THE UNIVERSITY
of EDINBURGH

Competition Policy and State-Owned Enterprises in Contemporary China

Lei Kuang

Doctor of Philosophy

The University of Edinburgh

2016

DECLARATION

This is to certify that that the work contained within has been composed by me and is entirely my own work. No part of this thesis has been submitted for any other degree or professional qualification.

_____

Signature

_____

Date

ABSTRACT

This thesis explores, first, the evolvement and implementation of competition policy in China, where a competition culture was largely missing for decades; and second, the extent to which the government has resolved the inherent contradiction between preserving state control and promoting competition. The main aim is to evaluate how a competition law, which is essentially a product of capitalist free market economy, is being applied in China, a socialist country where predominant state-owned enterprises (SOEs) together with their owner – the Chinese government – generate the most distortions to market competition. To achieve this aim, the thesis studies, first, the ongoing economic transition and the historical development of Chinese competition policy; second, the prolonged drafting process of the Anti-Monopoly Law (AML); third, the substantive and institutional aspects of the enforcement of the AML, and the outstanding problems of the current competition system; and fourth, the role of the government in the interplay between competition policy and SOEs.

The thesis also studies the European Union (EU) competition regime, which had substantial influence on the adoption of the AML and the design of China's competition system. This discussion intends to use the experiences of the EU in modernising its competition system and in handling competition-related issues involving public enterprises to provide some meaningful answers to certain problems concerning the application of the AML and to possible reform of competition system in China.

CONTENTS

TABLE OF LEGISLATION

Chinese Legislation

Criminal Law of the People's Republic of China [中华人民共和国刑法]

Criminal Procedure Law of the People's Republic of China [中华人民共和国刑事诉讼法]

Decision of the Central Committee of the Communist Part of China on Foreign Trade [中央关于对外贸易的决定]

Decision of the Central Committee of the Communist Party of China on Major Issues Concerning Comprehensively Deepening Reforms [中共中央关于全面深化改革若干重大问题的决定]

Decision of the Central Committee of the Communist Party of China on Some Issues Concerning the Establishment of a Socialist Market Economic Structure [中共中央关于建立社会主义市场经济体制若干问题的决定]

Decision of the Central Committee of the Communist Party of China on the Reform of Economic System [中共中央关于经济体制改革的决定]

Decision of the First Plenary Session of the 10th National People's Congress on the Plan of the Institutional Reform of the State Council [十届全国人大一次会议关于国务院机构改革方案的决定]

Detailed Rules for the Implementation of the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises [中华人民共和国外资企业法实施细则]

Enterprise State-Owned Assets Law of the People's Republic of China [中华人民共和国企业国有资产法]

General Principles of the Civil Law of the People's Republic of China [中华人民共和国民法通则]

Guidelines of the Anti-Monopoly Commission of the State Council on the Definition of Relevant Market [国务院反垄断委员会关于相关市场界定的指南]

Guiding Opinions on Further Strengthening and Improving the Work of Women Employees of Central State-Owned Enterprises [关于进一步加强和改进中央企业女职工工作的指导意见]

Guiding Opinions of the Central Committee of the Communist Party of China and the State Council on the Deepening Reform of State-Owned Enterprises [中共中央、国务院关于深化国有企业改革的指导意见]

Guiding Opinions on the Notification of Concentration of Business Operators [关于经营者集中申报的指导意见]

Guiding Opinions on the Notification of Simple Cases of Concentrations of Business Operators (Trial) [关于经营者集中简易案件申报的指导意见（试行）]

Guiding Opinions of the State-Owned Assets Supervision and Administration Commission on Furthering the Restructuring of State Capital and the Reorganisation of State-Owned Enterprises [关于推进国有资本调整和国有企业重组的指导意见]

Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures [中华人民共和国中外合资经营企业法]

Law of the People's Republic of China on Wholly Foreign-Owned Enterprises [中华人民共和国外资企业法]

Legislation Law of the People's Republic of China [中华人民共和国立法法]

Management Measures on Oil Price (Trial) [石油价格管理办法（试行）]

Measures on the Enforcement Work against Monopoly Agreement, Abuse of Dominant Position and Administrative Monopoly in China (Shanghai) Pilot Free Trade Zone [中国（上海）自由贸易试验区反垄断协议、滥用市场支配地位和行政垄断执法工作办法]

Measures on the Exclusive Licensing for Table Salt [食盐专营办法]

Measures on the Notification of Concentrations of Undertakings [经营者集中申报办法]

Measures on the Review of Concentrations of Business Operators [经营者集中审查办法]

Measures on the Work of Anti-Monopoly Review of Concentrations of Business Operators in China (Shanghai) Pilot Free Trade Zone [中国(上海)自由贸易试验区经营者集中反垄断审查工作办法]

Measures on the Work of Anti-Price Monopoly in China (Shanghai) Pilot Free Trade Zone [中国（上海）自由贸易试验区反价格垄断工作办法]

Notice on the Removal of Regional Blockade in Market Economic Activities [关于清理在市场经济活动中实行地区封锁规定的通知]

Organic Law of the National People's Congress of the People's Republic of China [中华人民共和国全国人民代表大会组织法]

Opinions of the State Council on the Implementation of the Negative List System for Market Access [国务院关于实行市场准入负面清单制度的意见]

Opinions on Cleaning-up and Rectifying Small Refineries and Regulating the Order of Distribution of Crude Oil and Processed Oil [关于清理整顿小炼油厂和规范原油成品油流通秩序的意见]

Price Law of the People's Republic of China [中华人共和国价格法]

Procedural Rules on Administrative Enforcement against Price Monopoly [反价格垄断行政执法程序规定]

Procedural Rules of the Administration for Industry and Commerce on the Investigation and Handling of Cases relating to Monopoly Agreements and Abuse of Dominance [工商行政管理机关查处垄断协议、滥用市场支配地位案件程序规定]

Procedural Rules of the Administration for Industry and Commerce on the Prohibition of Abuse of Administrative Power to Eliminate or Restrict Competition [工商行政管理机关制止滥用行政权力排除、限制竞争行为程序规定]

Provisional Measures on the Investigation and Handling of Concentrations between Business Operators Not Notified in Accordance with the Law [未依法申报经营者集中调查处理暂行办法]

Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors [外国投资者并购境内企业暂行规定]

Provisional Rules on the Assessment of the Competitive Effects of Concentrations of Business operators [关于评估经营者集中竞争影响的暂行规定]

Provisional Rules on the Management of Executives in Central SOEs [中央企业领导人员管理暂行规定]

Provisional Rules on the Prohibition of Price Monopoly Conduct [反价格垄断行为的暂行规定]

Provisional Rules on the Promotion and Protection of Competition in the Socialist Economy [关于开展和保护社会主义竞争的暂行规定]

Provisional Rules on the Promotion of Economic Alliance [关于推动经济联合的暂行规定]

Provisional Rules on the Standards Applicable to Simple Cases of Concentrations of Business Operators [关于经营者集中简易案件适用标准的暂行规定]

Provisions of the People's Republic of China on Open Government Information [中华人民共和国政府信息公开条例]

Resolution on the Mutual Aid and Cooperation in Agriculture [关于农业生产互助合作的决议]

Rules of Procedure of the National People's Congress of the People's Republic of China [中华人民共和国全国人民代表大会议事规则]

Rules of Procedure of the Standing Committee of the National People's Congress of the People's Republic of China [中华人民共和国全国人民代表大会常务委员会议事规则]

Rules of the Administration for Industry and Commerce on the Prohibition of Abuse of Administrative Power to Eliminate or Restrict Competition [工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定]

Rules of the Administration for Industry and Commerce on the Prohibition of Abuse of Dominant Market Position [工商行政管理机关禁止滥用市场支配地位行为的规定]

Rules of the Administration for Industry and Commerce on the Prohibition of Monopoly Agreements [工商行政管理机关禁止垄断协议行为的规定]

Rules of the Ministry of Commerce on the Implementation of the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors [商务部实施外国投资者并购境内企业安全审查制度的规定]

Rules of the State Council on Notification Thresholds for Concentrations of Undertakings [国务院关于经营者集中申报标准的规定]

Rules of the State Council on the Prohibition of Regional Blockade in Market Economic Activities [国务院关于禁止在市场经济活动中实行地区封锁的规定]

Rules of the Supreme People's Court on Judicial Interpretation Work [最高人民法院关于司法解释工作的规定]

Rules of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct [最高人民法院关于审理垄断民事纠纷案件适用法律若干问题的规定]

Rules on Anti-Price Monopoly [反价格垄断规定]

Rules on Major Duties, Internal Organization and Staffing of MOFCOM [商务部主要职责内设机构和人员编制规定]

Rules on Major Duties, Internal Organization and Staffing of the National Development and Reform Commission [国家发展与改革委员会主要职责内设机构和人员编制规定]

Rules on Major Duties, Internal Organization and Staffing of the State Administration for Industry and Commerce [国家工商行政管理总局主要职责内设机构和人员编制规定]

Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors [关于外国投资者并购境内企业的规定]

Rules on the Administration of Foreign Investment in Domestic Telecommunications Enterprises [外商投资电信企业管理规定]

Rules on the Prohibition of Abuse of Intellectual Property Rights to Eliminate or Restrict Competition [关于禁止滥用知识产权排除、限制竞争行为的规定]

Rules on the Prohibition of Below-Cost Sales [关于制止低价倾销行为的规定]

Several Opinions of the Central Committee of the Communist Party of China and the State Council on Furthering the Reform of Price System [中共中央国务院关于推进价格机制改革的若干意见]

Telecommunications Provisions of the People's Republic of China [中华人民共和国电信条例]

EU Legislation

Treaties

Treaty Establishing the European Economic Community

Treaty Establishing the European Community

Treaty on the European Union

Treaty on the Functioning of the European Union

Directives

Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, OJ L 195 of 29.07.1980.

Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204 of 21.07.1998.

Commission Directive 2002/77/EC on competition in the markets for electronic communications networks and services, OJ L 249/21 of 16.09.2002.

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 337 OF 18.12.2009.

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349 of 05.12.2014.

Regulations

Council Regulation No 17/62 of 6 February 1962 (EEC): First Regulation implementing Articles 85 and 86 of the Treaty, OJ 013 of 21.02.1962.

Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 257 of 21.09.1990.

Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Art 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336 of 22.12.1999.

Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Art 81(3) of the Treaty to categories of specialisation agreements, OJ L 304 of 29.11.2000.

Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Art 81(3) of the Treaty to categories of research and development agreements, OJ L 304 of 29.11.2000.

Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Art 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ 2000, L 203 of 31.07.2002.

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, OJ L 001 of 04.01.2003.

Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Art 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ 2003, L 53 of 27.02.2003.

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24 of 29.01.2004.

Commission Regulation (EC) No 802/2004 of 20 January 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133/1 of 07.04.2004.

Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123 of 27.04.2004.

Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway, OJ L61/1 of 26.02.2009.

Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L102/1 of 23.04.2010.

Other Legislation

An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, 52-53 Vict, c 41.

Sherman Act 15 USC §§ 1-7.

Gesetz gegen Wettbewerbsbeschränkungen vom 27. Juli 1957, 1957 BGBl. I S. 1081; most recent consolidation at BGBl. 2013 I S. 1751.

TABLE OF CASES

Chinese Cases

Court Decisions

Qihoo 360 v Tencent (2013) Min San Zhong Zi No.4 [民三终字第 4 号].

Qihoo 360 v Tencent (2011) Yue Gao Fa Min San Chu Zi No. 2 [粤高法民三初字第 2 号].

Rainbow v Johnson & Johnson (2012) Hu Gao Min San (Zhi) Zhong Zi No. 63 [沪高民三(知)终字第 63 号].

Rainbow v Johnson & Johnson (2010) Hu Yi Zhong Min Wu (Zhi) Chu Zi No. 169 [沪一中民五(知)初字第 169 号].

Shenzhen Huierxun Science and Technology Co., Ltd. v Shenzhen Pest Control Association (2012) Yue Gao Fa Min San Zhong Zi No. 155 [粤高法民三终字第 115 号].

Tencent v Qihoo 360 (2013) Min San Zhong Zi No.5 [民三终字第 5 号].

Tencent v Qihoo 360 (2011) Yue Gao Fa Min San Chu Zi No. 1 [粤高法民三初字第 1 号].

Decisions of the Anti-Monopoly Enforcement Agencies

Ministry of Commerce

ARM/G&D/Gemalto (2012) MOFCOM Notice No. 87, http://fldj.mofcom.gov.cn/article/ztxx/201212/20121208469841.shtml.

Baxter/Gambro (2013) MOFCOM Notice No. 58, http://fldj.mofcom.gov.cn/article/ztxx/201308/20130800244176.shtml.

Coca-Cola/Huiyuan (2009) MOFCOM Notice No. 22,
http://fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml.

GE/Shenhua (2011) MOFCOM Notice No. 74,
http://fldj.mofcom.gov.cn/article/ztxx/201111/20111107855595.shtml.

Glencore/Xstrata (2013) MOFCOM Notice No. 20
http://www.mofcom.gov.cn/article/b/fwzl/201304/20130400091299.shtml.

GM/Delphi (2009) MOFCOM Notice No. 76,
http://fldj.mofcom.gov.cn/article/ztxx/200909/20090906540211.shtml.

Google/Motorola Mobility (2012) MOFCOM Notice No. 25,
http://english.mofcom.gov.cn/article/policyrelease/domesticpolicy/201206/20120608199125.shtml.

InBev/ Anheuser-Busch (2008) MOFCOM Notice No. 95,
http://fldj.mofcom.gov.cn/article/ztxx/200811/20081105899216.shtml.

Maersk/MSC/CMA-CGM (P3 Network) (2014) MOFCOM Notice No. 46,
http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml.

Marubeni/Gavilon (2013) MOFCOM Notice No. 22,
http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400100376.shtml.

MediaTek/MStar (2013) MOFCOM Notice No. 61,
http://fldj.mofcom.gov.cn/article/ztxx/201308/20130800269821.shtml.

Merck/AZ Electronics Materials (2014) MOFCOM Notice No. 30,
http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400569060.shtml.

Mitsubishi Rayon/Lucite (2009) MOFCOM Notice No. 28,
http://fldj.mofcom.gov.cn/article/ztxx/200904/20090406198805.shtml.

Nokia/Alcatel (2015) MOFCOM Notice No. 44,
http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139743.shtml

Novartis/Alcon (2010) MOFCOM Notice No. 53,
http://fldj.mofcom.gov.cn/article/ztxx/201008/20100807080639.shtml.

Panasonic/Sanyo (2009) MOFCOM Notice No. 82, http://fldj.mofcom.gov.cn/article/ztxx/200910/20091006593175.shtml.

Pfizer/Wyeth (2009) MOFCOM Notice No. 77, http://fldj.mofcom.gov.cn/article/ztxx/200904/20090406198805.shtml.

Seagate/Samsung (2011) MOFCOM Notice No. 90, http://fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml.

Thermo Fisher/Li Fei (2014) MOFCOM Notice No. 3, http://fldj.mofcom.gov.cn/article/ztxx/201401/20140100461603.shtml.

Uralkali/Silvinit (2011) MOFCOM Notice No. 33, http://fldj.mofcom.gov.cn/article/ztxx/201106/20110607583288.shtml

UTC/Goodrich (2012) MOFCOM Notice No. 35, http://fldj.mofcom.gov.cn/article/ztxx/201206/20120608181083.shtml.

Walmart/Niuhai (2012) MOFCOM Notice No. 49, http://fldj.mofcom.gov.cn/article/ztxx/201303/20130300058730.shtml.

Western Digital/Hitachi Global Storage Technologies (2012) MOFCOM Notice No. 9, http://www.mofcom.gov.cn/article/b/c/201203/20120307993792.shtml.

National Development and Reform Commission[1]

Administration for Communication of Yunnan Province (2015) NDRC, 'Abuse of Administrative Power to Eliminate or Restrict Competition by the Administration for Communication of Yunnan Province was Rectified under the AML [云南省通信管理局违反《反垄断法》滥用行政权力排除限制竞争被依法纠正]', 2 June 2015, http://www.sdpc.gov.cn/gzdt/201506/t20150602_694807.html.

Bengbu Health and Family Planning Commission (2015) NDRC Decision No. 2175, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201508/t20150826_748684.html.

[1] Since NDRC has not published all of its detailed official decisions, some decisions provided below were published in the form of press release by either NDRC or Xinhua News Agency – China's ministerial-level press agency.

Dongfeng-Nissan (2015) NDRC, 'Guangdong DRC Imposed CNY 120 million on Dongfeng-Nissan [广东发改委对东风日产开出 1.2 亿垄断罚单]', 25 September 2015, http://fgs.ndrc.gov.cn/xtjl/201509/t20150925_752485.html.

Guangdong River Sand Case (2013) Guangdong DRC, 'Price Bureau of Guangdong Province Investigates Price Monopoly Conduct by River Sand Undertaking [广东省物价局严查河砂企业价格垄断]', 4 September 2013, http://www.fzb.gd.gov.cn/sofpro/otherproject/text/content.jsp?info_id=10848.

Hitachi (2014) NDRC Decision No. 2, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140918_626086.html.

Infant Milk Formula Case (2013) NDRC, 'Biostime and other Infant Milk Formula Manufacturers Violated the Anti-Monopoly Law [合生元等乳粉生产企业违反《反垄断法》]', 7 August 2013, http://xwzx.ndrc.gov.cn/xwfb/201308/t20130807_552992.html.

Insurance Industry Association of Zhejiang Province (2013) NDRC Decision No. 7, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140902_624511.html.

International LCD Cartel (2013) NDRC, 'Six Foreign Undertakings Sanctioned for Price Monopoly concerning LCD [六家境外企业实施液晶面板价格垄断被依法查处]', 17 January 2013, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201301/t20130117_523206.html.

Loudi Insurance Cartel (2012) Xinhua News Agency, 'First Monopoly Case Sanctioned in Hunan Province [湖南查处首起垄断案件]', 28 December 2012, http://www.gov.cn/jrzg/2012-12/28/content_2301393.htm.

Mercedes-Benz (2015) Xinhua News Agency, 'China Imposes Antitrust Fine on Mercedes-Benz', 23 April 2015, http://news.xinhuanet.com/english/2015-04/23/c_134177599.htm.

Moutai (2012) Xinhua News Agency, 'Moutai Fined CNY 247 million for Price Monopoly by Guizhou Price Bureau [贵州物价局公布罚单 茅台价格垄断被罚 2.47 亿]', 22 February 2013, http://news.xinhuanet.com/fortune/2013-02/22/c_124377781.htm.

Nachi-Fujikoshi (2014) NDRC Decision No. 10, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140918_626078.html.

NTN (2014) NDRC Decision No. 12, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140918_626076.html.

People's Government of Hebei et al. (2014) NDRC, 'NDRC Puts Forward Suggestion Pursuant to the Law to People's Government of Hebei Province of Rectifying the Behaviour of Departments of Transport and Other Departments of Abusing Administrative Power to Eliminate or Restrict Competition [国家发展改革委依法建议河北省人民政府纠正交通运输厅等部门违反《反垄断法》滥用行政权力排除限制竞争行为]', 26 September 2014, http://jjs.ndrc.gov.cn/gzdt/201409/t20140926_626773.html.

Qualcomm Incorporated (2015) NDRC Decision No. 1, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201503/t20150302_666176.html.

Shanghai Gold Cartel (2013) NDRC, 'Shanghai Golden Jewelry Association and A Number of Gold Retailers Fined for Implementing Price Monopoly [上海黄金饰品行业协会及部分金店实施价格垄断被依法查处]', 13 August 2013, http://jjs.ndrc.gov.cn/gzdt/201308/t20130813_553441.html.

Wuchang Salt Group Company (2010) NDRC, 'Hubei Price Bureau Sanctioned Wuchang Salt Group Company for Tying [湖北省物价局依法查处武昌盐业分公司强制搭售案件]', 15 November 2010, http://www.sdpc.gov.cn/fzgggz/jggl/zhdt/201011/t20101115_380425.html.

Wuliangye (2013) Sichuan Development and Reform Commission, 'Wuliangye Fined CNY 202 million for Price-Fixing [五粮液公司实施价格垄断被处罚 2.02 亿元]', 22 February 2013, http://www.scdrc.gov.cn/dir25/159074.htm.

Zhejiang Branch of China Life Insurance Co., Ltd. (2013) NDRC Decision No. 8, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140902_624515.html.

Zhejiang Branch of China People's Insurance Insurance Co., Ltd. (2013) NDRC Decision No. 4, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140903_624625.html.

Zhejiang Branch of China Ping An Insurance Co., Ltd. (2013) NDRC Decision No. 9, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140902_624516.html.

Zhejiang Branch of Min An Insurance Co., Ltd. (2013) NDRC Decision No. 29, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140902_624537.html.

State Administration for Industry and Commerce

Anyang Used Car Trading Market Co., Ltd. et al. (2012) Henan AIC Decision No. 1, http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136758.html.

Chenzhou Insurance Industry Association (2012) Hunan AIC Decision No. 3, http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136764.html.

Changde Insurance Industry Association (2012) Hunan AIC Decision No. 4, http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136763.html.

Chifeng Tobacco Company (2014) Inner Mongolia AIC Decision No. 2, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201407/t20140730_147161.html

Huizhou Daya Bay Yiyuan Purified Water Co., Ltd. (2014) Guangdong AIC Decision No. 2, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201401/t20140106_140962.html.

Lianyungang Concrete Cartel (2010) Jiangsu AIC Decision No. 37, http://www.saic.gov.cn/fldyfbzdjz/dxal/201302/t20130219_133370.html.

Ningxia Branch of China Telecom Co., Ltd. (2015) Ningxia AIC Decision No, 4, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201507/t20150715_158909.html

Ningxia Branch of China Tietong Group Co., Ltd. (2015) Ningxia AIC Decision No, 2, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201507/t20150715_158905.html

Ningxia Brach of China United Network Communications Group Co., Ltd. (2015) Ningxia AIC Decision No, 3, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201507/t20150715_158907.html

Shangyu Concrete Industry Association et al. (2014) Zhejiang AIC Decision No. 20, http://www.saic.gov.cn/zwgk/gggs/jzzf/201412/t20141201_150200.html.

Sunyard System Engineering Co., Ltd. (2015) Anhui AIC Decision No. 2, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201511/t20151105_163656.html.

Taihe Liquefied Petroleum Gas Station (2010) Jiangxi AIC Decision No. 1, http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136750.html.

Xiaobo Zhang (Wuxi Quarry Cartel) (2014) Chongqing AIC Decision No. 5, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201411/t20141104_149669.html.

Yongzhou Branch of An Bang Insurance Co., Ltd. (2013) Hunan AIC Decision No. 11, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201401/t20140107_140988.html.

Zhangjiajie Insurance Industry Association (2012) Hunan AIC Decision No. 2, http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136762.html.

EU Cases

Cases before the Court of Justice

AKZO v Commission (C-62/86) [1991] ECR I-3359.

Britannia Alloys & Chemicals Ltd v Commission (C-76/06) [2007] ECR I-4405.

Commercial Solvents Corporation v Commission (6 and 7/73) [1974] ECR 223.

Commission v Dimosia Epicheirisi Ilektrismou AE (C-553/12 P) ECLI:EU:C:2014:2083.

Commission v Schneider Electric (C-440/07 P) [2009] ECR I-6413.

Commission v Spain (C-207/07) [2008] ECR I-111.

Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (C-209/07) [2008] ECR I-8637.

Consten SaRL and Grundig-Verkaufs-GmbH v Commission (56/64 and 58/64) [1966] ECR 299.

Continental Can v Commission (C-6/72) [1973] ECR 215.

Coöperatieve Vereniging “Suiker Unie” UA and others v Commission (40 to 48/73, 50/73, 54 to 56/73, 113 and 114/73) [1975] ECR I-1663.

CRAM and Rheinzink v Commission (29/83 and 30/83) [1984] ECR 1679.

Eco Swiss China Time Ltd v Benetton International NV (C-126/97) [1999] ECR I-3055.

ERT and others v DEP and others (C-260/89) [1991] ECR I-2925.

Flaminio Costa v ENEL (6/64) [1964] ECR 585.

French Republic, Italian Republic and the UK v Commission (C-188/80) [1982] ECR 2545.

Hoffmann-La Roche & Co AG v Commission (C-85/76) [1979] ECR 461.

Klaus Höfner and Fritz Elser v Macrotron GmbH (C-41/90) [1991] ECR I-1979.

Michelin v Commission (C-322/81) [1983] ECR 3461.

RTT v GB-Inno-BM (C-18/88) [1991] ECR I-5941.

SA Musique Diffusion française and others v Commission (100-103/80) [1983] ECR 1825.

Société Technique Minière v Maschinenbau Ulm GmbH (56/65) [1966] ECR 235.

United Brands Co and United Brands Continentaal BV v Commission (C-27/76) [1978] ECR 207.

Cases before the General Court

Bank Austria Creditanstalt v Commission (T-198/03) [2006] ECR II-1429.

ENS v Commission (T-374-375/94) [1998] ECR II-3141.

Gencor v Commission (T-102/96) [1999] ECR II-759.

Intel v Commission (T-286/09) ECLI:EU:T:2014:547.

Michelin v Commission (Michelin II) (T-203/01) [2003] ECR II-4071.

Microsoft v Commission (T-201/04) [2007] ECR II-3601.

Omya v Commission (T-145/06) [2009] ECR II-145.

Schneider Electric SA/Legrand v Commission (T-310/01) [2002] ECR II-4071.

Schneider Electric SA/Legrand v Commission (T-77/02) [2002] ECR II-4201.

Schneider Elec. SA v Commission (T-351/03) [2007] ECR II-2237.

Tetra Laval BV v Commission (T-5/02) [2002] II-4389.

Timab Industries v Commission (T-456/10) ECLI:EU:T:2015:296.

Tréfilunion v Commission (T-148/89) [1995] ECR II-1063.

Commission Decisions

Abertis/Autostrade (COMP/M.4249) Commission decision of 22 September 2006.

Aerospatiale-Alenia/de Havilland (IV/M.053) Commission decision of 2 October 1991.

Enel/Acciona/Endesa (COMP/M.5171) Commission decision of 13 June 2008.

E.ON/Endesa (COMP/M.4110) Commission decision of 25 April 2006.

GE/Honeywell (COMP/M.2220) Commission decision of 2 July 2001.

Heat Stabilisers (COMP/38589) Commission decision of 11 November 2009.

Holcim/Cemex West (M.7009) Commission decision of 5 June 2014.

Hutchison 3G UK/Telefónica (M.6992) Commission decision of 28 May 2014.

Intel (COMP/C-3/37.990) Commission decision of 13 May 2009.

LCD (Liquid Crystal Displays) (COMP/39.309) Commission decision of 8 December 2010.

Liberty Global/Ziggo (M.7000) Commission decision of 10 October 2014.

Lyonnaise Des Eaux/ Northumbrian Water (IV/M.567) Commission decision of 21 December 1995.

Nokia/Alcatel-Lucent (COMP/M.7632) Commission decision of 24 July 2012.

Optical Disk Drives (COMP/39639) Commission decision of 21 October 2015.

PO/Hard Haberdashery: Fasteners (COMP/39.168) Commission decision of 19 September 2007.

Schneider/Legrand (COMP/M.2283) Commission decision of 10 October 2001.

UniCredit/HVB (COMP/M.3894) Commission decision of 18 October 2005.

UTC/Goodrich (COMP/M.6410) Commission decision of 26 July 2012.

Volkswagen/Scania (COMP/M.5157) Commission decision of 16 September 2008.

Volvo/Scania (COMP/M.1672) Commission decision of 14 March 2000.

Western Digital Irland/Viviti Technologies (COMP/M.6203) Commission decision of 23 November 2011.

US Cases

Business Electronics Corp. v Sharp Electronics Corp., 485 U.S. 717, 723 (1988).

Credit Suisse Securities (USA) LLC v. Billing, 127 S.Ct. 2383 (2007).

Dr. Miles Medical Co. v John D. Park & Sons Co., 220 U.S. 373 (1911).

Leegin Creative Leather Products, Inc. v PSKS, Inc., 127 S. Ct. 2705 (2007).

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 US. 398 (2004).

LIST OF ABBREVIATIONS

ABA	American Bar Association
AICs	Administrations for Industry and Commerce
AMC	Anti-Monopoly Commission
AMEAs	Anti-Monopoly Enforcement Agencies
AML	Anti-Monopoly Law
AUCL	Anti-Unfair Competition Law
CCDI	Central Commission for Discipline Inspection of the CPC
CNOOC	China National Offshore Oil Corporation
CNPC	China National Petroleum Corporation
CNR	China North Locomotive and Rolling Stock Industry Corporation Limited
CNY	Chinese Yuan Renminbi
COD	Central Organisation Department
CPC	Communist Party of China
CPLC	Central Political and Legislative Committee
CSR	China South Locomotive and Rolling Stock Industry Corporation Limited
DRCs	Development and Reform Commissions
EC	European Community

ECMR	European Community Merger Regulation
ECN	European Competition Network
EEC	European Economic Community
EU	European Union
EUMR	European Union Merger Regulation
FDI	Foreign Direct Investment
FIEs	Foreign Investment Enterprises
FMC	Federal Maritime Commission
GATT	General Agreement on Tariffs and Trade
GBP	Great British Pound Sterling
HHI	Herfindahl-Hirschman Index
HMT	Hypothetical Monopoly Test
ICN	International Competition Network
IM	Instant Messaging
IPRs	Intellectual Property Rights
LAO	Legislative Affairs Office
MIIT	Ministry of Industry and Information Technology
MIM	Mobile Instant Messaging
MOFCOM	Ministry of Commerce
MOFTEC	Ministry of Foreign Trade and Economic Cooperation

NCAs	National Enforcement Authorities
NDRC	National Development and Reform Commission
NPC	National People's Congress
OECD	Organisation for Economic Co-operation and Development
PRC	People's Republic of China
ROC	Republic of China
RPM	Resale Price Maintenance
SAIC	State Administration of Industry and Commerce
SASAC	State-Owned Assets Supervision and Administration Commission
SDPC	State Development and Planning Commission
SEPs	Standard-Essential Patents
SETC	State Economic and Trade Commission
SEZs	Special Economic Zones
SGEI	Services of General Economic Interest
SOEs	State-Owned Enterprises
SPC	Supreme People's Court
SSNDQ	Small but Significant and Non-Transitory Decrease in Quality
SSNIP	Small but Significant and Non-Transitory Increase in Price
TEEC	Treaty Establishing the European Community
TEU	Treaty on the European Union

TFEU	Treaty on the Functioning of the European Union
TVEs	Township and Village Enterprises
US	United States of America
WFOEs	Wholly Foreign-Owned Enterprises
WTO	World Trade Organization

Chapter One

Introduction

1. GENERAL INTRODUCTION

This thesis explores, first, the evolution and implementation of competition policy in China,[1] where a competition culture was largely absent for decades; and second, the extent to which the government has resolved the inherent contradiction between preserving state control and promoting competition. Since the government exerts control over, and directly engages in, economic activities through state-owned enterprises (SOEs), which represent significant political interests, the latter part of this thesis focuses on the interplay between competition policy and the government's treatment of SOEs.

'China often appears as a contradiction within itself'.[2] Indeed, as reflected in the term 'socialist market economy',[3] China seeks to establish a capitalist-style market-oriented economy whilst refusing to relinquish its socialist ideology. The introduction of the Anti-Monopoly Law (AML) in China is closely related to this paradox: a socialist state that protects its SOEs and a large segment of the industrial sector from competition, and yet adopts and implements a competition legislation, which in essence promotes market liberalisation and competition. Therefore, on the one hand,

---

[1] Unless otherwise indicated, the term 'China' as used hereinafter in this thesis denotes only the mainland of the People's Republic of China and makes no reference to the Special Administrative Regions of Hong Kong, where a competition legislation – the Competition Ordinance – will enter into force on 14 December 2015, and Macau, where there is no general competition legislation (some competition-related provisions are included in the Commercial Code of Macau). In addition, Chinese names appearing in this thesis, except for those in citations, are written in the traditional Chinese order, namely, family name first, followed by given name.

[2] Christopher McNally, 'The China Impact' in Christopher McNally (eds.) *China's Emergent Political Economy: Capitalism in the Dragon's Lair* (Routledge 2008) 4.

[3] This term is adopted in Article 15 of the Constitution of the People's Republic of China as revised on 29 March 1993, but is not defined or explained in either the Constitution itself or anywhere else. The official English translation of the Constitution of the People's Republic of China is available at http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm.

since China's ongoing economic reform has to be responsive to changing needs resulting from its integration with the global economy,[4] the AML is expected to nurture and promote a competitive market in China. On the other, the fundamental interests of the socialist market economy – even the anti-competitive aspect, such as the isolation of state sector – are not to be placed at risk. In light of this paradox, this thesis studies, first, China's ongoing economic transition and the historical development of Chinese competition policy; second, the prolonged drafting history of the AML; third, the substantive and institutional aspects of the enforcement of the AML and the outstanding problems of the current competition system; and fourth, the role of the government in the interplay between competition policy and SOEs.

1.1 Background

Until recent decades, competition as an economic driver had been largely overlooked in China. The dominant political policies of each dynasty required extensive state control over different kinds of resources, and this prevalent feature made competition an unrealistic tool for economic development. The very same situation persisted even into the early decades of the People's Republic of China (PRC). During that time, economy-driving sectors other than agriculture had already developed prosperously in the western world, but China's economy still relied substantially on agricultural production and its early attempt to transfer the country into an industrial state tragically failed.[5] However, in recent decades, and against the backdrop of the evolution of the business world and overwhelming globalisation, China has gradually taken steps towards shaping its economy into a more modern form, and inevitably opened its door to foreign capital.[6] As a consequence, although state

---

[4] Henry C. Cheng, 'China's New Anti-monopoly Law: Big Trouble in Little China?' (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344921, 43.

[5] This refers to the 'Great Leap Forward' movement, started in 1959. This incident will be further explored in section 1.2, Chapter 2. See also Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge University Press 2005) 101.

[6] See Wanda Tseng and Harm Zebregs, 'Foreign Direct Investment in China: Some Lessons for other Countries' (2002) IMF Policy Discussion Paper, PDP/02/3,

control remains significant, private sectors have now been effectively contributing to economic development.[7]

In August 2007, China joined the club consisting of more than 120 countries[8] which have at least some form of regulatory regime governing competition, by enacting its long-awaited AML,[9] the first comprehensive set of competition rules in China's history. In light of the substantial growth of China's markets and the vast amounts of foreign capital invested in China in recent decades, especially after China's accession to the World Trade Organisation (WTO), the AML has engendered an 'unprecedented level of interest'[10] in the political circles, the business community, and of course academia.

Apart from standard competition provisions – monopoly agreement,[11] abuse of a

---

http://www.imf.org/external/pubs/ft/pdp/2002/pdp03.pdf; and OECD, 'FDI in Figures' (2013), http://www.oecd.org/daf/inv/FDI%20in%20figures.pdf.

[7] As of 2012, the private sector contributes 60% of China's GDP, pays 50% of the taxes and creates more than 70% of the jobs. CCTV, 'China to Work on Developing Private Sector', 20 December 2012, http://english.cntv.cn/program/bizasia/20121220/102630.shtml.

[8] Maher Dabbah, *International and Comparative Competition Law* (Cambridge University Press 2010) 3. See also OECD Secretariat, 'Optimal Design of a Competition Policy', submitted to the Global Forum on Competition (2003), *www.oecd.org/dataoecd/58/29/2485827.pdf.*

[9] The Anti-Monopoly Law of China, adopted at the 29th meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China on 30 August 2007, available at http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm. The full text of the English version of the AML is provided in the Appendix, where the authentic Chinese text of the AML can also be found.

[10] H. Stephen Harris, 'The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China' (2006) 7 Chi. J. Int'l L. 169, 169.

[11] Chapter II, AML. Chapter II can to a degree be treated as equivalent to Article 101 of the Treaty on the Functioning of the European Union (TFEU), therefore monopoly agreements can be seen as 'all agreements between undertakings, decisions by associations of undertakings and concerted practices'. Nonetheless, the term 'monopoly agreements' – which is a direct literal translation of the Chinese term *longduan xieyi* [垄断协议] – in the AML can cause confusion. The Oxford English Dictionary defines 'monopoly' as, first, 'the exclusive possession or control of the supply of or trade in a commodity or service'; second, 'a company or group having exclusive control over a commodity or service'; and third, 'a commodity or service in the exclusive control of a company or group'. According to these definitions, 'exclusivity' is at the core of 'monopoly'; however, the conclusion of an 'agreement' requires no fewer than two parties. Therefore, the term 'monopoly agreements' represents an inherent contradiction. Similarly, as can be seen in Chapter 3 of the AML, 'monopoly' does not constitute a violation of the AML in itself, therefore, it seems that the very title of this law – Anti-Monopoly Law – also represents the same type of contradiction. Nonetheless, it has to be acknowledged that both the terms 'monopoly agreements' and 'Anti-Monopoly Law' are accurately translated based on the Chinese language used in the AML, and almost all scholars and competition officials use 'monopoly agreements' to refer to anti-competitive agreements when the AML is concerned. Therefore, for the sake of coherence, this thesis will use 'monopoly agreements' to refer to 'agreements, decisions or other concerted actions which eliminate or restrict competition' – the definition of 'monopoly agreements' set out in para. 2 of Article 13 of the AML.

dominant position,[12] and merger control[13] – the new law creatively takes into account some significant issues which are unique to China. It includes the prohibition of anti-competitive practices carried out by undertakings operating in 'industries controlled by the State-owned economy and concerning the lifeline of national economy and national security',[14] most if not all of which are in fact SOEs. In China, the socialist ideology dictates that economic intervention by the government by means of SOEs will always be a prevalent phenomenon. As a consequence, SOEs practically controlled the entire Chinese economy in the centrally planned model era, and have been playing a significant role in China's ongoing economic transformation to a socialist market economy.[15] Given the extensive economic involvement of SOEs, it can be suggested that the enforcement of the AML will not be deemed effective if it is to circumvent the issues of SOEs.

In capitalist economies, discrimination normally arises between domestic and foreign undertakings. In China, discrimination also exists between SOEs and private undertakings. Whilst private undertakings in most cases have to adopt a myriad of means to establish a relationship with government departments – most notably through bribery – there is an inherent connection between the government and SOEs. Indeed, ownership is what makes state-owned and privately-owned undertakings different in the eyes of the government. The government always has a tendency towards treating the undertakings which are actually owned by it more preferably. State ownership of SOEs hence makes them formidable market players, not only in terms of financial conditions, but also in terms of political support. However, one of the most essential functions of competition law is to ensure that unencumbered market forces determine

---

[12] Chapter III, AML.
[13] Chapter IV, AML.
[14] Article 7, AML.
[15] Andrew Szamosszegi and Cole Kyle, 'An Analysis of State-Owned Enterprises and State Capitalism in China' U.S.-China Economic and Security Review Commission (2011), http://www.uscc.gov/Research/analysis-state-owned-enterprises-and-state-capitalism-china, 1.

the allocation of resources in the marketplace;[16] government should only intervene when there is a persistent market failure which cannot be overcome by the market itself.[17] Therefore, whilst the promulgation of the AML represents the willingness of the Chinese government to facilitate the construction of a market-oriented economy, an inherent contradiction was nonetheless raised: market competition is at the core of a market economy, and state control is pervasive in a socialist economy; how then can these seemingly conflicting ideologies be reconciled?

It is against the backdrop of the growing interest of the public in competition issues, China's long-standing state control over the economy, and the profound impacts of SOEs, that the evolving topic of competition development in China is elaborated and evaluated in this thesis.

1.2 The Definition of SOEs

Since this thesis specifically studies the application of the AML to SOEs, it implies that, in practice, state-owned and private undertakings are treated differently under the AML. It is therefore necessary first to understand what SOEs are. In practice, there is no single accurate definition for the term 'SOE', as ownership of enterprises in China is inconveniently mixed. In official statistics, SOEs are 'business entities established by central and local governments, and whose supervisory officials are from the government'.[18] However, this category includes only wholly state-funded enterprises and excludes share-holding cooperative enterprises, joint-operation enterprises, and limited liability corporations.[19] Therefore, a considerable number of enterprises whose management is practically overseen and supervised by state actors, are not officially considered as SOEs. Another category is 'state-owned and state-

[16] Niamh Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* (Cambridge University Press 2015) 7.
[17] *Ibid*., 1.
[18] Junyeop Lee, 'State Owned Enterprises in China: Reviewing the Evidence' (2009) OECD Occasional Paper, 5.
[19] *Ibid*., 6.

holding enterprises', [20] which includes fully state-owned enterprises and those enterprises whose majority shareholder is the government, public organisations, or other SOEs.[21] This category, unlike the previous one which rigidly requires full state ownership, emphasises the external 'controlling influence' over management and operation of an enterprise, which mainly comes from the government and other SOEs.[22] Therefore, it also includes enterprises in which the state-owned or SOE-owned share is less than 50%.[23]

Despite the uncertain definitions of SOEs, the AML does not explicitly make a distinction between private and public enterprises, therefore, it is not necessary – at least for the purpose of this thesis – to go to the root of a particular enterprise in order to ascertain if it is a SOE in the strictest sense. The second part of this thesis – the implementation of competition policy in the state sector – does not focus on ownership status *per se*, but rather examines how the strong political ties between the government and SOEs have shaped competition policy and enforcement outcomes. Therefore, so long as there is *prima facie* evidence that the state holds shares in an enterprise – irrespective of how small the share is and how indirectly the state exerts its influence on the enterprise – it is deemed a SOE in this thesis.

2. RESEARCH QUESTIONS

2.1 Research Question 1 (Chapter 2)

Given China's unique and ingrained characteristic of extensive state involvement in economic activities, the first research question consists of two interrelated aspects: first, it asks what the main characteristics of the Chinese government were before the

[20] This category is in line with the definition of SOEs provided by the World Bank – 'government owned or government controlled economic entities that generate the bulk of their revenues from selling goods and services'. World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership* (Oxford University Press 1995) 26.
[21] Lee (fn 18) 6.
[22] *Ibid*.
[23] World Trade Organization, *Trade Policy Review: China (Revised)* (WTO 2010) 54.

economic transition; and second, it asks what the main driving factors behind the establishment of a competition system in China were. This thesis argues that the outstanding problems of China's competition system stem not only from current environment in which the system operates, but also from historical events which changed the environment that nurtured the system. Therefore an appraisal of these events may be the only way to understand the outstanding problems.

There is extensive literature discussing either the reason why China needs a competition law, or the drivers of the adoption of the AML.[24] Generally, it has been agreed that there were three major factors behind China's decision to establish a competition system.[25] First, and the most essential factor, is China's historic transaction from a centrally planned economy to a socialist market economy.[26] Second, foreign pressures, especially after China's accession to the WTO on 11 November 2002, have been some of the vital impetuses for the acceleration of the drafting process of the AML.[27] Third, there has been a growing need to overhaul China's legal system to adapt to the new competition environment.[28]

However, it should be acknowledged that the emergence of these drivers was a result of the failure of the centrally planned economy and political campaigns initiated by the Communist Party of China (CPC). Before the Reform and Opening Up policy,[29] China had gone through decades of economic recession and political turmoil

---

[24] See for example, Bing Song, 'Competition Policy in a Transitional Economy: the Case of China' (1995) 31 Stanford Journal of International Law 387; and Jared A. Berry, 'Anti-Monopoly Law in China: A Socialist Market Economy Wrestles with Its Antitrust Regime' (2005) 2 International Law & Management Review 129. For general discussion on the historical aspect of China's competition system, see David J Gerber, 'Economics, Law & Institutions: The Shaping of Chinese Competition Law' (2008) 26 Journal of Law & Policy 271; Yong Huang, 'Pursuing the Second Best: The History Momentum, and Remaining Issues of China's Anti-Monopoly Law' (2008) 75 Antitrust Law Journal 117; and Grace Li and Angus Young, 'Competition Laws and Policies in China and Hong Kong: A Tale of Two Regulatory Journeys' (2008) 7 Journal of International Trade Law and Policy 186.

[25] See for example, Dan Wei, 'Antitrust in China: An Overview of Recent Implementation of Anti-Monopoly Law' (2013) 14 European Business Organization Law Review 119, 120.

[26] Gerber (fn 24) 282-283.

[27] Mark Furse, 'Competition Law Choice in China' (2007) 30 World Competition 323, 332; and Gerber (fn 23) 281. For discussion of the impact of WTO accession on China's legal system, see Donald Clarke, 'China's Legal System and the WTO: Prospects for Compliance' (2003) 2 Wash. U. Global Stud. L. Rev. 97.

[28] Berry (fn 24) 136.

[29] Adopted at the Third Plenary Session of the 11th Communist Party Congress in 1978.

resulting from unrealistic economic policy and radical ideological conflicts.[30] Whilst years of social unrest were finally terminated by the more pragmatic reformers in the Communist Party, and the abovementioned drivers gradually emerged to influence China's economic development and policy-making, the political environment and structure have not hitherto been fundamentally changed. As a consequence, China's astonishing economic reforms over recent decades has not been accompanied by corresponding reform in the political arena.[31] Such mismatching leads to a situation where modern legal instruments governing evolved market practices are drafted and implemented by outmoded bureaucratic institutions which are profoundly influenced by the residual political characteristics of the Chinese government in the era of centrally planned economy – pervasive state intervention in economic activities and superior status of political goals in government's decision-making.

Given the topic of this thesis, which puts significant emphasis on the role that the government has played and is playing in the implementation of competition policy, this first research question, besides discussing the drivers of the adoption of the AML, briefly introduces the government control over the economy through the operation of SOEs before the economic transition, and important historical events that defined the characteristics of the Chinese government.

2.2 Research Question 2 (Chapter 3)

The second research question asks what the major concerns were during the drafting of the AML that prolonged the drafting process and shaped the AML into its current form. Since the drafting of the AML was a prolonged and tedious process that took China 13 years finally to accomplish, it must to a degree have involved debates over the most central issues. Indeed, the drafting of the AML was subject to fierce

---

[30] For comprehensive studies on China in the pre-reform era, see Gregory C. Chow, *China's Economic Transformation* (Blackwell Publishing 2007); Peter Nolan, *Transforming China: Globalization, Transition and Development* (Anthem Press 2004); and Barry Naughton, *The Chinese Economy: Transitions and Growth* (MIT Press 2007).

[31] Xiaoye Wang and Jessica Su, *Competition Law in China* (Kluwer Law International 2012) 20.

internal dispute amongst government departments, 'each of which had different interests and stakes in the outcome of the legislative proceedings'.[32]

The thesis finds that during the drafting of the AML, the most complicated task for drafters was not what types of modern competition doctrines should be incorporated and how to address them, but how to balance various sources of interest deriving from China's ingrained socialist ideology. First, the market-driven principle introduced by the AML would inevitably endanger the interests of many influential factions that gained their powerful status from China's traditional state-controlled economy.[33] Second, pervasive state involvement in the allocation of resources had made government departments used to struggling for more policy-making powers, and the introduction of the AML initiated a new round of conflicts over competition enforcement power.[34] In the end, political compromises were made. As will be discussed in the thesis, the non-transparent and incoherent enforcement by the Anti-Monopoly Enforcement Agencies (AMEAs) is a direct result of excessive compromise made in the drafting process of different interests and stakes.[35]

Through a discussion on its drafting, two important issues concerning the enforcement of the AML will be addressed. First, what were the considerations behind the insertion of the provisions that have unique Chinese characteristics? Second, why had a tripartite enforcement system – one of the most controversial issues of China's competition system – been designed under the AML?

2.3 Research Question 3 (Chapters 4 and 5)

The third research question asks how well the AML has been applied to regulate anti-competitive behaviour, and if the current competition system is able to ensure an

---

[32] Yi Shin Tang, 'Lawmaking Process and Non-Governmental Stakeholders in China's Antimonopoly Law' (2015) 36 European Competition Law Review 174, 179-180.
[33] Williams (fn 5)192.
[34] Angela Huyue Zhang, 'The Enforcement of China's Anti-Monopoly Law: An Institutional Design Perspective' (2011) 56 Antitrust Bulletin 630, 640-645.
[35] Tang (fn 32) 180.

effective enforcement of the AML. It is answered through evaluating both the application of the substantive text of the AML to monopolistic conduct and the public enforcement system in general.

Considerable resources have been devoted to the making of the AML, but the enforcement is the actual spirit that decides if the devotion is worth it. '[T]he legal instruments governing both substance, competences and procedure' and 'the administrative structures and processes through which the legal instruments are implemented' are the two essential components that form a competition system.[36] The effectiveness of these two components is interdependent: a well drafted competition law requires properly designed enforcement structures and procedures, and *vice versa*.[37] This thesis finds that, after seven years of development,[38] legal instruments, administrative structures, and processes in China's competition system still have substantial weaknesses that impede the effective enforcement of the AML, and in some cases induce more serious market distortions.[39]

The inefficiency of China's competition system results from various factors, and extensive literature has touched upon this issue.[40] Nonetheless, since the administration of the CPC led by President Xi Jinping came to power, new sets of

---

[36] Philip Lowe, 'The Design of Competition Policy Institutions for the 21st Century – the Experience of the European Commission and DG Competition' (2008) Competition Policy Newsletter, http://ec.europa.eu/competition/publications/cpn/2008_3_1.pdf, 1.

[37] *Ibid.*

[38] In the formative years of China's competition system, the effectiveness of the AML has been questioned due to infrequent application. See for example, Nathan Bush, 'Chinese Competition Policy: It Takes More than Law' (2005) The China Business Review, http://www.chinabusinessreview.com/public/0505/bush.html; and Salil Mehra and Meng Yanbei, 'Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law' (2008) 49 Virginia Journal of International Law 379.

[39] See for example, the consideration of industrial policy in competition analysis, section 5.3, Chapter 6.

[40] See for example, Liyang Hou, 'An Evaluation of the Enforcement of China's Anti-Monopoly Law in 2008-2013' (2013), http://ssrn.com/abstract=2292296; Angela Huyue Zhang, 'Bureaucratic Politics and China's Anti-Monopoly Law' (2014) King's College London Dickson Poon School of Law Legal Studies Research Paper Series, paper no. 2014-9, http://ssrn.com/abstract=2391187; Angela Huyue Zhang, 'The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective' (2011) 56 The Antitrust Bulletin, http://ssrn.com/abstract=1783037; Yong Huang and Zhiyan Li, 'An Overview of Chinese Competition Policy: Between Fragmentation and Consolidation' in Adrian Emch and David Stallibrass (eds.) *China's Anti-Monopoly Law: the First Five Years* (Kluwer Law International 2013).

initiatives for further political and economic reform have been enforced.[41] Given the importance that the AML had in the preservation of market orders, the enforcement of the AML has been at the top of government's agenda, and more resources have been devoted to the better functioning of the AMEAs.[42] The recent enforcement actions, given the increasing number of investigations and more frequent disclosure of enforcement decisions, have shown a positive trend towards more effective enforcement of the AML. In addition, Chinese courts are increasingly familiar with the economic reasoning and analysis.[43] It is against this backdrop that this thesis provides an up to date examination of the application of the AML, and the structure and effectiveness of the enforcement system.

2.4 Research Question 4 (Chapter 6)

The last research question asks what the relation between competition policy and SOEs is in China's current economic and political environment. A number of scholars have stated that SOEs are generally less economically efficient than private undertakings in the same sector because in theory government ownership provides fewer incentives for business operators to pursue profits maximisation.[44] Such argument is supported by various statistics on the performance of China's SOEs.[45]

---

[41] For example, see Xinhua News Agency, 'Initiative of Reform on Structure and Functioning of State Council Has been Approved', 14 March 2013, http://news.xinhuanet.com/2013lh/2013-03/14/c_115024855.htm.

[42] China News, 'China Plans to Reinforce Supervision of Anti-Monopoly Enforcement and Establish the Essential Status of Competition Policy', 15 October 2015, http://www.chinanews.com/gn/2015/10-15/7571992.shtml.

[43] Howard Chang, David Evans and Vanessa Yanhua Zhang 'Analyzing Competition among Internet Players: Qihoo 360 v. Tencent' (2013) Antitrust Chronicle, https://www.competitionpolicyinternational.com/analyzing-competition-among-internet-players-qihoo-360-v-tencent.

[44] See for example, D.Daniel Sokol, 'Competition Policy and Comparative Corporate Governance of State-Owned Enterprises' (2009) BYU L. Rev. 1713, 1720; Wei Li and Lixin Xu, 'The Political Economy of Privatization and Competition: Cross-Country Evidence from the Telecommunications Sector' (2002) 30 Journal of Comparative Economics 439, 456; and Joel Samuel, ''Tain't What You Do' Effect of China's Proposed Anti-Monopoly Law on State Owned Enterprises' (2007) 29 Penn. St. Int'l. Rev. 169, 176.

[45] According to China Enterprise Confederation and China Entrepreneur Association, among the top 500 undertakings in China, 43 suffered a loss last year, and 42 of them are SOEs. See Xinhua News Agency, 'China 500: 42 SOEs are at Loss', 2 September 2014, http://news.xinhuanet.com/fortune/2014-09/02/c_1112329319.htm.

However, as will be suggested in Chapter 6, it has to be recognised that although the AML may be able to play an important role in opening up to competition some sectors currently monopolised by inefficient SOEs, that alone would not be sufficient for China to achieve this goal.[46] SOEs represent a complex subject which is not created by a single piece of law, and can definitely not be dealt with by another piece. The outcome of competition enforcement against SOEs depends substantially on more meaningful reform of SOEs in the short term, and that of the political system in the long term.

In addition, there is an intense conflict between competition policy and industrial policy in China.[47] As a socialist country placing significant emphasis on rigorous control over the economy, China commonly uses industrial policy to achieve political goals, which may not necessarily be in conformity with competition goals.[48] Since the most important industries are controlled by SOEs,[49] the government's attitude towards the state sector can be partially demonstrated by how industrial policy is evolving. This research question therefore also studies how the government reacts in the case of a conflict between market competition and industrial interests.

3. REASONS FOR INTRODUCING THE EU COMPETITION SYSTEM

In addition to answering the four research questions, this thesis – in Chapter 7 – also adopts a comparative research methodology by introducing the competition system in the EU. Although the focus of this thesis is not on the EU, and Chapter 7 is not designed to provide an in-depth critical analysis of EU competition system, the

---

[46] Zhang (fn 40) 23.

[47] See generally Yanbei Meng, 'The Uneasy Relationship between Antitrust Enforcement and Industry-Specific Regulation in China' in Adrian Emch and David Stallibrass (eds.) *China's Anti-Monopoly Law: the First Five Years* (Wolters Kluwer 2013).

[48] Samuel (fn 44) 199.

[49] The government maintains absolute control over seven strategically important industrial sectors. State-Owned Assets Supervision and Administration Commission, 'Guiding Opinions on the Restructuring of State Capital and the Reorganisation of State-Owned Enterprises' (2006), http://www.gov.cn/gongbao/content/2007/content_503385.htm.

EU's way of enforcing its competition law has valuable lessons for its Chinese counterpart for several reasons.

First, as one of the oldest and most sophisticated competition jurisdictions, the EU has always been an important model for developing countries to design their own competition systems to prevent anti-competitive activities and promote competition in the market.[50] Second, whilst the US was founded on the ideology of economic liberalism and the belief that market activities should be free from excessive state intervention, Europe had been in a period when state control over the economy was pervasive.[51] The experiences of many EU member states in replacing their rigorously controlled economies with liberal market economies through economic and legal means are a valuable reference for Chinese policymakers.[52] Third, China and the EU share a similar legal tradition.[53] In the US common law system, which has case law as the main legal source, the judiciary is placed at the centre of the enforcement of competition rules. In contrast, the civil law tradition followed by China and the EU relies primarily on written law.[54] Fourth, based on the similarities between the EU and China, China's competition system has been modelled substantially on EU competition law.[55] Indeed, it is significantly influenced by the EU competition system, from which meaningful assistances have been sought during the drafting of the AML. Moreover, like competition enforcement in the EU, the AML is mostly enforced through administrative remedial mechanism, in contrast with the preferred mechanism of judicial enforcement through litigation in the US.

---

[50] Qianlan Wu, 'EU–China Competition Dialogue: A New Step in the Internationalisation of EU Competition Law?' (2012) 18 European Law Journal 461, 461.
[51] Jacob Schneider, 'Administrative Monopoly and China's New Anti-Monopoly Law: Lessons from Europe's State Aid Doctrine' (2010) 87 Washington University Law Review 869, 884.
[52] Dan Wei, 'China's Anti-Monopoly Law and Its Merger Enforcement: Convergence and Flexibility' (2011) 14 Journal of International Economic Law 807, 813.
[53] *Ibid*.
[54] David J. Gerber, 'Economics, Law and Institutions: The Shaping of Chinese Competition Law' (2008) 26 Washington University Journal of Law and Policy 271, 293.
[55] See Nathan Bush, 'Constraints on Convergence in Chinese Antitrust' (2009) 54 The Antitrust Bulletin 87, 93; and Cornelia Lefter, 'Law Antimonopoly of China – a Model of European Inspiration' (2011) 18 Theoretical and Applied Economics 75, 76. See also section 3, Chapter 3.

These similarities and the close link in the realm of competition law between these two jurisdictions make a comparative study of competition systems in China and the EU relevant and worthwhile. It is possible to use the experiences of the EU as a mirror to reflect the status quo of China's competition system. By illustrating the European experiences in enforcing competition law, the main purpose of this chapter is to introduce the merits of the EU competition system that make it one of the most advanced, and, in light of these merits, what practical solutions can be provided to some of the problems facing China's competition system.

Chapter Two
Historical Development of Economic Transition, Competition Policy and Institutions in China

1. INTRODUCTION

This chapter provides, first, an introduction of the historical aspect of economic development in China; second, an analysis of the reasons behind China's decision to establish a competition system; and third, a brief overview of AML-related institutional reform. All of these historical developments have had profound impacts on how China's competition policy was formulated and the way in which the AML is enforced. This chapter intends to demonstrate that the outstanding issues currently facing China's competition system – in particular the issue concerning SOEs – can only be properly understood in a wider historical context.

Since ancient times, agriculture was the major source of fiscal revenue in feudal China,[1] where a history of restraining private business activities was longstanding.[2] Even in modern times, competition as an important factor to promote economic performance in the market had not been appreciated for a considerably long time since the founding of the People's Republic of China (PRC) in 1949. However, along with the stunning evolution of civilisation and the globalisation of the world economy, the competition environment in China began to gradually change.

Aiming – at least apparently[3] – to protect competition process and promote

---

[1] Agricultural tax on rural households' operating income and production, which has been effective for more than 2600 years, was abolished for the first time in China's history in 2006. See Central Government of China, 'Abolition of Agricultural Tax', 6 March 2006, http://www.gov.cn/test/2006-03/06/content_219801.htm.

[2] '*Zhongnong yishang* [重农抑商]' is a commonly known saying describing the basic policy of empires in feudal period, it means literally 'stressing agriculture, restraining commerce'.

[3] As will be discussed later, external factors had played a significant role in the development of China's competition policy, it is questionable as to if pure competition-related consideration was the most essential reason for China to adopt the AML.

market economy,[4] the enactment of the AML in 2007 signalled the long-awaited appreciation of competition by Chinese authorities. Nevertheless, the imperative need on the part of China to start building a market economy and taking market competition seriously did not exist in a vacuum. What then were the major events and driving forces that spurred China to finally perceive that competition legislation was needed? And to what extent did these factors shape the competition policy and its institutions in present-day China? In light of the close relationship between the development of competition policy and that of the economy, an investigation into China's unique economic environment – the foundation on which China's competition policy is based – is necessary.

Ronald Coase, a Nobel laureate in economics, once said: 'We cannot possibly understand this incredible transformation or the path that China had travelled to get there without a clear notion of where it started – China under Mao'.[5] This chapter will start with a discussion of China in Mao's era.[6]

2. PAIN IN SEEKING THE RIGHT PATH

For nearly a century before the founding of the PRC in 1949, both the economy and the life of the people on the land had been severely damaged by military invasion by foreign expansionists. Maybe it was because of these long years of bitter experience that many Chinese people associated capitalism with imperialism as it was practised by capitalist countries.[7] The founding of the CPC in Shanghai in 1921 and the

[4] Interestingly, Ulen argues that 'there is no persuasive evidence to suggest that any form of substantive or procedural law has been or might be a valuable spur to growth in the developing countries', and regulatory or competition law enforcement cannot improve the performance of the Chinese economy. Thomas Ulen, 'The Uneasy Case for Competition Law and Regulation as Decisive Factors in Development: Some Lessons for China' in Michael Faure and Xinzhu Zhang (eds.) *Competition Policy and Regulation: Recent Developments in China, the US and Europe* (Edward Elgar 2011) 13-14 and 33-34.

[5] Ronald Coase and Ning Wang, *How China Became Capitalist* (Palgrave Macmillan 2013) 2.

[6] Mao Zedong, the founding father of the PRC and the most paramount leader in the PRC's history, was in office from 1949 to 1976.

[7] Gregory C. Chow, *China's Economic Transformation* (Blackwell Publishing 2007) 24.

Communist ideology the CPC supported gave the people a new perspective as to how a better country could be built by avoiding the pitfalls of capitalism.[8] The CPC inherited an economy 'whose growth potential was obscured by the ravages of war and inflation'.[9] At the very beginning, inflation was quelled, fiscal balance was revived, and it seemed that a rapid economic resurgence was to be expected.[10] However, it took little time for the masses to realise that the long-lasting nightmare had not been driven away; if anything, it had become even more terrifying.

2.1 China's Planned Economy

At the beginning of 1950s, a land reform – the Land Reform Campaign – was introduced. In order to increase agricultural productivity, most or all of the land belonging to landlords was confiscated by local government and redistributed to peasants.[11] This campaign was extremely welcome among poor peasants who had been exploited by landlords for years;[12] however, it also resulted in the death of millions of landlords and their families.[13] During this period, private undertakings were allowed to continue their operation, whilst SOEs of the Republic of China (ROC) were taken over by the CPC.[14] However, in order to mobilise all necessary resources to deliver China's first Five-Year Plan, major changes took place.

The core of the Five-Year Plan of 1953-1957 was to adopt a Soviet economic model in China that aimed to bring China onto a fast track towards industrialisation

---

[8] *Ibid.*
[9] Loren Brandt and Thomas G. Rawski, 'China's Great Economic Transformation' in Loren Brandt and Thomas G. Rawski (eds.) *China's Great Economic Transformation* (Cambridge University Press 2008) 4.
[10] *Ibid.*
[11] The proportion of land to be surrendered was calculated based on the per capita land ownership rate in a given village.
[12] According to the classification of social class during the Land Reform Campaign, people who owned land, collected rents and employed farmers to work on their land were classified as 'landlords' and subject to overthrow and public humiliation unless they or their family members also farmed on the land, in which case they would be classified as 'rich peasants', who would not be overthrown.
[13] Chow (fn 7) 26.
[14] *Ibid.*

and socialisation.[15] The basic characteristics of such model were, first, centralised planning for every aspect of the economy; second, prevalent state ownership in all factories and undertakings – the rudiment of today's state sector; third, numerous collectively owned units in the countryside responsible for agricultural activities; and fourth, concentration of state capital on heavy industry. As a result, market competition and the forces of demand and supply were virtually non-existent in China's centrally planned economy.[16]

The central planning authority was the State Planning Commission under the then Government Administration Council of the Central People's Government.[17] It was a powerful body that controlled all raw materials and inputs required for production. It decided the production quotas of all production units – enterprises, farms and factories – all of which were either state- or collectively owned.[18] The whole economy was administered as a single enterprise.[19] Before the economic reforms of 1978, competition played a negligible role in China's economy since SOEs enjoyed a predominant presence in economic activities. They were merely production units rather than corporations in the modern sense, and there was also no competition amongst SOEs. In 1978, SOEs' share of national industrial output was 77.6%, whilst private enterprises consisted only of 0.2%.[20] At that time, profit-driving business was 'condemned as a symptom of corrupt capitalist systems' by communist ideology.[21] In addition, the State Planning Commission had control over the supply of all consumer

---

[15] Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge University Press 2005) 109; and Barry Naughton, *Growing Out of the Plan: Chinese Economic Reform, 1978-1993* (Cambridge University Press 1995) 6.

[16] Chow (fn 7) 29.

[17] The Government Administration Council was dissolved as a result of the constitutional amendment in 1954, which created the State Council. The State Planning Commission was then under the supervision of the State Council.

[18] Chow (fn 7) 29.

[19] Peter Nolan, *Transforming China: Globalization, Transition and Development* (Anthem Press 2004) 57.

[20] The remaining share was held by the collectively owned enterprises. Youngjin Jung and Qian Hao, 'The New Economic Constitution in China: A Third Way for Competition Regime' (2003) 24 Northwestern Journal of International Law & Business 1, 5.

[21] BM Owen, Su Sun and Wentong Zheng, 'China's Competition Policy Reforms: The Antimonopoly Law and Beyond' (2007) 75 Antitrust Law Journal 231, 238.

goods. In the centrally planned economy, most products such as food and commodities could only be purchased by ration coupons, the quota of which for each month was calculated based on the demographic nature of each household.[22]

As for the agricultural sector, even before the land redistribution was complete, the CPC had decided to promote the transformation of land ownership from privately owned to collectively-owned.[23] As a consequence, peasants were forced to form collective agricultural units where all land and farming equipment were deemed to be collectively owned.[24] In addition, in order to finance sustainable industrialisation, which was characterised by concentration of capital and resources in heavy industry,[25] all agricultural produce was procured by the government at extremely low prices and resold to fulfil domestic needs or exports at much higher prices.[26] From the implementation of the Plan, the government used its control over virtually all fiscal and physical resources to build new factories and increase industrial outputs, which grew 11.5% annually between 1952 and 1978.[27] In addition, industry's share of total GDP grew from 18% in 1952 to 44% in 1978, whilst agriculture's share declined from 51% to 28%.[28]

Nevertheless, central economic planning was interrupted by two notorious economic and political campaigns that substantially changed the course of development of China.

2.2 Disastrous Social Upheaval

Inspired by a couple years of desirable performance of this Soviet-style economy,

---

[22] Stephen Pudney and Limin Wang, 'Rationing and Consumer Demand in China: Simulating the Effects of Changes in the Food Subsidy System' in SP Gupta, Nicholas Stern and Athar Hussain (eds.) *Development Patterns and Institutional Structures: China and India* (Allied Publishers 1995) 116.

[23] See the Resolution of the Central Committee of the Communist Party of China on the Mutual Aid and Cooperation in Agriculture, 9 September 1951, http://cpc.people.com.cn/GB/64184/64186/66656/4492674.html.

[24] In today's China, the ownership of land in rural areas still belongs to the collective units.

[25] Naughton (fn 15) 27.

[26] Gerard Turley and Peter J. Luke, *Transition Economics: Two Decades on* (Routledge 2011) 310.

[27] Barry Naughton, *The Chinese Economy: Transitions and Growth* (MIT Press 2007) 56.

[28] *Ibid*.

Mao became overconfident and believed that China was ready to surpass the United Kingdom in 15 years.[29] In 1958, he launched the Great Leap Forward movement with the purpose of increasing China's industrial output and developing its economy dramatically, and of rapidly transforming the country from an agrarian-based economy into an advanced socialist economy through industrialisation by forcing the whole country to be part of the 'construction current'. The whole movement was built on the false belief that China's vast supply of cheap labour would compensate for the lack of technological and financial support.

Another round of collectivisation took place in the Great Leap Forward movement whereby farmers were organised into 'communes'.[30] Within less than a year during 1958, almost all farms in China were converted to communes.[31] Farmers were asked to build furnaces in their backyards to produce iron.[32] To satisfy unreasonable output targets, every piece of metal that could be found in ordinary households and which could be used to produce iron and steel – normally cooker and metal farming implements – was put into the furnace.[33] Because investment and manpower were diverted to increase industrial output, agricultural development was inevitably overlooked. Consequently, and accompanied by serious natural disasters such as drought and flooding, famine resulted. The end result of the Great Leap Forward was a complete disaster in the history of China. This 'disastrous utopian fantasy'[34] is said to have caused more than 30 million people to starve to death in this country of agrarian tradition.[35]

After the Great Leap Forward ended in 1961, although Mao was still the chairman

---

[29] Nikita Khrushchev, Khrushchev's Memoirs (Little Brown 1970) 250.
[30] Turley and Luke (fn 26) 310.
[31] *Ibid*.
[32] Chow (fn 7) 27.
[33] Turley and Luke (fn 26) 311.
[34] Williams (fn 15) 101.
[35] *Ibid*. However, because the actual number of death induced by this movement has never been officially reported, disputed figures to this day range from 14 million to 45 million. See Frank Dikotter, *Mao's Great Famine: the History of China's most Devastating Catastrophe, 1958-62* (Bloomsbury Publishing Plc 2010); Chow (fn 7); and Turley and Luke (fn 26).

of the CPC Central Committee, he was practically suspended. Nonetheless, a campaign called the 'Cultural Revolution' was initiated by Mao in 1966.[36] This class conflict aimed to restore Mao's prestige in the country and enforce the orthodox Maoist thought by accusing the more moderate government led by President Liu Shaoqi as being 'capitalist roaders'. Millions of Chinese youths formed the 'Red Guard' which, as a well-known slogan during that time said, 'would defend Chairman Mao with blood and lives'. Government buildings and economic infrastructure was attacked by the radical Red Guards.[37] Moreover, since the Cultural Revolution called for the overturn of Chinese traditional culture, such as Confucianism, universities were closed, books were destroyed, and many intellectuals were hurt or killed.[38]

The movement spread to all segments of society and seriously hindered the development of the Chinese economy.[39] It also led to the deaths of many important politicians in the CPC, and the most influential figure in the following economic transition, Deng Xiaoping, was exiled. This movement directly resulted in a decade-long recession of China's already poor economy and the total elimination of positive social and cultural activities. China in the era of Cultural Revolution was 'in a state of lawless chaos and desperately poor'.[40] After Mao's death in 1976, Hua Guofeng, Mao's designated successor, brought down the so-called Gang of Four,[41] who were responsible for helping to engineer the Cultural Revolution, and finally ended the campaign.

Two main features in this age of turbulence were embedded in the bureaucratic culture of the government that continues to exist today – although no longer in an explicit way – and impacts upon China's competition system. First, state control over

---

[36] The issuance of 'May 16 Notification', which marked the start of the Cultural Revolution, was seen as the ideological basis on which this campaign was built.
[37] Chow (fn 7) 27.
[38] *Ibid*.
[39] Red Guard was accused of seizing weapons from the army. Turley and Luke (fn 26) 312; and Chow (fn 7) 28.
[40] Williams (fn 15) 101.
[41] The Gang of Four consisted of Mao's last wife, Jiang Qing, and three of her close associates.

every aspect of economic activities was pervasive. It was the state, rather than the market, that determined what goods the public could have, the way in which they were distributed, and their prices. The principles on which SOEs were established required them to be directly controlled by the government. SOEs were therefore more like government departments instead of market players, since there was no market as such.[42] Second, like economic control, political control was equally if not more pervasive. Orderly operation of the government was frequently disrupted by the CPC's recourse to mass campaigns.[43] Political goals always took precedence over any other goals, be they economic or social in nature. Goals deriving from either superior political ideology – the Great Leap Forward – or political conflicts – the Culture Revolution – had to be achieved even it required the mobilisation of the whole nation and the deaths of many.

3. AN ERA OF REFORMS AND RAPID DEVELOPMENT – THE PATH LEADING TO A CHINESE COMPETITION SYSTEM

While China impenitently persisted in the planned economy, some Asian countries and regions surrounding it were doing extraordinarily well in terms of social and economic development. Following a capitalist ideology, which emphasised the importance of market forces, Asia's 'Four Little Dragons' – Hong Kong, Singapore, Taiwan and South Korea – maintained high growth rates between the 1960s and 1990s, and had all become highly developed and industrialised economies. This rapid wealth accumulation in the rest of East Asia did not go unnoticed by the leaders,[44] it in fact increased the pressure for reform.[45] Although catastrophic economic policies and

[42] Xiaojuan Jiang, 'Promoting Competition and Maintaining Monopoly: Dual Functions of Chinese Industrial Policies during Economic Transition' (2002) 1 Washington University Global Studies Law Review 49, 49.
[43] Frederick C. Teiwes, 'The Chinese State during the Maoist Era' in David Shambauge (eds.) *The Modern Chinese State* (Cambridge University Press 2000) 119.
[44] Christopher McNally, 'The Institutional Contours of China's Emergent Capitalism' in Christopher McNally (eds.) *China's Emergent Political Economy: Capitalism in the Dragon's Lair* (Routledge 2008) 116; and Naughton (fn 15) 62.
[45] Harry Harding, *China's Second Revolution: Reform after Mao* (The Brookings Institution 1987) 38.

political campaigns brought suffering and death to the country, they nonetheless helped free China's new leaders from substantial constraints.[46] It became clearer to the reform faction within the CPC – which had overtaken its more conservative rivals[47] – that after years of social upheaval, realistic economic development rather than impossible uniformity of political ideology should be the top priority for China.

In 1978, after Deng Xiaoping – who himself had been victim of the Cultural Revolution during which he was purged twice – took over power from Hua Guofeng and became the leader of China.[48] China gained new life and entered an era of rapid development at the Third Plenary Session of the 11th Communist Party Congress. This meeting – at which the Reform and Opening Up policy was initiated – is now widely recognised as 'a watershed in the history of the PRC and the beginning of China's post-Mao economic reform'.[49]

From then, China began its journey of experimentation and gradual economic reform, which aimed to 'solidify [the CPC's] political position'.[50] Initial reform took place in the rural part of China where the agricultural sector was based. On 20 October 1984, the Third Plenum of the 12th Central Committee of the CPC adopted a major decision to overhaul the entire economic system, which consisted of seven major reform priorities.[51] A dual-track price system was established which formed the basis for the first round of SOE reform and, after the tragic Tiananmen Square Incident in June 1989,[52] as a way to promptly placate public indignation and shift the attention of the enraged masses, there was a fundamental veer of priorities within the CPC from ideological debates and political struggles to economic reform and development.

---

[46] Chow (fn 7) 47.
[47] Harding (fn 45) 39.
[48] Paramount leader refers to the most important leader who does not necessarily enjoy a formal position within the party or the state.
[49] Coase and Wang (fn 5) 40.
[50] Naughton (fn 15) 61.
[51] See Decision of the CPC Central Committee on the Reform of Economic System, 20 October 1984, http://news.xinhuanet.com/politics/2008-10/20/content_10203429.htm.
[52] For more details about the Tiananmen Square Incident, see Harrison E. Salisbury, *Tiananmen Diary: Thirteen Days in June* (Unwin Hyman Ltd 1989).

Subsequently, the Decision of the CPC Central Committee on Some Issues Concerning the Establishment of a Socialist Market Economic Structure was adopted at the Third Plenary Session of the 14th CPC Central Committee in November 1993. This called for the establishment of the socialist market economy – a modern competitive and market-oriented economy in which the predominance of public ownership and direct economic administration was preserved. From then, China entered the second phase of economic reform characterised by, *inter alia*, more market-oriented and liberalised economic policies, the growing presence and importance of non-public – both domestic and foreign – undertakings, deepening reform in the state sector, and strengthening of government's legal and regulatory oversight of economic activities.

The reform of Chinese economy is itself a subject too broad and comprehensive to be fully discussed in this chapter. For the purposes of this chapter, the following sections discuss aspects of economic reform that are most relevant to the establishment of competition system. More specifically, they address the main drivers – both internal and external – of the adoption of the AML.

3.1 Emergence of Competition in China's Domestic Market

In March 1979, a few months after the landmark Third Plenary Session of the 11th CPC Central Committee, Chen Yun was appointed as the director of the Financial and Economic Affairs Committee under the State Council, and carried out a series of reform plans.[53] Although these reform plans called for the overhaul of a wide range of economic sectors under the centrally planned economy, initial success was seen in the rural areas, where collective ownership was and still is predominant, with dramatic agricultural reform. It was not only because China's agriculture was in need of reform, but also because the agricultural industry was far more flexible than the enormous state

[53] Joe Studwell, *The China Dream: the Elusive Quest for the Greatest Untapped Market on Earth* (Profile Books Ltd 2002) 32; and Jude Howell, 'The Impact of the Open Door Policy on the Chinese State' in Gordon White (eds.) *The Chinese State in the Era of Economic Reform: the Road to Crisis* (MacMillan 1991) 119.

sector and rural areas were considered less strategically important than urban areas.[54] As a result, rural areas became a major field for local governments to implement 'secret' tentative projects toward which the central government turned a blind eye.[55] Nonetheless, the success of rural reform was unforeseen by Chinese leaders.[56]

The rural communes established during the Great Leap Forward had proven extremely inefficient and unproductive. Central planners, sometimes technically incompetent political cadres,[57] lacked the required farming-related knowledge and the ability to appreciate special conditions in local areas, and the output quotas were largely unrealistic and impractical. Farmers were inadequately incentivised to conduct agricultural activities since the procurement price paid for agricultural produce had been extremely low to cross-subsidise urbanisation and industrialisation. Secret experiments took place in several rural areas, where each farm household was assigned a piece of land – the ownership of which was still collective – by communes. In return, a fixed delivery quota would be imposed on each household, and the above-quota output would be retained by farmers who could choose to trade in local markets. This household responsibility system generated incentives for farmers to take on agricultural tasks whilst at the same time ensuring that the procurement targets for rural communes – which were no longer as unfeasible in 1978 – could be met.[58] The household responsibility system was later supported by both Deng Xiaoping and Chen Yun, and was introduced on a national scale. The output of grain increased dramatically as a result: 305 million tonnes in 1978, 355 million in 1982, and 407 million in 1984.[59]

---

[54] Nolan (fn 19) 51; and Barry Naughton, 'A Political Economy of China's Economic Transition' in Loren Brandt and Thomas Rawski (eds.) *China's Great Economic Transformation* (Cambridge University Press 2008) 98.

[55] In as early as 1962, on the topic of agricultural reform, Deng Xiaoping remarked: 'The masses should also be allowed to adopt whatever mode they see fit, legalizing illegal practices as necessary.' Xiaoping Deng, 'How to Restore Agricultural Production' (7 July 1962) in *Selected Works of Deng Xiaoping*, Vol. 1 (1938-1965) (Foreign Languages Press 1992).

[56] Studwell (fn 53) 39.

[57] Nolan (fn 19) 58.

[58] Chow (fn 7) 49.

[59] Studwell (fn 53) 33.

In addition, the increase in agricultural output and income of farmers stimulated the development of non-agricultural businesses in rural areas. After fulfilling the delivery quota, the farm household would be free to keep the remaining output for its own consumption or for sale on the market. As local trading became more vigorous, township and village enterprises (TVEs) were established under the auspices of local government in order to meet the increasing demands of the market.[60] Rural industry in general and TVEs in particular – which were once described by Deng Xiaoping using a Chinese idiom as '*yijun tuqi* [异军突起]'[61] – played a significant role in the dissolution of the monopoly enjoyed by SOEs and changed the course of China's transition economy.[62] Between 1978 and 1996 – the 'golden age of TVEs' – development of TVEs was prosperous in China's rural areas, which were less economically and politically scrutinised than their urban counterparts.[63] In 1978, TVEs absorbed 28 million employees and accounted for 6% of GDP; in 1996, employment increased to 135 million and their share of GDP grew to 26%.[64] During the same period, rural TVEs' share of output increased from 9% to 28%. The astonishing performance of TVEs, which were collectively owned as opposed to state-owned, gave rise to market competitive challenge at local level that SOEs had never encountered before. Consequently, SOEs' share in industrial output declined from 77% in 1978 to only 33% in 1996.[65]

TVEs were originally transformed from rural communes, and therefore their collective status had close government connections. However, since the mid-1990s, when marketisation was introduced nationwide and market competition became intensified, the advantages TVEs once had – for example, easy access to a large pool

---

[60] *Ibid.*, 34.
[61] Deng Xiaoping, *Selected Works of Deng Xiaoping (vol. 3)* (People's Publishing House 1993) 238. The idiom literally means 'a strange army appeared suddenly from nowhere'.
[62] Naughton (fn 27) 271; and Nolan (fn 19) 131.
[63] Naughton (fn 27) 271.
[64] *Ibid.*, 274.
[65] *Ibid.*, 300; and Thomas Cheng, 'Competition and the State in China' in Daniel Sokol, Thomas Cheng and Ioannis Lianos (eds.) *Competition and the State* (Stanford University Press 2014) 172.

of rural labour – were lost and their intrinsic disadvantages – for example, small scale of operations and difficulty in acquiring financial aid – were revealed.[66] Consequently, TVEs underwent an ownership transformation beginning in the mid-1990s, during which time a considerable number of TVEs were privatised. From then, TVEs 'never regained their momentum of the 1980s'.[67] Nonetheless, the emergence of TVEs was the most important internal factor that accelerated China's marketisation process and forced institutional transformation in China's industrial sector. In addition, the ensuing emergence of urban private and foreign undertakings, when the Chinese market was further liberalised as a result of the Reform and Opening Up policy, also boosted China's industrial reform process. In 1993, the share of industrial output in the non-state sector – 53% – exceeded that of the state sector for the first time in China's history.[68]

Increasingly intensive market competition generated by the entry of non-public undertakings, which was deemed one of the most striking elements of China's economic reform,[69] brutally exposed the severe inefficiency of SOEs. The central leadership started to consider the reform of its state sector as a necessary step towards successful economic transition.

