINA, EUROPE AND THE US

A. Distinguishing Chinese Anti-monopoly Law from the Statutes Governing Competition in the West

For the general public, statutory schemes governing competition policy in different jurisdictions look similar at first glance.[183] It is not difficult to understand why ordinary citizens have that impression because competition laws throughout the world are designed for similar proposes.[184]

It is not surprising that legislators in different jurisdictions design competition laws with identical purposes in mind. Nonetheless, a small difference in legislation or enforcement of such competition laws may lead to enormously different outcomes. Differences in statutory schemes may cause

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[181] Id. 81.

[182] Mark Cooper, *Antitrust as Consumer Protection in the New Economy: Lessons from the Microsoft Case*, 52 Hasting L.J. 874.

[183] See fn. 135, 384.

[184] See fn. 12.

problems for Western investors encountering Chinese competition laws. For example, it may violate the Chinese Anti-monopoly Law if a local government unfairly supports a foreign investor and places domestic companies at a disadvantage under Article 32; this section is different from the equivalent section governing state aid in European Competition Law.

Two issues will be explored in this section. First, we investigate whether there are significant differences in the frameworks of the Chinese Anti-monopoly Law and equivalent statutory schemes governing competition in Europe and the United States. Second, we determine whether there are important provisions in the European and American frameworks that do not have equivalents in Chinese law.

B. A Comparison of Matters Covered by the Chinese Anti-monopoly Law and by the Statutes Governing Competition in the West

Following is a comparison of four issues introduced in Chapter I that are covered by the Chinese Anti-monopoly Law.

1. Monopoly Agreement (Articles 13–16). — Article 13 of the *Chinese Anti-monopoly Law* (AML) covers similar issue as Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Section 1 of the *US Sherman Act* for anti-monopoly acts committed in conspiracy by multiple parties.

One fundamental difference between the laws in three jurisdictions is that, the statute of China and EU are relatively detailed as mainly the civil law system is adopted while the *US Sherman Act* is less detailed under the common law system.

Article 13 of the AML of China, a civil law country,[185] explicitly prohibits 6 acts, which are (1) price fixing or changing; (2) limitation of output or sales; (3) division of markets; (4) restriction on the availability of new technology or new products; (5) boycott transactions; and (6) other monopoly agreements.[186]

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[185] The People Web, *Civil Law Tradition, the Foundation Stone of Chinese Law*, at http://mnc.people.com.cn/BIG5/7596397.html (last visited Jul 2, 2012).

[186] *The Anti-monopoly Law*, 13 (1–6) (2008) (P.R.C.).

The European Union is a combined entity of 27 countries.[187] All member countries adopt the civil law system except England and Wales and the Republic of Ireland.[188]

Article 101 of the TFEU, as the AML, covers five areas: (1) price fixing; (2) limiting or controlling production, markets, technical development, or investment; (3) sharing markets or sources of supply; (4) applying dissimilar conditions to equivalent transactions to place other parties in a competitive disadvantage; and (5) imposing supplementary obligations having no connection with the subject of such contracts.[189]

The issues outlined by the AML of China and the TFEU of the European Union are quite similar (see Table 1).

Table 1 The AML of China and the TFEU of the EU

	AML (China)	TFEU (Europe)
Pricing	Article 13(1)	Article 101(1)(a)
Limitation of sales and productions	Article 13(2)	Article 101(1)(b)
Dividing of markets/ boycott	Article 13(3)(5)	Article 101(1)(c)
Restriction of competitors' power	Article 13(4)	Article 101(1)(d)(e)
Other agreement determined by the Council	Article 13(6)	N/A

The only issue in the AML which the TFEU does not cover is that the Anti-monopoly Authority under the State Council may prohibit other monopoly agreements as it determines.[190]

The merit of this sub-section is that it empowers the bureau to intervene in any anti-competitive behavior that legislators do not expect. This relatively broad power ensures the Authority to prohibit new ideas before amending the statute, as legislation is always criticized for lagging behind the development

[187] http://europa.eu/about-eu/countries/index_en.htm (last visited Jul. 3, 2012).

[188] William Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (codified and uncodified)*, at http://www.cisg.law.pace.edu/cisg/biblio/tetley.html#1 (last visited Jul. 3, 2012).

[189] *Treaty of Lisbon*, 101(1) (2007) (Eur.).

[190] *The Anti-monopoly Law*, 13(6) (2008) (P.R.C.).

in the real world.[191]

Contrarily, the effect of this sub-section may cause confusion to market participants. It creates uncertainties to stakeholders for legality of their act because the statute was not clearly defined and judgment from the court in a civil law jurisdiction may not be sufficiently referable.

It creates uncertainties to investors when the bureau may sue individuals when it determines that the latter's act negates competition, which is not clearly described in advance. Risk of entering into the Chinese market becomes unpredictable. In extreme circumstance, they may hesitate in making business decisions concerning that an aggressive plan may violate the Law.

It may also harm the Authority's image, as it is not easy for outsiders to judge the fairness of a particular decision when the Authority wishes to sue under Article 13(6). The problem is worsened when the judgments issued by the Authority are too brief, as will be discussed in the following chapters.

As most statute authorities in common law jurisdictions, Section 1 of the Sherman Act is relatively brief and the court is allowed to interpret the law in detail.[192]

Unlike the AML and the TFEU, Section 1 of the Sherman Act does not explicitly specify prohibitive acts, but merely declares that "every contract, combination in the form of trust or otherwise, or conspiracy result in restraint of trade or commerce is illegal."[193]

Although Section 1 is not detailed enough, stakeholders may still obtain necessary information from opinions issued by courts under the common law system.

For issues outlined by the AML and the TFEU, investors may find out in case reports whether their activities are governed by Section 1 and how the

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[191] Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7(3) Cardozo Public Law, Policy and Ethics Journal (2009), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1495726 (last visited Jul. 10, 2012).

[192] Alan Morrison, *Fundamentals of American Law*, 1st edition, Oxford University Press (Oxford), at 17 (1996).

[193] 15 U.S.C. § 1 (1890).

court interpret the law, such as price fixing,[194] limitation of output,[195] dividing of markets,[196] or imposing unfair contract terms to negate competitors' power.[197]

As is the traditional debate about common law and civil law jurisdictions, US courts are able to define the scope of the law through adjustment in interpretation,[198] which makes Section 1 more flexible than Article 13(1)(6) of the AML.

Article 14 of the Chinese law is about anti-monopoly acts committed in conspiracy by business operators and their trading partners, which are also equivalent to some circumstances laid down in Article 101 of the TFEU and Section 1 of the US Sherman Act.

Comparing with Article 13, Article 14 focuses more on pricing issues, namely, (1) price fixing, and (2) restricting the minimum price of commodities for resale.[199] However, as what have been explained about Article 13, Article 14(3) provides that the Anti-monopoly Authority under the State Council may prohibit other monopoly agreements it deems unfit for competition.[200] It creates uncertainty under the civil law framework.

It is common for competition policies to provide exemptions, as benefits of market participants' act may exceed problems caused, balancing unequal economic or bargaining power,[201] for example.

The exemptions provided by Article 15 are relatively wider than those in Western countries in areas of new technologies, product quality or cost efficiency, operational efficiency, public interests, mitigating serious decrease in sales volume, safeguarding the justifiable interests in foreign trade or

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[194] See *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

[195] See *National Society of Prof. Engineers v. United States*, 435 U.S. 679 (1978)

[196] See *United States v. Topco Assocs*, 405 U.S. 596, 608 (1972).

[197] See *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001).

[198] William Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law* (codified and un-codified), at http://www.cisg.law.pace.edu/cisg/biblio/tetley.html#1 (last visited Jul. 3, 2012).

[199] *The Anti-monopoly Law*, 14 (1–2) (2008) (P.R.C.).

[200] Id. art. 14(3)

[201] Shyam Kehmani, *Application of Competition Law: Exemptions and Exceptions, United Nations Conference on Trade and Development*, New York and Geneva (2002), at 27, at http://unctad.org/EN/docs/ditcclpmisc25_en.pdf (last visited Jul.15, 2012).

economic cooperation, and other circumstances as stipulated by laws and the State Council.[202]

It is clear that Chinese legislators concern much about economic efficiency, in particular the interests of business entities during economic depression. Comparably, the exemptions provided by the TFEU and the *Sherman Act* are limited.

Under the TFEU, Article 101(3) provides a similar exemption as Article 15(1–4) of the AML. Improving the production or distribution of goods or promoting technical or economic progress is a ground for exemption from liability under this article. However, it is applicable only when consumers are allowed a fair share of the resulting benefit, which is not stated in the AML.

The *US Sherman Act* does not explicitly provide exemptions, except the *Miller-Tydings Fair Trade Act of 1937* which provided an exemption for certain resale price agreements between a manufacturer and its dealers before 1975.[203] The courts, instead of the statute, discuss whether economic efficiency shall be an available exemption.[204]

Comparing with Article 13 and 14, the problem of court discretion is more serious in Article 15 because the State Council is not the only authority to determine whether parties are chargeable under the Anti-monopoly Law. Market participants are subject to other laws in China. It may cause uncertainties to them when exemptions may be granted by both the laws and the State Council.

Article 16 specifies that trade associations may not organize business operators in its own industry to implement monopolistic conducts.

Even though the TFEU and the *US Sherman Act* do not explicitly prohibit activities committed by trade associations, such activities are already covered by Article 101 of the TFEU and Section 1 of the Sherman Act, as trade association is not an exception.[205][206]

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[202] *The Anti-monopoly Law*, 15 (1–6) (2008) (P.R.C.).

[203] *Supra* ch. II.F.1.

