Competition law and policy in contemporary China
some critical issues

Spano, Alessandro Roberto

Awarding institution:
King's College London

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KING’S COLLEGE LONDON

Thesis submitted for PhD in Law

Alessandro Spano

0542488

COMPETITION LAW AND POLICY IN CONTEMPORARY CHINA: SOME CRITICAL ISSUES

Supervised by

Professor Andrea Biondi
ABSTRACT

Since the beginning of the process of economic reform and the introduction of the “Open Door Policy” in 1978, the People’s Republic of China has made remarkable progress in introducing competition to most sectors of its economy. Furthermore, during this transitional period, the enactment of industrial policies and foreign direct investment have played a key role in reshaping Chinese industrial structure and favouring the development of competition policy and law. After more than a decade of debates and drafting, on 30 August 2007, China adopted the Anti-Monopoly Law (hereinafter, “AML”), which represents the first comprehensive code in the field of competition law in the country.

Competition law reforms in China and, in particular, the enactment of the AML, have been the subject of intense scholarly interest both in China and the West. Most early works of China’s AML focused on the historical review of the evolution of competition law in China, on the analysis of the legal provisions of the AML and speculations about its effectiveness.

This PhD thesis will revisit these arguments and will attempt to tackle some further empirical and theoretical questions left hitherto unanswered. What sort of competition law have Chinese policymakers intended to create? What is the relationship between competition policy and other governmental policies? What purposes are served by enforcing competition law? And, finally, what is the status of competition law in China’s socialist market economy, both ideologically and practically?

These questions will be answered by focusing on specific issues such as: merger policy and practice, administrative monopolies and State-owned enterprises, which are all particularly significant to understand how competition law functions in contemporary China.
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INTRODUCTION

I admit. I had one of those moments. What moments? Well, the ones brilliantly depicted by Joseph Conrad in his literal classic masterpiece “The shadow line”: “[...] moments of boredom, of weariness, of dissatisfaction. Rash moments. I mean moments when the still young are inclined to commit rash actions, such as getting married suddenly or else throwing up a job for no reason.”1 Like the protagonist of Conrad’s novel, mine is not a marriage story. It wasn't as bad as that. My action, rash as it was, had more the characteristics of a drastic, though temporary, separation. For no reason on which a sensible person could put a finger on, I abandoned the study and tutoring of EU law and left the School of Law of King’s College London of which the worst that could be said was that it had not moved to Somerset House yet. However, it's no use trying to put a gloss on what even at the time I myself half suspected to be a caprice: going to China to study its laws.

Even the most inexperienced reader need not be reminded at length about the profound differences between the European and Chinese legal traditions. However, when addressing the study of Chinese law, we are inclined to excessively rely on conceptual categories supplied by our own legal systems. The risk of this process is to pursue academic research in a misleading way, without considering the roots and the web of rules which characterise every aspect of the Chinese legal system. The reason for this approach is sometimes the desire of most people (including legal scholars), who, having travelled and lived in China for a certain period of time, are willing to share their first impressions about this fascinating country when they return home. In this respect, I now understand the persistent, at times irritant scepticism, of some Chinese legal scholars about the capacity of their foreign colleagues to overcome in their research the many

linguistic and cultural gaps that separate Chinese and Western legal traditions.

Should my work still reveal some traces of this attitude, I trust the reader’s understanding also in considering that when conducting legal research in a foreign jurisdiction, (again by paraphrasing Conrad), “[e]very turn of the path has its seduction. And it isn’t because it is an undiscovered country. One knows well enough that [many others] […] had streamed that way. It is the charm of universal experience from which one expects an uncommon or personal sensation - a bit of one's own.”2 Or, as less poetically affirmed by Professor Stanley Lubman: “…foreign law students are always in danger of uncritically transfer to [the foreign law] the assumptions which we make about the foundations of our own law.”3

Always keeping this in mind, my own experience as a European legal scholar in China for almost two years has reinforced the idea that efforts to understand the Chinese legal system should be complemented by parallel efforts to understand its society and its system of governance. The main challenge is to move from the abstractedness of legal norms and to analyse their practical application and functioning within the context of Chinese society. In this regard, I will always be grateful to the many Chinese scholars, students and of course, friends, who helped me rendering less illusory the study of Chinese law.

Having tried to explain, why China? It is now time to answer the question: why competition law? Well, probably for the desire to give my contribution to the study of that global phenomenon that is the proliferation of competition law around the world and that, in the words of Professor John Haley, “has, in effect, become the latest fashion.”4

From a practical point of view, China over the years has started to recognise, as have many other developing countries, that competition law could be highly beneficial for accelerating economic transition and promoting economic

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2 Ibid.
development.

International trade considerations have also played a major role. China’s accession to the World Trade Organisation (hereinafter, “WTO”) in 2001 represented a milestone in Chinese history, particularly in relation to the implementation of liberation policies (da gaige kaifang) and to the integration of the Chinese economy into the process of globalization. Since then, China’s economic landscape has underpinned epochal changes. While commentators may debate on the success of some of the country’s economic reforms, China today indisputably possesses a more market oriented economy. In this respect, the Chinese government has been persuaded to put some order into China’s chaotic and fragmentary competition law system, in order to promote the establishment of a competitive market environment for both domestic and foreign business operators and to accomplish its process of transition towards a market economy.

From a theoretical point of view, competition law has the potential to redefine the relationship between the State and the market.

It is worth noting, that since the late 1970s, Chinese policymakers have tried to determine the direction and content of economic reforms and to rethink the role of the State within the context of their unique economic system. Thus, within the framework of China’s authoritarian system of governance, competition law assumes “a potentially powerful symbolic-expressive function. As it represents symbolically the relationship between economic and political processes, articulating the political system’s normative claims about the proper relationship between the market, society and the political system.”

At first glance, the number of competition rules which have been put into place in China since the beginning of the reformation period represent, at least in formal terms, an achievement of considerable magnitude.

Retrospectively, the theoretical significance and the fruits of this legislative fertility can hardly be exaggerated when considering the initial aversion of the founding fathers of the People’s Republic of China in 1949

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towards competition. The Chinese government has, in the last three decades, devoted great amounts of resources and efforts in revamping its competition law regime. Starting in 1980 with little more than a set of broadly drafted and unenforceable provisional regulations, China possesses today an almost complete competition law system whose most prominent part is with no doubt the recently approved Anti-Monopoly Law (hereinafter, “AML”).

Although, China’s attitude towards competition has undergone a definite, though gradual reversal, the long-term direction of competition law development in China remains unclear. For instance, various commentators continue to lament that vagueness, inconsistency and unenforceability remain endemic plagues of China’s competition legislation. There is, in view of such problems, a temptation to consider China’s competition law construction project, including the way it has drawn from the experience of Western competition law jurisdictions, as ill-conceived and poorly carried out. Such an approach, however, would be misleading because not only would it limit our understanding of China’s legislative effort, but it would also undermine our capacity to answer wider questions about the rationale and role of competition law in today’s China.

There is the need to understand properly the historical, political and social context in which competition rules have been developed, and to challenge our own preconceptions before pronouncing a final judgment on the strengths and weaknesses of China’s competition law system. The theoretical challenge is to study the development of competition law in China in a way that does justice to the complexity of Chinese legal context. In this regard, we should perhaps abandon our latent liberal democratic perspective before properly starting the analysis of the competition law regime that China has attempted to implement.