3.2 Reform of State-Owned Enterprises

As discussed above, the core of centrally planned economy was planning every single aspect of economic activities, ranging from the annual output of steel to the number of ration coupons issued to every household. Under China's traditional centrally planned economy, SOEs were not considered as modern corporations even in the loosest sense. Instead, they were more like government departments or

---

[66] Naughton (fn 27) 271.
[67] Yasheng Huang, *Capitalism with Chinese Characteristics: Entrepreneurship and the State* (Cambridge University Press 2008) 23.
[68] Xiaolin Xia, 'The Sustained Growth of Chinese Economy and the Non-State Economy' (2012) National Economic Research Institute, at *www.neri.org.cn/document/20120402104213392l9.pdf.*
[69] Naughton (fn 15) 137.

production units with no managerial autonomy, which were assigned the task of carrying out the most basic business activities such as manufacturing and selling products that any real enterprise would normally perform, and fulfilling the quantitative output targets.[70] Other important elements found in a modern enterprise such as marketing, autonomous decision-making, corporate governance, corporate strategy and corporate accountability were all missing in China's SOEs at that time.[71] Moreover, since a non-public economy literally did not exist before China's economic transition, the number of people working in the public sector was massive. For the sake of social stability, SOEs were, and in fact still are, responsible for some significant non-economic tasks, such as the provision of health care, housing, and even education for the employees' family members. For the same reason, workers of SOEs were not subject to layoffs – the so-called 'golden rice bowl' – and SOEs were not subject to bankruptcy, no matter how unprofitable they were,[72] since the social security system robust enough to provide sufficient protection to redundant workers was not to be found in China.[73]

Since SOEs were practically embedded in the bureaucratic hierarchy, they did not have the right to retain any profits, but at the same time they would not be held responsible for any losses.[74] As a consequence, managers of SOEs believed in 'not hoping to acquire merit, just avoiding mistakes'[75] and were therefore scarcely incentivised to increase either the productivity or profitability of the enterprise.[76] Moreover, SOE management placed significant emphasis on the quality and quantity of the tangibles, such as machineries and equipment, but placed less or no emphasis

---

[70] Turley and Luke (fn 26) 191.
[71] Naughton (fn 27) 308.
[72] Turley and Luke (fn 26) 192.
[73] Haizheng Zhang, 'Bankruptcy of State-owned Enterprises and Planned Bankruptcy' in Rebecca Parry, Yongqian Xu and Haizheng Zhang (eds.) *China's New Enterprise Bankruptcy Law: Context, Interpretation and Application* (Ashgate Publishing Limited 2010) 295.
[74] Naughton (fn 27) 308.
[75] Translated from a Chinese saying, *buqiu yougong, danqiu wuguo* [不求有功，但求无过].
[76] Naughton (fn 27) 308.

on the intangibles, such as incentives and business strategy.[77]

Consequently, the state sector in the era of the centrally planned economy suffered from serious principal-agent problems as a result of information asymmetry and incentive incompatibility. Since the planning agency and the ministries were not able to monitor the performance of individual SOE closely, and the managers of SOEs, who had the first-hand information concerning the enterprise, were not sufficiently rewarded on the basis of business performance of their enterprises, they had a tendency to act in their own interests at the expense of the interests of state. Since the profits of profitable SOEs would be remitted to compensate for the loss made by unprofitable SOEs, the more productive SOEs would be given higher future output targets if they over-fulfilled their previous targets,[78] a situation in which the managers certainly would not wish to be. As a consequence, the managers were incentivised to understate their production capacity. Moreover, since SOEs faced a soft budget constraint, the managers were incentivised to overstate the input requirements in order to obtain additional financial support.[79]

These problems concerning SOEs in China's centrally plan economy were well recognised. Soon after the Reform and Opening Up policy was introduced, industrial reform started. The first phase of industrial reform did not see privatisation as a feasible option for public sector. Instead, it focused on strengthening profitability-related incentives for the managers.[80] During the initial period, due to the fear that dramatic restructuring might lead to disquiet among industrial workers who were 'wrapped […] in a cocoon of stability' in the state-owned sector, reformers chose to maintain an essential character of the existing planned economy – economic planning – whilst at the same time incentivising managers of SOEs to promote productivity and

---

[77] Yasheng Huang, *Selling China* (Cambridge University Press 2003) 224.
[78] Turley and Luke (fn 26) 193.
[79] *Ibid*.
[80] Sarah Tong, 'Reforming State-Owned Enterprises' in Gungwu Wang and John Wong (eds.) *Interpreting China's Development* (World Scientific Publishing Co. Pte. Ltd. 2007) 123.

profitability by rewarding them based on the performance of individual SOE.[81] In order to implement this incentive plan, the government followed a gradualist approach and created a 'dual-track' pricing system – the start of China's price liberation and the formation of market economy – which put emphasis on incentivising the SOEs to promote their productivity, as opposed to the 'big bang' approach adopted by the Soviet Union,[82] which was characterised by complete privatisation of the SOEs. Under the dual-track system, SOEs which had fulfilled their output targets were allowed to trade their surplus at market prices, whilst their planned output was sold at state-set prices. In addition, SOEs were no longer required to remit all their profits to the state; instead, under a new contract responsibility system, the managers of SOEs signed contracts – known as profit retention – with the government in relation to the fixed sums to be remitted and consequently retained the remaining profits.[83] Also, salaries and bonuses of SOE managers were calculated based on the profits made by the SOE they managed. Managers were therefore incentivised to improve productivity so that the amount of products to be sold on the market increased, so did the profitability of undertaking and their own incomes. As a consequence, market competition in the industrial sector started to emerge.

However, there were serious residual problems with this incentive plan. First, the soft budget constraint still existed. Market competition arising from the dual-track pricing system led some of the previously unprofitable SOEs to be even more unprofitable. However, due to the soft budget constraint, the income of the profitable SOEs was fiscally redistributed to unprofitable ones in the form of subsidies to avoid bankruptcy.[84] Second, the principal-agent problem still existed. Since the government

---

[81] Naughton (fn 27) 310.

[82] For a discussion on the big bang reform strategy, see Mathias Dewatripont and Gérard Roland, 'The Virtues of Gradualism and Legitimacy in the Transition to a Market Economy' (1992) 102 The Economic Journal 291; and Mathias Dewatripont and Gérard Roland, 'The Design of Reform Packages under Uncertainty' (1995) 85 American Economic Review 1207.

[83] Studwell (fn 53) 39. Other contract types included 'profit-loss responsibility' – the SOEs were solely responsible for the profits made and losses incurred – and 'tax for profits system' – instead of remitting profits to the government, SOEs paid taxes. Tong (fn 80) 124.

[84] Turley and Luke (fn 26) 192.

required additional funds to bail out unprofitable SOEs, the managers of profitable SOEs would be incentivised to understate the enterprises' productivity potential, otherwise the planned output target would be increased and so would the income remitted to the government. In addition, the margin between state-set and market prices – known as institutional rent[85] – and the government's inability to acquire accurate information concerning the operation of SOEs, had created incentives and opportunities for managers to engage in rent-seeking by abusing their managerial discretion for personal gain which caused a serious loss of state-owned assets.[86] Whilst SOEs could sell above-quota output for higher prices, they were still entitled to buy cheap input, such as raw material and machinery.[87] The managers became the ultimate beneficiaries as a result of the increase in retained profits, whilst the overall profitability of SOEs was less promising.[88]

At the same time as the restructuring of a large number of TVEs in the mid-1990s, the necessity to bring the reform of SOEs to the next level – ownership restructuring and corporate governance – was widely perceived.[89] The adoption of the Company Law in 1993 was considered by many as the beginning of the second phase of industrial reform.[90] It provided a legal framework not only for the corporatisation of SOEs, but also for the diversification of ownership forms: private undertakings were able to acquire the shares of public undertakings, which were converted into a legal form of corporation.[91] In September 1995, an important reform policy – *zhuada fangxiao* [抓大放小] (grasping the large and letting go of the small) – was introduced at the Fifth Plenary Session of the 14th CPC Central Committee,[92] which was another milestone

---

[85] Yifu Lin, Fang Cai and Zhou Li, *The China Miracle: Development Strategy and Economic Reform* (Chinese University Press 2003) 20.
[86] Naughton (fn 27) 313.
[87] Studwell (fn 53) 40.
[88] *Ibid*.
[89] Naughton (fn 27) 313.
[90] *Ibid*., 301.
[91] *Ibid*.
[92] See the Suggestions of the Central Committee of the Communist Party of China on Drawing up the Ninth Five-Year Plan for National Economic and Social Development and the Long-Range Objectives to the Year 2010, http://www.china.org.cn/95e/95-english1/2.htm.

in SOEs history. According to this policy, the state would maintain control of the large – particularly central – SOEs, and enhance their efficiency by reorganisation and restructuring; but would tighten the credits available to SOEs and privatise a large number of small and medium-size – particularly local – loss-making SOEs, and would allow some of them to go into bankruptcy.[93] In addition, many of the larger SOEs started to issue tradable shares on stock exchanges, although public listing did not essentially transfer corporate control from government to private actors.[94] Whilst a large number of SOEs became financially efficient after the second round of reforms, they nonetheless faced serious corporate governance problems after being converted into modern enterprises. Due to their entrenched link with government, SOEs started to adversely influence China's socialist market economy in order to protect the dominant market power they had been enjoying since the centrally planned economy.[95]

Nonetheless, it should be fully acknowledged that the TVEs and SOEs – both of which played vital roles in the industrial growth – contributed significantly to bringing about competition that did not exist before the end of the 1970s. China finally had a functioning market, which could be regulated within the legal framework. A large number of laws and regulations governing business practices of market players, such as those that will be discussed in section 2.5 below, were promulgated during this period of time. The first attempt to enact a competition law was seen in 1987 against this backdrop.[96]

Accompanying the advent of TVEs and reform of SOEs was the emergence of foreign undertakings facilitated primarily by the Reform and Opening Up policy. These undertakings became the new blood of the transition economy and contributed significantly to the increasingly vibrant and competitive market in China.

---

[93] Naughton (fn 27) 301.
[94] Huang (fn 67) 17.
[95] Chapter 6 will discuss the competition issues in relation to SOEs in more detail.
[96] See fn 41, Chapter 3.

3.3 The Emergence of Foreign Capital

Even before the PRC was founded, the importance of foreign trade was recognised by the CPC leadership.[97] However, due to years of political turmoil and deterioration of the political relationship with the US and the Soviet Union,[98] China had been largely isolated from the world economy until the adoption of the Reform and Opening Up policy. In 1978, China had a total volume of import and export of $20.6 billion, which ranked 32nd worldwide.[99] After nearly four decades, the number had increased to $4.3 trillion in 2014, which made China the largest trading nation in the world.[100] In addition, the Reform and Opening Up policy significantly attracted foreign capital to invest in China. From 1979 to 1983, the foreign direct investment (FDI) inflows were $1.8 billion, whilst in 2014, China became the world's largest FDI recipient with inflows of $129 billion.[101]

One of the greatest achievements of the Reform and Opening Up policy with regard to attracting foreign investment was the opening up of various designated regions in China through the establishment of Special Economic Zones (SEZs). As mentioned above, in the past China's general public always associated capitalism with imperialism and exploitation, and would normally resist the idea of having foreign investors establishing businesses and hiring local workers in China.[102] In addition, even if Chinese reformers considered foreign investment essential to boost China's economic growth, a conducive business environment – well-enforced legal instruments protecting the interests of investors and basic infrastructure supporting the

---

[97] See for example, the Decision on Foreign Trade by the Central Committee of CPC, issued on 16 February 1949.

[98] In the 1950s, because China fought against the US in the Korean War, the US along with some of its allies implemented trade embargo on China, which was not lifted until 1969. The Sino-Soviet split from 1960 to 1989 substantially undermined China's economic performance, since the Soviet Union was China's largest trading partner. The split also led to the decline of trade volume between China and former socialist countries in Eastern Europe.

[99] Information Office of the State Council, 'China's Foreign Trade', 7 Decemeber 2011, http://www.gov.cn/zwgk/2011-12/07/content_2013475.htm.

[100] Ministry of Commerce, 'The Development of China's Foreign Trade in 2014', 5 May 2015, http://zhs.mofcom.gov.cn/article/Nocategory/201505/20150500961314.shtml.

[101] State Council, 'China Becomes World's Largest FDI Recipient amid Mixed Global Outlook', 25 June 2015, http://english.gov.cn/news/top_news/2015/06/25/content_281475134110982.htm.

[102] Chow (fn 7) 326.

operation of business – for foreign investment was largely lacking.[103] As a consequence, the SEZ project was put forward to increase the confidence of foreign investors in China's development potential. Initially, four SEZs – Shenzhen, Zhuhai, Shantou and Xiamen – were established in 1980 as 'experimental stations for sceptical Party members and government officials to observe'.[104] Essentially, the SEZs provided foreign undertakings with a more favourable tax policy – notably the tax rate of enterprise income tax was merely 15% whilst the rate for a domestic undertaking at that time was 33% – less bureaucratic red tape, and complete sets of law and regulation. The Shenzhen SEZ has been the most outstanding achievement under this project. The city of Shenzhen, neighbouring Hong Kong, was originally a small village where fiscal revenue depended heavily if not solely on fishing. However, since the establishment of the SEZ, low land costs and cheap labour made investing in Shenzhen a wise and profitable option for Hong Kong businessmen – Shenzhen's very first foreign investors – who invested considerable capital in establishing numerous manufacturing plants.[105] Thirty four years after the establishment of SEZ, Shenzhen had the 4th largest municipal GDP of CNY 1.6 trillion in 2014, after Beijing, Shanghai and Guangzhou.[106]

In the early days of the establishment of SEZs, in order to prevent foreign capital from 'invading' the Chinese market by wiping out domestic undertakings, the government cautiously adopted a gradualist and scrutiny-oriented approach. Initially, foreign capital could only be invested through equity joint ventures,[107] whilst wholly foreign-owned enterprises (WFOEs) were prohibited. When WFOEs were permitted to be established in China in 1986,[108] the scope of operation allowed was rather

---

[103] *Ibid*., 328.
[104] Chow (fn 7) 328.
[105] Williams (fn 15) 111.
[106] Statistics Bureau of Shenzhen, 'Economic Performance of Shenzhen in 2014', 28 February 2015, http://www.sztj.gov.cn/xxgk/tjsj/tjfx/201502/t20150228_2820587.htm.
[107] Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, adopted on 1 July 1979. Cooperative joint ventures can also be established after 1988. See the Law of the People's Republic of China on Sino-foreign Cooperative Joint Ventures, adopted on 13 April 1988.
[108] Law of the People's Republic of China on Wholly Foreign-Owned Enterprises, adopted on 12 April 1986.

limited as WFOEs 'shall' use advanced technology and equipment and export all or a greater portion of their products.[109] The scope was significantly widened for WFOEs by a revision of the Wholly Foreign-Owned Enterprises Law in 2000,[110] as China was moving closer in its bid for the World Trade Organisation (WTO) membership. In light of China's more liberalised and active attitude towards foreign capital, as well as the adoption of preferential policies encouraging foreign investment,[111] the inflow of FDI has been growing steadily over the past three decades. Inward FDI increased from $1.769 billion in 1979 to $123.911 billion in 2013.[112] However, whilst during the same period the number of foreign investment enterprises (FIEs) grew from 920 to 22,819, there was a sheer and continuous decline after 1993 when the number of FEIs reached the peak at 83,437. Such a phenomenon suggests that multinational conglomerates are becoming more financially powerful, the efficiency and business performance of which in China has been significantly strengthened. Indeed, 490 out of the top 500 undertakings in the world have businesses operating in China.[113]

The emergence of foreign undertakings made China's domestic market much more open and competitive. Domestic undertakings benefited significantly from the capital, technology, modern management theory, and labour training project brought by foreign undertakings.[114] Moreover, in order to build up the confidence of foreign undertakings in investing in China, the Chinese government had to refrain from

---

[109] Article 3, Law on Wholly Foreign-Owned Enterprises of 1986.

[110] Article 3 of the Law on Wholly Foreign-Owned Enterprises as revised on 31 October 2000 stipulated that '[t]he State encourages the establishment of export-oriented foreign investment enterprises and foreign investment enterprises with advanced technology'. See also the Detailed Rules for the Implementation of the Law on Wholly Foreign-Owned Enterprises, as revised on 19 February 2014.

[111] A Catalogue for the Guidance of Foreign Investment Industries was published in 1995, which has been revised sixth times. The latest version is the 2015 Catalogue amended jointly by MOFCOM and NDRC, http://www.sdpc.gov.cn/zcfb/zcfbl/201503/t20150313_667332.html. This Catalogue consists of three categories detailing specific industries and projects in which foreign investment is 'encouraged' (349 types of projects), 'restricted' (38 types) or 'prohibited' (36 types). Essentially, investment in industries not listed in the Catalogue is deemed permitted. The preferential treatments granted to FIEs vary according to the specific industries listed on the Catalogue.

[112] MOFCOM, 'Statistics on FDI in China 2014', http://www.fdi.gov.cn/1800000121_33_4320_0_7.html, 5.

[113] MOFCOM, '490 of the Global 500 Have Invested in China', 22 June 2012, http://www.gov.cn/jrzg/2012-06/22/content_2167702.htm.

[114] It is noticed that the main reason for SOEs to form joint ventures with foreign undertakings is to acquire advanced technology. Huang (fn 77) 223.

supervising economic activities in the same way as it did in the planned economy era. Instead, it started the process of deregulation, initially in SEZs and later in a wider area, and performed its functions in a more normative and standardised manner. Therefore, foreign undertakings were helpful not only in terms of massive capital, but also in relation to forcing the government to pay more attention to the importance of market forces in allocating resources and of establishing a legalised framework and a level playing field to safeguard the interests of market players.

As illustrated by the above discussion on China's dramatic economic expansion from the late 1970s to 1990s, one can appreciate the overwhelming change regarding the rise of private – both domestic and foreign – actors and market competition in China's socialist market. The Reform and Opening Up policy created a policy environment conducive to economic diversification, which in turn furthered both the 'reform' – reforms in rural areas and public sectors – and 'open' – open of domestic market facilitated by the establishment of SEZs – aspects of China's economic transition. The diversion of the policy priority of the central government from ideology-oriented political campaigns and movements to market-oriented economic development laid the foundation for China's integration into the global economy, and hence for the legal framework to safeguard its increasingly open and competitive market. At the dawn of the new millennium, the integration process was fundamentally promoted by China's accession to the WTO. The next section discusses how the WTO membership significantly influenced China's decision to establish a competition system.

3.4 Accession to the WTO

After losing the civil war in 1949, the Kuomintang re-established a ROC government in Taiwan and announced the decision to withdraw from the General Agreement on Tariffs and Trade (GATT), to which ROC was one of the 23 original signatories. Not long after the Reform and Opening Up policy was introduced, the

leadership of the PRC saw the necessity to expand the scale of economy by integrating China more closely into the global economy. In 1986, the PRC officially notified the GATT of its request for resumption of China's status as a GATT contracting party.[115] In 1995, China applied for accession to the Marrakesh Agreement that had replaced the GATT and established the WTO. China's WTO membership was finally approved in 2001 after years of bilateral and multilateral negotiations with other WTO members, in particular the US and the EU.

Using foreign competition to promote economic reform had been one of the main motivations for China to join the WTO.[116] As discussed, in the mid-1990s, China's economic reform entered a stage where a large number of TVEs were privatised and the reform of SOEs was moving from promoting the incentives of management to wide-scale corporatisation. Nonetheless, corporate reform faced drastic resistance as a result of vested interests deeply embedded in the state economy.[117] Most SOEs still had not become efficient corporations, largely because corporate governance was unsatisfactory. However, the accession to the WTO was likely to induce more foreign capital to invest in a larger geographical area and a wider scope of industries of China, which meant that China's SOEs would be subject to a scale of foreign competition the SEZs were not capable of creating. Foreign undertakings were able to help create a competitive environment conducive to spurring SOEs to improve efficiency.

Moreover, apart from the emergence of domestic and foreign competition discussed above, the accession to WTO has been another vital impetus for the adoption of the AML.[118] Essentially, WTO membership gives members access to the markets of other members, whilst in return, members are required to open domestic markets to

---

[115] Report of the Working Party on the Accession of China, WT/ACC/CHN/49.
[116] McNally (fn 44) 114. See also Joseph Fewsmith, 'The Political and Social Implications of China's Accession to the WTO' (2001) 167 The China Quarterly 573.
[117] Chapter 6 will discuss the issue concerning the vested interests in SOEs in more details.
[118] Mark Furse, 'Competition Law Choice in China' (2007) 30 World Competition 323, 332. For discussion of the impact of WTO accession on China's legal system in general, see Donald Clarke, 'China's Legal System and the WTO: Prospects for Compliance' (2003) 2 Wash. U. Global Stud. L. Rev. 97.

foreign competitors.[119] A regulatory scheme overseeing government actions and business conducts which may have adverse impact on market competition and setting a level playing field is therefore important for the protection of foreign undertakings' interests in host countries. Whilst the Protocol on the Accession of China to the WTO and the Working Party Report specifically stipulate principles concerning non-discrimination, tariff reduction, abolition of nontariff barriers, and transparency, competition policy (which normally scatters across a wider range of WTO agreements) did not form a substantive part in the entry negotiations at the WTO level.[120] Although WTO membership was and is still not explicitly conditional on the existence of a comprehensive competition regime,[121] there has been a general requirement for members to promote open, fair and undistorted competition[122] – which was also reflected in the reference to China's competition policy in the Report of the Working Party on the Accession of China[123] – and the adoption of a competition law, which complements the existing legislation on protection of fair competition, can partially fulfil this requirement. Moreover, the persistent pressure from other WTO members, seeking to protect their own undertakings from distorted competition in China, has also impelled the Chinese government to take meaningful action toward the improvement of competition regulatory framework.[124] Therefore, it was both economically and politically wise to have comprehensive competition legislation in place to cement China's status in global trade and investment.

In summary, in relation to the pre-AML policy and economic environment in China, it was a combination of internal and external factors that raised the need to establish a modern competition system in China. Internally, successful rural reform

---

[119] Chow (fn 7) 78.
[120] Xiaoye Wang and Zhenghua Tao, 'WTO Competition Policy and Its Influence in China' (2003) 5 Social Sciences in China 49, 45.
[121] Furse (fn 118) 332.
[122] WTO, *Understanding the WTO* (WTO Publications 2015) 12.
[123] Paragraph 65.
[124] H. Stephen Harris, 'The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China' (2006) 7 Chi. J. Int'l L. 169, 176.

had created competitors – the TVEs – to SOEs and functioning markets where domestic trade could take place; SOEs were reformed to respond to increasing pressures generated by non-public actors whilst competition between SOEs also intensified as a result of the reform. Externally, foreign undertakings were incentivised by the Reform and Opening Up policy to invest in China whilst the accession to the WTO forced China further to diversify its domestic market. China's integration with global economy brought not only vigorous competition into China but also the needs to regulate competition.

Besides China's economic transition and foreign pressures,[125] there was another driving force behind the adoption of the AML – the weakness of China's pre-AML legal framework governing competition-related activities – without which there would not have been a need for China to establish a competition system in order to be compatible with WTO requirements in the first place.

3.5 Dispersal of Competition-Related Laws

The enforcement of the Reform and Opening Up policy in 1978 created the need for economic regulation to stabilise its socialist market economy,[126] but such need did not become a priority since considerable resources at that time had been devoted to economic development. In general, China's pre-AML legal framework governing competition issues was 'interwoven with uncertainty, inconsistency, and unenforceability'.[127]

Before the enactment of the AML, China did not have a systemic body of competition rules, possibly the result of a lack of theoretical awareness of the competition concept in a less developed economy. In 1980 the Provisional Rules on

---

[125] For general discussion on how international factors had impacted China's economic transition, see Bruce Cumings, 'The Political Economy of China's Turn Outward' in Samuel Kim (eds.) *China and the World: New Directions in Chinese Foreign Relations* (Westview Press 1989).

[126] JA Berry, 'Anti-Monopoly Law in China: A Socialist Market Economy Wrestles with Its Antitrust Regime' (2005) 2 International Law & Management Review 129, 136.

[127] Maher Dabbah, 'The Development of Sound Competition Law and Policy in China: An (Im)possible Dream?' (2007) 30 World Competition 341, 347.

the Promotion and Protection of Competition in the Socialist Economy was introduced. It was China's first law dealing with competition issues.[128] However, this law created significant contradictions and became a 'fruitless exercise'.[129] On the one hand, it purported to outlaw monopoly, while on the other it articulated that the trade of all products was reserved to the government.[130] During the initial period of the Reform and Opening Up policy, although some damaging anti-competitive activities were found in the market, the Chinese authorities had to rely on competition-related provisions scattered across a number of miscellaneous laws and administrative rules with varying degrees of competition relevance to regulate market behaviours,[131] which led to inconsistent and unpredictable enforcement of market-related legislation.[132]

At the start of China's second-phase reform in 1993 there was a shift in transition strategy that the policy makers began to recognise the need to build a firmer legal basis to preserve the fruit the continuing reform had achieved.[133] Since then, with China's changing attitude towards legal framework and the closer connection with the outside world, legislation on economic matters was enacted more frequently and drafted with more sophistication. The most comprehensive set of competition-related rules in place before the enactment of the AML was the Anti-Unfair Competition Law (AUCL), promulgated in 1993.[134] This law contains several provisions that are usually found in competition law, such as prohibition of dumping,[135] tie-in sales,[136] and prohibition of

---

[128] Furse (fn 118) 328. See also Jung and Hao (fn 20) 26.
[129] Furse (fn 118) 328.
[130] *Ibid*.
[131] Maher Dabbah, 'The Development of Sound Competition Law and Policy in China: An (Im)possible Dream?' (2007) 30 World Competition 341, 345.
[132] Williams (fn 15) 95; and Xinzhu Zhang and Vanessa Zhang, 'The Antimonopoly Law in China: Where Do We Stand?' (2007) 3 Competition Policy International 185, 188.
[133] Naughton (fn 27) 90.
[134] Anti-Unfair Competition Law of the People's Republic of China, adopted on 2 September 1993, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383803.htm. This law is currently under revision by the Legal Affairs Office of the State Council. See NPC, 'Revised AUCL Sent to the Legal Affairs Office', 17 February 2015, http://www.npc.gov.cn/npc/xinwen/dbgz/2015-02/17/content_1905127.htm.
[135] Article 11, AUCL.
[136] *Ibid*, Article 12.

price fixing and bid rigging.[137] But these provisions, unlike typical competition provisions, do not lay down the requirement of market share or market power, namely, the party in question may be in breach even if it does not hold a significant position in the market. Moreover, the AUCL also addresses many other practices that are not normally considered by a competition law, including bribery,[138] deceptive advertising,[139] and appropriation of business secrets.[140] Therefore, the AUCL is in fact a fusion of a small fraction of competition provisions and a large fraction of consumer protection provisions. The main objective of the AUCL is to safeguard and maintain the order and fairness of competition in the market, which is premised on the fact that there is market competition to start with. The AML, on the other hand, protects and promotes the freedom of competition in the market, which will otherwise be prevented or restricted. As required by the AUCL, also in 1993 the State Administration of Industry and Commerce (SAIC) – the enforcer of the AUCL – issued the Rules on Prohibiting Public Utility Companies from Restricting Competition,[141] which addresses the abuse of dominant position on the part of public utility companies. These rules are relatively short and general in nature, and contain no detailed and enforceable provisions.

Another competition-related law is the Price Law enacted in 1997,[142] which contains provisions against improper pricing behaviour including price-fixing, predatory pricing, and price discrimination.[143] As will be seen in Chapter V of this thesis, the National Development and Reform Commission (NDRC) – the enforcer of both the Price Law and the AML – on several occasions applied the Price Law instead of the AML to punish anti-competitive practices. To complement the implementation

---

[137] *Ibid*, Article 15.
[138] *Ibid*, Article 8.
[139] *Ibid*, Article 9.
[140] *Ibid*, Article 10.
[141] Available at http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027927.html.
[142] Price Law of the People's Republic of China, adopted on 29 December 1997, http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383577.htm
[143] Article 14, Price Law.

of the Price Law, the Rules on the Prohibition of Below-Cost Sales was issued by the State Development and Planning Commission (SDPC) – the predecessor of NDRC – in 1999, it prevents business operators from eliminating competitors or monopolising the market through predatory pricing.[144] Later in 2006, the Administrative Measures on Fair Transaction between Retailers and Suppliers was issued to address, *inter alia*, rebates,[145] tying,[146] and resale price maintenance.[147] In spite of the existence of competition-related provisions, the Price Law is mainly applied to control the prices of key commodities and services. The direct price control feature of the Price Law dictates that it is not suitable to be treated as a piece of competition legislation.

Moreover, after China joined the WTO, an increasing number of multinational undertakings reoriented their operational strategies and concentrated major capital on the emerging Chinese market. Acquisition of domestic undertakings became one of the most favourable means of starting businesses in China, and the government gradually appreciated the necessity to establish a merger control framework. On 7 March 2003, the Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (Provisional M&A Rules) were adopted, which provided the legal basis for a merger review mechanism applicable to foreign-domestic transactions. As stated in Article 19, notification to the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) and SAIC is required before a merger can legally proceed if certain conditions are met. The Provisional M&A Rules were replaced by the Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors in 2006. As suggested by the title, the Provisional M&A Rules only concerned foreign acquisition of domestic undertakings; mergers and acquisitions between domestic undertakings were therefore not appropriately scrutinised.

---

144 *Ibid*, Article 2.
145 *Ibid*, Article 6(4).
146 *Ibid*, Article 18(1).
147 *Ibid*, Article 18(2).

Apart from the above anti-competitive behaviours, abuse of administrative power to eliminate or restrict competition by government departments – the so-called administrative monopoly – has been a prevalent source of distortion of market competition in China.[148] Administrative monopoly was already subject to regulation by legal instruments in pre-AML era. More than thirty years ago, anti-competitive administrative practices such as local blockades and protectionism were already addressed in regulations. Paragraph one of the abrogated Provisional Rules on the Promotion of Economic Alliance stated that economic alliance was conducive to breaking down regional blockades, and Article 6 of the abrogated Provisional Rules on the Promotion and Protection of Socialist Competition stipulated that the development of competition required the breakdown of regional blockades and departmental barriers. Explicit prohibition of administrative monopoly in the form of local blockade was included in the AUCL[149] and the Rules of the State Council on the Prohibition of Regional Blockade in Market Economic Activities. Moreover, in the Provisional Rules on the Prohibition of Price Monopoly Conduct of 2003, [150] government agencies were restrained from illegally intervening in market price setting. However, the prohibitions under these regulations were merely general principles, and were not accompanied by practical enforcement mechanisms or sufficient deterrence. Therefore, whilst an increasing number of practices that adversely impacted upon competition were sanctioned under miscellaneous laws, administrative monopoly was largely intact in the pre-AML era.

It has to be appreciated that the promulgation of these regulations and rules showed the awareness of the government of some major competition concerns in China's market such as the widespread abuse of market power by the SOEs and

---

[148] Zhengxin Huo, 'A Tiger without Teeth: the Antitrust Law of the People's Republic of China' (2008) 10 Asian-Pacific Law & Policy Journal 32, 37; Shiying Xu, 'Regulating Administrative Monopoly is an Essential Choice for the Anti-Monopoly Law of China' in Xiaoye Wang (eds.) *Hot Spots of Chinese Antimonopoly Legislation* (Social Sciences Academic Press 2007) 112; and Cheng (fn 65) 171.

[149] Article 7.

[150] These Provisional Rules were replaced by the Rules on Anti-Price Monopoly on 1 February 2011

damaging impacts brought by administrative monopoly. However, the competition-related provisions in these regulations are 'fragmented' and 'vague'.[151] Also, the effectiveness of enforcement is largely compromised by inconsistent and unpredictable decisions brought by the existence of multiple enforcement agencies authorised by different laws.[152]

As will be shown in later chapters of this thesis, this multiple-agencies problem has not been solved by the AML at all. As Zenguo Wu argues, there are four main issues with China's pre-AML legislation. First, there is no unified and complete anti-monopoly law and system. Second, the content of the existing rules is relatively general and impractical. Third, the actual impact of the existing rules was likely to be relatively low, and consequently the rules were not perceived as authoritative, and fourth, there were insufficient penalties for violations.[153] It was, therefore, anticipated by many that market competition should be more properly protected by comprehensive competition legislation instead of a myriad of laws containing competition-related provisions but suffering from major shortfalls.

Sections 3.1-3.5 above discussed the three determinants of the adoption of the AML; China' economic transition from centrally planned economy to socialist market economy, foreign pressures in general, and the accession to the WTO in particular, and the lack of legal instruments overseeing market competition. Each of these determinants played a significant part in reinforcing Chinese policymakers' awareness of the necessity of competition law in a market-oriented economy. However, whilst China's increasingly open domestic market and its integration into global economy represented the forward-looking aspect of China's policymaking, the above discussion also shows that the government was reluctant to relinquish its pervasive control over economy as proved by the relentless SOEs reform as opposed to thorough privatization. Consequently this conservative aspect of policymaking deriving from considerations

---

[151] Owen, Sun and Zheng (fn 21) 247.
[152] *Ibid*., 235.
[153] Zhenguo Wu, 'Perspectives on the Chinese Anti-Monopoly Law' (2008) 75 Antitrust LJ 73, 76.

of political and social stability inevitably collided with the capitalist ideology of free market economy. As will be seen in the following chapters of this thesis, such collision existed throughout the formulation and implementation of China's competition policy.

When various factors stimulated the emergence of China's competition policy, in order to address and accommodate novel issues raised by its economic integration China had also taken steps towards reforming its institutions. The next section briefly introduces the institutional reform of the State Council in 2003, which had a decisive impact on the drafting of the AML and more generally on the functioning of China's competition system.

4. INSTITUTIONALISATION OF REFORM IN 2003

At the same time when legislation and regulations – including the AML – was either revised or drafted in conformity with WTO obligations and requirements, a series of administrative reform also took place within the State Council to provide a more efficient and 'investor-friendly'[154] institutional framework to safeguard a more open and market-oriented economy.

Since the founding of the PRC, design of economic institutions has always been a major topic for the leadership. This was especially true after China was freed from decades of political turmoil and started its economic transition. In 1986, Premier Zhao Ziyang stated at the Fourth Plenary Session of the Sixth National People's Congress (NPC) that in order to accommodate the change of government function from direct management of enterprises to indirect management, the functions of economic supervision departments at each level should be transformed from assigning quotas, approving projects, and allotting funds and materials, to overall planning, comprehending policies, organising coordination, providing services, using economic

[154] McNally (fn 44) 115.

means of regulation, and reinforcing inspection and supervision.[155] As the accession to the WTO had changed the economic landscape significantly in China, bureaucratic institutions in charge of managing economic activities should also be transformed to fulfil new requirements.

On 10 March 2003, the Decision of the First Plenary Session of the 10th National People's Congress on the Plan of the Institutional Reform of the State Council (Decision) was approved.[156] This is the first major institutional reform of the State Council after China joined the WTO, and it was designed purposefully, at least in part, to address the challenges brought by the WTO accession.[157] In this Decision, several institutional changes essentially influencing the drafting and future enforcement of the AML as well as the reform of SOEs have been made.

4.1 Ministry of Commerce

First, the Ministry of Commerce (MOFCOM) was established, which was to be responsible for merger control under the AML.[158] According to the Decision, parts of the State Economic and Trade Commission (SETC),[159] parts of SDPC, and the entire MOFTEC were merged to form MOFCOM.[160] Before WTO accession, domestic trade and foreign trade including anti-dumping and countervailing duty were supervised by SETC and MOFTEC respectively, and these two departments, along

---

[155] Ziyang Zhao, 'On the Seventh Five-Year Plan', 25 March 1986, http://cpc.people.com.cn/GB/64184/64186/66679/4493899.html.

[156] The Decision of the First Plenary Session of the 10th National People's Congress on the Plan of the Institutional Reform of the State Council, adopted on 10 March 2003, http://www.gov.cn/gongbao/content/2003/content_62008.htm.

[157] In explaining the rationale behind this reform plan, Wang Zhongyu, the State Councilor and Secretary General of the State Council, stated that 'as the economic reform deepens and new circumstances arise after the accession to the WTO, some problems concerning the institutional adaptation of government bodies have been discovered, which have to be solved through deepening reform.' NPC, 'Explanation on the Plan of the State Council's Institutional Reform', 7 March 2003, at http://www.npc.gov.cn/wxzl/gongbao/2003-04/04/content_5312163.htm. The original remark of Mr Wang was in Chinese, and was translated by the author.

[158] There are three central enforcement agencies responsible for enforcing the AML, namely, the Ministry of Commerce, the National Development and Reform Commission, and the State Administration for Industry and Commerce. The topic on public enforcement of the AML will be dealt with in Chapter 5.

[159] SETC was dissolved as a result of this institutional reform.

[160] NPC (fn 157).

with SDPC, were also responsible for the supervision of product import and export. Such a regulating system separating internal and external trade, internal and external markets, and import and export quotas could not adapt to the new requirements stemming from accession.[161] As a consequence, some functions of SETC, including management of domestic trade, coordination of foreign economic cooperation, and organisation of import and export of raw materials, and some functions of SDPC including organisation of import and export of agricultural produce, and all the functions of MOFTEC were transferred to the newly established MOFCOM.[162]

A major part of the functions of MOFCOM is 'outward-facing', involving overseas investment and foreign economic cooperation, representing China in bilateral and plurilateral trade negotiations, and trade-related international organisations.[163] These functions provide MOFCOM with the ability to obtain the most up-to-date global information and a forward-looking perspective on handling economic matters, which the departments overseeing mere domestic issues do not have. This feature, as will be demonstrated in later chapters, has proved to be extremely valuable in bilateral communication with competition authorities from other jurisdictions.[164]

4.2 National Development and Reform Commission

Second, NDRC was established, which was to be responsible for enforcement against price-related anti-competitive agreement and abuse of dominant position. In order to reduce overlap of government functions, increase departmental efficiency, and strengthen macroeconomic regulation and control, SDPC was re-organised to form NDRC, which, like MOFCOM, also absorbed some functions from SETC. In addition, all functions of the State Council Office for Restructuring the Economic System –

[161] *Ibid*.
[162] *Ibid*.
[163] MOFCOM, 'Mission', http://english.mofcom.gov.cn/column/mission2010.shtml.
[164] See for example, section 2, Chapter 7.

mainly involved guiding the operation of experimental units for economic reform in different areas and industries – were transferred to NDRC.

After its establishment, NDRC became one of the most powerful and influential ministries in China, overseeing a tremendous range of economic activities[165] and is dubbed 'Little State Council' by the general public due to the fact that some of its departments practically have policy-making powers comparable to those of some ministries under the State Council. Its most important functions include sector planning, industrial policy making, and economic operation regulating, which range from approving the construction of metro lines to issuing water conservation plans; and from deciding the size of Shanghai Disneyland to supervising the management of nature reserves. Not to mention that NDRC has the ultimate power to set prices,[166] which is the main reason why enforcement responsibilities are divided between NDRC and SAIC based on whether an alleged monopolistic conduct is price-related.

SDPC, NDRC's predecessor, was the last government body that had the word 'planning' in its name. This change signals that planning has an increasingly nominal role to play in government's macroeconomic regulation and control. However, since NDRC can trace its history back to the State Planning Commission, China's first central planning agency, it inevitably inherited certain departmental modes of operation characterised by government intervention. This can be seen in the name of the unit responsible for competition enforcement – the Price Supervision and Anti-Monopoly Bureau – which is also empowered to enforce price regulation, namely, the Price Law. As will be seen in Chapter 5, whilst the super ministry status of NDRC did to a certain degree promote its engagement in competition enforcement, on some

[165] In September 2015 alone, the worth of projects officially approved by NDRC – including the construction of railway, highway and tramway in different cities – exceeded CNY 1.2 trillion. Details of the projects approved by NDRC are available at http://www.sdpc.gov.cn/gzdt.

[166] In China, when the prices of most consumer products are determined by the market itself, there are still a small number of commodities deemed vital to the Chinese economy and to everyday life subject to governmental supervision, the prices of which are either set – for example, salt and petrol – or regulated – for example, agricultural produce and medicine – by the government. The unit responsible for direct price oversight within NDRC is the Price Department.

occasions it was suspicious if the purpose of NDRC's intervention was one that based on economic analysis or one that based solely on direct price control.

4.3 State-Owned Assets Supervision and Administration Commission

Third, a brand new government body, the State-Owned Assets Supervision and Administration Commission (SASAC) was established. It absorbed the function of SETC in guiding the reform and management of SOEs, all functions of the Central Party Work Committee on Large Enterprises, and the function of the Ministry of Finance in state-owned assets management.[167] SASAC was created as a new experiment to fulfil the government's investor responsibilities, uphold shareholder rights, and advance the management of state-owned assets on behalf of the state.[168] At the time when SASAC was established, the number of undertakings under the control of central SASAC – the so-called central SOEs[169] – was 196. After over a decade of restructuring, the number declined to 107 by 11 December 2015,[170] which is nominal compared to the total number of SOEs – 155,000.[171] However, central SOEs are the largest and most capitalised undertakings in China. They account for 88.1% of the revenue, 84.1% of the profits, and 86.4% of the net assets of all nonfinancial SOEs.[172]

This new institution was expected to separate government's roles of market participant from those of market regulator, and separate its functions as owner of state-owned assets from its managerial functions. The essential functions of the SASAC

---

[167] NPC (fn 157).
[168] The Decision on the Plan of the Institutional Reform of the State Council (fn 156).
[169] In the narrow sense, the term 'central SOEs' only refers to SOEs that are controlled and supervised by SASAC; however, in the broad sense, it can additionally include, first, financial undertakings supervised by China Securities Regulatory Commission, China Insurance Regulatory Commission, or China Banking Regulatory Commission; and second, undertakings supervised by other ministries, such as the Ministry of Finance and the Ministry of Transport. For the purpose of this thesis, the broader interpretation is followed.
[170] For the full list of central SOEs, see http://www.sasac.gov.cn/n86114/n86137/c1725422/content.html. The subsidiaries of central SOEs are not included on the list.
[171] Ministry of Finance, 'National Final Accounts Statement of State-Owned Enterprises 2013', 28 July 2014, http://www.mof.gov.cn/preview/qiyesi/zhengwuxinxi/gongzuodongtai/201407/t20140728_1118640.html.
[172] Cheng (fn 65) 174.

also include guiding and pushing forward the reform and restructuring of state-owned enterprises, advancing the establishment of modern enterprise system in SOEs, improving corporate governance, and propelling the strategic adjustment of the layout and structure of the state economy.[173] However in practice, the government's method of entrusting a bureaucratic body with powers significantly greater than those of ordinary shareholders[174] to supervise the management and operation of business entities is not without problems. The issue about corporate governance of SOEs will be discussed in Chapter 6.

5. CONCLUSION

China has come a long way on a path strewn with setbacks, faulty economic policies, and flawed political decisions. Fortunately, instead of experiencing uprising and wars as had happened in China's history for thousands of years, the CPC chose a path of profound reform. It did not follow the approach to transition adopted by its old comrades in Eastern Europe; there was never a 'big bang' that overthrew the entire political and economic structure and build a new one from the bottom up. Instead, it was assumed that the transformation of the economic system would have to take place concurrently with economic development, and the process of economic development would drive market transition forward and guarantee its eventual success.[175] This incremental reform strategy was criticised by many economists, who regarded big bang reform as the right strategy for a transition economy.[176] Nonetheless, a seemingly longer and more obscure path in fact brought China into an era of astonishingly rapid economic development: both private sector and foreign capital have been gradually recognised as important parts of China's socialist economy; the

[173] SASAC, 'Main Functions', http://en.sasac.gov.cn/n1408028/n1408521/index.html.
[174] Cheng (fn 65) 174.
[175] Naughton (fn 27) 86.
[176] Andrew H. Wedeman, *From Mao to Market: Rent Seeking, Local Protectionism, and Marketization in China* (Cambridge University Press 2003) 1.

state sector was forced by intensified market competition to adapt to new challenges; and the accession to the WTO opened up new opportunities for China to integrate into the global economy. All these factors led to the replacement of the fragmented legal framework governing economic activities by a more comprehensive competition system.

Moreover, following the discussion on China's development history, it is unequivocal that two features of the Chinese government stand out. The first is China's entrenched tradition of state intervention in economic activities. Although the level of state intervention in the centrally planned economy is not likely to reappear in China today, it should be pointed out that socialist ideology the main attribute of which is public ownership, will always prevail over capitalist ideology, the main attribute of which is private ownership, as long as the CPC is in power. This means SOEs will continue to be active players in Chinese market. As will be shown later, it is always because of their ideological status rather than the financial dominance *per se* that gives rise to the difficulties of the competition enforcement in state sector.

The second is China's prevalent political conflicts. The first three decades of the PRC was characterised by irrational and fierce political struggles, which were demonstrated by disastrous campaigns and movements leading to the deaths of millions of civilians. Decades of political struggles had a decisive impact on how the Chinese bureaucracy is functioning now. Whilst political interests take precedence over the interests of the public, the discretionary exercise of governmental functions is difficult if not impossible to constrain. As the political structure in general has never been substantially reformed, political conflicts can be found in every apparatus within China's bureaucratic hierarchy, which are sometimes concealed by positive economic development. When China chose to rely on administrative bodies to enforce its competition law, the inherent weaknesses of the competition agencies, which are deeply embedded in China's political culture, cannot be overlooked. In fact, serious

conflicts among government departments over policy-making powers were found during the drafting of the AML, which will be the focus of the next chapter.

Chapter Three
The Drafting of the AML

1. INTRODUCTION

This chapter studies the long and arduous drafting process of the AML, identifying several key points which were deemed most controversial to the drafters and others involved. The most debated topics in the drafting of the AML in fact shaped the AML and its enforcement system into their current forms, and continue to influence the development of competition policy in China. Some outstanding issues concerning the application of the AML and the operation of the competition system in general, which will be discussed in the next two chapters, can in fact find their origins in the drafting process of the AML.

The AML was adopted in 2007 after 13 years of discussion, during which time government departments involving in the drafting of the AML regularly solicited and studied comments from public and private organisations, companies, academics, and practitioners from regions with mature competition systems.[1] Nonetheless, it is apparent that 13 years is not a common length for drafting a piece of legislation, especially when meaningful external assistance was provided. Then what were the factors that delayed the process? What role had they played in shaping the final AML?

This chapter finds that, first, the underlying rationale of a competition law contradicts that of socialism. Competition law, as a product of capitalism, focuses on the liberalisation of markets and the function of market forces in creating public welfare. To the direct opposite, socialism seeks to avoid the pitfalls of capitalism derived from a free market,[2] such as inequality in the distribution of resources and the overlook of externality, by stressing public ownership of means of production, and

[1] H. Stephen Harris, Peter Wang, Yizhe Zhang, Mark Cohen and Sebastien Evrard (2011) *Anti-Monopoly Law and Practice in China* (Oxford University Press 2011) 8.

[2] The Constitution of China regards capitalism as 'exploitation of man by man [人剥削人]'. Article 6.

direct economic administration by the government. Therefore, in a socialist regime, the government has the paramount power – which it certainly does not wish to relinquish – to supervise and regulate a massive number of properties and various economic activities. However, the clash between competition law and socialist ideology makes at least partial relinquishment inevitable. Therefore, objections were put forward by government departments during the drafting of the AML. Consequently, compromise was made. The AML, as a piece of competition legislation in a socialist nation, represents an ideological paradox: on the one hand, it incorporates well-established and normative competition thinking so as to make the Chinese competition system more aligned with its western counterparts; on the other, in order fully to address China's unique problems stemming from the political environment and the ongoing economic transition, it maximises the appearance of provisions which are not normative *vis-à-vis* normal competition legislation.

Second, the entrenched tradition of achieving social and economic goals through political means had profoundly influenced the ways in which government departments exercised their functions. Since socialism dictates government intervention in the economy, a huge government apparatus formed by countless departments is established in order to govern every aspect of economy. Within such apparatus, conflicts between and among government departments over policymaking powers are extremely common; the boundary between economic activities is blurred, as is the boundary between departmental jurisdictions overseeing these activities. The same applies to the power to draft and, more importantly, to enforce the AML. When conflicts arose between covetous departments over competition policymaking powers, the solution they sought was unfortunately not communication and coordination through legalised channel, but uncivilised departmental war. The end result was the creation of a tripartite enforcement structure, a uniquely unsound design and a completely political compromise.

These two factors delaying the drafting process of the AML will be elaborated on later in this chapter. The discussion starts by introducing the law-making procedure in China.

2 LAW-MAKING IN CHINA

As stipulated by the Legislation Law of China, bodies entrusted with law-making powers are divided into two levels.[3] The primary legislator in China is the National People's Congress (NPC) – the 'highest organ of state power'[4] – and its Standing Committee.[5] The next level consists of secondary law-making bodies including the State Council,[6] and local People's Congresses and their standing committees.[7] For the purpose of this chapter, and as the AML was adopted by NPC's Standing Committee, the discussion focuses on the legislative procedure of the first level legislature.

The NPC is the only organ allowed to enact 'basic laws'[8] and to amend the Constitution.[9] It normally has around 3,000 part-time delegates,[10] who meet for two weeks in the first quarter each year.[11] The Standing Committee has around 170 full-

---

[3] The Legislation Law of the People's Republic of China (Legislation Law), *adopted on 15 March 2000, http://english.gov.cn/laws/2005-08/20/content_29724.htm*

[4] Article 57, Constitution. The Constitution of the People's Republic of China, adopted on 20 September 1954, http://www.npc.gov.cn/wxzl/wxzl/2000-12/26/content_4264.htm. Since 1954, the Chinese Constitution has undergone totally four amendments respectively in 1988, 1993, 1999 and 2004. Unless otherwise stated, the 'Constitution' throughout this chapter refers to the Constitution of the PRC as amended in 2004, http://english.gov.cn/2005-08/05/content_20813.htm.

[5] Article 7, Legislation Law.

[6] The State Council is the highest executive body in China. Article 85, Constitution.

[7] Chapter III.

[8] See Article 62 (3) of the Constitution and Article 7 of the Legislation Law. However, the definition of 'basic laws' is not provided in the Constitution or in the Legislation Law. Generally, basic laws are believed to be laws which are fundamentally critical to the basic rights and interests of the public, including but not limited to the Criminal Law, the Criminal Procedure Law, the General Principles of the Civil Law and the Civil Procedure Law.

[9] Article 62(1), the Constitution.

[10] 2987 delegates were elected in 2013 to the 12th NPC, which will be in session from 2013 to 2018.

[11] Article 2, Rules of Procedure of the National People's Congress of the People's Republic of China, adopted on 4 April 1989, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383914.htm t.

time members[12] who organise routine meetings and legislative activity every two months.[13] The NPC also serves the role, constitutionally, to elect and dismiss the leadership of the state, which includes the President and Vice-President of China, Premier and Vice-Premiers of the State Council, the President of the Supreme People's Court, and the Prosecutor-General of the Supreme People's Procuratorate,[14] all of whom are first nominated by the Presidium of the NPC.[15] The predominant power of the NPC to determine the leadership of executive and judicial organs of the state indicates that China does not adopt the doctrine of separation of powers, and there are few if any constitutional checks and balances between governmental branches.[16] Nonetheless, members of the Standing Committee are not allowed to hold positions in any administrative, judicial, or procuratorial bodies.[17]

There are several parties who can submit legislative bills to either the NPC or the Standing Committee. First, a legislative bill can be submitted to the NPC by the Presidium of the NPC. In this case, the bill in question is to be deliberated by the NPC with no further condition.[18] Second, a bill can be submitted by the Standing Committee, the State Council, the Central Military Commission, the Supreme People's Court, the Supreme People's Procuratorate, and the special committees of the NPC[19]

---

[12] There are – including Chairman Zhang Dejiang, 13 vice-chairmen and a Secretary-General – 176 members in the Standing Committee of the 12th NPC.

[13] Article 3, Rules of Procedure of the Standing Committee of the National People's Congress of the People's Republic of China, adopted on 24 November 1987, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383928.htm.

[14] Articles 62(4) – (8), Constitution.

[15] The Presidium of NPC consists of 178 members, who are elected by the NPC. It 'is composed of senior officials of the Communist Party of China (CPC), the state, non-Communist parties and All-China Federation of Industry and Commerce, personages without party affiliation, heads of central government agencies and people's organizations, leading members of all the 35 delegations to the NPC session including those from Hong Kong and Macao and the People's Liberation Army'. See Xinhua News Agency, 'Presidium Elected, Agenda Set For China's Landmark Parliamentary Session', 4 March 2013, at http://news.xinhuanet.com/english/china/2013-03/04/c_132206014.htm. The actual function of this Presidium is provided in the Organic Law of the National People's Congress of the People's Republic of China (Organic Law), available at http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384019.htm.

[16] Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge University Press 2005) 127.

[17] Article 65, Constitution.

[18] Article 12.

[19] The NPC has nine special committees, each of which is subjected to the leadership of the NPC and the Standing Committee, and is responsible to 'study, examine and draw up bills related to their fields

to the NPC. The Presidium should then decide if the bill in question should be put on the agenda of a session of the NPC. Similar procedures are adopted when a legislative bill is submitted by 'a delegation or a group of thirty or more deputies',[20] except that the Presidium may choose to refer the bill to a relevant special committee for deliberation before deciding whether it should be put on an agenda.[21]

When the NPC is not in session, a bill may be submitted first to the Standing Committee, which will decide after deliberation whether to submit it to the NPC.[22] When the bill has successfully been listed on the agenda of a session of the NPC, it should be deliberated first by all the delegates of the NPC and the relevant special committees. It is then subject to 'a unified deliberation by [the NPC's] Law Committee on the basis of the deliberated opinions of the various delegations and the relevant special committee'.[23] After this deliberation, a report composed of the results of the review, major dissenting views, and a revised draft law is submitted to the Presidium.[24] Where significant questions are raised during the deliberation, the NPC may authorise the Standing Committee to carry out further deliberation and report to the next session of the NPC its decision on the draft bill.[25] Alternatively, the Standing Committee may be authorised to work out a revision proposal and submit it to the next session of the NPC for further deliberation.[26] When a revised draft is further revised by the Law Committee according to the opinions during the deliberation, the draft may be prepared for vote in a plenary meeting of an NPC session.[27] The bill is passed and becomes law when a simple majority is met, and it signed by the President of China.[28]

---

and to assist the NPC and its Standing Committee in their work of legislation, supervision and others.' These special committees are not organs of state power; rather, they are institutions performing designated law-enacting functions under the auspices of the NPC, and are composed of specialists, academics and practitioners in respective fields.See NPC, 'Special Committees', http://www.npc.gov.cn/englishnpc/Organization/node_2849.htm.

[20] Article 13, Legislation Law.

[21] *Ibid*, Article 13.

[22] *Ibid*, Article 14.

[23] *Ibid*, Article 18.

[24] *Ibid*, Article 18.

[25] *Ibid*, Article 21.

[26] *Ibid*, Article 21.

[27] *Ibid*, Article 22.

[28] *Ibid*, Article 23.

In addition, a legislative bill may be submitted to the Standing Committee. The Council of Chairmen[29] may submit bills to the Standing Committee for deliberation.[30] It is also responsible for making the decision as to whether a bill submitted by the State Council, the Central Military Commission, the Supreme People's Court, the Supreme People's Procuratorate, the special committees under the NPC,[31] or ten or more members of the Standing Committee is to be referred to the Standing Committee.[32] In addition, the Council of Chairman may decide to publish a legislative bill placed on the agenda of a meeting of the Standing Committee to solicit opinions from the public.[33] Theoretically, a legislative bill is put to a vote after deliberations among members of the Standing Committee and relevant special committees in three meetings.[34] The Law Committee provides reports on the revised draft bill at the last two of these three meetings based on the result of deliberation in the meetings.[35] Nonetheless, the Legislation Law also provides that if major questions concerning the bill still exist after three meetings, the Council of Chairman may propose to refer the bill to the Law Committee and relevant special committees for further discussion without voting.[36] If a bill has been put aside for two years because of major disagreement as to the 'necessity and feasibility of making the bill into a law', or has not been placed back on the agenda of a meeting of the Standing Committee within two years after not being put to a vote after the three original meetings, the deliberation

---

[29] The Council of the Chairman is composed of the Standing Committee's Chairman, Vice-Chairmen and Secretary-General, and is responsible for the handling of the important day-to-day work of the Standing Committee.' Article 25, Organic Law.

[30] Article 24, Legislation Law.

[31] The nine permanent special committees under the NPC are: the Ethnic Groups Committee, the Law Committee, the Financial and Economic Committee, the Education, Science, Culture and Health Committee, the Foreign Affairs Committee, the Overseas Chinese Committee, the Civil and Judicial Affairs Committee, the Environment and Resources Protection Committee and the Agriculture and Rural Areas Committee. See NPC, 'Special Committees', at http://www.npc.gov.cn/englishnpc/Organization/node_2849.htm.

[32] Articles 24 and 25, Legislation Law.

[33] *Ibid*., Article 35.

[34] *Ibid*., Articles 27, 29 and 30.

[35] *Ibid*., Article 27.

[36] *Ibid*., Article 38.

on the bill in question is terminated.[37] As with the voting procedures with regard to the NPC, a simple majority is required in the voting of the Standing Committee.[38]

The law-making system of China is not fiendishly complex, and the procedures laid down in the Legislation Law are not to be blamed for the unusual length of the AML drafting process. The political interests involved in the deliberation of drafts are what made the drafting of the AML controversial. The following sections will consider the drafting of the AML and main concerns raised during this process.

3. DRAFTING HISTORY OF THE AML

As discussed in the previous chapter, when China opened its doors to the world after the Reform and Opening Up Policy and its resolution to establish a socialist market economy, the necessity to adopt a comprehensive law on competition issues further to sustain its astonishingly growing economy became increasingly appreciated. The first Chinese attempt to enact a competition law can be traced back almost thirty years.[39] As early as August 1987, the Legal Affairs Bureau[40] of the State Council founded an AML drafting team.[41] It was in charge of producing a Draft Provisional Rules on Anti-Monopoly and Anti-Unfair Competition, which was completed in 1988. Nonetheless, whilst the second part of this draft was passed as AUCL[42] at the Third Plenary Meeting of the Eighth Standing Committee of the NPC on 2 September 1993,

---

[37] *Ibid*., Article 39.
[38] *Ibid*., Article 40.
[39] For an exhaustive introduction to the drafting history of the AML, see Xiaoye Wang, *The Evolution of China's Anti-Monopoly Law* (Edward Elgar 2014).
[40] The Bureau was restructured to form the current Legal Affairs Office of the State Council in March 1998.
[41] People Daily, 'Departmental 'Confrontation' behind the Anti-Monopoly Law', 3 March 2005, at http://legal.people.com.cn/GB/42731/3216347.html. See also Jijian Yang, 'Market Power in China: Manifestations, Effects and Legislation' (2002) 21 Rev. Indus. Org. 167; Yong Zhao, 'Will Protectionists Hijack China's Competition Law?' (2004) 23 Int'L Fin. L. Rev. 21; and Gordon Chan, 'Administrative Monopoly and the Anti-Monopoly Law: an Examination of the Debate in China' (2009) 18 Journal of Contemporary China 263.
[42] As discussed in the preceding chapter, although the AUCL addresses competition issues such as predatory pricing, tying and regional blockades, it is not a comprehensive competition legislation. It mainly focuses on consumer protection, and includes issues such as business bribery, passing-off, false advertising and trade secrets.

the content concerning anti-monopoly was 'met with intense opposition'[43] and in the end failed to gain consensus.

Nonetheless, the attempt to enact competition legislation did not cease. In 1994, a year after the promulgation of the AUCL, the project to draft the current AML officially commenced. The AML was included on the legislative agenda of the Standing Committee of the Eighth NPC,[44] and two government agencies – SETC and SAIC – were commissioned by the State Council jointly to draft the AML.[45] An 'AML Drafting Leading Group' and an 'AML Drafting Working Group' were established in May 1994. The first and second draft outline of the AML were produced in July 1997 and November 1998 respectively. The first consultation draft of the AML was distributed to the relevant government departments for comments in June 2000, which was followed by the second consultation draft in July 2002. In 2003, as discussed in section 3.1 of Chapter 2, MOFCOM was established as a result of institutional reform within the State Council and subsequently held the 'lead role' in the drafting of the AML.[46] With the establishment of this new ministry, the AML project was 'suddenly revived and expedited.'[47] MOFCOM undertook a few rounds of revision, after which in 2004 it submitted a draft AML[48] to the Legislative Affairs Office (LAO) of the State Council,[49] where an 'AML Review and Revision Leading Group',[50] an 'AML Revision Working Group' and an 'AML Review and Revision Expert Advisory Group' were established. LAO's work was complete on 7 June 2006 after State Council

---

[43] Youngjin Jung and Qian Hao, 'The New Economic Constitution In China: A Third Way for Competition Regime?' (2003) 24 Northwestern Journal of International Law & Business, available at: http://ssrn.com/abstract=2121126, 8.

[44] The AML was later listed on the legislative agenda of the Standing Committee of the following two consecutive NPC, namely, the Ninth and Tenth in 1998 and 2003 respectively. The NPC is elected for a term of five years. Article 60, Constitution.

[45] Xinhua News Agency, 'The Drafting Anti-monopoly Law under Review', 25 May 2005, http://news.xinhuanet.com/zhengfu/2005-05/25/content_2998831.htm.

[46] Williams (fn 16) 204.

[47] Yong Huang, 'Pursuing the Second Best: the History, Momentum, and Remaining Issues of China's Anti-Monopoly Law' (2008) 75 Antitrust Law Journal 117, 119.

[48] Legislative Affairs Office of the State Council, 'On the Explanation of the Anti-Monopoly Law of China (Draft)', 24 June 2006, http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374671.htm.

[49] A ministry has no right under the Legislation Law directly to submit a draft law to the NPC or its Standing Committee for deliberation. See *supra* notes 35 and 37.

[50] LAO (fn 48).

approval of the revised AML, which was then submitted to the Standing Committee of the NPC. Further revisions were undertook by the Law Committee of the NPC, and the draft AML was deliberated at the 22nd Session of the Standing Committee of the 10th NPC in June 2006, the 28th Session in June 2007, and the 29th Session in August 2007 at which it was finally adopted.

Although the whole process took thirteen years to complete, meaningful drafting efforts were not visible until China became a WTO member in 2001, after which several drafts were circulated and comments were more frequently solicited. Speculation began that the sudden acceleration of the drafting process was a direct outcome of international pressure. Indeed, WTO membership, which furthers China's economic integration with foreign countries, is the most important and evident stimulus to the acceleration of the AML drafting process. Although in the late 1970s, China did voluntarily adopt the Reform and Opening Up policy, which signalled the beginning of its economic transformation and opened its market to the outside world, it was in fact introduced at a time of egregious chaos. The CPC had to regain its legitimacy through restoring promptly social and economic order, otherwise it would have been the doom of the CPC and the PRC. On the issue concerning the pressures for reform in the late 1970s, Harry Harding remarks:

> '[T]he difficulties China faced at the time of Mao's death were so massive, the inefficiencies so glaring, and the advantages of political and economic liberalization so obvious, that the reforms later undertaken by Deng Xiaoping were inevitable […] The situation in the political sphere was too explosive for the status quo to remain intact.'[51]

Yet, when China gained WTO membership, it was in an era of rapid economic development and steady social order. Although market competition has been seriously restricted and distorted by the existence of SOEs and local protectionism, the adverse impact of the distortion on Chinese economic development still did not seem pernicious enough to justify the adoption of a legal instrument – such as competition

[51] Harry Harding, *China's Second Revolution: Reform after Mao* (The Brookings Institution 1987) 39.

law – that inherently contradicts the socialist ideology, which espouses state ownership and state control of economy. However, it is much more plausible when the globalisation of the economy is concerned: given China had been through 15 years of negotiation in order to become a WTO member, it beyond doubt showed a strong eagerness to obtain its own share in the ongoing trend of worldwide economic convergence even if the convergence led to the restraint of its freedom of direct economic control. This meant that adopting competition legislation – a capitalist-style legal framework governing economic activities – and integrating its competition system with Western ones was clearly a solid step forward for China.

As with the opportunity brought about by the WTO accession to benefit from overseas markets and more preferential trading terms, the global integration of competition law creates opportunity for a new competition jurisdiction like China to profit from overseas assistance in relation to competition knowledge and experiences. Competition legislation and enforcement have a history dating back to the late 19th century,[52] and many developed countries have obtained mature and valuable enforcement experiences. Departments involved in drafting the AML – MOFCOM, SAIC, the LAO of the State Council, and the Law Committee of the NPC – hosted numerous conferences and seminars in which opinions on the development of competition policy in China were provided and substance of AML drafts were commented on by domestic as well as foreign competition enforcement officials,[53] academics, and practitioners.[54] Organisations including the American Bar Association, Asia-Pacific Economic Cooperation, Organisation for Economic Cooperation and Development, United Nations Conference on Trade and Development, and the World

[52] The first competition statute in the world, the Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, was enacted by Canada in 1889 and followed by the most famous competition legislation, US Sherman Act of 1890.
[53] Major contributions were made by enforcement officials from the US Department of Justice, the US Federal Trade Commission and the European Commission. Harris (fn 1) 17.
[54] For details of these conferences and seminars, see *ibid.*; and Wang (fn 39).

Bank were also substantially involved in the AML consultation process.[55] Given the lack of competition-related experience of Chinese government officials, the opinions and comments were indispensable in shaping the AML into its final form.[56] This successful collaboration also helped create a positive and cordial atmosphere conducive to future information exchange and cooperation between competition agencies.[57]

Indeed, the final AML is a fruit of positive international cooperation.[58] Despite

---

[55] Harris (fn 1) 17. See also, Xiaoye Wang, 'Highlights of China's New Anti-Monopoly Law' (2008) 75 Antitrust Law Journal 133, 134.

[56] BM Owen, Su Sun and Wentong Zheng, 'China's Competition Policy Reforms: the Antimonopoly Law and Beyond' (2007) 75 Antitrust Law Journal 231, 237. For example, a draft AML of 2002 had 'prohibition of monopoly' as the legislative goal of the AML, the American Bar Association accordingly commented that 'it is monopolistic conduct that achieves or maintains a monopoly that is offensive, and not a monopoly that may have resulted from superior products, low prices and hard work'. The suggestion was accepted by AML drafters, and the term 'monopoly' was replaced by 'monopolistic conduct'. See ABA, 'Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China', July 2003, http://apps.americanbar.org/intlaw/committees/business_regulation/antitrust/chinacommentsantimonopoly.doc, 7.

[57] For example, in July 2011, the three central AMEAs signed an antitrust memorandum of understanding (MOU) with the US Federal Trade Commission and the Department of Justice to promote communication and cooperation in the area of competition policy. Federal Trade Commission, 'Federal Trade Commission and Department of Justice Sign Antitrust Memorandum of Understanding with Chinese Antitrust Agencies', 27 July 2011, https://www.ftc.gov/news-events/press-releases/2011/07/federal-trade-commission-and-department-justice-sign-antitrust; in addition, NDRC and SAIC have signed a MOU with European Commission in 2012 to increase cooperation between competition enforcement agencies in the two jurisdictions. European Commission, 'Commission Signs EU Cooperation Agreement with China', 20 September 2012, http://europa.eu/rapid/press-release_IP-12-993_en.htm?locale=en.

[58] Wang (fn 55) 134; and Qianlan Wu, 'EU–China Competition Dialogue: A New Step in the Internationalisation of EU Competition Law?' (2012) 18 European Law Journal 461, 462. See also Carl W. Hittinger and John D. Huh, 'The People's Republic of China Enacts Its First Comprehensive Antitrust Law' (2007) 4 NYU J. L. & Bus. 245. Although the involvement of foreign assistance did reflect the openness and willingness of the Chinese government to solicit and accept professional views from myriad sources in adopting economic laws, an issue of 'selective transparence' was raised since drafts of the AML were not publicly available, but only circulated among domestic and foreign government officials and competition law specialists associated with the drafting of the AML. Selene Ko, 'An Introduction to Chinese Legislation' 3 Washington University Global Studies Law Review 267, 271. It is noteworthy that improving the transparency of the legislative process of and seeking public comments on trade-related laws are obligations imposed on China by its WTO membership. Article 2(c)(2), Protocol on the Accession of the People's Republic of China, https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm. For analysis of various non-publicly available drafts of the AML, see H. Stephen Harris, 'The Making of an Antitrust Law: the Pending Anti-Monopoly Law of the People's Republic of China' (2006) 7 Chi. J. Int'l L. 169; William Blumenthal, 'Presentation to the International Symposium on the Draft Anti-Monopoly Law of the People's Republic of China' Legislative Affairs Office of the State Council, 23-24 May 2005, https://www.ftc.gov/public-statements/2005/05/presentation-international-symposium-draft-anti-monopoly-law-peoples; and American Bar Association, 'Joint Submission of the American Bar Association's Sections of Antitrust

certain fundamental 'Chinese characteristics' being inevitably taken into account[59] – as will be discussed later, the adaptation of them may lead to equivocal and ambiguous interpretation and implementation of the law – the substance of the AML largely mirrored that of EU competition law[60] and embodies overall the best practice of advanced competition systems in the world.[61] Most apparently, the three pillars of modern competition law – anti-competitive agreement,[62] abuse of a dominant position,[63] and merger control[64] – are incorporated into the substantive text. Additionally, several principles well established under EU competition law can also find AML equivalence: effects doctrine,[65] commitments,[66] 10% fine ceiling,[67] and leniency programme.[68]

As illustrated by the brief overview of the drafting timeline of the AML above, China's accession to the WTO – as the most important driver to the adoption of the AML – divided the AML's drafting history into two phases. First, before the WTO accession, drafting work was negligible with merely several versions of an outline being produced, and external assistance was not visibly sought. Second, after WTO accession, the drafting process suddenly accelerated, especially after the institutional

---

Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China', May 2005, at http://apps.americanbar.org/intlaw/committees/business_regulation/antitrust/chinacommentsantimonopoly.pdf.

[59] See for example Article 7, on the special treatment offered to SOEs in strategically important sectors; Chapter V, on the prohibition of abuse of administrative power.

[60] See David Gerber, 'Economics, Law & Institutions: the Shaping of Chinese Competition Law', (2008) 26 *Journal of Law & Policy* 281, 289; Nathan Bush, 'Constraints on Convergence in Chinese Antitrust' (2009) 54 *The Antitrust Bulletin* 87, 93; and Wu (fn 58) 462.

[61] Allan Fels, 'China's Antimonopoly Law 2008: An Overview' (2012) 41 Rev. Ind. Organ. 7, 7; and Roberto Pardolesi, 'Monopoly Agreements and Abuse of Dominance: Some Remarks about the Substantive Rules' in Michael Faure and Xinzhu Zhang (eds.) *Competition Policy and Regulation: Recent Developments in China, the US and Europe* (Edward Elgar 2011) 281.

[62] Chapter 2, AML; Article 101, the Treaty on the Functioning of the European Union (TFEU).

[63] Chapter 3, AML; Article 102 TFEU.

[64] Chapter 4, AML; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24 of 29.01.2004.

[65] Article 2, AML; Case T-102/96 *Gencor v Commission* [1999] ECR II-759, paras. 94-95.

[66] Article 45, AML; Article 9 of 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, OJ L 001 of 04.01.2003 (Regulation 1/2003).

[67] Articles 46 and 47, AML; Article 23(2) of Regulation No 1/2003.

[68] Paragraph 2, Article 46, AML; Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298 of 08.12.2006.

reform in the State Council. During this phase, intellectual assistance and communications started to become frequent and contributive. Whilst the complex nature of and China's unfamiliarity with competition law clearly made the drafting work much more arduous, in these two phases there were two major issues that were subject to intense debate and seriously hindered the timely drafting of the AML: domestic debates in relation to the necessity of competition law and the clash between promoting competition and preserving government powers; and the fierceness of different departments striving for interests over competition enforcement.[69]

3.1 Domestic Debates

Domestic debates over the adoption of the AML could be grouped into two categories. First, at the very early stage, there were debates over whether competition law was even necessary in contemporary China.[70] Second, at later stages there were intense debates over how to reconcile the conflicts between the forbearance of the government's regulatory power – a direct consequence of the liberalisation of domestic markets promoted by competition law – and the government's desire to retain its existing power.

3.1.1 Did China need a competition law?

In the early stages of China's economic reform, monopoly as an economic concept was largely associated with market power rather than with anti-competitive conduct. It was argued that, despite rapid economic development, most private undertakings in China merely held insignificant market powers;[71] it was therefore inappropriate to adopt legislation that was applied only to undertakings with considerable market power, like foreign conglomerates. Indeed, China's pre-WTO

---

[69] Chan (fn 41) 263. ('The lengthy process was due to a number of reasons, not least, the intense political lobbying between different interest groups both within and outside the government, who were anxious to protect their own rights and scope of influence.')
[70] Huang (fn 47) 118.
[71] *Ibid*.

market was characterised by a low degree of industrial concentration and productivity.[72] For example, in 1997 there were 17,831 plastic product manufacturers, 58,662 non-metal mineral product manufacturers, and 28,283 metal product manufacturers in China. In the automobile industry, 47% of undertakings in 1996 produced less than 1,000 vehicles.[73] It was believed that market competition would even be significantly restrained if the AML was to be enacted, because undertakings would be overly careful in implementing their business strategies, and as a consequence it would create more problems than it solved.[74] Some also argued that competition legislation like Sherman Act in the US was not like what it legally claimed to be; it was just used as an excuse for governmental interference in the economy, which was exactly the phenomenon that should be curbed in China.[75] In an economic environment in which state control has been the most prominent element, it is not entirely illegitimate to speculate that the idea of a competition law, if used in an arbitrary manner, will actually be a tool for the Chinese government to better scrutinise private and foreign undertakings. This line of thinking led many to regard competition law as unnecessary and unwelcome.

Nonetheless, when China entered the WTO, the momentum toward adopting the AML became irreversible; it was not a question of whether China should draft the AML any more, but how China should draft the AML.

3.1.2 What should be the proper scope of the AML?

Influenced by years of disastrous social upheaval resulting from recklessly-formulated economic policy, legal instruments governing economic activities in China

---

[72] Aimin Chen, 'China One Year after Its WTO Entry' in Shuming Bao, Shuanglin Lin and Changwen Zhao (eds.) *The Chinese Economy After WTO Accession* (Ashgate Publishing Limited 2006) 18. See also Aimin Chen, 'The Structure of Chinese Industry and the Impact from China's WTO Entry' (2002) 44 Comparative Economic Studies 72.

[73] Chen (fn 72) 18.

[74] Zhengxin Huo, 'A Tiger without Teeth: the Antitrust Law of the People's Republic of China' (2008) 10 Asian-Pacific Law & Policy Journal 32, 37.

[75] See Jung and Hao (fn 43) 8 citing Zhang Wuchang, 'An Economic Interpretation: the Fuzzy Nature of Antitrust Law'.

always pay prominent attention to social and political stability,[76] which requires a delicate balance of interests. Policy makers also had to ensure that the adoption of the AML would not have adverse impact on China's sustained economic growth. Politically influential factions – including both private and public conglomerates and consortiums – were afraid that their entrenched interests protected by existing political and economic framework would be endangered by the introduction of the AML.[77] In the political arena, their views and interests could not be overlooked when any novel reform plan was to be implemented.[78] China's on-going transition from a centrally planned economy to a socialist market economy brought about both economic reform and political reform. However, the gradualist approach adopted by the Chinese government indicates that economic reform will always takes priority over political reform, which is generally narrow in scope.[79] Astonishing transformation as found in economic development is not seen in the political arena.[80] The discordant pace of economic and political reform led China into a developing dilemma with too many residual issues to be solved and too many interests to be balanced: an inherent contradiction between political ideology and social reality, that of the 'maintenance of a socialist country' and the 'creation of a dynamic private sector'.[81] Consequently, the potential effect of the AML on the performance of a single undertaking and even of a whole business sector required the drafters to give way to political considerations and to gain consent from various interest groups by making significant compromise and reaching agreements regarding the specific types of practices the AML was going to

---

[76] Jacob Schneider, 'Administrative Monopoly and China's New Anti-Monopoly Law: Lessons from Europe's State Aid Doctrine' (2010) 87 Washington University Law Review 869, 883.

[77] Huo (fn 74) 36. For empirical studies on political control in Chinese undertakings, see Lixin Colin Xu, Tian Zhu and Yi-min Lin, 'Politician Control, Agency Problems and Ownership Reform: Evidence from China' (2005) 13 Economics of Transition 1; and Eric C. Chang and Sonia ML Wong, 'Political Control and Performance in China's Listed Firms' (2004) 32 Journal of Comparative Economics 617.

[78] Huo (fn 74) 38.

[79] For general studies on political reform in China, see Lowell Dittmer and Guoli Liu, *China's Deep Reform: Domestic Politics in Transition* (Rowman & Littlefield Publishers 2006); and Elizabeth J. Perry and Merle Goldman, *Grassroots Political Reform in Contemporary China* (Harvard University Press 2007).

[80] Xiaoye Wang and Jessica Su, *Competition Law in China* (Kluwer Law International 2012) 20.

[81] Huang (fn 47) 118; and Williams (fn 16) 103.

restraint. It also required them to hold onto the most basic norms and general scope a piece of modern competition legislation was supposed to have, without which the role of the AML as an 'Economic Constitution' would be substantially jeopardised.

At the end, Article 1 of the AML accommodates the interests of both pro-AML groups and literally every political faction by providing:

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

Many of these objectives – preventing and restraining monopolistic conducts, enhancing economic efficiency, and safeguarding the interests of consumers – are consistent with those of other competition jurisdictions.[82] Nonetheless, some vague and abstract objectives, such the enhancement of social public interest and the promotion of healthy development of the socialist market economy, are also provided, the meanings of which in practice can be interpreted loosely to take into account a myriad of non-competition-related considerations. Due to the vagueness and fuzziness of these objectives, the competition agencies may be easily captured by the parties they are supposed to regulate or by the political connections those parties possess to favour particular interests.[83] As will be shown in following chapters, the adoption of these non-competition objectives indeed results in serious regulatory capture during competition enforcement, as there is wider room for interest groups to intervene and for competition agencies to abuse their discretionary powers.[84] In addition, unclearly defined non-competition objectives may also lead to a situation where the competition agencies are pursuing objectives unrelated to the case, such as personal promotion or departmental prestige.[85] Such weakness is easily used by parties under investigation

---

[82] Harris (fn 1) 2.
[83] *Ibid.*
[84] Mario Mariniell, Damien Neven and Jorge Padilla, 'Antitrust, Regulatory Capture, and Economic Integration' (2015) E15Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, www.e15initiative.org, 1.
[85] *Ibid.*

to establish a mutually beneficial relationship with the competition agencies and achieve results that may be detrimental to market competition.

In addition, resistance also came from central ministries whose regulatory power over policy-making and allocation of resources might be seriously undermined if the AML was enacted. During the discussion of AML drafts, the then Ministry of Railways[86] and the Civil Aviation Administration held the opinion that since railways and airports were natural monopolies, exemption from the AML should be granted to undertakings in these sectors.[87] Moreover, the Ministry of Communications, now the Ministry of Transport, requested to retain the power to supervise competition issues within the transport industry.[88] Also, as with the main principle underlying China's current SOE reform – wide scale consolidation – industrial policy at that time promoted mergers between SOEs in the same industrial sector, since it was believed to be the fastest way for SOEs to increase their size and to be able to compete with multinational undertakings which had started to penetrate the Chinese market. However, the enactment of the AML might hinder the effectiveness of this policy and endanger the interests of a considerable amount of SOEs. Since SOEs were responsible for the provision of a wide range of social benefits to workers such as health care and pension funds, if some financially inefficient SOEs failed to survive in the increasingly competitive market, the interests of the redundant workers would not be adequately protected without a well-functioning social security system, which might lead to social upheaval on a national scale.[89] The government therefore called for properly designed competition law to introduce competition into the market without endangering the vested interests of, for example, SOEs in strategically important sectors.

---

[86] The Ministry of Railways was dissolved in 2013. Its duties have been taken up by the Ministry of Transport, the State Railways Administration and China Railway Corporation.
[87] Williams (fn 16) 192.
[88] *Ibid*.
[89] Bruce M. Owen, Su Sun and Wentong Zheng, 'Antitrust in China: the problem of incentive compatibility' (2005) 1 Journal of Competition Law & Economics 123, 133.