[204] *NW Wholesale Stationers v. Pac. Stationery*, 472 U.S. 284 (1985)

[205] Ian Reynolds in White & Case Brussels, *EU Competition Compliance for Trade Associations, British Chamber of Commerce*, Brussels, Dec. 2011, at http://britcham.be/LinkClick.aspx?fileticket=OT1JEcEhJvM%3D&tabid=175 (last visited Jul. 16, 2012).

[206] Electronic Transactions Association, *Antitrust Laws & Trade Associations*, at http://www.electran.org/content/view/82/108/ (last visited Jul. 16, 2012).

2. Abuse of Dominant Market Position (Articles 17–19). — Comparing with Article 13–16 on multiple entities, Article 17 focuses on a single entity abusing its dominant market position, which is equivalent to Article 102 of the TFEU and Article 2 of the US Sherman Act.

Issues that Article 17 covers are more detailed than those under the TFEU. They are (1) unfair pricing; (2) predatory pricing; (3) refusing to trade; (4) unfair exclusion of competitors; (5) unreasonable terms; (6) market division; and (7) other conducts determined as abuse of a dominant market position by the Anti-monopoly Authority under the State Council.[207]

The TFEU provides four circumstances which constitute a dominant market position: (1) unfair price; (2) limiting production, markets or technical development; (3) dissimilar conditions placing them at a competitive disadvantage; and (4) unfair supplementary obligations.

At the first glance, the areas Article 17 of the AML covers are wider than those under Article 102 of the TFEU. There seems no specific provision in the latter which prohibits predatory pricing or unfair exclusion of competitors. But it is not the case.

Even though the TFEU does not explicitly prohibit those actions, such actions would unlikely be excluded by the scope of undertaking provided by the regulation, or imposing unfair contract terms to third parties (see Table 2).[208]

Table 2 Comparision of Articles in AML and TFEU

	AML (China)	TFEU (Europe)
Unfair pricing	Article 17(1)	Article 102(a)
Predatory pricing	Article 17(2)	Article 102(a)
Refusing to trade	Article 17(3)	Article 102(c)
Unfair exclusion of competitors	Article 17(4)	Article 102(c)
Limiting production, markets or technical development	N/A	Article 102(b)
Unfair terms	Article 17(5)	Article 102(d)
Market division	Article 17(6)	Article 102(c)
Other conduct determined by the Council	Article 17(7)	N/A

[207] *The Anti-monopoly Law*, 17 (2008) (P.R.C.).

[208] See fn. 57, ch. 10; see also Raimundas Moisejevas, *The Importance of the Intent in Predatory Pricing Cases*, at http://www.mruni.eu/en/mokslo_darbai/jurisprudencija/archyvas/dwn.php?id=269408 (last visited Jul. 18, 2012).

Regarding Article 13, the major difference between the AML and the TFEU is that Article 13 allows the State Council to intervene in an act pursuant to Article 17(7) as it thinks fit, which is liable for creating uncertainties to market participants.

Article 1 and Article 2 of the *US Sherman Act* only briefly outline the principle that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce" is guilty.[209]

Article 1 highly relies on court interpretations. For example, in case of price reduction, courts may conclude that the party adopts the price policy to obtain monopoly position instead of committing predatory pricing.[210]

Articles 18 and 19 define whether the party is in a dominant market position. Article 18 outlines 6 factors for the court to assess the nature of monopoly, namely (1) market share; (2) capacity of control the market; (3) financial and technical conditions; (4) the degree of dependence of other business operators; (5) the degree of difficulty to enter the relevant market; and (6) other factors related to determine a dominant market position of the said business operator.[211] On the other hand, Article 19 provides a quantitative standard for assessing market dominance by percentage of market share.

These factors are not showed in Article 102 and 106 of the TFEU,[212] and Section 2 of the US Sherman Act[213] in written form even if they are frequently used by European and American courts in determining whether a business operator is in a dominant position or a monopoly of the market, but Chinese legislators have clearly written these factors into the statute.

This is meritorious because business operators know what factors they should pay attention to in order to avoid violating the law, and courts are able to adopt a consistent standard to determine whether the party is chargeable

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[209] 15 U.S.C. § 2 (1890).

[210] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2589, 209, 1993.

[211] *The Anti-monopoly Law*, 18 (2008) (P.R.C.).

[212] *AKZO Chemie BV v. Commission of the European Communities* (Eur.)

[213] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

under Article 17.

However, the last factor which empowers the State Council to consider any other factors may create an image of rule of man, even though there may be other factors to be considered.

One fundamental difference between the Chinese law and the Western laws is that Europe and the US do not treat market share as a critical factor to judge whether a company is in a dominant or monopoly position.[214]

On the contrary, the AML Article 19 presumes that a business operator is in a dominant market position if it reaches a certain level of market share, unless it can prove otherwise.[215]

3. Concentration of Business Operators (Articles 20–31). — In the AML, provisions regarding the concentration of business operators govern matters relating to mergers and acquisitions.

Articles 20, 21 and 22 outline the framework of the Chinese competition law that governs business concentration in the marketplace.

Article 20 limits the application of the Law to merger and acquisition matters.[216] Article 21 refers to the concentration threshold stipulated by the State Council; if the concentration threshold is met, a declaration must be lodged with the Anti-monopoly Authority under the State Council in advance of a merger or acquisition resulting in a concentration.[217]

Article 22 provides that a concentration occurs when (1) one business operator who is a party to the concentration has the power to exercise more than half the voting rights of every other business operator, whether by means of equity or asset ownership; or (2) one business operator who is not a party to the concentration has the power to exercise more than half the voting rights of every business operator concerned, whether by means of equity or asset ownership.[218]

Article 22 indicates that Chinese legislators focus on the power to

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[214] *AKZO Chemie BV v. Commission of the European Communities*; see also *United Brands Continental BV v. Commission [1978] ECR 207*.

[215] *The Anti-monopoly Law*, 19 (2008) (P.R.C.).

[216] Id. 20.

[217] Id. 21.

[218] Id. 22.

exercise more than half the voting rights, whether that power emanates from ownership of the equity or assets of the entity, which is narrower in meaning than that under the European regulation.

Under Council Regulation EC No. 139/2004, which governs the concentration issue in the EC, changes in ownership below a certain threshold amount are strictly excluded from consideration under the regulation.[219]

Comparing with the focus of the AML on hard figures such as voting rights, whether obtained through ownership of equity or assets, the European regulation pays more attention to the issue of control, which comprises a combination of rights.[220]

From the perspective of corporate law, the European approach seems to be more reasonable because, in certain cases, the actual right of control in a company may not be connected to the percentage ownership of shares or assets and may emanate from elements such as the structure of the group of companies, or through a combination of shareholders.[221]

The primary statutory authority governing concentration in the US is Article 7 of the *Clayton Act of 1914*, amended by the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* (HSR).

The Clayton Act prohibits acquisitions that substantially lessen competition or tend to create a monopoly.

Like the European Council regulations, the HSR limits merger and acquisition control to commerce purposes that exceed a certain amount.

Article 21 of the AML requires that an entity to file a notification with the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division. However, there is no deadline for filing under the HSR.

Articles 23–26 of the AML provide guidelines on procedures to be applied by the Anti-monopoly Authority under the State Council for performing concentration tests that are not significantly different from similar

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[219] *Council Regulation* (EC) No. 1/2003, 2–3 (Eur.).

[220] Id. 3(1)(2).

[221] R v CIR ex parte Newfields Developments Ltd.

regulations in Western countries, such as the HSR.

Article 27 provides the elements that the State Council will consider in determining whether an acquisition creates concentration.

Most of the factors listed in the AML, such as the checklists in Articles 13 and 17, are similar to the competition laws in effect in the Europe or the US. However, under the AML, the State Council is entitled to adopt any other factors they think fit,[222] which may create an impression of subjectivity and uncertainty.

Articles 28–31 provide standards to be utilized by the State Council in deciding cases in special circumstances.

Investors should consider two points. First, Article 28 confirms that efficiency is a defense for a merger and acquisition under the AML.

Generally, a merger or acquisition is accepted only when it provides positive effects for business operators, such as saving costs. It may be disallowed under competition laws when it may cause negative effects for the entire society. However, it is difficult for economists to conclude that a merger's positive effects on an individual are greater or less than its negative effects on external parties; this is still a matter of debate in Europe[223] and the US.[224]

Article 28 adopts the principle that a business operator may object to a charge of concentration when the positive effects of the agreement outweigh its negative effects. Such principle ensures economic efficiency but may not protect the interests of consumers.

The AML may give the impression that it is a tool for the Chinese government to achieve political ends because Article 31 highlights national security as an issue. Although invoking national security in a statute may indicate that business activities shall not violate the government's interests,[225] it is not common for pure economic legislation, such as the TFEU or the

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[222] *The Anti-monopoly Law*, 27(6) (2008) (P.R.C.).

[223] See fn. 127, 370–75; see also Andreea Cosnita-Langlais & Jean-Philippe Tropeano, *Do Remedies Affect the Efficiency Defence? An Optimal Merger Control Analysis*, at http://esnie.org/pdf/textes_2010/CosnitaTropeano-2010-a.pdf (last visited Jul. 27, 2012).

[224] *Federal Trade Commission v. H.J. Heinz Company* (2000), Civ. No. 1:00CV01688 JR.

[225] See 31 U.S.C. § 5318(l).

Sherman Act, to have this type of overt political element.