Liberal political theorists, for example, usually link together the process of marketisation with that of democratisation and of more political accountability.

Various commentators have challenged this line of thinking. In China there has not been a correlation between economic growth and the rise of private wealth with pressures for political liberalisation.6 In this respect, the level of

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6 For discussion, see: Lily L. Tsai, Accountability without Democracy, New York: Cambridge
economic development in Chinese regions does not necessarily relate to more accountable and responsive systems of governance.  

By looking at China’s system of governance, the country remains characterised by a high degree of decentralisation within an extremely rigid authoritarian polity. Under China’s authoritarian system, political and legal decentralisation has actually become the chosen strategy of the central government for improving the level of governance, through soliciting voluntary compliance from local authorities; motivating their initiatives towards the implementation of modernisation policies.

In this regard, Professor Kun Chun Lin notes that: “The centripetal force that holds various aspects of decentralised governance together is the party-state organisation at the national level, where the State Council agencies and the Politburo of the Chinese Communist party work in relatively seamless agreement and with overlapping relations of authority, keeping the worst excesses of local state predatory extraction or wasteful investment behaviour under control.”

This particular structure of power aims at maintaining China’s authoritarian system of governance in equipoise, and to even accompany its co-evolution with the socialist market economy.

It is within this context that China’s sui generis system of competition law has developed. In this respect, most competition law principles and solutions borrowed from Western jurisdictions have been shorn of their original conceptual meaning and adapted to serve China’s purposes. Most relevant for competition policy, is the State’s role in the economy, although gradually declining remains

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9 Lin, supra note 8, at 74.
10 Ibid.
prominent. In the words of Jiang Zemin’s, one of the founders of China’s new economic model, the socialist market economy will continue to operate “under the macro-economic control of the socialist state.”\textsuperscript{11} The role of the State within a socialist context is therefore the key element which distinguishes China’s market economy from Western ones.

Certainly, the central role of the State in China’s transitional economy should not be equated with the State's dirigiste role under the planned economy. The process of transformation to a market economy should entail the redefinition of this role. In this regard, Chinese authorities should adopt a clear distinction, and not confuse the government's role in setting and enforcing market rules with direct intervention in market activities.

Simply stated, it seems to me that China’s leadership maintains a certain degree of ambivalence toward competition law. On the one hand, it tends to use competition law as an instrument for pursuing the goal of economic development and for enhancing China’s international credibility. On the other hand, ironically, it aspires to achieve these objectives without accepting to be completely subject to the rules of the game, and by retaining, in the end, ultimate authority over them.

Not all concerns, however, depend on China’s system of governance. Many other factors complete the general picture of China’s competition law system. Similarly to other transitional economies, China faces the goal of creating and not simply maintaining, a competitive market by overcoming the hurdles inherited from the planned economy.

First of all, the pernicious phenomenon of administrative monopolies consisting in the (ab)use of administrative power by State’s bodies, at all levels, by means of legislative and non-legislative instruments, to impede or restrict competition.

Secondly, China’s rapid economic growth has fostered market distortions, while the ever-increasing number of foreign companies has also raised concerns about the excessive monopolisation of the domestic market.

Finally, competition law enforcement, constrained by the unaccomplished reform of legal and institutional infrastructures, remains one of the main concerns.

The fact that China’s transitional economy faces different challenges from those of Western market economies does not justify the implementation of less stringent competition rules or loose enforcement procedures. On the contrary, the existing economic scenario should call for vigorous interventions to break-up State monopolies, establish an integrated national market, deregulate industry and foster the private sector.

Competition law reforms in China and, in particular, the enactment of the country’s first comprehensive competition code, the AML, have been the subject of intense scholarly interest both in China and the West. Most early works on China’s AML focused on the historical review of the evolution of competition law in China, on the analysis of the legal provisions of the AML and speculations about its effectiveness.

By addressing a similar line of arguments, my PhD thesis attempts to answer some further empirical and theoretical questions left hitherto unanswered about the development of China’s competition law system as amended by the AML, including: What sort of competition law have Chinese policymakers intended to create? What is the relationship between competition policy and other governmental policies? What purposes are served by enforcing competition law? And, finally, what is the status of competition law in China’s socialist market economy, both ideologically and practically?

The thesis does not purport to discuss all aspects of China’s system of competition law, but focuses on predominant issues which I have identified as most significant to answer the proposed research questions. In this respect, the thesis is divided as follows:

Chapter I. This Chapter provides an historical overview of some major aspects linked with China’s transitional process from a planned to a market economy that have formed the current economic conditions in relation to competition law.
Chapter II. This Chapter is divided in two parts. The first part offers a textual and substantive analysis of the AML in a comparative perspective with its inspiring prototype, the EU competition law model. The second part of Chapter II studies the relationship of the AML with the tradition of socialist law and ideology in an attempt to understand its rationale, its goals and its role within the framework of China’s socialist market economy and its system of governance.

Chapter III. Since the enactment of the AML, China has actively enforced the new rules on merger and acquisitions (hereinafter, “M&A”) while less vigorously enforcing the provisions on monopoly agreements and abuse of dominant position. To date, the most substantial part of China’s competition law enforcement is merger review. In this respect, Chapter III reviews some major merger cases decided by the Chinese Ministry of Commerce (hereinafter, “MOFCOM”). In assessing the convergence of MOFCOM’s solutions with international practise, the analysis aims at clarifying what purposes are served by China’s merger policy and the possible relationship between competition policy and other governmental policies.

Chapter IV. Modern China has inherited two major problems from the Maoist era: the harmful phenomenon of administrative monopolies and the substantial number of State-owned enterprises (hereinafter, “SOEs”) which monopolise key Chinese industries. Chapter V of the AML introduces a series of prohibitions to fight against the (ab)use of administrative power by governmental bodies on competition. Furthermore, the “national security review” provision contained in Article 7 of the AML states that industries critical to the well-being of the national economy and national security shall be protected by State authorities, provided that their activities are carried out consistently with the law so as to protect the interests of Chinese consumers and to advance technological progress. Chapter IV of the thesis provides an analysis of Chapter V of the AML and related provisions, in order to understand if the Chinese legislator has been successful in implementing well-designed competition rules capable of effective enforcement. In doing this, Chapter IV frames the discussion regarding the
relationship between competition law and State-restraints on competition, within the contextual need to pursue further legal and institutional reforms, including the restructuring of China’s State bureaucracies.