The end result was the insertion of the most controversial provision in the AML, Article 7. It was not included in the draft submitted to the Standing Committee for deliberation, but was added later by the Standing Committee.[90] Article 7 concerns undertakings operating in strategically important sectors, which in most if not all cases are SOEs. The issue concerning SOEs is a tricky one for competition policymakers. On the one hand, the AML is likely to introduce more competition to the market and hopefully put meaningful pressure on SOEs to promote their efficiency, since the strong market power of most SOEs results from their monopoly status which is not earned by business efficiency.[91] On the other, the sudden exposure of SOEs, most of which are already accustomed to uncompetitive markets and to following orders and instructions concerning business operations on regular basis, to excessive competition might make the least economically efficient vulnerable and lead them to bankruptcy. Since the vested interests in the most vital industrial sectors were considerable, the Standing Committee perceived that it was necessary to protect these interests by singling out SOEs for special attention under the AML and preventing private capital, especially foreign capital, from entering into these sectors.[92] At the end, Article 7 was included in the text of the AML and was seen by many as a seeming anti-monopoly immunity granted to SOEs in strategic industries.[93]

Another major hold-up in the drafting of the AML was the inclusion of the chapter on administrative monopoly,[94] which is the most prevalent form of anti-competitive

---

[90] Zhenguo Wu, 'Perspectives on the Chinese Anti-Monopoly Law' (2008) 75 Antitrust Law Journal 73, 98.

[91] Owen, Sun and Zheng (fn 56) 246.

[92] In previous drafts of the AML, full immunity was granted to utility enterprises in the sectors of postal services, railways, electricity, gas, and water. However, such provision was later removed. See Wang (fn 39) 135.

[93] As will be shown later, the purpose of the addition of Article 7 is certainly not to immune SOEs from the reach of the AML. It nonetheless creates confusion in relation to the relationship between competition policy and industrial policy, which will be explored in Chapter VI.

[94] Thomas Cheng, 'Competition and the State in China' in Daniel Sokol, Thomas Cheng and Ioannis Lianos (eds.) *Competition and the State* (Stanford University Press 2014) 182; and Chan (fn 41) 263.

practice in China.[95] The causes of administrative monopoly are complicated,[96] but generally include the government's far-reaching power in resource allocation, its financial reliance on tax revenue generated by local undertakings, and the lack of transparency and supervision in its decision making.[97] The chapter on prohibition of administrative monopoly was initially included in the drafts of the AML, but was removed completely in 2005 by the State Council.[98] However, the chapter appeared again in the draft submitted by the State Council to the Standing Committee of the NPC.[99]

This repeated reversal of the treatment of administrative monopoly is in fact understandable. To the government, prohibiting administrative monopoly not only endangers its basic interests, it also requires the government to levy penalties on itself, a task that will obviously be met with resistance.[100] To the policymakers, it is evident that administrative monopoly is not likely to be successfully curbed in the near future under China's current political structure. Whilst it becomes a common view that a piece of competition legislation is far from competent to achieve any meaningful results regarding prohibition of administrative monopoly,[101] the reason for bringing this sensitive issue into the AML framework and offending enormous interest groups seems to be implausible. However, if administrative monopoly is not addressed in the AML, it may convey a message to the public that the government does not take competition law seriously and as a consequence undermine its authority.[102] Although this seesaw struggle was eventually won by the more liberal reformers, as will be

---

[95] See fn 148, Chapter 2.
[96] For a discussion on the causes and effects of administrative monopoly, see Changqi Wu and Zhicheng Liu, 'A Tiger without Teeth? Regulation of Administrative Monopoly under China's Anti-Monopoly Law' (2012) 41 Rev. Ind. Organ. 41.
[97] Yong Guo and Angang Hu, 'The Administrative Monopoly in China's Economic Transition' (2004) 37 Communist and Post-Communist Studies 265, 272.
[98] Yikun Huang, 'Awkward Status Quo of Anti-Monopoly Law', 15 January 2006, http://finance.sina.com.cn/review/20060115/14572276700.shtml.
[99] Xinhua News Agency, 'State Council Approves the Anti-Monopoly Law (Draft) in Principle', 8 June 2006, http://news.xinhuanet.com/legal/2006-06/08/content_4661181.htm
[100] Wu and Liu (fn 96) 140.
[101] *Ibid*.
[102] Owen, Sun and Zheng (fn 56) 256.

discussed later, the *status quo* of the enforcement against administrative monopoly suggests that the inclusion of this chapter remains symbolic rather than practical.

In addition to balancing the interests of different groups by adjusting and revising the scope and substance of the AML, conflicts between ministries over competition policy-making power also considerably prolonged the drafting of the AML, and finally led to unsound design of enforcement system.

3.2 Institutional Conflicts

Another crucial cause of the delay in the enactment of the AML, and perhaps the most direct and decisive one, was the 'bureaucratic turf war'[103] between would-be competition agencies, MOFCOM, SAIC and NDRC.[104] Early drafts of the AML prepared by SETC and SAIC called for the creation of an Anti-Monopoly Management Body directly under the State Council.[105] This new body was to be the only authority dedicated to competition policy making and enforcement.[106] Despite the fact that even competition experts from the US, where the Department of Justice and the Federal Trade Commission share concurrent antitrust jurisdiction, supported the idea of having a single agency with a competition mandate,[107] the tendency towards creating a new competition enforcement authority was not found in later AML drafts since the major institutional reform within the State Council took place in 2003. Thereafter, conflicts over which existing departments should be empowered to enforce the AML became intensified.

After MOFCOM was established and took over the drafting project, the draft AML submitted to the State Council in February 2004 called for an enforcement authority under MOFCOM.[108] However, this proposal had met with fierce

---

[103] Williams (fn 16) 163.
[104] Yi Shin Tang, 'Lawmaking Process and Non-governmental Stakeholders in China's Antimonopoly Law' (2015) 36 European Competition Law Review 174, 179; and Huo (fn 74) 38.
[105] Harris (fn 1) 15.
[106] *Ibid*.
[107] ABA (fn 58) 4.
[108] Harris (fn 1) 16.

opposition.[109] In the same year, MOFCOM gained the upper hand over its competitors and took a bold step to establish a temporary body, the Anti-Monopoly Office, within its bureaucratic structure.[110] Officially, the Office was said to be responsible for helping speed up the drafting process of the AML, an objective it had indeed successfully accomplished,[111] and for related investigations and international communications on prevention of monopolies.[112] Factually, the establishment of the Anti-Monopoly Office could be seen as the revelation of MOFCOM's ambition to have all competition enforcement powers to itself. In fact, some had considered MOFCOM the most suitable AML enforcement authority,[113] since the nature of its designated functions significantly contributed to its bid for AML enforcement powers. MOFCOM played a prominent role in '[formulating] the strategies, guidelines and policies of developing domestic and foreign trade and international economic cooperation',[114] which made it a well-placed regulator to handle economic-related activities, such as competition matters. Its predecessor – MOFTEC – had wide experience from drafting the Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors,[115] of which MOFCOM itself was an enforcer.

SAIC, on the other hand, was to a certain degree eclipsed by MOFCOM. Although SAIC's efforts in the drafting of the AML were recognised,[116] the February 2004 draft AML was in fact submitted by MOFCOM alone to the State Council.[117] Moreover, in June 2004 the Notice on the Removal of Regional Blockade in Market Economic Activities was issued jointly by MOFCOM, the Ministry of Supervision,

---

[109] Williams (fn 16) 191.
[110] H. Stephen Harris, 'An Overview of the Draft China Antimonopoly Law' (2005) 34 Ga. J. Int'l & Comp. L. 131, 133; and Yan Yang, 'Ministry Sets up Anti-Monopoly Office', 17 September 2004, http://www.chinadaily.com.cn/english/doc/2004-09/17/content_375331.htm.
[111] Huang (fn 47) 119.
[112] Yang (fn 110).
[113] *Ibid*.
[114] MOFCOM, 'Mission', http://english.mofcom.gov.cn/column/mission2010.shtml.
[115] The Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors was adopted on 7 March 2003, a few days later one of its drafters, MFTEC, was re-organised to form MOFCOM, which became the enforcer of the Interim M&A Regulations. See section 3.1, Chapter 2.
[116] LAO stated that the submitted draft was a joint effort of MOFCOM and SAIC. LAO (fn 48).
[117] *Ibid*.

LAO, the Ministry of Finance, the State Administration of Taxation and the State Administration of Quality Supervision, Inspection and Quarantine. SAIC was excluded on this occasion for unknown reasons. Generally, market behaviour such as regional blockade should have fallen within the jurisdiction of SAIC.[118] This Notice was issued to implement the State Council Rules on the Prohibition of Regional Blockade in Market Economy Activities, in which references to 'Industry and Commerce Administration of the State Council' were explicitly made.[119] Nevertheless, as the most experienced department in handling competition-related violations, SAIC also took steps to preserve its existing regulatory power. In March 2004 SAIC published an article entitled 'Anti-Competitive Behaviours of Multinationals in China and the Counter-Measures' in its official journal.[120] In the article, normal prohibited business practices such as predatory pricing, refusal to deal, anti-competitive agreements, and anti-competitive mergers were analysed, and large multinationals such as Lenovo, Kodak, Motorola, Tetra Pak and Coca-Cola were mentioned.[121] It called for the restriction on the 'capital invasion' of foreign undertakings, since the interests of millions of Chinese small and medium-sized enterprises might be undermined by the operation of these undertakings, which were formidable in terms of technological advancement, financial condition, and management efficiency. Moreover, in 2006 SAIC, as the department responsible for overseeing the registration of foreign enterprises, drafted the Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors along with MOFCOM, the State-owned Assets Supervision and Administration Commission, the State Administration of Taxation,

---

[118] See for example, Article 7, AUCL.

[119] See Articles 18 and 20, the State Council Rules on the Prohibition of Regional Blockade in Market Economy, adopted on 21 April 2001, at http://www.mofcom.gov.cn/article/swfg/swfgbh/201101/20110107350882.shtml.

[120] Anti-Monopoly Office of the Fair Trade Bureau of SAIC, 'Anti-Competitive Behaviours of Multinationals in China and the Counter-Measures' (2004) 5 Industry and Commerce Administration 42.

[121] *Ibid*, 42-43.

China Securities Regulatory Commission, and the State Administration of Foreign Exchange.

Although NDRC was not responsible for drafting the AML, it was a member of the AML Review and Revision Leading Group established by LAO.[122] In addition, NDRC, like MOFOCOM, took up certain functions from SETC, another of the AML drafters, during the 2003 institutional reform of the State Council,[123] and its predecessor – SDPC[124] – was charged with enforcing the Price Law of 1997.[125] In light of its far-reaching power over macroeconomic planning in general and over the enforcement of the Price Law in particular, NDRC also became active in scrambling for AML enforcement power. In 2003 it adopted the Provisional Rules on the Prohibition of Price Monopoly to prohibit, *inter alia*, price manipulation, bid rigging and resale price maintenance, anti-competitive behaviours which were all to be regulated under the AML.[126] A year later, in a report entitled 'Current Economic Situation and Policy Orientation in 2005' NDRC urged further reform in natural monopoly sectors and the prompt adoption of the AML.[127]

As two powerful ministries established to address new challenges after the WTO accession and entrusted with a wide scope of the most important economic mandates, MOFCOM and NDRC were expected to exercise their functions to sustain and promote China's economic growth in the WTO era effectively. Unlike MOFCOM and NDRC, which oversaw national economic strategies and policies, SAIC's authority – which was not subject to revision in 2003 – mainly lay in regulating market activities and maintaining market order. For example, it investigated and punished business

---

[122] See fn 56.
[123] See section 4.2, Chapter 2.
[124] In 2003 SDPC was reorganised into NDRC. *Ibid.*
[125] Competition-related prohibition in the Price Law includes collusion between competitors and predatory pricing. Article 14, Price Law.
[126] Articles 4 to 7, Provisional Rules on the Prohibition of Price Monopoly, adopted on 18 June 2003, http://www.sdpc.gov.cn/zcfb/zcfbl/200506/t20050613_6683.html.
[127] NDRC, 'Current Economic Situation and Policy Orientation in 2005', http://www.smesy.gov.cn/news_view.php?id=2978

irregularities such as false advertising, commercial bribery, and smuggling.[128] Whilst MOFCOM and NDRC certainly had considerable political and financial advantages over SAIC,[129] the latter had accumulated sufficient competition enforcement experience through years of enforcement of the AUCL. Each ministry had its own merits of being responsible for enforcing the AML and wished to have a larger slice of the cake, whilst all three apparently opposed the proposal of having a new department to take on this task. The lack of channels and incentives for communication among them caused the allocation of enforcement jurisdiction to be a chaotic turf war. They worked in isolation and busily engaged in largely overlapping and homogeneous activities which they believed could demonstrate their own capability of enforcing the AML and effectively marked off their 'spheres of influence', such as setting up offices, and publishing article and reports.

As a solution to end the conflict among the three ministries, a dispersed tripartite enforcement system, rather than a new, unified and independent competition agency, was created.[130] The three agencies were assigned to oversee certain aspects of the AML that were most relevant to their respective pre-AML competition-related expertise. After years of debate, this seemed to be a logical and convenient solution; nonetheless, since the solution circumvented the core cause of this conflict – political interests of government department in policy-making and lack of means to supervise coordination – the very same issue will continue to be raised in this tripartite structure. In addition, as can be seen in the discussion above, departments other than the three central AMEAs were also involved in the revision of the AML, and more departments with particular competition-related mandates had a say in the formulation of secondary

---

[128] SAIC, 'Mission', http://www.saic.gov.cn/english/aboutus/Mission.

[129] For example, in 2015 the annual budgets of MOFCOM, NDRC and SAIC are respectively CNY 26.11 billion, CNY 1.07 billion and CNY 0.59 billion. The Annual Departmental Budget of MOFCOM 2015, http://www.mofcom.gov.cn/article/cwgongzuo/feiyqr/201504/20150400943825.shtml; the Annual Departmental Budget of NDRC 2015, http://www.ndrc.gov.cn/gzdt/201504/t20150417_688410.html; and the Annual Departmental Budget of SAIC 2015, http://www.saic.gov.cn/zwgk/zyfb/czzj/201504/P020150417504006779767.pdf.

[130] This complex public enforcement system will be discussed in more detail in Chapter 5.

implementation rules. These industrial policy makers all expected to retain control of competition issues within their respective industries after the AML came into force. The institutional conflicts between competition and industrial policy led to another end result: the Anti-Monopoly Commission (AMC), which is composed of the three central AMEAs and fourteen other ministries, was created to accommodate the ministries' interests in competition policymaking.[131]

4. CONCLUSION

'*Zhongti xiyong* [中体西用]' – 'Chinese learning as substance, Western learning as functions'[132] – was the guiding ideology for the Self-Strengthening Movement in the latter half of the 19th century, which was famously expounded by Zhang Zhidong, a grand secretary in the imperial government of the Qing Dynasty. This ideology was put forward at a time when China was surpassed by western capitalist countries in every aspect, in terms of economy, technology, military and so on. Some outward-looking government officials began to consider it necessary for China to learn from the social and technological achievements of western countries, and use them to advance the development of China without losing its local roots. After more than a century, the very same ideology can also be applied in the drafting process of the AML: transplanting western competition norms to establish a competition system based on China's unique political and economic environments.

The AML, as the first complete set of competition rules *vis-à-vis* China's previous competition-related laws and regulations, indeed makes significant progress in terms of comprehensiveness and clarity in the field of competition law.[133] Compared with other Chinese legislation, as a result of in-depth international cooperation during the

[131] Article 9, AML.
[132] Mingdong Gu, *Sinologism: An Alternative to Orientalism and Postcolonialism* (Routledge 2013) 134.
[133] Huang (fn 47) 120.

drafting and discussion of the AML, the substantive provisions reflect many fundamental competition rules and economic principles acknowledged by most mature competition jurisdictions. In addition, the inclusion of the provisions on SOEs and administrative monopoly demonstrates that whilst the convergence of competition laws across the globe is the general trend, it is equally important for a piece of legislation to address and solve the most prominent issues which are unique in a country so that legal transplants can be more useful and effective.

However, the prolonged drafting process raised serious concerns. Conflicts and compromises had shaped the final AML, and the most salient causes of delay – entrenched interests in economic sectors and a political tug-of-war – will continuously impact on the formation of competition policy in the future. Whilst the division of enforcement responsibilities among existing ministries significantly mitigated the delay,[134] at the same time it generated instability in the competition system and uncertainty of enforcement. Since every department involved in or associated with the AML drafting wished to preserve its pre-AML bureaucratic functions whilst simultaneously striving for further policy control powers in future competition enforcement, the legislation which was supposed to be based on rigorous economic analysis and intended to promote public welfare was eventually turned into a product of political compromise which preserved vested interests and placated departmental conflicts at the expense of public welfare.

In light of the concerns raised in this chapter, the next two chapters will appraise respectively the application of the AML by the AMEAs and the courts to monopolistic practices in several influential cases, and the operation of the public competition enforcement system. As will be shown, the compromises made during the drafting of

---

[134] Xu Kunlin, the then Director General of NDRC's Price Supervision Inspection and Anti-monopoly Bureau, once stated at a press conference: 'If we had chosen to establish a single agency to enforce the AML when it was being drafted, its promulgation would have been postponed for many years.' MOFCOM, 'The Information Office of the State Council Holds Press Briefing on Anti-Monopoly Enforcement', 11 September 2014, http://fldj.mofcom.gov.cn/article/i/201409/20140900733559.shtml. Xu's statement was in Chinese and translated by the author.

the AML have greatly hindered the effectiveness of China's competition system.

Chapter Four

The Application of the AML to Monopolistic Conduct

1. INTRODUCTION

This chapter explores the three basic pillars of the AML, namely, anti-competitive agreements, abuse of a dominant position, and merger review.[1] It evaluates the administrative and judicial application of the AML in several important cases, and illustrates the general trends in the enforcement against monopolistic conduct. In addition, it sheds some light on the practices in the EU competition system, a model which the drafters of the AML heavily emulated.[2]

After more than a decade of arduous discussion and drafting, the AML was finally adopted on 30 August 2007. As discussed in the previous chapter, during designing its own competition system, China substantially benefited from well-founded competition law theories and enforcement experiences in advanced competition jurisdictions. Therefore, in general, the structure of the AML does not differ significantly from most competition laws in other jurisdictions, and the substantive text of the AML is basically consistent with international norms.[3] It contains 57 Articles divided into 8 Chapters. After describing some general principles of the AML in Chapter I such as legislative

---

[1] Article 3, AML. As already mentioned, the AML in fact has four basic pillars, the last one being the prohibition of abuse of administrative power – the so-called administrative monopoly. However, since the enforcement of the AML against administrative monopoly to a large extent requires sophisticated political means instead of legal interpretation of the substantive text, the issue of administrative monopoly will be dealt with in the next chapter, which discusses the prominent problems concerning the public competition enforcement system.

[2] H. Stephen Harris, Peter Wang, Yizhe Zhang, Mark Cohen and Sebastien Evrard, *Anti-Monopoly Law and Practice in China* (Oxford University Press 2011) 2.

[3] Yi Shin Tang, 'Lawmaking Process and Non-Governmental Stakeholders in China's Antimonopoly Law' (2015) 36 European Competition Law Review 174, 174; H. Stephen Harris, 'The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China' (2006) 7 Chi. J. Int'l L. 169, 172.

objectives,[4] extraterritorial application of the AML,[5] special emphasis on lifeline industry,[6] and the establishment of the AMC,[7] the AML sets out the prohibition of monopoly agreements in Chapter II, abuse of dominant position in Chapter III, and anti-competitive concentration in control of operator concentration in Chapter IV. Chapter V represents the unique feature of the AML by prohibiting the abuse of administrative power to eliminate or restrict competition. Chapter VI articulates the procedural rules governing investigation of monopolistic conduct, including the possibility for AMEAs to make a commitment decision.[8] Chapter VII lays down the legal liabilities for the breach of the AML. It stipulates the range of fines,[9] introduces a leniency programme,[10] and provides the legal basis for private party to claim damages.[11] It is provided in Chapter VIII that the AML is not applicable to, first, the exercise of intellectual property rights (IPRs) so long as the IPRs are not abused to eliminate or restrict market competition,[12] and second, the alliance between or concerted practices of agricultural producers and rural economic organisations in economic activities such as the production, processing, sales, transportation and storage of agricultural products.[13]

---

[4] Article 1, AML.

[5] Article 2, AML. See section 2.1.1 below for a case example of the extraterritorial application of the AML. However, the AML does not set forth the required criteria for Article 2 to be triggered by an alleged monopolistic conduct formed outside China; neither the AMEAs nor the courts have addressed the issue as to how the implementation of effects doctrine under the AML will be justified. Under the EU competition law, in *Gencor* the General Court held that EU merger control law could by applied extraterritorially to a concentration leading to a dominant duopoly operating outside the EU since the concentration 'would have had the direct and immediate effect of creating the conditions in which abuses [of dominance] were not only possible but economically rational […] [and] would have had an immediate effect in the Community'. Case T-102/96 *Gencor v Commission* [1999] ECR II-759, at 94-95.

[6] Article 7, AML.

[7] Article 9, AML.

[8] Article 45, AML. This commitment procedure is believed to be modelled after Article 9 of Regulation 1/2003, which provides that where undertakings offer commitments to meet the competition concerns put forward by the Commission for the purpose of bringing the infringement to an end, the Commission may decide to suspend the proceedings.

[9] Articles 46 and 47, AML.

[10] Paragraph 2, Article 46, AML.

[11] Article 50, AML.

[12] Article 55, AML. See section 2.3 of Chapter 5 for the discussion on the Rules on the Prohibition of Abuse of Intellectual Property Rights to Eliminate or Restrict Competition issued by SAIC.

[13] Article 56, AML.

Whilst the AML is overall a standard competition law, it does not guarantee a consistent and normative application of the law. It is therefore important to examine how well internationally recognised competition norms and economic thinking have been incorporated by analysing the decisions of both the AMEAs and the courts, and what lessons can be drawn from the application of the AML.

2 PROHIBITION OF MONOPOLY AGREEMENTS

One of the most important tasks for a competition law is to invalidate agreements that eliminate or restrict market competition, also known as monopoly agreements in the AML. The AML makes a distinction – apparently inspired by §1 of the German Gesetz gegen Wettbewerbsbeschränkungen (GWB)[14] instead of Article 101 TFEU, which does not distinguish between these two forms of collusion[15] – between horizontal agreements formed between competitors in the same market[16] and vertical agreements formed between undertakings[17] and their trading partners at different levels of a supply chain.[18] The reason behind such separation of treatment is that the restrictive effects of a vertical agreement on market competition are generally less

[14] Xiaoye Wang, 'Highlights of China's new Anti-Monopoly Law' (2008) 75 Antitrust Law Journal 133, 136. However, after the seventh amendment to the GWB in 2005, §1 mirrors Article 101 TFEU and no longer makes distinction between horizontal and vertical restrictions.

[15] The distinction between horizontal and vertical agreements nevertheless plays an important role under EU competition law especially when block exemption regulations are considered, in which a more lenient regime for vertical than for horizontal agreements is adopted by the Commission. Ioannis Lianos, 'Collusion in Vertical Regulations under Article 81 EC' (2008) 45 Common Market Law Review 1027, 1032.

[16] Article 13, AML. Under EU competition law, vertical agreement is defined as 'an agreement or concerted practice entered into between two or more undertakings each of which operates […] at a different level of the production or distribution chain'. Article 1(1) (a), Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L102/1 of 23.04.2010.

[17] The term 'undertakings' is not defined in the TFEU. In *Höfner and Elser*, the ECJ stated that 'the concept of an undertakings encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, para. 21. In the AML, 'business operator' – the AML equivalent of 'undertaking' – is defined as 'a natural person, legal person, or any other organization that is in the engagement of commodities production or operation or service provision'. Article 12, AML.

[18] Article 14, AML.

significant than that generated by a horizontal agreement. In fact, some vertical agreements are used to coordinate the actions of upstream and downstream undertakings in order to ensure the efficient supply of consumer goods, and therefore are welfare improving in nature.[19] However, as will be shown later, neither the AMEAs nor the courts seem to treat vertical and horizontal agreements any differently in practice.

In relation to horizontal agreements, Article 13 lists five types of agreement between competitors which are treated as monopoly agreements and are therefore prohibited under the law: first, agreements that fix or change prices of commodities; second, agreements that limit the output or sales of commodities; third, agreements that divide the sales market or the raw material procurement market; fourth, agreements that restrict the purchase of new technology or new facilities or the development of new technology or new products; and fifth, agreements that make boycott transactions.[20] Similar to Article 101(1) TFEU,[21] the list is not exhaustive. In addition, according to the second paragraph of Article 13, monopoly agreements within the meaning of the AML are defined as 'agreements, decisions, or other concerted behaviour that eliminate or restrict competition'.[22] This definition is similar to what is provided for in Article 101(1) TFEU.[23] However, as will be discussed later,

---

[19] Vincent Verouden, 'Vertical Agreements: Motivation and Impact' (2008) 3 Competition Law and Policy 1813, 1817.

[20] As will be further elaborated in the next Chapter, NDRC and SAIC share parallel jurisdiction in the enforcement against monopoly agreements and abuse of dominant position. NDRC enforces the AML against price-related infringements whilst SAIC handles non-price-related ones. Therefore, in the context of Article 13, NDRC only applies Article 13(1) and Articles 13(2)-(5) are applied by SAIC.

[21] Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers* [2008] ECR I-8637, paras. 16-17.

[22] During the drafting of the AML, the American Bar Association once recommended that the AML should adopt an appreciability test commonly found in advanced competition regimes and only prohibit monopolistic conducts that eliminated or substantially restricted competition. However, this recommendation was not accepted. See ABA, 'Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China', May 2005, 8.

[23] Although no definition of 'concerted behaviour' is given in the AML, it should be plausible to assume that 'concerted behaviour' has the same meaning as 'concerted practice' under EU competition law. The ECJ defined concerted practice as 'a form of coordination [...] which, although it has not been taken to the stage of an agreement properly so-called, knowingly substitutes practical cooperation [...] for the risks of competition'. Joined Cases 40 to 48/73, 50/73, 54 to 56/73, 113 and 114/73 *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission* [1975] ECR I-1663, para. 25. Article 6 of NDRC

the structure of Article 13, providing the definition of monopoly agreements immediate after the stipulation of prohibiting horizontal agreements instead of in a separate provision, gives rise to prominent problems concerning burden of proof in private litigation.

Article 14 prohibits vertical agreements that fix the price of commodities for resale to a third party, or restrict the minimum price of commodities for resale to a third party. Therefore, resale price maintenance (RPM) is the only conduct prohibited under Article 14. Nonetheless, as with the list in Article 13, the list in Article 14 is not exhaustive, and other monopoly agreements as determined by the AMEAs can also be prohibited.[24]

Article 15 of the AML, similar to Article 101(3) TFEU, allows monopoly agreements falling within the scope of application of Articles 13 and 14 to be exempt in five circumstances.[25] It effectively provides a 'rule of reason' for undertakings to rely upon.[26] Nonetheless, as will be discussed later, due to the opacity of decision-making process and the lack of information in official decision, in most cases, it was unknown whether infringing undertakings had invoked Article 15 at all, therefore the actual interpretation and application of this Article remains largely unclear.

Article 16 articulates the applicability of Articles 13 and 14 to trade associations, which are referred to as 'associations of undertakings' in Article 101(1) TFEU. The specific reference to trade associations was made at a late stage in the drafting of the AML, which was believed to be a direct consequence of the price collusion amongst several Chinese instant noodle producers through a trade association – the Chinese Branch of World Instant Noodles Associations – not long before the enactment of the

---

Rules on Anti-Price Monopoly provides that concerted behaviour may be found if there is uniformity between the pricing conduct of business operators and there has been communication of intention between business operators.

[24] Articles 13(6) and 14(3), AML.

[25] Articles 15(1) – (7), AML. Early drafts of the AML had provided an *ex ante* notification mechanism for anti-competitive agreements to invoke exemptions – very similar to previous EU practices – which was removed later. See Allan Fels, 'China's Antimonopoly Law 2008: An Overview' (2012) 41 Rev Ind Organ 7, 18; and Harris et al. (fn 3) 190.

[26] Wang (fn 14) 136.

law.[27] This is in fact a wise step, as will be shown in the case analysis below, because a considerable number of cases handled by the AMEAs involved trade associations.

Sections 2.1 and 2.2 below will examine respectively the approaches taken by the AMEAs and the courts in the application of the provisions on horizontal and vertical agreements.[28]

2.1 Enforcement against Cartels

In Western competition jurisdictions, horizontal agreement is deemed hard restraint, which represents one of the most serious restrictions on market competition, and there are ongoing debates as to whether it should be treated as *per se* illegal. If a formalistic approach is followed, the formation of cartel will be *per se* illegal, and no consideration of its effects on competition or lack thereof will be necessary. On the other hand, when an effects-based approach is followed, a more careful appraisal of the context in which the agreement operates should be carried out even for a *prima facie* infringement as serious as price fixing or division of markets before a violation could be established.

According to Article 101(1) TFEU, all agreements that have as their object or effect the prevention, restriction, or distortion of competition are prohibited, and these are 'not cumulative but alternative requirements'.[29] Therefore, a certain form of agreements, which 'by their very nature [are] injurious to the proper functioning of normal competition',[30] can be found to be anti-competitive and therefore illegal

---

[27] Fels (fn 25) 17; and NDRC, 'NDRC Asserts Increase of Instant Noodle Suspected of Collusion', 17 August 2007, http://xwzx.ndrc.gov.cn/mtfy/zymt/200708/t20070820_154545.html.

[28] Unlike SAIC, NDRC has not published all of its detailed official decisions, most of its decisions were published in the form of press release by either NDRC or press agencies of the government. Due to the fact that the quality in terms of substantive analysis of these 'notices' – as opposed to formal decisions – is comparatively poor – for example, the notice published by Price Bureau of Guizhou Province on Moutai's RPM practice contains only two paragraphs (*Moutai* (2012) Xinhua News Agency, 'Moutai Fined CNY 247 million for Price Monopoly by Guizhou Price Bureau', 22 February 2013, http://news.xinhuanet.com/fortune/2013-02/22/c_124377781.htm) – the case analysis given below focuses on official decisions the full text of which is available on NDRC's website. Nonetheless, most of the cases concluded by NDRC will be studied in the next chapter, which deals with the issues regarding China's public competition system in general.

[29] Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, 249.

[30] *BIDS* (fn 21) para. 17.

merely based on their object without the need to assess the actual effects on market competition. Nonetheless, this approach does not indicate a *per se* illegality. After the modernisation of EU competition law, which seeks to promote an 'economics-principled' approach in the application of competition law,[31] the treatment of hard restraints has moving from a strict approach based on the form of a particular agreement[32] to a flexible approach based on the assessment of its seriousness.[33] In *BIDS*, Advocate General Trstenjak stated that in the assessment of whether an agreement restricts competition by its object, the content of the agreement must be taken into account in the light of its legal and economic context.[34] This line of reasoning was followed by the ECJ, which held that whilst there was no need to assess the actual effects of an agreement if it was established that its object was to prevent, restrict or distort competition, the establishment of such an object must be made in the light of the agreement's content and economic context.[35] Therefore, there are two steps in the analysis of whether an alleged anti-competition agreement is in breach of Article 101(1). First, the seriousness of the agreement will be appraised in light of its content and the economic context in which it is to be applied. If the restraint is so serious that the goals pursed by EU competition law will inevitably be harmed, the agreement will be found to have infringed Article 101(1) by object without the need to assess its actual effect. Second, if the seriousness is less obvious, the analysis must further prove that competition has in fact been appreciably prevented, restricted, or distorted as a result of the agreement.[36]

---

[31] Arianna Andreangeli, 'From Mobile Phones to Cattle: How the Court of Justice is Reframing the Approach to Article 101 (Formerly 81 EC Treaty) of the EU Treaty' (2011) 34 World Competition 215, 216.

[32] See for example, Case T-374-375/94 *ENS v Commission* [1998] ECR II-3141.

[33] Andreangeli (fn 31) 237.

[34] *BIDS* (fn 21) per Advocate General Trstenjak, para. 42. See also Case 56/65 *LTM* [1966] ECR 235, at 249; and Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paras. 25 to 28

[35] *BIDS* (fn 21) para. 16.

[36] *Ibid.*, para. 15; and Andreangeli (fn 31) 236.

However, the language of Article 13 does not seem to provide any room for adopting an EU-style effects-based approach to horizontal agreements. Article 13 stipulates that '[a]ny of the following monopoly agreements between competing business operators shall be prohibited'. Following a literal interpretation, it indicates that any examples listed in Article 13 are treated as monopoly agreements, therefore horizontal agreements which, for example, '[fix] or [change] prices of commodities',[37] '[limit] the output or sales of commodities'[38] or '[divide] the sales market or the raw material procurement market'[39] are without doubt monopoly agreements for the purpose of Article 13. Paragraph 2 of Article 13 further provides the definition of 'monopoly agreements', which refers to 'agreements, decisions or other concerted actions which eliminate or restrict competition'. As a direct consequence, agreements listed in Article 13 are deemed to have the effects of eliminating or restricting competition by nature, and is therefore *per se* illegal. It then seems unnecessary to provide any analysis to prove the anti-competitive effects derived from horizontal agreements that fix or change prices of commodities before an infringement can be found. Similar stipulations in relation to horizontal agreements can also be found in NDRC Rules on Anti-Price Monopoly[40] and SAIC Rules on Prohibition of Monopoly Agreements.[41] Following this method of interpretation, the focus of any cartel case, after establishing the existence of the cartel, should be on the assessment of the reasoning if any put forward by cartel members under Article 15 AML to prove that the pro-competition aspect of the agreement offsets its anti-competitive effects.

In addition, Article 46 of the AML stipulates that 'where the concluded monopoly agreement has not been performed, a fine of no more than 500,000 yuan shall be imposed'. It further proves that under the AML monopoly agreements have eliminating or restricting effects on competition by their nature, so the fact that they

---

[37] Article 13(1), AML.
[38] *Ibid*., Article 13(2).
[39] *Ibid*., Article 13(3).
[40] Article 7.
[41] Articles 4-7.

have not been implemented is not relevant to establishing infringement. However, the application of Article 13 by the AMEAs in practice seems to create confusion.

2.1.1 NDRC

So far, NDRC has only published the official decisions of three cases on its website,[42] two of which concerned cartels. However, the depth of analysis presented in the following two cartel decisions is significantly different.

2.1.1.1 Japanese auto parts and bearings cartels

On 20 August 2014, NDRC announced that 7 Japanese auto parts manufacturer – Denso, Asian, Mitsubishi Electric, Mitsuba, Yazaki, Furukawa and Sumitomo – and 3 bearings manufacturers – NSK, JTEKT and NTN – were fined aggregately CNY 1.2354 billion for taking part in price-fixing cartels.[43] One auto parts manufacturer, Hitachi,[44] and one bearing manufacturer, Nachi-Fujikoshi,[45] were exempt under the leniency programme as they were the first undertakings to report the existence of the respective cartels and provide important evidence.

NDRC found that, for the purpose of reducing competition and obtaining orders from automobile manufacturers at most beneficial terms, the eight auto parts manufacturers frequently participated in bilateral or multilateral meetings in Japan, and reached and implemented agreements concerning price quotations of auto parts

---

[42] Since most price-related AML infringements were handled by local DRCs, the decision of these cases were published on the web portals of relevant DRCs or local governments. However, these decisions in most cases are general and brief, and in fact they are more like press releases.

[43] NDRC, '12 Japanese Auto Parts and Bearings Manufacturers Fined CNY 1.23 thousand million by NDRC for Pricing Monopoly', 20 August 2014, at http://jjs.ndrc.gov.cn/gzdt/201408/t20140820_622756.html. The initial decision was published in the form of press release, whilst 12 separate official decisions were available on 18 September 2014, at http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld. Amongst the manufacturers which were fined by NDRC, the four Japanese bearings manufacturers – Nachi-Fujikoshi, NSK, JTEKT and NTN – were fine by European Commission in March 2014 for operating a price-fixing cartel. See European Commission, Press Release IP/14/280, at http://europa.eu/rapid/press-release_IP-14-280_en.htm.

[44] *Hitachi* (2014) NDRC Decision No. 2, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140918_626086.html.

[45] *Nachi-Fujikoshi* (2014) NDRC Decision No. 10, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140918_626078.html.

orders placed by Chinese customers. In addition, from 2000 to June 2011 the four bearing manufacturers had organised meetings in both Japan and Shanghai, where price increase strategies for bearings, and the timing and scope of price increases in Asia and China were discussed. The price increase of bearings sold in China was pursuant to the coordination of prices and the exchange of price increase information at these meetings.

In the official decisions on the auto parts cartel – the content of which is substantially identical – NDRC first provided the information on how these manufacturers colluded to coordinate prices and what orders from automobile manufacturers they successfully and unsuccessfully obtained as a result of the collusion. It then included a similar paragraph which set out the legal basis for the imposition of fines in each decision:

> 'The Authority considers that the monopoly agreements which fixed or changed the prices of auto parts your company and competing business operators entered into and implemented eliminated and restricted the competition in the relevant market, directly affected the prices of relevant auto parts, indirectly increased the prices of vehicle of relevant brands, impaired the interests of downstream automobile manufacturers and consumers. The above conduct of your company violates Article 13(1) of the AML, which prohibits monopoly agreement between competing business operators that fixes or changes the prices of commodities.'[46]

The decisions on the bearings cartel contained no legal analysis of the conduct carried out by the cartel. The facts of the case were immediately followed by a brief statement concluding that 'the above conduct violates Article 13(1) of the AML, which prohibits monopoly agreement between competing business operators that fixes or changes the prices of commodities.'[47]

As only the facts concerning the cartel conduct was available in the decisions, and the anti-competitive effects of these conducts went virtually unassessed, it appears that

---

[46] See, for example, *Hitachi* (2014) NDRC Decision No. 2, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140918_626086.html.

[47] See, for example, *NTN* (2014) NDRC Decision No. 12, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140918_626076.html.

NDRC had treated these two price-fixing cartel as *per se* illegal – compatible with the literal interpretation of Article 13 – although there was no reference to whether any undertakings had applied for exemption or provided justification for their conduct under Article 15. However, in another cartel case handled by NDRC, a seemingly different approach was taken.

2.1.1.2 Zhejiang insurance cartel

On 2 September 2014, NDRC published on its website official decisions made in December 2013[48] on a car insurance cartel in Zhejiang Province involving 23 insurance companies and 1 trade association, amongst which one insurance company – Zhejiang Branch of PICC, the first whistle-blower – was exempt from penalty[49] and two companies received significant reduction – 90% for the second whistle-blower,[50] Zhejiang Branch of China Life, and 45% for the third,[51] Zhejiang Branch of China Ping An – in fines under the leniency programme.[52] The Insurance Industry

[48] All of the 24 decisions were dated 30 December 2013.

[49] *Zhejiang Branch of China People's Insurance Insurance Co., Ltd.* (2013) NDRC Decision No. 4, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140903_624625.html.

[50] *Zhejiang Branch of China Life Insurance Co., Ltd.* (2013) NDRC Decision No. 8, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140902_624515.html.

[51] *Zhejiang Branch of China Ping An Insurance Co., Ltd.* (2013) NDRC Decision No. 9, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140902_624516.html.

[52] Article 14 of the NDRC Procedural Rules on Administrative Enforcement against Price Monopoly, pursuant to Article 46 of the AML, stipulates that the any business operator voluntarily discloses the formulation of price-related monopoly agreement and provides important evidence may receive mitigated penalty or exemption. The first reporting business operator is entitled to full exemption, the second may receive a reduction of no less than 50% in fine, and the rest may receive a reduction of no more than 50%. It seems that there is no maximum number of business operator which can benefit from the leniency programme in a single case, as long as the self-reporting undertakings can provide 'important evidence' to prove infringement. However, unlike the practice in the EU, where full immunity will only be granted when, first, sufficient evidence is provided about an undetected cartel, full immunity under the AML can also be granted even when the application for leniency is filed after the AMEA has already initiated an investigation, and second, the monopoly agreement in question concerns vertical restraints instead of formation of cartel. See, for example, *Infant Formula* (details available in section 3.4, Chapter 5). Moreover, in *Infant Formula*, regardless of Article 14 of the Procedural Rules on Administrative Enforcement against Price Monopoly, three undertakings received full immunity from penalties. This approach seems to be similar to a Commission decision in October 2015 on an optical disc drives cartel, in which the Commission imposed a total fine of EUR 116 thousand million on 8 optical disc drive suppliers, amongst which three undertakings were granted full immunity. Case COMP/39639 – *Optical Disk Drives*, Commission decision of 21 October 2015.

Association of Zhejiang Province was fined CNY 500,000, the highest possible penalty imposed on a trade association.[53]

It was found that the Insurance Industry Association of Zhejiang Province issued the Self-Discipline Convention of Automobile Insurance Industry of Zhejiang Province and organised on several occasions 23 insurance companies to fix both the discount rate for car insurance and the agency commission.[54] NDRC found that Zhejiang Insurance Industry Association and 23 participating insurance companies had violated Articles 16 and 13(1) of the AML.[55]

Contrary to the approach taken in *Japanese auto parts and bearings cartels*, which focused primarily on the facts concerning the operation of the cartels, NDRC in *Zhejiang Insurance Cartel* paid significant attention to the anti-competitive effects of the fixed discount rate and agency commission.[56] In all 24 decisions, NDRC alleged that the coordination of price-fixing conduct amongst competing undertakings directly excluded price competition amongst them, diminished the incentives for business operators to promote product quality and enhance services, deprived consumers of the freedom to choose different products, and made it more difficult for them to acquire high quality products and services at lower prices. Unified and fixed discount rates for new car insurance led to the homogenisation of commercial car insurance services, which eliminated price differences and the opportunity for consumers to obtain personalised services. Unified and fixed agency commission hindered competition amongst insurance companies in recruiting qualified agents for the purpose of market expansion, stabilised the market share of each company at the expense of the interests of consumers who were not able to benefit from competition amongst companies for

---

[53] Article 46, AML.

[54] *Insurance Industry Association of Zhejiang Province* (2013) NDRC Decision No. 7, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140902_624511.html.

[55] NDRC, 'Zhejiang Insurance Sector Fined 110 Million for AML Violation', 2 September 2014, http://www.ndrc.gov.cn/xwzx/xwfb/201409/t20140902_624476.html.

[56] See for example, *Zhejiang Branch of Min An Insurance Co., Ltd.* (2013) NDRC Decision No. 29, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140902_624537.html.

high quality products and services, and undermined efficiency in the car insurance market.

As can be seen in the decisions, NDRC's reasoning was largely effects-based; although there was no quantitative evidence and even the relevant market was not defined, it analysed the adverse effects the cartel had on market competition and consumer welfare. As NDRC considered the context in which the agreements were implemented and their anti-competitive effects before it drew a final conclusion, it seems to suggest that its application of Article 13 of the AML in this cartel case followed an analytical approach comparable to the EU analysis of infringement by effect under Article 101(1) TFEU, although it was not explicitly mentioned in the decisions that the actual effects of the agreements must be proved before the infringement can be established.

Both the *Japanese Auto Parts and Bearings Cartels* and *Zhejiang Insurance Cartel* were handle by NDRC itself as opposed to its local agencies, and this fact gives rise to serious concerns as to the inconsistent manner in which NDRC is enforcing the AML. Due to the fact the AMEAs are not required by any laws or rules to provide any detailed and comprehensive decisions[57] or to use any mandatory economic analytical methods, they have a wide discretion to tailor the final decision into any form they seem fit, either to hide any illegitimate treatment in favour of the infringing parties or simply to cover the fact that they failed to conduct the investigation thoroughly. No outsiders can grasp the real causes of the incoherent decisions. Was it because the *Japanese Auto Parts and Bearings Cartels* involved only foreign undertakings so no meaningful analysis was needed and the *Zhejiang Insurance Cartel* involved only domestic undertakings so that a closer look at the case was required? NDRC can nonetheless avoid scepticism by increasing the depth and comprehensiveness of the

[57] In relation to the issue concerning the preparation of published decision, the European approach will be introduced in section 5, Chapter 7.

analysis in its official decisions, in which way the public can better understand how the AML is interpreted and applied.

2.1.2 SAIC

There seems to be a change of attitude from an effects-based to a formalistic approach in SAIC's application of Article 13. In some of its early decisions, a trace of competitive analysis, although extremely brief, can be found. For example, in *Taihe Liquefied Petroleum Gas (LPG) Cartel*,[58] Huawei LPG Station entered into an agreement with six LPG undertakings to monopolise the retail market for LPG in Taihe County. In return, Huawei agreed to make monthly payments to the six undertakings to compensate for their loss of sales. Jiangxi AIC found that the agreement restricted the competition in Taihe and violated Article 13(3) on the grounds that the agreement deprived consumers of the freedom to choose products and as a result seriously harmed the interests of consumers, and that the agreement made it impossible for more efficient undertakings to take part in market competition and restricted their ability to expand the scale of operation through competition, therefore adversely affecting the optimal allocation of resources.

In *Anyang Used Car Cartel*,[59] 11 second-hand car dealers entered into several agreements over three years to divide the market by geographical area and market share, and to fix commission rates.[60] Henan AIC found that the 11 dealers, which were supposed to be competitors, would lack the incentive to increase service quality and reduce service price through fair competition as a result of this horizontal agreement. Second, compared with pre-cartel market prices, the implementation of the agreement led to the increase in transaction fees, which were evidently higher than the fees

---

[58] *Taihe Liquefied Petroleum Gas Station* (2010) Jiangxi AIC Decision No. 1, http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136750.html.

[59] *Anyang Used Car Trading Market Co., Ltd. et al.* (2012) Henan AIC Decision No. 1, http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136758.html.

[60] Since SAIC is only empowered to enforce the AML against non-price-related infringement, the practice of fixing commission rates was not touched upon in this case. Next chapter will discuss the problematic allocation of jurisdiction between NDRC and SAIC based on price element.

charged in neighbouring cities. Since the cartel members completely divided the market for second-hand cars, consumers were forced to accept a more expensive service.

In its more recent cartel decisions, however, SAIC has seemed to follow a strictly formalistic approach, even though a competitive analysis was not found. For example, in *Shangyu Concrete Cartel*,[61] AIC of Zhejiang Province found that 8 concrete undertakings and the Concrete Association of Shangyu City were in breach of the AML by formulating and implementing several horizontal agreements that allocated market share amongst participating undertakings. In the official decision, Zhejiang AIC started by stating the facts of the case, which were followed by an index of evidence.[62] Instead of going further to analyse the anti-competitive effects of the cartel, Zhejiang AIC concluded immediately after the list of evidence that the concrete cartel violated Article 13(3) of the AML that prohibited the division of sales market or the raw material procurement market. Therefore, it appears that the finding of infringement was purely based on the fact that the agreements entered into by offending undertakings divided the concrete market in Shangyu, and the adverse effects derived from these agreements on the concrete market were not relevant.

Similarly, in *Wuxi Quarry Cartel*,[63] several quarries competed excessively for supplying gravel to a motorway construction site by substantially reducing the price of gravel. As a result all quarries were less profitable and some even incurred operating losses. In order to end the excess competition, four individuals who controlled all seven quarries in Wuxi County of Chongqing City decided to allocate different sections of the motorway construction site near Wuxi area amongst themselves and each quarry would be responsible for supplying gravel to the sections allocated. Given

---

[61] *Shangyu Concrete Industry Association et al.* (2014) Zhejiang AIC Decision No. 20, http://www.saic.gov.cn/zwgk/gggs/jzzf/201412/t20141201_150200.html.

[62] Unlike NDRC, which never provides information on evidence used in cases, SAIC has included a list comprising of the titles of all evidence collected during the investigation to support its fact-finding decision in every AML case.

[63] *Xiaobo Zhang (Wuxi Quarry Cartel)* (2014) Chongqing AIC Decision No. 5, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201411/t20141104_149669.html.

the high transportation costs, gravel had to be purchased from nearby quarries, and therefore the department supervising the motorway project was forced to accept this agreement. After providing a list of evidence to prove these facts, Chongqing AIC concluded that the four quarries were in breach of Article 13(3). Again, no competitive analysis was given in this decision.

Whilst the decisions made by the two AMEAs have not provided much valuable information and guidance with regard to the analysis of cartel infringement, the next section will examine an analysis of RPM under Article 14 conducted by the court, which may be able to shed some light on how Article 13 is interpreted since in this case the court seems to suggest the interpretation of Article 13 should be equally applied to Article 14.

2.2 Enforcement against Resale Price Maintenance

Although the pro-competition effects of RPM such as preventing free-riders, eliminating double marginalisation, and solving inventory problems, are widely recognised,[64] its anti-competitive effects are equally profound, and it is therefore deemed a serious restriction on competition. In the EU, RPM is treated as hard restraint which '[removes] the benefit of the block exemption'.[65] Although, as discussed in section 2.1 above, Article 101 TFEU does not recognise *per se* illegality, RPM is 'unlikely to fulfil the conditions of Article 101(3)'.[66] In the US, RPM had been treated as *per se* under Section 1 of the Sherman Act for almost a century as a result of *Dr. Miles*.[67] The Supreme Court in the landmark *Leegin* case[68] found that the *per se rule*, which would only be applied to agreements that 'always or almost always tend to

---

[64] Shan Jiang and Daniel Sokol, 'Resale Price Maintenance in China: an Economic Perspective' (2015) 3 (suppl 1) Journal of Antirust Enforcement i132, i135.
[65] Article 4, Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.
[66] Para. 47, Commission Notice of 10 May 2010 – Guidelines on Vertical Restraints, OJ C 130 of 19.05.2010.
[67] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).
[68] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

restrict competition and decrease output',[69] no longer applied to RPM and subsequently overturned the ruling of *Dr. Miles*. RPM is now analysed under the rule of reason. Therefore, overall there has been an increasingly flexible attitude regarding RPM.[70] Similarly, in China the judicial application of Article 14 of the AML suggests that RPM is not *per se* illegal under the AML.

2.2.1 *Rainbow v Johnson & Johnson*

On 1 August 2013, the Shanghai High People's Court delivered its appellate judgement on the *Rainbow v. Johnson & Johnson* case,[71] the first litigation concerning a vertical monopoly agreement in China. The plaintiff, Beijing Ruibang Yonghe Science and Technology Trade Company (Rainbow), had been the distributor of Johnson & Johnson Medical (Shanghai) Ltd. and Johnson & Johnson Medical (China) Ltd for 15 years, during which time the distribution contracts were renewed annually. On 2 January 2008, in a new distribution contract, the parties agreed that Rainbow would sell Johnson & Johnson products in a designated area at prices not lower than those stipulated by Johnson & Johnson. In March 2008, Rainbow won a bid in an unauthorised area at a price below the fixed minimum resale price. As a punishment, Johnson & Johnson deducted Rainbow's deposit of CNY 20,000 in July, and terminated its dealership in December. Rainbow sued Johnson & Johnson in August 2010.

Shanghai No. 1 Intermediate People's Court, the court of first instance, ruled in favour of the defendant by concluding that the plaintiff failed to discharge the burden to prove, that the RPM in question had restricted inter- or intra-band competition,[72]

---

[69] *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988).

[70] Roberto Pardolesi, 'Monopoly Agreements and Abuse of Dominance: Some Remarks about the Substantive Rules' in Michael Faure and Xinzhu Zhang (eds.) *Competition Policy and Regulation: Recent Developments in China, the US and Europe* (Edward Elgar 2011) 288.

[71] Shanghai High People's Court, *Rainbow v Johnson & Johnson* (2012) Hu Gao Min San (Zhi) Zhong Zi No. 63.

[72] Similarly, para.17 of Guidelines on the application of Article 101(3) TFEU provides that the assessment of whether an agreement is restrictive of competition is necessary to take account of the likely impact of the agreement on inter-brand competition (i.e. competition between suppliers of

and therefore the agreement was not considered by the court as a 'monopoly agreement' for the purpose of the AML, and that the damages claimed were caused by RPM. The court found that the damages suffered by the plaintiff in fact resulted from contractual dispute.[73] Rainbow appealed to the Shanghai High People's Court (Shanghai High Court), where it was found that the agreement was in breach of the AML and the judgment of the lower court was overturned.[74]

The Shanghai High Court ruled, *inter alia*, that the definition of monopoly agreements provided in paragraph two of Article 13 applied equally to vertical monopoly agreements stipulated in Article 14, therefore elimination or restriction of competition should be a prerequisite for the finding of a vertical monopoly agreement. It also found that, since the Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (Judicial Interpretation) was silent on the burden of proof in private litigation concerning vertical agreements, according to Article 46 of the Civil Procedure Law – '[i]t is the duty of a party to an action to provide evidence in support of his allegations'[75] and thus the appellant, Rainbow, should bear the burden of proof. It held that four elements needed to be considered in proving the anti-competitive effects of RPM: the level of competition in the relevant market; the market power of defendant;[76] the intention of defendant to implement RPM; and the competitive effects on competition.

The judgment of the Shanghai High Court was said to be 'to date the most systematic and most elaborate discussion of the economics of RPM in a decision

---

competing brands) and on intra-brand competition (i.e. competition between distributors of the same brand).

[73] Shanghai No.1 Intermediate People's Court, *Rainbow v Johnson & Johnson* (2010) Hu Yi Zhong Min Wu (Zhi) Chu Zi No. 169.

[74] Shanghai High People's Court, *Rainbow v Johnson & Johnson* (2012) Hu Gao Min San (Zhi) Zhong Zi No. 63.

[75] Civil Procedure Law of the People's Republic of China, adopted on 9 April 1991, http://www.china.org.cn/english/government/207339.htm.

[76] It has been widely acknowledged that RPM will result in reduced welfare only when the undertaking implementing RPM has significant market power; in the case of a weak market power, RPM will not substantially undermine market equilibrium. See for example, Pardolesi (fn 70) 288.

delivered by a Chinese court, with a prudent classification of substance and procedural issues'.[77] Indeed, the court's four-step analysis of anti-competitive effects of RPM offers significant guidance value for future cases concerning vertical agreements, the level of informativeness and the comprehensiveness of legal and economic analysis are not found in any decisions made by the AMEAs.

Nonetheless, although the final findings of the lower court and appellate court were different, the analytical approach adopted by the lower court was in fact followed by the appellate court. The Shanghai High Court unequivocally agreed with the lower court that RPM was not anti-competitive in itself. In addition, the court even implied that an agreement that formed a price-fixing cartel was also not anti-competitive in itself:

> 'Article 7 of the Judicial Interpretation provided that 'where the alleged monopolistic conduct is a monopoly agreement as described in Article 13(1)-(5) of the AML, the defendant shall assume the burden to prove the agreement does not have the eliminating or restricting effects on competition', in accordance with this Article, proving the effects to eliminate or restrict competition should be the prerequisite for the finding that the horizontal agreements prescribed in Article 13 constitute monopoly agreements. Generally, since horizontal agreements directly eliminate and restrict market competition, the adverse effects of horizontal agreements are worse than vertical agreements, therefore, since the effects to eliminate and restrict competition are a necessary requirement for horizontal agreements, which have stronger anti-competitive effects, to constitute monopoly agreements, all the more reason to make the effects to eliminate and restrict competition a necessary requirement for vertical agreements, which has weaker anti-competitive effects, to constitute monopoly agreements'.[78]

---

[77] Jiang and Sokol (fn 64) i146.

[78] Shanghai High People's Court, *Rainbow v Johnson & Johnson* (2012) Hu Gao Min San (Zhi) Zhong Zi No. 63. This line of reasoning was also seen in *Shenzhen Pest Control Association*, a case concerning a price-fixing cartel, the court rejected the claim of the plaintiff on the ground, *inter alia*, that the plaintiff failed to prove that the horizontal agreement which fixed the minimum price an undertaking was allowed to charge for its service had restricted market competition, so the agreement was not a monopoly agreement within the meaning of Article 13. See Guangdong High People's Court, *Shenzhen Huierxun Science and Technology Co., Ltd. v Shenzhen Pest Control Association* (2012) Yue Gao Fa Min San Zhong Zi No. 155.

Such a statement, however, presents an inherent pitfall of the judgment in relation to the understanding of both the Judicial Interpretation and the AML. Instead of providing a legal basis for requiring the present of eliminating or restricting effects in the establishment of infringement of horizontal agreement, Article 7 of the Judicial Interpretation implies that the items listed in Article 13(1)-(5) of the AML are not random examples of horizontal agreements but examples of monopoly agreements, since the sentence 'monopoly agreement[s] as described in Article 13(1)-(5)' clearly indicates that what are described in Article 13(1)-(5) are monopoly agreements. It also implies that there is an assumption that the items listed in Article 13(1)-(5) have the effects to eliminate or restrict competition, and it is for the defendant to rebut this assumption since if there are no anti-competitive effects to start with, it would be meaningless to incorporate an article requiring the defendant to prove otherwise. Both implications indicate that an agreement to form a price-fixing cartel is a monopoly agreement for the purpose of the AML, and therefore there is no need to prove its anti-competitive effects on competition since it is already assumed. If there is a logical relationship between the structure of Article 13 and that of Article 14, and the definition of monopoly agreements provided in Article 13 applies equally to vertical agreements as was held by the Shanghai High Court, there should be no difficulty in finding that RPM is illegal *per se* under the AML, and the plaintiff should not bear the burden of proof.

In addition, it is worth noting that in a public consultation draft of the Judicial Interpretation, it was stipulated that:

> 'Where the alleged monopolistic conduct is a monopolistic agreement as described in Article 13 (1)-(5) and Articles 14(1) and (2) of the AML, the plaintiff shall not assume the burden to prove that the agreement has the eliminating or restricting effects on competition'.[79]

[79] Article 8, Rules of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (Public Consultation Draft).

The reference to Article 14 was removed later. The difference between the wording in the draft and the final Judicial Interpretation, which clearly puts heavier burden of proof on the plaintiff, seems to suggest that the treatment of Article 13 is different from that of Article 14. Whilst monopoly agreements under Article 13 are treated as illegal *per se*, effects to eliminate or restrict competition need to be proved to establish the infringement of vertical agreements. If this is the case, then the ruling of the Shanghai High Court, which suggested that analysis conducted under Articles 13 and 14 followed a same pattern, may give rise to ambiguity.

2.3 Concluding Remarks

The current enforcement against monopoly agreements under the AML raises two problems. The first accrues from the design of administrative enforcement of the AML. Despite the increasing number of investigations and cases, the information provided in official decisions falls short of the analytical standard that competition law decisions should present, not to mention that NDRC almost always announces decisions on competition cases in the form of a press release as opposed to the full text of official decisions. Under the AML, SAIC and NDRC are not required to publish their decisions in a detailed manner.[80] Based on the official decisions, which are abstract and general, it is difficult to grasp the pattern of interpretive approaches adopted by both NDRC and SAIC, which have not yet presented their competence as vehicles through which Articles 13 and 14 are applied.[81] As a result, the level of legal certainty and

[80] Article 44 of the AML only requires NDRC and SAIC to publish their decisions on handling alleged monopolistic conduct, but not the legal analysis and reasoning on which the decisions are based. In addition, since most administrative penalties imposed under laws other than the AML are based on the facts of violation instead of sophisticated economic analysis, the Administrative Penalty Law of China also does not set out any stipulations in relation to the reasoning based on which the penalty is imposed. See Article 39, Administrative Penalty Law of China.

[81] It is worth reiterating that SAIC does not have jurisdiction to apply Article 14 of the AML since both Articles 14(1) and (2) are price-related. Although in theory agreements formulated by undertakings in the upstream market that divide the market amongst undertakings in the downstream market – as in *Rainbow v Johnson & Johnson*, where Rainbow was only able to sell Johnson & Johnson's product in a specific area designated by the latter – should fall into the ambit of Article 14(3) and are therefore to be prohibited by SAIC, SAIC has not yet concluded any case under Article 14.

predictability of decision-making remains relatively low. Since anti-competition infringements concerning monopoly agreements are so common in China,[82] the way in which the AMEAs handle their cases has decisive impacts on the formulation of business strategies by a massive number of business operators. A more transparent and comprehensive decision-making process is necessary fully to appraise the application of the AML by both NDRC and SAIC, upon which a more stringent publicity obligations should be imposed.

Second, problems emerge as to the design of the statute. There is a divergence between what seems to be suggested by a literal interpretation of the text of the AML and what the Court actually interpreted. In light of the modernisation of EU competition law, a formalistic analytical approach to competition cases may not produce results that accurately reflect market conditions and may therefore give rise to Type I errors. Nonetheless, a careful reading of how Articles 13 and 14 are written and structured may suggest that the *per se* rule should be followed in infringements involving the practices listed, and there is no room for an effects-based approach to be taken. It is not argued here that a *per se* rule is the optimal approach; in fact the ruling given by the Shanghai High Court demonstrated a high level of expertise. It was certainly well-drafted and largely in line with the EU's two-step analysis of infringement by object or effect and the US treatment of RPM under the rule of reason. Nonetheless, it is not appropriate for either the AMEAs or the courts to second-guess the intentions of the legislature when the provisions are clearly written. Therefore, for the sake of consistency and coherence, either the AML should be amended to allow for a more modern approach to monopoly agreements,[83] or the Supreme People's Court of China (SPC) should adopt another judicial interpretation – judicial

[82] Dan Wei, 'Antitrust in China: An Overview of Recent Implementation of Anti-Monopoly Law' (2013) 14 European Business Organization Law Review 119, 130.

[83] It is reported that NDRC has already taken on the task of revising the AML. Legal Daily, 'NPC Members Propose the Revision of the AML', 17 November 2015, http://epaper.legaldaily.com.cn/fzrb/content/20151117/Articel03008GN.htm.

interpretations of the SPC have legal effects[84] – to set out the proper interpretation of Articles 13 and 14, and ensure the consistent and coherent application thereof.

In light of the shortcomings of the enforcement against monopoly agreements, the next section studies the substantive provisions of the AML on abuse of a dominant position, and their application by the SPC in the landmark case of *Qihoo 360 v. Tencent*. The case illustrates how Chinese enforcers in fact have the capability of applying the AML accurately to the most novel competition law issues, and delivering a convincing effects-based decision when the law itself is clear and political intervention is not involved.

3 PROHIBITION OF ABUSE OF A DOMINANT POSITION

Abuse of a dominant position to eliminate or restrict competition is prohibited under the AML.[85] Article 17 provides a non-exhaustive list of conduct which is deemed to be abusive: selling at unfairly high prices or buying at unfairly low prices; below-cost sales without justification; refusals to deal without justification; exclusive or designated dealing without justification; tying or imposing unreasonable trading conditions without justification; and discriminatory dealing. From the wording of Article 17, the opportunity to claim justification is not available for unfair pricing and discriminatory dealing.[86] This raises particular concerns, since the freedom for a monopolist to set prices is significantly restricted,[87] although such stipulation is not uncommon in other jurisdictions.[88] It is argued that a cautious approach should be

[84] Article 5, Rules of the Supreme People's Court on the Judicial Interpretation Work.
[85] Article 6, AML.
[86] It is not provided in the AML as to what factors will be considered as a valid justification. Nonetheless, Articles 12-14 of NDRC Rules on Anti-Price Monopoly provide non-exhaustive lists of valid justification.
[87] Article 11 of NDRC Rules on Anti-Price Monopoly sets out three factors which should be considered in determining if a specific price is 'unfairly high' or 'unfairly low'.
[88] See, for example, Article 102(a) TFEU. In *United Brands*, the ECJ held that '[c]harging a price which is excessive because it has no reasonable relation to the economic value of the product supplied may be an abuse of a dominant position within the meaning of subparagraph (a) of article 86'. Case C-27/76 *United Brands Co and United Brands Continentaal BV v Commission* [1978] ECR 207, at 9.

adopted to unfair pricing claims, otherwise the incentives of leading undertakings to innovate would be reduced.[89]

A dominant market position is defined in paragraph 2 of Article 17 as a market position held by a business operator having the capacity to control the price, quantity or other trading conditions of commodities in the relevant market, or to hinder or affect any other business operator to enter the relevant market. In the EU, a slightly different definition of dominant position was laid down in *Continental Can Co.*[90] and later upheld in *United Brands*[91] as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'.[92]

Article 18 provides a non-exhaustive list of factors for assessing if a business operator holds a dominant market position: the market share of a business operator in and the competitiveness of the relevant market; the capacity of a business operator to control the sales markets or the raw material procurement market; the financial and technical conditions of the business operator; the degree of dependence of other business operators upon of the business operator in transactions; and the degree of difficulty for other business operators to enter the relevant market.

Article 19 contains three rebuttable presumptions of dominant position based on the market share hold by the business operator(s) in question.[93] It provides, *inter alia*, that a business operator can be assumed to have a dominant market position if the market share of one business operator accounts for 50% or more in the relevant market.

---

[89] David S. Evans, Vanessa Yanhua Zhang and Xinzhu Zhang, 'Assessing Unfair Pricing under China's Anti-Monopoly Law for Innovation-Intensive Industries' (2014) Coase-Sandor Working Paper Series in Law and Economics No. 678, 4-5. For an in-depth study on excessive pricing, see Massimo Motta and Alexandre de Streel, 'Excessive Pricing in Competition Law: Never Say Never?' in Swedish Competition Authority (eds.) The Pros and Cons of High Prices (Konkurrensverket 2007).

[90] Case C-6/72 *Continental Can v Commission* [1973] ECR 215.

[91] *United Brands* (fn 88).

[92] *Ibid.*, at 65.

[93] See paragraph 3, Article 19. For a discussion on the Article 19 presumptions, see Félix E. Mezzanotte and Liyang Hou, 'The Role of Presumptions of Market Dominance in Civil Litigation in China' (2015) 3 (suppl 1) Journal of Antitrust Enforcement i108.

Although EU competition law does not have similar presumptions of dominance, the market share of an undertaking is an important factor in the assessment of a dominant market position. In *Hoffmann-La Roche*, the Court held that:

> 'The existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares.'[94]

'Very large market shares' were defined to be 50% or more in *AKZO*.[95] Nonetheless, the presumption of existence of a dominant position based on substantial market share can be rebutted since the importance of market share varies in different markets.[96] This is especially true in relation to dynamic and volatile markets like technology markets, in which incumbents can be more easily surpassed by new entrants no matter how powerful they once were, like IBM, Motorola and Nokia. In such markets, competition is always intense and market conditions change significantly over time. The fact that a particular undertaking holds a large share of the market does not necessarily give it the power actually to control prices or output or implement other anti-competitive policies. In light of the fact that the AML is not helpful in clarifying the factors which are deemed relevant in rebutting the rigid presumptions of dominance based on market shares, it is thus important for competition enforcement agencies to rely more on a competition-oriented assessment of dominant position as provided in Article 18. The next section will examine how the SPC had analysed market dominance in dynamic technology market without relying on the Article 19 presumptions.

---

[94] Case C-85/76 *Hoffmann-La Roche & Co AG v. Commission* [1979] ECR 461, para. 39.
[95] Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, para. 60.
[96] *Hoffmann-La Roche* (fn 94) para. 40.

3.1 Qihoo 360 v Tencent

On 16 October 2014, the SPC delivered its first AML judgement,[97] which concerned an abuse of dominance dispute between Qihoo 360, a provider of free security software known as *Koukou Bodyguard*, and Tencent, a provider of a free instant-message (IM) application, *QQ*. In the judgment, SPC upheld the decision of the court of first instance,[98] Guangdong High People's Court, and dismissed claims made by Qihoo on exclusive dealing[99] and illegal tying.[100]

In September 2010, Qihoo released a new security named *Koukou Bodyguard*, and claimed that this product was able to protect the privacy and internet security of *QQ* users by preventing *QQ* from scanning the hard drive of its users. As a counter measure, on 3 November 2010 Tencent announced that it would make *QQ* incompatible with any of Qihoo's security software by implementing the 'choose 1 from 2' plan, which forced the users of both products to choose either one to uninstall. However, compatibility was restored on the next day 'under the intervention of relevant government department' after the recall of *Koukou Bodyguard*.[101]

In April 2012, Qihoo brought a private action before Guangdong High People's Court claiming that Tencent had abused its dominant position in IM software and service market in mainland China by carrying out exclusionary practice, and by tying the installation of *QQ* with that of *QQ Software Manager*, which included Tencent's security software *QQ Doctor*. The claims were dismissed by the Court on the ground that Qihoo's definitions of relevant product and geographic markets were too narrow. Since Tencent did not possess a dominant position, there was no abuse. The case was

---

[97] Supreme People's Court, *Qihoo 360 v Tencent* (2013) Min San Zhong Zi No.4.
[98] Guangdong High People's Court, *Qihoo 360 v Tencent* (2011) Yue Gao Fa Min San Chu Zi No. 2.
[99] Article 17(4), AML.
[100] *Ibid*., Article 17(5).
[101] It is not sure which department was involved on that day, nonetheless, the Ministry of Industry and Information Technology made a public announcement on 20 November 2010 to criticise the practices of both undertakings, and urged them, *inter alia*, to make public apology, ensure the proper functioning of relevant products, and refrain from carrying out similar conduct. See Ministry of Industry and Information Technology, 'Circular on Criticising Bejing Qihoo and Shenzhen Tencent', 21 November 2010, http://www.miit.gov.cn/n11293472/n11293832/n12845605/n13916973/14019953.html.

then appealed by Qihoo to SPC, where an in-depth economic analysis was conducted focusing on three main aspects.

3.1.1 Market definition

The SPC stated that an unequivocally and clearly defined relevant market was not necessary for every abuse of dominance case in which the definition of relevant market was merely a tool to assess the market power of business operator and the effects of the alleged monopoly conduct on competition.

In the first instance judgment, the Guangdong High Court applied the SSNIP[102] ('small but significant and non-transitory increase in price') test to define the product market. Since the test required an increase of the product price by 5 to 10%, which was not possible with a totally free product, the Court alternatively assumed a small absolute increase in price. Although the SPC acknowledged that the Hypothetical Monopoly Test (HMT) was generally applicable in defining the relevant market, it rejected this rigid application of the HMT on the ground that charging a price on a previously free product would result in the fundamental change of business model in a two-sided market, and a significant decline in the number of users who might be forced to look for alternative products with no substitutability. It therefore rendered the market definition too broad. The more appropriate test, in the SPC's opinion, could be the SSNDQ test.

Instead of applying the HMT, the SPC assessed the demand-side substitutability based on product characteristics, functions, quality and accessibility[103] amongst integrated and non-integrated IMs,[104] Mobile Instant Messaging (MIM), social networking websites, Weibo,[105] text messaging and email. In conclusion, the SPC

---

[102] See Article 10, Guidelines of the Anti-Monopoly Commission of the State Council on the Definition of Relevant Market.
[103] *Ibid.*, Article 8.
[104] As defined by the SPC, an integrated IM, such as QQ, provides texting, audio and video functions, whilst non-integrated IM only provide one or two of the above functions.
[105] Weibo is China's equivalent of Twitter.

rejected the finding of the court of first instance that social networking websites and Weibo were included in the relevant market, and defined the relevant product market as IM service market – including both PC-based IM and MIM, and both integrated and non-integrated IM. The SPC also overturned the Guangdong High Court's finding that the relevant geographic market was global on the grounds, *inter alia*, that most major foreign IM service providers such as MSN, Yahoo, Skype and Google had already been operating in China before the alleged monopoly conduct was carried out. The choice of overseas IM services for Chinese users was considerably limited, and since foreign IM service providers could only operate in China's IM service market by obtaining necessary government permits and establishing joint ventures with Chinese telecommunications companies,[106] the likelihood that other foreign IM service providers could enter China's market and possess significant market power in a relatively short period of time (for example, a year) was low. The SPC therefore concluded that the relevant geographic market in this case was mainland China.

3.1.2 Market power

The SPC determined whether Tencent had a dominant position in the IM service market in China by assessing market share, competition condition in the relevant market, the ability of Tencent to control product prices, outputs and other trading conditions, Tencent's financial and technological capacity, the reliance of business operators on the transactions with Tencent, and the entry barriers of the relevant market. This analytical approach is in conformity with Article 18 of the AML which sets out the factors to be considered in determining a dominant market position.[107]

First, the SPC found that, during 2009-2011 Tencent had an average annual market share of over 80% in the PC-based IM service market, whilst the closest

[106] See, for example, Article 2, Rules on the Administration of Foreign Investment in Domestic Telecommunications Enterprises.
[107] See also Article 18, NDRC Rules on Anti-Price Monopoly; and Article 10, SAIC Rules on the Prohibition of Abuse of Dominant Market Position.

competitor during the same period had only 4.2%. In the MIM service market, Tencent had an average monthly market share of over 90% since August 2012. Under 19(1) of the AML, when the market share of a business operator accounts for 50% or more in the relevant market, it may be assumed that it has a dominant market position. Nonetheless, the SPC stated that high market share did not necessarily translate into a dominant market position, especially in the telecommunications industry characterised by dynamic competition.[108]

Second, in the IM service market in China, at the time when the alleged monopoly conduct took place, there were dozens of IM products, some of which had more than 100 million users. In addition, there was a trend in the IM service sector to integrate other internet platforms such as advertisements, news, online dating, and microblogs into the IM platform, and as a consequence competition became diversified. Therefore, there was sufficient competition in the IM service market.

Third, since IM services had been conventionally provided to users for free, users would lack the willingness to pay for any IM products that were charged, and no IM service providers would have the ability to control the prices of IM services. Moreover, owing to the fact that substitution between IM products would induce no or insignificant financial and technological obstacles, and many IM products were homogenised with no evident difference in the functions, IM service providers would normally not risk refusing to provide services or changing trading conditions. Therefore, the ability of Tencent to control product quality, quantity or other trading conditions was weak.[109]

---

[108] Areeda and Hovenkamp argue that the shift of consumer demand of a firm's product can be sudden and drastic, and consequently makes high market share transient. Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application (Volume XI)* (Aspen Publisher 2005) 505. See also Harris et al. (fn 2) 93.

[109] 'Other trading conditions' are defined by NDRC and SAIC as elements other than price and quantity that substantially affect market transactions, which include, *inter alia*, quality, payment conditions, delivery methods, after-sales services. See Article 17, NDRC Rules on Anti-Price Monopoly; and Article 3, SAIC Rules on the Prohibition of Abuse of Dominant Market Position.

Fourth, although Tencent had abundant financial and technological resources,[110] other major competitors in the IM service market such as Alibaba, Baidu, Microsoft and China Mobile all had comparable conditions which were sufficient to impact the leading role of Tencent. Therefore, the influence of the financial and technological conditions of Tencent on its market power was very limited.[111]

Fifth, Qihoo claimed that IM service had significant network effects and customer stickiness; an increase in the number of users would attract more users, and the cost to change IM service was high after the formation of a social network through long-term use.[112] The SPC rejected this claim by stating that it was common for a user to use multiple IM products simultaneously. According to a survey, 90% of IM service users used 2 or more IM products, therefore the network effects and customer stickiness were substantially alleviated. Moreover, the development of new technology such as easier export and import of contact details, which could be accessed by IM products, between different mobile phones furthered the alleviation of network effects and customer stickiness. The SPC supported its reasoning with the example of MSN. MSN had a global market share of 40% in 2011, however, the number of active users decreased to only 100 million after only one year in 2012. Therefore, customer stickiness did not necessarily translate into a reliance on a particular business operator.

Sixth, the SPC assessed the difficulty of entering the market and expanding market share.[113] It held that it was possible for a new entrant to increase its market share dramatically in a short period of time and create effective competitive constraint

---

[110] According to the financial statement published by Tencent, in 2014 it generated an annual revenue of CNY 78.9 thousand million. See Chinadaily, 'Tencent Publishes Financial Statement of the Fourth Quarter', 18 March 2015, http://www.chinadaily.com.cn/hqcj/xfly/2015-03-18/content_13394226.html.

[111] Financial status was also considered in *United Brands* and Case C-322/81 *Michelin v Commission* [1983] ECR 3461.

[112] Customer stickiness was considered as a valid factor for the assessment of market power in Case T-203/01 *Michelin v Commission (Michelin II)* [2003] ECR II-4071. Article 10(4) of SAIC Rules on the Prohibition of Abuse of Dominant Market Position stipulates that degree of reliance should be determined by taking into account of volume of transaction, duration trading relationship and difficulty to switch to other trading parties.

[113] In the determination of barriers to entry, factors to be considered include regulation of market access, possession of essential facility, distribution channel, financial and technological requirements. Article 10(5), SAIC Rules on the Prohibition of Abuse of Dominant Market Position.

to the incumbent. For example, the number of users of *Fetion*, developed by China Mobile, increased from 0 to 100 million in less than one year. The SPC also found that the increase rates of users of several IM services surpassed the increase rate of the number of internet user during the same period. This evidence indicated that the entry barriers and difficulty of market expansion were low.

In response to Qihoo's argument that Tencent dared to implement the 'choose 1 from 2' plan was only because Tencent believed that most users would choose *QQ* over *Koukou Bodyguard*, and it indicated Tencent had a dominant position, the SPC stated that the subjective intention of Tencent to implement the plan was irrelevant to the determination of a dominant position. Also, the implementation of the plan, which lasted merely one day, led to a dramatic increase in user numbers of major competing IM services. In the same month in which 'choose 1 from 2' took place, the user numbers of MSN, which had been declining, increased by 61.93% compared with the previous month; *Fetion* by 9.95%; and Alibaba by 5.15%. Since many IM service providers were able to expand their market due to Tencent's short-lived alleged monopoly conduct, it could be proved that Tencent did not have a dominant market position.

3.1.3 Abusive conduct

Although the SPC could choose to exercise judicial economy after finding that Tencent did not have a dominant position, it nonetheless continued with the analysis of Tencent's alleged abusive conducts.

Qihoo claimed that the 'choose 1 from 2' conduct was a violation of Article 17(4) of the AML because Tencent forced the uninstallation of users' own software. The SPC found that, first, the incompatibility practice targeted only the products and services of Qihoo. On the face of it, Tencent required users to choose between *QQ* and *Koukou bodyguard*, which in fact restricted its own operating environments. Although such restriction might cause inconvenience to users, the inconvenience could be mitigated

by the fact that there were sufficient substitution in both the IM service market and security software market. Second, the incompatibility practice was a countermeasure in response to Qihoo's unfair competition practices[114] – the release and operation of *Koukou Bodyguard*, which specifically targeted *QQ* – rather than conduct intended to eliminate or restrict competition in the IM service market. Third, as discussed above, the one-day 'choose 1 from 2' conduct in fact generated more vigorous competition. It was therefore justifiable to speculate that if the conduct had lasted longer, the market share of Tencent would have declined more significantly. On the other hand, although Tencent's conduct in fact had adverse effects on the market share of Qihoo, the focus of the AML was not on protecting individual undertaking, but on whether a healthy market competition mechanism was distorted or undermined. After the 'choose 1 from 2' took place, Qihoo's market share in the security software market dropped from 74.6% to 71.3%; and during the same period, Tencent's market share in the security software market only increased by 0.57% from 3.89% to 4.46%. It was clear that the effects of Tencent's conduct on security software market were negligible, and competition in the security software market was not eliminated or restricted. In conclusion, the 'choose 1 from 2' conduct did not amount to monopolistic conduct for the purpose of the AML.

In relation to whether the tying practice of Tencent was in breach of Article 17(5) which prohibited business operators with dominant market position from tying products without any justification, the SPC found that Qihoo failed to provide sufficient evidence to prove that Tencent had leveraged its competitive advantages in the IM service market into the security software market, since Qihoo had a market share of no less than 70% in the security software market after both the 'choose 1 from 2' and the tying practice took place, whilst Tencent only had less than 5%. Second, it

[114] During largely the same period of time as this anti-monopoly case, Qihoo was sued by Tencent under AUCL with regard to the same product, *Koukou Bodyguard*, which as claimed by Tencent undermined the integrity and security of Tencent's products and services, damaged the commercial and product creditability of Tencent. Both the Guangdong High People's Court – the first instance court – and the SPC supported the claims of Tencent, and held Qihoo to compensate Tencent CNY 5 million. See respectively, Guangdong High People's Court, *Tencent v Qihoo 360* (2011) Yue Gao Fa Min San Chu Zi No. 1, and Supreme People's Court, *Tencent v Qihoo 360* (2013) Min San Zhong Zi No.5.

was reasonable to tie the installation of *QQ* with that of *QQ Software Manager*, since such practice could realise the integration of functions, protect the security of accounts, and improve the performance and value of *QQ*. Third, the coerciveness of Tencent's tying practice was not obvious.[115] Although there was no notification when *QQ* and *QQ Software Manager* were installed, users could freely choose to uninstall any of the software. Therefore, the supply of IM service was not conditioned upon the use of *QQ Software Manager*.