4. Abuse of Administrative Power to Eliminate or Restrict Competition (Articles 32–37). — The fourth section of the AML, known as state aid, is one of the most critical provisions in Chinese competition law because state-owned enterprises play a more important role in China than they do in either the EU or the US.[226]

This section is equivalent to Article 107–109 of the TFEU; there is no equivalent provision in US antitrust law.[227]

Whereas the relevant provisions of the TFEU govern conflicts of interest as a result of aid granted by individual member states,[228] the AML provisions govern acts of administrative organs or organizations empowered by the government of China.[229]

The differences in application here are the result of the nature of the jurisdictional and legislative background of the European Union law. The TFEU prohibits individual member states that comprise the EU from granting aid in the marketplace because the TFEU seeks to prevent any state — particularly Germany — from dominating the EU market.[230]

Conversely, the "state aid" section in the AML focuses on limiting the power of the administrative organs or organizations that might allow state-owned enterprises or other companies closely related to the government to obtain advantages over the private sector and foreign entities in the Chinese market.

"The state advances as private industry recedes" — this adage embodies a recognized threat to Chinese economic development. Therefore, the AML prohibits public organs and organizations from discriminating, imposing different standards, exerting administrative powers against, setting barriers or inducing other conducts for the purpose of discouraging imports from

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[226] *Supra* ch. I.B.

[227] Delegation of the European Union to the United States of America, Competition (Antitrust), at http://www.eurunion.org/eu/Antitrust/Antitrust-Competition.html (last visited Jul. 20, 2012).

[228] See *Treaty of Lisbon*, 107–08 (2007) (Eur.); see also fn. 57, at 1497.

[229] *The Anti-monopoly Law*, 32 (2008) (P.R.C.).

[230] See fn. 60, 12–13; see also *Treaty of Lisbon*, 107(2)(c) (2007) (Eur.).

entering into local markets.[231]

Foreign investors are protected by this provision, but it is notable that they are not the only beneficiaries. This section applies to entities from different parts of China, such as companies from another province, that may be discriminated against by a local government, in addition to protecting foreign entities from outside China.[232]

C. Comparison of Issues Not Covered by Chinese Anti-monopoly Law but Covered by Equivalent Statutes in the West

The AML was modeled on the European Competition Law and the US antitrust laws that have been in force for decades and covers most of the matters covered by these statutory schemes.

The only additional coverage by the US Antitrust Law compared to the AML is that Section 6 of the *Sherman Act* explicitly excludes foreign entities engaging in trade and commerce activities, subject to certain exceptions.

Excluding foreign entities from the scope of the AML would be the most direct method to rebut criticism that the AML is merely a tool for the Chinese government to enforce protectionism.

Although it contains a regulation similar to Section 6 of the Sherman Act, foreign entities are not fully excluded from the AML; as applied, Coca Cola's proposal for acquisition of the Huiyuan Juice discussed in the following chapters, for example, was subject to the AML.

D. Sub-conclusion — Comparison of Competition Law at the Statutory Level

It has been suggested that the Chinese legislature drafts its laws to resemble those of Western countries, although China may not enforce these laws properly. For example, the Chinese Constitution provides for the protection of freedom of speech[233] in a manner similar to the First

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[231] *The Anti-monopoly Law*, 33(1) –(5) (2008) (P.R.C.).

[232] *Invitation of Investment by the Zongyang County of Anhui Province Constitutes Abuse of Administrative Power*, South Weekend, Aug. 13, 2012, at http://www.infzm.com/content/79601 (last visited Aug. 14, 2012).

[233] *The Constitutional Law*, 35 (1982) (P.R.C.).

Amendment to the US Constitution. However, such right is not well protected. In reality, the Chinese judiciary does not enforce the well-drafted law properly, which creates the impression that the problem is about the rule of law.

Owen Fiss suggests that it is not a question of enforcement, but that the law itself is imperfect. Although Article 35 of the Chinese Constitution Law guarantees freedom of speech, such right is subject to other provisions of the Constitution, such as protection of the interests of the State and society in Article 51 and the duty to safeguard the security, honor and interests of the motherland in Article 54.[234]

Nonetheless, Fiss has positive expectations about the development of Chinese law because the introduction of freedom of speech into the Chinese Constitution shows that the Chinese government intends to offer certain freedoms to her citizens and to develop the rule of law, notwithstanding the remaining gap between Chinese and Western laws.[235]

Jon and Lau hold a contrary view and believe that the Chinese Communist Party leadership is sufficiently motivated to permit political concerns to dominate Chinese law.[236]

Both analyses are partly true as applied to the AML. As Fiss predicted, Chinese legislators have continued to move in the correct direction when drafting the AML. They fill in part of the gap between the laws of the East and the West by referring to the latter[237] and limiting political protectionism in the AML.

The section in the AML governing the abuse of administrative power,

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[234] Owen Fiss, *Two Constitutions*, Yale J. Int'l L. 492–94.

[235] Id. 501–03.

[236] Jon Yau Fai & Lau Wan Wei, *Understanding the Rule of Law in China by the Deponent Requirement*, Hong Kong Professional Teachers' Union, at http://www.hkptu.org/ptu/director/pubdep/ptunews/602/index.htm (last visited Aug. 14, 2012).

[237] The National People's Congress of the P.R.C., *Statement of the People's Republic of China Anti-monopoly Law Legislation* (Draft), at http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374671.htm (last visited Aug. 14, 2012); see also The 5th Meeting of the National Congress of the People's Republic of China 10th Conference, at http://www.npc.gov.cn/wxzl/gongbao/2008-02/23/content_1462462.htm (last visited Aug. 14, 2012).

known as state aid, is strong evidence supporting the view that the Chinese government is concerned with rule of law and is not merely concerned with achieving its interests.

Unlike the basis of the "state aid" section of the EU Competition Law, which focuses on prohibiting member states from using state aid to enhance the advantage of domestic entities against entities from other countries, the AML limits the powers of Chinese governmental entities from attempting to help government-related entities compete with both Chinese and foreign private investors.

However, there is a fundamental problem with Fiss' view. The rights guaranteed by Chinese law are limited by the Chinese Communist Party's leadership which is the highest authority of Chinese Constitutional Law, according to the Preamble of the Chinese Constitutional Law, in addition to being limited by contradictory provisions in the Chinese Constitution and in particular statutory schemes.

As Jon and Lau maintain, although certain Chinese government officials argue that the leadership of the Chinese Communist Party under the Constitution is a general idea instead of a specific directive of Chinese Constitutional Law,[238] the political effect of the Preamble has the power to influence any enforcement of law in China.

However, this may not always be the case. As the above "state aid" example indicates, there is already more significant progress in the AML than in other Chinese statutes as a result of protection of the rights of non-local and foreign investors' rights against competitors who have close relations with the public sector. This provision may offer more protection than the circumstances of the Chinese Constitutional Law discussed above and commented upon by Fiss because there is no direct contradiction against the "state aid" section of the AML.

In terms of governmental discretion, the AML does provide discretion by the Anti-monopoly Authority under the State Council to assess whether a

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[238] Gao Kai, *Why the "Leadership by the Chinese Communist Party" Is Not Shown in the Main Content of the Constitutional Law 1982?*, Phoenix New Media, at http://big5.ifeng.com/gate/big5/news.ifeng.com/history/shixueyuan/detail_2011_08/25/8668192_0.shtml (last visited Aug. 14, 2012).

party is chargeable under Article 13(6), 14(3), 15(7), 17(7), 18(6) and 33(5).[239] It is too arbitrary to conclude that the inclusion of an element that does not exist in the equivalent law in Europe or the United States is problematic.

From a positive perspective, the Authority is empowered to prevent new competition-hindering actions that are not anticipated by the legislature. Such flexibility closes the loophole of the lagging effect of legislative responses to the real world.

From a negative perspective, individuals in the market may be confused because they do not understand how to avoid charges under the AML. They cannot rely on the judgment of a court — as they can in a common law jurisdiction — because China is a civil law country.

This arbitrariness may also harm the image of rule of law in China because it may be argued that the Chinese government has too much power to define the law subjectively, even if it does not exercise such discretion to make unfair decisions against individual parties.

Because this regulation affects the interests of local individuals and foreign investors, it is necessary that it be clearly stated to create an effective open market, which is one of the main purposes of modernization of China.

These problems will be further discussed in the following chapters and debates caused by the application of law will also be explored.

IV. DECISIONS OF COMPETITION LAW BY CHINESE ANTI-MONOPOLY LAW

A. Introduction — Studying Precedents of China

It may be easy to assume that it is not necessary to study precedents of China, a civil law jurisdiction, because court decisions are not strictly binding. However, such is not the case.

There is no such thing as either a pure common law system or pure civil law system. Statutes are one of the main sources of law in common law jurisdictions, such as the United Kingdom. Conversely, Chinese courts may refer to case law although it is a civil law system.

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[239] *Supra* ch. III.B.

In reality, Chinese courts may utilize the reasoning of precedents as a reference point in later cases although precedents are not binding.[240]

Even if precedents are not binding on Chinese courts, analysts may discover how courts apply the AML and determine whether courts make decisions according to precedents, and in accordance with rule of law.

Nonetheless, it is not simple to study case law in China. First, the Chinese government does not maintain a central database of reported cases and law-related materials.

Second, the government may not publish the decisions of major cases. The MOFCOM only published five judgments out of its first 230 decisions under the AML.[241]

In accordance with the AML, the Anti-monopoly Authority shall publicize such decisions on concentration of business operators to the general public in a timely manner whenever it prohibits a concentration or if it approves a concentration with conditions.[242] The MOFCOM does not tend to publish the details of cases approved by the Anti-monopoly Authority. As discussed above, only 5 out of 230 decisions have been published, which indicates that the public may be dissatisfied with the amount of information available from the Authority.[243]

The requirement under Article 30 is not sufficient on its own. It is valuable for market participants to understand the decisions of the Authority even when it does not reject a concentration.

The situation is likely much worse for the other three areas governed by the AML because there is no parallel requirement on publication of decisions related to monopoly agreement, abuse of market dominance and abuse of administrative power to eliminate or restrict competition.