Research method. The primary research method employed in this study is examination and analysis of primary and secondary documentary material in both English and Chinese. Primary sources include: Statutes, legislation, other kinds of normative documents and, where appropriate, decisions of Chinese authorities and case law of the EU courts. Secondary sources principally consist of scholarly works in the disciplines of law, politics and economics. Finally, during my stay as a visiting scholar at the Tsinghua University of Beijing from September 2009 to March 2011, I had the opportunity to conduct personal research by meeting and discussing my work with Chinese legal scholars at the Faculty of Law.
CHAPTER I

CONSTRUCTING A COMPETITIVE MARKET ENVIRONMENT IN CHINA: THE LONG MARCH FROM A PLANNED TO A MARKET ECONOMY

Introduction

China did not implement a competition policy until the late 1970s, when the country initiated its process of transition from a centrally planned to a market economy. Under the central planning system competition played no role and there was no need whatsoever for competition policy or law. Yet, the third plenary session of the Eleventh Central Committee of the Chinese Communist Party (hereinafter, “CCP”) held in Beijing between

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12 On October 1, 1949, the People’s Republic of China was formally established. Following the example of the Soviet Union, Maoist China adopted its own version of a centrally planned economy. In this sense, Chinese decision makers started to implement restrictive trade policies, promoted domestic industrialisation and introduced strict controls on all import and export activities. Furthermore, in the early 1950s private ownership was definitively replaced by public ownership. Fierce political struggles followed within the CCP during the “cultural revolution” (1966-1976). The rise of communist orthodoxy and class struggle brought with them the marginalisation of more progressive political views. The law-making process was also viewed as a typical characteristic of a “société bourgeoise”. Consequently, the Chinese government started to regulate and control the social economy only by means of administrative decrees and plans. All economic sectors were highly centralised and administrative power permeated all industries. The government in Beijing directly controlled and distributed most social resources and administered the production and management of Chinese enterprises. Local governments and enterprises did not enjoy any managerial autonomy but had to strictly enforce the decisions adopted at central level. Also Chinese laws related to foreign trade reflected Communist ideology and, as a result, China’s economic development was much slower than that of most Western market economies which in the post-war period had instead established a set of common rules for trade within the context of the General Agreement on Tariffs and Trade (hereinafter, “GATT”) in 1947. Over the years, the benefits of free trade and international cooperation made even clearer the failure of Mao’s policies. In this context and in the face of China’s political and economic weakness towards other countries and, notably, the United States, the Chinese government started to reconsider its position and to gradually open up the country to the outside world. For an insightful discussion about the process of economic reform in China see Barry Naughton, Growing Out of the Plan: Chinese Economic Reform, 1978-1993, Cambridge University Press, (1995); Barry Naughton, The Chinese Economy: Transitions and Growth, MIT Press, (2007).
December 18 and 22, 1978 represented a real watershed between Maoist and modern China. The strategic decision to rethink the existent economic model and to pursue “socialist modernisation” gave China the impetus to enact fundamental economic reforms and to initiate a process of modernisation that has not stopped ever since.\(^\text{13}\) The implementation of a legal framework to promote foreign trade and to attract foreign direct investment (hereinafter, “FDI”) became the cornerstone of Deng Xiaoping’s “Open Door Policy”.\(^\text{14}\) In this respect, in the early 1980s China shifted to a more decentralised economic system, the Chinese government permitted the development of the private sector and competition was introduced into economic life. Consequently, the need to formulate rules governing market competition progressively emerged.\(^\text{15}\)

The *Provisional Regulations on the Development and Protection of Socialist Competition* (hereinafter, “*Provisional Regulations*”), promulgated by

\(^{13}\) The decline of the planned economy started in 1978 when Deng Xiaoping, taking over Mao’s legacy, decided to adopt the so called “Open Door Policy”. Yet, China opted for a gradualist reform approach with emphasis on practical adaptation to involve economic conditions and permit reform to occur on an experimental basis in a decentralised manner. In this respect, the main elements of China’s gradualist strategy included: “minimise implementation costs instead of maximising economic efficiency; minimise political opposition to market-oriented reforms; practical adaptation to changing economic conditions; and includes allowing reforms to occur on an experimental basis in rural areas and regions.” Linda Yueh, \textit{A gradualist approach to economic transition: lessons from China?}, Centre for New and Emerging Markets – Working Paper, (2004). See also Alwyn Young, \textit{The Razor’s Edge: Distortions and Incremental Reform in the People’s Republic of China}, Quarterly Journal of Economics, Vol. 115, Issue 4, (2000), 1091-1135; Kiichiro Fukasaku and Henri-Bernard Solignac Lecomte, \textit{Economic transition and trade policy reform lessons from China}, OECD Development Centre – Working Paper No. 112, 6-34.

\(^{14}\) Over the years, Chinese decision makers have issued a myriad of laws and regulations in all fields, but it is indisputable that the vast majority of these laws have been specifically formulated to transform the country in one of the most attractive destination for foreign investment. China considered the opening up of its market to FDI as the fastest solution to accelerate its economic and political revival. For an analysis of China’s policies to attract FDI, see K.C. Fung, Hitomi Iizaka, Sarah Tong, \textit{Foreign Direct Investment in China: Policy, Recent Trend and Impact}, Global economic Review, Vol. 32, Issue 2, (2004), 99 – 130; Olena Havrylych and Sandra Poncet, \textit{Foreign Direct Investment in China: Reward or Remedy?}, CEPII Working Paper No. 14 (2006), 4–48 available at [http://www.cepii.fr/anglaisgraph/workpap/pdf/2006/wp06-14.pdf](http://www.cepii.fr/anglaisgraph/workpap/pdf/2006/wp06-14.pdf); Yan Wang, \textit{Chinese Legal Reform: The Case of Foreign Investment Law}, Routledge, (2002).

\(^{15}\) In general, Deng Xiaoping was convinced that law was crucial to socialist modernization and that Maoist legal nihilism had to be abandoned. For this purpose, he initiated an \textit{ad hoc} reform programme to reshape China’s legal system. Accordingly, the Chinese government amended the Constitution, started to codify law, reorganised the judicial system and revived legal studies. For discussion, see Donald C. Clarke, Peter Murrell and Susan Whiting, \textit{The Role of Law in China’s Economic Development}, George Washington University Law School – Public Law and Legal Theory Working Paper No.187, (2006), 1 - 71, available at [http://ssrn.com/abstract=878672](http://ssrn.com/abstract=878672); Perry Keller, \textit{Law and the Market Economy in China}, Ashgate Publishing, (2011).
the State Council in 1980, represented the first official document dealing with competition in the People’s Republic of China.\textsuperscript{16} Their text was rather simplistic and adopted a vague and rhetorical terminology. Furthermore, the \textit{Provisional Regulations} failed to introduce an effective enforcement mechanism. As a matter of fact, their significance was more political than legal. The Chinese legislator wanted to demonstrate its determination to introduce a set of competition rules to curb anti-competitive practices.

During the early stages of the economic reform process (1980-1992), government interventions aimed to enhance the performance of Chinese enterprises by introducing market competition, relaxing price controls and removing barriers to entry. Nevertheless, during this period market mechanisms were seen as supplementary to central planning and, as a result, Chinese decision makers principally focused on the implementation of specific industrial policies to achieve this objective.\textsuperscript{17}

In 1992, the Fourteenth Committee of the CCP officially proclaimed its intention to establish a “socialist market economy”.\textsuperscript{18} China’s traditional

\textsuperscript{16} See \textit{Provisional Regulations on the Development and Protection of Socialist Competition}, promulgated by the State Council on October 17, 1980 and effective on October 17, 1980. The \textit{Provisional Regulations} were repealed on October 6, 2001. Their text is available (in Chinese) at \url{http://www.competitionlaw.cn/n214c32.aspx}.

\textsuperscript{17} A research conducted in 2002 by Jiang Xiaojuan, Professor at the Institute of Finance and Trade and at the Chinese Academy of Social Sciences, studied the relationship between competition and industrial policies in China. The research found that: “From the perspective of market competition, China’s industrial policies have undergone three stages of development: (1) from the late 1970s to the mid-1980s, the industrial policies promoted competition; (2) from the mid-1980s, the industrial policies limited competition; and (3) since the mid-1990s, industrial policies have promoted and limited competition in concert.” See Jiang Xiaojuan, Promoting Competition and Maintaining Monopoly: Dual Functions of Chinese Industrial Policies During Economic Transition, Washington University Global Studies Law Review, Vol.1, Issue 1, (2002), 49 – 66, at 50.