3.1.4 Implications of *Qihoo v. Tencent*

In upholding the decision of Guangdong High Court, the SPC corrected several mistakes made by the court of first instance, the most noteworthy being the recommended replacement of the SSNIP test with the SSNDQ test. Although the SPC in the decision did not actually apply the SSNDQ test, it did carefully analyse the scope of the SSNIP test and its limited relevance to a product that was provided free of charge. It identified the special characteristics of the IM product, and examined the standard context in which the SSNIP typically applied. Instead of rigidly applying the SSNIP test, the SPC acknowledged that the SSNDQ test – although it is in a way more difficult to apply owing to the non-quantifiable feature of the quality of products – is more adaptable to accommodate the special conditions of the internet industry. It shows the Court's growing familiarity with well-established competition doctrines and the application thereof.

The same degree of flexibility can also be found in the determination of market power, where the court commendably ruled that a considerable market share – even as high as 80% – did not necessarily confer a dominant market position. Normally, AMEAs rely heavily on market share to determine if a business operator has a dominant position, as will be seen later, but when a relatively high market share does

[115] The EU competition law also requires the proof of coercion in the evaluation of tying practices. See for example Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601.

lead to the establishment of a dominant position, market share cannot accurately demonstrate the real market power a business operator possesses. The characteristics of the technology sector in general and PC-based or mobile software in particular, such as high innovation rate and low dissemination cost, dictates that the enforcement experience in traditional sectors should be adjusted accordingly in order for the law to be effectively applied. Therefore, the SPC successfully set a standard for assessing market power in a dynamic and volatile market through quantitative analysis.

Some parts of the analysis can be further elaborated. For example, in relation to the effects of Tencent's 'choose 1 from 2' conduct on the competition condition of IM service, it would be better to establish more firmly the casual link between Tencent's conduct and the increase in its competitors' market share, instead of taking the statistics for granted, by examining if the increase in market share was a result of, for example, a newly released IM products or a major upgrade of the previous version. Nevertheless, this landmark judgement provides valuable guidance – for example, an effects-based and statistical approach towards assessing alleged abusive conducts – for future AML litigation as well as administrative enforcement, especially in the vigorously developing internet sector and also the two-sided markets. Competition issues are derived from economic development, and a myriad of novel competition issues which cannot be foreseen by any legislature will be raised as economic activities continuously develop. It requires both the courts and the AMEAs to apply the AML in a way which preserves the basic norms and principles on which the competition law is founded such as the distinction between protecting competitive process and protecting competitors,[116] and addresses the unique features of a given product and market by giving a sophisticated economic analysis.

Sections 2 and 3 above discussed the application of the AML respectively to monopoly agreements and abuse of a dominant position. The discussion found that

[116] As will be discussed later, MOFCOM in *P3 Network* seemed to be substantially influenced by the potential adverse effects of the proposal transaction on China's domestic shipping companies.

whilst both courts – the Shanghai High Court and the SPC – had done an excellent job in conducting economics-based reasoning and analysis,[117] both NDRC and SAIC fell short of this standard. The next section will analyse MOFCOM's application of the AML in reviewing concentrations. It intends to show that, compared with the approaches taken in *Qihoo v Tencent*, the same degree of inflexibility and opacity presented in the decisions of NDRC and SAIC can also be found in merger control.

4. MERGERS AND ACQUISITIONS

A merger control system for foreign acquisition of domestic undertakings was established a few years before the enactment of the AML.[118] Chapter IV of the AML sets out the merger control mechanism. Concentration is defined in Article 21 as merger of business operators; or acquisition of control over other business operator by acquiring their shares or assets; or acquisition of control over or exercise of decisive influence on other business operator by contract or other means.[119] This definition is very similar to the European definition of concentration, which emphasises actual control rather than shares; however, unlike EU competition law, a definition of 'control' is not provided in the AML.[120] In the EC Merger Regulation, concentration is defined as 'a change of control on a lasting basis',[121] whilst control is 'constituted by rights, contracts or any other means which […] confer the possibility of exercising decisive influence on an undertaking'.[122] Nonetheless, in June 2014 MOFCOM published the revised Guiding Opinions on the Notification of Concentration of Business Operators,

---

[117] Howard Chang, David Evans and Vanessa Yanhua Zhang, 'Analyzing Competition among Internet Players: Qihoo 360 v. Tencent' (2013) Antitrust Chronicle, https://www.competitionpolicyinternational.com/analyzing-competition-among-internet-players-qihoo-360-v-tencent.

[118] See the Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.

[119] Articles 20(1) – (3), AML.

[120] Harris et al. (fn 2) 127.

[121] Article 3(1), Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (ECMR).

[122] Article 3(2), ECMR.

which lists a series of factors to be considered in assessing if there is a change of control by virtue of the transaction, including the objectives and future plans of the transaction, the composition of the board of directors or supervisors and their voting mechanism, and the appointment and dismissal of senior executives.[123]

As in most competition jurisdictions, *ex ante* notification is mandatory for transactions which meet certain thresholds.[124] Specific thresholds for mandatory notification are not provided in the AML.[125] Instead, on 3 August 2008, the State Council adopted Regulations on Notification Thresholds for Concentrations of Undertakings. Setting substantial factors such as thresholds through secondary regulation makes it possible for policy makers to adjust notification requirements according to economic and market conditions without the need to amend the AML itself.[126]

Article 23 sets out the required documents for notifying a concentration notification and Article 24 allows merging parties to supplement materials within a time limit if the first submission is held incomplete by MOFCOM. However, neither the AML nor the subsequent MOFCOM Measures on the Notification of Concentrations of Undertakings[127] provides the timeframe for supplement of additional materials. Although the wording of Article 23 does not seem to impose significant burden on merging parties, it is in fact one of the major causes of delay in the reviewing process.[128]

Once the submission is complete, a '2 plus 1' reviewing process commences. In phase one, a preliminary review is conducted within thirty days. If a further review is necessary, the review will enter phase two which gives MOFCOM ninety days to make

---

[123] Articles 3(1), (4) and (5), the Guiding Opinions on the Notification of Concentration of Business Operators.
[124] Article 21, AML.
[125] Article 21 of the AML articulates that the threshold of declaration is to be stipulated by the State Council.
[126] Harris et al. (fn 2) 138; and Xiaoye Wang, *Detailed Interpretation to China's AML* (Intellectual Property Right Press 2008) 167.
[127] See Article 13, MOFCOM Measures on the Notification of Concentrations of Undertakings.
[128] See section 3.1, Chapter 5.

a decision. However, phase two can be extended to another sixty days.[129] The notified transactions cannot be implemented before MOFCOM has reached a conclusion[130] or has failed to make a decision within the time limit.[131] However, in practice, MOFCOM always finds a way to prolong the reviewing process.[132]

Article 27 provides a non-exhaustive list of factors to be taken into account in the reviewing process, including the market share of the merging parties and the controlling power thereof over the relevant market, the degree of market concentration in the relevant market, the impact of the transaction on market access, technological progress, consumers, other business operators and national economic development. These factors, though largely in conformity with international norms,[133] are not necessarily competition-related, but instead represent a wide range of considerations similar to the legislative objectives of the AML.[134] Indeed, the merger control regime is accused of pursuing national interests at the expense of orderly market competition.[135]

Similar to Article 15, which provides exemptions for monopoly agreements, the opportunity for an alleged anti-competitive transaction to be exempt is provided in Article 28. For an exemption to be granted, the parties to the transaction will need to prove that the positive impacts of the transaction on competition evidently outweigh the negative impacts thereof, or that the transaction is in conformity with the public interest.[136] Due to the opacity of MOFCOM's reviewing process, it is not clear how MOFCOM assess an application for exemption in practice. Indeed, thus far only two

---

[129] Paragraph 3, Article 26, AML.
[130] Paragraph 1, Articles 25 and 26, AML.
[131] Paragraph 2, Article 25 and Paragraph 3, Article 26, AML.
[132] See section 3.1, Chapter 5.
[133] Ping Lin and Jingjing Zhao, 'Merger Control Policy under China's Anti-Monopoly Law' (2012) 41 Rev Ind Organ 109, 117. See for example, Article 2(1) EUMR.
[134] See Article 1, AML.
[135] See section 5.3, Chapter 6. See also *Coca-Cola/Huiyuan*, where the transaction was prohibited on the ground, *inter alia*, that it 'would adversely affect the sustainable and healthy development of China's fruit juice industry'. *Coca-Cola/Huiyuan* (2009) MOFCOM Notice No. 22, http://fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml.
[136] Article 28, AML.

transactions have been blocked by MOFCOM – Coca-Cola/Huiyuan[137] and P3 Network[138] – and it was similarly stated in both official decisions that merging parties 'could not prove that the positive impacts of the transaction on competition evidently outweigh the negative impacts thereof, or that the transaction is in conformity with public interests'. Since no further information or clarification is available, this statement alone cannot ascertain the fact was whether the parties did not successfully discharge the burden of proof or they simply did not invoke exemption.

Apart from prohibiting a transaction, MOFCOM can attach restrictive conditions to a decision that allows the transaction to be implemented.[139] Imposing restrictive conditions, either structural remedies, behavioural remedies or both,[140] aims at eliminating or reducing negative effects of the transaction.[141] However, the AML does not require MOFCOM to provide explanations for decisions to prohibit a transaction or impose restrictive conditions.[142] Such a pitfall led to the over-generality of and the lack of substantive analysis in MOFCOM's early decisions.

Article 31 establishes a separate security review process for merger and acquisition of Chinese undertakings by foreign undertakings, which was not included in the draft AML submitted by LAO to the Standing Committee of the 10th NPC.[143] As a consequence, a transaction involving foreign acquisition of domestic undertaking that reaches the required thresholds may be subject to both the merger review under the AML for competition purposes and the security review under relevant laws for national security purposes.[144] In February 2011, the State Council published the

---

[137] *Coca-Cola/Huiyuan* (fn 135).
[138] *Maersk/MSC/CMA-CGM* (2014) MOFCOM Notice No. 46, http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml.
[139] Article 29, AML.
[140] Article 3(1)-(3), Provisional Regulation on the Imposition of Restrictive Conditions on Concentration of Business Operators. Restrictive conditions can also be proposed by the merging parties. See Articles 11(1) – (3), MOFCOM Measures on the Review of Concentrations of Business Operators, http://fldj.mofcom.gov.cn/article/c/200911/20091106639145.shtml.
[141] Article 29, AML.
[142] Article 30 only requires the timely publication of decisions of, rather than the reasons for, rejection or additional approval.
[143] Zhenguo Wu, 'Perspectives on the Chinese Anti-Monopoly Law' (2008) 75 Antitrust Law Journal 73, 101. See also section 3, Chapter 3.
[144] MOFCOM has not yet publicised any case in which Article 31 is applied.

Circular on the Establishment of Security Review System regarding Merger and Acquisition of Domestic Enterprises by Foreign Investors pursuant to Article 31 of the AML. The Circular concerns not only transactions that reach the notification thresholds under the AML but also those that are not required to go through the merger review process.[145] This is the first comprehensive security review system for foreign acquisition of domestic undertakings in China.[146]

Over the past seven years, MOFCOM has been extremely active and has shown an increasingly sophisticated competition analysis.[147] However, significant problems concerning MOFCOM's application of the AML were nonetheless revealed. The following sections will look at how merger review was conducted by MOFOCM in its second prohibition decision under the AML.

4.1 The P3 Network

On 18 June 2013, world's top three container carriers, the Danish A.P. Møller-Maersk A/S (Maersk), the Swiss Mediterranean Shipping Company S.A. (MSC), and the French CMA CGM S.A. (CMA-CGM), announced a proposition to enter into a long-term vessel sharing agreement covering three routes, Asia-Europe, Transpacific and Transatlantic – the so-called P3 Network (P3). It was intended to 'make container liner shipping more efficient and improve service quality for the shippers […] due to more frequent and reliable services'.[148] It was stated that P3 was merely an operational as opposed to commercial cooperation, and the three participating undertakings would remain independent competitors.[149]

---

[145] Section 1(1), Circular.
[146] Fels (fn 25) 21. Article 12 of the Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors also sets forth a security review requirement, however, it is not accompanied by detailed implementing rules.
[147] Lin and Zhao (fn 133) 130.
[148] Maersk, 'Maersk Line and P3 Partners Receive European Commission Affirmation', 4 June 2014, http://www.maerskline.com/hi-in/countries/int/news/news-articles/2014/06/p3-partners.
[149] *Ibid*.

On 20 March 2014, the US Federal Maritime Commission (FMC) announced that it approved the agreement on the ground that P3 was unlikely to increase transportation cost or reduce transportation service unreasonably.[150] Later on 3 June 2014 the European Commission declared that it would not initiate investigation into P3 after the undertakings submitted a self-assessment on the compliance of the alliance with EU competition law.[151] However, two weeks later, MOFOCM surprisingly published its decision to disapprove the formation of the P3 Network,[152] the first time that MOFCOM blocked a foreign-to-foreign transaction. The following sections examine the official decision of MOFCOM.

4.2 MOFCOM's Decision

MOFCOM received notification of the proposed establishment of a network centre in the form of limited liability partnership jointly by Maersk, MSC and CMA-CGM on 18 September 2013. However, the first submission of notification documents and materials was deemed incomplete by MOFCOM, and the undertakings had to make a second submission. Three months later on 19 December 2013, MOFCOM officially started the merger review procedure. On the last day of Phase One, MOFCOM decided to conduct further review on 18 January 2014. Similarly, on the last day of Phase Two – 18 April 2014 – MOFCOM decided to extent the time limit and brought the case into Phase Three. A final conclusion was made on the last day of Phase Three, 17 June 2014. This timeline of the review on P3 is in fact quite interesting, as it shows that the review went through the longest possible time permitted by the AML for reviewing a single concentration.[153] This fact seems to suggest that MOFCOM experienced major

---

[150] The Federal Maritime Commission, 'P3 Agreement Clears FMC Regulatory Review', 20 March 2014, http://www.fmc.gov/nr14-06.

[151] Maersk, 'Maersk Line and P3 Partners Receive European Commission Affirmation', 4 June 2014, http://www.maerskline.com/hi-in/countries/int/news/news-articles/2014/06/p3-partners.

[152] *Maersk/MSC/CMA-CGM* (P3 Network) (2014) MOFCOM Notice No. 46, http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml.

[153] Articles 25 and 26, AML. However, as can be seen in the next chapter, on some occasions the merging parties withdrew the initial notification after the reviewing process had already begun and filed

difficulties during the review. It is worth reiterating that the merger review on P3 was conducted against the background that the US FMC had approved the agreement without significant delay whilst the European Commission had not even initiated official investigation. Therefore it can be assumed that the fact of the case and the potential effects of the proposed alliance on competition were at least not profoundly intricate. As will be shown later, this delay may be a result of the substantial involvement of interested parties in the reviewing process.

4.2.1 Relevant market

In relation to the relevant product market, MOFCOM defined it as the international container liner transportation service market. MOFCOM acknowledged that the international shipping market mainly included the container liner and non-liner market, solid bulk cargo transportation service market, and tanker transportation service market. It then defined the international container liner shipping service as a transportation service method according to which container liner enterprises provided normative and repeated container cargo transportation services to non-fixed consignors pursuant to stipulated operating rules between fixed ports on the international fixed routes according to shipping schedules formulated in advance, and calculated the freight based on the freight rate of per twenty-foot equivalent unit. MOFCOM concluded that there was no substitutability between non-liner transportation and liner transportation, and there was no substitutability amongst solid bulk cargo transportation, bulk cargo transportation, tanker transportation and container transportation. MOFCOM did not in fact provide any analysis to explain how the definition of relevant product market was formulated. According to the AMC's Guidelines on the Definition of Relevant Market, to assess the degree of substitutability amongst different products from demanders' perspectives, demanders'

---

a new notification, and therefore rendered the whole reviewing time longer than the limit allowed by the AML.

demand for the functions of the product, demanders' acceptance of the quality and price of the product, and the degree of availability all need to be considered.[154] However, MOFCOM failed to examine any of these aspects.[155]

A brief conclusory statement rather than any rigorously comprehensive analysis was provided for the definitions of three geographic markets, which were respectively defined as Asia-Europe routes, transatlantic routes, and transpacific routes. It was also stated that, since the transatlantic routes did not cover any ports in China, MOFCOM would focus on the effects of P3 on the Asia-Europe and transpacific routes. As explained by MOFCOM, the Asia-Europe routes consisted of two trade routes; the transatlantic routes consisted of three trade routes; and the transpacific routes consisted of four trade routes. However, MOFCOM did not explain how each of the above nine specific routes could be substituted by other route(s) in the same category and were therefore not appropriate to be defined as a relevant geographic market on its own.

4.2.2 Competitive analysis

Before analysing the effects of P3 on the relevant market, MOFCOM stated: 'Since there are competitors with high market shares on the transpacific routes and the market structure is comparatively dispersed, MOFCOM mainly investigated the container liner transportation service market on the Asia-Europe routes.' This statement clearly presents the lack of transparency, coherence and necessary depth in MOFCOM's decision. It should have clarified: who these competitors were; how high the market shares of these competitors and of the P3 partners were; and what it meant

---

[154] Article 5.

[155] MOFCOM provided simple 'conclusions' on as opposed to analysis of relevant product market in several cases, see for example, *Merck/AZ Electronics Materials* (2014) MOFCOM Notice No. 30, http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400569060.shtml; *MediaTek/MStar* (2013) MOFCOM Notice No. 61, http://fldj.mofcom.gov.cn/article/ztxx/201308/20130800269821.shtml; *Baxter/Gambro* (2013) MOFCOM Notice No. 58, http://fldj.mofcom.gov.cn/article/ztxx/201308/20130800244176.shtml; *UTC/Goodrich* (2012) MOFCOM Notice No. 35, http://fldj.mofcom.gov.cn/article/ztxx/201206/20120608181083.shtml; and *Walmart/Niuhai* (2012) MOFCOM Notice No. 49, http://fldj.mofcom.gov.cn/article/ztxx/201303/20130300058730.shtml. Similarly, the definitions of relevant geographic market in these cases were also extremely brief.

by ‘dispersed market structure’, as the existence of business operators possessing market shares which were high enough to disregard the effects of P3 seems to suggest a concentrated rather than dispersed market structure.

4.2.2.1 ‘Tight joint operation’ versus ‘loose shipping alliance’

MOFCOM found that P3 was a ‘tight joint operation’, which was essentially different from traditional ‘loose shipping alliance’. MOFCOM then carefully compared ‘tight joint operation’ with ‘loose shipping alliance’ in great detail. However, the discussion on the difference between traditional shipping alliance and P3 does not seem to be extremely relevant to assessing the competitive effects of the P3 transaction. Article 20 of the AML provides that a concentration refers to: a merger of business operators; acquisition of control over other business operators by virtue of acquiring their equities or assets; or acquisition of control over other business operators or the possibility of exercising decisive influence on other business operators by virtue of contact or any other means. To trigger the merger review, a given transaction between business operators must fall within one of these three categories. Although MOFCOM has not specifically clarified under which circumstance the establishment of a new joint venture will fall, Article 20(2) should be the legal basis of this merger review given the facts concerning the operation of the network centre. Since the establishment of the network centre was already treated as concentration under the AML, although the P3 partners claimed it to be ‘an operational, not a commercial, operation’, it is obviously different from an alliance formed by independent undertakings by its nature. Nevertheless, MOFCOM still spent most of its time differentiating the structure and operating mechanism of P3 with those of traditional shipping alliance, which could only explain, at most, why P3 fell into the ambit of merger control rather than how this ‘tight joint operation’ gave rise to substantial competition concerns that led to the prohibition decision. Moreover, it is noteworthy that whilst the US FMC approved P3 under the Shipping Act, and the European Commission considered the agreement

forming P3 as horizontal cooperation agreement as suggested by the self-assessment conducted by P3 partners,[156] China was the only jurisdictions amongst the three to initiate a merger review procedure to assess the impact of P3.

4.2.2.2 Market share and market concentration

The second and third aspects of MOFCOM's competitive analysis were market share[157] and market concentration. It was found that, as the first three largest shipping companies on the Asia-Europe routes, Maersk, MSC and CMA-CGM had market shares of 20.6%, 15.2% and 10.9% respectively as of 1 January 2014. The integrated market share after the formation of P3 would be 46.7%, which represented a significant increase in market power. In addition, it was found that P3 would dramatically increase the degree of concentration in the relevant market. MOFCOM applied the Herfindahl-Hirschman Index (HHI) to support its argument.[158] Before the transaction, the HHI in the international container liner transportation service market on Asia-Europe routes was 890; after the transaction, due to the reduction in the number of competitors, the HHI increased to 2240, an increment of 1350. Therefore, the dispersed market structure of the international container liner transportation service market on Asia-Europe routes would become highly concentrated. Since the conditions of the relevant market in this case were totally different from that of the relevant market in *Qihoo v Tencent*, it was legitimate for MOFCOM to rely more on market share in the assessment of market power and regard 46.7% as a high market share in a market

[156] Article 1, Regulation 1/2003.

[157] In a number of earlier cases, MOFCOM did not provide market share data in the analysis of market power, which demonstrates the lack of rigorousness in MOFCOM's decision-making. See for example, *ARM/G&D/Gemalto* (2012) MOFCOM Notice No. 87, http://fldj.mofcom.gov.cn/article/ztxx/201212/20121208469841.shtml; *GE/Shenhua* (2011) MOFCOM Notice No. 74, http://fldj.mofcom.gov.cn/article/ztxx/201111/20111107855595.shtml; *GM/Delphi* (2009) MOFCOM Notice No. 76, http://fldj.mofcom.gov.cn/article/ztxx/200909/20090906540211.shtml; and *InBev/ Anheuser-Busch* (2008) MOFCOM Notice No. 95, http://fldj.mofcom.gov.cn/article/ztxx/200811/20081105899216.shtml.

[158] In addition to the HHI, MOFCOM can also apply Concentration Ratio Index (CRn) to measure the degree of market concentration. See Article 6, Provisional Rules on the Assessment of Competitive Effects of Concentrations of Undertakings.

characterised by capital-intensity and high risks. However, the application of HHI by MOFCOM was careless. First, MOFCOM failed to clarify how the pre-transaction HHI was calculated, since it did not provide information on the names and corresponding market shares of the incumbents. Second, even if the pre-transaction HHI (890) was correct, the increment in the post-transaction HHI should have been 1406.68, rather than 1350. Third, the HHI is frequently used to assess the coordinated effects of a concentration,[159] however MOFCOM had not even touched upon the issue of possible collusion amongst competitors.[160]

4.2.2.3 Ease of entry

After the analysis of market share and market concentration, MOFCOM moved on to analyse barriers to entry. It was found that the transaction integrated P3 partners' operating networks, eliminated the effective competition amongst the major competitors in the relevant market, and might further heighten the entry barriers of the international container liner transportation service market, which prevented the generation of new competitive constraints. However, MOFCOM's analysis on barriers to entry was primarily qualitative rather than quantitative; no evidence was provided concerning the competition conditions of the relevant market and the way in which the entry of new entrants would be impeded by the formation of P3. In fact, due to the capital-intensive characteristics of and excess capacity in the container liner transportation service market,[161] there would unlikely be any new entrant even in the absence of P3.

---

[159] Haixiao Gu and Andrew L. Foster, 'Substantive Analysis in China's Horizontal Merger Control: A Six-Year Review and Beyond' (2015) 3 (suppl 1) Journal of Antitrust Enforcement i26, i42.

[160] Compared with unilateral effects, the theory of coordinated effects is rarely examined by MOFCOM. In case where the theory was used, a plain statement instead of reasoned analysis concerning possible coordination was given. See for example, *Novartis/Alcon* (2010) MOFCOM Notice No. 53, http://fldj.mofcom.gov.cn/article/ztxx/201008/20100807080639.shtml.

[161] Francesco Munari, 'Competition in Liner Shipping' in Jürgen Basedow, Ulrich Magnus and Rudiger Wolfrum (eds.) *The Hamburg Lectures on Maritime Affairs 2009 & 2010* (Springer Publishing 2012) 4.

4.2.2.4 Impacts on other business operators

In the last part of its competitive appraisal, MOFCOM acknowledged that other competitors in the market would be squeezed out due to the increased market power of P3, a statement explicitly referring to the protection of competitors rather than competition. Moreover, MOFCOM stated that since consignors had limited bargaining power *vis-à-vis* container transportation, the increased market power of P3 might undermine the interests of consignors, and P3 might force ports to accept a reduced port charge. Although buyer power is a legitimate consideration for merger appraisal,[162] it remains unclear whether the consideration of the interests of consignors and ports was based solely on competition grounds. In fact, the potential adverse effects of P3 on China's shipping industry had made many consignors and associations of consignor in China anxious.[163] It seems that the protection of competitors might be a consideration in MOFCOM's analysis. In addition, it was provided at the beginning of the decision that advice from 'relevant government departments, industry associations and relevant enterprises' was sought by MOFCOM during the review in order to 'comprehend the definition of relevant market, the market structure, the industry characteristics, and the prospects of future development'. As discussed in the preceding chapters, multiple objectives including industrial policy considerations were incorporated into the AML by design as a result of political compromise.[164] The extent to which MOFCOM had incorporated non-competition considerations and been influenced by Chinese shipping industry in *P3 Network* is unknown. Currently, rules on weight of evidence are lacking, and in particular the extent to which the documents and materials submitted to MOFCOM will serve as a basis for its final decision is uncertain.[165] MOFCOM's decision-making may

---

[162] Article 27(4), AML. See also *Panasonic/Sanyo* (2009) MOFCOM Notice No. 82, http://fldj.mofcom.gov.cn/article/ztxx/200910/20091006593175.shtml.
[163] Sina, 'P3 Network May Trigger New Round of Integration in Shipping Industry', 11 November 2013, http://finance.sina.com.cn/stock/hyyj/20131111/020017277871.shtml.
[164] Section 3.1.2, Chapter 3. See also Lin and Zhao (fn 133) 126.
[165] Wei (fn 82) 124.

therefore be subject to rent-seeking practice and political lobbying.[166] The opacity of MOFCOM's decision-making will always lead the public to question its neutrality as a competition enforcer.

4.2.2.5 Proposed remedies

On top of non-comprehensive analysis of competitive harm, no useful information was given about MOFCOM's decision to prohibit the proposed transaction rather than to impose additional conditions. In *MediaTek/MStar*, the analytical methods conducted by MOFCOM were largely similar: it was noticed that the transaction substantially altered the structure of the LCD TV main control chip market, eliminated the main competitor, created a dominant position, and restricted the choice of chip suppliers. Despite the fact that the merged undertaking would have a market share of 80% and the HHI increment was 1962,[167] MOFCOM accepted the remedies proposed and conditionally approved the transaction. But in *P3 Network*, where the post-merger market share was merely 46.7% and the HHI increment was 1406.68, MOFCOM only briefly stated that the remedies proposed by the merging parties were not able to offset the restrictive effects of the transaction without mentioning what remedies had been proposed and why they had been declined.

4.2.2.6 Conclusive remarks

Although the analytical structure in *P3 Network* was strictly in line with the stipulation provided in Article 27 of the AML,[168] the analysis conducted by MOFCOM was largely formalistic as opposed to effects-based.[169] It provided no in-

---

[166] *Ibid*.
[167] However, the correct HHI increment should be 1967, since MOFCOM also provided the pre-merger HHI (4533) and the post-merger HHI (6500). There must be a mistake in MOFCOM's calculation.
[168] See also, Articles 3-5, Provisional Regulations on the Assessment of Competitive Effects of Concentrations of Business Operators.
[169] MOFCOM's reliance on the structure rather than effects of a concentration can also been found in *Mitsubishi Rayon/Lucite* (2009) MOFCOM Notice No. 28, http://fldj.mofcom.gov.cn/article/ztxx/200904/20090406198805.shtml and *Pfizer/Wyeth* (2009)

depth analysis to support its concerns in relation to the proposed transaction. A central issue in the appraisal of merger transaction is to balance the reduction in market competition against possible efficiency gains from economies of scale arising from the transaction.[170] However, MOFCOM considered how the proposed transaction would alter the structure of current market without appraising possible anti-competitive effects and pro-competitive efficiencies the transaction would have.[171] Competitive harm of a horizontal concentration includes both the coordinated effects and unilateral effects. In this case, it appears that MOFCOM merely focused on the latter. Unilateral effects arise when 'the merged firm, without any coordination with non-merger rivals, will be able profitably to exercise market power to a materially greater degree than would have been possible for either of the merged firms before the merger'.[172] The merged undertaking may be incentivised to raise prices above the pre-merger level, since the merging parties were previously competitors and constrained each other's ability to raise prices.[173] However, MOFCOM did not explain why P3 would have the incentive to exercise its market power, provided that significant increase in market power was proved,[174] independent of the pressures from remaining competitors. Although MOFCOM appeared to use both the dominance test and the substantial lessening of competition test,[175] the analysis was notably brief and was not grounded

---

MOFCOM Notice No. 77, http://fldj.mofcom.gov.cn/article/ztxx/200904/20090406198805.shtml. See also Gu and Foster (fn 159) i39.

[170] Lin and Zhao (fn 133) 125.

[171] See Article 28 AML and Articles 8-11, Provisional Rules on the Assessment of Competitive Effects of Concentrations of Business Operators.

[172] ICN, 'Recommended Practices for Merger Analysis' (2010), http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf, 17.

[173] *Ibid*.

[174] MOFCOM basically relied on the increase in market share and high market concentration to establish P3's market power, however, these are merely initial rather than conclusive indicators that the transaction raises competitive concerns. *Ibid*., 14.

[175] Under the dominance test, a merger should be prohibited if 'it strengthens or creates a dominant position in the market'; under the SLC test, a merger should be prohibited if 'it is likely to substantially lessen competition in the market'. OECD, 'Report on Country Experiences with the 2005 OECD Recommendation on Merger Review' (2013), http://www.oecd.org/daf/competition/ReportonExperienceswithMergerReviewRecommendation.pdf, 55-56.

in sound economics. It is therefore difficult to ascertain if the transaction was truly prohibited as a result of competition concerns.

Ironically, consolidation of domestic shipping companies is treated much more leniently. On 11 December 2015 the State Council approved a merger between China Ocean Shipping (Group) Company (COSCO) and China Shipping (Group) Company (China Shipping), respectively the world's sixth- and seventh-largest container shipping companies, both of which are central SOEs under the supervision of SASAC.[176] The new company will become the fourth-largest container shipping company in the world after the three P3 partners, and the world's largest solid bulk shipping company.[177] The merger was approved against a background of excess capacity suffered by COSCO and China Shipping, the subsidiaries of which, China COSCO Holdings Co. Ltd. and China Shipping Container Lines Co. Ltd, reportedly made losses of CNY 1.7 billion and CNY 1 billion in the third quarter of 2015.[178] The government anticipates that the integration of capacity and networks is able to promote the efficiency of these two companies, reduce costs, and increase their competitiveness in the global market.[179] The objectives of this merger seem to be largely similar to those the P3 Network was expected to achieve, and the market powers of the merging parties are equally significant; nonetheless, provided that this transaction is notified to MOFCOM, it will undoubtedly approve the merger without imposing any conditions. As will be discussed in Chapter 6 of this thesis, potential intervention of the AML is hardly a concern for state-led mergers between large central SOEs; in the event of SOE restructuring, industrial policy almost always takes precedence over competition policy.

---

[176] SASAC, 'COSCO and China Shipping to Consolidate', 11 December 2015, http://www.sasac.gov.cn/n85881/n85901/c2152972/content.html.
[177] Xinhua News Agency, 'Consolidation Plan for COSCO and China Shipping Will Soon be Issued', 11 December 2015, http://news.xinhuanet.com/finance/2015-12/11/c_128519605.htm.
[178] Wall Street Journal, 'Consolidations between China's SOEs Raise Concerns', 10 December 2015, http://cn.wsj.com/gb/20151210/biz112153.asp.
[179] Xinhua News Agency (fn 177).

In theory MOFCOM's decision-making would be more transparent and sophisticated if it is exposed to judicial review.[180] However, it is noticed that the outcome of administrative litigation is largely uncertain since the courts in China is not independent enough to deliver unbiased judgments regarding appeal of administrative decisions.[181] In addition, multiple mandates of the AMEAs which mean that they in fact oversee various aspects of undertakings' businesses other than competition-related matters[182] make undertakings reluctant to challenge competition decisions in the first place.[183] When there is a conflict between an undertaking and an AMEA in a competition case, there is a high possibility that the AMEA will retaliate in areas where the performance of the undertaking's business is subject to regulatory approval by or cooperation of the AMEAs.[184] Possible methods of retaliation are, for example, refusing to grant certain licences and deliberately delaying the approval process. It is therefore wise for undertakings to establish a good relationship with the AMEAs by not challenging their decisions. In fact, based on publicly available information, no competition decisions made by the AMEAs have so far been challenged before the courts.

---

[180] Judicial review is an important aspect of competition enforcement, however, due to the limited length of this thesis, it will not be discussed in detail here. For general studies on judicial review in China, see Yuwen Li and Yun Ma, 'The Hurdle is High: The Administrative Litigation System in the People's Republic of China' in Yuwen Li (eds.) *Administrative Litigation Systems in Greater China and Europe* (Ashgate Publishing 2014); Ji Li, 'Suing the Leviathan – An Empirical Analysis of the Changing Rate of Administrative Litigation in China' (2013) 10 Journal of Empirical Legal Studies 815; Eric C. Ip, 'Judicial Review in China: A Positive Political Economy Analysis' (2012) 8 Review of Law and Economics 331. For a discussion on judicial review regarding competition cases, see Lester Ross and Kenneth Zhou, 'Administrative and Civil Litigation under the Anti-Monopoly Law' in A. Emch and D. Stallibrass (eds.) *China's Anti-Monopoly Law: the First Five Years* (Kluwer Law International 2013).

[181] Mark Furse, 'Merger Control in China: Four and a Half Years of Practice and Enforcement – a Critical Analysis' (2013) 36 World Competition 285, 294.

[182] See section 4, Chapter 2.

[183] Angela Huyue Zhang, 'Bureaucratic Politics and China's Anti-Monopoly Law' (2014) King's College London Dickson Poon School of Law Legal Studies Research Paper Series, paper no. 2014-9, available at http://ssrn.com/abstract=2391187, 12.

[184] Ross and Zhou (fn 180) 325.

5. CONCLUSION

The substantive and procedural provisions of the AML are largely consistent with competition norms in leading jurisdictions, although the application of some provisions by the courts have raised concerns due to the lack of sufficient implementing rules and judicial interpretation. However, as can be demonstrated in *Johnson & Johnson*, one can question the interpretation of Articles 13 and 14 given by the Shanghai High Court, while in *Qihoo 360 v Tencent*, the application of the law can be in line with advanced effects-based analysis. After seven years of enforcement, some Chinese judges have started to reveal their sophistication in handling novel competition issues and conduct in-depth economic analysis.

However, the application of the AML by AMEAs embodies the non-normative aspect of China's competition system. They are still in the process of digesting competition concepts and understanding the provisions. Notwithstanding the rationality or legality of adopting a *per se* illegal or rule of reason approach, consistency in the law should always be preserved in order to restrict the abuse of discretionary power. The seemingly different analytical approaches adopted in *Japanese Auto Parts and Bearings Cartel* and *Zhejiang Insurance Cartel* seriously undermined the predictability of NDRC's decision-making. In addition, the interpretive analysis in the official decisions on monopoly agreements made by both NDRC and SAIC is largely general, and provides limited if any in-depth economic consideration. Similar pitfalls can also be found in MOFCOM's decision in *P3 network*, in which although MOFCOM followed an internationally recognised procedure and adopted standard theories of harm, it failed to explain several important findings in desirable detail and the approach taken in presenting the case was more descriptive than analytical, not to mention the incorrect application of the HHI. The P3 case also gives rise to concerns over MOFCOM's ability to withstand political lobbying, in spite

of the fact that the degree of involvement of consignors and associations of consignors remains unclear.

Sloppy decision-making is a product of multiple weaknesses of the competition system, such as the lack of experience of competition officials and the lack of judicial oversight. The most essential weakness, however, is the lack of means to hold the agencies accountable. Neither the AML nor its implementing rules have rules laid down to ensure the consistent application of the law or to require that decisions are presented in an informative manner, let alone an enforceable mechanism to punish any ill-behaved officials. Therefore, some major problems concerning the application of the AML to monopolistic conducts, such as the lack of information in official decisions, do not only concern the experience and professional knowledge of the enforcer, but also the design of China's public competition enforcement system as a whole. The next chapter will identify the outstanding problems of the public competition enforcement system that have been hindering the effective application of the AML.

Chapter Five

Public Competition Enforcement System in China

1. INTRODUCTION

The preceding chapter examined the text of the AML and its application by the AMEAs and the courts to monopolistic conduct. It was found that the substantive provisions of the AML – for example, Articles 13 and 14 – potentially gave rise to incoherent decision-making and caused the divergence between the enforcement by the AMEAs and by the courts. In addition, the AMEAs still failed to deliver convincing effects-based decisions to the same extent as the courts did. This chapter argues that the prominent problems that constrain the proper application of the AML in fact stem from the competition enforcement system as a whole rather than a single piece of legislation. It evaluates the overall performance of the AMEAs since the entry into force of the AML in the areas of merger control and antitrust, and sheds some light on the ineffective institutional design of the Chinese competition system, the lack of transparency and consistency in decision-making, and the complex relationship between the AMEAs and the government.

In 2015, the AML enters its seventh year of enforcement. During the first three years the AMEAs were occupied with the construction of a legislative framework for a new competition system, enforcement activities were, therefore, to a large extent dormant and the public had little awareness of how this new legislation might have substantial impact on market behaviour. Indeed, several commentators raised serious concerns about the prospect of competition enforcement in China.[1] After the AMEAs

[1] See for example Nathan Bush, 'Chinese Competition Policy: It Takes More than Law' (2005) The China Business Review, http://www.chinabusinessreview.com/public/0505/bush.html; Salil Mehra and Meng Yanbei, 'Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law' (2008) 49 Virginia Journal of International Law 379; and Thomas Brook, 'China's Anti-Monopoly Law: History, Application, and Enforcement' (2011) 16 Appeal 31.

acquired greater familiarity with applying the AML, the past four years have seen an increasing number of competition cases. News about high-profile probes and enormous fines imposed by the AMEAs on well-known domestic as well as foreign conglomerates commonly make the headlines. Nonetheless, these ostensibly positive developments may not be enough to tell the true story about China's competition system, which has from the very beginning suffered from major defects involving ineffective institutional design, lack of transparency and consistency in decision-making, and all too frequent political intervention.

2. COMPETITION ENFORCEMENT STRUCTURE IN CHINA

Trebilcock and Iacobucci [2] classify the institutional design of competition authorities into three models: a bifurcated judicial model, under which competition agencies have authority to investigate, but formal complaints must be brought before the courts; a bifurcated agency model, under which competition agencies have authority to investigate, but formal complaints must be brought before specialised agencies which have adjudicative power; and an integrated agency model, under which competition agencies have authority to investigate and adjudicate. China's competition system, which follows an integrated agency model, relies substantially on administrative rather than judicial machinery as its primary enforcement mechanism.

The AML establishes a three-tier administrative enforcement system. The first is a policy-making body, the AMC established by the State Council, which is in charge of 'organising, coordinating, and guiding anti-monopoly work'.[3] The AMC is chaired by the Vice Premier of China; the directors of NDRC, SAIC and MOFCOM and a deputy secretary general of the State Council all serve as deputy directors of the AMC.

---

[2] Michael Trebilcock and Edward Iacobucci, 'Designing Competition Law Institutions: Values, Structure, and Mandate' (2010) 41 Loyola University Chicago Law Journal 455, 459.
[3] Article 9, AML.

It also comprises deputy ministers of 14 ministries who act as members.[4] The involvement of numerous ministries leaves many uncertainties as to how such an institution will work effectively and independently, as no official information with regard to the division of responsibilities and functions among these ministries has been publicly available thus far.[5]

The second tier comprises central AMEAs designated directly to enforce the AML. Pursuant to the State Council's *san ding* [三定] scheme,[6] three AMEAs currently share the authority to enforce the AML, and each of the three was already responsible for certain aspects of competition enforcement under pre-AML laws. The division of responsibility as laid down in these rules is largely identical to that which existed in the pre-existing system. First, MOFCOM,[7] the enforcer of the Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (M&A Rules), is responsible for merger control review and overseeing mergers and acquisitions which may have an adverse effect on competition in the Chinese market.[8] Second, NDRC,[9] the enforcer of the Price Law, is responsible for enforcement against price-related monopoly agreements and abuse of dominant position.[10] Finally SAIC,[11] the

[4] The Circular of the General Office of the State Council on the Main Functions and Constituent Members of the Anti-Monopoly Commission of the State Council.
[5] Liyang Hou, 'An Evaluation of the Enforcement of China's Anti-Monopoly Law in 2008-2013' (2013), http://ssrn.com/abstract=2292296, 3.
[6] *San ding* – literally three determinations – is the basis for institutional reform in the State Council: first, to determine the administrative functions of a ministry (*ding zhize* [定职责]); second, to determine its internal structure (*ding jigou* [定机构]); and three, to determine the assignment of officials (*ding bianzhi* [定编制]). *San ding* is put forward to accommodate government's policy to streamline administrative organs.
[7] The responsible unit within MOFCOM is the Anti-Monopoly Bureau. See http://fldj.mofcom.gov.cn
[8] Section 3.11, Rules on Major Duties, Internal Organization and Staffing of MOFCOM, http://www.gov.cn/gzdt/2008-08/23/content_1077586.htm
[9] The responsible unit within NDRC is the Price Supervision and Anti-Monopoly Bureau. See http://jjs.ndrc.gov.cn
[10] Section 2.3, Rules on Major Duties, Internal Organization and Staffing of NDRC, http://news.xinhuanet.com/fortune/2008-08/21/content_9574275.htm.
[11] The responsible unit within SAIC is the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau. See http://www.saic.gov.cn/fldyfbzdjz

enforcer of the AUCL, is responsible for enforcement against non-price-related monopoly agreements and abuse of dominant position.[12]

At the third level, these three central AMEAs, with the exception of MOFCOM whose agencies at the local level are not entrusted with merger review authority, may delegate their enforcement responsibilities to their responding provincial-level AMEAs, including those of centrally administered municipalities and autonomous regions.[13] In fact, most competition cases concluded so far have been handled by local rather than central AMEAS. SAIC has a total number of 32 provincial-level Administration for Industry and Commerce (AICs) in 23 provinces, 4 centrally administered municipalities and 5 autonomous regions. It also has a massive number of municipal-level and county-level branches, but these agencies are only entrusted with the authority to accomplish other missions of SAIC. Similarly, NDRC has agencies at provincial, municipal and county level, but in most cases its corresponding local agencies are not provincial Development and Reform Commissions (DRCs), but provincial Price Bureaux. Guangdong Province provides one of the exceptions to this complex institutional arrangement. Whilst the provincial Price Bureau was originally responsible for enforcing the AML under the supervision of NDRC, it was dissolved in early 2014 as a result of reorganisation of government structure in Guangdong, and all its functions were absorbed into the DRC of Guangdong Province.[14]

Most scholars are wont to describe the Chinese system as a two-tier system with the AMC being the first tier and all AMEAs the second.[15] Such descriptions, however, overlook an important bureaucratic characteristic of China: local AMEAs are all part

---

[12] Section 2.6, Rules on Major Duties, Internal Organization and Staffing of SAIC, http://www.gov.cn/gzdt/2008-07/26/content_1056531.htm

[13] AML, Article 10(2). The term 'SAIC' and 'NDRC' used in the following paragraphs can denote both the central agencies and their local agencies.

[14] See China.org, 'Guangdong Dismantles Department of Foreign Trade and Economic Cooperation, Functions of Price Bureau Assumed by Provincial DRC' 27 February, 2014, at http://news.china.com.cn/2014-02/27/content_31617326.htm.

[15] See for example, Dan Wei, 'China's Anti-Monopoly Law and Its Merger Enforcement: Convergence and Flexibility' (2011) 14 Journal of International Economic Law 807, 809; and Angela Huyue Zhang, 'The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective' (2011) 56 The Antitrust Bulletin, http://ssrn.com/abstract=1783037, 4.

of the government structure of their respective provinces. They are administratively and financially controlled not by central AMEAs, which exercise only 'professional leadership' over their local agencies,[16] but by provincial-level governments – the 'administrative leaders' of provincial AMEAs – which have the same administrative rank as central ministries. This contributes to the difficulty in applying the AML at local level, which will be elaborated on later.

In addition to the three-tier system, in some rare cases the sector-specific regulator might be deemed the *de facto* competition enforcement agency. Though they cannot enforce the AML, they can nonetheless intervene where the alleged anti-competitive behaviour also falls foul of particular sector-specific regulation. For example, Article 41(3) of the Telecommunications Provisions of China prohibits telecommunications service operators from 'modifying, or modifying in disguised form, its charge rates […] without authorisation'.[17] Such behaviour may give rise concurrently to a *prima facie* case of, for example, price fixing or of unfairly charging high prices,[18] both of which fall within the jurisdiction of NDRC. As will be discussed in the next chapter, when the AML is enforced against SOEs in certain regulated sectors, this blurred and unclear division of responsibility in relation to regulating competition-related issues between the AMEAs and sector-specific regulators has led to undesirable confusion and uncertainty.

---

[16] China adopts a 'dual leadership' system, in which an administrative leader has the authority over the appointment of cadres and the budget of the supervised government body; a professional leader may issue instructions and directives in relation to the performance of functions of the supervised government body. For example, Guangdong Provincial government is the administrative leader of Guangdong Provincial DRC, while NDRC is the professional leader. In case of conflict of views, administrative leadership takes priority over professional leadership. See Yasheng Huang, 'Administrative Monitoring in China' (1995) 143 The China Quarterly 828, 836; and Kenneth Lieberthal and Michel Oksenberg, *Policy Making in China: Leaders, Structures, and Processes* (Princeton University Press 1988), 148.

[17] See Article 41(3), the Telecommunications Provisions of People's Republic of China, adopted on 20 September 2000, http://tradeinservices.mofcom.gov.cn/en/b/2000-09-25/18619.shtml.

[18] See respectively Articles 13 (1) and 17(1).

Before discussing the problems confronting the Chinese competition enforcement system, recent developments of implementing rules and major enforcement efforts by the AMEAs over the past seven years will be examined.

3. ENFORCEMENT TREND

3.1 Ministry of Commerce

MOFCOM, the most active player among AMEAs,[19] oversees the review procedure that requires parties to notify a merger transaction that reaches certain thresholds; a concentration cannot be implemented without MOFCOM's clearance.[20] In addition, under circumstance where it does not reach the specified thresholds, MOFCOM can nonetheless investigate a concentration proven to have the effect, or likely to have the effect, of eliminating or restricting competition.[21] MOFCOM is required by the AML to make public any decision that rejects or imposes restrictive conditions on a merger transaction.[22] In recent years, as the public appeal in relation to increasing the transparency of competition enforcement has attracted growing attention, MOFCOM has also published quarterly every decision of unconditional approval, although only the names of the merging parties are available.[23] Since the entry into force of the AML, MOFCOM has, as of 27 November 2015, concluded 1,215 transactions, with 1,186 unconditional clearances, 27 conditional approvals, and 2 rejections.

---

[19] See Angela Huyue Zhang, 'Bureaucratic Politics and China's Anti-Monopoly Law' (2014) King's College London Dickson Poon School of Law Legal Studies Research Paper Series, paper no. 2014-9, http://ssrn.com/abstract=2391187, 13; Wei (fn 15) 815; and Fei Deng and Cunzhen Huang, 'A Five Year Review of Merger Enforcement in China' Antitrust Source, http://awards.concurrences.com/IMG/pdf/fei_antitrust_source_a_five_year_review_of_merger_enforcement_in_china.pdf, 1.

[20] Article 3(1) and (2), Rules of the State Council on the Notification Thresholds for Concentrations of Business Operators; and Article 21, the AML.

[21] Article 4, Rules of the State Council on the Notification Thresholds for Concentrations of Business Operators.

[22] AML, Articles 30 and 29, the AML.

[23] For cases which were approved unconditionally, see http://fldj.mofcom.gov.cn/article/zcfb. For cases which were approved conditionally or rejected, see http://fldj.mofcom.gov.cn/article/ztxx.

One of the major improvements of the merger review system can be seen in the implementation of secondary rules. Pursuant to Article 21 of the AML, which states that the notification thresholds shall be stipulated by the State Council, the Rules of the State Council on the Notification Thresholds for Concentrations of Business Operators came into force two days after the enforcement of the AML. This short legal document removes the inconvenient thresholds based on market share under the former M&A Rules,[24] which created a degree of uncertainty as to whether a given transaction should be notified. The new notification thresholds under the Rules are based on the worldwide and China-wide turnovers of the participating undertakings.[25] The Rules were followed by two important and more detailed implementing rules in 2009, both in force as of 1 October 2010: Measures on the Notification of Concentrations of Business Operators, which provide the explanation of certain critical terms such as the meaning of 'control' that are relevant to the calculation of turnover, the procedures and required documents for submitting a notification; and the Measures on the Review of Concentrations of Business Operators, which sets out the procedures for reviewing a merger transaction. In addition, on 6 June 2012, a new Notification Form for Anti-Monopoly Review of Concentration of Undertakings was issued, which replaced the Notification Form for Concentration of Undertakings effective as of 1 May 2009.

Whilst earlier rules are concerned mainly with filing notification for review, rules governing the procedural aspect of dealing with concentrations which have not been notified were adopted later: the Provisional Measures on the Investigation and Handling of Concentrations between Business Operators Not Notified in Accordance with the Law came into force on 1 February 2012. The legal basis for MOFCOM to probe into un-notified transactions is Article 48 of the AML, and the remedies and penalties provided in the Measures are identical to those in Article 48. When the

[24] Article 51, M&A Rules.
[25] Article 3, Regulation of the State Council on the Notification Thresholds for Concentrations of Undertakings.

monetary punishment, a fine up to CNY 500,000, is unlikely to provide sufficient deterrence, the Measures additionally allow MOFCOM to order the participating undertakings to cease implementing the offending transaction, to dispose of shares or assets and transfer the business within a prescribed time.[26] The risks for companies that deliberately or unknowingly fail to notify their transaction theoretically increase with the existence of detailed procedural rules.[27]

Another significant development was the publication of the Provisional Rules on the Standards Applicable to Simple Cases of Concentrations of Business Operators (Simple Cases Rules), in force as of 12 February 2014. Given that the review process in China has a reputation for tedious length, the introduction of these Regulations will hopefully simplify the notification process for some transactions which are deemed simple by creating a 'fast-track' procedure, and as a result promote MOFCOM's reviewing efficiency.[28] These Rules were followed two months later by the Guiding Opinions on the Notification of Simple Cases of Concentrations of Business Operators,[29] which lay down the procedural rules for simple case notification. Following the introduction of these Opinions, MOFCOM also began to publish online every transaction notified under the new Simple Cases Rules; a party who considers the classification of a transaction as a simple case to be inappropriate is invited to submit evidence to MOFCOM within ten days.[30]

With regard to reviewing merger transactions, the most notable trend in recent years has been the growing confidence of MOFCOM in taking independent decisions without following unquestioningly the analysis of other competition jurisdictions

---

[26] Article 13, Provisional Measures on the Investigation and Handling of Concentrations between Business Operators Not Notified in Accordance with the Law.

[27] As of 10 October 2015, 7 undertakings were fined for violating the Provisional Measures.

[28] This 'fast-track' procedure is available in case where (i) the undertakings to the transaction do not hold a substantial share in the given market; (ii) the joint venture or the acquired undertaking does not operate businesses in China or (iii) the joint venture established as a result of the transaction was already controlled by two or more undertakings to the transaction. See Article 2(1)-(6), Provisional Rules on the Standards Applicable to Simple Cases of Concentrations of Business Operators

[29] Available at http://fldj.mofcom.gov.cn/article/xgxz/201404/20140400555353.shtml.

[30] See MOFCOM, 'MOFCOM Publishes Simple Cases of Concentrations among Business Operators', 23 May 2014, http://www.mofcom.gov.cn/article/ae/ai/201405/20140500598547.shtml.

concerning the same transaction. For example, Western Digital's acquisition of Hitachi Global Storage Technologies was cleared by both the US Federal Trade Commission and the European Commission with structural remedies[31] which required the divestment of essential production assets for 3.5-inch hard disk drives. Yet whilst MOFCOM ordered similar structural remedies in its decision, it went further in ordering a behavioural remedy which required Western Digital to hold Hitachi separate as an independent competitor for at least 24 months.[32] In another divergent decision, both the US and EU cleared the *Google/Motorola Mobility* transaction with no conditions attached, but MOFCOM obliged Google, *inter alia*, to continue providing a free and open Android platform and to treat all original equipment manufacturers non-discriminatorily in terms of the platform.[33] Whilst these cases to a certain degree embodied MOFCOM's growing confidence in reviewing merger transactions, there is a good chance that making innovative decisions such as the frequent use of 'hold-separate' remedy[34] which depart from normal practices in mature competition jurisdictions, would be deemed inappropriate from a legal standpoint. Indeed, these divergent decisions are widely debated among competition practitioners and scholars.[35] Nevertheless, it is undeniable that MOFCOM's expertise in merger review is becoming more sophisticated. For instance, in *UTC/Goodrich*,

---

[31] See respectively, Federal Trade Commission, 'FTC Action Preserves Competition in the Market for Desktop Hard Disk Drives Used in Personal Computers', http://www.ftc.gov/news-events/press-releases/2012/03/ftc-action-preserves-competition-market-desktop-hard-disk; and Case COMP/M.6203 – *Western Digital Irland/ Viviti Technologies*, Commission decision of 23 November 2011.

[32] *Western Digital/Hitachi Global Storage Technologies* (*WD/HGST*) (2012) MOFCOM Notice No. 9, http://www.mofcom.gov.cn/article/b/c/201203/20120307993792.shtml.

[33] See *Google/Motorola Mobility* (2012) MOFCOM Notice No. 25, http://english.mofcom.gov.cn/article/policyrelease/domesticpolicy/201206/20120608199125.shtml. The latter obligation was removed by MOFCOM on 9 January 2015 as a result of Chinese technology giant Lenovo's acquisition of Motorola Mobility. See MOFCOM's decision concerning the removal of Google's obligation at http://fldj.mofcom.gov.cn/article/ztxx/201501/20150100862331.shtml.

[34] In addition to *WD/HGST*, see also *Marubeni/Gavilon* (2013) MOFCOM Notice No. 22, http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400100376.shtml; MediaTek/MStar (2013) MOFCOM Notice No. 61, http://fldj.mofcom.gov.cn/article/ztxx/201308/20130800269821.shtml; and *Seagate/Samsung* (2011) MOFCOM Notice No. 90, http://fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml.

[35] See for example, Mark Furse, 'Merger Control in China: Four and a Half Years of Practice and Enforcement – a Critical Analysis' (2013) 36 World Competition 285, 301; and Deng and Huang (fn 19) 14-15.

MOFCOM approved the acquisition of the electrical systems business of Goodrich,[36] subject to the divestitures of its assets. Similar structural remedies concerning the divestitures of Goodrich's businesses in the production of aircraft electrical power systems and engine control systems were then required by the US Department of Justice[37] and European Commission[38] a month later. This is the first case in which MOFCOM has published a decision in advance of its American and European counterparts regarding the same transaction.

Whilst MOFCOM has indeed issued several important implementing rules to guide and facilitate its merger review procedures, and has made independent decisions without unduly following the analytical approach of other jurisdictions, the analysis conducted by it in official decisions is far from satisfactory.[39] In addition, as will be discussed in section 4.1 below, the length and opacity of reviewing process also give rise to serious concerns.

3.2 National Development and Reform Commission

In 2011, several implementing rules were adopted to elaborate further the enforcement responsibilities of NDRC. It has published Rules on Anti-Price Monopoly and Procedural Rules on Administrative Enforcement against Price Monopoly. Specifically, NDRC oversees enforcement against monopoly agreements concerning price fixing and resale price maintenance (RPM),[40] and against abuse of a dominant position concerning unfairly high or low prices, predatory pricing, price discrimination, and exclusive dealing through price discounts.[41]

---

[36] *UTC/Goodrich* (2012) MOFCOM Notice No. 35, http://www.mofcom.gov.cn/article/b/fwzl/201206/20120608181085.shtml

[37] Department of Justice, 'Justice Department Requires Divestitures in Order for United Technologies Corporation to Proceed with Its Acquisition of Goodrich Corporation', http://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-united-technologies-corporation-proceed-its.

[38] Case COMP/M.6410 – *UTC/Goodrich*, Commission decision of 26 July 2012.

[39] See section 4, Chapter 4.

[40] Articles 7 and 8, Rules on Anti-price Monopoly Conduct.

[41] *Ibid*., Articles 11 to 14.

Positive progress has been made in respect of enforcement against monopoly agreements. In recent years, 'targeting famous undertakings' and 'imposing massive fines' have proven to be the most effective tools in raising public awareness of the AML. Indeed, in 2013 alone fines imposed by NDRC and its local agencies exceeded the total amount in the previous four years, with the record of highest fines being repeatedly surpassed,[42] and most cases involving well-known domestic or foreign giants. In January 2013 a fine of CNY 144 million was imposed in the international liquid-crystal-display cartel case, which involved big names like Samsung and LG, being the first time foreign undertakings had been punished for anti-monopoly agreements.[43] A month later, Wuliangye and Moutai, two Chinese state-owned Baijiu[44] corporations, were fined CNY 202 million and CNY 247 million respectively by NDRC's local agencies for implementing policies that restricted distributors' freedom to set resale prices, being the first time SOEs had been penalised for RPM.[45] In another case also concerning RPM, in August 2013 six manufacturers of infant milk formula, including Fonterra and Mead Johnson, were fined a total of CNY 670 million.[46]

In 2014 the enforcement activities of NDRC became an issue of great contention in China. This is because NDRC finally reached a conclusion on the alleged anti-competitive pricing policy implemented by luxury car makers as a result of a nationwide anti-monopoly campaign against car makers and dealers. The prices of foreign luxury vehicles set in China have long been a topic of public concern. There is

---

[42] See Ifeng, 'Fifth Year of Chinese Anti-Monopoly Law: the NDRC has Imposed more Fines than the First Four Years', http://news.ifeng.com/shendu/nfzm/detail_2013_09/28/29971882_0.shtml.

[43] Xinhua News Agency, 'Six Foreign Undertakings Colluded to Manipulate Price of LCD, NDRC Imposed Fines of over CNY 100 Million', 5 January 2013, http://news.xinhuanet.com/energy/2013-01/05/c_124184578.htm. However, since the anti-competitive business policies of these undertakings were implemented and later ceased prior to the promulgation of the AML, the decision of this case was in fact made under the Price Law of China. These six undertakings had already been fined by the European Commission in December 2010 for price-fixing cartel. Case No COMP/39.309 – *LCD (Liquid Crystal Displays)*, Commission decision of 8.12.2010.

[44] A kind of Chinese distilled spirit, generally about 40–60% alcohol by volume.

[45] Xinhua News Agency, 'NDRC Administers Liquor Industry, Moutai and Wuliangye Fined CNY 449 Million', 20 February 2013, http://news.xinhuanet.com/fortune/2013-02/20/c_124365285.htm.

[46] China.org, 'China Fines Milk Formula Makers for Price-fixing', 7 August 2013, at http://www.china.org.cn/business/2013-08/07/content_29648698.htm.

a huge gap between the prices of imported cars in China and their overseas prices. For example, the recommended on-the-road price of a Mercedes-Benz GL63 AMG provided on Mercedes' UK website is GBP 93,350,[47] whilst the recommended retail price of the same model provided on its Chinese website is CNY 1,980,000, or approximately GBP 198,000.[48] The anti-monopoly probe into the auto sector reportedly started in as early as 2011, and formal investigation drew to a close in 2014. From the latter half of 2014 through to the latter half of 2015, fines were imposed by NDRC's local agencies on a large number of car makers and dealers over price-related restrictive agreements.[49] In addition, in June 2015 NDRC was commissioned by the AMC to draft an anti-monopoly guideline for the automobile sector[50] which will be instructive in the formation of more effective compliance programmes, and will hopefully improve the consistency and predictability of NDRC's decision-making.

Apart from monopoly agreements, abusive business practices of foreign undertakings in China have also been targeted by NDRC. Technology giants InterDigital and Qualcomm were accused of charging Chinese companies unfairly high royalties for patent licences, bundling the licences for standard-essential patents (SEPs) with non-SEPs, and forcing Chinese companies to accept unreasonable

---

[47] Apart from the vehicle itself, the 'recommended on-the-road price', according to Mercedes, also includes 'a standard UK delivery charge (GBP 540.00 incl. VAT), new vehicle registration fee (GBP 55.00), number plates (GBP 25.00 incl. VAT) and fuel (GBP 50.00 incl. VAT).' See http://www2.mercedes-benz.co.uk/content/unitedkingdom/mpc/mpc_unitedkingdom_website/en/home_mpc/passengercars/home/new_cars/models/gl-class/_x166/advice_sales/catalogue_prices.html.

[48] The 'recommended retail price' does not include any additional costs as shown on the UK website. See http://www.mercedes-benz.com.cn/content/china/mpc/mpc_china_website/zhng/home_mpc/passengercars/home/new_cars/amg/Off-roader/gl_63_amg/pricelist.html.

[49] See for example, Xinhua News Agency, 'The Biggest Fine Ever in Chinese Antimonopoly History', 20 August 2014, http://news.xinhuanet.com/fortune/2014-08/20/c_126894311.htm; Financial Times, 'NDRC Fines FAW- Volkswagen and Chrysler', 11 September 2014, http://m.ftchinese.com/story/001058157; Biru Han, 'NDRC Fines FAW-Volkswagen and Chrysler' Financial Times, 11 September 2014, http://m.ftchinese.com/story/001058157; Xinhua News Agency, 'China Imposes Antitrust Fine on Mercedes-Benz', 23 April 2015, http://news.xinhuanet.com/english/2015-04/23/c_134177599.htm; and NDRC, 'Guangdong DRC Imposed CNY 120 million on Dongfeng-Nissan', 25 September 2015, http://fgs.ndrc.gov.cn/xtjl/201509/t20150925_752485.html.

[50] Xinhua News Agency, 'The Drafting of Anti-Monopoly Guidelines for Automobile Sector Commences, Preliminary Draft will be Produced in a Year', 18 June 2015, http://news.xinhuanet.com/finance/2015-06/18/c_127928081.htm.

licensing terms.[51] The investigation of InterDigital was suspended by NDRC in May 2014 after the American corporation committed to 'take specific steps to eliminate the consequences of [its] suspected monopolistic behaviour'.[52] After more than a year, the investigation against Qualcomm finally came to an end in February 2015 with a fine of CNY 6.088 billion imposed, the highest fine in the AML history.[53] In addition to the fine, Qualcomm, which had abused its dominant position in CDMA, WCDMA and LTE wireless communications, SEPs, licensing markets and the baseband processor market, agreed to rectify its business and licensing practices by charging royalties in China based on 65% (previously 100%) of the net wholesale price of the device in question. They also provided Chinese licensees with full lists of licensed patents and stopped charging license fees for expired licenses, requesting free cross-licenses from Chinese licensees, bundling the licenses of SEPs with non-SEPs, and making the supply of its baseband processors subject to Chinese licensees' acceptance of unreasonable conditions in the licensing agreement.[54]

In September 2014 NDRC for the first time published its decision on an administrative monopoly investigation.[55] It was found that, in 2013 the Department of Transport, the Price Bureau, and the Department of Finance of Hebei Province had violated the AML by issuing government resolutions that allowed passenger vehicles

---

[51] See New York Times, 'China Investigating Qualcomm's Pricing', 20 February 2014 http://www.nytimes.com/2014/02/20/technology/china-investigating-qualcomms-pricing.html?_r=0.; John Ruwitch and Matthew Miller, 'China Suspends InterDigital Anti-monopoly Probe' Reuters, 22 May 2014, http://www.reuters.com/article/2014/05/22/interdigital-china-idUSL3N0O80PQ20140522.

[52] *Ibid*.

[53] *Qualcomm Incorporated* (2015) NDRC Decision No. 1, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201503/t20150302_666176.html. Qualcomm is currently being investigated by both the European Commission and the Fair Trade Commission of Korea for its alleged abusive practices. See respectively European Commission, Press Release IP/15/5383, http://europa.eu/rapid/press-release_IP-15-5383_en.htm; and Don Clark, 'Qualcomm Says South Korea Recommends Fine for Alleged Antitrust Violations' The Wall Street Journal, 18 November 2015, http://www.wsj.com/articles/qualcomm-says-south-korea-recommends-fine-for-alleged-antitrust-violations-1447820172.

[54] See NDRC, 'NDRC Orders Rectification and Fines Qualcomm CNY 6 billion', 10 February, 2015, http://www.sdpc.gov.cn/xwzx/xwfb/201502/t20150210_663822.html.

[55] See NDRC, 'NDRC Puts Forward Suggestion Pursuant to the Law to People's Government of Hebei Province of Rectifying the Behaviour of Departments of Transport and Other Departments of Abusing Administrative Power to Eliminate or Restrict Competition', 26 September 2014, http://jjs.ndrc.gov.cn/gzdt/201409/t20140926_626773.html.

registered in Hebei Province to enjoy a 50% discount on toll charges.[56] Since toll expenditure accounted for a substantial percentage of the revenue generated by passenger vehicles, the implemented preferential policy effectively subsidised passenger vehicle businesses in Hebei. NDRC stated that the practices of the three departments had violated Articles 8 and 33(1) of the AML, and issued a letter of recommendation to the General Office of Hebei Provincial Government suggesting that the relevant departments correct their practices and treat all passenger vehicles equally regardless of their origin.[57] Following this case, in March, June and August 2015, NDRC issued respectively letters of recommendation to urge the ratification of abuse of administrative power by the Department of Transport of Shandong Province,[58] the Communications Administration of Yunnan Province,[59] and the Health and Family Planning Commission of Bengbu City.[60] However, there is no further update on what punishment, if any, has been imposed on the relevant departments or officials.

As the 'Little State Council',[61] NDRC is empowered to regulate various industries. In recent years, NDRC has become increasingly active in applying the AML to a wide range of products, such as electric appliance, alcohol, infant formula, and auto parts. It indeed attracts more attention than SAIC, which shares similar enforcement jurisdiction to NDRC; nonetheless, as will be shown later, high-profile enforcement activities at the same time reveal significant weakness concerning

---

[56] See Department of Transport of Hebei Province, 'Three Departments Unify Preferential Policy on Tolls Payable by Passenger Vehicles Using Toll Roads', 6 November 2013, http://www.mot.gov.cn/st2010/hebei/hb_jiaotongxw/jtxw_wenzibd/201311/t20131108_1509846.html.

[57] AMEAs are not allowed directly to punish a government body. The only available action for the AMEAs in case on administrative monopoly is to issue a letter of recommendation suggesting the relevant superior authority to handle the illegal practices in question. See Article 51, AML.

[58] *Department of Transport of Shandong Province* (2015) NDRC Decision No. 501, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201503/t20150327_668912.html.

[59] NDRC, 'Abuse of Administrative Power to Eliminate or Restrict Competition by the Administration for Communication of Yunnan Province was Rectified under the AML', 2 June 2015, http://www.sdpc.gov.cn/gzdt/201506/t20150602_694807.html.

[60] *Bengbu Health and Family Planning Commission* (2015) NDRC Decision No. 2175, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201508/t20150826_748684.html.

[61] See section 4.2, Chapter 2.

NDRC's competition enforcement.

3.3 State Administration for Industry and Commerce

SAIC issued three significant rules in 2011: the Rules on the Prohibition of Abuse of Dominant Market Position, the Rules on the Prohibition of Monopoly Agreements, and the Rules on the Prohibition of Abuse of Administrative Power to Eliminate or Restrict Competition. In relation to abuse of dominance, SAIC is responsible for enforcement against refusal to deal, exclusive dealing, tying, and discriminating against equivalent trading partners.[62] In relation to monopoly agreements, SAIC is in charge of enforcing the AML against restrictions of output or sales, allocation of sales markets or raw materials supply markets, restrictions of purchase of new technologies and equipment, and boycott of transactions.[63]

Compared with NDRC, SAIC's decision-making is more transparent as it has published all of its case decisions. However, it is noticeable that, unlike NDRC, the influence of SAIC's enforcement activities is rather limited, since its regulatory focus seems to be put on small local companies in small cities and counties.[64] In all 29 cases handled by either SAIC or local AICs, only 9 took place in comparatively large cities.[65] Seven of these 9 cases involved tying practices of state monopolies operating in the industries of water supply, tobacco and telecommunications, their dominant positions and abusive acts were therefore comparatively easier to prove. Moreover, the total amount of fines imposed by SAIC under the AML to date is approximately CNY 52.67

[62] Articles 4 to 7, SAIC Rules on Prohibition of Abuse of Dominant Market Position.
[63] Articles 4 to 7, SAIC Rules on Prohibition of Monopoly Agreements.
[64] Xiaoye Wang and Adrian Emch, 'Chinese Antitrust – A Snapshot' (2015) 3 (suppl 1) Journal of Antitrust Enforcement i12, i21.
[65] The term 'comparatively large city' was originally introduced by Article 30 of the Constitution of China, however, its definition was not provided. Under the Legislation Law, the right to formulate local regulations is granted only to a 'comparatively large city', which refers to 'a city where a provincial or autonomous regional people's government is located or where a special economic zone is located, or a city approved as such by the State Council'. Article 63, Legislation Law. Currently, there are 49 comparatively large cities.

million,[66] which is significantly less than most of the fines imposed by NDRC on individual undertakings. This phenomenon may be a result of SAIC's rather scarce enforcement resources,[67] which restrict its ability to target larger undertakings and more complex cases. It may also be a result of the different focus of SAIC's mandates, which involve less if any macroeconomic control and more supervision and regulation of market order and individual business practices at local level.[68]

Compared with MOFCOM and NDRC, SAIC still lags somewhat behind in the intensity of competition enforcement and attracts scant public attention. It published its first decision under the AML only in August 2010.[69] SAIC and its local agencies have concluded to date only 29 cases in 7 years. While all but one concluded cases were handled by local AICs under authorisation from SAIC, SAIC itself probed into only 3 cases.[70] However there is a welcome trend in the last 2 years: the enforcement priority of SAIC seems to be veering from monopoly agreements to abuse of a dominant position – an area into which both NDRC and SAIC rarely ventured in the past – and from private undertakings to SOEs. Generally investigation of abuse of dominance requires more resources than cases concerning only monopoly agreements, for detailed market surveys and complex economic analyses are essential to, for

---

[66] The highest fine imposed on a single undertaking is CNY 5.95 million whilst the lowest is CNY 1,800. See respectively *Chifeng Tobacco Company* (2014) Inner Mongolia AIC Decision No. 2, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201407/t20140730_147161.html; and *Yongzhou Branch of An Bang Insurance Co., Ltd.* (2013) Hunan AIC Decision No. 11, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201401/t20140107_140988.html. The total amount also includes a fine of CNY 200,000 imposed under Article 52 of the AML – the first time in the history of the AML – which prohibits business operators under competition investigation from refusing to provide relevant materials and information, providing fraudulent materials or information, concealing, destroying or removing evidence, or refusing or obstructing investigation in other ways. See *Sunyard System Engineering Co., Ltd.* (2015) Anhui AIC Decision No. 2, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201511/t20151105_163656.html.

[67] See fn 129, Chapter 3.

[68] 'With creating a regulated and harmonized market environment of fairness, justice and faithfulness for the coordinated socioeconomic development as its objective, SAIC functions in maintaining market order and protecting the legitimate rights and interests of businesses and consumers by carrying out regulations in the fields of enterprise registration, competition, consumer protection, trademark protection and combating economic illegalities.' SAIC, 'Mission', at http://www.saic.gov.cn/english/aboutus/Mission.

[69] *Lianyungang Concrete Cartel* (2010) Jiangsu AIC Decision No. 37, http://www.saic.gov.cn/fldyfbzdjz/dxal/201302/t20130219_133370.html.

[70] One of these three cases has been terminated by SAIC in February 2015, and the other two involve respectively Tetra Pak and Microsoft, which are still pending.

example, defining the relevant product and geographical markets, and determining both the dominant status and adverse effects on competition. SAIC initiated its very first case of abuse of a dominant position in 2013 by investigating Tetra Pak for alleged tying practices in the market for food and liquid packaging[71] but the case has yet to be concluded. In January 2014, SAIC closed its first abuse of dominance case, in which AIC of Guangdong Province fined a state-owned water company CNY 3.2 million.[72] Subsequently, as of October 2015, ten abuse of dominance cases have been closed, 9 of which involved SOEs in industries such as tobacco, water, gas and telecommunications. However, in all 6 cases concerning the telecommunications sector, local AICs chose to suspend the investigations without imposing any fines.[73]

In light of the growing attention to abusive practices of intellectual property rights (IPRs) as in the *Qualcomm* case, another notable development is SAIC's publication of the Rules on the Prohibition of Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (IPR Rules) on 7 April 2015. The IPR Rules represent the first regulation in the sphere of intellectual property under the AML.

Whilst Article 55 of the AML, which forms the legal basis for competition scrutiny of the exercise of IPRs, is too abstract to provide any practical guidance to IPR holders, the IPR Rules lay down lists of examples of IPR-related anti-competitive agreements and abuse of a dominant position that may induce violation of competition law. One of the most controversial provisions in the IPR Rules is Article 7, which requires patent owners compulsorily to license their patents that are deemed 'essential facilities'.[74] Whilst the IPR Rules state that competition law and regulation of IPR share the same objectives of encouraging competition and innovation, enhancing

---

[71] Reuters, 'China Starts Investigation into Tetra Pak 'Dominance': State Media', 5 July 2013, http://www.reuters.com/article/2013/07/05/us-china-tetrapak-idUSBRE9640E620130705.

[72] *Huizhou Daya Bay Yiyuan Purified Water Co., Ltd.* (2014) Guangdong AIC Decision No. 2, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201401/t20140106_140962.html.

[73] Some of these suspended investigations will be explored in section 2.2, Chapter 6.

[74] The circumstances in which a patent will constitute an essential facility are laid down in Article 7(1)-(3) of the IPR Rules.

economic efficiency and protecting consumer and public interests,[75] the incorporation of the 'essential facility' doctrine seems to be greeted as an egregious development for IP-intensive industry in developed countries. Although China has the largest number of patent applications in the world,[76] the general trend of China importing patents from more advanced economies remains intact.[77] It is therefore a logical consequence for China to adopt a comparatively harsher scheme for mandatory licence of IPR when foreign patented technologies and know-how have proven to be an essential stimulus to the development of the Chinese technology sector and economy. The deftness with which SAIC, whose enforcement capacity seems to afford a rather limited caseload, applies this important piece of regulation to protect competition whilst seeking to ensure that competition enforcement does not stifle technological innovation remains to be seen.

Moreover, when future abuses of IPR such as those in the Qualcomm case emerge, there is a good chance that SAIC will wade in and apply the IPR Rules. However, since the IPR Rules apply only to non-price-related practices,[78] the marginal increase in legal certainty and enforcement predictability given by the IPR Rules with regard to competition enforcement against IPR abuses will be lost where the abuses are price-related. Whilst it is difficult at the current stage to provide a reliable prediction as to the extent to which the IPR Rules will be instructive to NDRC's future enforcement against price-related IPR abuses, it is beyond question that the non-price-related practices in the Qualcomm case such as a mandatory cross-licensing agreement[79] all fall within the scope of the IPR Rules.

---

[75] Article 2.

[76] WIPO, 'WIPO IP Facts and Figures', June 2014, http://www.wipo.int/edocs/pubdocs/en/statistics/943/wipo_pub_943_2013.pdf.

[77] 'In 2012, China had a record deficit in royalties and license fees of nearly $17bn – compared with an $82bn surplus for the US.' Valentina Romei, 'China's Patent/Royalty Disconnect' Financial Times, 6 May 2013, http://blogs.ft.com/beyond-brics/2013/05/06/chart-of-the-week-chinas-patent-royalty-disconnect.

[78] Article 3, IPR Rules.

[79] See Article 10, IPR Rules.

Recently AMEAs appear to be more sophisticated and confident in applying the AML, although regulation of administrative monopoly is still rare.[80] On top of that, public competition enforcement is well supplemented by the implementation of various secondary rules and is meeting initial success.[81] Some investigations indeed attract worldwide attention as the companies involved are internationally renowned undertakings and their businesses all rely heavily on the Chinese market. Nonetheless, whilst intensified enforcement raises public awareness of the AML and expectations of the prospect of competition enforcement, it reveals at the same time a myriad of unsolved problems concerning this fiendishly complex, and in ways unsound, competition system.

4. OUTSTANDING ISSUES OF CHINA'S COMPETITION SYSTEM

Periodic upgrades and regular refinements are necessary for a competition system to function effectively,[82] and the first step is to identify what the existing problems are. The following sections explore six outstanding issues which impede the effective enforcement of the AML. First, the lengthy reviewing time of proposed concentration and the opacity of MOFCOM's decision-making undermine the interests of merging parties. Second, multiple mandates of the AMEAs and division of jurisdiction between NDRC and SAIC have proven problematic and lead to incoherence. Third, a functioning coordination mechanism in place to resolve conflicts in relation to

[80] NDRC concluded only four administrative monopoly cases in more than seven years, whilst SAIC has concluded none.

[81] Apart from secondary rules governing the nationwide enforcement activities of the AMEAs, in order to enhance the legal framework of one of China's most important experimenting project – the free trade zone – the Measures for the Enforcement Work against Monopoly Agreement Abuse of Dominant Position and Administrative Monopoly in China (Shanghai) Pilot Free Trade Zone, the Measures on the Work of Anti-Price Monopoly in China (Shanghai) Pilot Free Trade Zone, and the Measures on the Work of Anti-Monopoly Review of Concentrations of Business Operators in China (Shanghai) Pilot Free Trade Zone were issued respectively by Shanghai Administration for Industry and Commerce, Shanghai Development and Reform Commission and Shanghai Municipal Commission of Commerce in 2014.

[82] William E. Kovacic, 'China's Competition Law Experience in Context' (2015) 3 (suppl 1) Journal of Antitrust Enforcement i2, i4.

enforcement responsibility is lacking, and fourth, decision-making in antirust cases is not consistent and induces an accusation of selective enforcement. Fifth, the lack of investigatory powers and independence make the AMEAs vulnerable to local governments and SOEs, and finally the current AML structure is not able to ensure effective enforcement and generate meaningful deterrence against administrative monopoly.

4.1 Lengthy Timelines and Lack of Transparency in M&A Reviews

Although MOFCOM receives far more plaudits than the other two AMEAs, it faces several problems that undermine the efficiency of the review process. First, the duration of review conducted by MOFCOM has been notoriously long, which may seriously jeopardise the commercial strategy of the parties to the merger transaction. Under the AML, MOFCOM will initially have up to 30 days to conduct a preliminary review ('Phase One') and decide if further review is necessary.[83] Once MOFOCOM decides to conduct further review after Phase One, it will be given 90 days ('Phase Two'), to draw a conclusion.[84] The time limit will be extended by another 60 days ('Phase Three'), for MOFCOM to take a final decision.[85] If no conclusion is made after Phase Three, the transaction is automatically allowed to proceed.[86] When most transactions in the US and the EU are cleared in their equivalent of Phase One, MOFCOM clears most transactions in Phase Two or Phase Three.[87]

The statutory review time from the acceptance of filing to the conclusion of a case, therefore, lasts up to six months. However, in practice the actual duration between

---

[83] Article 25, AML.
[84] *Ibid.*, Article 26.
[85] The circumstances under which the review process is allowed to enter Phase Three are: (1) the business operators and MOFCOM have reached an agreement to extend the time limit; (2) the documents or materials submitted are in need of further verification; or (3) there has been a material change after the notification of the concentration in question. Articles 26(1)-(3), the AML.
[86] AML, paragraph 3, Article 26.
[87] Deng and Huang (fn 19) 6; and Mark Thatcher, 'European Commission Merger Control: Combining Competition and the Creation of Larger European Firms' 53 (2014) European Journal of Political Research 443, 451.

initial notification of a transaction and the final decision may be much longer.[88] The reason is threefold. First, Phase One will commence only on receipt of all the relevant documents and materials which are required pursuant to Article 23.[89] However, the Article 23 submission requirement has proved to be a difficult one for merging parties to fulfil. In all 29 transactions that were either conditionally approved or rejected by MOFCOM, only two successfully submitted all the required documents and materials at the first attempt.[90] This high re-submission rate suggests that review of most transactions would have commenced earlier, but were delayed at the very early stage of the process. The delay in relation to the re-submission can be substantial, for example, in *MediaTek/MStar*, the gap between initial and final submissions was two months.[91] Second, MOFCOM frequently extends the time limit and brings the review process into Phase Three. In 21 out of 29 transactions, there was a request for extension made by MOFCOM. Since MOFCOM is the sole department that decides if a concentration can be implemented, the parties to the transaction will most certainly

---

[88] Since only the names of the parties to an unconditionally approved transaction are available to the public, the statistics and analyses here mainly focus on transactions which did not receive unconditional approval.