Although the AML also states that "where after investigation into and

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[240] Liming Wang, *Innovation of Civil Law Traditions*, Feb. 20, 2012, at http://www.chinacourt.org/article/detail/2012/02/id/473206.shtml (last visited Aug. 2, 2012).

[241] Yee Wah Chin, *M&A under China's Anti-monopoly Law: Update*, Feb. 21, 2012, Victoria University of Wellington Legal Research Paper No. 23/2012, at http://ssrn.com/abstract=2008639 (last visited Aug. 1, 2012).

[242] *The Anti-monopoly Law*, 30 (2008) (P.R.C.).

[243] See fn. 241.

verification of the suspected monopolistic conduct, the authority for enforcement of the Anti-monopoly Law concludes that it constitutes a monopolistic conduct, the said authority shall make a decision on how to deal with it in accordance with law and may make the matter known to the public,"[244] in fact the MOFCOM does not publish decisions concerning these three issues as often as those concerning the concentration of business operators.[245]

This practice does create barriers for researchers studying the AML, in addition to causing confusion for investors and parties who may not be aware that to what extent their activities are allowed or not allowed under the AML.

Thirdly, information is not offered in a systematic database but in a press release list called "significant news" that contains articles in unrelated topics sorted by date.[246]

Fourthly, the MOFCOM may provide publication of judgments in Chinese but not in English, such as the case of the Coca Cola's acquisition of the Huiyuan Juice, discussed below. The mass media may offer translations, but they are not official.

Finally, the MOFCOM does not maintain documents permanently. For instance, although the English version of "*MOFCOM Approves the InBev-AB Merger on 19 November 2008*" appears in search results on the MOFCOM official webpage, the content no longer exists when the link for 16 August 2012 is clicked.[247]

Thus, researchers studying the AML in China must translate official documents themselves, and secondary and tertiary sources must be relied upon, particularly with respect to materials no longer maintained on the governmental webpage.

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[244] *The Anti-monopoly Law*, 44 (2008) (P.R.C.).

[245] See the Ministry of Commerce of the P.R.C., at http://english.mofcom.gov.cn (last visited Aug. 7, 2012).

[246] Ministry of Commerce of the P.R.C., *The MOFCOM Makes Decision on the Acquisition of Huiyuan Juice by Coca Cola*, at http://www.mofcom.gov.cn/aarticle/ae/ai/200903/20090306108388.html (last visited Aug. 22, 2012).

[247] See fn. 245.

B. Leading Cases of Chinese Anti-monopoly Law

As discussed above, the MOFCOM does not typically publish its decisions. In accordance with Articles 30 and 44 of the AML, only decisions that prohibit concentrations of business operators, approve such concentrations with conditions, or hold parties liable for monopolistic conduct are published.

When comparing the enforcement of competition law between China and Western countries, cases with these outcomes comprise the subject matter of the comparisons because the reasoning of judgments in other matters covered by the AML is not available at the official authority.

1. The InBev-Anheuser-Busch (2008). — The merger proposal of the Anheuser-Busch Companies ("AB") and the InBev SA/NV ("InBev") was the first AML decision published by the MOFCOM.[248]

The MOFCOM simply stated that it did not prohibit the merger application submitted by the InBev after "considering the opinion from governmental bureaus, beer unions, manufacturers of raw materials and retailers" and provided no further information about the basis for the decision.[249]

Although the MOFCOM allowed the InBev's proposed acquisition of Anheuser-Busch, the approval was subject to the following 4 conditions:

> *(1) The InBev's share of the Tsingtao Brewery is not to exceed the current 27%; (2) Any change in the controlling shareholder of the InBev or of its holding companies must be reported to the MOFCOM immediately; (3) The InBev's share of the Zhujiang Brewery is not to exceed the current 28.56%;*

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[248] Li Jing, *MOFCOM Approves InBev, AB Merger*, China Daily, Nov. 19, 2008, at http://www.chinadaily.com.cn/business/2008-11/19/content_7219360.htm (last visited Aug. 17, 2012); see also Stephen Smith & Xiaohu Ma, *InBev-Anheuser-Busch: China's First Public Merger Decision under the AML, Morrison & Foerster LLP*, at http://www.mofo.com/inbev-anheuser-busch-chinas-first-public-merger-decision-under-the-aml-12-03-2008 (last visited Aug. 17, 2012).

[249] Ministry of Commerce of the P.R.C., *Announcement No. 95 in 2008 by MOFCOM of the P.R.C.*, at http://www.mofcom.gov.cn/aarticle/b/c/200811/20081105899353.html (last visited Sept. 5, 2012).

(4) No stock of the China Resources Snow Breweries and the Beijing Yanjing Brewery was to be obtained by the InBev.

In the InBev judgment, there is no any information about how the MOFCOM made its decision and why the application was approved; the decision only showed that the MOFCOM was concerned about InBev's further expanding its market share.

2. Acquisition of the Huiyuan Juice by the Coca Cola (2009). — The decision of the MOFCOM with respect to the Coca Cola's proposed acquisition of the Huiyuan Juice received much attention.

Firstly, it was the first application that MOFCOM rejected.[250]

Secondly, as MOFCOM claims, the bureau only rejects a small proportion of merger and acquisition applications under the Anti-monopoly Law, and Coca Cola's application is an exception. In 2009, the MOFCOM only rejected 1 application, imposed additional conditions on 5, and approved the remaining 61 decisions.[251]

Thirdly, the decision of the MOFCOM was criticized by the media for being protectionist with respect to foreign entities,[252] and other political and economic reasons[253] unrelated to the original ground of the AML.[254]

Fourthly, the MOFCOM does not provide clear reasoning in the decision

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[250] Sullivan & Cromwell LLP, *Antitrust Developments in the PRC: PRC Ministry of Commerce Blocks Coca-Cola's Proposed Acquisition of China Huiyuan Juice*, at http://www.sullcrom.com/files/Publication/1fc3cdad-76b8-4efd-8cb2-430c29464ffe/Presentation/PublicationAttachment/a3c7bc8d-bfa7-4b09-b7ff-45554f54b8c9/SC_Publication_Antitrust_Developments_in_the_PRC.pdf (last visited Sept. 5, 2012).

[251] The Ministry of Commerce of the P.R.C., *Presentation by the Vice-Minister Ma in the First Anti-monopoly Reporting Conference on 6-7 January*, Jan. 8, 2010, at http://maxiuhong.mofcom.gov.cn/aarticle/activities/201001/20100106730289.html (last visited Sept. 5, 2012).

[252] Stephanie Wong & Wing-gar Cheng, *China Blocks Coca-Cola's 2.3 Billion Huiyuan Bid (Update 2)*, Bloomberg, at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=awHnS1HJ2Usw (last visited Sept. 5, 2012).

[253] Frederik Balfour, *Huiyuan Juice: China Says Coke Isn't It*, at http://www.businessweek.com/globalbiz/content/mar2009/gb20090318_570130.htm (last visited Sept. 5 2012).

[254] Rick Carew, *China Denies Protectionism in Coca-Cola Ruling, Rejection of $2.4 Billion Takeover Bid for Huiyuan Prompts Questions on Foreign-Investment Deals in Pipeline*, at http://online.wsj.com/article/SB123751554403891673.html (last visited Sept. 5 2012).

and the released judgment is too brief — 777 Chinese words[255] and 493 English words (as translated by the Wall Street Journal).[256]

From the published judgment, readers may not obtain much information beyond that the evidence provided by the Coca Cola was insufficient to clear the MOFCOM's concern about market dominance and concentration. The MOFCOM's brief predictions of higher prices and less consumer choice if Coca Cola's application was approved contains far less information than the reasons listed in textbooks arguing against monopolies.[257]

Although the MOFCOM may have explained its reasoning through informal channels, such as through interviews with reporters,[258] it would be more appropriate to provide information in an official judgment because a MOFCOM spokesperson was not responsible for making the actual decision.

3. Dominant Position of the Dongfeng-Nissan Motor (2011). — As with cases decided by the MOFCOM, official information about decisions made by domestic courts is also limited.

Dongfeng-Nissan Motor is a subsidiary of the Dongfeng Motor Company Limited,[259] a joint venture of the Dongfeng Motor Company, a Chinese company, and the Nissan, a Japanese manufacturer.[260]

In May 2011, Lau Tai-Wah sued Dongfeng-Nissan for abuse of a dominant market position to exclude competition and charge unreasonably high prices. The complaint charged that consumers suffered from higher

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[255] See Ministry of Commerce of the People's Republic of China, *The MOFCOM Makes Decision on Anti-monopoly Issue, for the Case of Coca Cola's Acquisition of Huiyuan Juice*, at http://www.mofcom.gov.cn/aarticle/ae/ai/200903/20090306108388.html (last visited Sept. 22, 2012).

[256] See Wall Street Journal, *China's Statement Blocking Coca-Cola Huiyuan Deal*, Mar. 18, 2009, at http://blogs.wsj.com/chinarealtime/2009/03/18/china%e2%80%99s-statement-blocking-coca-cola-huiyuan-deal (last visited Sept. 22, 2012).

[257] See fn. 143, 12–17.

[258] The People's Web, *MOFCOM's Spokesperson Responds to the Case of Acquisition of Huiyuan Juice by Coca Cola*, at http://mnc.people.com.cn/BIG5/7927452.html (last visited Oct. 4, 2012).

[259] Dongfeng-Nissan Motor, *Company Overview*, at http://www.dongfeng-nissan.com.cn/about/profile.php (last visited Sept. 7, 2012).

[260] Dongfeng Motor Co. Ltd, *Company Introduction*, at http://www.dfl.com.cn/dfl/info/introduce.aspx (last visited Sept. 7, 2012).

prices to repair vehicles as a result of the defendant's behavior.