\textsuperscript{18} Although there is a general consensus about the fact that a socialist market economy is a market economy, its definition is still controversial. With reference to this issue, Professor Jijian Yang argues: “Since a socialist market economy is a market economy, it has to embrace the competitive process. That is, it must seek a rational distribution of resources through competition, create a market pricing mechanism, improve the interplay between supply and demand, meet market needs, encourage enterprises to improve management, reduce production costs and raise quality, and improve the living standards of the population. The major differences of a socialist market economy from general market economies are adherence to public ownership, with the state economy playing the leading role in the national economy; and adherence to socialist direction, especially to state macro-control over the economy.” Jijian Yang, Market Power in China: Manifestations, Effects and Legislation, Review of Industrial Organization, Vol. 21, (2002) 167–183, at 168.
approach, in which the market was supplementary to central planning, was therefore progressively abandoned and market mechanisms began to be recognised as an alternative, and possibly much better, as a means to deal with the country’s economic challenges.\textsuperscript{19}

In the following years, significant legislative efforts in the area of competition law were made. However, although the government established in 1994 a drafting group for this purpose, China did not approve a comprehensive anti-monopoly legislation until 2007.

The reasons behind this delay were multiple. First of all, most government officials and Chinese scholars considered that the underlying rationale of anti-monopoly legislation applied only to well-developed market economies. In China’s transitional economy, for example, there were no concerns about excessive concentration of market power, because Chinese enterprises were relatively small in size. They believed that the government should continue to promote the development of small and medium enterprises (hereinafter, “SMEs”).\textsuperscript{20}

Since the most serious restrictions on competition in China were administrative monopolies, some others thought that the government should have focused on the implementation of related economic and institutional reforms rather than wasting energy drafting anti-monopoly laws.\textsuperscript{21}

Ultimately, in addition to the existence of divergent views on the necessity to enact an anti-monopoly law, the Chinese government also hindered its approval. An anti-monopoly law, being the main piece of legislation regulating the market, would have affected other related laws such as the \textit{Law Against Unfair

\textsuperscript{19} However, industrial policies continue to play an important role in China. For instance, in recent years the Chinese government has launched the so called “going global” policy which aims to establish a number of “national champions” capable to compete at international level. See for discussion Yongjin Zhang, \textit{China Goes Global}, Foreign Policy Centre – Working Paper, (2005), 1-32; Peter Nolan, \textit{China and the Global Economy: National Champions, Industrial Policy and the Big Business Revolution}, Palgrave Macmillan, (2001).


\textsuperscript{21} Ibid. at 294.
Competition (hereinafter, “LAUC”) and the Price Law. Consequently, since a fierce struggle of power arose among the existing competition authorities in order to decide which of them should have been the future enforcement body, the enactment of the law was delayed.

In December 2001, after 15 years of strenuous negotiations, the People’s Republic of China finally entered the WTO. China’s entry into the WTO represented a milestone in Chinese history, particularly in relation to the adoption of reform and liberation policies (da gaike kaifang). Joining the WTO has meant


24 Ibid. at 296.


26 Wang Jiafu, The construction of a legal system for China’s market economy, Washington Global Studies Law Review, Vol. 3, (2002), 297-306, at 297. China’s WTO commitments are summarised in the Protocol, which contains the terms and conditions of the bilateral negotiation agreements between China and the other WTO members, in particular the US, the EU and Canada. Furthermore, the Protocol outlined China’s existing trade laws and policies and set a deadline for compliance with WTO’s standards. China’s commitments fell into four categories: “First was market access to goods and related mainly to the commitment of foreign trade liberalization and tariff barrier reduction under GATT. The second related to market access in services and required the lifting of bans on market access as required under GATS. The third related to the TRIPS Agreement and China’s acceptance of and adherence to internationally accepted norms to protect and enforce the Intellectual Property Rights (IPRs) of foreign companies and individuals in China. The fourth related to China’s transparency-related commitments: China specifically agreed to translate into one of the WTO languages and make publicly available all WTO-related laws, to apply such law in a uniform and neutral manner, and to allow judicial review of administrative
the beginning of a new era for China, integrating the Chinese economy into the
globalisation process and accelerating internal reforms.

The external pressure on China to implement the WTO’s commitments has
been the catalyst for the creation of a modern legal framework to support the
development of the country’s socialist market economy. In this regard, China’s
accession to the WTO brought with it a further stimulus to pass a comprehensive
anti-monopoly law which was finally promulgated in August 2007.27

Studying China’s path of transition towards a market economy is essential
in order to understand the economic context under which China’s new
competition law regime has been implemented. Thus, Chapter I of the Thesis will
offer an historical overview of a number of key issues related to China’s-transitional process that have shaped its existing economic conditions in relation
to competition law.

1. Setting the stage: the planned economy and its legacy

1.1 Price liberalisation

Until the late 1970s, when China began its process of transition from a
planned to a market economy, the State fixed the prices of almost all commodities
and services. Over the years, however, price planning led to a series of market
distortions and inefficiencies and, consequently, in 1979 the Chinese government

27 For discussion, see Jared A. Berry, Anti-Monopoly Law in China: A Socialist Market Economy
Wrestles with It’s Antitrust Regime, International Law & Management Review, Vol. 2, (2005), 129 –152. For a discussion on the influence of WTO competition policy for the enactment of anti-
started to gradually liberalise the pricing system.\textsuperscript{28} In this respect, the period between 1979 and 1984 witnessed major liberalisations and the implementation of the so called “dual pricing system” according to which enterprises had to sell their planned production quotas at the price set by the State but they were free to sell their surplus production at market prices.\textsuperscript{29}

The “dual pricing system” proved to be highly beneficial for the Chinese economy. It also helped eliminate the most serious shortage and facilitate the progressive adaptation of economic actors to market rules. First applied to oil companies in 1981, by the end of 1985 it was therefore extended to all industries.\textsuperscript{30} Finally, in 1993, when the Chinese government abolished price controls on most products in key industries of the national economy, the process of price liberalisation was virtually complete.\textsuperscript{31} Control on prices in China is still present though. According to the Price Law the Chinese government is entitled to set prices only for those goods for which competition would be inappropriate, including those which are of strategic importance to the national economy, rare resources, resources in shortage, naturally monopolised goods, and goods related to public welfare.\textsuperscript{32} In this regard, the Price Fixing Catalogue, as reviewed by the central government in July 2001, lists 13 broad types of commodities with government-set prices including: tobacco, salt and civil explosive equipment,

\textsuperscript{28} For an insightful analysis about the process of price liberalization in the People’s Republic of China, see Jean-Jacques Laffont and Claudia Senik-Leygonie, \textit{Price controls and the economics of institutions in China}, OECD Publishing, (1997). The peculiarities of China’s pricing system under the planned economy can be summarized as follows. First of all, in order to favour the rapid growth of heavy industry the prices of light-industry manufactures, agricultural products and raw materials were kept artificially low. Secondly, the Chinese government imposed the price differentials between agricultural and industrial products and between raw materials and manufactures in order to achieve industrial policy goals. Finally, in order to protect the profitability of certain producers without affecting the possibility for the population to buy basic products, the producer prices of many products were higher than their retail prices. Ibid. at 18.