[89] Article 24, AML. This requirement is in line with the EU practice, see Article 10(1) EUMR. Moreover, in exceptional circumstances, the Commission also has the discretion under Article 10(4) EUMR – the so-called 'stop-the-clock' provision – to suspend proceedings in order to request additional information from the merging parties. Examples of the Commission stopping the clock include Case COMP/M.6992 – *Hutchison 3G UK/Telefónica*, Commission decision of 28 May 2014; Case COMP/M.7009 – *Holcim/Cemex West*, Commission decision of 5 June 2014; and Case COMP/M.7000 – *Liberty Global/Ziggo*, Commission decision of 10 October 2014. However, the use of this provision, which leads to the delay of the review process, may undermine the interests of the merging parties, see for example, Case T-145/06 *Omya v Commission* [2009] ECR II-145.

[90] These two transactions are *Uralkali/Silvinit* (2011) MOFCOM Notice No. 33, http://fldj.mofcom.gov.cn/article/ztxx/201106/20110607583288.shtml; and *Novartis/Alcon* (2010) MOFCOM Notice No. 53, http://fldj.mofcom.gov.cn/article/ztxx/201008/20100807080639.shtml.

[91] *MediaTek/MStar* (fn 34). Nonetheless, it is announced by MOFCOM that the Measures on Notification of Concentration of Undertakings is currently under revision, and one of the notable changes is the establishment of an information feedback mechanism before case filing, which provides: 'Where the notification documents and/or materials are not complete or does not satisfy the conditions as provided in these Measures, MOFCOM should inform the notifying party of all the contents that should be supplemented and/or corrected within five working days. Where MOFCOM fails to inform the notifying party within the above time limit, the notification should be deemed as being officially accepted as of the date, on which MOFCOM receives the notification documents and/or materials.' Lefu Xu, 'Measures on Notification of Concentration of Undertakings' Workshop on Procedural Matters in Merger Investigations, EU-China Competition Week, 22 October 2015, http://www.euchinacomp.org/index.php/competition-weeks?id=481. This new change is in line with the EU practice, which

agree to such request.[92] Third, for the same reason, in cases where merging parties have not reached a desirable outcome with MOFCOM concerning the possible remedies, or MOFCOM simply does not finish its review on time, the parties to the transaction are encouraged to withdraw their filings and make new filings.[93] In *WD/HGST*, five days before the expiry date of Phase Three, after which the transaction could be implemented regardless of MOFCOM's decision, it was said that Western Digital voluntarily withdrew the filing on the ground that there was a material change concerning the transaction.[94] The parties filed again only six days later, and the review went through Phase Two in the second round, making the total review time 297 days.[95] In *MediaTek/MStar*, the parties and MOFCOM failed to reach a consensus after several rounds of negotiations with regard to possible remedies to remove competition concerns. The parties withdrew in Phase Three and filed again three weeks later. The second round review also went through all three Phases, and the final review time was 416 days, the longest to date in the AML history.[96] These serious delays significantly undermined the commercial rationale underlying the merger transactions.

The delay is caused partially by the lack of MOFCOM manpower, which is badly understaffed compared with other merger review agencies in large jurisdictions. The Anti-Monopoly Bureau of MOFCOM, responsible for reviewing around 200 cases each year,[97] only has approximately 30 staff,[98] and unlike NDRC and SAIC, MOFCOM's local agencies are not involved in the merger review process. Whilst the Simple Cases Rules were adopted to speed up the process, its operation may not be as simple as it appears. For example, in Articles 3 of the Simple Cases Rules, exceptions

---

[92] As discussed in the preceding chapter, multiple mandates of MOFCOM make merging parties reluctant to challenge its decisions. See fn 182, Chapter 4.
[93] Deng and Huang (fn 19) 5.
[94] *WD/HGST* (fn 32).
[95] *Ibid.*
[96] *MediaTek/MStar* (fn 34).
[97] China.org, 'Official: China's Anti-Monopoly Enforcement 'Not Selective'', 11 September 2014, at http://www.china.org.cn/business/2014-09/11/content_33490663.htm.
[98] Deng and Huang (fn 19) 1; Yong Huang and Zhiyan Li, 'An Overview of Chinese Competition Policy: Between Fragmentation and Consolidation' in Adrian Emch and David Stallibrass (eds.) *China's Anti-Monopoly Law: the First Five Years* (Kluwer Law International 2013) 9.

which exclude the application from the fast-track procedure are provided. Pursuant to these exceptions, concentration which has potential adverse influence on 'national economic development'[99] would not be deemed to be a simple case.[100] Moreover, MOFCOM is allowed to take into account new circumstances under which the fast-track procedure would not be applicable.[101] The vagueness of this provision and the non-exhaustive nature of the list of exceptions provide MOFCOM with a legal basis to intervene in a particular transaction, which would otherwise be deemed a simple case, so rendering the actual impact of the procedure on mitigating delays uncertain.

The second problem with MOFCOM's merger review is the opacity of its decision-making. Compared with its early decisions, which are extremely short and over-simplified, MOFCOM has begun to provide more information in its recent decisions.[102] As with its analyses of relevant products and markets, and the assessment of the competitive effects, which still lack appropriate depth, any information with regard to its decision-making process is largely general. In its published decision, there is always a similar sentence stating that during the review process, MOFCOM has obtained opinions and information concerning the definition of relevant market and current market structure from 'relevant' government departments, trade associations, upstream/downstream and competing undertakings. This consultation can take various forms. Mostly, information is obtained through organising symposiums;[103] in 3 cases, MOFCOM conducted surveys of competing undertakings and consumers,[104] and in 2 conducted telephone interviews.[105] In addition, independent third parties such as

[99] This provision adheres to Article 27(5) of the AML, which states that competition agency shall consider 'the influence of the concentration of business operators on the national economic development' in the merger review process.
[100] Article 3(5), Provisional Rules on the Standards Applicable to Simple Cases of Concentrations of Business Operators.
[101] *Ibid*, Article 3(6).
[102] Deng and Huang (fn 19) 4.
[103] For example in *Mitsubishi Rayon/Lucite* (2009) MOFCOM Notice No. 28, http://fldj.mofcom.gov.cn/article/ztxx/200904/20090406198805.shtml.
[104] *Panasonic/Sanyo* (2009) MOFCOM Notice No. 82, http://fldj.mofcom.gov.cn/article/ztxx/200910/20091006593175.shtml; *Thermo Fisher/Li Fei* (2014) MOFCOM Notice No. 3, http://fldj.mofcom.gov.cn/article/ztxx/201401/20140100461603.shtml; and UTC/Goodrich.
[105] Panasonic/Sanyo and Novartis/Alcon.

consulting organisations also participated to verify the data provided by the filing parties[106] or to conduct quantitative analyses.[107] Other than this general summary, MOFCOM has never stated what the 'relevant' government department, organisations or interviewees from which it sought information and opinions specifically were, and what kinds of opinions and information were actually obtained.

Such a consultation process, which forms another reason for serious delay, is in fact indispensable in many cases, since it is unrealistic to expect MOFCOM to have all the necessary knowledge and expertise to conduct complex economic analyses independently concerning every sector. It nonetheless contributes substantially to the unpredictability of the review process, since competition practitioners involved in merger reviews have claimed that MOFCOM does not communicate the information it obtains during the consultation with the parties to the transaction.[108] To the merging parties, some information obtained from competing undertakings or third party organisations may adversely affect the final decision, but the opacity prevents them from confronting MOFCOM about the relevance or accuracy of the source. In addition, it is more easily foreseeable that MOFCOM regularly consult with the NDRC and the Ministry of Industry and Information Technology (MIIT), since these two ministries oversee the making of macroeconomic and industrial policies, but there is at the same time suspicion that MOFCOM might be influenced in making the final decision by their opinions which are based primarily on industrial policy rather than pure economics.[109] Since it is highly impractical to make all relevant information and materials in every case publicly available, the only way to still this suspicion – a reasonable one given the close relationship between the ministries – is to bring the

---

[106] *GE/Shenhua* (2011) MOFCOM Notice No. 74, http://fldj.mofcom.gov.cn/article/ztxx/201111/20111107855595.shtml.
[107] Thermo Fisher/Li Fei.
[108] Deng and Huang (fn 19) 10.
[109] *Ibid*.; D. Daniel Sokol, 'Merger Control under China's Anti-Monopoly Law' (2013) Minnesota Legal Studies Research Paper No. 13-05, http://ssrn.com/abstract=2207690, 14-15; Zhang (fn 19) 14; and Ping Lin and Jingjing Zhao, 'Merger Control Policy under China's Anti-Monopoly Law' (2012) 41 Rev Ind Organ 109, 128.

merging parties more closely into the review procedure and thus ensure the fairness of this process.[110]

4.2 Shared Jurisdiction of Competition Enforcement Leads to Conflicts and Incoherence

As a direct consequence of the conflicts among the three AMEAs during the drafting of the AML, a tripartite enforcement structure was introduced as a compromise.[111] A substantial weakness of China's competition system which hinders the development of competition enforcement is that 3 central AMEAs are not distinct and standalone government bodies, but are directly under respective larger ministries.[112] As three ministerial bodies, MOFCOM, NDRC and SAIC are charged with performing many other functions, and the priorities of the 3 bodies are largely different.[113]

When there is a divergence of tasks and limited resources, the enforcement agenda is always shaped to prioritise bureaucratic missions which yield the most 'profits' – policy control powers;[114] and as a consequence, resources would not be preferentially invested in those units which are not able to maximise this interest. In this sense, the enforcement of the AML is actually a drudgery which not only requires more resources than other jobs that the AMEAs are more familiar with, but also generates less positive impact on the development of the AMEAs, or more specifically, on the political prospects of the leaders of the AMEAs. Since at the local level, only the provincial-level AMEAs can enforce the AML, the bureaucrats certainly lack

---

[110] In the EU, in order to increase the transparency of competition proceedings, relevant parties have rights of access to commission files. This issue will be discussed in section 5.1, Chapter 7.
[111] See section 3.2, Chapter 3.
[112] Zhang (fn 19) 26.
[113] *Ibid*.; and Wang Xiaoye and Adrian Emch, 'Enforcement under China's Anti-Monopoly Law: So Far, So Good?' in Nicolas Charbit and others (eds) *William E. Kovacic; An Antitrust Tribute Liber Amicorum, vol. 1* (Concurrences 2012) 384. For the functions of each central AMEAs, see section 3 of Chapter 2 and section 3.2 of Chapter 3.
[114] Jing Huang, *Factionalism in Chinese Communist Politics* (Cambridge University Press 2000) 412; and Zhang (fn 19) 26.

intense enthusiasm to prioritise competition enforcement when all their local agencies, including those at municipal and county levels, are able to fulfil other designated responsibilities.[115] Competition enforcement officials within the AMEAs may frequently have to consider issues other than competition-related matters when enforcing the AML, or even handle cases that are not relevant to competition enforcement. For example, in local Price Bureau it is common for an official from the Anti-Monopoly Division to join other teams and probe into non-competition-related cases as the price regulator for certain key commodities under the Price Law.[116] Indeed, in practice, competition enforcement only constitutes a minor part of the day-to-day work of these AMEAs: at central level, there are only approximately 50 people who are handling anti-monopoly matters in these 3 ministries combined.[117] In contrast, although the European Commission also has a wide range of missions, competition enforcement has become one of its major priorities, and the Directorate-General for Competition has a total staff of approximately 900.[118]

A separation of jurisdiction of competition enforcement amongst various departments can also lead to different understanding of the law because they are each part of a distinct environment dealing with different tasks, and it is likely that when interpreting the law the 3 agencies would have different understanding of some

---

[115] For example, SAIC and local AICs concluded 37,219 counterfeiting cases in 2014, whilst during the same time the number of concluded AML cases is eight. See SAIC, 'Administrative Enforcement of Trademarks', 22 April 2015, http://sbj.saic.gov.cn/ztbd/xsbfsxyzn/gzgl/201504/t20150422_155391.html.

[116] As discussed above, the Price Law also has some competition-related provisions, for example, Article 14(1) prohibits price-fixing cartel. So there is a certain degree of overlap between the Price Law and the AML. In practice, NDRC is allowed to apply either the Price Law or the AML against price-fixing cartels, but this discretion may lead to serious rent-seeking behaviour since the maximum fine allowed under the Price Law is significantly less than what is provided for under the AML. There is a possibility that offending cartel members may persuade NDRC to apply the Price Law instead of the AML, although there is no evidence suggesting that this type of behavour has actually taken place. Nonetheless, for the sake of legal certainty, competition-related provisions in the Price Law should be removed completely.

[117] MOFCOM, 'The Information Office of the State Council Holds Press Briefing on Anti-Monopoly Enforcement', 11 September 2014, http://fldj.mofcom.gov.cn/article/i/201409/20140900733559.shtml.

[118] Alec Burnside et al., 'Making Life Simpler – China's Anti-Monopoly Bureau Has Reformed the Merger Review Regime', 30 July 2014, http://www.mondaq.com/x/331490/Antitrust+Competition/Making+Life+Simpler+Chinas+AntiMonopoly+Bureau+Has+Reformed+The+Merger+Review+Regime.

fundamental concepts, which would induce conflicts and incoherence.[119] This is a particular concern for the enforcement on restrictive agreements and abuse of dominant positions, where SAIC and NDRC share parallel enforcement responsibilities, the demarcation between which is based solely on whether a particular practice has a price element. However, such dichotomy is neither absolute nor mutually exclusive.[120] When a case triggers the concurrent jurisdiction of both agencies, it will in theory require these 2 agencies to work together in a coordinated fashion. However, as will be discussed later, the lack of coordination is in fact one of the most prominent problems that undermines the effective enforcement of the AML. In practice, under circumstances where the anti-competitive practices include both elements the enforcement actions seemed to be relatively random. On some occasions, one agency stepped in and handled all the illegal practices regardless of their nature. In the Qualcomm case,[121] there were several non-price-related anti-competitive practices involved, which could not justify NDRC's intervention. For example, although tying SEPs to non-SEPs eventually led to excessive patent royalties, the practice alone did not seem to have a price element. Similarly, Qualcomm's abusive practice of incorporating unreasonable conditions into its licensing agreement for the supply of baseband processors was also non-price-related. Theoretically, these two illegal practices should have been sanctioned by SAIC under Articles 6(1) and (2) of SAIC Rules on Prohibition of Abuse of Dominant Market Position, which prohibits business operators from 'tying products or imposing unreasonable trading conditions

[119] Xiaoye Wang, 'Highlights of China's New Anti-Monopoly Law' (2009) 75 Antitrust Law Journal 133, 144; Nathan Bush, 'Constraints on Convergence in Chinese Antitrust' (2009) 54 The Antitrust Bulletin 87, 104; Yong Huang, 'Pursuing the Second Best: The History Momentum, and Remaining Issues of China's Anti-Monopoly Law' (2008) 75 Antitrust Law Journal 117, 125; and Zhang (fn 15) 12.

[120] Xinzhu Zhang and Vanessa Yanhua Zhang, 'New Wine into Old Wineskins: Recent Developments in China's Competition Policy against Monopolistic/Collusive Agreements' (2012) 41 Rev Ind Organ 53, 66.

[121] See *Qualcomm Incorporated* (fn 53).

without justifiable cause'. In addition, the newly adopted IPR Rules also make it clear that these IPR-related violations fall under SAIC's jurisdiction.[122]

On other occasions, one agency intervened and dealt with the practices that fell within its scope of responsibility while leaving the other practices untouched. In November 2012, SAIC's local agency in Hunan Province, Hunan AIC, imposed fines of CNY 1.7 million on insurance industry associations and insurance companies in 4 cities over monopoly agreements.[123] The Hunan AIC found that these agreements prevented cross-regional sales of insurance by dividing the sales market among participating companies. In addition, they stipulated a discount ceiling on new automobiles insurance of 5%. Hunan AIC concluded that the agreements were in breach of Article 13(3) of the AML, which prohibits the division of the sales market, and made no reference to the illegal practice of setting discounts.[124] A month later, in a different city of the same province, the Price Bureau of Hunan Province imposed penalties of CNY 2.19 million on an insurance cartel over price fixing.[125] The cartel was led by the Loudi Insurance Industry Association and made up of 11 insurance companies and 1 insurance broker. Each member had signed cooperation agreements with the Association, which divided the sales market among the members. The members also agreed collectively to apply a 5% discount to all automobile insurances. Whilst the price fixing was penalised, the practice of market allocation was ignored.

Given the proximity of time and propinquity of locality and the very close similarity of facts in these cases, there is every likelihood that the two AMEAs – Hunan AIC and Hunan Price Bureau – were fully aware of the investigations conducted by each other, yet were unwilling to be involved in the same case because they feared the other agency might 'steal the show'.[126] Such method of enforcement may send the

---

[122] Articles 9 and 10, IPR Rules.
[123] Official decisions available at http://www.saic.gov.cn/zwgk/gggs/jzzf.
[124] *Ibid*.
[125] Xinhua News Agency, 'First Monopoly Case Sanctioned in Hunan Province', 28 December 2012, http://www.gov.cn/jrzg/2012-12/28/content_2301393.htm.
[126] The competition between SAIC and NDRC will be discussed in the next section.

wrong signal to potential perpetrators and the general public who are unfamiliar with the AML and may conclude that the unpunished practices are unobjectionable. In this sense, enforcement will be more effective if one agency takes over the responsibilities from the other, as did NDRC in the Qualcomm case, although it is not strictly in line with current law.

In addition, this incoherent division of antitrust jurisdiction may worsen the application of the leniency programme, the legal basis of which is provided by Article 46 of the AML. Since NDRC and SAIC each adopts provisions regarding its own leniency programme,[127] companies seeking to report illegal practices and benefit from the leniency programme will have to correctly identify the nature of their conducts and then reach the corresponding AMEAs. However, this has already proven not to be an easy task even for the AMEAs themselves. Additionally, the AMEAs are silent as to whom the whistle-blower should go if the monopoly agreement contains both price-related and non-price-related elements. The lack of transparency and predictability potentially deters those companies that would otherwise apply for leniency and endangers the effectiveness of this policy.[128]

4.3 Lack of Coordination amongst Government Departments and the AMEAs

The failure of the AML and its implementing rules to address concrete guidance on the allocation of enforcement responsibilities leads to random application of laws. Even worse, since the AMC is not functioning as expected, competition enforcement is not accompanied by satisfactory cooperation and coordination amongst ministries involved and the AMEAs.

The AMC is supposed to be a superior authority to supervise enforcement activities and coordinate conflicts between AMEAs. However, as its everyday

---

[127] See respectively Article 14 of NDRC Procedural Rules on Administrative Enforcement against Price Monopoly; and Article 20, SAIC Procedural Rules on the Investigation and Handling of Cases relating to Monopoly Agreements and Abuses of Dominant Market Position.

[128] Andrew Eichner, 'Battling Cartels in the New Era of Chinese Antitrust Enforcement' (2012) 47 Texas International Law Journal 588, 613.

administrative work is handled by the Anti-Monopoly Bureau of MOFCOM,[129] which is an AMEA under the supervision of the AMC itself, its neutrality as a coordinator is largely questionable. Moreover, what functions it actually has in practice is still unknown. It has kept a low-profile since the entry into force of the AML with only one guideline published.[130] In fact, considerable policy-making and guideline-drafting tasks have been performing by the AMEAs in practice. For example, in addition to the guidelines on anti-monopoly enforcement in automobile sector as mentioned above,[131] NDRC has been commissioned by the AMC to draft anti-monopoly guidelines on issues such as intellectual property rights, leniency programme, exemptions, suspension of investigation, and calculation of fines.[132] Moreover, when the competition investigation attracts the interests of some particular ministry, it is still not clear how the AMC can step in and resolve this kind of problem. This is especially the case when the AMC includes representatives from other ministries. For example, MIIT is one of the members within the AMC. When the investigation into the abuse of the dominance of China Telecom and China Unicom began[133] there were debates as to which rule should prevail, the AML or sector regulations of the telecommunication industry. But there was no evidence that the AMC ever addressed the issue and it is believed that, in practice, the commissioners rarely meet to discuss competition issues.[134]

On top of this, conflicts between NDRC and SAIC are intense.[135] It is widely perceived that, given all the defects of the status quo, the tripartite enforcement system

---

[129] 'The Ministry of Commerce shall undertake concrete work of the Anti-Monopoly Commission of the State Council […]' See the Circular of the General Office of the State Council on the Main Functions and Constituent Members of the Anti-Monopoly Commission of the State Council, 28 July, 2008.
[130] See the Guidelines on the Definition of the Relevant Market, at http://www.gov.cn/zwhd/2009-07/07/content_1355288.htm.
[131] See fn 50 above.
[132] *Ibid*.
[133] Xinhua News Agency, 'China Telecom and China Unicom Face Anti-Monopoly Investigation', 10 November 2011, http://news.xinhuanet.com/fortune/2011-11/10/c_111158620.htm. This case will be discussed in more detail in section 2.2, Chapter 6.
[134] Zhang (fn 15) 19.
[135] Angela Huyue Zhang, 'The Enforcement of China's Anti-Monopoly Law: An Institutional Design Perspective' (2011)56 Antitrust Bull. 630, 640-645.

in China will eventually be replaced by a more logical and preferable structure, namely a single body purpose built for to competition enforcement.[136] In response to a suggestion that urged China to consolidate its three central AMEAs and confer the sole enforcement authority upon a single enforcement agency, Xu Kunlin, the director general of NDRC, stated:

> 'Frankly, I personally think that those which were long divided would eventually be unified,[137] this is a general trend. If we chose to establish a single agency to enforce the AML when it was being drafted, its promulgation would have been postponed for many years. With the development of enforcement, we do need a consolidated, independent, authoritative and powerful enforcement agency in the long term.'[138]

If the AMEAs are to be consolidated, the normal practice in China when it comes to restructuring government bodies is to let the stronger departments absorb the weaker departments with similar mandates. As a result, NDRC and SAIC, two enforcement agencies afforded similar competition enforcement priorities, are placed in an intensely competitive situation. On the one hand, they each 'strive to achieve pre-eminence and greater appropriations',[139] and will therefore contend for the right to investigate when the case is simple or is likely to raise public concern. On the other, they will produce as many obstacles as they can to hinder the investigatory actions of the opposite side, and will be unwilling to take on complicated cases.[140] This hostile competition between the AMEAs clearly makes enforcement more time-consuming, wastes public resources, and possibly results in misfeasance.

---

[136] See for example, Xiaoye Wang and Adrian Emch, 'Five Years of Implementation of China's Anti-Monopoly Law – Achievements and Challenges' (2013) 1 Journal of Antitrust Enforcement 247, 268.

[137] This sentence comes from '*fenjiu bihe, hejiu bifen* [分久必合，合久必分]', an old Chinese idiom describing the trend of political evolution in ancient China. It literally means those which were long divided would eventually be unified, and those which were long unified would eventually be divided.

[138] MOFCOM (fn 117). The statement given by Xu Kunlin was in Chinese, and was translated by this author.

[139] William E. Kovacic and David A. Hyman, 'Competition Agency Design: What's on the Menu?' (2012) GW Law Fculty Publications & Other Works, Paper 628, http://scholarship.law.gwu.edu/faculty_publications/628, 8.

[140] Interviews with anonymous Chinese competition enforcement officials.

4.4 Inconsistency of Decision Making in Antitrust Cases

Foreign undertakings have been a target of Chinese government bodies and viewed as the main source of distortion of Chinese market competition since before the adoption of the AML, given that they possess 'huge advantages in technology, scale, capital, etc. It is easy for them to gain a competitive edge, even monopoly positions, in the market'.[141] After the entry into force of the AML, since the number of investigations involving foreign undertakings has grown rapidly in recent years, western media have been criticising the AMEAs for selective enforcement by hostile targeting of foreign undertakings whilst deliberately overlooking the anti-competitive practices of domestic undertakings.[142] Nonetheless, it is noteworthy that according to a public statement made by NDRC, as of 11 September 2014 it has conducted in total 335 anti-monopoly investigations, among which only 33 involved foreign undertakings.[143] Similarly, SAIC has initiated 39 cases, only 2 concerned foreign undertakings, namely, Tetra Pak and Microsoft.[144] Although it appears difficult to show statistically that the AMEAs have selectively enforced the AML, suspected bias becomes apparent in the use of enforcement discretion in some decisions made by NDRC, which is imbedded in the governmental culture[145] and worsened by the incorporation of multiple objectives.[146]

---

[141] Anti-Monopoly Office of the Fair Trade Bureau of SAIC, 'Anti-Competitive Behaviours of Multinationals in China and the Counter-Measures' (2004) 5 Industry and Commerce Administration 42. See also Daniel CK Chow, 'How China's Enforcement of Its Anti-Monopoly Law Poses Risks to Multinational Companies' 14 Santa Clara Law Review (forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2599518, 5.

[142] See for example, Jerin Mathew, 'China's Anti-Monopoly Unit Looks to Strengthen Medical Devices and Semi-Conductor Sector against Foreign Competition, 4 September 2014, at http://www.ibtimes.co.uk/chinas-anti-monopoly-unit-looks-strengthen-medical-devices-semi-conductor-sectors-against-1463938; and Richard Epstein, 'Controlling Chinese Antitrust Abuses against Foreign Patent Owners Requires US to Make Sound Decisions at Home', 1 August 2015, http://www.forbes.com/sites/richardepstein/2015/01/08/controlling-chinese-antitrust-abuses-against-foreign-patent-owners-requires-u-s-to-make-sound-decisions-at-home.

[143] China.org, 'Official: China's Anti-Monopoly Enforcement 'Not Selective'', 11 September 2014, at http://www.china.org.cn/business/2014-09/11/content_33490663.htm.

[144] MOFCOM (fn 117).

[145] See section 1.2, Chapter 2.

[146] See section 3.1.2, Chapter 3.

In the field of monopoly agreements, in 2013 NDRC issued 3 highly influential decisions, 2 of which concerned domestic undertakings. In February a case concerning vertical agreements which involved two powerful state-owned alcohol enterprises came to prominence in the Chinese media. Moutai and Wuliangye had a month earlier released new marketing policies to set the lowest retail price, and distributors who failed to comply would face heavy penalties.[147] However, after only a few days, on 15 and 17 January Moutai and Wuliangye respectively made similar statements which declared that as a result of investigation by NDRC and its local price bureau they undertook to comply with the AML and decided to rescind their newly adopted marketing policies.[148] On 22 February, the Price Bureau of Guizhou Province[149] and the Sichuan Provincial DRC[150] released their official decisions on Moutai and Wuliangye respectively. Penalties of CNY 247 million and CNY 202 million were imposed on Moutai and Wuliangye respectively for their RPM practices. Both undertakings received the lowest possible fine, namely 1% of their relevant sales revenue in the previous financial year,[151] because they cooperated actively in the investigation, and voluntarily returned to the affected distributors the illegal sanctions collected as penalties for non-compliance with the pricing policies.

A few months later, on 7 August 2013, 6 manufacturers of infant formula were fined a total of CNY 670 million for RPM, which is a breach of Article 14(2) of the AML.[152] The decision was concluded after an NDRC's investigation commencing in

---

[147] See fn 45 above.

[148] Sina, 'Moutai and Wuliangye Fined CNY 449 Million over Price Monopoly', 20 February 2013, http://finance.sina.com.cn/chanjing/gsnews/20130220/023014588388.shtml

[149] *Moutai* (2012) Xinhua News Agency, 'Moutai Fined CNY 247 million for Price Monopoly by Guizhou Price Bureau', 22 February 2013, http://news.xinhuanet.com/fortune/2013-02/22/c_124377781.htm.

[150] *Wuliangye* (2013) Sichuan Development and Reform Commission, 'Wuliangye Fined CNY 202 million for Price-Fixing', 22 February 2013, http://www.scdrc.gov.cn/dir25/159074.htm.

[151] It is worth noticing that only the official decision issued by Sichuan Development and Reform Commission made reference of the fines imposed to '1% of relevant sales revenue' of the undertaking, the relatively short decision from Guizhou Provincial Price Bureau stated only the amount of the fines. Therefore, the relation between fines on Moutai and the%age of its sales revenue is probably based on speculation, and is mainly referred to in media and academic articles.

[152] *Infant Milk Formula Case* (2013) NDRC, 'Biostime and other Infant Milk Formula Manufacturers Violated the Anti-Monopoly Law', 7 August 2013, http://xwzx.ndrc.gov.cn/xwfb/201308/t20130807_552992.html.

March into 9 infant formula manufacturers, Wyeth, Dumex, Mead Johnson, Meiji, Biostime, Beingmate, Abbott, FrieslandCampina and Fonterra, all of which are Chinese subsidiaries of foreign undertakings. NDRC found them to have engaged in RPM by instructing distributors and retailers to sell their products at a specific price set by the manufacturers. In return, compliant retailers and distributors would receive rebates whilst any not complying would suffer fines, reduced rebates, or restricted supply of products. As for penalties, 3 undertakings received full immunity; 4 faced fines corresponding to 3% of their annual sales revenue; and the remaining 2, Mead Johnson and Biostime, were fined respectively CNY 203.76 million (4% of annual sales revenue) and CNY 162.9 million (6%). According to the decision the varying penalty level was a result of the undertakings' degree of cooperation with the NDRC in the investigation, during which Biostime was accused of being highly uncooperative and of failing actively to implement corrective measures, whilst Mead Johnson, though also not fully cooperative, nonetheless actively adopted corrective methods. Although the NDRC decision did not provide any details as to what corrective measures had been taken by these companies, it is worth noting that several of them have been reported to have 'voluntarily' reduced retail prices for their products significantly prior to the publication of the NDRC's decision.[153] Therefore, there is a possibility that NDRC exerted direct price control by forcing the undertakings to reduce product prices, and in return granting confession-based concessions to them according to the level of compliance.[154] Although consumers can benefit from lower prices in the short term, intervention in undertakings' freedom to set price is an improper means to promote consumer welfare, since it is itself a distortion to competitive process and will undermine the order of market economy in the long term.

---

[153] Sina, 'NDRC Clears up Doubts concerning the Immunity of Wyeth: the First to Reduce Prices and Admit Faults', 8 August 2013, http://finance.sina.com.cn/chanjing/gsnews/20130808/022816379184.shtml.

[154] The unit responsible for price regulation within NDRC is not the Price Supervision and Anti-Monopoly Bureau, but the Price Department. However, the enforcement activities of these two units may be subject to influence of each other, as they answer to the same supervising official – Hu Zucai, Deputy Director of NDRC. See NDRC, 'Hu Zucai – Portfolio', http://huzucai.ndrc.gov.cn/zggz.

Only 5 days after the infant milk formula decision, NDPC and Shanghai DRC published the decision pursuant to an investigation into a Shanghai-based gold cartel.[155] In the decision, 5 retailers were accused of manipulating the price of gold in Shanghai through a pricing scheme created in cooperation with the *Shanghai Gold* and *Jewellery* Trade *Association.* The 5 retailers were fined aggregately CNY 10.09 million, equivalent to 1% of their annual sales revenue, for violating Article 13(1) of the AML. Responding to the inquiry as to why the lowest end of a 1% to 10% range was chosen, the NDRC claimed that it was because the retailers had been cooperative during the investigation by submitting 'confession reports' to NDRC in which they admitted taking part in the cartel and provided further details in the matter, and that they had ceased illegal price-fixing before the investigation.[156]

There is a certain degree of similarity in these 3 high profile cases. For example, all but two undertakings – Mead Johnson and Biostime – were reported to be cooperative and showed a willingness to implement corrective measures, and most received a reduced fine on the ground of a high degree of cooperation. Nonetheless, the decisions raise some questions concerning the consistency of NDRC's decision-making.

First, because there is no implemented rule available to govern the calculation of fines, it is left entirely to the AMEAs' discretion to evaluate the 'nature', the 'seriousness' and the 'duration' of the illegal conduct.[157] Yet NDRC and its local authorities have failed to include any useful information in the decisions as to how the adverse effects of the business practices were assessed and how a specific percentage of sales revenue was chosen. There is still some debate over whether vertical agreements that fix minimum resale price, as in the Moutai and infant formula cases,

---

[155] *Shanghai Gold Cartel* (2013) NDRC, 'Shanghai Golden Jewelry Association and A Number of Gold Retailers Fined for Implementing Price Monopoly', 13 August 2013, http://jjs.ndrc.gov.cn/gzdt/201308/t20130813_553441.html.

[156] Xinhua News Agency, 'NDRC Talks about the Gold Retailers Case', 12 August 2013, http://news.xinhuanet.com/2013-08/12/c_125156636.htm.

[157] Article 49, AML.

are *per se* illegal or whether adverse effects on competition must first be established.[158] The authorities seemed reluctant to touch upon this issue in their decisions, as no explicit reference to either a *per se* rule or a rule of reason is to be found. This debate notwithstanding, at least a proper assessment of the illegal conduct in question should have been presented in the decisions of the AMEAs, so that the undertakings involved would be made aware of how the severity level of their illegal practices were determined.

Second, when using its discretion, there is nothing wrong in a competition authority reducing fines or granting immunity. However, the factors that were taken into account to justify a reduction in fines remain elusive. In *Moutai*, *Wuliangye* and *Shanghai Goal Cartel*, all undertakings involved received reduced fines of 1% of their sales revenue owing to their 'high degree of cooperation'.[159] Yet when a 'high degree of cooperation' was considered a factor that led to fine reduction in the infant formula case, the undertakings which were highly cooperative still received fines as high as 3% of sales revenue.[160] Moreover, several of the manufacturers reduced the retail prices of their products during the investigation, but had this fact been considered as an element helping to reduce the fine? NDRC's failure to explain in detail how different levels of seriousness of conduct and different degrees of cooperation led to differences between fines makes some raise the question of whether there is actually a different treatment between domestic – or more specifically, SOEs[161] – and foreign undertakings.[162] This could be relevant since the government has been extremely

---

[158] For study on the treatment of RPM in China, see Shan Jiang and Daniel Sokol, 'Resale Price Maintenance in China: An Economic Perspective' (2015) 3 (suppl 1) Journal of Antitrust Enforcement i132.

[159] See fn 149, fn 150 and fn 155 above.

[160] See fn 162 above.

[161] See also *Zhejiang Insurance Cartel*, all of the three undertakings benefiting from the leniency programme were SOEs, and the original fines imposed on the two undertakings entitled to reduction were, again, 1% of the relevant revenue. Namely, the actual fines levied on these two SOEs were merely 0.1% and 0.55% of the relevant revenue respectively. See section 2.1.2 of Chapter 4 for case details.

[162] Zhan Hao and Ying Xue, 'NDRC Flexes Antitrust Muscles to Infant Formula Producers', http://www.chinalawvision.com/2013/07/articles/competitionantitrust-law-of-th/ndrc-flexes-antitrust-muscles-to-infant-formula-producers.

supportive of domestic infant formula manufacturers ever since the domestic milk scandal started.[163]

Third, whilst the AML empowers the AMEA to impose a fine of 1% up to 10% of the sales revenue in the previous year on business operators for reaching monopoly agreements or abusing their dominant positions,[164] there is an ambiguity as to the calculation of the 'sales revenue' and a divergence of the determination of what 'previous year' refers to. In *Wuliangye*, the fine was based on the 'relevant revenue' of Wuliangye;[165] in *Qualcomm*, 'sales revenue in China' of Qualcomm; and in *Zhejiang Insurance Cartel*, 'revenue of commercial car insurance' of the Zhejiang Branches of each insurance company.[166] It is clear that there is an inconsistency in determining whether the 'sales revenue' refers to the total revenue or the revenue of the relevant product of an undertaking, which clearly greatly affects the calculation of the final fine. In addition, it is still unknown how 'previous year' is defined. In a seminar organised during the Ninth EU-China Competition Week, an official from NDRC stated that '[w]e tend to understand the previous year as [']the previous year before the anti-monopoly enforcement agency make the penalty decision[']'.[167] This was the approach taken in *Zhejiang Insurance Cartel*, where the final decision was made in 2013, as a consequence the revenue in 2012 was used to calculate the fine. However, in *Qualcomm*, NDRC stated that the sales revenue referred to was Qualcomm's sales

---

[163] See BBC, 'China 'Fake Milk' Scandal Deepens', 22 April 2004, http://news.bbc.co.uk/1/hi/world/asia-pacific/3648583.stm.

[164] Articles 46 and 47, AML.

[165] *Wuliangye* (fn 150).

[166] See for example, *Zhejiang Branch of Min An Insurance Co., Ltd.* (2013) NDRC Decision No. 29, http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140902_624537.html. In *Zhejiang Insurance Cartel*, business operators involved were all branches of respective controlling insurance companies, which had no legal personality. Although generally the controlling company should be liable for any breach of law committed by its branch, NDRC considered that these branches qualified as 'other organisations' under the meaning of paragraph 1 of Article 12 of the AML, which reads 'business operator refers to a natural person, legal person, or any other organization that is in the engagement of commodities production or operation or service provision', and should therefore be sanctioned for the violations.

[167] Changqing Li, 'Investigation and Handling of Horizontal Monopoly Case in Insurance Industry', October 2014, http://www.euchinacomp.org/attachments/article/461/EN/3.%20Investigation%20of%20horizontal%20monopoly%20case%20in%20insurance%20industry.pdf.

revenue in China in 2013. According to the official decision, the investigation into Qualcomm's abuse of dominant position commenced in November 2013 and concluded in February 2015, it is clear that 'previous year' was treated neither as the fiscal year before the investigation started nor as the fiscal year before the final conclusion was made. Moreover, on some other occasions, the AMEAs did not provide information on the relevant revenue used to calculate the fine.[168]

In order to reduce legal uncertainty, limit discretion of the AMEAs, preserve consistency of decision-making, it is necessary for either the AMC or the relevant AMEAs to adopt clear guidance on the calculation of fines, and, in this regard, the European experience is highly relevant.[169]

4.5 The AMEAs lack Sufficient Investigatory Powers

In today's commercial world, as no single business can survive on its own, the actual boundary between markets can be blurred, and every little interest in a particular product may connect, directly or indirectly, to huge profits gained in different markets. It is, therefore, not difficult to envisage how desperately a businessman will try to protect his commercial interests, even those which seem to be small in scale, by whatever means he is able to employ. This is even more explicit in China, where most wealth is in the hands of a small group of people who inevitably enjoy some sort of governmental connections;[170] and at the same time, the Chinese government is the regulator of and, ironically, the player in commercial markets. Against this background, when trying to protect market competition with the AML, the AMEAs are confronted with one inherent institutional problem that impedes the effective competition

---

[168] See for example, *Infant Milk Formula Case* (fn 152).

[169] See section 5.4, Chapter 7.

[170] A study conducted by Peking University finds that Chinese households at the top 5% of all income earners took in 23% of the total, while the bottom 5% earned 0.1%. See 'In China, A Wide Gap between Rich and Poor' at http://www.upi.com/Business_News/2013/07/19/In-China-a-wide-gap-between-rich-and-poor/UPI-11571374248981. The close relationship between businessmen and government officials stems from China's traditional culture of *guanxi*, which will be elaborated in the next chapter.

enforcement at very early stage: the lack of sufficient investigatory powers to overcome local impediments.

In most cases concerning merely local undertakings, either private or state-owned, political pressures from superior government bodies are not likely to be major, as the commercial links between these bodies and local undertakings are generally indirect and weak. However, when facing constraints from local government during investigation at the local level, the AMEAs often do not have adequate means to cope with the situation, because the investigatory powers they enjoy are too limited. Several procedural rules have been issued to entrust the AMEAs with sufficient investigatory powers, for example, the Procedural Rules for Investigating and Handling Cases Relating to Monopoly Agreements and Abuse of Dominance Cases for SAIC, and Procedural Rules on Anti-price Monopoly Conduct for NDRC. However, in China sometimes there is a wide gap between what legal documents state on paper and how they are implemented in practice, especially when the interests of local undertakings will be harmed by state-formulated rules.[171] Generally, effective performance of investigation would always be realised only with the assistance and cooperation of some other government bodies at local level.

In 2013 an undertaking in Guangdong Province was accused of abusing its dominant position in the river-sand[172] exploitation market in Qujiang District of Shaoguan City by charging unfairly high prices.[173] The case was brought to the competition agency, the Price Bureau of Guangdong Province, upon a complaint filed with the Provincial Government of Guangdong alleging that the construction of a motorway across the region near Qujiang was delayed as a consequence of significant increase in the river-sand price. Although the actions of the competition agency were

---

[171] Shahid Yusuf, Kaoru Nabeshima and Dwight H. Perkins, *Under New Ownership: Privatizing China's State-Owned Enterprises* (Stanford University Press 2006) 85-86.

[172] River-sand is one of the basic raw materials for the production of concrete.

[173] *Guangdong River Sand Case* (2013) Guangdong DRC, 'Price Bureau of Guangdong Province Investigates Price Monopoly Conduct by River Sand Undertaking', 4 September 2013, http://www.fzb.gd.gov.cn/sofpro/otherproject/text/content.jsp?info_id=10848. The details of this case were mainly obtained through interviews with anonymous competition officials.

backed by a direct order from the provincial government, the investigation did not go as smoothly as expected. It took a much longer for the agency to obtain all the information it needed, mainly because the local government of Qujiang was unusually un-cooperative with the agency and protective of the monopolist undertaking during the investigation. At the same time, the agency did not have adequate means to cope with the situation. It was believed that the reason that the case was able to be concluded was only because one of the high-ranking officials at the Price Bureau used his own personal connections to persuade the local government to co-operate. The use of connections rather than legal means may be a time-efficient solution where more powerful implementing rules and meaningful coordination between government bodies are lacking, but it is fundamentally contrary to the rule of law.

The local government's reluctance to cooperate in this case might also be a result of a possible abusive exercise of administrative power. In China, the extraction of river-sand is a business that can only be legitimately run when a license is granted to an undertaking by the local government. However, the bidding process concerning the grant of license is not always transparent enough to guarantee compliance with relevant laws, including the AML. Investigation into the illegal practice of the river-sand undertaking would inevitably trace back to the conferral of its license at the very beginning, and lead to the exposure of the illegal exercise of administrative power on the part of the local government.

The AMEA's vulnerability at local level mainly results from there being no rule to protect the investigative powers of the AMEAs from intervention by local government, and the governmental structure – which is largely based on rule of man rather than rule of law – dictates that it is extremely difficult if not impossible to hold local government accountable for hindering an ongoing competition investigation. A second issue is the close link between local government and local enterprises, which will be the topic of discussion for the next section.

4.6 The Difficulty of Tackling Administrative Monopoly

The prohibition of administrative monopoly is included in Chapter V of the AML.[174] Administrative monopoly refers to the abusive exercise of administrative power of government departments in relation to the supervision and regulation of economic activities that have the effect of eliminating or restricting competition.[175] The causes of administrative monopoly are complicated, but generally include government's far-reaching power in resource allocation, government's financial reliance on tax revenue generated by local undertakings, and the lack of transparency and supervision in government's decision making. It was recognised at the Third Plenary Session of the 11th CPC Central Committee that the over concentration of authority had been a 'serious weakness' of the economic administration system. Therefore the economic supervision power should be decentralised and devolved to local levels, where local enterprises should be allowed to enjoy more managerial

[174] Article 3 of the AML provides the definition of 'monopolistic conducts': '(1) monopolistic agreements among business operators; (2) abuse of dominant market positions by business operators; and (3) concentration of business operators that eliminates or restricts competition or might be eliminating or restricting competition.' In addition to this three basic areas of regulation, Article 8 further prohibits the abuse of administrative powers to eliminate or restrict competition – the so-called administrative monopoly. Following a literal interpretation of Articles 3 and 8, abuse of administrative power to eliminate or restrict competition is not deemed a 'monopolistic conduct', therefore the term 'administrative monopoly' does not seem to be absolutely accurate. Nonetheless, since the term is widely used in literature, this thesis will use 'administrative monopoly' to refer to the abuse of administrative powers to eliminate or restrict competition.

[175] The AML does not define administrative monopoly. Instead, it provides a list of governmental actions which constitute abuse of administrative power. See Articles 32 to 37. It is noteworthy that a few scholars argue that administrative monopoly includes both industry monopoly and regional monopoly. See for example, Youngjin Jung and Qian Hao, 'The New Economic Constitution in China: A Third Way for Competition Regime?' (2003) 24 Nw J. Int'L L. and Bus. 107, 113; Jacob S. Schneider, 'Administrative Monopoly and China's New Anti-Monopoly Law: Lessons from Europe's State Aid Doctrine' (2010) 87 Washington University Law Review 869, 871; and Changqi Wu and Zhicheng Liu, 'A Tiger without Teeth? Regulation of Administrative Monopoly under China's Anti-Monopoly Law' (2012) 41 Rev Ind Organ 133, 135. Nonetheless, the wording of Article 8 and Chapter V of the AML indicates the illegality of the abuse of administrative power; however, an industry monopoly is a legitimate economic policy implemented by the state for the purpose of preserving public interests. It is by nature fundamental different from regional monopoly, and is excluded from the framework of the AML. Therefore, industry monopoly should be regarded as 'state monopoly' instead of administrative monopoly. See Gordon Y.M. Chan, 'Administrative Monopoly and the Anti-Monopoly Law: an Examination of the Debate in China' (2009) 18 Journal of Contemporary China 263, 264. For the purpose of this thesis, only regional monopoly will be considered in this section.

autonomy and the law of value should be appreciated.[176] As a consequence, the traditional planned economy was transformed to embrace elements found in the market economy, such as market regulation and supply-demand relationship.[177] With the gradual market and price liberalisation, incentives to pursue profits grew dramatically, as did the non-state sector.[178] Finally, in 1992, the establishment of a socialist market economy where market forces rather than government planning are the core in the allocation of resources, became the essential goal of economic reform. Since then competition has become an integral part of China's economic development.[179]

However, the decentralised feature of Chinese economy induced serious problems of local protectionism. During Mao's era, local self-sufficiency – or autarky – was advocated for defence purpose, since the dispersal of key industries would ensure the ability of China to counterattack even if large parts of the country were occupied.[180] Local self-sufficiency led to duplicated industrial infrastructure being built in almost every province in disregard of regional characteristics, and this caused serious excess capacity.[181] Due to decentralisation of economic development, local governments – which had increasing supervisory power over local economy – have had a tendency towards protecting local enterprises from the competition of a large number of similar out-of-province undertakings. They cause the fragmentation of Chinese market.[182]

---

[176] See the Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China, 22 December 1978, http://www.people.com.cn/GB/shizheng/252/5089/5103/5205/20010428/454803.html.

[177] Part IV and V of the Decision of the Central Committee of the Communist Party of China on Reform of the Economic System, adopted at the Third Plenary Session of the 12th Central Committee of the Communist Party of China on 20 October 1984, http://www.people.com.cn/GB/shizheng/252/5089/5104/5198/20010429/467454.html.

[178] Youngjin Jung and Qian Hao, 'The New Economic Constitution in China: A Third Way for Competition Regime' (2003) 24 Northwestern Journal of International Law & Business 1, 7.

[179] *Ibid*.

[180] Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge University Press 2005) 109.

[181] It was noticed that in 1987, 80 factories in 21 provinces produced refrigerators, over 100 factories in 26 provinces produced televisions and 300 factories in 28 provinces produced washing machines. World Bank, 'China – Internal Market Development and Regulation', 17 March 1994, http://documents.worldbank.org/curated/en/1994/03/698509/china-internal-market-development-regulation, 4.

[182] Jung and Hao (fn 175) 15.

The inclusion of administrative monopoly in the AML is certainly a revolutionary step forward, given the fact that it is one of the major sources of monopoly in China that has never been seriously confronted.[183] However, though evidence of administrative monopoly could be easily gathered as government resolutions are in most cases documented in either written or electronic form, rather than in the form of secret meetings, the performance of enforcement against administrative monopoly since adoption of the AML has been negligible and yielded few successes.[184] Maybe this could have been predicted, for the Chinese government has always been anxious that exposure of government wrongdoing could send the wrong message to society and potentially weaken the authority of the government. The inclusion of this chapter does show that the government is fully aware of the need to address prohibition of administrative monopoly in the first ever competition law in China, yet the enforcement against administrative monopoly is unlikely to be effective under China's current bureaucratic structure in the near future for 2 main reasons.

First, local protectionism is essentially a political and fiscal – instead of legal – problem due to the devolution of political and economic powers to local governments. Since ancient times, China has had a traditional problem with enforcing centrally-formulated orders and policies at the local level.[185] The areas subject to central government control are relatively broad, and it is unrealistic for it to supervise the implementation of all policies. It therefore creates room for local government merely to follow those orders that best serve its interests. Policies with restrictive nature made by the central government, such as prohibition of administrative monopoly, are likely to be met with fierce opposition at local level; so are central agencies investigating at

---

[183] Zhengxin Huo, 'A Tiger without Teeth: the Antitrust Law of the People's Republic of China' (2008) 10 Asian-Pacific Law & Policy Journal 32, 37. See also fn 148, Chapter 2.

[184] Shiying Xu and Baisha Zhang, 'Judicial and Administrative Remedies against Administrative Monopoly: Cases and Analysis' in Adrian Emch and David Stallibrass (eds.) *China's Anti-Monopoly Law: the First Five Years* (Kluwer Law International 2013) 274.

[185] Xinzhu Zhang and Yanhua Zhang, 'The Antimonopoly Law in China: Where Do We Stand?' (2007) 3 Competition Policy International 185, 199. For a general discussion on the relation between central and local governments, see Suli Zhu, 'Federalism' in Contemporary China – A Reflection on the Allocation of Power between Central and Local Government' (2003) 7 SING. J. INT'L & CoMP. L. 1.

the local level. In China, local governments are financially dependent on tax income from local undertakings; the better performance of these undertakings might to a certain extent translate into the better performance of the governments. Before meaningful fiscal reform is introduced to address the local government revenue shortfall, local government will always have the momentum towards adopting specific regulations to protect the interests of these undertakings and, accordingly, its own.[186] In the case concerning the preferential discount on tolls for local passenger vehicles,[187] the discriminatory treatment was adopted by the local government to the detriment of competition in the Hebei passenger vehicle market, and it effectively enhanced the performance of local passenger vehicle undertakings. Clearly, proper enforcement of the AML against local protectionism fundamentally conflicts with local governments' interests.[188]

Second, the mechanism adopted regarding enforcement of the AML against administrative monopoly is largely ineffective and creates limited deterrence. Local AMEAs, namely provincial DRCs and provincial AICs, are in fact administratively and financially controlled by provincial governments. They answer to their administrative leaders within the bureaucratic system of provincial governments, rather than their professional leaders at the central level. When affiliated department of the provincial government, municipal or county government abuse its administrative powers, there is a possibility that the provincial AMEAs will be facing enormous pressures if the anti-competitive practice is in fact carried out under the order of or is accord with the interests of the provincial government. Though it is not orthodox, the fact is that the bureaucratic structure and the lack of independence of local AMEAs make it impractical to disobey and apply the AML against the will of their administrative supervisors.

---

[186] Thomas Cheng, 'Competition and the State in China' in Daniel Sokol, Thomas Cheng and Ioannis Lianos (eds.) *Competition and the State* (Stanford University Press 2014) 171.
[187] See fn 55 above.
[188] Zhang and Zhang (fn 185) 199.

When anti-competitive governmental resolutions are directly implemented by the provincial government, the central AMEAs will intervene instead of their provincial AMEAs.[189] However, because of the administrative hierarchy in China, central AMEAs may as well feel reluctant to probe into the case. Under the Civil Servant Law,[190] China establishes a sequence of civil servant posts, which are divided into five levels, and each level is further divided into chiefs and deputies.[191] According to this administrative hierarchy, the three central AMEAs are all ministerial-level departments, whilst their responding anti-monopoly units, namely, the Anti-Monopoly Bureau of Ministry of Commerce, the Price Supervision and Anti-Monopoly Bureau of NDRC, and the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of SAIC, are all bureau-level departments. As a logical consequence, central AMEAs are required by the AML to bring enforcement actions against local government bodies with equal or even higher administrative ranks. As China does not currently have a government structure based on a clearly defined rule of law,[192] such institutional arrangements puts the AMEAs in an uncomfortable and awkward position. It is difficult to think of a single reason why central AMEAs would risk offending these higher-ranking departments when they do not even have enough investigatory power to confront these departments at the local level.

According to Article 51 of the AML, when dealing with abuse of administrative power, AMEAs are not allowed to directly punish the department in question; they can only put forward advisory suggestions on possible remedies to the superior authorities of the department in question. When AMEAs are certainly not capable of overseeing the work of the superior authorities, there is no supervising mechanism in place to ensure the superior authorities that receive the suggestions are as neutral as they should

---

[189] See for example, Article 3, Procedural Rules on the Prohibition of Abuse of Administrative Power to Eliminate or Restrict Competition.
[190] Article 15, Civil Servant Law of China.
[191] *Ibid*., Article 16. The five levels are: state level; provincial and ministerial level; department and bureau level; county and section level; and township and sub-division level.
[192] Bruce M. Owen and others, 'China's Competition Policy Reforms: The Antimonopoly Law and Beyond' (2008) 75 Antitrust Law Journal 231, 257.

be in dealing with disputes involving their subordinate departments.[193] In fact, in all four administrative monopoly cases concluded by NDRC there has been no further update on what penalty, if any, was imposed on the relevant officials. The lack of an impartial third-party adjudicator renders the enforcement against administrative monopoly largely ineffective.[194]

China's unique political structure and its incomplete economic transition dictate that administrative monopoly cannot be eradicated, since the government is and will continue to be substantially involved in resource allocation although 'allowing [the] market [to] play a decisive role' has been firmly reiterated by the Xi administration.[195] At the same time, rampant distortion of market competition by government bodies determines that administrative monopoly cannot exist unnoticed, and it is therefore necessary for the government to take a stand and prohibit it by law, even if it is merely a political gesture. Anti-competitive administrative practices such as local blockades and protectionism were initially addressed in Chinese legislation over thirty years ago, and numerous rules have incorporated provisions on the prohibition of administrative monopoly.[196] However, decades of enforcement yielded scarce success. It should be clear enough that the way in which the government tackled administrative monopoly, namely by empowering a superior government body to make rectification orders,[197] was simply a failure. There was no feasible mechanism in place to ensure that penalties on government officials were commensurate with the violations, and as a consequence they could not be effectively deterred.[198] The AML nonetheless inherited the old

---

193 Wang and Emch (fn 136) 266.
194 Cheng (fn 186) 184.
195 See the Decision on Major Issues Concerning Comprehensively Deepening Reforms, adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China on 16 November 2013, http://www.china.org.cn/china/third_plenary_session/2013-11/16/content_30620736.htm.
196 See section 3.5, Chapter 2.
197 For example, Article 30, AUCL stipulates 'where a government or its subordinate departments, in violation of the provisions of Article 7 of this Law, restrict people to purchasing commodities from a designated business operator or impose limits on other business operator's rightful operation activities or the normal circulation of commodities between different areas, the supervision and inspection department at higher levels shall order them to make corrections'.
198 Dan Wei, 'Antitrust in China: An Overview of Recent Implementation of Anti-Monopoly Law' (2013) 14 European Business Organization Law Review 119, 122.

mechanism with no material enhancement.[199] It is therefore not surprising that the AML fails to produce any meaningful results in tackling administrative monopoly.

5. CONCLUSION

Although the competition system of China is comparatively young and immature, it has nonetheless become one of the major competition jurisdictions in the world as a result of China's great importance in the global economy. Competition policy is an increasingly influential tool to protect market competition and preserve market order, as the AMEAs grow to be active in many aspects of the Chinese economy. However, it should be noted that although cases involving large multinational undertakings have certainly raised public attention and awareness, and that the knowledge and experience of competition officials are constantly accumulating, the current structure of enforcement and the work carried out by AMEAs are not without problems.

The extremely lengthy process and opacity of merger control, and the inconsistency of decision-making in antirust are caused by a number of factors. The incorporation of multiple objectives creates room for the AMEAs to abuse their administrative powers and balance the interests of various interest groups, and the political tradition to conceal the exchange of interest from the supervision of the public since political interests take precedence over a transparent governmental decision-making process. The problematic allocation of jurisdictions and the lack of coordination among the AMEAs directly results from the compromises made during the drafting of the AML. Had the conflicts not taken place, there would not have been the need to allocate jurisdiction and coordinate the enforcement activities among

[199] It is worth noticing that under Article 30 of the AUCL, SAIC is empowered to confiscate the illegal gains of the business operator benefited from the anti-competitive governmental action and to impose on it a fine amounting to one to three times the illegal gains. However, whilst the 2004 Draft AML also had a similar provision – Article 48 – and additionally granted competition agency, rather than the superior authority of the delinquent department, the power directly to order the department to cease anti-competitive action and impose administrative penalties on relevant officials, the enforcement method provided in the final AML is in fact regressive.

various AMEAs in the first place. If these problems of China's competition system are not properly solved, competition policy may create more distortions of the market structure than it prevents and hold back sustainable economic development in China.

However, the difficulties of conducting investigations at local level and tackling administrative monopoly are essentially not problems that can be completely solved by the AML alone. They are products of the decentralisation of political and economic powers, which led to the fragmentation of China's domestic market and the reliance of local government on local undertakings. Their resolution requires substantive fiscal and institutional reform. Similarly, as will be shown in the next chapter, the AML alone is not capable of effectively regulating market distortions caused by the SOEs. External assistance is necessary.

Chapter Six

Competition Policy and State-Owned Enterprises

1. INTRODUCTION

This chapter discusses the implementation of competition policy in the state sector, where the AML is still not able fully to function. It illustrates the conflict between the capitalist concept of competition and socialist concept of state control in China by studying the status quo of the state sector, the ineffective competition enforcement against SOEs, the poor corporate governance of SOEs, the complicated relation between competition and industrial policies, and the external tools used to remove the vested interests in China's state sector.

The previous chapters have identified several issues in need of special attention with regard to competition enforcement in China. Some are expected to be solved when the AMEAs and courts become more comfortable and sophisticated in applying the AML through increasingly frequent enforcement efforts. However, intense impediment is likely to be met when some other problems in relation to the implementation of competition policy are dealt with, and the application of the AML to SOEs is with no doubt the most intricate one amongst them.

As will be demonstrated later, the AML is applicable to SOEs, and there is a growing willingness for AMEAs to intervene when SOEs are involved in anti-competitive activities. However, although the AML does not explicitly lay down a distinction between enforcement against private undertakings and non-private undertakings, in practice it is difficult if not impossible to treat undertakings with diverse ownership equally since the doctrine of non-discrimination as found in EU competition law is largely missing in China's competition system. Generally, the reason to establish an SOE is that the government seeks either to rectify perceived

market failures, or to advance social objectives.[1] However, China's SOEs represent the core constituent part of the Communist ideology, and their existence is based mainly on political rather than economic considerations. State ownership of major enterprises creates incentives for the government to protect these enterprises from regulations that impede their performance.[2] As a consequence, such political proximity has made the outcomes of competition enforcement unsatisfactory. In light of the special characteristics of SOEs, the next section looks at the status quo of and competition enforcement in the state sector.

2. POWERFUL AND WELL-CONNECTED MARKET PLAYERS

2.1 SOEs in China's Economy

An intuitive benchmark for evaluating the significance of SOEs in Chinese economy is SOEs' share of GDP. However, given the complexity, and sometimes inconsistency, concerning the classification of SOEs,[3] there is no helpful official statistics to quantify their actual economic influence on China's economy. Statistics based on different calculation criteria and definitions of SOEs have resulted in divergence of final numbers. For example, in a report prepared by the Ministry of Finance, as of 2013 there were 155,000 'state-owned and state-controlled enterprises' in China excluding state-owned financial institutions with CNY 104.1 trillion worth of assets and 36.98 million employees.[4] However, according to the latest national economic census of China published in December 2014, which used data available as

[1] David Sappington and J.Gregory Sidak, 'Competition Law for State-Owned Enterprises' (2003) 71 Antitrust Law Journal 479, 515.
[2] David Gerber, 'Asia and Global Competition Law Convergence' in Michael Dowdle, John Gillespie and Imelda Maher (eds.) *Asian Capitalism and the Regulation of Competition towards a Regulatory Geography of Global Competition Law* (Cambridge University Press 2013) 3641.
[3] See section 1.2, Chapter 1.
[4] This is the first time an official report on the overall financial status of SOEs is published. See Ministry of Finance, 'National Final Accounts Statement of State-Owned Enterprises 2013', 28 July 2014, http://www.mof.gov.cn/preview/qiyesi/zhengwuxinxi/gongzuodongtai/201407/t20140728_1118640.html.

of 31 December 2013, there were 113,000 SOEs.[5] In the latter case, the term 'SOEs' merely refers to enterprises that are fully state-funded. Nevertheless, one important conclusion is undeniable: the share of the state-owned economy is shrinking rapidly. As compared with the second national economic census of 2008, the number of SOEs has dropped by 2.1% whilst the number of private enterprises has increased from 3.6 million in 2008 to 5.6 million (amounting to 68.3% of the total number of corporate enterprises) in 2013.[6]

Indeed, decades of economic reform have led to the continuous decline of the total number of SOEs and their dominance in China's industrial development. Between 1998 and 2010, SOEs' share in the total number of industrial enterprises fell from 39.2% to 4.5%, their share in total industrial assets from 68.8% to 42.4%, and their share in national employment from 60.5% to 19.4%.[7] Currently there has been a growing reliance on private enterprises and market-oriented incentives in China's transition economy, and the CPC's attitude towards private enterprises and entrepreneurs, which were regarded as class enemies in pre-reform era,[8] has been changing substantially. In one of the constitutional amendments passed in March 1999, the legal status of the non-public economy – including individual, private and foreign economies – was formally established. Article 11 stipulates that '[t]he non-public sectors of the economy […] constitute an important component of the socialist market economy'. Nonetheless, the current role of government in shaping economic outcomes and the significance of state ownership in economic development in China is largely unchallenged. Despite the growing share of the private sector in the Chinese economy, SOEs remain, as Premier Li Keqiang remarked, 'the prominent material and political

---

[5] National Bureau of Statistics, 'Communiqué on Major Data of the Third National Economic Census', 16 December 2014, http://www.stats.gov.cn/english/PressRelease/201412/t20141216_653982.html.
[6] State Information Center, 'Corporate Structure Improved, Market Vitality Promoted', 30 June 2015, http://www.sic.gov.cn/News/455/4883.htm.
[7] World Bank and Development Research Center of the State Council, *China 2030: Building a Modern, Harmonious, and Creative Society* (The World Bank 2013) 104.
[8] Bruce Dickson, *Red Capitalists in China: The Party, Private Entrepreneurs, and Prospects for Political Change* (Cambridge University Press 2003) 168.

basis of the development of the Communist Party and the state'.[9] In fact, the reform of the Chinese economy, and specifically that of SOEs, has made the elite's undertakings in certain sectors more powerful and their dominance more stable. It was stated by SASAC that the state would maintain absolute control over seven strategically important industrial sectors through SOEs.[10] The government will aim to increase the injections of state capital in these industries, and will seek to develop some 'backbone' SOEs into world-class corporations.[11]

Because of direct state control and prioritised state investment, some SOEs in these sectors are among the wealthiest in the world. Among the top 500 Chinese undertakings,[12] 293 are state-owned or state-controlled enterprises, the aggregate annual revenues of which account for 78.3% of the total revenue of all undertakings on the list.[13] Moreover, 3 SOEs are among the top 10 of 'Fortune Global 500'.[14] The business performance of these SOEs has substantially benefited not only from a number of government policies including favourable tax treatment and preferential status in government procurement market,[15] but also from financial support from

---

[9] Xinhua News Agency, 'Li Keqiang: Use the Dividends of Reform to Enhance the Vitality and Competitiveness of SOEs', 20 September2015, at http://news.xinhuanet.com/fortune/2015-09/20/c_1116618997.htm.

[10] These sectors are national defense, electrical power generation and grids, petroleum and petro-chemicals, telecommunications, coal, civil aviation, and waterway transportation. See the Guiding Opinions of the State-Owned Assets Supervision and Administration Commission on the Promotion of the Restructuring of State Capital and the Reorganisation of State-Owned Enterprises. Industries in which central SOEs operate are classified into three categories: key industries critical to national security and the economic lifeline, basic and pillar industries and other industries. China maintains sole ownership or absolute control over undertakings in key industries; maintains relatively significant control over backbone undertakings in basic and pillar industries; maintains necessary influence in other industries by acquiring stakes in key undertakings. See Xinhua News Agency, 'China Confirms Absolute Control over Seven Industries', 19 December 2006, http://news.xinhuanet.com/fortune/2006-12/19/content_5504591.htm.

[11] *Ibid*.

[12] State Council, 'List of Top 500 Chinese Undertakings 2015', 23 August 2015, http://www.gov.cn/zhengce/2015-08/23/content_2917905.htm. These undertakings concentrate mainly in the most important industries of China such as electricity, petroleum, railroads, aviation, telecommunications, and banking.

[13] *Ibid*.

[14] The three undertakings are: No. 3, Sinopec Group; No.4, China National Petroleum; No. 7, State Grid. See Fortune Global 2014, at http://fortune.com/global500.

[15] Andrew Szamosszegi and Cole Kyle, 'An Analysis of State-owned Enterprises and State Capitalism in China' U.S.-China Economic and Security Review Commission, October 26, 2011, http://www.uscc.gov/Research/analysis-state-owned-enterprises-and-state-capitalism-china, 2.

state-owned banks which provide them with easier access to credit, below-market interest rates on loans, and flexible repayment.[16] However, whilst the financial support gives SOEs considerable competitive advantages over their private counterparts, the most important factor giving rise to real competition concern in China is the government's vested interests in SOEs that lead to frequent political intervention.

2.2 Competition Enforcement against SOEs

Chinese SOEs are not to be taken simply as market players making profits and competing with other firms, they are sometimes created to achieve certain political objectives of the government. Neither are they to be seen as mere puppets of the government. They are combinations of interests, either common or conflicting, of numerous behind-the-curtains factions[17] known as 'families' which do not necessarily represent the government. Indeed, there are too many interests involved in the path towards enforcement against SOEs. When the expectations of society are raised because of the tendency that China is taking actions to correct anti-competitive practices of SOEs through the enforcement of the AML, the AMEAs are not given independent status to achieve the expected goals, and they are too weak and vulnerable to take on SOEs.

The moderate attitude of the AMEAs towards SOEs can be seen in the series of investigations into the telecommunications sector. In 2011, the Price Supervision and Anti-Monopoly Bureau of the NDRC initiated an investigation against China Telecom and China Unicom, together accounting for 90% of China's broadband business.[18] This was the first time SOEs in strategically important sector were investigated under the AML. The issue in NDRC's investigation was whether the two companies had

[16] Jin Zeng and Kellee Tsai, 'The Local Politics of Restructuring State-owned Enterprises in China' in Jean C. Oi (eds.) *Going Private in China: the Politics of Corporate Restructuring and System Reform* (The Walter H. Shorenstein Asia-Pacific Research Center 2011) 39.
[17] For general work on Chinese factions, see Jing Huang, *Factionalism in Chinese Communist Politics* (Cambridge University Press 2000).
[18] Xinhua News Agency, 'China Telecom and China Unicom Face Anti-Monopoly Investigation', 10 November 2011, http://news.xinhuanet.com/fortune/2011-11/10/c_111158620.htm.

abused their dominant position in broadband access and interconnection to eliminate competition in the downstream market.[19] In response to the news revealed by the national television broadcaster CCTV that NDRC had started an investigation into the two companies, a journal belonging to MIIT reported that 'China Unicom and Telecom say there is no basis' for the NDRC investigation.[20] Similarly, another article in an industry specific publication managed by MIIT stressed that the fact that 'in the market for Internet access providers China Telecom and Unicom have a dominant market position is not itself illegal'. [21] Although MIIT had not made any official announcement regarding this investigation, it is not difficult to see that MIIT was questioning the jurisdiction of the AMEAs in matters concerning the regulation of the telecommunications industry. Later, the investigation was suspended without penalties after the two undertakings committed to 'raising substantially their broadband speeds while further lowering broadband costs over the next five years'.[22]

In December 2012, complaints about tying practices of Ningxia branches of China Tietong, China Unicom and China Telecom were diverted from SAIC to the AIC of the Ningxia Hui Autonomous Region. Official investigation was initiated in June 2013. After almost two years, in May 2015 Ningxia AIC found that these 3 undertakings had abused their dominant positions in the internet service market by tying the sale of landline telephone services to the provision of fixed internet services. However, Ningxia AIC decided to suspend the investigations after all 3 undertakings gave certain undertakings. They committed to engage in 'self-correction' tasks,

---

[19] Yanbei Meng, 'The Uneasy Relationship between Antitrust Enforcement and Industry-Specific Regulation in China' in Adrian Emch and David Stallibrass (eds.) *China's Anti-Monopoly Law: the First Five Years* (Wolters Kluwer 2013) 260.

[20] Meng (fn 19) 260.

[21] Zhao Jin and Li Lei, 'Two Media Outlets belonging to MIIT Refute the Report on China Telecom and China Unicom's Suspected Monopoly Practices', 12 November 2011, http://finance.jrj.com.cn/tech/2011/11/12072611543388.shtml.

[22] Xinhua News Agency, 'China Telecom, China Unicom Pledge to Mend Errors after Anti-monopoly Probe', 2 December 2011, http://news.xinhuanet.com/english/business/2011-12/02/c_131285213.htm. For detailed analysis of this case, see Xiaoye Wang and Adrian Emch, 'Five Years of Implementation of China's Anti-Monopoly Law – Achievements and Challenges' (2013) 1 Journal of Antitrust Enforcement 247, 258-9.

provide training projects to the sales team, and prevent future tying practices; to publicise their commitment to allow consumers to choose products and services freely; and to ensure that requests of aggrieved consumers to cancel the tied landline telephone services would be approved.[23] In light of Article 45 of the AML, on which the decisions to suspend were based, Ningxia AIC stated in all of the 3 official decisions:

> 'The purpose of anti-monopoly enforcement is to prevent monopoly, protect competition, and safeguard consumer interests. The Administration considers that the party was highly cooperative during the investigation, and has already perceived the adverse nature of tying practices; the commitments and rectifying measures put forward are adequate to eliminate the negative effects of the illegal practices, the objectives of anti-monopoly enforcement are therefore achieved.'[24]

Following this line of thinking, it seems to suggest that punishment in any form will not be necessary as long as an undertaking is remorseful about carrying out anti-competitive practices and actively puts forward rectifying measures. This level of leniency has never been and will likely never be found in competition cases involving only private undertakings. A sceptical but somewhat plausible assumption is that there were local impediments involving in the investigation process, since it unusually took Ningxia AIC 2½ years from the acceptance of complaints to the suspension of investigations to reach conclusions on cases the facts of which were not even particularly complex.

In addition, representing the economic arms of the Chinese government, SOEs are often instructed to pursue certain goals, which can be economic, political, or social. Therefore, the success of an SOE is not merely measured by its financial performance but sometimes by political commitments. Since most managers of SOEs are party

---

[23] *Ningxia Branch of China Tietong (Group) Co., Ltd.* (2015) Ningxia AIC Decision No, 2, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201507/t20150715_158905.html; *Ningxia Brach of China United Network Communications Group Co., Ltd.* (2015) Ningxia AIC Decision No, 3, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201507/t20150715_158907.html; and *Ningxia Branch of China Telecom Co., Ltd.* (2015) Ningxia AIC Decision No, 4, http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201507/t20150715_158909.html.

[24] The remarks are translated by the author.

members, and loyalty and obedience rank higher than business performance when it comes to advancement of political careers, distortion of market orders may not be an issue of concern for managers of SOEs if an anti-competitive business strategy, albeit illegal, is able to realise these goals set by their superiors more readily. Given the overall lack of competition culture in China's state sector, and the liberal approach adopted by the AMEAs towards anti-competitive practices of SOEs, it seems that violation of the AML becomes a risk that SOEs are more than willing to take. In November 2010, the Wuchang branch of the Hubei Salt Group Company was investigated by the Hubei Price Bureau for tying the sale of washing powder to the sale of salt.[25] In this case, the branch compelled its salt distributors to purchase a certain amount of washing powder from it when they purchased salt. Its decision to sell washing powder was a direct result of a business plan formulated by its parent company – the Hubei Salt Group Company – which required all branches to 'develop [a] non-salt economy' by expanding their scale of operation.[26] In order to fully comply with this policy, the Wuchang branch aimed to raise the sale of washing powder by abusing its dominant position in the salt wholesale market, which gave it the market power to penetrate into the washing powder market. Although the practices were found illegal under the AML, no fine was imposed owing to the Wuchang branch's cooperation with the investigation, which was then suspended with several commitments made by the branch to rectify its business policy.[27]

When touching upon the issue of competition enforcement against large SOEs, what the government needs – assuming it wishes the AML to be applied to large SOEs – is an agency independent enough to mitigate the adverse influence coming from

[25] The distribution of salt in China is monopolised by China National Salt Industry Corporation and its wholly-owned provincial and municipal subsidiaries, for example, the Hubei Salt Group Company and its Wuchang branch in this case. See the Measures on the Exclusive Licensing for Table Salt. Since privately owned salt producers, which require quotas from the local salt industry management bureau legally to produce edible salt, are required by law to sell all the salt to state distributors, every salt company naturally holds a dominant position in the wholesale market for salt in the local area it serves.
[26] NDRC, 'Hubei Price Bureau Sanctioned Wuchang Salt Group Company for Tying', 15 November 2010, http://www.sdpc.gov.cn/fzgggz/jggl/zhdt/201011/t20101115_380425.html.
[27] *Ibid*.

these 'families'. However, as discussed in the previous chapter, it is unlikely that an enforcement agency which is independent of all other government bodies and interest groups is going to be established in the foreseeable future. The existing AMEAs are relatively vulnerable in front of SOEs. Most of the time, the AML seems to be merely a bargaining chip during political meddling: when agreements between government and offending SOEs are reached, and rounds of interest distribution are accomplished, the mission of the AML is complete. The end result is that SOEs become both arsonist and firefighter at the same time. Therefore, the outstanding issue is no longer about how to apply the AML correctly, but – as ironic as it sounds – how to bring the AML into the enforcement activities against SOEs, which still remain largely symbolic. If competition enforcement is not even about correcting and punishing anti-competitive practices in the first place, the discussion of the actual application of the substantive texts will be meaningless. The following sections analyse the factors that make SOEs different from private undertakings from a competition law point of view and protect SOEs from the effective intervention of competition law.

3. WEAK CORPORATE GOVERNANCE

On 18th September 2015, Premier Li Keqiang at a forum on deepening reform and development of SOEs urged market-oriented reform of SOEs since languid operating mechanisms and poor corporate governance had resulted in a decline of profits and loss of state-owned assets.[28] It is also considered that weak corporate governance leads to higher levels of corruption.[29] The advancement of corporate governance has

[28] Xinhua News Agency, 'Premier Urges Progress in SOE Reforms', 20 September 2015, http://news.xinhuanet.com/english/2015-09/20/c_134642631.htm. Apart from reiterating the importance of increasing SOEs' efficiency, Premier Li also stated that chronic loss-making 'zombie enterprises', which became burdens for the sustained growth of the economy, should be closed down.

[29] See Andrei Shleifer and Robert Vishny, 'Corruption' (1993) 108 The Quarterly Journal of Economics 599. The topic on corruption in China's state sector will be discussed later in section 5.2 below.

been the priority for SOEs reform since the mid-1990s.[30] However, the achievement so far remains unsatisfactory.

3.1 Corporate Governance System of SOEs

Corporate governance of modern enterprises generally follows two patterns. One that relies on the control of the stock market – the 'Anglo-American system' – and one that relies on the control of funding entities – the 'Continental system'.[31] In the former system, the stock market is able to constitute the basis for the increase of corporate transparency, improvement of corporate efficiency, and separation of government's administrative and business functions.[32] Also, legal protection of the interests of minority shareholders in this system is prioritised and the market discipline mechanism is well developed, and as a result the board of directors, which holds the final decision on both the appointment and removal of managers, has to monitor and give serious consideration to the satisfaction of shareholders about the performance of management.[33] In the latter system, oversight of corporate management is exercised by the parties providing funds for the undertaking, namely core investors, who consequently have insider information about the performance of management and adopt necessary corrective measures.[34]

In China, where the interests of minority shareholders are inadequately protected,[35] the corporate governance system based on the stock market for SOEs 'serve[s] a very weak disciplinary role' since most listed SOEs have parent undertakings (typically SOEs) which hold the majority shares, and whose controlling status is constitutionally incontestable by non-state shareholders unsatisfied with the

---

[30] See section 3.2, Chapter 2.
[31] Barry Naughton, *The Chinese Economy: Transitions and Growth* (MIT Press 2007) 319.
[32] David Blumental, ''Reform' or 'Opening'? Reform of China's State-Owned Enterprises and WTO Accession – The Dilemma of Applying GATT to Marketizing Economies' (1998) 16 UCLA Pac. Basin L.J. 198, 224.
[33] Naughton (fn 31) 319.
[34] *Ibid*.
[35] Henry C. Cheng, 'China's New Anti-monopoly Law: Big Trouble in Little China?' (2008), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344921, 14.

management.[36] Since major shares of SOEs are not tradable on the market, the influence of private shareholders and other market mechanisms on the operation of SOEs is largely negligible.[37] Likewise, the system based on control of funding parties has also proven ineffective. SOEs rely financially on credit from banks, most of which are as well state-owned. Therefore, SOEs face a soft budget constraint which allows them to be more flexible in terms of repayment and regulatory scrutiny, but at the same time causes inefficiency of SOEs and accumulates non-performing loans.[38] The state-owned banks, which in most cases merely follow the financial policy and sometimes even direct orders of the government concerning loans granted to SOEs, are neither incentivised nor obligated to monitor the performance of SOEs since they are unlikely to be held responsible even for loans granted to chronic loss-making SOEs.[39]

Since China began its economic transition from a centrally planned economy to a socialist market economy, reforms aimed at privatising and restructuring Chinese SOEs have commenced.[40] In theory, a sharp separation should be made between managerial autonomy and state ownership.[41] In addition, the old management model adopted in the planned economy era would have to be replaced by a modern system of corporate governance characterised by safeguards for minority shareholders and strong transparency. However, as discussed in Chapter 2, the Chinese government has no intention of privatising all of its SOEs – especially the large ones – but instead seeks to 'corporatise' them to diversify the ownership of SOEs by converting them into shareholding cooperative corporations whilst preserving the controlling shares. Whilst state control remains in evidence, the line between management and ownership is inevitably blurred.

---

[36] Naughton (fn 31) 321.
[37] Blumental (fn 32) 224.
[38] Cheng (fn 35) 25.
[39] Naughton (fn 31) 320.
[40] See Kai Guo and Yang Yao, 'Causes of Privatisation in China' (2005) 13 Economics of Transition 211.
[41] Daniel C.K. Chow, 'An Analysis of the Political Economy of China's Enterprise Conglomerates: A Study of the Reform of the Electric Power Industry in China' (1997) 28 Law & Pol'y Int'l Bus. 383, 394.

In March 2003, SASAC was established at the First Plenary Session of the 10th National People's Congress to execute the theory of separation between managerial autonomy and state ownership.[42] Following the establishment of SASAC, in October 2008 the Enterprise State-Owned Assets Law (State Assets Law) was promulgated at Fifth Plenary Meeting of the Standing Committee of the 11th National People's Congress, which explicitly stipulates that SASAC is entitled to returns on assets of SOEs, and should enjoy the right to participate in major decision-making and selection of managers.[43] However, whilst SASAC is not allowed to intervene in the business activities of SOEs,[44] the State Assets Law nonetheless requires any decision of SOEs concerning merger, splitting, increase or reduction of registered capital, issuance of bonds, distribution of profits, dissolution, and petition for bankruptcy to be approved by SASAC.[45] In addition, SASAC also compels SOEs to fulfil certain political objectives through the issuance of government documents. For example, in 2013 the party committee of SASAC issued the Guiding Opinions on Further Strengthening and Improving the Work of Women Employees of Central State-Owned Enterprises, which requires central SOEs, *inter alia,* to guide women employees to serve the development of enterprises, establish and advance the training programmes for women employees, protect the legal rights and special interests of women employees, and increase the level of science in women employees' work. Although essentially these opinions raise the awareness of the protection of individual rights, they indicate at the same time that SASAC's functions go far beyond ordinary investor responsibilities and against basic principles of corporate governance. Although the establishment of SASAC in fact accelerates the speed of SOEs reform and to a certain degree promotes the transparency of the operation of SOEs,[46] the fusion of the government's

[42] See section 4.3. Chapter 2.
[43] Article 12, State Assets Law.
[44] *Ibid*., Article 14.
[45] Article 31, State Assets Law.
[46] Since SASAC advocates SOEs to be listed on stock markets – although the portion of tradable shares is not huge – reporting requirements concerning the operation of SOEs are imposed.

administration and business functions under the old framework has not been fundamentally changed.

As a consequence of poor corporate governance characterised by insider control, financial tunnelling, and excessive political meddling, SOEs are able substantially to engage in rent-seeking behaviours by virtue of their close relationship with government. They are protected from competition by governments through the implementation of preferential policies. The barriers to entry are consequentially heightened for private undertakings,[47] and the AMEAs are easily captured to favour the interests of SOEs in competition enforcement.[48] Rent-seeking in general, and regulatory capture in particular, are closely associated with *guanxi* [关系] (connection) which is an integral part of Chinese economy.