The Changsha Intermediate People's Court rejected the claim in December 2011, holding that the information submitted by Lau was insufficient to prove that the Dongfeng-Nissan Motor held a dominant market position, which should be supported by market research, economic analysis, studies and/or statistics. The court held that the mere fact that the price of Nissan's components was higher than those manufactured by other producers might not be the result of monopoly.[261]

It is not clear that the court did not choose to use the Anti-monopoly Law to enforce protectionism merely because Dongfeng-Nissan Motor is partly owned by a Japanese manufacturer and the plaintiff is a native Chinese. The court rejected the claim based on a generally accepted principle of civil litigation in Western courts that the burden of proof is "properly placed upon the party seeking relief."[262]

It is difficult for anyone to acknowledge the Dongfeng-Nissan Motor case while attempting to accuse based on the Huiyuan Juice case that foreign investors are generally discriminated against under the AML. The results are not strong evidence in discovering whether the Chinese government and the courts are for or against foreigners; the reasoning of judgments is necessary for this analysis.

4. Acquisition of the Hsu Fu Chi Foods by the Nestlé (2011). — The application for the acquisition of Hsu Fu Chi Foods submitted by Nestlé is a decision that drew attention because it involves a foreign enterprise purchasing a large domestic company and was after the Huiyuan case.[263]

On 11 July 2011, MOFCOM approved the proposal of Nestlé, a Swiss company, to become the majority shareholder of Hsu Fu Chi Foods, a major domestic food producer in China.[264]

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[261] Wah So, *Why Dongfeng-Nissan Is Not Liable for Monopoly*, at http://www.antimonopolylaw.org/article/default.asp?id=3644 (last visited Sept. 7, 2012).

[262] *Schaffer v. Weast (04–698)*, 546 U.S. 49 (2005) 377 F.3d 449.

[263] Xinhua News, *Mass Medias Predict That the Acquisition of Hsu Fu Chi Foods by Nestle Will Be Rejected*, Jul. 22, 2011, at http://big5.xinhuanet.com/gate/big5/www.zj.xinhuanet.com/website/2011-07/22/content_23294942.htm (last visited Oct. 3, 2012).

[264] The Nestlé, *Nestlé to enter partnership with Chinese confectionery company Hsu Fu Chi*, at http://www.nestle.com/Media/PressReleases/Pages/AllPressRelease.aspx?PageId=285&PageName=2011.aspx (last visited Oct. 3, 2012).

The proposed acquisition was even larger than that in the Huiyuan case. Nestlé's proposed purchase accounted for 60% of the shares of Hsu Fu Chi Foods (CHF1.4 billion)[265] (approximately USD 1.5 billion[266] and USD 2.5 billion for 100% share), compared with USD2.4 billion for 100% shares of Huiyuan Juice.[267] This rebuts the proposition that MOFCOM considers that a foreign enterprise may dominate a market simply based on its size.[268]

However, because Articles 30 and 44 of the AML stipulate that it is not necessary for the MOFCOM to state the reasons of approvals for concentrations (or when it finds parties not liable for monopolistic conducts), there is no information available from the MOFCOM about how it arrived at the decision on Nestlé's application.[269]

The decision on the Nestlé application is even more relevant than the Dongfeng-Nissan Motor case to rebut those who suggest that Coca Cola's application was rejected because of protectionism. Unfortunately, studying these cases is impossible when only the result is available from MOFCOM.

C. Sub-conclusion — Leading Cases of Chinese Anti-monopoly Law

Although it is a civil law country, case analysis is a key element in determining the reliability of the judiciary in China. However, restricted information publication — in terms of the number of cases reported and the information contained therein — creates a barrier to understand the real practices of the Chinese judiciary.

This policy also limits the information available for people who want to defend rule of law in China, thus blemished the image of the Chinese government, the legal system and the investment environment.

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[265] Id.

[266] Yahoo Finance Hong Kong, *Exchange Rate Calculator*, at http://hk.finance.yahoo.com /currencies/converter (last visited Oct. 3, 2012).

[267] Coca Cola Decides to Purchase All Shares of Huiyuan Juice by USD 2.4 Billion, at http://finance.ifeng.com/news/hgjj/20080904/460308.shtml (last visited Oct. 3, 2012).

[268] Xinhua News, *Mass Medias Predict That the Acquisition of Hsu Fu Chi Foods by the Nestle Will Be Rejected*, 22 July 2011, at http://big5.xinhuanet.com/gate/big5/www.zj.Xinhua net.com/website/2011-07/22/content_23294942.htm (last visited Oct. 3, 2012).

[269] See fn. 246.

From the cases discussed above, it is not easy to draw a conclusion about rule of law in China. However, it may remain useful in offering a starting point from which to compare the practical effects of Chinese competition policy with relevant cases in Europe and the United States.

V. DECISIONS OF COMPETITION LAWS OF THE EU AND THE US

A. Introduction — Areas of Cases for Comparison

Both the European Union and the United States have established databases for competition law cases in the past century. However, it is not meaningful or possible to compare all the cases in Europe and the US with Chinese cases because the reasoning of Chinese court decisions in many areas is not available, as is discussed above.

To draw limited inferences about judgments available from Chinese courts, the only possible points of comparison will be to utilize those few cases in China of which details have been made available and compare them with equivalent cases in Western countries.

As discussed above, applications prohibited because of excessive concentration of business operators are the only decisions that Chinese courts must provide reasoning in their judgments under the AML. Therefore, cases to be discussed in this chapter will center upon this issue.

It is clear that court decisions are foundational resources to understand law application in the United States. Precedents are also useful assets with which to study how the European Union applies competition rules — notwithstanding that most member states are civil law jurisdictions — in accordance with the arguments made above for analyzing Chinese precedents.

Cases heard by more than one jurisdiction, such as the GE/Honeywell merger that was brought before both the European and the US competition law authorities, are worthy of substantial discussion because they provide practical evidence about how judicial bodies in separate jurisdictions approach identical fact patterns and about how officials, business people and legal scholars respond to decisions that diverge from those in their home countries.

It is not always easy to classify whether a deal "merger" or "acquisition" is. Sometimes, parties involved may use the wrong terminology.[270] Because the market power of new companies after combination is much important than what such companies are called, all cases discussed herein are called "merger" regardless of the original text.

B. Leading Cases of Merger and Concentration in the EU

Since 2000, the European Commission and the European Court have analyzed dominant market position and competitive environment in deciding a series of cases about post-merger control. Because the AML in China is a new law enacted in 2007, it is relevant to focus on decisions in the same era.

1. Merger of the Volvo and the Scania (2001). — The first important element in the merger of the Volvo and the Scania for comparison with China is that the EU approved the application although the companies had substantial market shares (50%–90%) and there were significant barriers to entry into the truck manufacturing market,[271] which were larger than the situation when Coca Cola attempted to expand its share of the Chinese soft drink market by acquiring Huiyuan Juice.

The EC did estimate the effect of the combined new firm in the European market as a whole, in addition to considering the change in profit margins of the merged firm for each product — such as heavy trucks — in each member state.

The EC approved the application on the grounds that the new entity would likely not be in a monopoly position in markets in the European Union, although it might be in a dominant position with respect to some of its products in certain countries, such as heavy trucks in Sweden, Norway, Finland and Ireland.[272]

2. Merger of the General Electric and the Honeywell (2001/2005). — The attempted merger between two US companies, the General Electric (the GE)

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[270] The Kex Column, *Merger*, Financial Times (Dec. 27, 2012)

[271] See fn. 127 at 380.

[272] *Volvo/Scania* case No. COMP/M.1672, Mar. 15, 2000, at http://ec.europa.eu/competition/mergers/cases/decisions/m1672_en.pdf (last visited Oct. 4, 2012).

and the Honeywell, as decided in the EU, is an ideal case for comparison with cases in China and, in particular, with the acquisition of Huiyuan Juice by Coca Cola.

As with the Huiyuan Juice case, the case of the GE and the Honeywell — decided by the EU authorities — is an application of merger and acquisition determined by another jurisdiction. However, the Huiyuan Juice was a domestic company that was targeted for acquisition by Coca Cola, a foreign enterprise, whereas both GE and Honeywell are based in the US; this difference is not material when examining how China and Europe judge concentration.

The GE, "a diversified industrial corporation, active in fields including aircraft engines, appliances, information services, power systems, lighting, industrial systems, medical systems, plastics, broadcasting (through the NBC media channel), financial services and transportation systems,"[273] proposed to merge with the Honeywell International Inc., "an advanced technology and manufacturing company serving customers worldwide with aerospace products and services, automotive products, electronic materials, specialty chemicals, performance polymers, transportation and power systems as well as home, building and industrial controls"[274] on 22 October 2000.

GE filed an application for concentration with both the Department of Justice (DOJ) in the US, and the European Commission (EC) for approval.[275]

In May 2001, the DOJ approved the proposed merger, but the EC issued a statement of objection. The European Commission confirmed its decision to block the application on 2 July 2001.[276]

The EC first examined the market share of the GE, followed by concerns

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[273] *GE/Honeywell* case No. COMP/M.2220, Comm. Decision on Jul. 3, 2001, at http://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf (last visited Oct, 5, 2012).

[274] Id.

[275] Id.; see Gail Slater, *Summary of ABA and Canadian Bar Association Brown Bag Lunch Program on International Merger Enforcement: The GE-Honeywell Decision and the Future of EU Merger Analysis*, The Threshold, The American Bar Association, 2006, at http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/programs/ABA-GE-Honeywell.pdf (last visited Oct. 5, 2012).

