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企业并购的法律规制: 以中国、美国和欧洲的反垄断法为视角

Mergers & Acquisitions in the light of antitrust law: Chinese, American and European Perspective

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摘 要

本文将以全球视野分析企业并购，并着重于对美国、欧洲以及中国的法律制度的分析，这三者的法律制度是几乎所有其他国家倾向于遵照的模式。通过逐点比较，本文将试图重构大局，而这一大局正是从事企业跨国并购计划的核心。

论文包括引言和四章，每章都被划分为几个小节，其主题涵盖了这些新的投资形式取得非凡成就的原因（经济性评估）以及它们需要遵循的法律制度（规范性评估）。

第一章特别阐明了企业兼并和收购间的区别以及这些交易实现的不同形式，这是我们经常容易忽视的地方。为了揭示促使企业交易自我实现的潜在动力，本章从经济角度通过利用战略意图视角进一步分析这些区别。

第二章扩展到对本文所研究的国家的并购控制制度的规范性评估，这些国家将不仅会被单独地研究，而且还会被进行对比研究，从而指出这些国家制度间的异同，以便为那些希望参与其中的企业家提供一个对他们当前所处环境的真实模拟。

该部分涉及从法律所授予的权利和权力到动态控制等一系列实体问题和程序问题。

第三章将会提供一个当前的并购控制制度的综合评定，阐明其无法否认的碎片化以及将单一立法交织在一起的连续性元素。

该项研究将从理论视角并结合广泛的案例来进行，这些案例表明了在不同法律制度下跨国并购是如何被看待的，有时会产生不同结果，但是，多数情况下会得到一致反应。

第四章是本文的最后一章，保持前文的双重结构，将读者引导到未来并给读者提供了研究未来并购控制问题的窗口。通过对最新法律改革和案例实践的仔细评估，我们发现这样一个趋势，即并购控制将会朝着相对于现在而言具有更为全面、综合的框架的方向发展。

关键词：兼并，收购，反垄断法，美国，欧洲，中国。

Abstract

This piece will analyze mergers and acquisitions in a global perspective, with its main focus on the legal regimes of the three countries, US, Europe and China,that represent the models to which almost all the other States tend to conform. Through a point by point comparison it will try to recreate the big picture which is the core of the planning for undertakings engaging into trans-border mergers and acquisitions.

The structure of the dissertation consists in an introduction and four chapters, each divided in several sections and the topics covered span from the reasons of the extraordinary success of these new forms of investments (economic assessment) to the legal framework they should abide to (normative assessment).

In particular the first chapter sheds some light on the often neglected distinction between mergers and acquisitions and the different forms in which these transactions can manifest themselves. It further proceeds to analyze them from an economic point of view through the employment of the strategic intent perspective, in order to reveal the underlying incentives that move the undertakings to their realization.

The second chapter progresses to the normative evaluation of the merger control regimes of the countries object of the dissertation, which will be studied both individually and syncretically, pointing out the major differences and analogies between them, so as to provide a realistic simulation of the scenario faced by the entrepreneur willing to engage in them.

Both substantive and procedural issues will be covered in this part, from the authorities and the powers conferred to them by the law to the dynamic of the control.

A third chapter will provide a general assessment of the merger control regime as it is today, illustrating its undeniable fragmentation but also the elements of continuity which intertwine the singular legislations.

This study will be conducted not only from a theoretical perspective but also in light of a wide case repertoire showing how trans-border mergers and acquisitions have been received in different legal environments, sometimes with different outcomes but more often with a common response.

The fourth and final chapter, maintaining the duplex structure of the previous, will project the reader into the future, offering a window on the merger control of tomorrow. Through a careful assessment of the most recent legal innovations and case practice it will expose a trend that is likely to point in the direction of a more comprehensive and integrated framework with respect to the present one.

KEY WORDS: Mergers, Acquisitions, Anti-Monopoly Law, US, Europe, China

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INTRODUCTION

A complex topic

Even if the times in which the thought that national borders were the unquestioned domain of the sovereignty of one State have long since been abandoned, being us sons of an age of socio-economic globalization and unrest, the appalling degree of permeability that they offer towards operations such as **mergers and acquisitions** has made the latter object of an increasing concern and discomfort on the part of regulatory systems all over the world.

Of course, if the judgment could be monolithically rendered in those terms there would be little to no doubt about the tenure of the answer that the legal apparatuses of the States would give, which is, an answer of utter refusal and closure.

The fact is that similar occurrences present also another face, holding countless temptations and opportunities from an economic, but also politic, point of view, qualifying themselves as a new and partly unexplored forms of investment.