3.2 The Guanxi Network

Guanxi, regarded as 'special social investment',[49] is deeply embedded in Chinese traditional culture which values mutual-benefit, and influences virtually every aspect of daily life of the general public. A network of *guanxi* is vital for any business operators, either public or private. For any *guanxi* network to function, there must be give-and-take or exchange of favours;[50] one must have means to fulfil a party's need in order for his own need to be fulfilled with the help of that party. *Guanxi* is so important in China that it sometimes becomes an alternative to market forces in economic activities.[51] For example, in the public procurement market where bid rigging is regularly detected, the determinant of the supplier selection process in

---

[47] It is noteworthy that, as discussed in the previous chapter, local protectionism is not an issue concerns merely SOEs, but can also involve protection of local private undertakings.

[48] Section 3.1.2 of Chapter 3 has discussed how the pluralistic objectives feature of the AML can be used by the SOEs and other interest groups to capture the AMEAs in competition enforcement.

[49] Udo Braendle, Tanja Gasser and Juergen Noll, 'Corporate Governance in China – is Economic Growth Potential Hindered by Guanxi?' (2005) 110 Bus. Soc. Rev. 389, 394. See also Snejina Michailova and Verner Worm, 'Personal Networking in Russia and China: *Blat* and *Guanxi*' (2003) 21 European Management Journal 509.

[50] Thomas Dunfee and Danielle Warren, 'Is Guanxi Ethical? A Normative Analysis of Doing Business in China' (2001) 32 Journal of Business Ethics 191, 192.

[51] Braendle et al. (fn 49) 390.

certain transactions is not product quality or price but the *guanxi* between the government department involved and the supplier. Only well-connected suppliers are able to consummate a deal. In the most common and straightforward case, the starting point for a private undertaking to set up *guanxi* with government agencies is by bribing. However, there is no need for SOEs to establish *guanxi* with the government, since they are already inherently connected through state ownership. Therefore, substantially benefiting from the natural *guanxi* network which creates competitive advantages, SOEs do not have the same level of incentives to promote efficiency as their private undertakings do.

The same theory applies to department-to-department *guanxi* as well. In China, there is too much red tape in the bureaucratic system, which means a single task of one department always involves many other uncoordinated departments.[52] Since the accomplishment of the task depends on the cooperation of these departments, rent-seeking is induced: it is a tacit understanding that cooperation is conditional upon the return of favour. When the departments are glued together with a mutually-beneficial *guanxi* network, in light of the continual overlapping of government functions and future cooperation, no department is willing to endanger this relationship for the sake of one single event. This departmental *guanxi* network partially explains why the AMEA is unwilling to take on SOEs. Since SOEs are always backed by ministries, local governments or 'families', when competition enforcement undermines the interests of these groups – which is almost always the case – the *guanxi* between them and the AMEAs may as well be endangered. Since *guanxi* links directly to the prospects of the AMEAs and competition officials, the enforcement against well-connected SOEs is always treated with cautions.

Another factor that worsens the corporate system is the appointment system for management of SOEs, which is as well closely associated with *guanxi*.

---

[52] See for example, the Guangdong river-sand case discussed in section 4.5, Chapter 5.

3.3 Executive Appointment System

Since China's economic reform is not accompanied by corresponding political reform, the poor corporate governance of SOEs is featured by rigid government oversight. Indeed, the right to control the appointment of positions which have decisive influence over the management of SOEs – essentially a political rather than business consideration – is the most important power underlying state ownership.[53] It is one of the main sources that protects SOEs from any 'adverse' law enforcement actions, such as competition enforcement.

As the controlling shareholder, the government is legally entitled to appoint and remove the key position-holders in SOEs which are incorporated under the Company Law. In order to be appointed, potential candidates have to have well-functioning *guanxi* with officials within the CPC that oversee the appointment. Therefore, the selecting process is easily manipulated and the positions are not assigned based on capability or achievements but personal connection and political consideration.[54] In December 2009, the CPC Central Committee and the State Council jointly issued the Provisional Rules on the Management of Executives in Central SOEs, which explicitly states that the principle of 'the Party controls the cadres' should be strictly followed.[55] In addition, when the Rules stipulate five basic requirements for leaders of central SOEs, the requirement of 'high degree of political quality'[56] seems to take precedence over the other given the order in which the requirements are listed, including, *inter alia*, outstanding achievements and necessary expertise.[57] As a consequence, the management has the tendency towards acting in the interests of whoever contributes

[53] Qu Qiang, 'Corporate Governance and State-Owned Shares in China Listed Companies' (2003) 14 Journal of Asian Economics 771, 777.
[54] For discussion on the selection of management personnel in SOEs, see On Tam, 'Ethical Issues in the Evolution of Corporate Governance in China' (2002) 37 Journal of Business Ethics 303; Thomas Lin, 'Corporate Governance in China: Recent Developments, Key Problems, and Solutions' (2004) 1 Journal of Accounting and Corporate Governance 23; and Zezhong Xiao, Jay Dahya and Zhijun Lin, 'A Grounded Theory Exposition of the Role of the Supervisory Board in China' (2004) 15 British Journal of Management 39.
[55] Article 3(1).
[56] Article 4(1).
[57] Articles 4(2) and (3).

to the successful appointment as a return of favour with no regard of the interests of the enterprise. Therefore, appointment based on *guanxi* and poor corporate governance make it possible for the management to translate the interests of the enterprise into personal benefits.[58]

The body at the core of this appointment *guanxi* network is the Central Organisation Department (COD).[59] The CPC Central Committee, through COD, adopted a Soviet-style *nomenklatura* system – literally a list of names – to manage the placement of cadres.[60] The central *nomenklatura* system consists of two lists.[61] The first is a list of top 5,000 leadership positions which follow a strictly hierarchical order.[62] The second lists the suitable cadres with their detailed dossiers. For SOEs, the top positions of 53 ministerial level and vice-ministerial level central SOEs are directly appointed by COD,[63] whilst the top positions in the remaining central SOEs – bureau level rank – are appointed by SASAC with COD applying decisive influence.[64] These top positions are secretary, vice-secretary and members of CPC committee,[65] chairman and vice-chairman of board of supervisors, manager and vice-manager, and,

---

[58] Braendle et al. (fn 49) 401. However, since the financial rewards of executives are measured by the financial performance of SOEs, it is possible and in fact quite common that personal *guanxi* is used by executives to advance the interests of the enterprise, since certain essential resources, like the planning permission for the development of a piece of land, are rarely obtainable without government *guanxi*. See Ying Fan, 'Questioning Guanxi: Definition, Classification and Implications' (2002) 11 International Business Review 543.

[59] COD is one of the most important bodies within the CPC institutional structure that exercises control over major personnel matters. Apart from central SOEs, it appoints important positions ranging from ministers and governors to director of National Museum of China and principals of 31 vice-ministerial level universities.

[60] In addition, there are equivalent *nomenklatura* systems in place at provincial and municipal levels. The appointment of cadres at these levels is controlled by respective local organisation departments. See David Shambaugh, 'The Chinese State in the Post-Mao Era' in David Shambaugh (eds.) *The Modern Chinese State* (Cambridge University Press 2000) 173-174.

[61] Sebastian Heilmann and Sarah Kirchberger, 'The Chinese *Nomenklatura* in Transition: a Study based on Internal Cadre Statistics of the Central Organization Department of the Chinese Communist Party' (2000) China Analysis No.1, www.chinapolitik.de/resources/analysis1.pdf, 3.

[62] See the List of Cadre Posts Managed by the CPC Central Committee, as amended on 7 July 2008.

[63] List of Cadre Posts Managed by the CPC Central Committee. It has to be emphasised that, since these 53 central SOEs are considered the crown jewels of state economy, the decision of COD on the appointment of top executives in these SOEs has to be finalised by the Standing Committee of the Politburo, China's highest decision-making body.

[64] Article 22, State Assets Law. See Szamosszegi and Kyle (fn 15) 75.

[65] The CPC substantially influences the day-to-day operation of SOEs through the establishment of CPC committees within each SOE. The secretary of CPC committee, instead of board chairman or manager, is the *de facto* head of a SOE.

if there is a board of directors, chairman and vice-chairman of that board. Since the executives holding these positions are all party cadres whose career path is determined by the CPC, they are incentivised to follow orders and instructions without regard to market conditions, just like how SOEs operated in the era of centrally planned economy.

Weak corporate governance of SOEs characterised by the prevalence of *guanxi* and rigorous state control over executive appointment strengthens the ties between SOEs and the government. Such ties protect SOEs, which represents the government's overwhelming vested interests, from effective competition enforcement, which has the potential fundamentally to alter the current structure of the state sector. This is the reason why the attitude of the AMEAs towards SOEs under the AML is much more lenient compared with the treatment towards private undertakings, given the fact that the AMEAs are vulnerable to political pressures as a result of China's bureaucratic structure.[66] Besides poor corporate governance, another factor that renders public enforcement of the AML – which is of an administrative nature – largely ineffective, is China's heavy reliance on its industrial policy – which is of a political nature. In theory, the AMEAs should refrain from incorporating industrial policy considerations in competition enforcement. However, as will be shown later, the AMEAs sometimes seem to base their decisions solely on industrial policy grounds. The following section examines the relation between competition and industrial policies in China.

4. COMPETITION POLICY AND INDUSTRIAL POLICY

Network industries, which include telecommunications, energy, water supply and railways, normally are deemed natural monopolies since the provision of services in these industries presupposes the state-mandated access to fixed network infrastructures

[66] See section 4.6, Chapter 5.

of the incumbents.[67] Due to the sunk costs of some of these infrastructures, repeated construction of 'essential facilities', which can promote competition in the upstream markets, is either inappropriate or unrealistic for private investors.[68] Therefore, these industries were occupied initially by state-owned monopolies. The original objective was that public enterprises were more capable of providing services of general economic interest for lower prices and in a stable manner. Nonetheless, the lack of competition resulted in a lack of incentives to improve efficiency and promote innovation,[69] which slowed down the speed of industrial development and increased production costs. The development of the private sector was also impeded due to the inaccessibility of the network infrastructures. Currently, state-owned natural monopolies have been privatised in many economies, where the downstream market is open to free competition and the governments merely act as an infrastructure provider and industrial regulator.[70]

Nonetheless, the situation in China is largely different. The upstream markets of all network industries are still occupied by state-owned monopolies. In the centrally planned economy, where private undertakings were virtually non-existent and state-owned undertakings had no managerial autonomy, the only 'natural monopoly' was in fact the State Planning Commission. In the socialist market economy, increasing economic gains became one of the primary purposes of fostering state-owned monopolies; they exist so that the government can exercise control over the most vital industrial sectors and public services for political consideration.[71] However, in a non-competitive sector, economic development and consumer welfare will be undermined

---

[67] Martin Hellwig, 'Competition Policy and Sector-Specific Regulation for Network Industries' in Xavier Vives (eds.) *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press 2009) 203.
[68] Judith Clifton, Francisco Comín, and Daniel Díaz Fuentes, *Privatisation in the European Union: Public Enterprises and Integration* (Springer Science 2003) 24.
[69] *Ibid*., 25.
[70] Willem Hulsink, *Privatisation and Liberalisation in European Telecommunications: Comparing Britain, the Netherlands and France* (Routledge 1999) 108-109.
[71] Bridger Mitchell and Paul Kleindorfer, 'Public Enterprise and Regulation in International Perspective' in Bridger Mitchell and Paul Kleindorfer (eds.) *Regulated Industries and Public Enterprise: European and United States Perspectives* (Lexington Books 1979) 3.

if the operation of SOEs is unfettered, which leads to inefficient allocation of goods and services and consequentially to possible social unrest. Therefore, sector-specific regulations are implemented and institutions are established to oversee the business practices in these sector on a continuous and systematic basis, and ensure they are strictly consistent with public interests.[72]

Like competition policy, industrial policy is also in essence government intervention in economic activities. Essentially, both competition and industrial policies share the common goal and theoretical basis of correcting business practices that are deemed detrimental to economic development and social welfare.[73] However, they are very different in other aspects. Before discussing the incorporation of industrial policy considerations in competition enforcement in China, the next section examines the doctrinal difference between competition law and sector-specific regulation.

4.1 Competition Law versus Sector-Specific Regulation

The most prominent difference is that the enforcement of competition law follows an ex-post approach. Instead of specifically guiding the behaviour of undertakings beforehand,[74] it is only applicable when an illegal behaviour has been carried out. As a consequence, undertakings can be punished even if they are unaware that their business practices are anti-competitive. On the other hand, sector-specific regulation follows an ex-ante approach, which lays down specific business practices that are regulated or restricted, so undertakings will have a clear idea about the nature of any

---

[72] *Ibid*.; and Ingo Vogelsang, 'The Design of Regulatory Rules' in Bridger Mitchell and Paul Kleindorfer (eds.) *Regulated Industries and Public Enterprise: European and United States Perspectives* (Lexington Books 1979) 9.

[73] Meng (fn 19) 262.

[74] However, it becomes increasingly common for competition authorities to issue 'guidelines' for undertakings to consult as reference and accordingly establish a better compliance programme, which consist of useful information concerning the enforcement practices and priorities, and the interpretation of the law by competition authorities. These guidelines are significant in promoting legal certainty, transparency and consistency of enforcement. But these guidelines do not have the same legal effects as the intervention by sector-specific regulators.

business strategy they are going to implement.[75] In short, in the regulation of industrial practices, competition policy intervenes in a piecemeal and ad hoc fashion whilst the intervention of sector-specific regulation is more continuous and systematic.[76]

In addition, the competition authority can intervene in anti-competitive behaviour regardless of the nature of the industry concerned. It will have to analyse substantially different market structures and technological expertise in different cases. Sector-specific regulator, on the other hand, is characterised by its specialty and expertise concerning a particular industry. Therefore, a sector-specific regulator knows about the status quo and development trajectory of the industry it regulates much better than competition authority does.

Lastly, although the ultimate objective of competition policy and sectoral regulation is conformity, that is the promotion of consumer welfare, the approaches they adopt to achieve this objective are different. The analysis of a case given by competition authority is, at least in theory, economic in nature; the primary focus is on a particular business practice and the effect it may have on the relevant market as a whole rather than on particular competing undertakings. However, the focus for sector-specific regulator is on the governance of an industry and more detailed and specific 'operational protocols' in that industry which involve, for example, the specification of the pricing and quality level for a particular product or service, and dispute resolution between competing undertakings or between undertakings and their trading parties. Therefore, in a way, regulatory oversight is more directly linked with consumer welfare relative to competition policy.

When an industry becomes more mature and effectively competitive, it is believed that the sector-specific regulation governing that industry should be replaced by general competition rules – the so-called regulatory forbearance – since in a free

---

[75] PA Buigues, 'Competition Policy versus Sector – Specific Regulation in Network Industries: the EU Experience' (2006), http://unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf, 6; and European Commission, 'Evaluation of the Performance of Network Industries Providing Services of General Economic Interest' (2007) 1 European Economy, 11.

[76] Hellwig (fn 67) 216.

market economy, government intervention should exist only when there are failures that cannot be naturally corrected by market forces.[77] Therefore, ex-post regulation is able to limit the influence of government intervention on free economy to the minimum. Littlechild once famously illustrated the relationship between competition and regulation:

> 'Competition is indisputably the most effective means – perhaps ultimately the only effective means – of protecting the consumers against market power. Regulation is essentially a means of preventing the worst excesses of monopoly; it is not a substitute for competition. It is a means of 'holding the fort' until competition arrives.'[78]

However, does this theory equally apply to the unique situation in China? Sections 4.2 and 4.3 below explore how the conflict between competition and industrial policies is dealt with in China. The interpretation of Article 7 of the AML – the only article in the AML implicitly makes reference to industrial policy – will be studied first.

4.2 Interpreting Article 7

In 2008, the NPC published an article, which was written by the chairman of the Legislative Affairs Commission of the NPC Standing Committee, to provide the public with its comments on and interpretation of the new AML.[79] In this article, it was argued that since the AML should be drafted in full conformity with the Constitution, which stipulated:

> 'The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production […] In the primary stage of socialism, the State upholds the basic economic system

---

[77] Buigues (fn 75) 10.
[78] Stephen Littlechild, *Regulation of British Telecommunication's Profitability* (Department of Trade and Industry 1983) para. 4.11.
[79] Jingyu Yang, 'Correctly Understand Several Questions concerning the Anti-Monopoly Law' (2008) Legislative Affairs Commission of the NPC, http://www.npc.gov.cn/npc/xinwen/rdlt/fzjs/2008-03/04/content_1403948.htm.

> in which the public ownership is dominant and diverse forms of ownership develop side by side […]'[80]

Accordingly, three basic principles were followed during the drafting process. First, the law must protect the basic economic system of China by strengthening and developing the public economy, whilst simultaneously encouraging, supporting, and guiding the development of non-public economy. Second, it must establish basic rules for market competition, which ensure that SOEs and all other types of enterprises operate through fair and orderly market competition in accordance with the requirements of socialist market economy. Third, it must adequately take into account the reality of economic and social development of China at its current stage, and coordinate the relationship between competition policy and national industrial policy so as to ensure business operators could enlarge business operation, and increase industrial concentration and market competitiveness through fair competition and voluntary alliance.[81] As clearly shown by these 'three musts' which were 'the demonstration of the Chinese characteristics in and the underlying spirit of the AML',[82] the AML was designed to accommodate multiple objectives besides competition policy, and to a degree, serve the more crucial national interests in disregard of market competition.

As discussed in Chapter 3, Article 7, which was not initially included in AML drafts,[83] is the only provision in the AML that refers, albeit implicitly, to the relationship between the AML and sector regulators. It has two paragraphs:

> 'With respect to the industries controlled by the state-owned economy and concerning the lifeline of national economy and national security or the industries implementing exclusive operation and sales according to law, the state protects the lawful business operations conducted by the business

---

[80] Constitution, Article 6.
[81] Yang (fn 79). See also, US Chamber of Commerce, 'Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy', 9 September 2014, at https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf, 21.
[82] Yang (fn 79).
[83] See section 3.1.2, Chapter 3.

> operators therein. The state also lawfully regulates and controls their business operations and the prices of their commodities and services so as to safeguard the interests of consumers and promote technical progresses.
>
> The business operators as mentioned above shall lawfully operate, be honest and faithful, be strictly self-disciplined, accept social supervision, shall not damage the interests of consumers by virtue of their dominant or exclusive positions.'

On the face of Article 7, in any of the industries qualified as a 'lifeline' – which are fully controlled by SOEs – the relevance of the AML is largely questionable. Clause 1 of Article 7 makes it clear that dominant undertakings in lifeline industries operating strictly pursuant to the laws, which grant them their monopoly status, are not to be punished under the AML. However, Clause 2 of Article 7 states that no dominant undertaking as stipulated in Clause 1 is allowed to abuse its dominant position to 'damage interests of consumers', and therefore effectively overrides the seeming anti-monopoly immunity granted to the strategically important SOEs.

Nonetheless, Article 7 does not clarify which law should prevail when a particular lifeline enterprise damages the interests of consumers by virtue of their dominant or exclusive positions, the AML or the law governing the industry in question. If Article 7 did not exist, one can easily assume that, at least theoretically, the AML applies equally to every undertaking regardless of its ownership status or the industry in which it operates as long as it qualifies as a 'business operator' under the AML. However, the inclusion of Article 7 gives rise to uncertainty over the relevance of the AML *vis-à-vis* the enforcement against lifeline enterprises. Although from the enforcement actions in the past seven years, the speculation that SOEs would be immune from the AML has already proved to be invalid, the roles of competition policy and industrial policy in the regulation of anti-competitive behaviours of SOEs remain unclear. Based on existing practice under the AML, it is still unknown if Article 7 suggests that SOEs in lifeline industries will be protected from the application of the AML when the anti-competitive practices carried out by them are indispensable to the fulfilment of tasks

entrusted by sector-specific laws.[84] Whilst the insertion of Article 7 may be simply a political gesture which emphasises the ideological foundation of China's economy and provides no explicit and solid protection for SOEs, practice suggests that when it comes to the implementation of important national industrial policy, competition considerations will almost always give way to industrial policy considerations.

4.3 Pursuing Industrial Objectives

The ultimate objective of China's adoption of the AML is still debatable, with many scholars arguing that the AML is merely used as a tool to further the CPC's industrial objectives or national goals, rather than to promote a market-oriented economy.[85] For example, in the merger between Glencore and Xstrata in 2013, Glencore, a Swiss mining undertaking, sought to acquire another Swiss mining undertaking, Xstrata, and submitted its notification to MOFCOM for clearance. Whilst the transaction was cleared elsewhere,[86] MOFCOM approved the transaction on condition that a copper mine owned by Xstrata in Las Bambas in Peru – the biggest in Peru – was sold to a third party approved by MOFCOM.[87] Glencore accepted the condition, and sold the mine in July 2014 to a consortium led by MMG Ltd., a subsidiary of China Minmetals Corporation, a large state-owned metal and mineral trading company.[88] This decision raised serious doubt as to whether competition

---

[84] Cheng (fn 35) 24.

[85] See for example, Daniel CK Chow, 'How China's Enforcement of Its Anti-Monopoly Law Poses Risks to Multinational Companies' 14 Santa Clara Law Review (forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2599518, 3.

[86] See for example, Case COMP/M.6541 – *Glencore/Xstrata*, Commission decision of 22 November 2012.

[87] *Glencore/Xstrata* (2013) MOFCOM Notice No. 20 http://www.mofcom.gov.cn/article/b/fwzl/201304/20130400091299.shtml.

[88] MOFCOM, 'Consortium led by China Minmetals Corporation Acquired Copper Mine in Las Bambas of Peru for USD 7 Billion', 3 August 2014, http://www.mofcom.gov.cn/article/i/jyjl/l/201408/20140800684265.shtml. Upon the approval of the State Council, China Minmetals Corporation recently acquired another SASAC-supervised central SOEs – Metallurgical Corporation of China Ltd. Currently there is no information on possible merger review. See SASAC, 'China Minmetals Corporation and Metallurgical Corporation of China Ltd. to Consolidate', 8 December 2015, http://www.sasac.gov.cn/n85881/n85901/c2149110/content.html.

policy was being manipulated by MOFCOM to further China's industrial goals in South America.[89]

Mergers between central SOEs have proved to be even more problematic, since most of the time the merger decision is not made by the merging SOEs, or by their supervising ministries, but by the State Council. The government's attitude towards mergers between SOEs has not changed significantly since the old centrally planned economy era, when merger and restructuring of SOEs were basically political decisions with no need to take into account the economic effects of the transactions.[90] The number of SOEs in general, and the number of the most powerful central SOEs in particular, has been declining steadily since the reform, but this in no way indicates that the state sector plays a less important role in China's economic development. The decrease in the number of central SOEs dominating the strategically important sectors is largely a result of wide scale consolidation of these SOEs initiated by the government. The primary aim is mainly twofold. First, by consolidating central SOEs that are already formidable national champions in the market, the government will have larger SOEs with more prominent financial power to compete globally and become world leaders. Second, SOEs operating overseas have always encountered a situation in which undertakings bidding for the same project are all Chinese SOEs, as a result, consolidation of SOEs with similar scale of operation can effectively prevent excess competition and loss of state-owned assets. Due to the strategic importance of SOE restructuring, the AML is rarely applied to oversee state-led mergers between SOEs.

For instance, it has been reported that a merger in 2008 between two leading telecommunication companies in China, China Unicom, which had a turnover of CNY 100.47 billion, and China Netcom, which had a turnover of CNY 86.92 billion, should

---

[89] Chow (fn 85) 6; US Chamber of Commerce (fn 81) 33; and Ariel Ezrachi and Wei Han, 'Merger Remedies – the Chinese Experience' (2015) 3 (suppl 1) Journal of Antitrust Enforcement i69, i87.
[90] Thomas Cheng, 'Competition and the State in China' in Daniel Sokol, Thomas Cheng and Ioannis Lianos (eds.) *Competition and the State* (Stanford University Press 2014) 181.

have qualified as a 'concentration' under the AML, but the merger was never notified to MOFCOM.[91] Officials from the merging parties argued that the transaction had been approved by MIIT,[92] which at the time was a member of the Anti-Monopoly Commission. It is hard to be convinced that MOFCOM was not involved in such an influential transaction, yet MOFCOM was silent on this topic, or possibly was silenced. This merger seems to suggest that as long as the supervisor of the merging SOEs proposes or approves the transaction, the notification requirement – let alone the review process – under the AML can be practically circumvented.

In addition, on 30 December 2014, the State Council approved a merger between China South Locomotive and Rolling Stock Industry Corporation Limited (CSR) and China North Locomotive and Rolling Stock Industry Corporation Limited (CNR),[93] the top two train makers in the world, with a combined annual revenue of CNY 149 billion in 2013.[94] They collectively produce around 90% of the trains on mainland China, though the share of the overseas rolling stock market is less than 10%.[95] The new undertaking, CRRC Corporation Limited, will have a market capitalisation of $26 billion.[96] On 5 January 2015, the Federal Cartel Office of Germany accepted the

---

[91] Xiaoye Wang, 'An Evaluation of Three Years' Anti-Monopoly Enforcement in China' in Xiaoye Wang (eds.) *Capacity Building for the Enforcement of Competition Law* (eds.) (Social Sciences Academic Press 2012) 213.

[92] Angela Huyue Zhang, 'The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective' (2011) 56 The Antitrust Bulletin, http://ssrn.com/abstract=1783037, 22.

[93] State Council, 'Merged CNR and CSR Going Oversea', 31 December 2014, http://www.gov.cn/xinwen/2014-12/31/content_2798744.htm. Both CSR and CNR are centrally-owned enterprises directly under the control and supervision of SASAC. These two undertakings were once parts of a same corporation until 2000, when CNR was split from China National Railway Locomotive and Rolling Stock Industry Corporation. See Masashi Adachi, 'China's Competitiveness: Myth, Reality, and Lessons for the United States and Japan – Case Study: China South Locomotive and Rolling Stock Corporation', Center for Strategic and International Studies, http://csis.org/files/publication/130129_competitiveness_CSRcasestudy_Web.pdf.

[94] State Council, 'Merged CNR and CSR Going Oversea', 31 December 2014, http://www.gov.cn/xinwen/2014-12/31/content_2798744.htm.

[95] South China Morning Post, 'CNR, CSR Merger Likely to Rattle Global Competition', 29 October 2014, http://www.scmp.com/business/china-business/article/1627139/cnr-csr-merger-likely-rattle-global-competition.

[96] Financial Times, 'Chinese Train Makers Agree $26bn Merger', 31 December 2014, http://www.ft.com/cms/s/0/d0ec01b6-9037-11e4-a0e5-00144feabdc0.html#axzz3PPOmk0cy.

merger notification filed by CNR and CSR,[97] and the transaction was unconditionally approved on 20 January, making Germany the first country to clear the merger. It was followed by the Competition Commission of Singapore on 7 January 2015.[98]

Nonetheless, the transaction clearly has the ability to substantially affect China's rolling stock market and beyond doubt raises competition concerns, since the two undertakings were effectively a duopoly in China's rolling stock market. The merger between them therefore would eliminate market competition completely. In theory, if the two undertakings were treated as parts of a single entity belonging to the government under the AML, the merger between them – mere internal restructuring instead of concentration in the competition law sense – would not trigger a merger review.[99] Nonetheless, on 3 April 2015, both CSR and CNR made public announcements that MOFCOM had cleared the transaction unconditionally,[100] indicating that the doctrine of single economic entity was not followed. Since it was an unconditional decision, MOFCOM is not required by the AML to explain its decision. However, it can be speculated that the transaction was cleared on the ground that it was pursuant to public interests, so the positive impact outweighed the negative.[101] Nevertheless, the analysis of MOFCOM of this transaction was in fact largely irrelevant to the final outcome, since it seems exceptionally unlikely that a merger approved by the State Council would then be turned down by MOFCOM on the ground of anti-competitive effects, as the sole rationale behind the merger was to eliminate the 'destructive competition' between these two SOEs.[102] The review

---

[97] Federal Cartel Office, 'Ongoing Merger Control Proceedings', http://www.bundeskartellamt.de/DE/Fusionskontrolle/LaufendeVerfahren/laufendeverfahren_node.html

[98] Competition Commission of Singapore, 'CCS Consults on the Proposed Merger between China CNR Corporation Limited and CSR Corporation Limited', https://www.ccs.gov.sg/media-and-publications/media-releases/ccs-consults-on-proposed-merger-china-cnr-csr-corp.

[99] Angela Huyue Zhang, 'The Single-Entity Theory: An Antitrust Time Bomb for Chinese State-Owned Enterprises?' (2012) 8 Journal of Competition Law & Economics 805, 826.

[100] Xinhua News Agency, 'CSR and CNR Merger Cleared', 7 April 2015, http://news.xinhuanet.com/fortune/2015-04/07/c_127661351.htm.

[101] See Article 28, AML.

[102] State Council, 'Merged CNR and CSR Going Overseas', 31 December 2014, http://www.gov.cn/xinwen/2014-12/31/content_2798744.htm.

process in this case was merely a rubber stamp to ensure that the transaction was legitimate in the eyes of the public.

Thus far, the AML has yielded limited success in either regulating the anti-competitive practices of SOEs or in promoting competition in highly concentrated state sectors. Even worse, competition policy occasionally has to pursue industrial goals because these goals serve the 'national interest' which should be pursued by the AML[103] since they are supported by the central government. However, the authority of the AML can be seriously undermined as a result. In light of the above cases, it seems that another unique feature of introducing a competition law in a socialist country is in fact the forbearance of competition policy[104] – as opposed to regulatory forbearance – in industrial sectors where state control remains pervasive, especially when a particular industrial policy is pursed in the interests of the nation as a whole, such as state-led consolidation of large SOEs.

As can be seen in the previous chapters and the discussion above, there are several sectors where the AMEAs are particularly active, such as car insurance,[105] automobile[106] and telecommunication.[107] However, whilst both NDRC and SAIC has sanctioned a number of undertakings and achieved meaningful results in the insurance and automobile sectors where business operators were mainly private undertakings, they all failed adequately to punish the infringements of SOEs in the telecommunications sector. All investigations were either terminated or suspended, and MOFCOM even failed to investigate a questionable merger. The inaction of the AMEAs in these cases does not seem to be a coincidence. The political pressures were

---

[103] See the discussion on multiple objectives of the AML in section 3.1.2, Chapter 3.

[104] In practice, competition forbearance occurs either through an express choice of the legislature or as a result of the practice of courts. For example, in *Trinko* and *Credit Suisse*, the US Supreme Court ruled that sector-specific regulations should be favoured over antitrust rules. *Verizon v Trinko*, 540 U.S. 398 (2004) and *Credit Suisse v Billing*, 127 S.Ct. 2383 (2007). For a detailed study on these two cases, see Howard A. Shelanski, 'Antitrust and Regulation' in Einer R. Elhauge (eds.) *Research Handbook on the Economics of Antitrust Law* (Edward Elgar 2013).

[105] See section 3.2, Chapter 5.

[106] *Ibid*.

[107] See section 2.2, Chapter 6.

so substantial that even proper investigations could not be fully carried out in the telecommunications sector, let alone liberalisation. Therefore, it seems that both NDRC and SAIC in antitrust enforcement and MOFCOM in merger reviews have consciously taken a forbearance-based approach to anti-competitive practices in the most important industrial sectors.

Maybe this is exactly what the government wants the AML to achieve in the socialist market economy. In relation to the market economy spectrum, the AML demonstrates to the world that China is ready to take the openness of its domestic market to another level, so that foreign capital will be attracted, most distortions on domestic market will be corrected, economic efficiency will be improved, and economic growth will be sustained. In relation to the socialist economy spectrum, the AML tactfully abstains from regulating the most vital industrial sectors over which only the state can exercise control. It intervenes only in a way that suppresses the suspicion that China does not apply competition law to its state sector, but does not practically alter the structure in the state sector or prevent the accomplishment of industrial policy.

As can be seen in the discussion on the corporate governance of SOEs and the implementation of industrial policy, China's public economy remains largely a political arena occupied by powerful interests groups instead of a modern market place where orderly economic activities take place. Whilst market forces do not function in the unique circumstances of the state sector, and legal methods meant to promote competition such as the AML remain largely ineffective, it is sometimes better to fight fire with fire; the government has chosen to use political instead of legal methods to reform its state sector. The next section discusses how China's ongoing comprehensively deepening reform and anti-graft campaign have removed vested interests and promoted market-oriented reform in the state sector, tasks which the AML fails to accomplish.

5. EXTERNAL FACTORS FACILITATING SOE REFORM

The Chinese government recognises that SOEs need to improve their efficiency in order to improve the overall efficiency of the economy.[108] As China moves away from a low- to a medium-income country, future growth of the economy will need to come from efficiency gains, rather than simply from further increases in capital and labour inputs. The main objective of the AML is to increase efficiency in the economy and sustain economic growth by promoting competition. However, as shown in the discussion above, it is clear that whilst the AML is theoretically able to regulate corporate behaviour of SOEs and eventually promote their efficiency, the close tie between SOEs and the government may destroy the opportunities for the AML to intervene in the first place. In order to further SOE reform and subsequently facilitate competition enforcement against SOEs, radical reformers within the government chose an alternative path other than using sorely the AML.

China underwent its most recent 'once-in-a-decade'[109] leadership transition in November 2012 when the First Plenary Session of the 18th Central Committee of the CPC[110] elected the Politburo Standing Committee of the CPC Central Committee,[111]

---

[108] Xinhua News Agency, 'Premier Urges Progress in SOE Reforms', 20 September 2015, http://news.xinhuanet.com/english/2015-09/20/c_134642631.htm.

[109] According to the Constitutions of the CPC and the PRC, both the Secretary General of the Central Committee of the CPC and the President of China are elected for a term of five years. However, when the Secretary General can theoretically be re-elected for an infinite number of terms, the Constitution of China provides in Article 79 that the President cannot be in office for more than two consecutive terms, namely ten years. See the Constitution of the Communist Party of China, as amended at the Eighteenth National Congress of the Communist Party of China on 14 November 2012, http://www.china.org.cn/china/18th_cpc_congress/2012-11/16/content_27138030.htm; and the Constitution of the People's Republic of China, as amended on 14 March 2004. Based on the practice of China since the early 1990s, after which time the leadership of China directed its attention to peaceful economic development rather than internal conflicts over ideology, the political structure tends to become stable. It would therefore be extremely unlikely that a President fails to be re-elected to a second term. Moreover, it is worth noting that since 1993, the Secretary General of the Central Committee of the CPC has always been the President of China.

[110] Every five years, the Central Committee of the CPC is elected by the National Congress of the CPC, and then it goes on to elect both the Politburo and its Standing Committee. See the Constitution of the Communist Party of China.

[111] Officially, the term 'Political Bureau' is used instead of 'Politburo'. See for example, Xinhua News Agency, 'List of Members of Standing Committee of Political Bureau of 18th CPC Central Committee', 15 November 2012, http://news.xinhuanet.com/english/special/18cpcnc/2012-11/15/c_131976451.htm. However, since

the highest decision-making body in China. The new Secretary General of the Central Committee of the CPC, Xi Jinping, was elected at the First Plenary Session of the 12th NPC[112] to be the President of China in March 2013. All other top governmental posts were either elected or approved by the NPC at the same session.[113] Li Keqiang, at his debut press conference as Chinese Premier after the closing meeting of the 1st Plenary Session of the 12th NPC, stated that there were three top tasks awaiting China's newly-installed government: maintaining economic growth, improving people's livelihood, and safeguarding social justice.[114] To fulfil these tasks, Premier Li said 'China must build an innovative, clean government and government following the rule of law.'[115] He further stated that the government was responsible for furthering the reform and 'will try to make the dividends of reform benefit all the people.'[116] However, he admitted:

> 'In pursuing reform we have to navigate uncharted waters. We may also have to confront protracted problems, because we will have to shake up vested interests. Sometimes stirring vested interests may be more difficult than stirring the soul. But however deep the water may be, we will wade into the water because we have no alternative. Reform concerns the destiny of our nation.'[117]

Issues mentioned by Premier Li at the press conference were the views of the entire the government. Although it presumably also involved consensus reached between various interest groups, these statements provided a good indication as to what kinds of developing strategy the government was going to adopt, and where

---

'Politburo' is more commonly used in academic literature and English materials, this term is adopted in this Chapter.

[112] The NPC, which is constitutionally the 'highest organ of state power', elects the president and the vice-president of China every five years. See Articles 57, 60 and 62, the Constitution of PRC.

[113] See Articles 62(5)-(8), Constitution.

[114] Xinhua News Agency, 'Premier Li Keqiang Meets Press', 17 March 2013, http://news.xinhuanet.com/english/china/2013-03/17/c_132240100.htm.

[115] Xinhua News Agency, 'Premier Li Outlines Top Tasks of China's New Cabinet', 17 March 2013, http://news.xinhuanet.com/english/china/2013-03/17/c_132240078.htm

[116] Xinhua News Agency, 'Premier Li Stresses Reform, Opening Up', 17 March 2013, http://news.xinhuanet.com/english/china/2013-03/17/c_132240420.htm

[117] Xinhua News Agency, 'China's New Premier Presses Reforms as 'Biggest Dividend'', 17 March 2013, http://news.xinhuanet.com/english/china/2013-03/17/c_132240248.htm

China was heading. Three years have passed since the Premier made his statements, but it is still too early to tell if anything avowed has been fulfilled. Nevertheless, impressive efforts to confront the major obstacle to furthering economic reform – vested interests in the state sector – have indeed been made since the instalment of the new government.

After the discussion on the evolution of SOEs, it is not difficult to perceive that the state sector holds enormous vested interests as a beneficiary of China's pre-reform economic policy, and all interested parties involved would inevitably resist if the reform ever crossed the line and stepped into their territory. Like AMEAs, whose enforcement activities are monitored and influenced by both professional leaders and administrative leaders,[118] the operation of local industrial SOEs is also subject to conflicting instructions from two sets of institutions: central ministries overseeing industrial development, and local governments.[119] As a result of decentralisation, the power of local governments is considerable, and central government is generally not able to apply direct influence on the operation of local SOEs. Therefore, the innate economic bond between local governments and local SOEs is too overarching to be broken through legal means. However, fighting a battle is always about choosing the appropriate tactic, and there exists a powerful weapon to clear the path so that the AML can proceed to play its part in the new round of reform. As the inherent demerits of SOEs are holding back China's economic reform, the government regards the state sector as the perfect deep water into which to wade.

5.1 '*De-administrationisation*'

'De-administrationisation' ('*qu xingzhenghua* [去行政化]') essentially means the abolition of the administrative ranks currently conferred on executives of SOEs, and it has been a task which the central government has endeavoured to accomplish for years

---

[118] See section 4.6, Chapter 5.

[119] Blumental (fn 32) 226. See also Anna M. Han, 'China's Company Law: Practicing Capitalism in a Transitional Economy' (1996) 5 Pac. Rim L. & Pol'Y J. 457, 489.

but with no meaningful result so far.[120] As discussed in Chapter 2, every time a political movement and campaign advocated by the CPC failed, economic reform became the lifesaver. Political failures and conflicts were always successfully concealed by a new round of economic reform, and public attention was soon redirected as a consequence. Indeed, China's economy miracle has no equivalent in the realm of politics. When no reform plan of political structure is implemented, the bureaucratic behaviour of government officials is not likely to be greatly improved.[121] The same applies to the state sector, where executives of SOEs are effectively government officials performing bureaucratic duties. The Chinese market economy has therefore been characterised as a 'bureaucratic market economy'.[122] As a result, political means are needed to improve the performance of SOE executives and change their mode of running the business. The most prominent political feature in a SOE is the administrative rank; another 'vested interest' that needs to be cracked down besides massive financial benefits.

Ownership is what separates private undertakings and SOEs. It is also the reason why the application of the AML to SOEs becomes a major issue of concern. State ownership creates government connection, which is also shared by the AMEAs. Most SOEs are protected by government from negative influence because, quite straightforwardly, SOEs remit revenues to the government and competition enforcement adversely influences their financial performance. In some occasions, even without government protection, some executives of SOEs are powerful or well-connected enough to have impact on enforcement outcomes.

Because of the administrative ranking system operated by the Chinese government and the close ties between SOEs and the government, the distinction between an executive of SOE and a government official is obscure and the revolving

---

[120] Xinhua News Agency, 'The Key to *qu xingzhenghua* of SOEs is Acknowledgement and Resolution', 2 November 2013, http://news.xinhuanet.com/fortune/2013-11/02/c_117974454.htm.
[121] Gregory C. Chow, *China's Economic Transformation* (Blackwell Publishing 2007) 296.
[122] *Ibid*.

door phenomenon extremely common. In many cases, officials are appointed to hold positions in the management of SOEs,[123] and research shows that 115 senior executives in 47 central SOEs which disclosed information on the working experience of their senior management had previously worked in the government.[124] Alternatively, executives of SOEs are appointed to hold posts in the government,[125] the same research showed that 56 out of 183 government officials above vice-ministerial level in 19 government ministries and commissions had previously worked in SOEs.[126] In both cases, though high-level executives of SOE do not have civil servant status, administrative ranking nonetheless applies to them. When the three elite groups – provincial governors, ministers, and military leaders – have continuously constituted the principal components of the CPC Central Committee and its Politburo,[127] the number of SOE executives in central leadership has grown steadily.[128] However, from time to time, executive posts were treated by some as merely stepping stones in pursuing their political ambitions, in which case promoting the performance of SOEs they oversee is not a priority. The oil sector, which is the primary target of CPC's most recent anti-graft campaign,[129] vividly points to how corporate posts become important in a government official's career path, and how

---

[123] Jiang Jiemin, the former director of SASAC, was appointed to be the deputy governor and deputy party secretary of Qinghai Province when he was the vice-president of CNPC. After four years in Qinghai, he moved back to CNPC before being sacked as director of SASAC.

[124] Hong Sheng and Nong Zhao, *China's State-Owned Enterprises: Nature, Performance and Reform* (World Scientific 2013) 217.

[125] For example, Li Xiaopeng, the son of former Chinese Premier Li Peng and the current governor of Shanxi Province, was the former general manager of China Huaneng Group, a large SOE in electricity sector, and was dubbed 'king of electricity in Asia'; Su Shulin, the current governor of Fujian Province, was the former chairman of Sinopec; Zhang Qingwei, the current governor of Heibei Province, was the former chairman of the Commercial Aircraft Corporation of China, a SOE which builds large-size passenger aircraft 'with the goal of challenging the dominance of Boeing and Airbus in the global marketplace'. See Cheng Li, 'China's Midterm Jockeying: Gearing Up for 2012 (Part 4: Top Leaders of Major State-Owned Enterprises)' (2011) 34 China Leadership Monitor 9, 9.

[126] Sheng and Zhao (fn 124) 217.

[127] Li (fn 125) 9.

[128] In the 17th CPC Central Committee (2007-2012), there was only one SOE executive – Kang Rixin, the then party secretary of China National Nuclear Corporation, who was sentenced to life imprisonment in 2010 for corruption. In the 18th CPC Central Committee (2012-2017), the number of SOE executive increased to five.

[129] The anti-graft campaign in the oil sector will be discussed in the next section.

personnel mobility between corporate and government posts can have huge impact on departmental decision-making.

The oil sector, which is dominated by the China Petrochemical Corporation (Sinopec Group) and the China National Petroleum Corporation (CNPC),[130] has been the domain of powerful party officials since the founding of the PRC owing to the massive revenue it is able to produce and the ineffectiveness of the supervising and monitoring mechanisms. Years of development have made the network within the oil sector too politically complex and thorny for reformers to touch. Zhou Yongkang, former general manager of CNPC, was the strongest link between government leadership and the oil sector. Because of his senior status in the CPC as the secretary of the Central Political and Legislative Committee (CPLC), Zhou was 'one of the most powerful and divisive figures in Chinese politics' before he retired in late 2012. He was later taken into custody for corruption and became the most senior ranking communist member to be investigated in the history of PRC.[131] He was later sentenced to life imprisonment in June 2015.[132]

Starting his career as an oilfield technician in late 1960s, Zhou had worked in the oil sector for almost 30 years until he was promoted from general manager and party secretary of CNPC to minister and party secretary of Ministry of Land and Resources.[133] He then successfully moved into the inner circle of CPC as he became member of the Politburo Standing Committee and the secretary of CPLC,[134] a

---

[130] See Opinions on Cleaning-up and Rectifying Small Refineries and Regulating the Order of Distribution of Crude Oil and Processed Oil; and Circular on Further Rectifying and Regulating the Order of Refined Oil Market. Whilst Sinopec and CNPC control both the upstream and downstream markets for onshore oil, China National Offshore Oil Corporation (CNOOC), the third largest oil company in China, mainly operates in the upstream market for offshore oil. For a discussion on the historical development of these three oil companies, see Jinglian Wu, *Understanding and Interpreting Chinese Economic Reform* (Thomson/South-Western 2005) 156.

[131] New York Times, 'China Says Former Security Chief Is Being Investigated for Corruption', 30 July 2014, http://www.nytimes.com/2014/07/30/world/asia/china-says-zhou-yongkang-former-security-chief-is-under-investigation.html?_r=0

[132] Xinhua News Agency, 'Zhou Yongkang was Sentenced to Life Imprisonment at First Instance', 11 June 2015, http://news.xinhuanet.com/legal/2015-06/11/c_1115590304.htm.

[133] Xinhua News Agency, 'Curriculum vitae of Zhou Yongkang', 4 March 2002, http://news.xinhuanet.com/ziliao/2002-03/04/content_298986.htm.

[134] *Ibid*.

powerful organisation that oversees security apparatus and law enforcement agencies, and has in practice enormous influence on courts, procuratorates, and police forces.[135] It is hard to imagine how competition law, so far legislation of relatively minor significance within Chinese legal system, could be properly enforced against an SOE when the big boss who had the final say on enforcement matters is in fact closely associated with that SOE.

As a tool to deal with the close link between political and economic activities, a blueprint for future reform, the Decision on Major Issues Concerning Comprehensively Deepening Reforms (Deepening Reforms Decision), [136] was adopted at the 3rd Plenary Session of the 18th CPC Central Committee. The Deepening Reforms Decision, which is described as CPC's 'biggest package of reforms since the 1990s',[137] recognises that China's economic development 'has entered a new phase', and its reform 'has entered a period of overcoming major difficulties and a deep-water zone'.[138] The Deepening Reforms Decision, besides allowing more private capital into the state sector, pledged to promote a modern corporate system for SOEs and to carry out reform, focusing on separation of government administration from enterprise management and separation of government administration from state asset management. [139] One of the most prominent characteristics of SOEs is their administrative element, which stems from China's old planning economy and significantly impedes the reform process. However, previous efforts to separate government administration from enterprise management had not produced ideal outcomes. The rail sector provides an example.

---

[135] China Internet Information Center, 'the Major Functions of the Central Political and Legislative Committee', http://www.china.com.cn/cpc/2011-04/15/content_22369240.htm.

[136] Full text is available at http://www.china.org.cn/chinese/2014-01/17/content_31226494.htm. A new CPC organ, the Central Leading Group for Comprehensively Deepening Reforms, led by Xi Jinping, was established following the adoption of the Decision.

[137] China.org, 'Sinopec Embraces Private Investors' 20 February, 2014, at http://www.china.org.cn/business/2014-02/20/content_31534712.htm.

[138] Section 1(4), the Deepening Reforms Decision.

[139] *Ibid*., Section 2(7).

The Ministry of Railways of China, which was both the policy-maker and service provider in the railway market, was dissolved in March 2013. Its original administrative functions were brought under the Ministry of Transport, whilst the duty of construction and management was assumed by a newly established China Railway Corporation. The last minister of Ministry of Railways, Sheng Guangzu, became the first general manager and party secretary of China Railway Corporation. One of the main purposes of this move was to 'reduce bureaucracy and improve railway service efficiency'.[140] However, it is ironic that the China Railway Corporation is in fact directly under the supervision of State Council, just like the Ministry of Railways used to be, and therefore becomes a ministerial level central SOE; and Mr Sheng is still a ministerial level official. In such a case the railway monopoly will be transformed from a government monopoly into a large enterprise monopoly. This would legalise monopolies and result in a situation that is worse than the previous government monopoly.

The essence of the government's failure in the 'de-administrationisation' is the executive appointment system that includes rotation between corporate position and government position. When SOEs incorporated under the Company Law are empowered to make their own managerial, operational, and production decisions, the state retains the authority to appoint, remove, and reward high-level executives of SOEs, which according to the law should be the functions of the board of directors.[141] Although SOE executives are rewarded based on financial performance, the future career paths of the top SOE executives upon leaving the SOEs are determined by the COD, which gives incentives to SOE executives to follow the government's policy guidance.[142] Therefore, under a circumstance where the financial interests of shareholders conflict with the political goals of the state, management of SOEs is more

[140] Xinhua News Agency, 'China to Dismantle Railway Ministry' 10 Marche, 2013, at http://news.xinhuanet.com/english/china/2013-03/10/c_132221707.htm.
[141] Article 47(9), Company Law.
[142] See Nan Lin, 'Capitalism in China: A Centrally Managed Capitalism (CMC) and its Future' (2010) 7 Management & Org. Rev. 63.

than likely to prioritise the latter.[143] They certainly have the incentives to do so, as only those who perfectly adhere to CPC priorities and government orders, and are therefore deemed obedient and loyal by the COD, will rise rapidly in their career paths.

In order for SOEs to be transformed into a real modern corporation and for executives to act in the interests of shareholders rather than related government departments, their administrative rankings must be revoked, and in order for SOEs fully to be 'de-administrationised', the CPC appointment system must be reformed. In October 2015 it was reported that the board of directors of Xinxing Jihua Group Co., Ltd. appointed a non-cadre professional manager who has no administrative ranking and would therefore not be appointed to a government position in the future, as the general manager of the company. This is the first time that the board of directors of a central SOE exercised the right to appoint general manger without the interference of either SASAC or COD.[144] This is a welcome development, and it is expected that the experiment will be introduced to central SOEs in different sectors with the issuance of the pending reform plan on the governance of board of directors of SOE and modernisation of corporate system.[145]

However, a gradualist and moderate reform plan like de-administrationisation may not be useful in certain sectors where political oversight is extremely prevalent, since the likelihood that this plan will be implemented in the first place is low. In these sectors, a more radical political device may act as 'ice-breaker'. The next section will use the oil sector as an example to illustrate how political means have helped further reform in the state sector.

5.2 Anti-Graft and the Oil Sector

On 27 August 2013, the Politburo approved a five-year plan on anti-graft

---

[143] Szamosszegi and Kyle (fn 15) 2.
[144] As far, 74 central SOEs have a board of directors. Sina, 'General Manager of Central SOE No Longer 'Official': Board of Directors Exercises the Right to Appoint for the First Time', 24 October 2015, http://finance.sina.com.cn/china/20151024/004623561244.shtml.
[145] *Ibid*.

(Working Plan) prepared by the Central Commission for Discipline Inspection of the CPC (CCDI), the top agency empowered to investigate corruption and malfeasance. The Working Plan states that the government will firmly fight corruption and maintain its 'high-handed posture' over the next five years. It is reiterated in the Working Plan that the CPC will continue its pursuit of both 'flies' and 'tigers'[146] as well as its fight against harmful working styles – 'the hotbed of corruption'.[147] On the same day, SASAC stated on its website that three oil executives – Li Hualin, deputy general manager of CNPC; Ran Xinquan, vice president of PetroChina;[148] and Wang Daofu, chief geologist of PetroChina and head of the Research Institute of Petroleum Exploration and Development of PetroChina – were under investigation as a result of suspicion of grave violations of discipline.[149] One high-ranking CNPC executive had already been investigated by CCDI because of grave violations of discipline a day before.[150] Just a few days later, Jiang Jiemin, who was promoted to head the SASAC after the First Plenary Session of 12th NPC in March, was under investigation by CCDI and was later ousted. Jiang had been working in the oil industry for almost 40 years and was the chairman of CNPC before he assumed duties in SASAC. The oil executive and officials under investigation were the elite and backbone of CNPC who formed a powerful network within the company that led to large-scale corruption. It represents

---

[146] Section 3(1), Working Plan. At a plenary meeting of CCDI in January 2013, General Secretary Xi Jinping, who was not yet the President of China at that time, vowed to 'unswervingly fight against corruption and keep power reined within the cage of regulations.' He went on to say that the CPC would crack down not only 'flies' but 'tigers' at the same time. 'Flies' and 'tigers' refer to low-level corrupt officials and high-level corrupt officials respectively. Xinhua News Agency, 'Xi Jinping Vows 'Power within Cage of Regulations'', 22 January 2013, http://news.xinhuanet.com/english/china/2013-01/22/c_132120363.htm.

[147] Section 2, Working Plan.

[148] PetroChina Company Limited is the listed arm of CNPC, which is traded in Hong Kong, New York and Shanghai. It is the second-large Chinese company in terms of annual revenue as of 2013. See 'Top 500 Chinese Undertakings'.

[149] See SASAC, 'Li Hualin and Two Others under Investigation Suspected of Grave Violations of Discipline', 27 August 2013, http://www.sasac.gov.cn/n1180/n1566/n259835/n266216/15492369.html. The term 'grave violations of discipline' (*yanzhong weiji* [严重违纪]) is a strong word in Chinese politics; once it is used, it generally points to the end of political life of the government official. It is used by CPC invariably to refer to corruption and abuse of administrative power.

[150] People.cn, 'Deputy General Manager of CNPC Wang Yongchun under Investigation Suspected of Grave Violations of Discipline' 26 August 2013, http://politics.people.com.cn/n/2013/0826/c1001-22694851.html.

the most serious corruption case in the history of Chinese energy system. Jiang was convicted of corruption and sentenced to 16 years in prison on 12 October 2015.[151] In addition, Su Shulin, the governor of Fujian Province and the former manager, party secretary and chairman of CNPC, is currently under investigation for suspicion of grave violations of discipline.[152] It is still unknown whether this investigation has any link with his time in the oil sector, where he had worked for nearly three decades.

The detention of several executives and officials is just the beginning of China's path towards the so-called comprehensively deepening reform; it by no means indicates that government is going to be more comfortable in cracking down vested interests. Nevertheless, the undergoing investigations clearly indicate that government's effort to fight corruption extends beyond administrative organs to powerful parts of the state sector. By valiantly revealing the political scandal concerning state conglomerates like the CNPC, the government at least shows the resolution to develop its SOEs in a more transparent and modern way as it attracts more public attention and critical opinion, whilst at the same time provides larger room for public supervision. In fact, positive development concerning the reform of oil sector was seen after the anti-graft campaign against the oil giant.

The first is the abovementioned Deepening Reforms Decision, which was adopted in November 2013. It pledged, *inter alia*, vigorously to develop a mixed economy with cross share-holding of state-owned capital, collective capital and non-public capital;[153] to support the healthy development of non-public sector by removing all hidden barriers for the non-public economy and encouraging non-public

---

[151] Chinadaily, 'Former PetroChina Chairman Jiang Jiemin Sentenced to 16 Years in Prison', 12 October 2015, http://www.chinadaily.com.cn/china/2015-10/12/content_22166264.htm.
[152] Central Commission for Discipline Inspection, 'Vice-Secretary and Governor of Fujian Province is under Investigation for Suspicion of Grave Violations of Discipline', 7 October 2015, http://www.ccdi.gov.cn/xwtt/201510/t20151007_63072.html.
[153] Section 2(6), the Deepening Reforms Decision.

enterprises to participate in SOE reform;[154] and to let market play a decisive role in price determination without improper intervention by the government.[155]

In light of this important decision, in December 2013, Zhang Yi, who succeeded the ousted Jiang Jiemin as director of SASAC, spoke at a conference that SASAC's future tasks with regards to SOEs reform were encouraging more private capital, improved supervision, and better efficiency.[156] In addition to improving SASAC's performance as state assets watchdog and introducing more efficient operating mechanisms into management of SOEs, Zhang said SASAC would endeavour to create more favourable conditions for developing mixed ownership by introducing private capital in the restructuring of SOEs as well as in major state projects.[157] Later in March 2014, at the opening of the 2nd Plenary Session of 12th NPC, Premier Li Keqiang reiterated that the government 'will formulate measures for non-state capital to participate in investment projects of central government enterprises.'[158] Non-state capital will be allowed to participate in a number of projects in areas such as banking, oil, electricity, railway, telecommunications, resources development and public utilities.[159] The government pledged to open competitive operations in more areas to encourage full participation of private capital.[160]

Immediately after Premier Li's remarks at the NPC, CNPC announced that the company planned to make six business areas open to private investors.[161] Though detailed plans have not been issued, it is thought that CNPC will attract private capital to build pipelines, refineries and chemical complexes and tap unconventional oil and

---

[154] *Ibid*., Section 2(8).
[155] *Ibid*., Section 3(10).
[156] CCTV, 'China SOE Reform: Regulator Encourages Private Capital, Better Management', 27 December 2013,
http://english.cntv.cn/program/bizasia/20131227/102146.shtml.
[157] Ibid.
[158] CCTV, 'China to Allow Private Capital into More State Projects' 5 March, 2014, http://english.cntv.cn/20140305/101956.shtml.
[159] *Ibid*.
[160] *Ibid*.
[161] CCTV, 'Oil Giant CNPC to Open Six Business Areas to Private Investors' 6 March, 2014, http://english.cntv.cn/program/bizasia/20140306/101372.shtml.

gas resources.[162] Furthermore, CNPC also plans to open its overseas exploration and production and finance operations to private investment.[163] A month ago, Sinopec, the only competitor of CNPC in Chinese petroleum market and Asia's largest oil refiner, approved the plan to sell up to 30% of its retail oil business to private investors, including more than 30,000 fuel stations, pipelines, and storage.[164] While these initial steps in the new phase of SOEs reform are expected to produce positive results such as promoting industrial efficiency of SOEs, are not enough to make the markets dominated by SOEs become more suitable an area to be regulated by competition law, as the limits of shares hold by private investors mean that the SOEs remain the final decision-maker and therefore the strong tie between SOEs and relevant government organs, which has been hindering competition enforcement, continues to provide protection for vested interests. Nonetheless, this ongoing anti-corruption campaign certainly has the impact of breaking the existing political pattern within China's industrial sector and subsequently facilitates the effective competition enforcement therein.

Moreover, in August 2014 the public was thrilled by more news concerning the oil sector. Guanghui Petroleum Co. Ltd of Xinjiang was granted a licence by MOFCOM to import crude oil in 2014, making it the first private enterprise ever to obtain such a licence.[165] Many believed that this move signalled the government's willingness to break the monopoly of SOEs in the upstream market of the petroleum industry.[166] Despite this positive anticipation, the actual effect of the entry of Guanghui on breaking the dominant status of SOEs in petroleum industry remains largely symbolic. According to the licence, the import quota was merely 200,000 tons, which was less than a third of China's daily imports, not to mention that Guanghui

---

[162] *Ibid.*
[163] *Ibid.*
[164] China.org, 'Sinopec Embraces Private Investors', 20 February 2014, http://www.china.org.cn/business/2014-02/20/content_31534712.htm.
[165] Xinhua News Agency, 'China Focus: Oil Import License Ends State Monopoly', 28 August 2014, http://news.xinhuanet.com/english/china/2014-08/28/c_133603330.htm.
[166] *Ibid.*

was required to sell the crude oil to oil refining enterprises conforming to industrial policy, which could be subsidiaries owned by Sinopec and CNPC.[167] Nonetheless, given China's typical gradualist approach employed through its reform era, this move has the nominal potential to become the beginning of a diversifying and competitive petroleum industry in China.

Apart from crude oil, major developments in relation to refined oil can also be anticipated in the near future. On 12 October 2015, several Opinions of the Central Committee of the Communist Party of China and the State Council on Furthering the Reform of Price System (Price Reform Opinions) were issued.[168] These Opinions set forth primary principles for the reform of price system.[169] First, insistence on price determination by the market; the government should be refrained from improperly intervening in price determination when prices are able to be determined by the market, and price control in competitive areas should be relaxed. Second, insistence on the combination of delegation of power and effective oversight; oversight of the government's price control power in areas where prices are determined by the government should be rigorous and effective, and regulations and enforcement should be enhanced in areas where prices are determined by business operators. Third, insistence on innovation of reform; the government should pursue the innovation of price system and regulatory mechanism, and promote the transformation of price control from direct price determination to regulation of pricing behaviour and macroscopic supervision. Fourth, instead of steady and prudent reform; price reform should coordinate with the reforms of, such as, fiscal system, income distribution and industrial management, and any risks that endanger economic efficiency, social welfare and stability should be prevented.

---

[167] Fayen Wong and Chen Aizhu, 'China Private Energy Firm Wins Rare Crude Oil Import Permit' Reuters, 28 August 2014, http://uk.reuters.com/article/2014/08/28/china-crude-guanghui-stone-idUKL3N0QY0FY20140828.

[168] Full text available at http://www.gov.cn/xinwen/2015-10/15/content_2947548.htm.

[169] Section 1(2), Price Reform Opinions.

One of the most important areas that the Price Reform Opinions address is the price of refined oil.[170] Currently, NDRC adopts both government-set and government-guided prices for refined oil,[171] which vary according to the crude oil price on the international market.[172] According to the Price Reform Opinions, energy prices, including refined oil, gas and electricity, will be liberalised no later than 2020.[173] However, it should be noted that the overhaul of the pricing mechanism does not necessarily translate into the promotion of consumer welfare if the inherent structure of network industry is not overhauled, since natural monopolies may even be able to increase oil price substantially when it is liberalised by limiting output.

Whilst above events are all encouraging development in relation to the rigidly-control state sector, they are by no means a victory in themselves. Anti-graft campaigns, like the political movements in pre-reform China, can be an effective weapon to eliminate substantial political constraints. However, they must be followed by functioning legal mechanisms and conducive market environment which are the only long-term solution to ensure that the lowering of entry barriers, the advent of private actors, and the marketisation of price determination which will ultimately lead to the liberalisation of the state sector.

6. CONCLUSION

As above discussion clearly showed, SOEs are embedded in and integrated into China's hierarchical government bureaucracy.[174] The same theory applies equally to China's competition policy, which is largely a derivative of political policy. As a consequence, simple and straightforward application of competition law – if the

---

[170] *Ibid*, Section 2(5).
[171] Article 5(1) and (2), Management Measures on Oil Price, as revised on 26 March 2013, http://bgt.ndrc.gov.cn/zcfb/201303/t20130326_534082.html. Price of crude oil is determined by undertakings which have the licence to exploit and/or import.
[172] *Ibid*, Article 6.
[173] Section 1(3), Price Reform Opinions.
[174] Naughton (fn 31) 298.

AMEAs are lucky enough to be allowed to intervene – will not be an option to handle cases concerning SOEs; it is more of a political task of balancing interests than economic and legal consideration of business practices. The AML can only be a real economic constitution if external factors, namely the reform of SOEs' corporate structure and separation of government's administrative function from enterprise management, are able to achieve meaningful results in terms of eliminating vested interests. Although the AML currently fails to regulate anti-competitive practices of SOEs effectively, one of the main rationales behind this legislation – promoting a competitive socialist market economy – does create an environment conductive to forcing the overhaul of Chinese public sector and breaking the complete monopoly SOEs once enjoyed in some industrial sectors, as can be shown by China's ongoing corruption probe.

After the discussion on the historical development of China in Chapter 2, it is clear that any reform in China can be characterised by gradualism. Therefore, applying a competition law to liberalise a previously rigorously controlled sector and subsequently promoting economic efficiency through market competition is a big bang approach in the eyes of the Chinese government. Following a gradualist approach, a problem concerning a given sector can only be solved from within the sector, therefore, the efficiency of the state sector should be promoted through means other than competition law, for example, state-led reform in relation to the structure of the sector in general,[175] and the governance of SOEs in particular. Since political intervention is so pervasive in the history of China, it can only be defeated by political means, and

[175] For example, it was reported that the Telecommunications Law was included on the legislative agenda of the Standing Committee of the 12th NPC for deliberation in 2016. Legal Daily, 'MIIT Revising the Draft', 17 November 2015, http://www.legaldaily.com.cn/index/content/2015-11/17/content_6357852.htm?node=20908. A draft Telecommunications Law was submitted by MIIT to the State Council in 2004 – the same year in which the draft AML was submitted to the State Council – however, the deliberation and revision process was significantly prolonged. The Telecommunications Law, which will replace the current Telecommunications Regulations when promulgated, has seen by many as a signal sent by the central government to overhaul the telecommunications sector.

anti-corruption and de-administration are merely the first step towards promoting an economically efficient state sector.

SOEs were the core of China's traditional centrally planned economy. Although their dominance has been weakened since the beginning of the economic transition, their significance to China's economic and political stability remains largely unchanged in the new era. Nevertheless, for SOEs to continue to be the impetus to economic growth rather than holding it back, the public sector needs to be transformed from the apparatus of government into a modern enterprise system, which calls for the separation between management autonomy and public ownership.

Chapter Seven

The EU Competition System: Implications for China

1. INTRODUCTION

In light of the substantial involvement of European competition agencies in the drafting of the AML, the prominent similarities of the substantive competition laws in the two jurisdictions, and the problems with regard to China's competition law and competition system identified in the previous chapters, this chapter examines issues concerning the EU competition system which are instructive to solving China's problems. These include the design of competition institutions, enforcement efficiency, and last but not least, enforcement against SOEs.

This chapter does not intend to provide an in-depth and critical analysis of the EU competition system, it only seeks to provide relevant European reference to answering Chinese questions. Although the policy environments in which the competition systems of China and the EU operate are largely distinguishing, the emphasis of the EU competition system on, *inter alia*, transparency, consistency and predictability of decision-making, and equal treatment of private and public undertakings can indeed be valuable guidance for Chinese competition policymakers and enforcers. At the same time, however, this chapter does not suggest that the EU has a perfect competition model which should be transplanted completely in China; in fact, the EU competition system, like any other legal systems in the world, is subject to continuous criticism. Rather, it argues that since the EU competition system has partly been through what China is now dealing with – reform of the public economies and modernisation of competition system – besides receiving assistance during the drafting of the AML, China could also benefit from EU's experiences in seeking the optimal design of competition system which might provide China with a desirable shortcut to reforming

its own competition system. For example, the most prominent weakness of China's competition system – the inability of the AMEAs to withstand political pressures – is in fact the strength of its European part: the European Commission has been acting strictly in the interests of the EU only, and member states always ensure that competition authorities are independent of political meddling.

Nonetheless, as already made clear, several major pitfalls of competition enforcement in China are not derived from the competition system itself, and can only be avoided with the realisation of wide-scale economic and political reforms. The European practices recommended in the chapter will be limited to those which are feasibly and practically implementable within the political and institutional constrains to which the competition system is subject. The next section will introduce the bilateral cooperation between China and the EU in the field of competition policy.

2 EU-CHINA COMPETITION COOPERATION

Although the objectives a piece of competition legislation seeks to achieve vary in different jurisdictions[1] which do not share common competition traditions, in essence, a competition system protects and promotes competition in the marketplace. When the present day sees a constantly globalised economy and a steeply growing number of multinational corporations, there is an urgent need to harmonise the regulatory framework that oversees the economic behaviour of these market players for the sake of obviating potential conflicts that endanger commercial exchange. Advanced and sophisticated competition norms are therefore exported from leading competition jurisdictions to other parts of the world, particular to their trading partners.

[1] The AML states in Article 1 that competition rules are formulated to 'prevent and prohibit monopolistic conduct, safeguard fair market competition, improve efficiency of economic operation, protect the consumer and public interests, and promote the healthy development of the socialist market economy'; In the EU, it has been widely debated as to what the goal, or goals, of EU competition law really are, see for example, Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (2013) CLES Working Paper Series 3/2013.

More efficient interaction and communication between different competition jurisdictions also become more frequent.[2]

Since the establishment of formal relations in the 1970s,[3] Sino-EU trade has been dramatically increasing. China is the second trading partner and the biggest source of imports of the EU; and the EU is the biggest trading partner and source of imports of China.[4] Nonetheless, as the European Commission has once stated, 'China is the single most important challenge for EU trade policy'.[5] Whilst the economic interests shared by these two economic powers are tremendous, trading conflicts are not uncommon. Such tension requires the partnership, which was of an economic nature at the beginning, to solve various tasks concurrently. It has indeed developed over the past decades to encompass a much wider range of topics including, *inter alia*, security matters, human rights, and climate change.[6] Competition, as one of the most important areas of interest to the EU,[7] also became an issue regularly discussed in the bilateral communication. In September 2001, the 4th EU-China Summit called for the intensification of contacts and co-operation in the area of competition policy.[8] As a result, in May 2004 the Directorates-General for Competition of European Commission and MOFCOM jointly established a dialogue on competition – the EU-China Competition Policy Dialogue – which aims to establish a permanent forum of consultation and transparency between China and the EU in the area of competition policy, and to enhance the EU's technical and capacity-building assistance to China.[9]

---

[2] Qianlan Wu, 'EU – China Competition Dialogue: A New Step in the Internationalisation of EU Competition Law?' (2012) 18 European Law Journal 461, 461.

[3] The current EU-China partnership is based on the Trade and Economic Cooperation Agreement concluded in 1985 by China and the then European Economic Community.

[4] European Commission, 'Trade – China', http://ec.europa.eu/trade/policy/countries-and-regions/countries/china.

[5] European Commission, 'Competition and Partnership: A Policy for EU-China Trade and Investment', 24 October 2006, at http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130793.pdf.

[6] Meetings and dialogues between China and the EU are organised under 'three pillars': political dialogue, economic and sectoral dialogue and people to people dialogue. See European Union, 'EU-China Dialogue Architecture – Main Elements', http://eeas.europa.eu/china/docs/eu_china_dialogues_en.pdf.

[7] See Protocol No. 27, the Treaty on the Functioning of the European Union.

[8] See Joint Press Statement of the 4th EU-China Summit, http://europa.eu/rapid/press-release_PRES-01-312_en.htm?locale=en.

[9] Section 1, Terms of Reference for EU–China Competition Policy Dialogue.

This Dialogue is the first bilateral dialogue on competition joined by the EU, and it played a significant role in shaping the AML with EU competition thinking.[10]

In September 2012, acknowledging the importance of cooperation and coordination between competition authorities in enhancing an effective, transparent and non-discriminatory competition enforcement, the Directorate-General for Competition (DG Competition) – the institution responsible for conducting competition proceedings within the Commission – signed a Memorandum of Understanding on Cooperation in the Area of Anti-Monopoly Law with the other two Chinese competition enforcement agencies – NDRC and SAIC – aiming to increase mutual understanding and awareness of the trends and development of competition policy in the EU and China.[11]

In addition, in October 2015 DG Competition and MOFCOM, pursuant to the Terms of Reference for EU–China Competition Policy Dialogue, jointly issued the Practical Guidance for Cooperation on Reviewing Merger Cases.[12] The Guidance notices that cooperation in reviewing merger cases that fall within the jurisdiction of both the Commission and MOFCOM is, in fact, beneficial. It is also stated that both authorities should establish and maintain communication during the respective review of the same cases, and endeavour to make efficient, consistent, and non-conflicting decisions. Given that MOFCOM had from time to time made divergent decisions either by blocking a transaction which was approved by the Commission[13] or by putting forward unique remedies,[14] it remains unclear how this newly issued Practical

---

[10] Wu (fn 2) 465.

[11] Memorandum of Understanding on Cooperation in the Area of Anti-Monopoly Law, 20 September 2012.

[12] Practical Guidance for Cooperation on Reviewing Merger Cases of 15 October 2015, http://ec.europa.eu/competition/international/bilateral/china.html.

[13] See the P3 Network case.

[14] See for example *Nokia/Alcatel* (2015) MOFCOM Notice No. 44, http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139743.shtml. The case was unconditionally cleared by the Commission in July 2015, see Case No COMP/M.7632 – *Nokia/Alcatel-Lucent*, Commission decision of 24 July 2015.

Guidance can promote a convergence of decision-making in merger cases through effective communication and coordination.

Despite the more frequent communication and cooperation between competition authorities in the EU and China, it is worth noting that cooperation in the sphere of competition policy is just a means to serve the ultimate goal shared by the two economies, which is 'the establishment of smooth and sustainable trade relations between China and the EU'.[15] Indeed, as will be shown later, protection and promotion of competition is never the only goal for the implementation of competition policy in the EU. The next section briefly introduces the EU competition system.

3. THE EU COMPETITION SYSTEM

The EU has a long history of protecting market competition with well-developed competition policy, which plays a vital role in promoting consumer welfare in the form of lower prices, better quality of products, and more choice. It is widely recognised that competition law in Europe arose because rules regulating the market within the broader of Europe has become an economic, as well as political, necessity. The introduction of competition law not only provides a regulatory framework that fosters the free movement of goods and services by removing artificial and regulatory obstacles to intra-Union trade,[16] but also helps create 'an ever closer union among the peoples of Europe'.[17] The TFEU replaced the EC Treaty following the ratification of the Lisbon Treaty in 2009. The primary EU competition rules are now found in Articles 101-109 TFEU, which replaced Articles 81-89 EC (originally Articles 85-94 EEC). Although the Treaty of Lisbon is said to suppress the EU's commitment to

---

[15] See fn 9 above.

[16] See European Commission, 'Single Market Integration and Competitiveness in the EU and Its Member States', Report 2015. See also European Commission, 'A Deeper and Fairer Single Market: Commission Boosts Opportunities for Citizens and Business', 28 October 2015, http://europa.eu/rapid/press-release_IP-15-5909_en.htm.

[17] Treaty establishing the European Community, OJ C 325 of 24.12.2002.

'undistorted competition',[18] the EU competition system is still considered to be not only one of the most mature and advanced competition systems in the world,[19] but also a unique one, as it consists of enforcement authority at the EU level, the European Commission – a collegiate institution composed of 28 politically appointed commissioners from 28 member states – as well as national enforcement authority (NCAs) in 28 member states.

The following sections provide a brief overview of the historical development of EU competition law.

3.1 The Emergence of Competition Law

At the end of the nineteenth century, modern competition rules appeared in the United States.[20] However, Europe only had its competition rules more than half-century later with the promulgation of the 1951 Treaty of Paris establishing the European Coal and Steel Community (ECSC Treaty),[21] which initiated a process of substantial economic integration in the steel and coal sectors among six nations: Germany, Belgium, Italy, Luxembourg, France and the Netherlands. Besides a number of legal and economic provisions organising the trade of coal and steel, the founding

---

[18] According to Article 3(1) (g) EC (now Article 3(3) TFEU), one of the objectives of the Community is to establish 'a system ensuring that competition in the internal market is not distorted.' However, such reference was removed from the main body by the Lisbon Treaty. Now, the substantive content of Article 3(1) (g) EC is placed in Protocol No 27 on the Internal Market and Competition, annexed to the TEU and the TFEU. As such, there were concerns about competition enforcement in the EU would be downplayed. However, it has been argued that, following the practices of EU competition agencies and EU courts after the entry into force of the Lisbon Treaty, the omission of the sentence from the body of the amended EC Treaty 'does not affect the constitutional status of the Treaty rules on competition', and Protocol No. 27 is 'seen as a constitutive part of Article 3(3) TFEU and appears to have the same interpretative value as the appealed Article 3(1) (g) EC.' Therefore the removal of Article 3(1) (g) EC is simply 'symbolic'. Ben Van Rompuy, 'The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts' (2011) CPI Antitrust Chronicle, http://ssrn.com/abstract=1970081, 9. This argument was recently confirmed by the General Court. Case T-456/10 *Timab Industries v Commission*, ECLI:EU:T:2015:296, paras. 211-212.

[19] The EU has 'one of the world's two leading competition law systems.' Ian Forrester, 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009) 34 European Law Review 817, 817.

[20] See the Sherman Act 1890 of the United States, 15 U.S.C.

[21] Officially the Treaty establishing the European Coal and Steel Community.

member states, being 'enlightened by the US experience',[22] drafted competition law provisions[23] prohibiting both cartels and abuses of economic power in the steel and coal sectors.

In 1957, the six founding member states of the ECSC decided to extend the scope of their economic integration to a larger number of sectors.[24] They expanded the competition provisions of the ECSC Treaty to all economic sectors in the Treaty of Rome[25] which holds undistorted competition as one of its fundamental objectives.[26] The main competition provisions of the EEC Treaty can be found in Articles 85-90 EEC. In addition to Articles 85 and 86 of the EEC Treaty, which prohibited restrictive agreements between firms and abuses of a dominant position respectively, the EEC Treaty also contained Article 92 EEC aimed at preventing state aid.

After lengthy negotiations on the *ex ante* rules and *ex post* rules supported by Germany and France respectively, [27] the rules governing the enforcement of competition law finally came to existence in 1962 with the adoption of Council Regulation 17/62.[28] In favour of the German position, Regulation 17/62 established a centralised enforcement system,[29] where the European Commission was entrusted with significant investigative and regulatory powers to scrutinize *ex ante* agreements between firms through a notification system. It required firms to notify all agreements falling within the scope of Article 85 EEC – provided that the parties to the agreements seek exemption under Article 85(3) EEC – must be notified to the Commission.[30] In contrast, the role played by the competition authorities in Member States and national

---

[22] Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (Hart Publishing Ltd 2007) 36.
[23] Arts 65 and 66, ECSC Treaty.
[24] Elhauge and Geradin (fn 22) 36.
[25] Officially the Treaty establishing the European Economic Community.
[26] Article 3(g) of the EC Treaty.
[27] Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *EU Competition Law and Economics* (Oxford University Press 2012) 17.
[28] Council Regulation No 17/62 of 6 February 1962 (EEC): First Regulation implementing Articles 85 and 86 of the Treaty, OJ 013 of 21.02.1962.
[29] Council Regulation No 17/62 of 6 February 1962 (EEC): First Regulation implementing Articles 85 and 86 of the Treaty, OJ 013 of 21.02.1962, at 204.
[30] Article 4.

courts in the implementation of EC competition rules was marginal.[31] Article 9(1) of the Regulation provided that the Commission had the sole right to apply Article 85(3) EEC and grant exemptions – subject to review by the Court of Justice – to agreements which would otherwise be automatically void under Article 85(2) EEC.

Whilst the EEC Treaty governed anti-competitive agreements and abuse of dominant position, it made no reference to a merger control system, which was instead established by the Council pursuant to Regulation 4064/89 in 1989.[32] Regulation 4064/89 was revised in 1997 and again in 2004, and the current legal instrument governing the EU merger system is Regulation 139/2004 (EUMR).[33] Apart from primary EU legislation, sources of EU competition law also include regulations, directives, decisions, recommendations, and opinions. The latter two have no binding force and may take the form of notice, guideline or guidance. Whilst the core of the EU competition law as provided by the EEC Treaty remains largely intact, the implementing rules have been constantly amended to accommodate new developments in competition law arena.[34]

3.2 The Overhaul of European Competition System

Along with economic development, agreements were formulated more regularly, and the workload of the Commission to handle notifications was increasingly heavy. Since a significant number of the agreements entered into by undertakings were in fact able to satisfy the requirements of Article 81(3) EC,[35] the Commission adopted several so-called 'block exemption regulations', under which certain types of

---

[31] Elhauge and Geradin (fn 22) 39.

[32] For example, Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 257 of 21.09.1990.

[33] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24 of 29.01.2004.

[34] Philip Lowe, 'The Design of Competition Policy Institutions for the 21st Century – the Experience of the European Commission and DG Competition' (2008) Competition Policy Newsletter, available at http://ec.europa.eu/competition/publications/cpn/2008_3_1.pdf, 3.

[35] Elhauge and Geradin (fn 22) 37. The EEC Treaty was renamed the Treaty establishing the European Community (EC) in 1992.

agreements [36] or agreements concerning certain industrial sectors [37] were automatically exempt from the application of Article 81(3) EC. In addition, the Commission also issued guidelines, comfort letters, negative clearance decisions, and *de minimis* notices in order to enhance the efficiency of the notification procedure and ensured a timely enforcement of competition law.[38] However, these measures could not fundamentally compensate for the shortcomings of the system.

At the turn of the century, the Commission realised that, with 10 new member states joining the EU in 2004, its capacity would no longer be able to afford the increasing amount of notifications. Particularly, the centralised system set up by Regulation 17 could no longer secure a balance between effective supervision and simplified administration as required by Article 83(2)(b) EC.[39] On the one hand, the notification requirement 'impose[d] a heavy burden of work and expense on undertakings'[40] to draft notifications for agreements most of which did not pose real threat to trade between member states.[41] On the other, due to the fact that a major part of available resources had been devoted to reviewing notifications, the Commission was not able to 'detect the most serious infringements of the competition rules'.[42] Moreover, whilst the Commission had the sole authority to grant exemption, initially national courts and competition authorities lacked the necessary expertise and

---

[36] See, for example, Commission Regulation 2658/2000 of 29 November 2000 on the application of Art 81(3) of the Treaty to categories of specialisation agreements, OJ 2000, L 304 of 29.11.2000; Commission Regulation 2659/2000 of 29 November 2000 on the application of Art 81(3) of the Treaty to categories of research and development agreements, OJ 2000, L 304 of 29.11.2000; and Commission Regulation 2790/1999 of 22 December 1999 on the application of Art 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336 of 22.12.1999.