[276] Id.

that the company was already dominant in certain markets. It listed 7 factors about GE, aircraft engines, for example, to support its view that included (1) the valuation of the GE's market capitalization; (2) financing and leasing activities through the GE Capital Aviation Services (GECAS) that enhanced its competitive power over customers; (3) non-replicability of the GE Capital/GECAS; (4) commonality across engine types; (5) GE's dominance on 10 of the most recent 12 platforms for which airplane manufacturers offered exclusive positions; (6) no competitive constraint; and (7) lack of constraint from current competitors.[277]

The EC also outlined that the Honeywell was already a leader in the production of aerospace equipment and providing services in avionics, and why there was no competitor strong enough to make sufficient competition with the new company.[278]

Next, the EC explained its rationale for why it believed that the application should not be approved[279] by positing that the combined entity might create a horizontally dominant position in the jet aircraft market[280] that also enjoyed vertical integration from manufacturing of aircraft engines to aircraft leasing.[281]

Nonetheless, the concerns of the EC about the market power of the new entity were overly reliant on the theory of the "Cournot Effect"[282] because it indicated that "a price increase or decrease in the products and services it will be able to supply after the merger can be expected to influence the purchasers."[283]

The decision of the EC provoked widespread criticism from the US

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[277] See fn. 274, ch. 2.

[278] Id. ch. 3.

[279] Id. ch. 4.

[280] Id. para. 341

[281] Id. para. 405–22

[282] Id. para. 374–76

[283] Id. para. 375; see also Penelope Papandropoulos, *Article 82: Tying and Bundling a Half Step Forward?*, at http://ec.europa.eu/dgs/competition/economist/article82.pdf (last visited Oct. 7, 2012).

government,[284] mass media[285] and scholars in both the US[286] and Europe.[287] For example, Hal Varian expressed his objection that the EC might be too focused on preventing a single entity from having high market shares without considering whether customers will receive benefits from price decreases when the new company was vertically integrated.[288]

Although the GE attempted to appeal in an "unusual" way[289] by applying to the European Court of First Instance on the grounds that the EC "in the contested decision, which serves as a cornerstone for other aspects of its analysis of competition, that prior to the merger the applicant had a dominant position on the market for large commercial jet aircraft engines,"[290] GE also disagreed with the EU's view on the vertical overlap, the conglomerate effects and horizontal overlaps to which the merger would give rise[291] and also relied on procedural irregularities in its appeal.[292]

The application was rejected again in 2005 when the court reexamined the definition of, and circumstances in, the market if the application were approved.[293] The Court also provided additional guidelines for applying the

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[284] See Deborah Platt Majoras, *The Speech Before the Antitrust Law Section State Bar of Georgia*, Antitrust Division U.S. Department of Justice (Nov. 29, 2001), at http://www.justice.gov/atr/public/speeches/9893.htm#N_1 (last visited Oct. 8, 2012).

[285] See Frank Pellegrini, *A Merger Is Sunk Off European Shores*, The Time (Jul. 3, 2001), at http://www.time.com/time/business/article/0,8599,166399,00.html (last visited Oct. 8, 2012).

[286] See Hal Varian, *Economic Scene: In Europe, GE and Honeywell Ran Afoul of 19th-Century Thinking*, New York Times, at http://people.ischool.berkeley.edu/~hal/people/hal/NYTimes/2001-06-28.html (last visited Oct. 8, 2012).

[287] See Jeremy Grant & Damien Neven, *The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict*, Mar. 2005, at http://ec.europa.eu/dgs/competition/economist/honeywell.pdf (last visited Oct. 8, 2012).

[288] See fn. 287.

[289] See Slater, fn. 276.

[290] Case T-210/01, *General Electric Company v. Commission*, Judgment of the Court of First Instance, Dec. 14, 2005, para. 35, at http://curia.europa.eu/juris/document/document_print.jsf;jsessionid=9ea7d2dc30db690a5696219f43d0a211878affb3527c.e34KaxiLc3qMb40Rch0SaxuLbh50?doclang=EN&text=&pageIndex=0&part=1&mode=&docid=57077&cid=298582 (last visited Oct. 12, 2012).

[291] Id. 36.

[292] Id. 37.

[293] Id. 489–584.

conglomerate effect to the competitive environment, which was the weakest segment of the EU decision, by finding that "the merged entity would have extended to the markets for avionics and non-avionics products the practices found by the Commission on the market for large commercial jet aircraft engines, by which the applicant exploited the financial strength of the GE group attributable to GE Capital and the commercial lever represented by GECAS's aircraft purchases to promote sales of its products."[294]

Different views of the objectives of competition law will be discussed in the followed chapter.

3. Merger of Oracle and PeopleSoft (2004). — The EC approved the merger application of Oracle and PeopleSoft, two companies listed on NASDAQ[295] that provide solutions for enterprise application software (EAS).[296]

In addition to analyzing and estimating the circumstances of the market and the products of the companies, the EC based its decision in large part on the Small but Significant and Non-transitory Increase in Price Test (SSNIP Test),[297] which was different from what it did in the case of *Volvo/Scania* (2001) discussed above.[298]

The SSNIP Test was first introduced by the Antitrust Division of the DOJ in determining that "the product and geographic dimension of the market starts with a narrowly defined product (or geographic area) of one of the merging firms and judges the profitability of at least a "Significant and Non-transitory Increase in Price" by a hypothetical monopolist of the product in question."[299]

The Test is that "this market identification process seeks to recognize the smallest group of products and geographic areas, for which a hypothetical

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[294] Id. 364; see also Damien Neven, *The Analysis of Conglomerate Effects in EU Merger Control*, at http://ec.europa.eu/dgs/competition/economist/conglomerate.pdf (last visited Oct. 12, 2012).

[295] Case No. COMP/M.3216, at 10–11, at http://www.eco.uc3m.es/~acabrales/teaching/2005/Oracle-Peoplesoft.pdf (last visited Oct. 12, 2012).

[296] Id. 15–16.

[297] Id. 86–115.

[298] See fn. 127, 381.

[299] Id. 111.

monopolist could impose a profitable price increase, ranging between 5 and 10 per cent, lasting for the foreseeable future (at least one year)."[300]

By applying the SSNIP Test and examining the market power of both applicants and their competitors, the EU determined that, although the new entity was the main player of the market, it would not have the power to exclude other vendors, such as Lawson, Intentia, IFS and Microsoft.[301] The application of merger was allowed because the EU believed that the new company would not constitute concentration.[302]

4. Merger of Sony and BMG (2004). — Sony and BMG were two of 5 major global record companies who dominated 72%–93% market share in the European Economic Area.[303] The EC focused on three areas when determining the application, i.e. recorded music, online distribution of music and music publishing.[304]

For the recorded music market, the EC predicted that, when the 5 major sellers became 4 (upon the merger of 2 of them), the remaining 4 majors might create a collective dominant position in some oligopolistic markets.[305] However, the EC had insufficient evidence to prove that such concentration might result in a collectively dominant position.[306]

The EC recognized that the assessment of the market of the online distribution of music was different because it was relatively new and most participants in the market did not provide sufficient information about their profitability in this area.[307]

Moreover, the EC believed that the merger would "increase transparency in the market as the complexity of monitoring the behavior of the other members of the oligopoly is reduced."[308] The EC did not conclude that

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[300] Id. 108.

[301] See fn. 292,179.

[302] Id. 219.

[303] *Sony/BMG*, Case No. COMP/M. 3333 on 19 July 2004, at 47, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004A0464:EN:NOT (last visited Oct. 17, 2012).

[304] Id. 9–45.

[305] Id. 156.

[306] Id. 157–58.

[307] Id. 165–66.

[308] Id. 169.

approval of the merger would lead to a dominant position in the market of online distribution of music.

The EC considered that, the new Sony/BMG entity was unlikely to gain a dominant position in music publishing because the industry was "mainly carried out by the collecting societies."[309] In addition, the income in this market, royalties, was fixed by agreements with publishers, authors and composers that were unlikely to be changed as a result of the merger.[310]

For these reasons, the EC allowed the application because it was unlikely to violate European competition rules.[311]

5. Independent Music Publishers and Labels Association (Impala) (2006). — The European Court of First Instance heard an appeal from the European Commission in 2006 that was about the concentration of "major" music record companies.

The merit of this case was that the Court required, as a necessary and sufficient condition of its duties, the Commission "to state reasons that the decision states clearly and unequivocally the reasons why the Commission considers that the concentration at issue does not raise serious doubts as to its compatibility with the common market."[312]

This decision confirmed that the Commission should adopt a conservative attitude for addressing applications for mergers and acquisitions that a dominated position was assumed, unless it was shown otherwise.

C. Sub-conclusion — Leading Cases of Concentration in the EU

From the cases above, it is clear that the European Commission (now, the European Union) and the European Courts rely to a large extent on the effects of a merger on price by applying economic methods such as SSNIP Test stated above or the Cournot effect.

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[309] Id. 179.

[310] Id.

[311] Id.

[312] T464/04, *Independent Music Publishers and Labels Association (Impala) v. Commission*, Jul. 13, 2006, at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56489&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=321590 (last visited Oct. 25, 2012), at 281.

Hal Varian criticizes such an approach for being too focused on the competitive power of the firm and causing the rejection of applications in which a firm becomes competitive and customers simultaneously benefit from lower prices, citing the GE/Honeywell case, for example.[313]

To a certain extent, there is truth in Hal Varian's comment that innovation and customer benefit should be of higher priority as competition goals than controlling a firm's competitive power. However, it is also commonly understood that innovation and customer benefit are harmed in the long run when one firm in the market becomes dominant. This issue will be discussed further in the next chapter after we analyze the leading cases in the US with additional examples.

D. Leading Cases of Merger and Concentration in the US

As with the cases introduced in China and Europe above, this section will mainly focus on the US antitrust cases, particularly cases related to dominant position issues since 2000. Certain cases are valuable in comparing the reasoning between courts in the US and Europe, when same international entities apply for merger and acquisition being heard by courts in different jurisdictions.