\textsuperscript{30} It was noted that: “The multiplicity of prices was detrimental to the establishment of fair competition, however it encouraged all sorts of devious behaviour aimed at taking advantage of the price differences between free markets and state markets (by buying goods at the low state prices and by reselling them at a higher price).” Laffont and Senik-Leygonie, supra note 28, at 19.


\textsuperscript{32} See Article 18 of the \textit{Price Law}.
certain fertilisers, certain medicine, teaching material, natural gas, water supply for hydraulic projects under the direct administration of the central government or inter-provincial hydraulic projects, military supplies, major transportation and postal services, telecommunication business and some specialised services.\textsuperscript{33} Therefore, despite the market currently controlling approximately 95 percent of the price of commodities, the Chinese authorities still retain their regulatory power in strategic sectors of the Chinese economy.

\textbf{1.2 Industrial and fiscal decentralisation}

Under Mao Tse-Tung’s leadership (1949-1976) the People's Republic of China implemented a central planned economy inspired by the principles of economic self-sufficiency and political isolation. In this sense, the Chinese government started to implement restrictive trade policies, promoted domestic industrialisation, introduced strict controls on all import and export activities and completely replaced private ownership with public ownership.

Furthermore, Chinese decision makers were firmly convinced that in order to promote the healthy development of the national economy and to keep pace with Western market economies, it was necessary to pursue a rapid industrial growth through the development of heavy industries. Thus, following the example of the Soviet Union, the Chinese government started to implement its own version of the five-year plans for this purpose.\textsuperscript{34}

However, if compared with the highly centralised Soviet Union’s system, Chinese industries were geared in a more decentralised way.

The reasons behind this choice were made clear by Chairman Mao himself: “Our territory is so vast, our population is so large and the conditions

\textsuperscript{33} See Reform on Market Prices, Ministry of Commerce People’s Republic of China, November 17, 2002.

are so complex that it is far better to have the initiatives come from both the central and the local authorities than from one source alone. We must not follow the example of the Soviet Union in concentrating everything in the hands of the central authorities, shackleing the local authorities and denying them the right to independent action. The central authorities should take care to give scope to the initiative of provinces and municipalities, and the latter in their turn should do the same for the prefectures, counties, districts and townships; in neither case should the lower levels be put in a strait-jacket."  

In this "Chinese Style Federalism", local governments were given semi-autonomous power. Moreover, starting from 1980, the central government initiated a process of fiscal decentralisation to let local authorities have more independence in financing their needs and build up their accountability. As a result, Chinese regions were de facto industrially self-sufficient, but regional governments started to become financially dependent on the performance of local enterprises affiliated with them.

1.3 Market concentration

36 Yingyi Qian and Chenggang Xu, The M-form hierarchy and China’s economic reform, European Economic Review, Vol. 37, (1993), 541-548, at 544. This has been defined as the multi-layer-multi-regional form of hierarchy of China that was composed of six administrative layers: central, provincial, prefecture, county, township (previously, commune) and village (previously, brigade). Ibid.
38 Qian and Xu, supra note 36, at 544.
If compared with the Soviet Union, the Chinese economy was more decentralised and structured in a multi-layer/multi-regional manner. Furthermore, Mao’s objective to ensure local self-sufficiency provoked the duplication of industrial patterns in each region. As a consequence, the main industries, such as coal mining, textiles, chemicals, machinery, electronics existed in almost all provinces.

During the 1960s, the process of industrial decentralisation continued. The Chinese government implemented the so-called "Third Front" policy which consisted in a redistribution of strategic industries into the interior and underdeveloped parts of the country to ensure a better system of protection in case of military invasions. Finally, in the late 1970s the decision to focus on the development of local economies through the reform of the fiscal system further contributed to accentuate the decentralised character of Chinese industries.

With reference to the concentration of Chinese industries in a spatial sense, a report issued by the World Bank in 1994 concluded that although development of the private sector the ownership of the industrial output was substantially modified, China’s industrial structure had not changed. The number of enterprises and people employed in each industry showed the low level of variation across the Chinese regions despite the diversity in their size and in economic development. The uniformity of the market structure of Chinese regions demonstrated the failure of Maoist policies aimed to achieve regional specialisation.

As regards the concentration of the Chinese market in a sectoral sense, this could be assessed in two ways: by taking into account the average size of enterprises in a certain industry or by calculating the number of enterprises in the relevant industry. The analysis of both these factors confirmed that Chinese industries were not concentrated. The number of large enterprises was rather limited if compared with the multitude of SMEs. To cope with this problem, in the 1980s


40 World Bank Studies, supra note 31, at 12.

the Chinese government started to pursue targeted industrial policies to promote the establishment of larger enterprises. However, the strategy to compel mergers among enterprises in order to increase their size had the result to reduce the economic efficiency of many Chinese firms and to provoke debts. Like most other economic data, these findings assumed a great political significance in China and they had a substantial influence on the economic choices and strategies of the Chinese government. During the 1990s, for instance, these findings were put forward by government officials and scholars to delay the adoption of anti-monopoly legislation. As the average size of Chinese enterprises was very small, they considered that the enactment and the enforcement of anti-monopoly rules could have a negative effect on China’s industrial policy. They argued that anti-monopoly provisions on M&A could hinder the restructuring process of Chinese enterprises. The strategy of the Chinese government to encourage and even to compel mergers among enterprises was therefore considered justifiable and necessary to the healthy development of the Chinese economy.

structure. As a consequence, the main industries in China tended to have lower levels of market concentration than similar. Motor vehicle and machine tool manufacturing, for instance, was rather representative of China’s industrial structure as a whole. In 1991, there were 2531 firms producing motor vehicles employing an average of only 620 employees per firm. In 1990, Shanghai Volkswagen, one of the bigger firms in China, built only 17,000 cars. Machine tool manufacturing was another fragmented industry with many small firms. In the US and Japan, the top five machine tool firms accounted for 69 percent of national production and 42 percent of the US, respectively. In China, the corresponding figure was only 20 percent. Ibid.

Since the average size of Chinese enterprises was relatively small, it was difficult for them to effectively compete at international level. Consequently, during the reformation period, the Chinese government started to encourage mergers among enterprises in order to favour their expansion. In some cases, however, the government even compelled mergers between enterprises. Several trans-industry mergers, trans-regional mergers, and mergers of enterprises with different types of ownership were, enacted by the government to expand the economic scale of Chinese enterprises. In China, forced mergers became a widespread phenomenon consisting in the practice of the Chinese government to compel an enterprise to join an enterprise group or to force an efficient enterprise to merge with an inefficient one. The government justified its active role in mergers referring to the policy of the “equal distribution of wealth”. It considered that by establishing enterprise groups the interests of individual enterprises could be sacrificed to promote the development of the national economy. Yet, in many cases enterprises did not enjoy any benefit from the operation. See Xiaoye Wang, The Prospect of Antimonopoly Legislation in China, Washington University Global Studies Law Review, Vol. 1, Issue 1, (2002), 201 – 231, at 212.