[37] See, for example, Commission Regulation 358/2003 of 27 February 2003 on the application of Art 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ 2003, L 53 of 27.02.2003; and Commission Regulation 1400/2002 of 31 July 2002 on the application of Art 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ 2000, L 203 of 31.07.2002.

[38] Geradin et al. (fn 27) 17.

[39] Recitals 2 and 3, Regulation 1/2003.

[40] White Paper on the Modernisation of the Rules implementing Article 85 and 86 of the EC Treaty, COM (99) 101 final, 1999 O.J. (C 132) 1, 29

[41] Eric Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' (2008) Community Report to the FIDE Congress, at http://ssrn.com/abstract=1139776, 4.

[42] White Paper on the Modernisation of the Rules implementing Article 85 and 86 of the EC Treaty, COM (99) 101 final, 1999 O.J. (C 132) 1, 29

resources to conduct sophisticated economic evaluations under Article 81(3) EC, this was no longer the case since the Commission had already set major precedents in the application of Article 81(3) EC, and the capacity of national courts and competition authorities to handle complex competition cases had been significantly increased.[43] As a consequence, the Commission proposed the abolition of the notification procedure and the decentralisation of the application of Article 81(3) EC.[44]

Following the Commission's proposition, the Council replaced Regulation 17/62 with Regulation 1/2003,[45] the so-called 'Modernisation Regulation', which ushered in far-reaching changes to save the Commission from an increasingly overloaded and ineffective enforcement system.[46] Regulation 1/2003 came into force on 1 May 2004. After over 40 years of centralisation, the EU modernisation reforms brought by the Regulation abolished the *ex ante* notification procedure for agreements falling within the scope of Article 81 EC, diverted the enforcement of Article 81 EC from 'a standard presumption of illegality to a default assumption of legality',[47] and decentralised the power to enforce Article 81(3) EC which was previously held solely by the Commission. The reformed framework gave NCAs and national courts a primary role in the application of EU competition law and allowed the Commission to 'focus its investigations on sectors where there are only a few players, where cartel activity is recurrent or where abuses of market power are generic'.[48] This modernisation reform is said to be 'the most important legal and cultural policy revolution in the history of

---

[43] John Cooke (2004) 'Competition Law and Policy of the European Union: the Reform of Competition Law Enforcement – Will it Work?' in Dermot Cahill (eds.) *The Modernisation of EU Competition Law Enforcement in the European Union: FIDE 2004 National Reports* (Cambridge University Press 2004) 33.

[44] White Paper on the Modernisation of the Rules implementing Article 85 and 86 of the EC Treaty, COM (99) 101 final, 1999 O.J. (C 132) 1, 30

[45] 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, OJ L 001 of 04.01.2003.

[46] Wouter Wils, *Principles of European Antitrust Enforcement* (Hart Publishing 2005) 1.

[47] Ben Depoorter and Francesco Parisi, 'The Modernization of European Antitrust Enforcement: the Economics of Regulatory Competition' (2005) 13 Geo. Mason L. Rev. 309, 311.

[48] Communication for the Commission – A pro-active Competition Policy for a Competitive Europe, COM (2004) 293 final, 16.

European competition law,'[49] and it has profoundly changed the way in which EU competition law is enforced.[50]

The Commission also adopted a 'Modernisation Package' comprising of six notices to complement Regulation 1/2003, which aimed to promote the efficiency of the EU competition enforcement and reduce bureaucracy for undertakings to comply with the EU competition rules.[51] In the Modernisation Package, the Notice on Cooperation within the Network of Competition Authorities was of particular importance as it laid down the scope within and procedures through which the European Competition Network (ECN), established pursuant to Regulation 1/2003, would be operating.[52]

4. INTRA-NETWORK COOPERATION AND COORDINATION

The primary consideration leading to the decentralisation of competition enforcement, both in the EU and China, is that central agencies do not have the capacity in terms of financial resources and manpower to deal with a large number of competition cases, and so devolution of power to the local level is helpful and necessary. Through decentralisation, central agencies are able to devote scarce resources to the most complicated and influential cases whilst local agencies handle those with merely regional impact. However, consistent enforcement may be compromised as a result of inefficient communication caused by multi-level governance and involvement of multiple agencies.[53] Mechanisms to facilitate the cooperation and coordination amongst enforcement agencies – such as the European

---

[49] Angela Wigger 'Revisiting the European Competition Reform: the Toll of Private Self-Enforcement' (2004) Vrije Universiteit Amsterdam Working Papers Political Science, No.2004/07, 3.
[50] *Ibid*.
[51] European Commission, 'Commission Finalises Modernisation of the EU Antitrust Enforcement Rules', 30 March 2004, http://europa.eu/rapid/press-release_IP-04-411_en.htm?locale=en.
[52] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101 of 27.04.2004.
[53] Firat Cengiz, 'Multi-Level Governance in Competition Policy: the European Competition Network' (2010) 35 European Law Review 661, 661.

Competition Network (ECN)[54] in the EU and the AMC in China – are therefore essential to mitigate the weakness of decentralisation of the competition enforcement.

Whilst the relationship between EU and national law in general[55] – and that between EU and national competition law in particular[56] – need to be clarified in the EU, the relationship between national and local law is certainly not subject to debate in China.[57] However, as already illustrated, the interplays between central and local AMEAs and between local AMEAs can be subtle yet intricate even in a unitary state like China. The lack of coordination represents one of the major sources that contribute to the ineffectiveness of China's competition enforcement. This phenomenon exits at the central level, where the AMC is not functional in performing its coordinating duty; it worsens at local level, where the local DRCs and AICs are in a competing relationship.

In a loose sense, the '3-64' competition enforcement structure in China – three central AMEAs, 32 DRCs and 32 AICs – can be compared to the '1-28' enforcement structure in the EU – a European Commission and 28 National Competition Authorities (NCAs) – whilst the AMC can have similar functions to those of the ECN. The purpose of such comparison is to consider how the effective coordination and cooperation taking place within the ECN – which should, at least in theory, be a much

---

[54] For a general discussion on the development of the ECN, see David J. Gerber, 'The Evolution of a European Competition Law Network' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds) *Constructing the EU Network of Competition Authorities* (Hart Publishing 2004).

[55] In *Flaminio Costa v ENEL*, the ECJ held that '[b]y creating a community of […] real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves'. Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585, at 593. The principle that the EU law prevails over national law in the case of a conflict was affirmed by the Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, which reads 'the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States'. Declaration concerning primacy, OJ 2008/C 115/01, at 344.

[56] Article 3(2) of Regulation 1/2003 provides that in the case of a conflict the EU competition law prevails over national competition law. In addition, Member States are refrained from adopting either stricter or more lenient rules on anti-competitive agreement, whilst they are allowed to adopt stricter rules on unilateral conduct.

[57] Although, from time to time, there will be several local laws and regulations which are deemed unconstitutional. See China Daily, 'Scholars Propose: Reviewing the Law before Reviewing the Case in the Event of a Conflict between a Local Legislation and the Constitution', 5 June 2015, http://www.chinadaily.com.cn/micro-reading/interface_yidian/2015-06-05/13804323.html.

more complex apparatus than the network consisting of the AMEAs since the ECN involves the interests of both supranational entity and sovereign states[58] – can be an instrumental source of inspiration for enhancing the coordination and cooperation between the AMEAs, and contributing to the consistent and coherent application of the AML.

The ECN, as a 'splendid success story',[59] is a forum for discussion and cooperation of European competition authorities including the Commission and NCAs in relation to the enforcement of Articles 101 and 102, and helps create and maintain a common competition culture in Europe.[60] It was established for the purpose of preserving both an efficient division of work and an effective and consistent application of EU competition rules.[61] In relation to the division of work, the primary objective is to prevent conflicts amongst enforcement agencies by identifying a 'well placed' authority.[62] The Commission is 'well placed' to intervene in cases if they have effects on competition in more than three Member States,[63] if they are closely linked to other EU provisions which may be exclusively or more effectively applied by the Commission, and if the EU interest requires the adoption of a Commission decision to develop EU competition policy when a new competition issue arises or to ensure effective enforcement.[64] Since all NCAs have parallel competences in applying Articles 101 and 102, cases can be dealt with by a single NCA or several NCAs acting in parallel. Three cumulative conditions need to be fulfilled for an NCA to be 'well placed' to initiate an investigation. First, the alleged anti-competitive practice in

---

[58] For an evaluation of the functioning of the ECN, see Mislav Mataija, 'The European Competition Network and the Shaping of EU Competition Policy' (2010) 6 Croatian Yearbook of European Law and Policy 75; and Mihalis Kekelekis, 'The European Competition Network (ECN): It Does Actually Work Well' EIPAScope 2009/1, 35-39.

[59] Bruno Lasserre, 'The Furture of European Competition Network' 21st St. Gallen International Competition Law Forum ICF, May 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567620, 1. Nonetheless, it has been argued that the ECN, as a platform of policy development and dissemination, lacks transparency and democratic accountability. Mataija (fn 68) 78.

[60] Para. 1, Notice on Network of Competition Authorities.

[61] *Ibid.*, para. 3.

[62] Cengiz (fn 53) 667.

[63] Para. 14, Notice on Network of Competition Authorities.

[64] *Ibid.*, para. 15.

question has substantial direct actual or foreseeable effects on competition within its territory, and is implemented within or originates from its territory. Second, the NCA is able to adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and, where appropriate, adequately sanction the infringement. Third, the NCA is able to gather the necessary evidence, either with or without the assistance of other authorities, to prove the infringement.[65]

In order to ensure cases are dealt with by a 'well placed' competition authority, the ECN provides mechanisms through an ECN Electronic Transmission project for NCAs to inform the Commission before commencing an investigation under Articles 101 or 102 TFEU,[66] and to inform each other of a possible re-allocation of cases by means of a standard form containing information such as the authority dealing with the case, the product, territories and parties concerned, the alleged infringement, the suspected duration of the infringement, and the origin of the case.[67] In addition, no later than 30 days before the adoption of a decision, NCAs are obliged to provide the Commission with a summary of the case, the envisaged decision, or the proposed course of action.[68] In addition, the Commission and NCAs have powers to exchange and use information collected legally by them.[69] An NCA is able to ask another NCA for assistance in order to collect information or to carry our fact-finding measures on its behalf.[70] These mechanisms make it possible for the Commission to intervene and relieve NCAs of their competence to apply Articles 101 and 102 TFEU in a timely fashion.[71]

Although the ECN does not directly divide the work, the framework provided by it for exchange of information amongst the Commission and NCAs ensures the

---

65 *Ibid*., para. 8(1) (2) and (3).
66 Article 11(3), Regulation 1/2003.
67 Para. 17, Notice on Network of Competition Authorities.
68 Article 11(4), Regulation 1/2003.
69 *Ibid*., Article 12.
70 Para. 29, Notice on Network of Competition Authorities.
71 *Ibid*., para. 54.

efficiency of case allocation.[72] The same level of efficiency is largely lacking in China. As discussed in Chapter 5, the division of jurisdiction between NDRC and SAIC based on whether the alleged anti-competitive practice has a price-related element has proven to be largely questionable. In *Hunan Insurance Cartel*, the two separate cases that seemed to be related were handled by local agencies of NDRC and SAIC, whilst some illegal practices were left unpunished.[73] Since it is impractical to expect these two competing agencies to cooperate voluntarily, if there was a mandatory mechanism for collection and exchange of information at the AMC level amongst NDRC, SAIC and their local agencies, the AMEAs would have contributed to each other's investigations by providing additional evidence and information, and the cases would have been dealt with more efficiently.

The division of jurisdiction between central AMEAs and their local agencies is also problematic: in *Moutai and Wuliangye*, the RPM practices of the two SOEs, which affected numerous distributors on a national scale, were handled by the Price Bureaux of Guizhou Province and Sichuan Province.[74] In *Zhejiang Insurance Cartel*, where insurance companies and consumers mainly from Zhejiang Province were involved, the horizontal agreements were sanctioned by NDRC. However, the *Hunan Insurance Cartel*, which involved only insurance companies based in and affected car owners mainly from Hunan Province, were handled by Hunan AIC and Hunan Price Bureau. There seems to be no pattern behind the division of work in these cases. The most obvious difference between a central and a local intervention is that the fines imposed

---

[72] For a critical analysis of exchange of information and cooperation undertaken within the ECN, see Julian Nowag, 'Due Process: the Exchange of Information and Risk of Hindering Effective Cross-border Co-operation in Competition Cases' (2010) 7 The Competition Law Review 105; and Andreas Schwad and Christian Steinle, 'Pitfalls of the European Competition Network – Why Better Protection of Leniency Applicants and Legal Regulation of Case Allocation is Needed' (2008) 29 European Competition Law Review 523.

[73] See section 4.2, Chapter 5.

[74] It was stated that the two cases were first initiated by NDRC, but were subsequently directed respectively to local authorities in Guizhou and Sichuan. Angela Huyue Zhang, 'Bureaucratic Politics and China's Anti-Monopoly Law' (2014) King's College London Dickson Poon School of Law Legal Studies Research Paper Series, paper no. 2014-9, http://ssrn.com/abstract=2391187, 33. However, the reason of the delegation of enforcement authority remains unknown.

on infringing business operators are remitted to national treasury in the former case, and to the provincial treasury in the latter. Although there is no evidence suggesting that central AMEAs and provincial governments had engaged in any form of benefit exchange – namely, a furtive communication with regard to which enforcement agency should abstain from initiating the investigation in a particular case and what benefits the restrained agency could possibly obtain – a clearly defined allocation of jurisdiction amongst central and local AMEAs can certainly prevent the abuse of discretionary power and eliminate the advent of such maladministration.

Apart from allocation of jurisdictions among competition authorities, another important aspect of the EU from which China can draw a lesson is the Commission's promotion of a coherent decision-making process by adopting legal instruments and establishing supplement institutions.

5. TRANSPARENCY, CONSISTENCY AND COHERENCE IN COMPETITION PROCEEDINGS

As can be shown by the lack of information in official decisions made by the AMEAs, non-transparency of decision-making has been a major problem undermining parties' rights of defence and leading to inconsistency of decision-making.[75] It also prevents the public from effectively scrutinising and evaluating the enforcement activities under the AML, and the agencies from actively accumulating competition-related expertise. In the EU, improving transparency is the main way to promote good governance and ensure the participation of civil society.[76] Decisions taken and work conducted within the EU are required to be as open as possible.[77]

[75] See respectively section 3.1 of Chapter 5 regarding the opacity of MOFCOM's decision-making process and section 3.4 of Chapter 5 regarding NDRC's inconsistent fine setting.
[76] Article 15(1), TFEU.
[77] Article 1 TEU; Article 15(1) TFEU.

Article 30 of Regulation 1/2003 requires the Commission to publish – in the *Official Journal of the European Union* and on DG Competition's website[78] – any decision of finding and termination of infringement, order of interim measures, acceptance of commitments and finding of inapplicability,[79] as well as any decision on fines and periodic penalty payments.[80] Similar publication requirements are also set out in Article 20(1) of EUMR. In the published decisions, the Commission will make as much information as legally permitted available to the public.[81] Apart from these general principles governing the openness of published decisions, the Commission has been working towards providing fundamental procedural safeguard for transparency in competition proceedings.

5.1 Rights of Access to the File

The legal basis of the rights of addressees of a statement of objections made by the Commission[82] to access to Commission file can be found in Articles 27(1) and (2) of Regulation 1/2003, and Articles 18(1) and (3) of Regulation 139/2004. The right is further recognised by Article 41(2)(b) of the Charter of Fundamental Rights of the European Union, which states '[every person has] the right […] to have access to his

[78] Paras. 134 and 135, DG Competition – Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU.
[79] Article 30, Regulation 1/2003.
[80] *Ibid*. In addition, the Commission may make the initiation of antitrust proceedings public before informing the parties concerned. Article 2(3) of Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123 of 27.04.2004.
[81] Para. 2, Guidance on the preparation of public versions of Commission Decisions adopted under Articles 7 to 10, 23 and 24 of Regulation 1/2003. See also Guidance on the preparation of public versions of Commission Decisions adopted under the Merger Regulation. According to Article 28(2) of Regulation 1/2003 and Article 16(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, the Commission should refrain from disclosing confidential information which is covered by the obligation of professional secrecy. Any confidential information will need to satisfy three cumulative conditions in order to be covered by the obligation of professional. Case T- 198/03 *Bank Austria Creditanstalt v Commission* [2006] ECR II-1429, para. 71.
[82] Para. 7, Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325/07 of 22.12.2005 (Right of Access Notice). ('Access to the file […] is intended to enable the effective exercise of the rights of defence against the objections brought forward by the Commission.')

or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.' In 1997, pursuant to Article 19 of Regulation 17/62, the Commission adopted the Notice on the rules of procedure for access to the Commission's competition file[83] in order to increase transparency of procedures for parties involved in antitrust and merger cases.[84] Any breach of the rights of defence will in principle lead to the annulment of the decision.[85] In 2005, the Notice was revised to 'increase the transparency of competition procedures and underline the Commission's commitment to due process and parties' rights of defence'.[86]

The file to which the access may be granted consists of all documents that have been obtained, produced, or assembled by DG Competition during the investigation, with the exception of non-accessible documents,[87] including internal documents,[88] business secrets,[89] or other confidential information such as military secrets.[90] Given the increasing reliance on economic data in merger reviews in recent years, the Commission also permits merging parties to verify the Commission's use of economic data and empirical methods.[91] The Commission is allowed to decide in which way the access to the file should be granted.[92] In *GE/Instrumentarium*, after concluding that the proposed merger would significantly restrict competition, the economists retained by the merging parties were granted the access to the database and the computer

---

[83] Commission notice on the internal rules of procedure for processing requests for access to the file in cases under Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89, OJ C 23 of 23.01.1997.

[84] European Commission, Press Release IP/97/50, http://europa.eu/rapid/press-release_IP-97-50_en.htm?locale=en.

[85] Case T-5/02 *Tetra Laval BV v Commission* [2002] II-4389, para. 89.

[86] European Commission, Press Release IP/05/1581, http://europa.eu/rapid/press-release_IP-05-1581_en.htm?locale=zh.

[87] Paras. 8 and 10, Right of Access Notice.

[88] *Ibid*., paras. 12-16.

[89] *Ibid*., para. 18.

[90] *Ibid*., paras. 19 and 20.

[91] Nicholas Levy, 'Procedural Aspects of Merger Control' in Ioannis Lianos and Damien Geradin (eds.) *Handbook on European Competition Law* (Edward Elgar 2013) 315.

[92] Para. 44, Right of Access Notice. See also DG Competition – Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EUMR.

programs used by the Commission to generate its empirical results.[93] Because the data was confidential and could not be forwarded directly, the economists, after signing confidentiality agreements, were invited to work on the Commission's premises.[94]

Irrespective of the rationality of the final decision in a competition case, in the event that technical capability is restricted, a procedural measure such as the one in *GE/Instrumentarium* is able to provide a desirable degree of transparency for the parties involved, which will have the opportunity to understand the reasoning of the decision and will therefore be better placed to determine on their own if the decision had addressed all fundamental issues. The AMEAs should endeavour to make available to parties involved the evidence and information on which their decisions are based so as to give them the chance to express their views and increase the credibility of the decisions.[95]

Disputes between the parties and the Commission regarding confidentiality claims[96] or access to the file in general will be dealt with by the Hearing Officer.

5.2 Hearing Officer

For the purpose of safeguarding the effective exercise of the procedural rights of the parties concerned,[97] the post of Hearing Officer was created by the Commission in 1982.[98] The Hearing Officer should be 'an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity,

---

[93] Guillaume Loriot, François-Xavier Rouxel and Benoit Durand, 'GE/Instrumentarium: A Practical Example of the Use of Quantitative Analyses in Merger Control' (2004) 1 Competition Policy Newsletter 58, 61.

[94] *Ibid.*

[95] Article 32 of the Administrative Penalty Law of China stipulates: 'The parties shall have the right to state their cases and to defend themselves. Administrative organs shall fully heed the opinions of the parties and shall reexamine the facts, grounds and evidence put forward by the parties; if the facts, grounds and evidence put forward by the parties are established, the administrative organs shall accept them.'

[96] Para. 42, Right of Access Notice.

[97] These rights include all the procedural rights as set out in Regulation 1/2003, Regulation 139/2004, Regulation 773/2004, Regulation 802/2004, as well as in the relevant case law of the Court of Justice of the EU. Recital 2, Decision 2011/695/EU of the President of the European Commission on the function and terms of reference of the Hearing Officer in competition proceedings, OJ L 275/29 of 13.10.2011 (Terms of Reference of the Hearing Officer).

[98] Recitals 3 and 4, Terms of Reference of the Hearing Officer.

transparency and efficiency of [antitrust and merger] proceedings'.[99] In order to ensure the independence of the Hearing Officer from DG Competition, the post is attached to the Competition Commissioner, from whom the Hearing Officer should not seek or take instructions in exercising his or her functions,[100] for administrative purposes.[101]

The Hearing Officer operates to resolve issues affecting the effective exercise of the procedural rights of the parties involved, complainants, or interested third persons where such issues could not be resolved through prior contacts with the Commission.[102] The main functions of the Hearing Officer, apart from making reasoned decisions on requests for access to the files that are necessary for the proper exercise of the right to be heard,[103] include ensuring the parties involved are properly informed of their procedural status by DG Competition;[104] deciding on whether applications to be heard from third persons should be accepted and conducting the oral hearing for the addressees of a statement of objection or other third parties;[105] deciding on whether extension should be granted to addressees of a statement of objections or other third parties who consider that the time to make their views known is inadequate.[106] The Hearing Officer is required to, , prepare a final report in relation to the effective exercise of procedural rights during the proceedings based on the decision

---

[99] *Ibid*, Recital 3.
[100] Wouter Wils, 'The Role of the Hearing Officer in Competition Proceedings before the European Commission' (2015) updated version of a paper initially published in (2012) 35 World Competition 431, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087, 5. See Article 3(1), Terms of Reference of the Hearing Officer. ('In exercising his or her functions, the hearing officer shall act independently').
[101] Recital 5 and Article 2(2), Terms of Reference of the Hearing Officer.
[102] *Ibid*, Recital 8.
[103] *Ibid*, Article 7.
[104] *Ibid*, Article 4(2) (d).
[105] *Ibid*, Articles 5 and 6. According to Article 14, the Hearing Officer is required to submit an interim report to the Commission after the oral hearing to address issues including disclosure of documents and access to the file, time limits for replying to the state of objections, the observance of the right to be heard and the proper conduct of the oral hearing.
[106] *Ibid*, Article 9.

drafted by the Commission and submitted to the Advisory Committee,[107] which is to be published in the Official Journal together with the Commission's decision.[108]

The impartial and independent nature of the Hearing Officer in exercising these functions is of particular relevance for China's competition system,[109] in which there is no mechanism to resolve disputes between parties and the AMEAs regarding effective exercise of the procedural rights. Due to the lack of transparency, it is possible that the decisions made by the AMEAs are based on facts the parties deem incomplete, and on objections to which the parties involved have no chance to respond. An institution to protect the rights of third parties[110] whose interests may be affected by an ongoing investigation, to express their views on the proceedings, and have access to relevant information is equally necessary. Nonetheless, it has to be admitted that creating a position like the Hearing Officer in China will not produce meaningful outcomes, since the policy environment dictates that whoever holds the position is unlikely to be independent enough to fulfil the responsibility.

5.3 Advisory Committee

An Advisory Committee on Restrictive Practices and Monopolies was originally set up by Regulation No 17,[111] and was renamed the Advisory Committee on Restrictive Practices and Dominant Positions,[112] whose role has been strengthened following Regulation 1/2003. A similar committee – the Advisory Committee on Concentrations – was set up under EUMR.[113] Both Advisory Committees are

[107] Article 16, Terms of Reference of the Hearing Officer.
[108] *Ibid*, Article 17.
[109] For the discussion of potential weakness of the Hearing Office, see Nicolo Zingales, 'The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to be Heard?' (2010) 7 The Competition Law Review 129.
[110] The initiation of antitrust investigation and acceptance of concentration notifications under the AML are not publicised, therefore interested third parties may be excluded from the enforcement procedure. Dan Wei, 'Antitrust in China: An Overview of Recent Implementation of Anti-Monopoly Law' (2013) 14 European Business Organization Law Review 119, 124.
[111] Article 10, Regulation 17/62.
[112] Article 14, Regulation 1/2003.
[113] Article 18, Regulation 139/2004; Recital 19, Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L133/1 of 7 April 2004.

composed of representatives of the competition authorities of the member states.[114] The Advisory Committee on Restrictive Practices and Monopolies is said to 'ha[ve] functioned in a very satisfactory manner',[115] and although it does not issue opinions on cases dealt with by NCAs,[116] it is able to act as a forum for multilateral communication among NCAs and help safeguard the consistent application of the EU competition rules.[117]

The Commission is required to consult the Advisory Committee before taking some antitrust or merger decisions,[118] based on which the relevant Advisory Committee will deliver a written opinion on the preliminary decision drafted by the Commission.[119] The opinion formulated by the Advisory Committee is to be taken into account by the Commission to the greatest extent possible, and the Commission is required to inform the Advisory Committee as to the manner in which the opinion has been addressed.[120] In addition, the Commission is required to consult the Advisory Committee when drafting rules in order to implement Regulation 1/2003[121] and Regulation 139/2004.[122]

The Advisory Committee was established in the era of centralised enforcement of European competition rules, and it continued to play an active role after the ECN was founded, although a certain degree of overlap is bound to exist between these two forums. Whilst the original objective of creating an Advisory Committee was to establish closer liaison with NCAs and to integrate their decision-making processes, the Advisory Committee within the current EU competition system is becoming an external supervisory institution that monitors the substantive aspect of decision-making of the Commission. It ensures that the analytical thinking of the Commission

---

114 Article 14(2), Regulation 1/2003, and Article 19(4), Regulation 139/2004
115 Recital 19, Regulation 1/2003.
116 *Ibid*., Article 14(7).
117 *Ibid*., Recital 19.
118 Article 14(1) of Regulation 1/2003 and Article 19(3) of Regulation 139/2004.
119 Article 14(3) of Regulation 1/2003 and Article 19(6) of Regulation 139/2004.
120 Article 14(5) of Regulation 1/2003 and Article 19(6) of Regulation 139/2004.
121 Article 33(2).
122 Article 23(2).

is consistent and compliant with the EU competition rules. In light of the lack of judicial review in China's competition system, the existence of an impartial external organisation that is entrusted to review competition decisions should be able to, at least nominally, compensate for the arbitrary decision-making of the AMEAs.

Among the existing competition institutions in China, the AMC should be the most suitable to undertake this responsibility, since it is in essence an advisory rather than enforcement body. The Anti-Monopoly Experts Advisory Committee, a think-tank within the AMC, should be perfectly qualified to provide constructive opinions in respect of decisions drafted by the AMEAs, as it consists of 21 renowned Chinese legal and economic scholars. This Committee was created in 2011 to provide professional opinions on development of competition policy and related guidance, and on outstanding competition cases. Nevertheless, it is not properly functioning due to the lack of procedural rules to lay down the consultation process. The only perceivable activity of this Committee so far is the dismissal of one of its members in August 2014, who was alleged to have taken 'huge rewards' to defend Qualcomm during the investigation initiated by NDRC[123] and was therefore in breach of the disciplinary rules of the Committee.[124]

Another measure implemented in the EU competition which has proved useful to prevent inconsistent and non-arbitrary application of competition rules is the guidelines formulated by the Commission governing different stages of the decision-making process. The next section will use the fine-setting of the Commission as an example to illustrate the importance of detailed and comprehensive legal instruments in supplementing competition enforcement.[125]

---

[123] For the *Qualcomm* case, see section 3.2, Chapter 5.

[124] Reuters, 'China Sacks Anti-Monopoly Adviser over Qualcomm Payment: Xinhua', 13 August 2014, http://www.reuters.com/article/2014/08/13/us-antitrust-china-europe-idUSKBN0GD0SS20140813.

[125] In *Tréfilunion*, although the court declined a complaint concerning the inadequacy of the statement of the reasons on which the Commission's method of calculation of the fine was based, it considered that 'it is desirable for undertakings in order to be able to define their position in full knowledge of the facts to be able to determine in detail, in accordance with any system which the Commission might consider appropriate, the method of calculation of the fine imposed upon them'. Case T-148/89

5.4 The Fining System

Since criminalisation of competition enforcement is not available in China – similar to the EU – the penalties imposed on any breach of the AML are administrative in nature, and the imposition of fines is the principal means by which the AML deters and remedies anti-competitive practices. However, as discussed in Chapter 5, the inconsistent decisions made by the AMEAs in relation to fine setting have been a major source of suspicion that the AMEAs are selectively enforcing the AMLs to the detriment of foreign undertakings. The unregulated use of discretion mainly results from the fact that there are no rules governing the calculation of fines in China. In this regard, the EU experience can be a useful source of inspiration.[126]

Regulation 17/62 stipulated that the gravity and the duration of the infringement should be considered in fixing the amount of the fine.[127] In *Musique Diffusion France*, the ECJ held that during the assessment of the gravity of an infringement for the purpose of fixing the fine, the Commission must take into consideration both the particular circumstances of the case and the context in which the infringement occurred, and must ensure that its action has the necessary deterrent effect.[128] The court further provided that it was permissible to have regard both to the total turnover of the undertaking, the size of the undertaking, and its economic power, and the proportion of that turnover accounted for by the goods in respect of which the infringement was

Tréfilunion v Commission [1995] ECR II-1063, paras. 141-142.

[126] For critical analysis of the EU finding system, see, for example, Jeremy Lever, 'Whether, and If So How, the EC Commission's 2006 Guidelines on Setting Fines for Infringements of Articles 81 And 82 of the EC Treaty are Fairly Subject To Serious Criticism' (2009) BDI, http://bdi.eu/download_content/Publikation_BDI_Gutachten__Opinion__zu_EU_Bussgeldleitlinien.pdf; Éric Barbier de La Serre and Charlotte Winckler, 'A Survey of Legal Issues Regarding Fines Imposed in EU Competition Proceedings' (2011) 2 Journal of European Competition Law & Practice 356; and Damien Geradin, Christos Malamataris and John Wileur, 'The EU Competition Law Fining System' in Ioannis Lianos and Damien Geradin (eds.) *Handbook on European Competition Law* (Edward Elgar 2013).

[127] Article 15(2).

[128] Joined Cases 100-103/80 *SA Musique Diffusion française and others v Commission* [1983] ECR 1825, para. 106.

committed. This gives an indication of the scale of the infringement,[129] and Regulation 1/2003 also follows this line of reasoning.[130]

Pursuant to Regulation 1/2003, the Commission established a two-step process in the calculation of fines.[131] First, the Commission will determine a basic amount. The basic amount will be set based on a proportion of the value of the undertaking's sales of goods or services of the last full business year of its participation in the infringement,[132] to which the infringement directly or indirectly relates in the geographic area within the EEA. This is generally up to 30%, but may vary depending on the degree of gravity of the infringement. After the proportion of the value of sales is determined, the Commission will multiply it by the duration in years of the infringement to determine the final basic amount. In relation to the most harmful restrictions of competition such as price-fixing, market-sharing and output-limitation cartels, the Commission will add 15% to 25% of the value of sales to the basic amount.

Second, the basic amount may be adjusted to reflect any circumstances that should lead to an increase or decrease.[133] The basic amount will be increased where aggravating circumstances are found, such as recidivism, refusal to cooperate, and a leading role in the infringement. It will be decreased according to mitigating circumstances, such as termination of the infringement as soon as the investigation starts, evidence that the infringement has been committed as a result of negligence, and avoidance of implementing the offending agreement. On top of the two-step calculation process, in order to ensure that the fines have a sufficiently deterrent effect the Commission may choose to increase the fines when undertakings have a large turnover beyond the sales of goods or services to which the infringement relates, and

---

[129] *Ibid*., para. 121.
[130] Article 23(3).
[131] Para. 9, Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003, OJ C 210 of 01.09.2006 (Fine Setting Guidelines).
[132] In rare cases, the Commission may be allowed to refer to business year different from the definition given in the Guidelines to reflect the normal economic situation of the infringing undertaking. Case C-76/06 *Britannia Alloys & Chemicals Ltd v Commission* [2007] ECR I-4405, para. 43.
[133] Para. 27, Fine Setting Guidelines.

when the gains of offending undertakings resulted from the infringement exceed the fines imposed. However, there is a ceiling of 10% of the total annual turnover of each of the offending undertakings for the final amount of the fine.[134] The Commission may, in exceptional cases, take into account the undertaking's inability to pay, and reduce the final fine on the basis that its imposition would irretrievably jeopardise the economic viability of the undertaking.[135]

This two-step process has been rigorously followed by the Commission in competition cases. In a decision to impose a fine, the Commission explains step by step not only how the amount of the fine is calculated by assessing the gravity, nature, impact and duration of the infringement, but also on what grounds its imposition is justified by analysing why the infringing party's objections to the imposition of a fine, if any, should not be accepted. In the famous *Intel* case,[136] for example, Intel contested the conclusion that it had infringed Article 82 EC and further argued that even if it had, no fine should be imposed since the Commission failed to prove that the abuses were committed intentionally or negligently.[137] The Commission responded and dismissed all arguments put forward by Intel.[138] The final fine was €1.06 billion, equivalent to 4.15% of Intel's annual turnover. The Commission's decision was upheld by the General Court, which considered, *inter alia*, that 'there is nothing in the […] arguments […] put forward by the applicant […] from which it might be concluded that the fine that was imposed on it is […] disproportionate'.[139]

---

[134] Under the AML, there is an identical ceiling of 10%, see Articles 46 and 47 AML. However, there is additionally a minimum penalty of 1% of the sales revenue in the previous year imposed on undertakings infringing Articles 13, 14 and 17 AML.

[135] Para. 35, Fine Setting Guidelines. See for example Case COMP/39.168 – *PO/Hard Haberdashery: Fasteners*, Commission decision of 19 September 2007 (See Summary of Commission Decision of 31 March 2011 amending Decision C(2007) 4257 final of 19 September 2007, OJ C 210 of 16.07.2011); and Case COMP/38589 – *Heat Stabilisers*, Commission decision of 11 November 2009.

[136] Case No COMP/C-3/37.990 – *Intel*, Commission decision of 13 May 2009.

[137] *Ibid.*, para. 1759. Article 23(2) (a) provides that fines may be imposed where the infringements of Article 101 TFEU or 102 TFEU are either intentional or negligent.

[138] *Intel* (fn 136) 1760-1772.

[139] Case T-286/09 *Intel v Commission*, ECLI:EU:T:2014:547, para. 1647. Nonetheless, the seemingly formalistic as opposed to effects-based analysis of both the Commission and the General Court in the *Intel* case has been criticised. See for example, Damien Geradin, 'The Decision of the Commission of 13 May 2009 in the Intel Case: Where is the Foreclosure and Consumer Harm?' (2009) TILEC Discussion Paper No. 2010-022, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1490114; and

It was reported that NDRC has been in the process of drafting six anti-monopoly guidelines at the request of the AMC,[140] including one on the calculation of illegal gains and fines.[141] If the Guidelines on the method of setting fines are used for reference by NDRC, which is likely given the experiences of China in emulating EU competition rules and the increasingly frequent communication between the two jurisdictions, the transparency of and consistency in decision-making with regard to fine setting will certainly be significantly improved, and the agency will consequentially be more accountable.

6. MARKET LIBERATION AND INTEGRATION

As discussed in Chapter 5, China's economic decentralisation, which provides local governments with substantive controlling powers over local economy and amplifies their financial reliance on local undertakings, has led to market fragmentation.[142] The most prominent reason for inserting the prohibition of administrative monopoly in the AML is to prevent local protectionism and protect free circulation of commodities between regions,[143] so as to establish an integrated national market in China. Like the AML, in addition to enhancing consumer welfare[144]

Damien Geradin, 'Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffman-La Roche' (2015) George Mason Law & Economics Research Paper No. 15-15, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2586584.

[140] Issuing anti-monopoly guidelines is one of the functions of the AMC, see Article 9 of the AML. In practice, the work of drafting guidelines is carried out by the AMEAs on behalf of the AMC.

[141] People.cn, 'NDRC is Drafting Six Anti-Monopoly Guidelines', 5 November 2015, http://finance.people.com.cn/n/2015/1105/c1004-27781012.html. The other five are respectively on abuse of intellectual property rights, monopolistic practices in automobile sector, leniency programme, commitments, and procedures for the exemption of monopoly agreements.

[142] For general studies on decentralisation and market fragmentation in China, see Gabriella Montinola, Yingyi Qian and Barry R. Weingast, 'Federalism, Chinese Style: the Political Basis for Economic Success in China' (1995) 48 World Politics 50; and Chenggang Xu, 'The Fundamental Institutions of China's Reforms and Development' (2011) 49 Journal of Economic Literature 1076.

[143] Article 33, AML.

[144] Para. 33, Guidelines on the application of Article 81(3) of the Treaty, OJ C 101 of 27.04.2004. See also, Joined Cases 56/64 and 58/64 *Consten SaRL and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, at 340; and Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, para. 36.

and ensuring an efficient allocation of resource,[145] European competition law is also applied to achieve a political goal of establishing an internal market where 'the free movement of goods, persons, services and capital is ensured'.[146] David Gerber identifies two factors which are involved in the process of market integration in Europe: the reduction of government controls over economic activity, and the elimination of artificial borders that inhibit competition and the exchange of goods and services.[147] These two factors are in fact useful points of reference for the competition enforcement against SOEs and the elimination of local protectionism through administrative monopoly in China.

Although the benefits of a more integrated and open market created by effective competition policy are apparent, the mere existence of competition in certain cases may pose a threat to the state sector and consequently to political stability in China. Despite the fact that the AML has various legislative objectives which ought to be in conformity, they sometimes conflict with each other as vague terms such as 'healthy development of socialist market economy'[148] can be interpreted in any way the government deems fit, either pro-competition or pro-protectionism. When conflict does arise, pure competition goals will most likely be sacrificed to more prominent political goals, such as the creation of national champions. Therefore China, as a one-party communist state, has to sustain the political and ideological constraints which European states are not experiencing. Historically, all European states to a certain degree experienced significant government control of economic activities and prevalence of SOEs.[149] In order to promote an integrated market in the EU, one of the outstanding priorities is to downplay the unjustified intervention of Member States in market operations, and such priority creates and preserves a political environment

---

[145] Para. 33, Guidelines on the application of Article 81(3).
[146] Articles 26(1) and (2), TFEU.
[147] David Gerber, 'Constructing Competition Law in China: the Potential Value of European and U.S. Experience' (2004) 3 Wash. U. Glob. Stud. L. Rev. 315, 326.
[148] Article 1, AML.
[149] Gerber (fn 147) 327. See also, Pier Angelo Toninelli (eds.) *The Rise and Fall of State-Owned Enterprise in the Western World* (Cambridge University Press 2008).

conductive to the development of competition law.[150] In Europe, where the same level of obsession with state-owned economy as in China is not found, pure competition goals such as economic efficiency and consumer welfare are compatible with and contribute significantly to the superior political goal of creating an internal market. Therefore, market integration acts both as an objective and as a means to enhance competition in the EU.[151] As China is in the reform process of relaxing government control of economy and emphasising the importance of market forces, the effects of Article 106 TFEU on promoting market liberalisation and integration can be constructive.

Article 106(1) TFEU prevents member states from implementing any measure contrary to EU competition rules on public undertakings and undertakings on which it has conferred special or exclusive rights,[152] and it will always be applied in combination with other Treaty Articles. In addition, Article 106(2) TFEU provides an exception for undertakings entrusted with the operation of services of general economic interest (SGEI) if the application of EU competition rules obstructs the performance of the tasks assigned to them.[153] In *Höfner* the ECJ held that a member state was in breach of 106(1) if it created a situation in which an undertaking entrusted with SGEI – the Federal Office for Employment of Germany in this case – could not avoid abusing its dominant position because it was manifestly not able to satisfy the demand on the market.[154] In *ERT*, the ECJ held that, whilst the Treaty did not prevent

---

[150] Gerber (fn 147) 327.

[151] Commission Notice – Guidelines on Vertical Restraints, SEC (2010) 414, para. 7.

[152] 'Public Undertakings' was defined in Article 2 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, OJ L 195 of 29.07.1980 and upheld by the ECJ in *French Republic* as 'any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein or the rules which govern it. A dominant influence is to be presumed when the public authorities directly or indirectly hold the major part of the undertakings' subscribed capital, control the majority of the votes, or can appoint more than half of the members of its administrative, managerial or supervisory body'. Case C-188/80 *French Republic, Italian Republic and the UK v Commission* [1982] ECR 2545, para. 29-31.

[153] SGEI are 'are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention.' European Commission, 'A Quality Framework for Services of General Interest in Europe' COM (2011) 900 final, at 3.

[154] Case C-41/90 *Klaus Höfner and Fritz Elser v. Macrotron GmbH* [1991] ECR I-1979, paras. 31.

the granting of monopoly for public interest considerations, the manner in which the monopoly is organised or exercised might infringe the rules of the Treaty.[155] When the granting of a monopoly was liable to create a situation in which the undertaking was led to infringe Article 102 TFEU by virtue of a discriminatory policy, Article 106(1) TFEU was breached.[156] In *RTT*, a state measure that led to the extension of the dominant position of the undertaking in the market for the establishment and operation of telephone network was found to be in breach of Article 106(1) TFEU in conjunction with Article 102 TFEU.[157] Similarly, actual abuse on the part of undertaking was not required in *DEI*, where the ECJ upheld the Commission's claim that infringement of Article 106(1) TFEU may be established 'where the State measures at issue [created] unequal conditions of competition between companies, [which allowed] the public undertaking or the undertaking which was granted special or exclusive rights to maintain, strengthen or extend its dominant position over another market', and there was no need to establish that any abuse actually exist.[158]

Moreover, the Commission, pursuant to Article 106(3) has issued directives and made proposals on liberalising various public service sectors.[159] Apart from the relevance to the liberalisation of sectors in which SOEs are pervasive, the reasoning of the ECJ in these cases, which prohibits member states from '[putting] public undertakings and undertakings to which they grant special or exclusive rights in a

---

[155] Case C-260/89 *ERT and others v DEP and others* [1991] ECR I-2925, para. 11.
[156] *Ibid*, para. 38.
[157] Case C-18/88 *RTT v GB-Inno-BM* [1991] ECR I-5941, para. 24.
[158] Case C-553/12 P *Commission v. Dimosia Epicheirisi Ilektrismou AE*, ECLI:EU:C:2014:2083, para. 46. Advocate General Jacobs pointed out in his Opinion on *Höfner* that '[a]s the Court has pointed out, the concept of abuse is an objective concept relating to the behaviour of a dominant undertaking and Article 86 will apply where, for example, the effect of that behaviour is to hinder the maintenance of the degree of competition still existing in the market or the growth of that competition […] As an objective notion, an abuse may exist independently of any element of fault on the part of the dominant undertaking'. Case C-41/90 *Klaus Höfner and Fritz Elser v. Macrotron GmbH* [1991] ECR I-1979, per AG Jacobs, para. 47.
[159] See for example, Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain state measures relating to postal services, OJ C39/2 of 06.02.1998; Commission Directive 2002/77/EC on competition in the markets for electronic communications networks and services, OJ L249/21 of 16.09.2002; and Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway, OJ L61/1 of 26.02.2009.

position which the said undertakings could not themselves attain by their own conduct without infringing [Article 102 TFEU]',[160] is similar to the reasoning underpinning Article 36 of the AML, which concerns the second element relating to market integration in the EU: the elimination of barriers to trade.

Administrative monopoly involving protectionist measures, such as physical and technical trade barriers, creates impediments to the creation of an internal market in China to the detriment of the efficiency of national economy.[161] Nonetheless, it is not unique in China, although it is fair to argue that it is much more intractable in a single-party state.[162] Key provisions of TFEU on free movement of goods,[163] services[164] and capital[165] are in fact similar to Articles 33 and 35 of the AML. These freedoms, alongside the free movement of workers,[166] are complementary to competition rules and contribute to the elimination of artificial borders and the establishment of an integrated, competitive and efficient European Single Market.[167] The Commission is responsible for monitoring the functioning of the Single Market and ensuring the legislation proposed by Member States does not create unjustified barriers to trade.[168] Unlike NDRC, SAIC and their local agencies, which fail to eliminate abuse of administrative power mainly due to their close connection with and dependence on government departments which are subject to regulation, the independence of the Commission in pursuing the goals of the EU is protected by primary legislation. Article 17(3) of the Treaty on the European Union (TEU) stipulates that '[i]n carrying out its responsibilities, the Commission shall be completely independent […] the members of

---

[160] Case C-18/88 *RTT v GB-Inno-BM* [1991] ECR I-5941, para. 20.
[161] Mark Williams, 'Adopting a Competition Law in China' in Deborah Cass, Brett Williams and George Barker (eds.) *China and the World Trading System* (Cambridge University Press 2003) 302.
[162] *Ibid*., 303.
[163] Article 34, TFEU.
[164] *Ibid.*, Article 56.
[165] *Ibid.*, Article 49.
[166] *Ibid.*, Article 45.
[167] See also the Single European Act of 1986, which eliminated non-tariff trade barriers by 1 January 1993.
[168] See for example, Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204 of 21.07.1998.

the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks', and member states are required to respect the independence of the members of the Commission and refrain from influencing them in the performance of their tasks.[169] Since the Commission is independent of political lobbying and represents solely the interest of the EU,[170] the likelihood of it being captured by interest groups during enforcement against government measures that create obstacles to inter-regional competition is lower than its Chinese counterparts.

Indeed, it has to be acknowledged that, because of the lack of independence on the part of the AMEAs, these instructive theories and principles which are capable of furthering the liberation and integration of markets cannot be directly adopted. In relation to administrative monopoly, the legal basis for prohibiting administrative monopoly – similar to EU's provisions on free movement of goods, services, and capital – is already provided by the AML, so theoretically they can enforce the AML against any government department with regard to the abuse of administrative powers. However, the main reason that the enforcement against administrative monopoly yielded nominal outcomes is because, apart from the lack of sufficient punishment to deter abuse under the AML,[171] only on rare occasions can the AMEAs successfully initiate an investigation against a government department as a result of political interference. The governmental framework makes the AMEAs rely more on the consent of their superior departments rather than independent and conscientious judgment to commence an investigation. In relation to SOEs, China's competition system is not even at a stage where the question 'how competition law should be applied to SOEs' can be asked by the AMEAs, let alone to answer it. As made clear in the last chapter, it is not the intention of the Chinese government to use the AML to

[169] Article 245 TFEU.
[170] Article 17, TEU.
[171] See section 4.6, Chapter 5.

liberalise the state sector, particularly the most strategic industries. The AML merely provides some of the necessary impetus for SOEs to promote their economic efficiency. Therefore, the AMEAs are always 'informed' in relation to when and the extent to which they should apply the AML to SOEs. This policy environment dictates that the AMEAs will not, for example, refer to market demand – as the ECJ did in *Höfner* – in considering the legality of a measure put forward by the government, simply because they are far from independent enough to question any state-adopted measure in the first place, as can be seen in all the state-led consolidation of large SOEs. Unlike the AMEAs, the Commission is put in a position out of the reach of political intervention and it has also proven to be crucial in the preservation of the 'pureness' of competition policy when weighing it against industrial policy in merger review.

7. THE INDEPENDENCE OF THE COMMISSION IN DECISION-MAKING

As discussed in the preceding chapter, in the battle against industrial policy, competition policy almost always loses. It is particularly true when the ongoing reform of SOEs is concerned, which puts great emphasis on state-led mergers between large SOEs. The restructuring and consolidation of the strategic state sector is able to promote the creation of powerful SOEs in terms of technological and financial capacity, which will then be able to have competitive advantages in global markets. However, it at the same time further diminishes the level of competition of this sector in domestic market. Whilst the role played by competition policy – the AML more specifically – is largely symbolic in regulating the distortion of competition in the state-owned sector, it is ironically significant in pushing forward industrial policy. Instead of introducing competition into heavily regulated sectors, competition policy seems to be hijacked to accommodate industrial policy objectives. The causes of this peculiar phenomenon are in fact multifaceted, among which the lack of independent status of the AMEAs is proved one of the most prominent. However, this fatal weakness of the AMEAs seems

to be an exceptional strength of the Commission. The following sections will describe how the Commission has safeguarded the value of competition policy in the area of merger control, where EU member states have been actively pursuing the goals of industrial policy of their respective states.

7.1 Industrial Policy in Merger

The past decades have witnessed a dramatic structural change in network industries in Europe. SOEs which previously enjoyed a natural monopoly status in network industries were largely privatised, which was followed by the opening of network industries to market competition.[172] In addition, the previous regulatory mechanism of network industries characterised by direct control of the prices of final products and services was reoriented towards a focus on promoting the competitive process.[173] In order to promote an EU-wide internal market, both the ECJ and the Commission have been vigorous advocates of eliminating natural monopolies and encouraging competition in downstream markets of network industries in member states.[174] They mandated the undertaking owning the essential network infrastructures to provide access to these facilities to downstream undertakings at reasonable prices, even if the latter were competing with the former in the downstream markets.[175] Influence of industrial policy was thus significantly reduced as a result of the

---

[172] Martin Hellwig, 'Competition Policy and Sector-Specific Regulation for Network Industries' in Xavier Vives (eds.) *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press 2009) 205.
[173] *Ibid*, 206.
[174] *Ibid*.
[175] The ECJ in *Commercial Solvents* held that 'an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question, would amount to eliminating one of the principal manufacturers of ethambutol in the Common Market'. Joined Cases 6 and 7/73 *Commercial Solvents Corporation v Commission* [1974] ECR 223, at 250-251. See also, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 337 OF 18.12.2009.

proliferation of neoliberal doctrine in EU competition law.[176] Nevertheless, industrial policy still played an important role especially in times of economic crisis.[177] Instead of having state-owned monopolies, member states held 'golden shares' in undertakings that were of strategic importance, and started to rely on 'national champions' to pursue their industrial policy goals and to compete in global markets. In order to create national champions in the most vital industrial sectors, such as network industries, member states pushed forward industrial consolidation despite of merger control rules[178] – not an uncommon strategy in light of China's practices.

For example, in January 2002 the Federal Cartel Office in Germany blocked the acquisition of a 60% holding in the gas company Ruhrgas, the largest German grid gas company, by E.ON, one of Germany's largest energy companies, on the grounds that:

> '[t]he combination of E.ON and Ruhrgas in a time of emerging liberalisation in the gas markets would cement Ruhrgas' dominant position. This would considerably diminish the likelihood of any effective competition from other grid gas companies. There was also the danger of E.ON's market position in the electricity sector being further strengthened to the detriment of small competitors and consequently consumers'.[179]

However, following E.ON's application for ministerial approval of the *E.ON/Ruhrgas* transaction in February, the German Ministry of Economics and Technology acknowledged that 'the merger will increase the international competitiveness of Ruhrgas and that it will help secure Germany's gas supply', and subsequently overturned the decision of the Federal Cartel Office by granting ministerial approval with stringent requirements designed to promote competition in

---

[176] Damien Geradin and Ianis Girgenson, 'Industrial Policy and European Merger Control – A Reassessment' (2011) 53 *TILEC Discussion Paper* 1, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937586, 6.
[177] *Ibid*., 2.
[178] *Ibid*.
[179] Bundeskartellamt, 'Bundeskartellamt Prohibits E.ON/Gelsenberg (Ruhrgas) Merger', 21 January 2002, http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2002/21_01_2002_EON_eng.html?nn=3599398.

the gas market.[180] Although the *E.ON/Ruhrgas* raised significant competition concerns and might be incompatible with the goal of the single market, the Commission was not able to intervene in this case as the parties had more than two-thirds of their aggregate turnover within Germany.[181]

Nonetheless, the independent status of the Commission allowed it to reject industrial policy arguments of member states at the EU level and to prevent EU merger control being politicised. In May 1991, Aerospatiale of France and Alenia of Italian notified the Commission of their proposed joint acquisition of de Havilland, a Canadian division of Boeing. This transaction was strongly supported by both the French and Italian governments, since it would not only lead to the creation of a dominant turboprop aircraft manufacturer on the global market, but would also positively impact on employment.[182] The two governments even put pressure on commissioners appointed by them.[183] Whilst Jacques Delors, then Commission President, also supported the merger, Leon Brittan, then Competition Commissioner, opposed it on 'purely economic grounds'.[184] Eventually, the Commission blocked the transaction – the first time a prohibition decision was made under ECMR – on the ground that the proposed concentration would have created a non-temporary dominant position on the global markets for commuters of 40-59 seats and 60 seats, and would therefore significantly impede effective competition.[185]

In September 1999, the Commission received notification of proposed acquisition by Volvo of Scania. Both parties were Swedish undertakings active in the manufacture

---

[180] E.ON, 'E.ON is Granted Ministerial Approval for Ruhrgas Acquisition', 5 July 2002, at http://www.eon.com/en/media/news/press-releases/2002/7/5/e-dot-on-is-granted-ministerial-approval-for-ruhrgas-acquisition.html.

[181] Richard Gilbert and David Newbery, 'Electricity Merger Policy in the Shadow of Regulation' (2006) EPRG Working Paper 0628, http://www.cambridgeeprg.com/wp-content/uploads/2008/11/eprg0628.pdf, 15. See Article 1(2) EUMR.

[182] Michelle Cini and Lee McGowan, *Competition Policy in the European Union* (Palgrave MacMillan 2009) 154.

[183] *Ibid*.

[184] *Ibid*.

[185] *Case No IV/M.053 – Aerospatiale-Alenia/de Havilland*, Commission decision of 2 October 1991, para. 72.

and sale of heavy trucks and buses. The proposed concentration would create the largest European producer of heavy trucks and the second largest European bus manufacturer.[186] Despite the Swedish competition authority opposing this transaction, the Swedish government actively engaged in political lobbying for the Commission's approval.[187] Nevertheless, after concluding that the remedies proposed by Volvo were insufficient to remove the competition concerns, the Commission prohibited the transaction in 2000 as the concentration would result in significant impediment of effective competition in a number of national markets for heavy trucks, touring coaches, inter-city buses and city buses.[188]

In 2001, the Commission prohibited an acquisition of Legrand by Schneider, both active in electrical equipment market.[189] Possibly incentivised by strong political support (it was said that French President and Prime Minister personally lobbied Commission President Romano Prodi and Competition Commissioner Mario Monti for the approval of the transaction[190]), Schneider implemented the transaction by holding 98.1% of the shares in Legrand before the Commission made its final decision. The Commission subsequently made a decision to request Schneider to demerge from Legrand.[191] Although Schneider chose to challenge the Commission's decisions of incompatibility and divestiture before the Court of First Instance (now General Court), it concluded a contract of divestiture with the Wendel-KKR consortium in July 2002. Despite the fact that both of the Commission's decisions were later annulled by the Court of First Instance on the ground, *inter alia*, that the Commission had failed to

---

[186] Case No COMP/M.1672 – *Volvo/Scania*, Commission decision of 14 March 2000, paras. 13 and 214.

[187] Øivind Støle, 'Towards a Multilevel Union Administration? The Decentralization of EU Competition Policy' in Morten Egeberg (eds.) *Multilevel Union Administration: the Transformation of Executive Politics in Europe* (Palgrave Macmillan 2006) 98.

[188] Case No COMP/M.1672 – *Volvo/Scania*, Commission decision of 14 March 2000, para 363. Scania was acquired by Volkswagen of Germany in 2008, and the Commission found that there was no overlap between the core businesses of the merger parties. See Case No COMP/M.5157 – *Volkswagen/Scania*, Commission decision of 16 September 2008.

[189] Case No COMP/M.2283 – *Schneider/Legrand*, Commission decision of 10 October 2001.

[190] Geradin and Girgenson (fn 176) 14.

[191] *Schneider/Legrand* (fn 189).

have regard to Schneider's rights of defence,[192] the Commission resumed the merger control procedure after the judgments. Schneider then abandoned the transaction and decided to execute the contract of divestiture with the Wendel-KKR consortium.[193]

It has to be emphasised that the above cases do not indicate that the Commission is simply against government-supported concentration or the notion of 'national champions'.[194] The existence of national champions is not a violation *per se* of competition law; it is the methods adopted to create them that raise competition concerns. Therefore, the policy goals of industrial consolidation can coincide with competition policy goals if a transaction supported by government does not appreciably impede effective competition.[195] Besides creating national champions, member states also sought to use merger as a means to protect domestic undertakings from being acquired by foreign undertakings.[196]

7.2 Article 21 EUMR and State Intervention in EU Merger Control

The Commission not only blocked transactions strongly supported by member states, but also cleared transactions that member states strongly opposed. Whilst Article 21 EUMR provides a 'one-stop-shop' for mergers and acquisitions which have a EU dimension, Article 21(4) EUMR (ex-Article 21(3) ECMR) allows member states to take measures to protect legitimate interests on grounds including but not limiting to public security, plurality of the media and prudential rules. The measures will be

---

[192] Case T-310/01 *Schneider Electric SA/Legrand v Commission* [2002] ECR II-4071; and Case T-77/02 *Schneider Electric SA/Legrand v Commission* [2002] ECR II-4201.

[193] In October 2003, Schneider brought an action for damages against the Commission under Article 288 EC (now Article 340 TFEU) seeking compensation for the losses sustained as a result of the illegality of the incompatibility decision before the Court of First Instance, where Schneider's claim was accepted. See Case T-351/03 *Schneider Elec. SA v. Commission* [2007] ECR II-2237. The Commission lodged an appeal. The Court of Justice partially set aside the judgment of the Court of First Instance, and substantially reduced the Commission's liability for Schneider's loss. See *Case C-440/07 P Commission v Schneider Electric* [2009] ECR I-6413.

[194] Geradin and Girgenson (fn 176) 23.

[195] *Ibid*, 24.

[196] *Ibid*, 22. Protecting national champions from being acquired by foreign undertakings is also common in China, the most notorious example is MOFCOM's first prohibition decision under the AML, *Coca-Cola/Huiyuan* (2009) MOFCOM Notice No. 22, http://fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml.

approved by the Commission only if they are 'appropriate, proportional and non-discriminatory and more generally in line with [EU] law'.[197] Member states on a number of occasions invoked this 'legitimate interest' provision to implement economic protectionist measures and protect their national champions from acquisitions by foreign undertakings.[198] In 1999, when UniCredit, an Italian bank, acquired a state-owned Polish bank, Polska Kasa Opieki S.A. (Pekao), the Polish Ministry of Treasury concluded an agreement with UniCredit in which a 'non-competition clause' prohibited UniCredit from, *inter alia*, acquiring control of banks active in Poland for a period of ten years. In October 2005, the Commission cleared the acquisition of the German bank Bayerische Hypo-und Vereinsbank AG (HVB) by UniCredit.[199] However, since HVB indirectly controlled a Polish bank, BPH S.A., the Polish State Treasury argued that UniCredit had breached the 'non-competition clause' and requested UniCredit to divest its shares in BPH. The Commission considered that the measure adopted was in breach of Article 21 EUMR and launched proceedings against the Polish Treasury in March 2006.[200] Merely a month later, the dispute was resolved as UniCredit reached an agreement with the Ministry of Treasury in which UniCredit agreed to ensure BPH's independent status on Polish financial market by divest 200 outlets of BPH. [201] In addition, the Ministry of the Treasury was entitled to appoint two members of the supervisory board of BPH.[202]

In April 2006, the Commission cleared the acquisition of Endesa, a Spanish electricity operator, by the German energy company E.ON AG (E.ON).[203] After E.ON announced its bid over Endesa and before the Commission cleared the transaction,

---

[197] Case No IV/M.567 – *Lyonnaise Des Eaux/ Northumbrian Water*, Commission decision of 21 December 1995, para. 8.
[198] Geradin and Girgenson (fn 176) 11.
[199] Case No COMP/M.3894 – *UniCredit/HVB*, Commission decision of 18 October 2005.
[200] European Commission, Press Release IP/06/277, http://europa.eu/rapid/press-release_IP-06-277_en.htm.
[201] BPH, 'Signing of the Agreement between the Ministry of Treasury and UniCredit', 19 April 2006, at http://www.bph.pl/pl/investor_relations/announcements/2006/announcement_19_2006.
[202] *Ibid*.
[203] Case No COMP/M.4110 – *E.ON/Endesa*, Commission decision of 25 April 2006.

since the Spanish government wished Endesa to be acquired by another Spanish energy company, Gas Natural, in order to create a national champion.[204] The Spanish Council of Ministers adopted an urgent legislative measure, Royal Decree-Law 4/2006, to extend the supervisory powers of the CNE, Spain's energy regulator.[205] Consequently, the CNE decided to impose restrictive conditions on the *E.ON/Endesa* transaction. The Commission found that these conditions were not compatible with EC law and Spain had violated Article 21 EUMR.[206] The modified conditions put forward by the Spanish Minister of Industry, Tourism and Trade were also not accepted by the Commission.[207] Similarly, in another acquisition concerning Endesa, while on 5 July 2007 the Commission approved the joint control of Endesa by ENEL – an Italian electricity operator – and Acciona – a Spanish undertakings whose business include, *inter alia*, development and management of infrastructure and real estate projects[208] – the CNE imposed restrictive conditions on the transaction.[209] The Commission subsequently asked Spain to lift these conditions.[210] Endesa was eventually acquired jointly by ENEL and Acciona, which divested €10 billion worth of assets to E.ON.[211]

---

[204] Geradin and Girgenson (fn 176) 12; and Jonathan Galloway, 'The Pursuit of National Champions: the Intersection of Competition Law and Industrial Policy' (2007) 28 European Competition Law Review 172, 177. A Spanish government spokesman explicitly revealed the Spanish government's hostility to the *E.ON/Endesa* transaction by stating that '[w]e will do everything in our power to ensure that Spain's energy companies remain Spanish […] the government believes Spain should have strong national companies with independent decision-making power in strategic sectors such as energy'. Financial Times, 'Spain Vows to Prevent Foreign Takeover', 21 February 2006, http://www.ft.com/cms/s/0/949d4550-a31d-11da-ba72-0000779e2340.html.

[205] European Commission, Press Release IP/06/1265, http://europa.eu/rapid/press-release_IP-06-1265_en.htm?locale=fr. The compatibility of the Royal Decree-Law 4/2006 with EC Treaty was later challenged by the Commission which argued that it violated the principle of the free movement of capital and the right of establishment. See Case C-207/07 *Commission v. Spain* [2008] ECR I-111.

[206] European Commission, Press Release IP/06/1265, http://europa.eu/rapid/press-release_IP-06-1265_en.htm?locale=fr.

[207] European Commission, Press Release IP/06/1853, http://europa.eu/rapid/press-release_IP-06-1853_en.htm.

[208] The scope of the original transaction cleared by the Commission on 5 July was changed to include the transfer of assets to E.ON, and the new transaction was cleared by the Commission. See Case No COMP/M.5171 – *Enel/Acciona/Endesa*, Commission decision of 13 June 2008. See also, European Commission, Press Release IP/08/939, at http://europa.eu/rapid/press-release_IP-08-939_en.htm.

[209] European Commission, Press Release IP/08/164, http://europa.eu/rapid/press-release_IP-08-164_en.htm?locale=en.

[210] *Ibid*.

[211] Case No COMP/M.5171 *Enel/Acciona/Endesa*. See also Reuters, 'Enel, Acciona Bid for Endesa, E.ON Takes Assets', 2 April 2007, at http://uk.reuters.com/article/2007/04/02/endesa-idUKL0247139920070402.

In August 2006, a merger between Abertis of Spain and Autostrade of Italy – both active in the management of toll motorways – was blocked by the Italian Ministers of Infrastructures and of Economic Affairs, and ANAS, a public entity responsible for granting motorway concessions in Italy.[212] It was believed by the Italian government that the transaction was 'a disguised Spanish takeover of vital Italian infrastructure services'.[213] Nonetheless, the merging parties notified the proposed merger to the Commission, where a clearance decision was made in September 2006.[214] Subsequently, the Commission announced a preliminary assessment that Italy had violated Article 21 EUMR due to unjustified obstacles placed in the way of the merger.[215] These obstacles were later removed by the withdrawal of the decisions of both the Ministers and the ANAS.[216] However, the transaction was eventually abandoned due to 'insurmountable obstacles placed in the way of the deal by the Italian government'.[217]

As shown by these cases, intervention of member states in transactions already cleared by the Commission is not uncommon but has been dealt with cautiously. After initiating infringement proceedings against Poland in *UniCredit/HVB*, the then Competition Commissioner Neelie Kroes stated that 'I am determined to ensure that Member States do not stand in the way of mergers falling within the Commission's exclusive competence. Otherwise the EU's Single Market will descend into chaos.'[218] Therefore, it is important to examine closely if the measures adopted by Member States

---

[212] European Commission, Press Release IP/06/1418, http://europa.eu/rapid/press-release_IP-06-1418_en.htm?locale=en.

[213] Jonathan Galloway, 'EC Merger Control: Does the Re-emergence of Protectionism Signal the Death of the 'One Stop Shop'?' (2007) CCP Summer Conference, University of East Anglia, Norwich.

[214] Case No COMP/M.4249 – *Abertis/Autostrade*, Commission decision of 22 September 2006.

[215] European Commission, Press Release IP/06/1418, http://europa.eu/rapid/press-release_IP-06-1418_en.htm?locale=en

[216] European Commission, Press Release MEMO/06/414, http://europa.eu/rapid/press-release_MEMO-06-414_en.htm?locale=en.

[217] Financial Times, 'Autostrade and Abertis Abandon Merger', 13 December 2006, http://www.ft.com/cms/s/0/78606be6-8a9f-11db-8940-0000779e2340.html#axzz3rps3BXb2.

[218] European Commission, Press Release IP/06/277, http://europa.eu/rapid/press-release_IP-06-277_en.htm.

to disrupt a transaction are compatible with EU laws and to ensure any industrial policy considerations based solely on economic protectionism are not taken into account.

The above cases clearly show that the Commission is able to withstand political intervention of member states[219] and conduct the investigation independently, the prerequisites for a competition-oriented and comprehensive decision. The merit of the analysis given by the Commission in these cases is a separate topic of discussion. Although it is not realistic to expect the AMEAs to have the same level of independence as that of the Commission not least because the Commission is not directly controlled by the government of any member state, it has to be noticed that increased independence will allow the AMEAs to focus more on the analysis of market conditions as well as the efficiency of potential merging undertakings. Essentially, there is nothing wrong with creating national champions to compete in global marketplace as long as they are really champions on their merits instead of mere political products. Therefore, the selection of national champions should be conducted vigorously through economic consideration underpinning competition policy, and this is how competition policy and industrial policy can be reconciled.

8. CONCLUSION

It is not possible for any legal system to be completely flawless. The same applies to EU competition system, which is already deemed one of the most advanced in the

[219] The Commission also successfully resisted political lobbying of the US in *GE/Honeywell*. See Case No COMP/M.2220 – *GE/Honeywell*, Commission decision of 2 July 2001. However, this decision was subject to heavy criticism as the Commission was accused of taking into account industrial policy and protecting competitors rather than competition. See for example, Charles James, 'International Antitrust in the 21st Century: Cooperation and Convergence', OECD Global Forum on Competition, 17 October 2001, http://www.justice.gov/atr/speech/international-antitrust-21st-century-cooperation-and-convergence. See more generally about the *GE/Honeywell* case, Eleanor Fox, 'Mergers in Global Markets: *GE/Honeywell* and the Future of Merger Control' (2002) 23 U. Pa. J. Int'l Econ. L. 457; and Stefan Schmitz, 'The European Commission's Decision in *GE/Honeywell* and the Question of the Goals of Antitrust Law' (2002) 23 U. Pa. J. Int'l Econ. L. 539.

world.[220] Nonetheless, more than half decade of evolvement allows the EU to accumulate invaluable experiences with regard to how a competition system should be designed in order effectively to address and enforce competition policy. The modernisation brought about by Regulation 1/2003 clearly demonstrates that transparency, consistency, and coherence are the core values that ensure and safeguard the proper functioning of the EU competition system. The legal framework facilitating coordination and cooperation amongst European enforcement authorities, the legal instruments guiding enforcement activities, the judicial interpretation pursuing goals of the Union, and the institutional independence protecting the impartiality and objectivity of the Commission all contribute to the preservation and pursuance of the core values, and these sustained efforts are what make the EU competition system an instrumental model for China to learn from.

As the communication between the Commission and the AMEAs becomes increasingly frequent, it is expected that the EU's efforts in working towards establishing a better competition system will have positive impacts on changing the way in which China's competition system operates, and increasing the extent to which it accommodate the interests of the general public in China. However, when certain concerns can be eliminated the AMEAs through internal reform, other concerns, such as the issue on the independence of the AMEAs, can only be dealt with by external reform involving, among other things, restructuring of political and governmental structure. As a new entrant in the competition law family, China has already benefited from EU experiences in establishing its own competition system. This process of learning and emulation should be furthered to replace negative and non-normative 'local roots', as the Commission has already illustrated what an independent competition authority is capable of achieving.

---

[220] The operation of Commission in the field of competition policy is in fact subject to serious criticism, see, for example, OECD, 'European Commission – Peer Review of Competition Law and Policy' (2005) OECD Competition Law & Policy, *www.oecd.org/eu/35908641.pdf; and Ian Forrester, 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009) 34 European Law Review 817.*

In light of the practice of EU competition system, some recommendations for reform of China's competition system are provided in the next chapter.

Chapter Eight

Conclusion

1. GENERAL CONCLUSION

Since the entry into force of the AML, China has become one of the most important and active competition jurisdictions in the world in a comparatively short period of time. Whilst the AMEAs have accumulated substantial knowledge, experience and confidence over the past seven years, competition enforcement – which is increasingly intensified – starts to draw worldwide attention and demonstrates its tremendous impact on economic activities. The merger review regime has substantially influenced a few global transactions, and hefty fines have been imposed on large multinational conglomerates under the antitrust regime. Nonetheless, it has to be acknowledged that the growing importance of China's competition system derives mainly from its overwhelming importance in the global economy, rather than from its own merits. In fact, many high-profile decisions and investigations were not backed by sophisticated competition analysis and considerations, and the interests of business operators may be harmed as a result.[1] In addition, the AMEA's lack of determination to tackle anti-competitive practices carried out by SOEs effectively, and introduce private competition in state sector has led many to question the ability of China's competition system to create a level playing field and promote a competitive market.[2]

This thesis argues that whilst some problems – for example, publicity obligations of the AMEAs and the application of economics in decision-making – may eventually be solved when the competition system develops and becomes more mature. Other problems relating to the implementation of competition policy in general and the treatment of SOEs in particular cannot be dealt with in isolation of the developments

[1] See for example, *P3 Network* (fn 152, Chapter 4).
[2] See fn 38, Chapter 1.

in the economic and political sphere. Essentially the enforcement of a capitalist-style legal instrument in a socialist country induces ideological conflict which can only be resolved through a close examination of China's unique economic and political context in which competition policy has been evolving. The determination of legislative objectives, design of competition institutions and outcome of administrative enforcement are all deeply embedded in such context.

Like the initiation of China's economic reform project, the introduction of competition policy did not exist in a vacuum. The thesis finds that China's economic transition – including both the advent of TVEs and the reforms of SOEs – the accession to WTO, and the lack of legal instruments to cope with new economic environment were the main factors that led to the evolvement of competition policy and eventually to the adoption of the AML.[3] Moreover, the emergence of these drivers was facilitated by the cease of China's decades-long social and political upheaval, which had shaped the characteristics of the bureaucracy and economy. Through these economic and political movements, the CPC established the status of political goals as the top priority of the government, and SOEs – representing the economic arm of the government – became the major tool to realise this priority.[4] In addition, the government's tendency towards protecting departmental interests at the expense of effective application of the AML also result from the preference of political goals over other considerations.[5]

The thesis argues that since both domestic and foreign factors made China's reform process and its integration into world economy irreversible, the introduction of competition law is an inevitable option for China to further and sustain its dramatic economic growth. However, as made clear throughout the thesis that there is an inherent contradiction between the competition law which liberalises the market and the socialist ideology which constraints the market. This contradiction may be partially

[3] See section 3, Chapter 2.
[4] See section 2.2, Chapter 2.
[5] See section 4.2, Chapter 5.

explained by Deng Xiaoping, who remarked on the idea of 'socialist market economy' in 1992:

> 'We should be bolder than before in conducting reform and opening to the outside and have the courage to experiment … The proportion of planning to market forces is not the essential difference between socialism and capitalism. A planned economy is not equivalent to socialism, because there is planning under capitalism too; a market economy is not capitalism, because there are markets under socialism too. Planning and market forces are both means of controlling economic activity … We shall push ahead along the road to Chinese-style socialism.'[6]

In essence, the so-called 'Chinese-style socialism' requires China's socialist economy to embrace capital elements. Following this line of thinking, capitalist-style legislation such as the AML should embrace socialist elements, which are the basis on which Chinese-style socialism is formed. This is exactly what the drafters of the AML did. They incorporated Chinese-style provisions in a competition law in order to address the concerns raised by interest groups that basically opposed market liberalisation and competition, another example of political goals taking precedence over other goals.[7] These provisions – notably, Articles 1 and 7 – significantly changed the way in which the AML is enforced. First, Article 1 may allow the AMEAs to base their analysis on grounds that are in conflict with competition principles.[8] The vagueness and ambiguity by design create rooms for non-competition considerations in competition cases, which led to serious regulatory capture in competition enforcement. Second, Article 7 gives rise to uncertainty regarding competition enforcement against SOEs in strategic sectors. It implicitly establishes the preference of industrial policy over competition law whilst failing to either officially define 'lifeline industries' or allocate jurisdiction amongst sector-specific regulators or the AMEAs.

---

[6] Deng Xiaoping, 'Excerpts from Talks Given in Wuchang, Shenzhen, Zhuhai and Shanghai (18 January-21 February 1992)' in *Selected Works of Deng Xiaoping*, vol. 3 (1982-1992) (Foreign Languages Press 1994).

[7] See section 3.1.2, Chapter 3.

[8] See for example, *Coca-Cola/Huiyuan* (fn 135, Chapter 4).

Moreover, the design of the enforcement structure as a political compromise made during the drafting of the AML, embodies the bureaucratic conflicts China has been experiencing since it was founded.[9] MOFCOM, NDRC and SAIC, each of which was responsible for certain aspects of competition enforcement in the pre-AML era, all contended for policy-making powers. This compromise has far-reaching meaning for these three ministries, since their policy-making powers will be further enhanced as competition policy becomes increasingly important in China. At the same time, it has far-reaching meaning for the competition system as well, since this structure dictates that bureaucratic conflicts will continue to exist in the enforcement of the AML. Apart from the bureaucratic conflicts, as discussed in Chapter 5, the shared jurisdiction of competition enforcement is substantially uncoordinated and ineffective.[10]

The past seven years have seen an increasing number of competition cases.[11] However, several problems have also emerged. In relation to the application of the substantive provisions, there is a clear inconsistency in the decision handled by the AMEAs. Despite the fact that the interpretations of some Articles are not entirely accurate, Chinese courts have shown their capability of conducting economic analysis in competition cases. They have delivered decisions that are far more informative and convincing than those of the AMEAs. The lack of sufficiently detailed decisions of the AMEAs is in fact premeditated by competition policy makers, as no any reference to the transparency requirement of published decisions is made in the AML or any other implementing rules. However, it is difficult to determine whether the intention was to protect immature AMEAs from external pressures because they lack the necessary experiences regarding competition analysis, or to conceal the incorporation of non-competition considerations in the decisions. The AMEAs of course lack the knowledge

[9] For a discussion on the bureaucratic conflicts during Cultural Revolution, see Guoqiang Dong and Andrew G. Walder, 'Factions in A Bureaucratic Setting: the Origins of Cultural Revolution Conflict in Nanjing' (2011) The China Journal 1.
[10] See section 4.2, Chapter 5.
[11] See section 3, Chapter 5.

and expertise to conduct sophisticated effects-based analysis, but what is more prominent is the lack of efficient framework to nurture the environment conducive to conducting such analysis. The capacity of the AMEAs can only be substantially improved if their decision-making is subject to public supervision.

Another issue hindering the effective application of the AML is the non-independence of the AMEAs, which are rarely able to conduct investigations without political intervention. Whilst the lack of knowledge and experience will be compensated for by increasingly proactive enforcement activities and international cooperation during which the expertise of competition officials will always accumulate, the most damaging impediment causing the ineffectiveness of China's competition system is not derived from the text of the AML, but from a residual mode of political intervention and the prominent Chinese characteristic: rule of man prevails over rule of law. Gerber argues that competition law is able to function effectively only when it is part of a wider policy aiming to improve market functioning and as a result enjoys political support.[12] Nonetheless, political support for competition law is still largely insufficient in China.[13] Without a conductive environment to promoting competition policy, any sophisticated competition analysis will only be fancy ornaments. Whilst the AML and its enforcement have been substantially shaped by the residual influence of centrally planned economy and institutions therein, competition enforcement in the state sector further embodies the regressive attribute of China's competition system.

'*Zhibiao buzhiben* [治标不治本]' is an old Chinese idiom. It is used when a treatment can only temporarily relieve the symptom without completely curing the disease. The underlying rationale can equally be applied in the domain of social science when a policy description is not able essentially to cure the cause of the problem it is expected to solve. This is exactly the dilemma the AML currently

[12] David Gerber, 'Asia and Global Competition Law Convergence' in Michael Dowdle, John Gillespie and Imelda Maher (eds.) *Asian Capitalism and the Regulation of Competition towards a Regulatory Geography of Global Competition Law* (Cambridge University Press 2013) 43.
[13] *Ibid.*

encounters: it is merely a palliative that scratches the surface of the anti-competitive issues in the state sector. Like the difficulties of tackling administrative monopoly, the anti-competitive 'disease' of SOEs are not curable simply by the application of the AML. Since in essence anti-competitive conduct of SOEs is a '[manifestation] of the Chinese government's extensive intervention in the economy',[14] the AMEAs are anything but enforcement authorities which are independent of bureaucratic restraints. Therefore, the extent to which the AML can be successfully applied to SOEs is not and will not be determined solely by competition policy, but will depend largely on how the ongoing reform of SOEs evolves over time, which represents the changing attitude of the Chinese government towards its political and economic structure. This may be the reason why after seven years of enforcing the AML, the AMEAs seem to remain still helpless when it comes to the battle against state-owned giants.

On 18 September 2015, Premier Li Keqiang stated at a forum on deepening reform and development of SOEs that 'SOEs are the prominent material and political basis of the development of the Communist Party and the state'.[15] Indeed, no matter how unsuitable it is for public ownership to fit into today's modern market-oriented economy, it is not realistic to expect China to downplay its powerful SOEs. The status of SOEs is not determined by market force or any other economic elements, but by China's political ideology: state control over the economy. In any reform plans on SOEs, the government encourages diversification of ownership and improvement of corporate governance instead of overall privatisation, it is therefore unrealistic to expect the AML can be applied to liberalise China's state sector in the same way as Article 106 TFEU is being applied to promote market liberalisation.[16] It is apparent

[14] Thomas Cheng, 'Competition and the State in China' in Daniel Sokol, Thomas Cheng and Ioannis Lianos (eds.) *Competition and the State* (Stanford University Press 2014) 185.
[15] Xinhua News Agency, 'Li Keqiang: Use the Dividends of Reform to Enhance the Vitality and Competitiveness of SOEs', 20 September 2015, http://news.xinhuanet.com/fortune/2015-09/20/c_1116618997.htm. Premier Li's remarks are originally in Chinese, and are translated by the author.
[16] See section 6, Chapter 7.

that the government is seeking to promote the efficiency of the state sector without endangering the interests thereof.

In relation to normal monopolistic conduct of SOEs, such as monopoly agreements and abuse of dominant position, the AML is not as useful in altering and correcting the mode of operation of SOEs as it does in relation to private undertakings, since the fines imposed on SOEs are in most cases nominal, not to mention in a few cases there was no penalty. Therefore, it seems that the AML in these cases is merely used as a legitimate 'excuse' by the government to circumvent the vested interests in SOEs and subsequently to further the government-led reform in the state sector, rather than to promote the efficiency of SOEs directly. Nonetheless, it is a positive trend that the AMEAs SAIC in particular[17] are more frequently applying the AML to anti-competitive conduct of SOEs.

In relation to state-led mergers and liberalisation of state-controlled sectors, the AML is less useful since both the idea of national champions competing in global markets and strict state control over national economy concern the ultimate political interests of the government. So far, most SOEs are still not modern undertakings like those found in developed economies, since the government continues to intervene in their management and operation. Although it is expected that the AML will be more frequently applied to normal monopolistic conduct of SOEs as the competition policy environment improves, it cannot substantially change the status quo of the state sector, which can only be influenced by further political reform facilitated by political means such as the ongoing anti-graft campaign. However, the AML may be of importance in promoting the efficiency of the state sector when political reform therein achieves initial success, namely, when a substantial part of bureaucratic impediments have been removed. Therefore, the AML should not be seen as powerful a weapon as the EU competition law to promote market liberalisation as yet.