1. The Merger of General Electric and Honeywell (2001). — The Antitrust Law Division of the US Department of Justice (DOJ) made its decision on the application of merger between GE and Honeywell, based on the identical facts discussed in Chapter V, leading to the opposite result.[314]

The DOJ adopted the same basic posture in examining the application as the European Commission[315] and the European Court of First Instance, which consisted primarily of analyzing the effects of the horizontal and vertical integration of the two companies.[316]

However, the DOJ referred to the decision in *Monfort of Colorado, Inc. v. Cargill, Inc.*,[317] that the US Antitrust law did not prohibit companies from

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[313] See fn. 287.

[314] See fn. 285.

[315] Id.

[316] See ch. V.B.

[317] 479 U.S. 104, 114–17 (1986).

reaching a high market share and becoming efficient through merger, even if it might harm the competitive power of third parties.

The DOJ further quoted the views of Larry Summers, the former Treasury Secretary, that antirust laws' "goal is efficiency, not competition. The ultimate goal is that there be efficiency."[318]

The DOJ further emphasized the following: "After fifteen years of painful experience with now long-abandoned theories like entrenchment, the US antitrust agencies concluded that antitrust should rarely, if ever, interfere with any conglomerate merger. We simply could not identify any conditions under which a conglomerate merger, unlike a horizontal or vertical merger, would likely give the merged firm the ability and incentive to raise price and restrict output."[319]

Under these principles, when the DOJ considered the new company merged by GE and Honeywell in the jet engine, avionics and non-avionics markets, it reached the contrary conclusion from its European counterparts and approved the application because the market was unlikely to become less efficient after the merger.

This view matched the view of Hal Varian's criticism of the European Commission's decision.[320] The case of the GE/Honeywell is one of the core authoritative references when discussing the Chinese AML in the coming chapter because it provides evidence that those different legislative goals would result in contrary outcomes, in addition to the different outcomes likely, when courts in different jurisdictions apply their own reasoning to identical facts.

2. The Merger of Oracle and PeopleSoft (2004). — The merger of Oracle and PeopleSoft was another case heard by the competition law sectors of both Europe and the US.

The application in the US was first rejected by the DOJ and then approved by the United States District Court for the Northern District of

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[318] Antitrust Law Section of the State Bar of Georgia, United States Department of Justice, *GE-Honeywell: The U.S. Decision* (Nov. 29, 2001); see also Lawrence H. Summers, *Competition Policy in the New Economy*, 69 Antitrust L.J. 353, 358 (2001).

[319] Id.

[320] See fn. 287.

California when the companies appealed the main reason that the DOJ prohibited the application was that the merger violated Section 7 of the Clayton Act,[321] which states that "(the Act) prohibits acquisitions that may substantially lessen competition."[322]

The plaintiff first identified that a merger "may" not result in concentration that was prohibited by the Clayton Act. When concern about concentration arose, the burden of proof was on defendants that they should prove that the merger would not cause concentration. Once defendants provided sufficient evidence to show concentration was not constituted, the plaintiff should offer additional evidence to rebut; the plaintiff should retain the ultimate burden of proof at all times.[323]

As opposed to measurements in Europe and China, the plaintiff agreed that market definition and market shares were merely methods for determining competitive power. However, the plaintiff did not agree with Oracle's claim that cost savings from anticompetitive reductions in output or services should be regarded as efficiencies.[324]

The Court accepted the arguments by the plaintiff that the potential cost-saving effect by merger was too "speculative to be afforded credibility."[325] It was not sufficient evidence to prove that merger might enhance future innovations.[326]

Nonetheless, the court approved the application of merger by Oracle because the plaintiff failed to prove the likelihood that a post-merger Oracle and SAP would tacitly coordinate by allocating customers or markets. Although its defense of efficiency was not accepted, the application was allowed because neither side provided sufficient evidence to support their views, nor question was left to the burden of proof.

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[321] Plaintiff's Trial Brief, *United States of America, et al. v. Oracle Corporation* (2004), at http://www.justice.gov/atr/cases/f203800/203882.htm (last visited Nov. 10, 2012).

[322] 15 U.S.C. § 18 (US).

[323] Id.

[324] Id.

[325] *United States of America, et al. v. Oracle Corporation* (2004), at http://www.justice.gov/atr/cases/f205300/205388.htm (last visited Nov. 10, 2012).

[326] Id.

E. Sub-conclusion — Leading Cases of Concentration in the US Antitrust Law

It is not unusual for Europe and the United States, two jurisdictions with well-established competition policies, to make contrary decisions on identical facts about cases involving competition law, the GE/Honeywell case for example.

In assessing such different judgments, it may be questioned whether the objectives of another jurisdiction are reasonable or not, as Hal Varian has maintained, but it is also rare for people in Europe and the US to question the rules of law in the legal systems of one another.

Conversely, it might be too arbitrary to conclude that it is the question of different objectives instead of problems involving rules of law or protectionism when the Chinese courts and the MOFCOM make decisions which foreign jurisdictions may not expect or accept. Further discussion about this topic is forthcoming.

VI. COMPARISION OF COMPETITION LAW ENFORCEMENT IN CHINA, EUROPE AND THE US

A. Introduction

This chapter consists of 3 parts. The first part examines how a different focus on similar objectives of competition policies in Europe and the US, may cause substantially different conclusions during enforcement.

The second part applies the results from the first analysis to the decisions of Chinese courts and the MOFCOM in determining to what extent they make decisions influenced by political purposes, such as protectionism, or in accordance with the rule of law.

The third part highlights key issues that the Chinese judicial bodies address weakly when under political influence and how they convey the message that they are acting under the rule of law even if their rulings may not satisfy foreigners.

B. Stretch Effect of Legislation and Enforcement

1. Objectives of Competition Law in Europe and the US. — As discussed in Chapter I and II above, legislators in different jurisdictions generally design competition rules for similar purposes.[327] Hal Varian's criticism of the EC for rejecting the application of GE/Honeywell that it adopted an outdated principle in determining the competitive environment may be extreme because other objectives of EU competition law are also embodied in the US and Chinese law.[328]

According to Roth and Rose and Wim Kok,[329] it is not difficult to find similar objectives of antitrust law in the EU, the US and the AML in China (with the exception of fostering the internal market and parallel trading because these are tailor-made for the unique nature of the European Union, a jurisdiction consisting of individual countries).

It is notable that Kevin Marshall and Stephen Kalos disagree with Hal Varian, and posit that the US antitrust laws do not pay much attention to "deadweight loss," which is another side of economic efficiency.[330]

In determining whether a merger helps economic efficiency, it should first be identified whether the activity causes efficiency only for the new company or for the entire society, including the company and consumers.

It is common sense that companies agree to merge with others only if they predict that they will benefit from the combination, such as by means of economies of scale, for example. Therefore, the question for competition law should be whether the merger would benefit the economic efficiency of the entire society, with consumers sharing part of the benefit.

Hal Varian holds a positive view for the second issue, suggesting that when small numbers of companies in the market produce complementary products, such as zinc and copper, for example, the merger would lead to a

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[327] See fn. 12.

[328] See fn. 287.

[329] *Supra* ch. II.D.

[330] Kevin Marshall & Stephen Kalos, *The Economics of Antitrust Injury and Firm-Specific Damages*, 1st edition, Lawyers & Judges Publishing Co. Inc., at 49–51 (2007).

lower price of both metals because the new company would find out the lower price between the two materials. When the merged company enjoys a lower price of costs, its profitability increases and consumers benefit when the price is dropped.[331]

Nonetheless, what Hal Varian estimates may not always be the case. In their working paper, Hajime Hadeishi and Dave Schmidt[332] find that after the J.M. Smucker Company merged with the Jif Peanut Butter line of Proctor and Gamble, the prices of the two major products of the new company, grape jams and jelly, significantly increased,[333] which is completely contrary to what Hal Varian predicts.

The authors admit that they do not know with certainty the reasons why the price significantly increases, although the increases are factual.[334] This study at least provides evidence that post-merger price drops that benefit consumers is not the only outcome.

To some extent, these circumstances resemble the failure of David Stockman's "trickle-down economics," which has proven to be unsuccessful in several countries.

Stockman's original idea is that when the government supports the supply side, such as business activities, for example, all people will benefit when the rich earn large amounts and spend this money on other segments of the entire economy.[335]

However, in the experience of countries such as India, the trickle-down effect may not work.[336] It is clear that entities supported by the government

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[331] See fn. 285.

[332] Hajime Hadeishi & Dave Schmidt, *An Empirical Analysis of a Merger of Manufacturers of Complementary Goods*, at http://www.ftc.gov/be/seminardocs/04hadeishi.pdf (last visited Dec. 2, 2012).

[333] Id. 9.

[334] Id. 29–30.

[335] See William Greider, *The Education of David Stockman*, Dec. 1981, at http://www.theatlantic.com/magazine/archive/1981/12/the-education-of-david-stockman/305760/?single_page=true (last visited Dec. 7, 2012).

[336] Advisory Panel on Promoting Literacy; Generating Employment; Ensuring Social Security; Alleviation of Poverty, National Commission to Review the Working of the Constitution, a Consultation Paper on Social Security and Employment, Sept. 2001, at http://lawmin.nic.in/ncrwc/finalreport/v2b1-6.htm (last visited Dec. 9, 2012).

obtain benefit, and the total outcome of the entire economy, which may be indicated as increasing GDP, grows, but those in poverty may not share the welfare created on the supplier side.[337]

As for mergers, although the new combined company makes greater profits with lower costs, which results in greater outcome for the economy as a whole, these effects do not necessarily lead to consumer benefit because the company may, in fact, charge a higher price, as Hadeishi and Schmidt show, when there is no system to govern distribution of welfare after the merger.