Such ambivalence has produced an equally multifaceted legislative approach, where each State (or better area of influence, due to the international dimension of those phenomena, apt to trespass the traditional national borders) attempted to develop the best defenses against their dangers while, at the same time, encouraging them in order to exploit all the advantages of these new types of investments.

Hence the complexity that characterize merger control, despite its relative novelty compared with other branches of law.

At least its object is clear, with little fluctuations in the different jurisdiction: the safeguard of the survival of competition.

In the understanding that promoting the latter, through the maintenance of a specific market structure, is the best known instrument for ensuring the wellbeing of the consumers[1], it is self-evident how mergers and acquisitions, with their destabilizing potential, cannot go unchecked by the legislator.

The above consideration explains why, as of today, more than one hundred countries have systems of merger control in place, all inspiring themselves to the same cardinal principles, but resulting in practice in highly diversified legal answers, especially with regards to procedures.

It is easy to understand the difficulties a similar state of law poses to aspiring undertakings of M&A, forced to deal with anti-concentration rules of two or more countries at each time and struggling to find a solution acceptable to all.

Less straightforward is perhaps to fully appreciate the difficulties faced by the jurisdictions themselves which implement the anti-monopoly laws, often lacking the due expertise or the very physical resources to predispose rational and effective procedures to handle mergers and acquisitions, leading to inconsistent or contradictory implementations.

There are, however, two mature antitrust regulations to which the other countries tend to conform, specifically those of US and Europe, dating back to 1914 and 1989[2] respectively.

[1]Competition can also have some drawbacks, effectively pointed out in STUCKE MAURICE E., "Is competition always good?", Oxford Journals, Law Journal of Antitrust Enforcement, Volume 1, Issue 1 Pp. 162-197, 2013

[2]Council Regulation (EEC) No. 4064/89, Control of Concentrations Between Undertakings, 1989, later replaced by the Council Regulation (EC) No. 139/2004, Control of Concentrations Between Undertakings,]. Although at the time of the

Both of them pursue the protection of consumers by means of a preliminary evaluation of the consequences of a specific M&A operation upon them, conducted according to the criteria drawn by their laws.

In Europe the parameter used is the *'significant impediment to effective competition'*, in light of which the Commission tries to block mergers and acquisitions susceptible of impeding effective competition as a result of the creation or strengthening of a dominant position[3].

The US refers to a somewhat stricter standard, taking into considerations all those activities that *"can substantially reduce competition or tend to originatea monopoly*".[4]

But more than in the wording of the law the differences between the two antitrust regulations can be appreciated in the procedures adopted.

Under this respect Europe implements an administrative approach, intersected by rigid deadlines, with the sole Commission in charge of the investigations and the decision-making, and contemplating only administrative sanctions.

Conversely, the US control is judicial in character (agencies need the green light of the Federal Court in order to prevent mergers from happening) and the three anti-trust bodies enforce the provisions through more flexible and informal processes than in Europe.

However, the anti-monopoly law (AML) today is no longer a bi-polar environment with Europe on one end and America on the other, due to the Chinese assertion on the world stage as one of the artisans which will shape the global M&A regulation in the future. In fact, notwithstanding the novelty of its implementation[5], due to the leading role of the country in the world economics, its model is bound to exercise an increasing influence on the developing merger control regimes.

Although on the paper the Chinese AML seems to closely recall the European and American models to a more attentive inspection it reveals a different width of scope, encompassing also considerations of politics and industrial policy, since its very first article identifies one of its objectives in the advancement of the socialist market economy and the development of provisions coherent with it.[6]

The novelty of the Chinese model is reflected in the fact that, apart from its core provisions and principles, it presents also elements still at a fluid state, object of a development in course up to these days. Must be read in that sense the implementation of speedy procedure for the review of simple transactions[7] or MOFCOM decision, made on March 2014, to publish the names and penalties of the enterprises infringing the obligation

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first regulation several EU member states already had merger control regimes in place, like the United Kingdom since 1963, Germany since 1973, and France since 1977.

[3]See Council Regulation No 139/2004 on the control of concentrations between undertakings (EC Merger Regulation or ECMR), Art.2

[4] Clayton Act [1914] §7

[5] The Anti-Monopoly Law of the People's Republic of China was promulgated on 30/08/2007 and became effective from 01/08/2008

[6]See art. 1 and 5 AML respectively

[7]See, among others "China's Merger Control Rules Changing: MOFCOM Publishes New Draft Regulations on Remedies and Simple Cases", McDermott Will & Emery, retrieved via: http://www.mwe.com/Chinas-Merger-Control-Rules-Changing-MOFCOM-Publishes-New-Draft-Regulations-on-Remedies-and-Simple-Cases-04-17-2013/