[17] 11 out of 29 cases concluded by SAIC involved SOEs, and all of them were concluded after November 2013.

This thesis suggests that, in relation to the most strictly controlled industrial sectors where industrial policy considerations are prevalent, what competition policy-makers should aim to achieve is not to advocate market liberalisation or the entry of private competitors. In any case, the promotion of competition is not an end in itself. The most important objective is to create an environment where the positive results stemming from market competition can also be manifestly generated. In light of the 'grasping the large and letting go of the small' policy, the more realistic priority for the AML concerning the most powerful SOEs is further to encourage the presence of private capital in markets where private undertakings are allowed to enter and compete with SOEs, for example, promoting a prosperous downstream market. Without the government relinquishing its control over the state sector, this is merely another compromise China's competition system will have to make.

On 13 September 2015, the CPC Central Committee and the State Council jointly published the long anticipated Guiding Opinions on the Deepening Reform of State-Owned Enterprises (SOE Reform Opinions).[18] This top-down reform plan lays down the most outstanding priorities with regard to reforming SOEs and represents an accumulation of years of local reform experiences and the prospects of SOEs envisaged by the central government. The SOE Reform Opinions pledge to further SOE reform, improve modern corporate systems, improve supervision and management system of state-owned assets, develop diversified-ownership economy, prevent the loss of state-owned assets, and last but not least, reinforce Party leadership over SOEs. 'Decisive accomplishments' are expected to be achieved by 2020 in major fields of SOEs reform.[19] Nonetheless, it remains to be seen how these general opinions are implemented in practice and the extent to which the AMEAs are able to extricate themselves from bureaucratic predicament and apply the AML to anti-competitive

[18] Guiding Opinions on the Deepening Reform of State-Owned Enterprises, issued on 24 August 2015, http://www.gov.cn/zhengce/2015-09/13/content_2930440.htm.
[19] Section 3, SOE Reform Opinions.

conduct of SOEs in a more stringent way if and when decisive accomplishments are indeed achieved.

2. POSSIBLE REFORM RECOMMENDATIONS

2.1 A Dual Enforcement Structure

It was China's unique political environments that significantly delayed the drafting process, and led to the ineffective design of competition institutions. The tripartite enforcement structure is not a careful competition-related consideration, but merely a result of political compromise that aimed to preserve the previous division of responsibilities between three existing ministries and alleviate conflicts amongst them. The creation of this non-independent, non-transparent, and uncoordinated competition enforcement system is to an extent pouring old wine into new bottles, and the temporarily suppressed conflicts nonetheless continue to impede the functioning of the enforcement system and heavily undermine the effective enforcement of the AML.[20] As recent cases shown, it is difficult to find a valid reason to justify the existence of such structure.

In light of the ongoing 'super ministry system' reform initiated in March 2008 by the 11th NPC[21] which aims to reduce the number of government departments by integrating departments with close mandates, streamline administration by transforming government functions, and subsequently increase administrative efficiency, it seems that a complete integration of competition enforcement functions into an entirely new enforcement agency is unlikely in the near future. A more practical solution, therefore, seems to be the preservation of two of the agencies, MOFCOM

---

[20] HS Harris, Peter Wang, Yizhe Zhang, Mark Cohen and Sebastien Evrard, *Anti-Monopoly Law and Practice in China* (Oxford University Press 2011) 263; Xinzhu Zhang and Vanessa Yanhua Zhang, 'The Antimonopoly Law in China: Where Do We Stand?' (2007) 3 Competition Policy International 185, 195.

[21] For an introduction of the super ministry system reform, see Lan Xue and Kuotsai Tom Liou, 'Government Reform in China: Concepts and Reform Cases' (2012) 32 Review of Public Personnel Administration 115, 121-122.

and NDRC. This suggestion is based on several reasons. First, although MOFCOM, NDRC and SAIC are all responsible for the enforcement of the AML, the jurisdictional overlap between MOFCOM and the other two – merger control as opposed to anti-monopoly agreement and abuse of dominant position – is insignificant,[22] whilst the methods of enforcement between MOFCOM and the other two – *ex ante* as oppose to *ex post* – are significant.[23] Competition enforcement would not be compromised if merger control is supervised by an agency which is not responsible for the other two basic competition law pillars. Second, MOFCOM and NDRC, unlike SAIC, were new ministries formed from existing ministries during the institutional reform of the State Council in 2003 as a response to the new economic environment stemming from the WTO accession. This means that both MOFCOM and NDRC are more outward-looking in the sense that they are imposed the responsibility to fulfil the requirements of a more globalised Chinese economy,[24] whilst the mandate of SAIC – preservation of market order – remains largely unchanged. Third, as suggested by the evident difference in the number and influence of cases handled by NDRC and SAIC,[25] NDRC is more capable in terms of budgetary resources[26] of enforcing the AML. The reason that the number of cases handled by SAIC is low may be because price-related anti-competitive behaviours are more prevalent than non-price-related. However, this exact reason itself justifies the reason that NDRC should absorb the AML-related mandate of SAIC, rather than the other way around.

---

[22] However, there may be overlap between merger review and antitrust enforcement. For example, as discussed in Chapter 5, in *P3 Network*, whilst P3 was treated by the European Commission as a horizontal agreement, it underwent merger review in China.

[23] It is argued that *ex ante* review of merger transactions should be replaced by *ex post* abuse law, namely, competition law should only intervene when abusive practice stemming from the transaction actually emerges. Jacques Steenbergen and Leonard Waverman, 'Do We Need European Merger Control?' in Colin Robinson (eds.) *Governments, Competition and Utility Regulation* (Edward Elgar 2005) 203.

[24] For example, the Opinions of the State Council on the Implementation of the Negative List System for Market Access were issues in October 2015, which were drafted jointly by MOFCOM and NDRC, *inter alia*, to promote the establishment of an open economy.

[25] See sections 3.2 and 3.3, Chapter 5.

[26] See fn 129, Chapter 3.

2.2 More Detailed Implementing Rules and Improved Transparency

The AML is a broadly-worded legislation that requires the clarification of secondary implementing rules. This flexibility allows the AML to be adjusted according to the dynamic economic environment through interpretation by courts and enforcement agencies without the needs to modify the texts of the law. However, the vagueness and ambiguity of some provisions creates room for regulatory capture and abusive use of discretionary power during investigation. Vagueness of provisions also pose challenge for undertakings which seek to ensure their business practices are compliant with the AML, or for victims of anti-competitive practices and whistle-blowers who wish to identify the correct authority to go to. After seven years, it seems to be an appropriate time for NDRC and SAIC – which have only issued eight implementing rules, some provisions of which simply mirror the wording of the AML and are therefore less useful for the public to understand the AML[27] – to issue new rules or guidelines in light of their enforcement experience in the past few years.

In addition, transparency should be significantly increased in relation to the published decisions made by the three AMEAs, most of which suffer from over-generality, since China has no tradition of publishing detailed administrative decisions. Pursuant to the Regulations on Open Government Information,[28] section 2 of the Essentials of the Work on Open Government Information 2014 requires relevant government departments to reinforce the opening of the information on administrative sanctions.[29] But how to effectively implement this stipulation remains unclear. Moreover, there should be legal documents for the AMEAs to consult which lay down necessary items to be included in the final published decision.[30] In such way, the

[27] For example, Article 8 of NDRC Rules on Anti-Price Monopoly is exactly the same as Article 14 of the AML.
[28] Provisions of the People's Republic of China on Open Government Information, http://www.gov.cn/zwgk/2007-04/24/content_592937.htm.
[29] Essentials of the Work on Open Government Information in 2014, http://politics.people.com.cn/n/2014/0401/c1001-24796042.html.
[30] See for example, Guidance on the preparation of public versions of Commission Decisions (fn 81, Chapter 7).

general public is able better to oversee the enforcement activities of the AMEAs and so limit the arbitrary use of discretion in decision making. Transparency also helps increasing the predictability and consistency of the decision-making of AMEAs, which have significant value in guiding the formulation of business strategies of market players. The Right of Access Notice and the Fine Setting Guidelines of the EU are all practical examples of how legal certainty and transparency can be improved through legal means.[31]

2.3 A Functioning AMC

Given the unique structure of China's competition system, it is a necessity to have a coordinating body like the AMC. However, in practice it does not function as expected, if it functions at all. Because of the infeasible working mechanism, which results from the lack of incentives to prioritise competition enforcement, it becomes a factually dispensable empty shell. The creation of this non-independent, non-transparent and uncoordinated competition enforcement system of China is to an extent pouring old wine into new bottles, and such inadequacy indeed heavily undermines the effective and consistent enforcement of the law.

The involvement of multiple ministries may be the reason for its ineffectiveness. However, their involvement can at the same time be the solution to the conflict between competition policy and sector-specific regulation. Although the Chinese political environment dictates that it is unrealistic to call for regulatory forbearance in regulated sectors, the AMC can nonetheless be a forum for relevant ministries to discuss, share information and cooperate, which is able to improve transparency of consultation process and clearly define the jurisdictional responsibility for both the AMEAs and sector-specific regulators.

In addition, provided that the current tripartite enforcement remains intact, the operation of the ECN can be instructive for the reform of the AMC. It can act as a body

[31] See sections 5.1 and 5.4, Chapter 7.

through which cases involving overlapping jurisdictions are allocated to the most suitable AMEA and an intermediary in the event that involvement of multiple AMEAs is necessary. If the AMC is given sufficient power as a coordinating institution, it is able substantially to prevent conflicts and facilitate cooperation amongst the AMEAs. As a consequence, through effective cooperation and communication it can also safeguard the coherent and consistent application of the AML.

2.4 The Involvement of COD in Cases concerning Administrative Monopoly and SOEs

SOEs are powerful in the sense that they do not need to respect market forces and market regulations as much as their private counterparts do. Previously, market regulations were designed and tailored specifically for them; now, whilst many well written legal instruments are in place to regulate market behaviours and market orders, they fail to deter SOEs since the consequences of breach is too nominal for SOEs to act cautiously, not to mention that in many cases there are no consequences. For China to treat SOEs equally as other undertakings, the vested bureaucratic and economic interests which are deeply embedded in China's political system and have been accumulating for half century, must be substantially eradicated, a task which will never be accomplished in socialist China. Similarly, administrative monopoly is not properly prohibited not only because the AMEAs have limited political authority to conduct investigations, but also because they are not able to withstand pressures from other government departments, particularly their administrative leaders, and punishments provided in Article 51 of the AML generate inadequate deterrence. The AML's vulnerability in front of government agencies and SOEs is not because it is badly written, but because it is not applied.

COD has one of the most crucial political powers in China: oversight of job placement in CPC and government.[32] It is powerful because it determines the political career of cadres, and therefore it is where pluralistic sources of *guangxi* finally

[32] See section 3.3, Chapter 6.

converge. If the decisions of the AMEAs on competition cases involving SOEs and government departments are backed by COD, and the responsible officials are to be punished under COD's *nomenklatura* system, the deterrence will certainly be more adequate than what is available under the current competition system.

APPENDIX

Anti-Monopoly Law of the People's Republic of China[1]

中华人民共和国反垄断法[2]

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

（2007 年 8 月 30 日第十届全国人民代表大会常务委员会第二十九次会议通过）

Chapter I General Provisions

第一章　总　　则

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

第一条　为了预防和制止垄断行为，保护市场公平竞争，提高经济运行效率，维护消费者利益和社会公共利益，促进社会主义市场经济健康发展，制定本法。

Article 2 This Law shall be applicable to monopolistic conducts in economic activities within the People's Republic of China. This Law shall apply to the conducts outside the territory of the People's Republic of China if they eliminate or have restrictive effect on competition on the domestic market of the PRC.

第二条　中华人民共和国境内经济活动中的垄断行为，适用本法；中华人民共和国境外的垄断行为，对境内市场竞争产生排除、限制影响的，适用本法。

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

---

[1] English version available at http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm.

[2] Authentic Chinese version available at http://www.gov.cn/flfg/2007-08/30/content_732591.htm.

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

第三条 本法规定的垄断行为包括：
（一）经营者达成垄断协议；
（二）经营者滥用市场支配地位；
（三）具有或者可能具有排除、限制竞争效果的经营者集中。

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

第四条 国家制定和实施与社会主义市场经济相适应的竞争规则，完善宏观调控，健全统一、开放、竞争、有序的市场体系。

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

第五条 经营者可以通过公平竞争、自愿联合，依法实施集中，扩大经营规模，提高市场竞争能力。

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

第六条 具有市场支配地位的经营者，不得滥用市场支配地位，排除、限制竞争。

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

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

第七条 国有经济占控制地位的关系国民经济命脉和国家安全的行业以及依法实行专营专卖的行业，国家对其经营者的合法经营活动予以保护，并对经营者的经营行为及其商品和服务的价格依法实施监管和调控，维护消费者利益，促进技术进步。

前款规定行业的经营者应当依法经营，诚实守信，严格自律，接受社会公众的监督，不得利用其控制地位或者专营专卖地位损害消费者利益。

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

第八条 行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，排除、限制竞争。

Article 9 The State Council shall establish the Anti-monopoly Commission, which is in charge of organizing, coordinating, guiding anti-monopoly work, performs the following functions:
(1) studying and drafting related competition policies;
(2) organizing the investigation and assessment of overall competition situations in the market, and issuing assessment reports;
(3) constituting and issuing anti-monopoly guidelines;
(4) coordinating anti-monopoly administrative law enforcement; and
(5) other functions as assigned by the State Council.

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

第九条 国务院设立反垄断委员会，负责组织、协调、指导反垄断工作，履行下列职责：
（一）研究拟订有关竞争政策；
（二）组织调查、评估市场总体竞争状况，发布评估报告；
（三）制定、发布反垄断指南；
（四）协调反垄断行政执法工作；
（五）国务院规定的其他职责。

国务院反垄断委员会的组成和工作规则由国务院规定。

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

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

第十条 国务院规定的承担反垄断执法职责的机构（以下统称国务院反垄断执法机构）依照本法规定，负责反垄断执法工作。

国务院反垄断执法机构根据工作需要，可以授权省、自治区、直辖市人民政府相应的机构，依照本法规定负责有关反垄断执法工作。

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

第十一条 行业协会应当加强行业自律，引导本行业的经营者依法竞争，维护市场竞争秩序。

Article 12 For the purposes of this Law,

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

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

第十二条 本法所称经营者，是指从事商品生产、经营或者提供服务的自然人、法人和其他组织。

本法所称相关市场，是指经营者在一定时期内就特定商品或者服务（以下统称商品）进行竞争的商品范围和地域范围。

Chapter II Monopoly Agreement

第二章 垄断协议

Article 13 Any of the following monopoly agreements among the competing business operators shall be prohibited:
(1) fixing or changing prices of commodities;
(2) limiting the output or sales of commodities;

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

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

第十三条 禁止具有竞争关系的经营者达成下列垄断协议：
（一）固定或者变更商品价格；
（二）限制商品的生产数量或者销售数量；
（三）分割销售市场或者原材料采购市场；
（四）限制购买新技术、新设备或者限制开发新技术、新产品；
（五）联合抵制交易；
（六）国务院反垄断执法机构认定的其他垄断协议。

本法所称垄断协议，是指排除、限制竞争的协议、决定或者其他协同行为。

Article 14 Any of the following agreements among business operators and their trading parties are prohibited:
(1) fixing the price of commodities for resale to a third party;
(2) restricting the minimum price of commodities for resale to a third party; or
(3) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.

第十四条 禁止经营者与交易相对人达成下列垄断协议：
（一）固定向第三人转售商品的价格；
（二）限定向第三人转售商品的最低价格；
（三）国务院反垄断执法机构认定的其他垄断协议。

Article 15 An agreement among business operators shall be exempted from application of articles 13 and 14 if it can be proven to be in any of the following circumstances:
(1) for the purpose of improving technologies, researching and developing new products;
(2) for the purpose of upgrading product quality, reducing cost, improving efficiency, unifying product specifications or standards, or carrying out professional labor division;
(3) for the purpose of enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators;

(4) for the purpose of achieving public interests such as conserving energy, protecting the environment and relieving the victims of a disaster and so on;
(5) for the purpose of mitigating serious decrease in sales volume or obviously excessive production during economic recessions;
(6) for the purpose of safeguarding the justifiable interests in the foreign trade or foreign economic cooperation; or
(7) other circumstances as stipulated by laws and the State Council.

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

第十五条 经营者能够证明所达成的协议属于下列情形之一的，不适用本法第十三条、第十四条的规定：
（一）为改进技术、研究开发新产品的；
（二）为提高产品质量、降低成本、增进效率，统一产品规格、标准或者实行专业化分工的；
（三）为提高中小经营者经营效率，增强中小经营者竞争力的；
（四）为实现节约能源、保护环境、救灾救助等社会公共利益的；
（五）因经济不景气，为缓解销售量严重下降或者生产明显过剩的；
（六）为保障对外贸易和对外经济合作中的正当利益的；
（七）法律和国务院规定的其他情形。

属于前款第一项至第五项情形，不适用本法第十三条、第十四条规定的，经营者还应当证明所达成的协议不会严重限制相关市场的竞争，并且能够使消费者分享由此产生的利益。

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

第十六条 行业协会不得组织本行业的经营者从事本章禁止的垄断行为。

Chapter III Abuse of Market Dominance

第三章 滥用市场支配地位

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

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

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

第十七条 禁止具有市场支配地位的经营者从事下列滥用市场支配地位的行为：
（一）以不公平的高价销售商品或者以不公平的低价购买商品；
（二）没有正当理由，以低于成本的价格销售商品；
（三）没有正当理由，拒绝与交易相对人进行交易；
（四）没有正当理由，限定交易相对人只能与其进行交易或者只能与其指定的经营者进行交易；
（五）没有正当理由搭售商品，或者在交易时附加其他不合理的交易条件；
（六）没有正当理由，对条件相同的交易相对人在交易价格等交易条件上实行差别待遇；
（七）国务院反垄断执法机构认定的其他滥用市场支配地位的行为。

本法所称市场支配地位，是指经营者在相关市场内具有能够控制商品价格、数量或者其他交易条件，或者能够阻碍、影响其他经营者进入相关市场能力的市场地位。

Article 18 The dominant market status shall be determined according to the following factors:
(1) the market share of a business operator in relevant market, and the competition situation of the relevant market;
(2) the capacity of a business operator to control the sales markets or the raw material procurement market;
(3) the financial and technical conditions of the business operator;
(4) the degree of dependence of other business operators upon of the business operator in transactions;

(5) the degree of difficulty for other business operators to enter the relevant market; and
(6) other factors related to determine a dominant market position of the said business operator.

第十八条 认定经营者具有市场支配地位，应当依据下列因素：
（一）该经营者在相关市场的市场份额，以及相关市场的竞争状况；
（二）该经营者控制销售市场或者原材料采购市场的能力；
（三）该经营者的财力和技术条件；
（四）其他经营者对该经营者在交易上的依赖程度；
（五）其他经营者进入相关市场的难易程度；
（六）与认定该经营者市场支配地位有关的其他因素。

Article 19 Where a business operator is under any of the following circumstances, it may be assumed to be have a dominant market position:
(1) the relevant market share of a business operator accounts for1/2 or above in the relevant market;
(2) the joint relevant market share of two business operators accounts for 2/3 or above; or
(3) the joint relevant market share of three business operators accounts for 3/4 or above.

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

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

第十九条 有下列情形之一的，可以推定经营者具有市场支配地位：
（一）一个经营者在相关市场的市场份额达到二分之一的；
（二）两个经营者在相关市场的市场份额合计达到三分之二的；
（三）三个经营者在相关市场的市场份额合计达到四分之三的。

有前款第二项、第三项规定的情形，其中有的经营者市场份额不足十分之一的，不应当推定该经营者具有市场支配地位。

被推定具有市场支配地位的经营者，有证据证明不具有市场支配地位的，不应当认定其具有市场支配地位。

Chapter IV Concentration of Business operators

第四章　经营者集中

Article 20 A concentration refers to the following circumstances:

(1) the merger of business operators;

(2) acquiring control over other business operators by virtue of acquiring their equities or assets; or

(3) acquiring control over other business operators or possibility of exercising decisive influence on other business operators by virtue of contact or any other means.

第二十条　经营者集中是指下列情形：
（一）经营者合并；
（二）经营者通过取得股权或者资产的方式取得对其他经营者的控制权；
（三）经营者通过合同等方式取得对其他经营者的控制权或者能够对其他经营者施加决定性影响。

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

第二十一条　经营者集中达到国务院规定的申报标准的，经营者应当事先向国务院反垄断执法机构申报，未申报的不得实施集中。

Article 22 Where a concentration is under any of the following circumstances, it may not be declared to the Anti-monopoly Authority under the State Council:
(1) one business operator who is a party to the concentration has the power to exercise more than half the voting rights of every other business operator, whether of the equity or the assets; or
(2) one business operator who is not a party to the concentration has the power to exercise more than half the voting rights of every business operator concerned, whether of the equity or the assets.

第二十二条　经营者集中有下列情形之一的，可以不向国务院反垄断执法机构申报：
（一）参与集中的一个经营者拥有其他每个经营者百分之五十以上有表决权的股份或者资产的；

（二）参与集中的每个经营者百分之五十以上有表决权的股份或者资产被同一个未参与集中的经营者拥有的。

Article 23 A business operator shall, when lodge a concentration declaration with the Anti-monopoly Authority under the State Council, submit the following documents and materials:
(1) a declaration paper;
(2) explanations on the effect of the concentration on the relevant market competition;
(3) the agreement of concentration;
(4) the financial reports and accounting reports of the proceeding accounting year of the business operator; and
(5) other documents and materials as stipulated by the Anti-monopoly Authority under the State Council.

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

第二十三条 经营者向国务院反垄断执法机构申报集中，应当提交下列文件、资料：
（一）申报书；
（二）集中对相关市场竞争状况影响的说明；
（三）集中协议；
（四）参与集中的经营者经会计师事务所审计的上一会计年度财务会计报告；
（五）国务院反垄断执法机构规定的其他文件、资料。

申报书应当载明参与集中的经营者的名称、住所、经营范围、预定实施集中的日期和国务院反垄断执法机构规定的其他事项。

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

第二十四条 经营者提交的文件、资料不完备的，应当在国务院反垄断执法机构规定的期限内补交文件、资料。经营者逾期未补交文件、资料的，视为未申报。

Article 25 The Anti-monopoly Authority under the State Council shall conduct a preliminary review of the declared concentration of business operators, make a

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

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

第二十五条 国务院反垄断执法机构应当自收到经营者提交的符合本法第二十三条规定的文件、资料之日起三十日内，对申报的经营者集中进行初步审查，作出是否实施进一步审查的决定，并书面通知经营者。国务院反垄断执法机构作出决定前，经营者不得实施集中。

国务院反垄断执法机构作出不实施进一步审查的决定或者逾期未作出决定的，经营者可以实施集中。

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

Under any of the following circumstances, the Anti-monopoly Authority under the State Council may notify the business operators in written form that the time limit as stipulated in the preceding paragraph may be extended to no more than 60 days:
(1) the business operators concerned agree to extend the time limit;
(2) the documents or materials submitted are inaccurate and need further verification;
(3) things have significantly changed after declaration.

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

第二十六条 国务院反垄断执法机构决定实施进一步审查的，应当自决定之日起九十日内审查完毕，作出是否禁止经营者集中的决定，并书面通知经营者。作出禁止经营者集中的决定，应当说明理由。审查期间，经营者不得实施集中。

有下列情形之一的，国务院反垄断执法机构经书面通知经营者，可以延长前款规定的审查期限，但最长不得超过六十日：
（一）经营者同意延长审查期限的；

（二）经营者提交的文件、资料不准确，需要进一步核实的；
（三）经营者申报后有关情况发生重大变化的。

国务院反垄断执法机构逾期未作出决定的，经营者可以实施集中。

Article 27 In the case of the examination on the concentration of business operators, it shall consider the relevant elements as follows:
(1) the market share of the business operators involved in the relevant market and the controlling power thereof over that market,
(2) the degree of market concentration in the relevant market,
(3) the influence of the concentration of business operators on the market access and technological progress,
(4) the influence of the concentration of business operators on the consumers and other business operators,
(5) the influence of the concentration of business operators on the national economic development, and
(6) other elements that may have an effect on the market competition and shall be taken into account as regarded by the Anti-monopoly Authority under the State Council.

第二十七条 审查经营者集中，应当考虑下列因素：
（一）参与集中的经营者在相关市场的市场份额及其对市场的控制力；
（二）相关市场的市场集中度；
（三）经营者集中对市场进入、技术进步的影响；
（四）经营者集中对消费者和其他有关经营者的影响；
（五）经营者集中对国民经济发展的影响；
（六）国务院反垄断执法机构认为应当考虑的影响市场竞争的其他因素。

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

第二十八条 经营者集中具有或者可能具有排除、限制竞争效果的，国务院反垄断执法机构应当作出禁止经营者集中的决定。但是，经营者能够证明该集中对竞争产生的有利影响明显大于不利影响，或者符合社会公共利益的，国务院反垄断执法机构可以作出对经营者集中不予禁止的决定。

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

第二十九条 对不予禁止的经营者集中，国务院反垄断执法机构可以决定附加减少集中对竞争产生不利影响的限制性条件。

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

第三十条 国务院反垄断执法机构应当将禁止经营者集中的决定或者对经营者集中附加限制性条件的决定，及时向社会公布。

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

第三十一条 对外资并购境内企业或者以其他方式参与经营者集中，涉及国家安全的，除依照本法规定进行经营者集中审查外，还应当按照国家有关规定进行国家安全审查。

Chapter V Abuse of Administrative Power to Eliminate or Restrict Competition

第五章 滥用行政权力排除、限制竞争

Article 32 Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power, restrict or restrict in a disguised form entities and individuals to operate, purchase or use the commodities provided by business operators designated by it.

第三十二条 行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，限定或者变相限定单位或者个人经营、购买、使用其指定的经营者提供的商品。

Article 33 Any administrative organ or organization empowered by a law or an administrative regulation to administer public affairs may not have any of the

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

第三十三条 行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，实施下列行为，妨碍商品在地区之间的自由流通：
（一）对外地商品设定歧视性收费项目、实行歧视性收费标准，或者规定歧视性价格；
（二）对外地商品规定与本地同类商品不同的技术要求、检验标准，或者对外地商品采取重复检验、重复认证等歧视性技术措施，限制外地商品进入本地市场；
（三）采取专门针对外地商品的行政许可，限制外地商品进入本地市场；
（四）设置关卡或者采取其他手段，阻碍外地商品进入或者本地商品运出；
（五）妨碍商品在地区之间自由流通的其他行为。

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

第三十四条 行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，以设定歧视性资质要求、评审标准或者不依法发布信息等方式，排斥或者限制外地经营者参加本地的招标投标活动。

Article 35 Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative

power to reject or restrict business operators from outside the locality to invest or set up branches in the locality by imposing unequal treatment thereupon compared to that upon local business operators.

第三十五条 行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，采取与本地经营者不平等待遇等方式，排斥或者限制外地经营者在本地投资或者设立分支机构。

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

第三十六条 行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，强制经营者从事本法规定的垄断行为。

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

第三十七条 行政机关不得滥用行政权力，制定含有排除、限制竞争内容的规定。

Chapter VI Investigation into the Suspicious Monopolistic Conducts

第六章 对涉嫌垄断行为的调查

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

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

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

第三十八条 反垄断执法机构依法对涉嫌垄断行为进行调查。

涉嫌垄断行为，任何单位和个人有权向反垄断执法机构举报。反垄断执法机构应当为举报人保密。

举报采用书面形式并提供相关事实和证据的，反垄断执法机构应当进行必要的调查。

Article 39 The anti-monopoly authority may take any of the following measures in investigating suspicious monopolistic conducts:
(1) conducting the inspection by getting into the business premises of business operators under investigation or by getting into any other relevant place,
(2) inquiring of the business operators under investigation, interested parties, or other relevant entities or individuals, and requiring them to explain the relevant conditions,
(3) consulting and duplicating the relevant documents, agreements, account books, business correspondences and electronic data, etc. of the business operators under investigation, interested parties and other relevant entities or individuals,
(4) seizing and detaining relevant evidence, and
(5) inquiring about the business operators" bank accounts under investigation.

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

第三十九条 反垄断执法机构调查涉嫌垄断行为，可以采取下列措施：
（一）进入被调查的经营者的营业场所或者其他有关场所进行检查；
（二）询问被调查的经营者、利害关系人或者其他有关单位或者个人，要求其说明有关情况；
（三）查阅、复制被调查的经营者、利害关系人或者其他有关单位或者个人的有关单证、协议、会计账簿、业务函电、电子数据等文件、资料；
（四）查封、扣押相关证据；
（五）查询经营者的银行账户。

采取前款规定的措施，应当向反垄断执法机构主要负责人书面报告，并经批准。

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

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

第四十条 反垄断执法机构调查涉嫌垄断行为，执法人员不得少于二人，并应当出示执法证件。

执法人员进行询问和调查，应当制作笔录，并由被询问人或者被调查人签字。

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

第四十一条 反垄断执法机构及其工作人员对执法过程中知悉的商业秘密负有保密义务。

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

第四十二条 被调查的经营者、利害关系人或者其他有关单位或者个人应当配合反垄断执法机构依法履行职责，不得拒绝、阻碍反垄断执法机构的调查。

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

第四十三条 被调查的经营者、利害关系人有权陈述意见。反垄断执法机构应当对被调查的经营者、利害关系人提出的事实、理由和证据进行核实。

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

第四十四条 反垄断执法机构对涉嫌垄断行为调查核实后，认为构成垄断行为的，应当依法作出处理决定，并可以向社会公布。

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

Where the anti-monopoly authority decides to suspend the investigation, it shall supervise the implementation of the promise by the relevant business operators. If the business operators keep their promise, the anti-monopoly authority may decide to terminate the investigation.

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

第四十五条 对反垄断执法机构调查的涉嫌垄断行为，被调查的经营者承诺在反垄断执法机构认可的期限内采取具体措施消除该行为后果的，反垄断执法机构可以决定中止调查。中止调查的决定应当载明被调查的经营者承诺的具体内容。

反垄断执法机构决定中止调查的，应当对经营者履行承诺的情况进行监督。经营者履行承诺的，反垄断执法机构可以决定终止调查。

有下列情形之一的，反垄断执法机构应当恢复调查：
（一）经营者未履行承诺的；
（二）作出中止调查决定所依据的事实发生重大变化的；
（三）中止调查的决定是基于经营者提供的不完整或者不真实的信息作出的。

Chapter VII Legal Liabilities

第七章 法律责任

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

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

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

第四十六条 经营者违反本法规定，达成并实施垄断协议的，由反垄断执法机构责令停止违法行为，没收违法所得，并处上一年度销售额百分之一以上百分之十以下的罚款；尚未实施所达成的垄断协议的，可以处五十万元以下的罚款。

经营者主动向反垄断执法机构报告达成垄断协议的有关情况并提供重要证据的，反垄断执法机构可以酌情减轻或者免除对该经营者的处罚。

行业协会违反本法规定，组织本行业的经营者达成垄断协议的，反垄断执法机构可以处五十万元以下的罚款；情节严重的，社会团体登记管理机关可以依法撤销登记。

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

第四十七条 经营者违反本法规定，滥用市场支配地位的，由反垄断执法机构责令停止违法行为，没收违法所得，并处上一年度销售额百分之一以上百分之十以下的罚款。

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

第四十八条 经营者违反本法规定实施集中的，由国务院反垄断执法机构责令停止实施集中、限期处分股份或者资产、限期转让营业以及采取其他必要措施恢复到集中前的状态，可以处五十万元以下的罚款。

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

第四十九条 对本法第四十六条、第四十七条、第四十八条规定的罚款，反垄断执法机构确定具体罚款数额时，应当考虑违法行为的性质、程度和持续的时间等因素。

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

第五十条 经营者实施垄断行为，给他人造成损失的，依法承担民事责任。

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

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

第五十一条 行政机关和法律、法规授权的具有管理公共事务职能的组织滥用行政权力，实施排除、限制竞争行为的，由上级机关责令改正；对直接负责的主管人员和其他直接责任人员依法给予处分。反垄断执法机构可以向有关上级机关提出依法处理的建议。

法律、行政法规对行政机关和法律、法规授权的具有管理公共事务职能的组织滥用行政权力实施排除、限制竞争行为的处理另有规定的，依照其规定。

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

第五十二条 对反垄断执法机构依法实施的审查和调查，拒绝提供有关材料、信息，或者提供虚假材料、信息，或者隐匿、销 毁、转移证据，或者有其他拒绝、阻碍调查行为的，由反垄断执法机构责令改正，对个人可以处二万元以下的罚款，对单位可以处二十万元以下的罚款；情节严重 的，对个人处二万元以上十万元以下的罚款，对单位处二十万元以上一百万元以下的罚款；构成犯罪的，依法追究刑事责任。

Article 53 Where any party concerned objects to the decision made by the anti-monopoly authority in accordance with Articles 28 and 29 of this Law, it may first

apply for an administrative reconsideration; if it objects to the reconsideration decision, it may lodge an administrative lawsuit in accordance with law.

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

第五十三条 对反垄断执法机构依据本法第二十八条、第二十九条作出的决定不服的，可以先依法申请行政复议；对行政复议决定不服的，可以依法提起行政诉讼。

对反垄断执法机构作出的前款规定以外的决定不服的，可以依法申请行政复议或者提起行政诉讼。

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

第五十四条 反垄断执法机构工作人员滥用职权、玩忽职守、徇私舞弊或者泄露执法过程中知悉的商业秘密，构成犯罪的，依法追究刑事责任；尚不构成犯罪的，依法给予处分。

Chapter VIII Supplementary Provisions

第八章 附 则

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

第五十五条 经营者依照有关知识产权的法律、行政法规规定行使知识产权的行为，不适用本法；但是，经营者滥用知识产权，排除、限制竞争的行为，适用本法。

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

第五十六条 农业生产者及农村经济组织在农产品生产、加工、销售、运输、储存等经营活动中实施的联合或者协同行为，不适用本法。

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

第五十七条 本法自 2008 年 8 月 1 日起施行。

BIBLIOGRAPHY

A

American Bar Association, 'Comments on the proposed Anti-Monopoly Law of the People's Republic of China', May 2005, http://connect.abaantitrust.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=951e4fe0-b7cc-4927-85c6-9c359989b8b6&forceDialog=1.

American Bar Association, 'Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China', July 2003, http://apps.americanbar.org/intlaw/committees/business_regulation/antitrust/chinacommentsantimonopoly.doc.

Andreangeli A., 'From Mobile Phones to Cattle: How the Court of Justice is Reframing the Approach to Article 101 (Formerly 81 EC Treaty) of the EU Treaty' (2011) 34 World Competition 215.

Andreangeli A., 'Between Economic Freedom and Effective Competition Enforcement: the Impact of the Antitrust Remedies Provided by the Modernisation Regulation on Investigated Parties' Freedom to Contract and to Enjoy Property' (2010) 6 The Competition Law Review 225.

Andreangeli A., *EU Competition Enforcement and Human Rights* (Edward Elgar 2008)

Andreangeli A. et al., 'Enforcement by the Commission: the Decisional and Enforcement Structure in Antitrust Cases and the Commission's Fining System' (2009) The Global Competition Law Centre, http://www.learlab.com/learconference_2009/documents/The%20decisional%20and%20enforcement%20structure%20and%20the%20Commission_s%20fining%20system%20GERADIN.pdf.

Anti-Monopoly Office of the Fair Trade Bureau of SAIC, 'Anti-Competitive Behaviours of Multinationals in China and the Counter-Measures [在华跨国公司限制竞争行为表现及对策]' (2004) 5 Industry and Commerce Administration [工商行政管理] 42.

Areeda P. and H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application (Volume XI)* (Aspen Publisher 2005).

Aubert C., O. Falck and S. Heblich, 'Subsidizing National Champions: An Evolutionary Perspective' in O. Falck, C. Gollier and L. Woessmann (eds.) *Industrial Policy for National Champions* (MIT Press 2011).

B

Baker J., 'Antitrust Enforcement and Sectoral Regulation: the Competition Policy Benefits of Concurrent Enforcement in the Communications Sector' (2013) 9 CPI 1.

Baldassaarri M. and L. Lambertini (eds.) *Antitrust, Regulation and Competition* (Palgrave Macmillan 2003).

Barbier de La Serre É. and E. Lagathu, 'The Law on Fines Imposed in EU Competition Proceedings: Faster, Higher, Harsher' (2013) 4 Journal of European Competition Law & Practice 325.

Barbier de La Serre É. and C. Winckler, 'A Survey of Legal Issues Regarding Fines Imposed in EU Competition Proceedings' (2011) 2 Journal of European Competition Law & Practice 356.

Barros P., 'Looking behind the Curtain – Effects from Modernization of European Union Competition Policy' (2002) 47 European Economic Review 613.

Berry J., 'Anti-Monopoly Law in China: A Socialist Market Economy Wrestles with Its Antitrust Regime' (2005) 2 International Law & Management Review 129.

Blumental D., '"Reform" or "Opening"? Reform of China's State-Owned Enterprises and WTO Accession – The Dilemma of Applying GATT to Marketizing Economies' (1998) 16 UCLA Pac. Basin L.J. 198.

Blumenthal W., 'Presentation to the International Symposium on the Draft Anti-Monopoly Law of the People's Republic of China' Legislative Affairs Office of the State Council, 23-24 May 2005, https://www.ftc.gov/public-statements/2005/05/presentation-international-symposium-draft-anti-monopoly-law-peoples.

Bork R., *The Antitrust Paradox: a Policy at War with Itself* (Basic Books 1978).

Braendle U., T. Gasser and J. Noll, 'Corporate Governance in China – is Economic Growth Potential Hindered by Guanxi?' (2005) 110 Bus. Soc. Rev. 389.

Brandt L. and T. Rawski, 'China's Great Economic Transformation' in L. Brandt and T. Rawski (eds.) *China's Great Economic Transformation* (Cambridge University Press 2008).

Brødsgaard K., 'Governing Capacity and Institutional Change in China in the Reform Era' (2010) 28 The Copenhagen Journal of Asian Studies 20.

Brook T., 'China's Anti-Monopoly Law: History, Application, and Enforcement' (2011) 16 Appeal 31

Buigues P., 'Competition Policy versus Sector – Specific Regulation in Network Industries: the EU Experience' (2006), http://unctad.org/sections/wcmu/docs/c2clp_ige7p14_en.pdf.

Bush N., 'Constraints on Convergence in Chinese Antitrust' (2009) 54 The Antitrust Bulletin 87.

Bush N., "Chinese Competition Policy: It Takes More than Law" (2005) The China Business Review, http://www.chinabusinessreview.com/public/0505/bush.html.

Büthe T., 'The Politics of Competition and Institutional Change in European Union: The First Fifty Years' in S. Meunier and K. McNamara (eds.) *Making History: European Integration and Institutional Change at Fifty* (Oxford University Press 2007).

C

Cengiz F., 'Multi-Level Governance in Competition Policy: the European Competition Network' (2010) 35 European Law Review 661.

Chan G., 'Administrative Monopoly and the Anti-Monopoly Law: an Examination of the Debate in China' (2009) 18 Journal of Contemporary China 263.

Chang E. and S. Wong, 'Political Control and Performance in China's Listed Firms' (2004) 32 J. Comparative & Econ. 617.

Chen A., 'China One Year after Its WTO Entry' in S. Bao, S. Lin and C. Zhao (eds.) *The Chinese Economy After WTO Accession* (Ashgate Publishing Limited 2006).

Chen A., 'The Structure of Chinese Industry and the Impact from China's WTO Entry' (2002) 44 Comparative Economic Studies 72.

Cheng H., 'China's New Anti-monopoly Law: Big Trouble in Little China?' (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344921

Cheng T., 'Competition and the State in China' in D. Sokol, T. Cheng and I. Lianos (eds.) *Competition and the State* (Stanford University Press 2014).

Chow D., 'How China's Enforcement of Its Anti-Monopoly Law Poses Risks to Multinational Companies' 14 Santa Clara Law Review (forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2599518.

Chow D., 'An Analysis of the Political Economy of China's Enterprise Conglomerates: A Study of the Reform of the Electric Power Industry in China (1997) 28 Law & Pol'y Int'l Bus. 383.

Chow G., *China's Economic Transformation* (Blackwell Publishing 2007).

Cini M. and L. McGowan, *Competition Policy in the European Union* (Palgrave MacMillan 2009).

Clarke D., 'China's Legal System and the WTO: Prospects for Compliance' (2003) 2 Wash. U. Global Stud. L. Rev 97.

Clifton J., F. Comín, and D. Fuentes, *Privatisation in the European Union: Public Enterprises and Integration* (Springer Science 2003).

Coase R. and N. Wang, *How China Became Capitalist* (Palgrave Macmillan 2013)

Collier M., 'Explaining Corruption: An Institutional Choice Approach' 2002) 38 Crime, Law & Social Change 1.

Cooke J., 'The Reform of Competition law Enforcement—Will it Work?' in Dermot Cahill (eds.), *The Modernisation of EU Competition Law Enforcement in the European Union: FIDE 2004 National Reports* (Cambridge University Press 2004).

Cseres K., 'Comparing Laws in the Enforcement of EU and National Competition

Law' (2010) 3 E. J. L. S. 7.

Cumings B., 'The Political Economy of China's Turn Outward' in S. Kim (eds.) *China and the World: New Directions in Chinese Foreign Relations* (Westview Press 1989).

D

Dabbah M., *International and Comparative Competition Law* (Cambridge University Press 2010).

Dabbah M., 'The Development of Sound Competition Law and Policy in China: An (Im)possible Dream?' (2007) 30 World Competition 341.

Dabbah M., *The Internationalisation of Antitrust Policy* (Cambridge University Press 2003).

Danov M., *Jurisdiction and Judgments in Relation to EU Competition Law Claims* (Hart Publishing Ltd 2011).

Deng F. and C. Huang, 'A Five Year Review of Merger Enforcement in China' Antitrust Source, http://awards.concurrences.com/IMG/pdf/fei_antitrust_source_a_five_year_review_of_merger_enforcement_in_china.pdf.

Deng X., *Selected Works of Deng Xiaoping (vol. 3)* [邓小平文选 (第三卷)] (People's Publishing House [人民出版社] 1993).

Deng X., 'How to Restore Agricultural Production' (7 July 1962) in *Selected Works of Deng Xiaoping*, Vol. 1 (1938-1965) (Foreign Languages Press, 1992).

Depoorter B. and F. Parisi, 'The Modernization of European Antitrust Enforcement: the Economics of Regulatory Competition' (2005) 13 Geo. Mason L. Rev. 309.

Dewatripont M. and G. Roland, 'The Design of Reform Packages under Uncertainty' (1995) 85 American Economic Review 1207.

Dewatripont M. and G. Roland, 'The Virtues of Gradualism and Legitimacy in the Transition to a Market Economy' (1992) 102 The Economic Journal 291.

Di Federico G., 'The New Anti-Monopoly Law in China from a European Perspective' (2009) 32 World Competition 249.

Dickson B., *Red Capitalists in China: The Party, Private Entrepreneurs, and Prospects for Political Change* (Cambridge University Press 2003).

Dikotter F., *Mao's Great Famine: the History of China's most Devastating Catastrophe, 1958-62* (Bloomsbury Publishing Plc 2010).

Dittmer L. and G. Liu, *China's Deep Reform: Domestic Politics in Transition* (Rowman & Littlefield Publishers 2006).

Dong G. and A. Walder, 'Factions in A Bureaucratic Setting: the Origins of Cultural Revolution Conflict in Nanjing' (2011) The China Journal 1.

Dunfee T. and D. Warren, "Is Guanxi Ethical? A Normative Analysis of Doing Business in China' (2001) 32 Journal of Business Ethics 191.

Dunne N., *Competition Law and Economic Regulation: Making and Managing Markets* (Cambridge University Press 2015).

E

Economides N., 'Competition Policy in Network Industries: an Introduction' in D. Jansen (eds.) *The New Economy and Beyond: Past, Present and Future* (Edward Elgar Publishing 2006).

Egeberg M., 'European Government(s): Executive Politics in Transition' in K. Goetz, P. Mair and G. Smith (eds.) *European Politics: Pasts, Presents, Futures* (Routledge 2009)

Eichner A., 'Battling Cartels in the New Era of Chinese Antitrust Enforcement' (2012) 47 Texas International Law Journal 587.

Elhauge E. and D. Geradin, *Global Competition Law and Economics* (Hart Publishing Ltd 2007).

Emch A., 'Antitrust in China – the Brighter Spots' (2011) 3 E. C. L. R. 132.

Ezrachi A. and W. Han, 'Merger Remedies – the Chinese Experience' (2015) 3 (suppl 1) Journal of Antitrust Enforcement i69.

European Commission, 'Evaluation of the Performance of Network Industries Providing Services of General Economic Interest' (2007) 1 European Economy.

Evans D. and V. Zhang 'Analyzing Competition among Internet Players: Qihoo 360 v. Tencent' (2013) Antitrust Chronicle, https://www.competitionpolicyinternational.com/analyzing-competition-among-internet-players-qihoo-360-v-tencent.

Evans D., V. Zhang and X. Zhang, 'Assessing Unfair Pricing under China's Anti-Monopoly Law for Innovation-Intensive Industries' (2014) Coase-Sandor Working Paper Series in Law and Economics No. 678.

F

Fan Y., 'Questioning Guanxi: Definition, Classification and Implications' (2002) 11 International Business Review 543.

Faure M. and X. Zhang (eds.), *Competition Policy and Regulation: Recent Developments in China, the US and Europe* (Edward Elgar Publishing Limited 2011).

Fels A., 'China's Antimonopoly Law 2008: An Overview' (2012) 41 Rev Ind Organ 7.

Fewsmith J., 'The Political and Social Implications of China's Accession to the WTO' (2001) 167 The China Quarterly 573.

Foer A. and J. Cuneo (eds.), *The International Handbook on Private Enforcement of Competition Law* (Edward Elgar Publishing Ltd 2010).

Forrester I., 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009) 34 European Law Review 817.

Forrester I., 'Modernization of EC Competition Law' (1999) 23 Fordham International Law Journal 1028.

Fox E., 'An Anti-Monopoly Law for China – Scaling the Walls of Protectionist

Government Restraints' (2007) NYU Law School, Public Law Research Paper No. 07-13, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003162.

Fox E., 'Mergers in Global Markets: *GE/Honeywell* and the Future of Merger Control' (2002) 23 U. Pa. J. Int'l Econ. L. 457.

Furse M., 'Merger Control in China: Four and a Half Years of Practice and Enforcement – a Critical Analysis' (2013) 36 World Competition 285.

Furse M., 'Competition Law Choice in China' (2007) 30 World Competition 323.

G

Galloway J., 'The Pursuit of National Champions: the Intersection of Competition Law and Industrial Policy' (2007) 28 European Competition Law Review 172.

Garnaut R., 'Twenty Years of Economic Reform and Structural Change in the Chinese Economy' in R. Garnaut and Y. Huang (eds.) *Growth without Miracles: Readings on the Chinese Economy in the Era of Reform* (Oxford University Press 2001).

Gerber D., 'Asia and Global Competition Law Convergence' in M. Dowdle, J. Gillespie and I. Maher (eds.) *Asian Capitalism and the Regulation of Competition towards a Regulatory Geography of Global Competition Law* (Cambridge University Press 2013).

Geradin D., 'Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffman-La Roche' (2015) George Mason Law & Economics Research Paper No. 15-15, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2586584.

Geradin D., 'The Decision of the Commission of 13 May 2009 in the Intel Case: Where is the Foreclosure and Consumer Harm?' (2009) TILEC Discussion Paper No. 2010-022, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1490114.

Gerber D., 'Economics, Law & Institutions: the Shaping of Chinese Competition Law' (2008) 26 Journal of Law & Policy 271.

Gerber D., 'The Evolution of a European Competition Law Network' in C. Ehlermann and I. Atanasiu (eds.) *Constructing the EU Network of Competition Authorities* (Hart Publishing 2004).

Gerber D., 'Constructing Competition Law in China: the Potential Value of European and U.S. Experience' (2004) 3 Wash. U. Glob. Stud. L. Rev. 315.

Geradin D., 'The Opening of State Monopolies to Competition: Main Issues of the Liberalization Process' in D. Geradin (eds.) *The Liberalization of State Monopolies in the European Union and Beyond* (Kluwer Law International 2000).

Geradin D., A. Layne-Farrar and N. Petit, *EU Competition Law and Economics* (Oxford University Press 2012).

Geradin D., C. Malamataris and J. Wileur, 'The EU Competition Law Fining System' in I. Lianos and D. Geradin (eds.) *Handbook on European Competition Law* (Edward Elgar 2013).

Geradin D. and I. Girgenson, 'Industrial Policy and European Merger Control – A Reassessment' (2011) 53 *TILEC Discussion Paper* 1, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937586.

Gilbert R. and D. Newbery, 'Electricity Merger Policy in the Shadow of Regulation' (2006) EPRG Working Paper 0628, http://www.cambridgeeprg.com/wp-content/uploads/2008/11/eprg0628.pdf.

Gippini-Fournier E., 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' (2008) Community Report to the FIDE Congress, http://ssrn.com/abstract=1139776.

Gu H. and A. Foster, 'Substantive Analysis in China's Horizontal Merger Control: A Six-Year Review and Beyond' (2015) 3 (suppl 1) Journal of Antitrust Enforcement i26.

Gu M., *Sinologism: An Alternative to Orientalism and Postcolonialism* (Routledge 2013).

Guo K. and Y. Yao, 'Causes of Privatisation in China' (2005) 13 Economics of Transition 211.

Guo Y. and A. Hu, 'The Administrative Monopoly in China's Economic Transition' (2004) 37 Communist and Post-Communist Studies 265.

H

Haley J., ‘Competition Law for the Asia-Pacific Economic Cooperation Community: Designing Shoes for Many Sizes’ (2002) 1 Wash. U. Glob. Stud. L. Rev. 1.

Han A., ‘China's Company Law: Practicing Capitalism in a Transitional Economy’ (1996) 5 Pac. Rim L. & Pol'Y J. 457.

Harding H., *China’s Second Revolution: Reform after Mao* (The Brookings Institution 1987).

Harker M., ‘EU Competition Law as a Tool for Dealing with Regulatory Failure: the Broadband Margin Squeeze Cases’ (2013) 8 Journal of Business Law 817.

Harris H., ‘The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People’s Republic of China’ (2006) 7 Chi. J. Int’l L. 169.

Harris H. et al., *Anti-Monopoly Law and Practice in China* (Oxford University Press 2011).

Heidenheimer A., ‘Perspectives on the Perception of Corruption’ In A. Heidenheimer and M. Johnston (eds.) *Political Corruption, a Handbook* (Transaction Publisher 2002).

Heilmann S. and S. Kirchberger, ‘The Chinese *Nomenklatura* in Transition: a Study based on Internal Cadre Statistics of the Central Organization Department of the Chinese Communist Party’ (2000) China Analysis No.1, www.chinapolitik.de/resources/analysis1.pdf.

Hellwig M., ‘Competition Policy and Sector-Specific Regulation for Network Industries’ in X. Vives (eds.) *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press 2009).

Hittinger C. and J. Huh, ‘The People’s Republic of China Enacts Its First Comprehensive Antitrust Law’ (2007) 4 NYU J. L. & Bus. 245.

Hofmann H., ‘Good Governance in European Merger Control: Due Process and Checks and Balances under Review’ (2003) 24 European Competition Law Review 114.

Hou L., ‘An Evaluation of the Enforcement of China's Anti-Monopoly Law in

2008-2013' (2013), http://ssrn.com/abstract=2292296.

Howell T. et al., 'China's New Anti-Monopoly Law: A Perspective from the United States' (2009) 18 Pacific Rim Law & Policy Journal 53.

Huang J., *Factionalism in Chinese Communist Politics* (Cambridge University Press 2000).

Huang Y., *Capitalism with Chinese Characteristics: Entrepreneurship and the State* (Cambridge University Press 2008).

Huang Y., 'Pursuing the Second Best: The History Momentum, and Remaining Issues of China's Anti-Monopoly Law' (2008) 75 Antitrust Law Journal 117.

Huang Y., *Selling China* (Cambridge University Press 2003).

Huang Y., 'Administrative Monitoring in China' (1995) 143 The China Quarterly 828.

Huang Y. and Z. Li, 'An Overview of Chinese Competition Policy: Between Fragmentation and Consolidation' in A. Emch and D. Stallibrass (eds.) *China's Anti-Monopoly Law: the First Five Years* (Kluwer Law International 2013).

Huang Y. et al., 'China's 2007 Anti-Monopoly Law: Competition and the Chinese Petroleum Industry' (2010) 31 Energy Law Journal 337.

Hulsink W., *Privatisation and Liberalisation in European Telecommunications: Comparing Britain, the Netherlands and France* (Routledge 1999).

Huo Z., 'A Tiger without Teeth: the Antitrust Law of the People's Republic of China' (2008) 10 Asian-Pacific Law & Policy Journal 32.

I

International Chamber of Commerce, 'Due Process in EU Antitrust Proceedings' (2010), http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2010/Due-process-in-EU-antitrust-proceedings.

International Competition Network, 'Recommended Practices for Merger Analysis' (2010), http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf.

Ip E., 'Judicial Review in China: A Positive Political Economy Analysis' (2012) 8 Review of Law and Economics 331.

J

Jiang S. and D. Sokol, 'Resale Price Maintenance in China: an Economic Perspective' (2015) 3 (suppl 1) Journal of Antirust Enforcement i132.

Jiang X., 'Promoting Competition and Maintaining Monopoly: Dual Functions of Chinese Industrial Policies during Economic Transition' (2002) 1 Washington University Global Studies Law Review 49.

Jung Y. and Q. Hao, 'The New Economic Constitution in China: A Third Way for Competition Regime?' (2003) 24 Nw J. Int'L L. and Bus. 107.

K

Kallay D., 'China's New Anti-Monopoly Law: An International Antitrust Convergence Perspective' (2008), delivered at Melbourne Law School's "Unleashing the Tiger? Competition Law in China and Hong Kong" Conference, http://www.ftc.gov/oia/speeches/081004kallaymelbourne.pdf.

Käseberg T. and A. Van Laer, 'Competition Law and Industrial Policy: Conflict, Adaptation, and Complementarity' in K. Patel and H. Schweitzer (eds.) *The Historical Foundations of EU Competition Law* (Oxford University Press 2013).

Kekelekis M., 'The European Competition Network (ECN): It Does Actually Work Well' EIPAScope 2009/1, 35-39.

Khrushchev N., *Khrushchev's Memoirs* (Little Brown 1970).

Killion M., 'China's Amended Constitution: Quest for Liberty and Independent Judicial Review' (2005) 4 Washington University Global Studies Law Review 43.

Klauwer K., J. Musch and B. Naumer, 'On belief Bias in Syllogistic Reasoning' (2000) 107 Psychological Review 852.

Ko S., 'An Introduction to Chinese Legislation' 3 Washington University Global Studies Law Review 267.

Kovacic W., 'China's Competition Law Experience in Context' (2015) 3 (suppl 1) Journal of Antitrust Enforcement i2.

Kovacic W. and D. Hyman, 'Competition Agency Design: What's on the Menu?' (2012) GW Law Fculty Publications & Other Works, Paper 628, http://scholarship.law.gwu.edu/faculty_publications/628.

Kroes N., 'Many Achievements, More to Do' (2009) IBA Conference, SPEECH/09/106, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/106&format=HTML&aged=0&language=EN&guiLanguage=en.

L

Lasserre B., 'The Furture of European Competition Network' 21st St. Gallen International Competition Law Forum ICF, May 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567620.

Lee J., 'State Owned Enterprises in China: Reviewing the Evidence' (2009) OECD Occasional Paper.

Lefter C., 'Law Antimonopoly of China – a Model of European Inspiration' (2011) 18 Theoretical and Applied Economics 75.

Leonard G., 'Incentives and China's New Antimonopoly Law' (2008) 22 Antitrust Magazine 73.

Lever J., 'Whether, and If So How, the EC Commission's 2006 Guidelines on Setting Fines for Infringements of Articles 81 And 82 of the EC Treaty are Fairly Subject To Serious Criticism' (2009) BDI, http://bdi.eu/download_content/Publikation_BDI_Gutachten__Opinion__zu_EU_Bussgeldleitlinien.pdf.

Levy N., 'Procedural Aspects of Merger Control' in I. Lianos and D. Geradin (eds.)

Handbook on European Competition Law (Edward Elgar 2013).

Li C., 'China's Midterm Jockeying: Gearing Up for 2012 (Part 4: Top Leaders of Major State-Owned Enterprises)' (2011) 34 China Leadership Monitor 9.

Li G. and A. Young, 'Competition Laws and Policies in China and Hong Kong: A Tale of Two Regulatory Journeys' (2008) 7 Journal of International Trade Law and Policy 186.

Li J., 'Suing the Leviathan – An Empirical Analysis of the Changing Rate of Administrative Litigation in China' (2013) 10 Journal of Empirical Legal Studies 815.

Li W. and L. Xu, 'The Political Economy of Privatization and Competition: Cross-Country Evidence from the Telecommunications Sector' (2002) 30 Journal of Comparative Economics 439.

Li Y. and Y. Ma, 'The Hurdle is High: The Administrative Litigation System in the People's Republic of China' in Y. Li (eds.) *Administrative Litigation Systems in Greater China and Europe* (Ashgate Publishing 2014).

Lianos I., 'Competition Law in the European Union after the Treaty of Lisbon' in D Ashiagbor, N Countouris and I Lianos (eds.), *The European Union after the Treaty of Lisbon* (Cambridge University Press 2012).

Lianos I., 'Collusion in Vertical Regulations under Article 81 EC' (2008) 45 Common Market Law Review 1027.

Lieberthal K. and M. Oksenberg, *Policy Making in China: Leaders, Structures, and Processes* (Princeton University Press 1988).

Lieberthal K. and M. Oksenberg, *Policy Making in China: Leaders, Structures, and Processes* (Princeton University Press 1988).

Lin N., 'Capitalism in China: A Centrally Managed Capitalism (CMC) and its Future' (2010) 7 Management & Org. Rev. 63.

Lin P. and J. Zhao, 'Merger Control Policy under China's Anti-Monopoly Law' (2012) 41 Rev Ind Organ 109.

Lin T., 'Corporate Governance in China: Recent Developments, Key Problems, and Solutions' (2004) 1 Journal of Accounting and Corporate Governance 23.

Lin Y., F. Cai and Z. Li, *The China Miracle: Development Strategy and Economic Reform* (Chinese University Press 2003).

Littlechild S., *Regulation of British Telecommunication's Profitability* (Department of Trade and Industry 1983).

Liu Z. and Y. Qiao, 'Abuse of Market Dominance under China's 2007 Anti-Monopoly Law: A Preliminary Assessment' (2012) 41 Rev Ind Organ 77.

Loriot G., François-Xavier Rouxel and Benoit Durand, 'GE/Instrumentarium: A Practical Example of the Use of Quantitative Analyses in Merger Control' (2004) 1 Competition Policy Newsletter 58.

Lowe P., 'The Design of Competition Policy Institutions for the 21st Century – the Experience of the European Commission and DG Competition' (2008) Competition Policy Newsletter, http://ec.europa.eu/competition/publications/cpn/2008_3_1.pdf.

Lowe P., 'Current Issues of EU Competition Law: The New Competition Enforcement Regime' (2004) 24 Nw. J. Int'L L. & Bus 567.

Lyons C., 'The Dragon in the Room: China's Anti-Monopoly Law and International Merger Review' (2009) 62 Vanderbilt Law Review 1577.

M

Mariniell M., D. Neven and J. Padilla, 'Antitrust, Regulatory Capture, and Economic Integration' (2015) E15Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, www.e15initiative.org.Martin S., 'The Goals of Antitrust and Competition Policy' (2007) Purdue CIBER Working Papers, No. 48, http://docs.lib.purdue.edu/ciberwp/48.

Mataija M., 'The European Competition Network and the Shaping of EU Competition Policy' (2010) 6 Croatian Yearbook of European Law and Policy 75.

McNally C., 'The Institutional Contours of China's Emergent Capitalism' in C. McNally (eds.) *China's Emergent Political Economy: Capitalism in the Dragon's Lair* (Routledge 2008)

Mehra S. and M. Yanbei, "Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law" (2008) 49 Virginia Journal of International Law 379.

Meng Y., 'The Uneasy Relationship between Antitrust Enforcement and Industry-Specific Regulation in China' in A. Emch and D. Stallibrass (eds.) *China's Anti-Monopoly Law: the First Five Years* (Wolters Kluwer 2013).

Mez L., 'The Transformation of the German Gas Supply Industry' in M. Arentsen and R. Künneke (eds.) *National Reforms in European Gas* (Elsevier 2003).

Mezzanotte F. and L. Hou, 'The Role of Presumptions of Market Dominance in Civil Litigation in China' (2015) 3 (suppl 1) Journal of Antitrust Enforcement i108.

Michailova S. and V. Worm, 'Personal Networking in Russia and China: *Blat* and *Guanxi*" (2003) 21 European Management Journal 509.

Mitchell B. and P. Kleindorfer, 'Public Enterprise and Regulation in International Perspective' in B. Mitchell and P. Kleindorfer (eds.) *Regulated Industries and Public Enterprise: European and United States Perspectives* (Lexington Books 1979).

Mollers T. and A. Heinemann (eds.), *The Enforcement of Competition in the Europe* (Cambridge University Press 2007).

Montag F., 'The Case for a Radical Reform of the Infringement Procedure under Regulation 17' (1996) 8 European Competition Law Review 428.

Montinola G., Y. Qian and B. Weingast, 'Federalism, Chinese Style: the Political Basis for Economic Success in China' (1995) 48 World Politics 50.

Moore T., *China in the World Market: Chinese Industry and International Sources of Reform in the Post-Mao Era* (Cambridge University Press 2002).

Motta M. and A. de Streel, 'Excessive Pricing in Competition Law: Never Say Never?' in Swedish Competition Authority (eds.) *The Pros and Cons of High Prices* (Konkurrensverket 2007).

Munari F., 'Competition in Liner Shipping' in J. Basedow, U. Magnus and R. Wolfrum (eds.) *The Hamburg Lectures on Maritime Affairs 2009 & 2010* (Springer Publishing 2012).

N

Naughton B., 'A Political Economy of China's Economic Transition' in L. Brandt and T. Rawski (eds.) *China's Great Economic Transformation* (Cambridge University Press 2008).

Naughton B., 'SASAC and Rising Corporate Power in China' (2008) China Leadership Monitor No. 24.

Naughton B., *The Chinese Economy: Transitions and Growth* (MIT Press 2007).

Naughton B., *Growing Out of the Plan: Chinese Economic Reform, 1978-1993* (Cambridge University Press 1995).

Nolan P., *Transforming China: Globalization, Transition and Development* (Anthem Press 2004).

Nowag J., 'Due Process: The Exchange of Information and Risk of Hindering Effective Cross-border Co-operation in Competition Cases' (2010) 7 The Competition Law Review 105.

O

OECD, 'Report on Country Experiences with the 2005 OECD Recommendation on Merger Review' (2013), http://www.oecd.org/daf/competition/ReportonExperienceswithMergerReviewRecommendation.pdf

OECD, 'FDI in Figures' (2013), http://www.oecd.org/daf/inv/FDI%20in%20figures.pdf.

OECD, 'European Commission – Peer Review of Competition Law and Policy' (2005) OECD Competition Law & Policy, www.oecd.org/eu/35908641.pdf.

OECD Secretariat, 'Optimal Design of a Competition Policy', submitted to the Global Forum on Competition (2003), *www.oecd.org/dataoecd/58/29/2485827.pdf*

Owen B., S. Sun and W. Zheng, 'China's Competition Policy Reforms: the Antimonopoly Law and Beyond' (2007) 75 Antitrust Law Journal 231.

Owen B., S. Sun and W. Zheng, 'Antitrust in China: the Problem of Incentive Compatibility' (2006) Stanford Law and Economics Olin Working Paper No. 295, http://ssrn.com/abstract=595801.

P

Pardolesi R., 'Monopoly Agreements and Abuse of Dominance: Some Remarks about the Substantive Rules' in M. Faure and X. Zhang (eds.) *Competition Policy and Regulation: Recent Developments in China, the US and Europe* (Edward Elgar 2011).

Perry E. and M. Goldman, *Grassroots Political Reform in Contemporary China* (Harvard University Press 2007).

Posner R., *Economic Analysis of Law* (Aspen Publishers 2007).

Pudney S. and L. Wang, 'Rationing and Consumer Demand in China: Simulating the Effects of Changes in the Food Subsidy System' in S. Gupta, N. Stern and A. Hussain (eds.) *Development Patterns and Institutional Structures: China and India* (Allied Publishers 1995)

Pye L., *The Dynamics of Factions and Consensus in Chinese Politics: A Model and Some Propositions* (Rand Corporation 1980).

Q

Qiang Q., 'Corporate Governance and State-Owned Shares in China Listed Companies' (2003) 14 Journal of Asian Economics 771.

R

Riley A., 'EC Antitrust Modernisation: the Commission Does Very Nicely – Thank you! Part One: Regulation 1 and the Notification Burden' (2003) 11 E. C. L. R. 604.

Riley A., 'EC Antitrust Modernisation: the Commission Does Very Nicely – Thank

you! Part Two: Between the Idea and the Reality: Decentralisation under Regulation 1' (2003) 12 E. C. L. R. 657.

Riskin C., *China's Political Economy* (Oxford University Press 1987).

Ross L. and K. Zhou, 'Administrative and Civil Litigation under the Anti-Monopoly Law' in A. Emch and D. Stallibrass (eds.) *China's Anti-Monopoly Law: the First Five Years* (Kluwer Law International 2013).

Ruan Z., *Tutorial on the Anti-Monopoly Law* [反垄断法教程] (Shanghai People's Publishing House [上海人民出版社] 2011).

Rumbaugh T. and N. Blancher, 'International Trade and the Challenges of WTO Accession' in E. Prasad (eds.) *China's Growth and Integration into the World Economy: Prospects and Challenges* (International Monetary Fund 2004).

S

Salisbury H., *Tiananmen Diary: Thirteen Days in June* (Unwin Hyman Ltd 1989).

Samuel J., '"Tain't What You Do" Effect of China's Proposed Anti-Monopoly Law on State Owned Enterprises' (2007) 29 Penn. St. Int'l. Rev. 169.

Sappington D. and Sidak J., 'Competition Law for State-Owned Enterprises' (2003) 71 Antitrust Law Journal 479.

Schmitz S., 'The European Commission's Decision in *GE/Honeywell* and the Question of the Goals of Antitrust Law' (2002) 23 U. Pa. J. Int'l Econ. L. 539.

Schneider J., 'Administrative Monopoly and China's New Anti-Monopoly Law: Lessons from Europe's State Aid Doctrine' (2010) 87 Washington University Law Review 869.

Schwad A. and C. Steinle, 'Pitfalls of the European Competition Network – Why Better Protection of Leniency Applicants and Legal Regulation of Case Allocation is Needed' (2008) 29 European Competition Law Review 523.

Schwarze J. and R. Bechtold, 'Deficiencies in European Community Competition Law – Critical Analysis of Current Practice and Proposals for Change' (2008), http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/gleiss_lutz

_en.pdf.

Shambaugh D., 'The Chinese State in the Post-Mao Era' in D. Shambaugh (eds.) *The Modern Chinese State* (Cambridge University Press 2000).

Shan P. et al., 'China's Anti-Monopoly Law: What is the Welfare Standard?' (2012) Rev Ind Organ 41.

Shelanski H., 'Antitrust and Regulation' in E. Elhauge (eds.) *Research Handbook on the Economics of Antitrust Law* (Edward Elgar 2013).

Sheng H. and N. Zhao, *China's State-Owned Enterprises: Nature, Performance and Reform* (World Scientific 2013).

Shi L., 'Research on the Efficiency of China's Anti-monopoly Law' (2009) 5 Asian Social Science 97.

Shleifer A. and R. Vishny, 'Corruption' (1993) 108 The Quarterly Journal of Economics 599.

Sokol D., 'Merger Control under China's Anti-Monopoly Law' (2013) Minnesota Legal Studies Research Paper No. 13-05, http://ssrn.com/abstract=2207690.

Sokol D., 'Competition Policy and Comparative Corporate Governance of State-Owned Enterprises' (2009) BYU L. Rev. 1713.

Song B., 'Competition Policy in a Transitional Economy: the Case of China' (1995) 31 Stanford Journal of International Law 387.

Støle Ø., 'Towards a Multilevel Union Administration? The Decentralization of EU Competition Policy' in M. Egeberg (eds.) *Multilevel Union Administration: the Transformation of Executive Politics in Europe* (Palgrave Macmillan 2006).

Steenbergen J. and L. Waverman, 'Do We Need European Merger Control?' in C. Robinson (eds.) *Governments, Competition and Utility Regulation* (Edward Elgar 2005).

Studwell J., *The China Dream: the Elusive Quest for the Greatest Untapped Market on Earth* (Profile Books Ltd 2002).

Su J., 'Globalization and Privatization: Evidence from China' in Shuming Bao, S. Lin and C. Zhao (eds.) *The Chinese Economy After WTO Accession* (Ashgate

Publishing Limited 2006).

Szamosszegi A. and C. Kyle, ‘An Analysis of State-Owned Enterprises and State Capitalism in China’ (2011) U.S.-China Economic and Security Review Commission, http://www.uscc.gov/Research/analysis-state-owned-enterprises-and-state-capitalism-china.

T

Tam O., ‘Ethical Issues in the Evolution of Corporate Governance in China’ (2002) 37 Journal of Business Ethics 303.

Tan W., ‘SOEs and Competition Policy in China’ CPI Asia Column, https://www.competitionpolicyinternational.com/assets/Columns/cpi-asia-antitrust-column-tanFINAL.pdf.

Tang Y., ‘Lawmaking Process and Non-Governmental Stakeholders in China's Antimonopoly Law’ (2015) 36 European Competition Law Review 174.

Teiwes F., ‘The Chinese State during the Maoist Era’ in D. Shambauge (eds.) *The Modern Chinese State* (Cambridge University Press 2000).

Thatcher M., ‘European Commission Merger Control: Combining Competition and the Creation of Larger European Firms’ 53 (2014) European Journal of Political Research 443.

Tong S., ‘Reforming State-Owned Enterprises’ in G. Wang and J. Wong (eds.) *Interpreting China’s Development* (World Scientific Publishing Co. Pte. Ltd. 2007).

Toninelli P. (eds.) *The Rise and Fall of State-Owned Enterprise in the Western World* (Cambridge University Press 2008).

Trebilcock M. and E. Iacobucci, ‘Designing Competition Law Institutions: Values, Structure and Mandate’ (2010) 41 Loyola University Chicago Law Journal 455.

Tseng W. and H. Zebregs, ‘Foreign Direct Investment in China: Some Lessons for Other Countries’ (2002) IMF Policy Discussion Paper, PDP/02/3, http://www.imf.org/external/pubs/ft/pdp/2002/pdp03.pdf.

Turley G. and Luke P., *Transition Economics: Two Decades on* (Routledge 2011).

U

Ulen T., 'The Uneasy Case for Competition Law and Regulation as Decisive Factors in Development: Some Lessons for China' in M. Faure and X. Zhang (eds.) *Competition Policy and Regulation: Recent Developments in China, the US and Europe* (Edward Elgar 2011)

US Chamber of Commerce, 'Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy', 9 September 2014, https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf.

V

Van Gerven G. and M. Gotlieb, 'Data Gathering and Analysis: the Anatomy of a Merger Investigation in Europe' in B. Hawk (eds.) *International Antitrust Law and Policy: Fordham Competition Law 2014* (Juris Publishing 2015).

Van Rompuy B., 'The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts' (2011) CPI Antitrust Chronicle, http://ssrn.com/abstract=1970081.

Vanghan V. et al., *EU Competition Law: General Principles* (Richmond Law & Tax Ltd 2006).

Verouden V., 'Vertical Agreements: Motivation and Impact' (2008) 3 Competition Law and Policy 1813.

Vogelsang I., 'The Design of Regulatory Rules' in B. Mitchell and P. Kleindorfer (eds.) *Regulated Industries and Public Enterprise: European and United States Perspectives* (Lexington Books 1979).

W

Wang X., *The Evolution of China's Anti-Monopoly Law* (Edward Elgar 2014).

Wang X., 'An Evaluation of Three Years of Anti-Monopoly Enforcement in China [中国反垄断三年执法的评析]' in X. Wang (eds.) *Capacity Building for the Enforcement of Competition Law* [竞争执法能力建设] (Social Sciences Academic Press [社会科学文献出版社] 2012).

Wang X., *Issues Surrounding the Enforcement of Anti-Monopoly Law* [反垄断法实施中的重大问题] (Social Sciences Academic Press [社会科学文献出版社] 2010).

Wang X., *Competition Law* [竞争法学] (Renmin University Press [人民大学出版社] 2009).

Wang X., 'Highlights of China's New Anti-Monopoly Law' (2009) 75 Antitrust Law Journal 133.

Wang X., *Detailed Interpretation of the Anti-Monopoly Law of the People's Republic of China* [中华人民共和国反垄断法详解] (Intellectual Property Right Press [知识产权出版社] 2008).

Wang X., 'Issues Surrounding the Drafting of China's Anti-Monopoly Law' (2004) 3 Washington University Global Studies Law Review 285.

Wang X. and J. Su, *Competition Law in China* (Kluwer Law International 2012).

Wang X. and A. Emch, 'Five Years of Implementation of China's Anti-Monopoly Law – Achievements and Challenges' (2013) 1 Journal of Antitrust Enforcement 247.

Wang X. and Z. Tao, 'WTO Competition Policy and Its Influence in China [WTO 竞争政策及其对中国的影响]' (2003) 5 Social Sciences in China [中国社会科学] 49.

Wedeman A., *From Mao to Market: Rent Seeking, Local Protectionism, and Marketization in China* (Cambridge University Press 2003).

Wei D., 'Antitrust in China: An Overview of Recent Implementation of Anti-Monopoly Law' (2013) 14 European Business Organization Law Review

119.

Wei D., 'China's Anti-Monopoly Law and Its Merger Enforcement: Convergence and Flexibility' (2011) 14 Journal of International Economic Law 807.

Wen X., Y. Meng and Z. Gao (2011) *Anti-Monopoly Law: Study on the Enforcement System* [反垄断法: 执行制度研究] (China Social Science Press [中国社会科学出版社] 2011).

White G., *Riding the Tiger: the Politics of Economic Reform in Post-Mao China* (Stanford University Press 1993).

Wigger A., 'Revisiting the European Competition Reform: the Toll of Private Self-Enforcement' (2004) Vrije Universiteit Amsterdam Working Papers Political Science, No.2004/07, http://www.fsw.vu.nl/en/Images/Revisiting%20the%20European%20Competition%20Reform_tcm31-42715.pdf.

Williams M., *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge University Press 2005).

Williams M., 'Adopting a Competition Law in China' in D. Cass, B. Williams and G. Barker (eds.) *China and the World Trading System* (Cambridge University Press 2003).

Wils W., 'The Role of the Hearing Officer in Competition Proceedings before the European Commission' (2015) updated version of a paper initially published in (2012) 35 World Competition 431, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087.

Wils W., *Principles of European Antitrust Enforcement* (Hart Publishing 2005).

Wils W., 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function: A Legal and Economic Analysis' (2004) 27 World Competition 201.

Wilson L., 'Investors Beware: The WTO Will Not Cure All Ills with China' (2003) Colum Bus L Rev 1007, 1020. See also SB Lubman, 'Bird in a Cage: Legal Reform in China after Mao' (Stanford University Press 1999).

World Bank and Development Research Center of the State Council, *China 2030: Building a Modern, Harmonious, and Creative Society* (The World Bank 2013).

WTO, *Understanding the WTO* (WTO Publications 2015).

Wu C. and Z. Liu, 'A Tiger without Teeth? Regulation of Administrative Monopoly under China's Anti-Monopoly Law' (2012) 41 Rev Ind Organ 133.

Wu J., *Understanding and Interpreting Chinese Economic Reform* (Thomson/South-Western 2005).

Wu Q., 'EU – China Competition Dialogue: A New Step in the Internationalisation of EU Competition Law?' (2012) 18 European Law Journal 461.

Wu Z., 'Perspectives on the Chinese Anti-Monopoly Law' (2008) 75 Antitrust Law Journal 73.

X

Xia X., 'The Sustained Growth of Chinese Economy and the Non-State Economy' (2012) National Economic Research Institute, http://www.neri.org.cn/document/20120402104213392l9.pdf.

Xiao Z., J. Dahya and Z. Lin, 'A Grounded Theory Exposition of the Role of the Supervisory Board in China' (2004) 15 British Journal of Management 39.

Xu C., 'The Fundamental Institutions of China's Reforms and Development' (2011) 49 Journal of Economic Literature 1076.

Xu L., T. Zhu and Y. Lin, 'Politician Control, Agency Problems and Ownership Reform: Evidence from China' (2005) 13 Economics of Transition 1.

Xu S., 'Regulating Administrative Monopoly is an Essential Choice for the Anti-Monopoly Law of China [规制行政垄断是我国反垄断法的必然选择]' in X. Wang (eds.) *Hot Spots of Chinese Antimonopoly Legislation* [反垄断立法热点问题] (Social Sciences Academic Press 2007 [社会科学文献出版社]).

Xu S. and B. Zhang, 'Judicial and Administrative Remedies against Administrative Monopoly: Cases and Analysis' in A. Emch and D. Stallibrass (eds.) *China's Anti-Monopoly Law: the First Five Years* (Kluwer Law International 2013).

Xue L. and K. Liou, 'Government Reform in China: Concepts and Reform Cases' (2012) 32 Review of Public Personnel Administration 115.

Y

Yan G. and Q. Pu, 'Evaluation and Analysis of Administrative Monopoly in China's Oil Industry' (2014) 32 Copenhagen Journal of Asian Studies 49.

Yang D., *Beyond Beijing: Liberalization and the Regions in China* (Routledge 1997).

Yang J., 'Correctly Understand Several Questions concerning the Anti-Monopoly Law [准确理解反垄断法的几个问题]' (2008) Legislative Affairs Commission of the NPC, http://www.npc.gov.cn/npc/xinwen/rdlt/fzjs/2008-03/04/content_1403948.htm.

Yang J., 'Market Power in China: Manifestations, Effects and Legislation' (2002) 21 Rev Ind Organ 167.

Yuan F., 'A Study on Characteristics of China's Government Reform in Different Stages since the Reform and Opening-Up and Its Prospects' (2010) 3 Journal of Politics and Law 85.

Yusuf S., K. Nabeshima and D. Perkins, *Under New Ownership: Privatizing China's State-Owned Enterprises* (Stanford University Press 2006).

Z

Zeng J. and K. Tsai, 'The Local Politics of Restructuring State-owned Enterprises in China' in J. Oi (eds.) *Going Private in China* (The Walter H. Shorenstein Asia-Pacific Research Center 2011).

Zhang A., 'Bureaucratic Politics and China's Anti-Monopoly Law' (2014) King's College London Dickson Poon School of Law Legal Studies Research Paper Series, paper no. 2014-9, http://ssrn.com/abstract=2391187.

Zhang A., 'The Single-Entity Theory: An Antitrust Time Bomb for Chinese State-Owned Enterprises?' (2012) 8 Journal of Competition Law & Economics 805.

Zhang A., 'The Enforcement of China's Anti-Monopoly Law: An Institutional Design Perspective' (2011) 56 Antitrust Bulletin 630.

Zhang A., 'Problems in Following E.U. Competition Law, A Case Study of Coca-Cola/Huiyuan' (2010) Peking Uni. J. Legal Studies, http://ssrn.com/abstract=1569836.

Zhang H., 'Bankruptcy of State-owned Enterprises and Planned Bankruptcy' in R. Parry, Y. Xu and H. Zhang (eds.) *China's New Enterprise Bankruptcy Law: Context, Interpretation and Application* (Ashgate Publishing Limited 2010).

Zhang X. and V. Zhang, 'New Wine into Old Wineskins: Recent Developments in China's Competition Policy against Monopolistic/Collusive Agreements' (2012) 41 Rev Ind Organ 53.

Zhang X. and V. Zhang, 'The Antimonopoly Law in China: Where Do We Stand?' (2007) 3 Competition Policy International 185.

Zhao Y., 'Will Protectionists Hijack China's Competition Law?' (2004) 23 Int'L Fin. L. Rev. 21.

Zhu S., "Federalism' in Contemporary China – A Reflection on the Allocation of Power between Central and Local Government' (2003) 7 Sing. J. Int'l & Comp. L. 1.

Zingales N., 'The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to be Heard?" (2010) 7 The Competition Law Review 129.