However, this does not indicate that Hal Varian's argument is wrong. As Tin Cheuk Leung's statement about dominant position with different assumptions and methods indicates, economists may have a contrary conclusion about economic efficiency from identical facts.[338] What Hal Varian thinks is arbitrary in that the statute governing European competition laws are concerned with the interests of consumers even more than the US antitrust law is so concerned.

2. Application of Objectives to Competition Law in Europe and the US. — The US Antitrust Law may have less focus on economic efficiency than the European Competition Law, as Hal Varian states. However, it might not be the opposite extreme, i.e. that the US antitrust laws do not prevent monopoly or that the European Courts are not concerned with consumer interests.

The strongest evidence is that Articles 1 and 2 of the *Sherman Act* prohibit activities which act "in restraint of trade or commerce" and "monopolize any part of the trade or commerce," which would indicate that these activities are anti-competition.

Thus, it may be an exaggeration for Hal Varian to posit that "United States antitrust officials tend to focus on the benefits of consumers, while European regulators give substantial weight to the impact on competitors."[339]

The TFEU even explicitly states that one of its objectives is "allowing consumers a fair share of the resulting benefit."[340] An undertaking agreement

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[337] Id. ch. V.

[338] Tin Cheuk Leung, *Is It Good or Bad When the Competition Law Does Not Cover Merger Activities?*, H.K. Econ. J., B3 (Jan. 9, 2013).

[339] See fn. 287.

[340] *Treaty of Lisbon*, 349 (2007) (Eur.).

is not allowed by European law if consumers do not obtain a share of the benefit, even if the parties benefit from economic efficiency, which is exactly contrary to Hal Varian's statement.

It is also not the case that US laws are not concerned with consumer interests just because the US statutes do not explicitly state consumer interests as an objective as the European law does. The opinions of the US courts indicate that consumer interests are important.

Using the GE/Honeywell's case introduced in the previous chapter as an example, it is clear, as Hal Varian emphasizes, that the US DOJ applies *Hoffman-LaRoche v. Comm'n*[341] concerning the price effect generated by the new company's market power, which governs the interests of the company and the interests of competitors and customers.[342]

The EU pays attention to the same area with a different opinion. Its concern is that Honeywell and GE are in a unique position of selling Supplier-Furnished-Equipment and Buyer-Furnished-Equipment. Merging these two companies may lead to their withdrawal from market competition.[343]

At a first glance, this is what Hal Varian describes, i.e. that the EC merely focuses on competition and neglects effects on consumers. However, Varian's statement is true only if predatory pricing does not exist.

Predatory pricing means that a firm may decrease its pricing low enough to push its competitor(s) out of the market; after those competitors have exited, the firm will increase the price because there will be no other choice for consumers. Economists argue whether it is possible for firms to dominate the market through predatory pricing. However, it is relatively clear in terms of the application of competition law. The US courts do not have a clear view on this, but the European courts regard it as dominant.[344] Therefore the EC prohibits the Honeywell/GE application because it believes that consumers may be harmed in the long run when competitors of the merged firm

[341] Case 85/76, 1979 ECR 461 (CJ).

[342] See fn. 285.

[343] See fn. 274.

[344] Massimo Motta, *Competition Policy: Theory and Practice*, Cambridge University Press (Cambridge), at 442–45 (2004).

withdraw from the market.

When courts of the US and Europe have different views of the economic theories that apply to identical facts, as Leung's statement indicates, they may have contrary conclusions although they may have similar objectives.

Instead, scholars and legal practitioners in both the US and Europe rarely question the other's commitment to rule of law, as courts of both jurisdictions provide sufficient materials and explanations to show how they arrive at their conclusions, although they may disagree.

However, this is not the case for the Chinese courts and the MOFCOM. It is difficult for analysts to study whether they make decisions under the rule of accordance to the law or not, which puts the MOFCOM into a difficult position.

C. Objectives of Competition Law and Its Enforcement in China

As discussed above, the objectives of the Chinese AML are similar to those of the European and the US competition policies. Most of the contents of the AML may, in fact, match the TFEU.[345]

Moreover, the main focus of the question of rule of law in China is not about statutes themselves, but about how the Chinese judiciary properly enforces the law, when adopting Hilaire Bamett's definition.[346]

It is a difficult task to examine the reasoning of Chinese courts. First, Chinese judiciary does not publish most of its judgments. Second, few judgments it publishes contain far less details than is required to understand the reasoning of the court.

The EC must publish the names of the parties and the main content of its decisions, including any penalties imposed, unless it is opposed by business secret,[347] whereas it is normal practice for US courts to provide a judgment to the public because it is in a common law jurisdiction.

As discussed in Chapter IV, the bureau must provide reasons only in limited circumstances under the Chinese AML, such as when it rejects an

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[345] *Supra* ch. III.B.

[346] See fn. 5, at 73–74.

[347] *Council Regulation* (EC) No. 1/2003, 30 (Eur.).

application based on concentration of business operators, for example.

There are two problems with this policy. First, the bureau only publishes a few cases with limited reasoning instead of the entire decision. Second, it should not merely provide reasons when it rejects applications because it is valuable for market participants and scholars to study how it reaches conclusions when it approves.

It is noted that this problem may be a weakness of designing statutes but is not related to the question of rule of law because the latter is an issue of enforcement.

The decision about the acquisition of the Huiyuan Juice by the Coca Cola (2009) is a typical example of the second problem. The MOFCOM only states that it considers "market share and market control, the degree of market concentration, the impact on market access and technological progress, the impact on consumers and other business operators, and the impact of brands on market competition in the juice market"[348] in rejecting the application without any explanation for these elements.

These are well-accepted issues for making decisions according to competition laws in the world. However, it is likely impossible for analysts to comment on the case as they do on cases of Europe or the US, such as Hal Varian's comments on the Honeywell/GE decisions. Hal Varian may disagree with the EU's focus on competition and its failure to account for consumer interests — in his opinion — but would be unlikely do so if there is no information available from the judgment. It may be inevitable for analysts to question the rule of law of China when key information and the reasoning behind judgments are not available.

The situation may become even worse when the spokesperson of the MOFCOM elaborates the case in a press conference after publishing the judgment. Explanation from non-legal professional staff may cause people to doubt why the MOFCOM or the courts do not provide official information before reporters question whether what the spokesperson says is true or if the judgment was really formed by the judiciary if there is any apparent contradiction.

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[348] See fn. 257.

CONCLUSION

Ronald Coase's dictum "Not being clear, it was never clearly wrong"[349] is true in a half here. When the Chinese judiciary does not provide sufficient information, it is nearly impossible for analysts to prove that the judiciary has made a reasoned judgment without political concerns. By the same token, it is difficult for people on the side of Chinese courts to defend that the judges are acting in accordance with the rule of law.

However, it is clearly not appropriate for the Chinese judiciary to create such confusion. Stakeholders in the market may hesitate to become involved in the market when they cannot estimate the risks of vague legal rules.

Even if the Chinese judiciary bodies make decisions under the rule of law, they already breach their duties if they fail to create the image of fairness, as Lord Chief Justice Hewart states, "Not only must Justice be done, it must also be seen to be done."[350]

This is not merely a principle of judicial bodies but also a general practice in the business world with, for example, accountants and auditors, as evidenced by the following: "The avoidance of facts and circumstances that are so significant that a reasonable and informed third party would be likely to conclude, weighing all the specific facts and circumstances, that… integrity, objectivity or professional skepticism has been compromised."[351]

As law is an enforceable body of rules that govern any society,[352] it is necessary to clearly convey the message to stakeholders, business people and non-legal professionals that the rule of law will be upheld. As for the enforcement of the AML, no strong evidence shows that the Chinese bureau makes use of the law to achieve political purposes, although it is unlikely the

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[349] Ronald Coase, *The Problem of Social Cost*, J.L. & Econ. 39 (Oct. 1960).

[350] *R v Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER 233) (UK).

[351] Int'l Federation of Accountants, Int'l Ethics Standards Board of Accountants, *Code of Ethics B, Section 290.6, Conceptual Framework Approach to Independence*, at http://www.ic aew.com/en/members/regulations-standards-and-guidance/ethics/code-of-ethics-b/part-b-290 (last visited Dec. 13, 2012).

[352] Elizabeth Martin, *Oxford Dictionary of Law*, 5th edition, Oxford University Press (Oxford), at 280 (2002).

case.

From the legal point of view, it is not appropriate to criticize the Chinese judiciary for violating the rule of law without sufficient basis. However, if the Chinese government wants to provide the impression of China as a reliable investment environment, it must provide sufficient information about its judiciary's legal decisions to show that it is a fair environment.

It is the end of the story if the Chinese government wants to fulfill its political will through the decisions of the judiciary. If this is not the goal, a detailed analysis with supporting information — as judgments are published in another civil law jurisdiction, the European Union — shall be the basic requirement for the Chinese government to create a legal environment reaching international investment standards. The civil law system is not an acceptable reason for refusing to publish such decisions, as the legal system only indicates it is statute-oriented. It is valuable information for law users to understand how the courts apply these laws.

As with the Honeywell/GE case in the EC, analysts may challenge the preferences of judges but the rule of law, with decisions published as part of such process, should emanate from detailed public information. The judgment shall be the primary source of judicial opinions as opposed to a non-legal professional spokesperson of the MOFCOM, as is the case with Chinese competition law cases, for example.

WEN Jiabao, the former Premier of China, recognizes that transparency is an essential condition for political system development, as there is no success without understanding, involvement and supervision.[353] The same is true of a legal system. In short, it may not merely be the question of law, but also a question of the image and future development of the Chinese legal system that is at issue.

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[353] Sina Finance, *Wen Jiabao Emphasizes Improvement of Transparency of Decision Making*, Nov. 26, 2008, at http://finance.sina.com.cn/g/20081126/10045554423.shtml (last visited Dec. 15, 2012).