The efficiency of an enterprise does not depend only on the scale of its production. In order to individuate the actual scale of an enterprise in an industrial sector, internal economic and technological conditions to the enterprise itself (such as the areas of specialised production and its facilities) and external factors (such as the needs and the maturity of the market) are relevant as well. In this regard, although Chinese enterprises were rather small in size, it was possible for
These arguments, however, were unconvincing. The efficiency of an enterprise does not depend only on the scale of its production. In order to individuate the actual scale of an enterprise in an industrial sector internal economic and technological conditions of the enterprise (such as areas of specialised production and basic facilities) and external conditions (the needs and maturity of the market) are relevant as well. Even though the average size of Chinese enterprises was rather small, it was possible for them to enjoy and achieve a dominant market share and restrict competition in the market. Anti-monopoly legislation was therefore necessary to prevent the formation of monopolies which could hinder free competition and affect consumer welfare. Nonetheless, at that time, several Chinese scholars argued that in order to promote economic development in China, a specific anti-monopoly law should not be adopted. A major concern was related to the consequences that the enactment of anti-monopoly rules could have on the survival of many inefficient and overstaffed State-owned enterprises (hereinafter, “SOEs”). Since a proper mechanism to supply pensions and social security programmes to former employees of defunct SOEs did not exist in China, such services were provided by SOEs themselves which received consequently a huge amount of subsidies from the Chinese government and substantial loans from State-owned banks for this purpose, even though they were not able to repay them back. In this sense, various government officials considered that the enactment of anti-monopoly legislation should be accompanied by the reform of existing social security systems, not threaten the stability of Chinese society.\textsuperscript{44}

1.4 Administrative monopolies

Many scholars have identified in the low degree of industrial concentration and in the process of administrative decentralisation the root cause, in particular at local level, of the phenomenon of administrative monopolies.\textsuperscript{45}

Administrative monopolies can be defined as the abuse of administrative power by the Chinese government, at all levels, by means of legislative and non-legislative instruments, to impede or restrict competition in the market.\textsuperscript{46}

These practices can be divided in two main categories. Firstly, sectoral monopolies which consist in large groups of enterprises integrating administrative and business functions and assuming a regulatory role in a certain sector, and in enterprises directly affiliated with government ministries or departments that receive preferential treatment. This category also includes the conduct of public utility enterprises (hereinafter, “PUEs”) which backed by their advantage as natural monopolies may abuse their administrative power. These enterprises operating in strategic sectors such as water, power, heat, gas, postal services, telecommunications, civil aviation, and railways often use laws and government policies as a justification to restrict competition and to harm the interests of consumers.\textsuperscript{47} Secondly, regional monopolies which refer to the trade barriers erected by local authorities to impede or restrict the entry of goods or services into

\textsuperscript{45} For a discussion on this issue see Young, supra note 13; Andrew Hall Wedeman, \textit{From Mao to market: rent seeking, local protectionism, and marketization in China}, Cambridge University Press, (2003); Belton M. Fleisher, Nicholas C. Hope, Anita Alves Pena and Dennis Tao Yang, \textit{Policy reform and Chinese markets: progress and challenges}, Edward Elgar Pub, (2008).


\textsuperscript{47} Yang, supra note 45, at 172. These practices are also called “vertical monopolies” or “departmental monopolies” since they refer to the conduct of administrative companies which are established or operate with the approval of the Chinese government and its subordinate agencies. In China, various administrative companies not only carry out a business activity but they are also entitled to regulate the business activity of other undertakings within the same sector. When administrative companies depend directly on the central government it is more difficult to distinguish their business activity from their administrative prerogatives. Chaowu Jin and Wei Luo, \textit{Competition Law in China}, Chinese Law Series, William S. Hein & Co, Inc., (2002), at 82-83.
the local market, or to prevent local raw materials or technology from being exported to other parts of the country.\textsuperscript{48}

Many examples of these practices could be given. With reference to sectoral monopolies, in 1999, for instance, the Bureau of Civil Aviation issued a circular to prohibit airlines by applying discounts on air tickets to limit competition in the airline industry.\textsuperscript{49} Moreover, State agencies may also compel the purchase of goods and services from SOEs or former SOEs which are still under their control. A reported case referred to the conduct of agencies in charge to issue marriage licenses that forced applicants to take pictures to be affixed on licenses only at photo studios affiliated with them.\textsuperscript{50} On a larger scale, these “affiliate” companies often enjoy a position of monopoly in key sectors of the Chinese economy and, consequently, by controlling the production, sale and purchase of raw materials may easily abuse their power to restrict competition on the market. In the telecommunication sector, for instance, the national telephony provider forced new customers to buy its handset before proceeding with the installation of the telephone line, and in the gas sector, the gas company compelled consumers to buy a cooker before making available the distribution of gas.\textsuperscript{51} In practice, these types of abuses principally aim to prevent market competition from other companies operating in the same sector. Administrative companies try to reduce the competition pressure which could derive from the entrance in the relevant market of more efficient enterprises.\textsuperscript{52}

The elimination of such practices represents a hard task for China. On the one hand, since administrative companies differ from private business operators, normal company regulations cannot be applied to them. On the other hand,

\begin{itemize}
\item[\textsuperscript{48}] Yang, supra note 45, at 172. These practices which are also called “horizontal monopolies” can assume various forms. Local authorities, for instance, can refuse to issue business licenses to companies selling products coming from other parts of the country. Furthermore, they can confiscate products, impose fines on the importers and even set up checkpoints at the regional border to prevent them from entering the local market.
\item[\textsuperscript{49}] Ibid. at 173.
\item[\textsuperscript{50}] Fleisher and others, supra note 45, at 78.
\item[\textsuperscript{51}] Wang, supra note 42, at 209.
\item[\textsuperscript{52}] These practices are now declared illegal under Articles 28 to 31 of the Anti-Monopoly Law. However, it remains to be seen whether Chinese competition authorities will decide to vigorously enforce these prohibitions towards State agencies and their affiliated companies. This issue will be addressed in Chapter IV of the Thesis.
\end{itemize}
regulations provided for normal state agencies are also inapplicable, as administrative enterprises may also carry out actual business activities.

As regards regional monopolies, several cases can also be cited. For example, in 1997, the public authorities of Gushi County in the Henan Province issued an order to block the sale of chemical fertiliser produced in other regions. In 1999, in the car sector, the government of the Hubei Province that produced Citröen cars imposed a special tax on the purchase of cars produced in the Shanghai Municipality to support local companies facing economic difficulties. The tax was supposed to compensate a similar one imposed by the Shanghai Municipality which decided to charge lower license fee for cars produced within its jurisdiction.

Administrative monopolies and, in particular, regional monopolies have pernicious effects on the development of the Chinese economy. First of all, they frustrate the establishment of a single national market. Secondly, they restrict competition and impede a rational allocation of economic resources by favouring duplication and waste. Although some government officials still think that regional monopolies can promote the development of local enterprises, in reality, this so-called “development” transfers the cost of market inefficiency to Chinese consumers.

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53 Wang, supra note 42, at 211.
54 Ibid. at 212. These practices are now dealt with in Articles 32 to 35 of the AML.
55 These practices protect from inefficient local firms which produce low quality products at higher prices. In this regard, they prevent the development of economies of scale of Chinese enterprises since larger and more efficient firms encounter various obstacles in accessing markets outside their local area. In doing that, they also delay the process of restructuring of many SOEs which continue to receive subsidies or loans at preferential interest rates by affiliate banks despite their capacity to repay them back. Yang, supra note 18, at 173.
56 Yong Guo and Angang Hu, The administrative monopoly in China’s economic transition, Communist and Post-Communist Studies, Vol. 37, Issue 2, (2004), 265-280, at 274. More specifically, with reference to the effects of administrative monopolies on market competition: firstly, they apply discriminatory treatment to private enterprises and enterprises not affiliated with the government and restrict market access of those industries not belonging to natural monopoly; secondly, by means of administrative acts they may set up price cartels; thirdly, they establish a monopoly of public resources since in this way a few enterprises can have exclusive access to them; finally, they create artificial trade barriers by administrative means. Ibid. at 275.
1.5 The reform of State-owned enterprises

With the establishment of the People’s Republic of China in 1949, Chinese decision makers decided to adopt a centrally planned economy by nationalising virtually all private enterprises and transforming them in SOEs.\(^{57}\)

In the late 1970s, however, the Chinese government initiated intensive economic reforms and privatisation of SOEs. In this sense, this process aimed to release SOEs from central planning administration and to adapt them to the principles of a market economy. Whether at a macro level, the reform of SOEs could be seen as the shift from a central planned economy to a more market oriented one; at a micro level, the proposed objective was the transformation of SOEs into modern corporations.\(^{58}\)

Chinese scholars divide the process of reform of SOEs into three successive phases. During the first phase, from 1978 to 1984, the link between the State and the enterprises were weakened by increasing managerial autonomy and by allowing the pursuit of economic profit.\(^{59}\) During the second phase, from 1985 to 1993, the Central government aimed to transform most SOEs in independent

\(^{57}\) Before 1978, the Chinese economy was dominated by public ownership. According to statistics, in 1978 SOEs were responsible for 98 percent of the gross domestic product (hereinafter, “GDP”) and accounted for 98.8 percent of the industrial output in China. However, under the planned economy, SOEs did not enjoy managerial autonomy. All decisions about personnel, finance, production, supply and marketing were taken by governmental agencies under the control of the central state. Centralised State plans regulated the production quotas, prices, supply, finance, raw materials, facilities and personnel of enterprises. The State Planned Commission set down general economic objectives for the various industrial agencies under the State Council and for the provincial planning departments. The agencies and local governments adapted such objectives to their needs and sent them to enterprises. SOEs had neither an independent legal status nor autonomous decision making prerogatives. Furthermore, several SOEs acted as organs of the State. They carried out their economic activity on behalf of the Chinese government and implemented its political decisions on economic matters. Thus, they could not modify their behaviours to meet the needs of the market without government’s approval. For discussion, see Donald C. Clarke, *What’s Law Got to Do with It? Legal Institutions and Economic Reform in China*, Pacific Basin Law Journal, Vol.10, Issue 1, (1991), 1-76; Jan Hoogmartens, *Can China’s Socialist Market survive WTO accession? Politics, Market Economy and Rule of Law*, Law and Business Review of the Americas, Vol. 7, Issue 1 & 2, (2001), 37 – 83.


\(^{59}\) Ibid.
economic entities responsible for their own profits and losses and to establish independent legal entities sharing certain rights and obligations.\textsuperscript{60} Finally, during the third phase from 1993 to the present day, the Chinese authorities have focused on modernising SOEs. The main objective has been the establishment of a modern enterprise system since: “The SOE reform has started to move away from the adjustment of distribution relationship and authority reallocation between government and enterprise towards the system of property rights (ownership). The main form of this movement is shareholding system. For SOEs being turned into shareholding companies, it is not solely the state that exercises the rights for enterprise assets, but all shareholders (including individuals, other state or non-state entities).”\textsuperscript{61} During this phase, the Chinese government started to privatise

\textsuperscript{60} The gradual diminution of the percentage of SOEs was also accelerated by the enactment of economic reforms expressly provided for aligning the Chinese economy with WTO requirements. In light of the goal of WTO membership, Chinese decision makers realised that the development of the private sector represented a fundamental step to establish a socialist market system. The huge percentage of SOEs would have hindered the development of the national economy and have provoked economic rigidity and recession. On the contrary, the presence of private actors would have favoured the creation of a competitive market environment and optimised the reallocation of resources in the country. A fundamental step entailed the reform of the management system of state-owned enterprises. In 1986, with the adoption of the “Management Responsibility System” SOEs started to enjoy a certain level of managerial independence. Although state plans still regulated most aspects of their business activity, the government progressively delegated some managerial prerogatives directly to enterprises which became free to determine their production schedules, purchase supply, marketing strategies, hiring, rewarding and, in particular, pricing. Moreover, enterprises became responsible for their civil obligations and they started to manage the assets, as authorised by the state, assuming in such a way the status of legal persons. However, as result of the absence of clear property rights (managers had only the right to operate the firm but they did not own it), SOEs tended to pursue short-term profit rather than focusing on a long-term strategic growth. Hoogmartens, supra note 57, at 64. In general, see also Henry R. Zheng, \textit{Business Organization and Securities Laws of the People's Republic of China}, Business Law, Vol. 43, (1987-1988), 549 - 558.

\textsuperscript{61} Kuo-Tai Cheng, \textit{State-owned Enterprise Reform in People’s Republic of China}, Working Paper, (2007), 1-38, at 10, available at http://www.npue.edu.tw/adm/research/%E5%AD%B8%E5%A0%B1/27/27/1 %E9%84%AD%E5 %9C%8B%E6%B3%B0.pdf. In this regard, the main advantages of this system have been: “(1) separating government ownership from enterprise management; (2) mobilising and rationalising the allocation of financial resource; (3) providing greater financial and decision-making autonomy to enterprises so that they can become more efficient and respond dynamically to changing market.” Ibid. It is worth remembering that in 1993 China issued its \textit{Company Law} which introduced for the first time a set of rules to coordinate the business activities of enterprises in China. In this sense, the \textit{Company Law} promoted the reform of the State sector and allowed the conformation of Chinese enterprises at international standards. See \textit{Company Law of the People's Republic of China} adopted at the Fifth Session of the Standing Committee of the Eighth National People's Congress on December 29, 1993. The Company Law revised in 1999, 2004 and 2005. The Company Law text is available (in Chinese) at http://www.fdi.gov.cn.
many SOEs and, in particular, the small ones. One of the crucial aspects of the reform has been the so called “holding the big and letting go the small” strategy according to which, on the one hand, the government has kept control of large SOEs in strategic sectors of the national economy by developing them into large group enterprises and, on the other hand, it has reorganised SMEs by selling them to private business operators.62

Nowadays, the importance of SOEs lies in their dominant status in the national economy in terms of government fiscal revenue, employment and social service role. According to the Second National Economic Census conducted in 2008 by the National Bureau of Statistics of China, 30 percent of total assets of the industrial and service sectors were held by SOEs.63 However, by the end of 2008, SOEs only accounted for 3.1 percent of the total enterprise number.64 It appears evident that, despite their number is rather limited, SOEs still keep control on a significant part of the Chinese economy and, as a corollary of these data, it follows that their average size is much bigger than that of non-SOEs.65

In particular, SOEs are still dominant in most strategic sectors of the Chinese economy including important infrastructure construction, telecommunications, financial services, energy and raw materials. In 2006, the State Assets Supervision and Administration Commission (hereinafter, “SASAC”) published a list of seven sectors critical to the national economy and in which public ownership was considered essential.66 These sectors include armaments, electrical power and distribution, oil and chemicals, telecommunications, coal, aviation, and shipping.67

62 Ibid. at 12.
64 Ibid.
67 Ibid.
In this respect, Li Rongrong, minister in charge of SASAC, stated that: "State capital must play a leading role in these sectors, which are the vital arteries of the national economy and essential to national security" and "[t]he Chinese government will inject more capital into large state-owned companies in these priority sectors, optimize their structure and make them more competitive."\(^{68}\)

However, China has also taken steps to let private business operators enter sectors dominated by SOEs. For instance, in 2005 the State Council promulgated the “Opinions on Encouraging, Supporting, and Guiding the Development of Private Capital and Other Non State-Owned Capital” (hereinafter, “2005 Opinions”) to allow private capital to enter sectors, such as electricity, telecommunications, railroad, civil aviation, petroleum, public utilities, financial services, social services, and national defence.\(^{69}\) They also authorised market entry by private enterprises in so far as long as such entry was not expressly prohibited by the law, and authorised market entry by domestic private enterprises if foreign investors were allowed such entry.\(^{70}\)

2. The development of Chinese competition law

As Mr Shang Ming, Director General of the Anti-Monopoly Bureau of the Chinese Ministry of Commerce (hereinafter, “MOFCOM”), stated: “A review of the history reveals that the legislative process of China’s antitrust law can be divided into three stages, during which relevant rules were scattered in legal texts of various levels.”\(^{71}\)

\(^{68}\) Ibid.
\(^{69}\) Owen, supra note 44, at 245.
\(^{70}\) Ibid. In the aviation sector for instance, four private airlines have entered the market since 2005.
2.1 1949-1978

The first stage corresponds with the period between 1949 and 1978. As previously discussed, under Chairman Mao’s leadership, the People's Republic of China was characterised by a socialist planned economy in which the allocation of economic resources and the price of industrial products were determined by the central government in Beijing. SOEs did not have managerial autonomy but they were solely required to slavishly implement their planned economic objectives. Thus, since market competition had no role to play, competition law was not needed as well.

2.2 1978-1992

The second phase began in 1978 when the complete failure of China’s economic model and the chaos unleashed in the country by the Cultural Revolution convinced Deng Xiaoping to implement economic reforms and to open up the national economy to the outside world again. This second period lasted from the launch of the so-called “Open Door Policy” until 1992 with the decision of the CCP to establish a socialist market economy.72

Although China gradually started to recognise the importance of market competition for its political and economic revival, the enactment of competition legislation was still rather limited and sporadic. In 1980, the State Council issued China's first document related to competition law, the Provisional Regulations, which emphasised the necessity to develop competition and to break up regional blockades and departmental monopolies. In this respect, Article 3 of the Provisional Regulations stated: “In economic life, with the exception of the products which are to be exclusively traded in by the departments or units designated by the State, no other products may be monopolised or exclusively

72 Ibid at 3.
traded in.” Article 6 further pointed out: “In carrying out competition, efforts must be made to break regional blockades and departmental divisions. No region or department may block the market or prohibit the sale of commodities originating in other regions or departments.” Thus, State departments were invited to revise the existing rules and to implement more specific measures in line with the spirit of the Provisional Regulations.

These rules opened the way for the enactment of competition legislation in China and, consequently, in the following decade more legislation followed. For instance, in 1987 the State Council issued the Regulations on Control of Advertisements, the Regulations on Control of Price and other rules containing anti-monopoly provisions. Nevertheless, most of the administrative regulations adopted in China between 1980 and 1992 were never properly enforced. In most cases they contained abstract principles and general proclamations without effective legal authority. They did not implement substantive rules to deal with monopolies or effective enforcement mechanisms to punish the violators. Their significance was more political than legal. At the beginning of the reform period, the Chinese government was willing to demonstrate its determination to introduce a set of competition rules to curb monopolies and, in particular, administrative monopolies.

2.3 1992-onwards

In 1992, when the CCP announced its decision to transform the country in a socialist market economy, the history of competition legislation in China entered

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75 This analysis does not take into account the new AML whose text will be examined in Chapter II.
the third period which has been characterised by the proliferation of more sophisticated pieces of competition legislation.\textsuperscript{76}

The Chinese government gradually began to recognise market mechanisms as beneficial for the achievement of economic reforms. As a result, it soon emerged the necessity to establish a more effective legal framework to regulate the market activities of domestic and foreign business operators. In this regard, the enactment of the LAUC in 1993 represented the first serious attempt to adopt a comprehensive competition statute in China.

Initially, the LAUC was entitled "Fair Transaction Law" and it should have included a combination of rules against unfair business practices and monopolies.\textsuperscript{77} Yet, after intense behind-the-scene bargaining and the need to find a balance between the conflicting interests of various State departments, the provisions dealing with monopolies were cancelled from the text on the assertion that China had not sufficient legislative experience in the area and that at that time monopolies did not represent a serious threat for the development of the Chinese economy.\textsuperscript{78}

Nonetheless, the Chinese government realised that monopolistic practices, though limited and sporadic, were having a negative effect on market competition. Consequently, it decided to reintroduce some anti-monopoly provisions in the final version of the LAUC.\textsuperscript{79}

In this sense, Article 1 of the LAUC now states: "This Law is formulated with a view to safeguarding the healthy development of socialist market economy, encouraging and protecting fair competition, repressing unfair competition acts, and protecting the lawful rights and interests of business operators and consumers." With reference to the content of the LAUC, the prohibited activities can be divided into three different categories. Articles 8, 9, 13, and 14 prohibit

\textsuperscript{76} Ming, supra 71, at 5.
\textsuperscript{78} Ibid.\textsuperscript{79} Ibid.
misleading advertising and other unfair business practices; Articles 5 and 10 deal with violations of intellectual property rights (herein after, “IPRs”) and trade secrets; and Articles 6, 7, 11, 12, and 15 contain a series of anti-monopoly provisions.

With reference to this third category of provisions, Article 6 reads: “A public utility enterprise or any other business operator occupying monopoly status according to law shall not restrict people to purchasing commodities from the business operators designated by him, thereby precluding other business operators from fair competition.” Article 7 prohibits State agencies to abuse their administrative power to force consumers to purchase commodities from enterprises designated by them and it prohibits imposing limitations on the business activities of non-affiliated firms. Local governments and their subordinate departments must not abuse their power to restrict commodities originated in other parts of the country from entering the local markets or the local commodities. Article 11 prohibits the practice of predatory pricing. Article 12 of the LAUC provides that business operators must not, against the will of purchasers, conduct tie-in sale of commodities or attach any other unreasonable conditions to the sale of their commodities. Finally, according to Article 15, bidders must not act in collusion with each other in order to force up or down bidding prices.

The administrative agency responsible to enforce the LAUC is the State Administration for Industry and Commerce (herein after, “SAIC”) and its branches

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80 Article 8 of the LAUC prohibits bribery in business transactions. Article 9 prohibits false or misleading advertising. Furthermore, it extends the liability for false advertising to advertising agencies that know or ought to know the seller’s falsehood. Article 13 limits lottery-attached sale activities as a marketing strategy. Article 14 prohibits business operators from fabricating or spreading false information to injure their competitors’ commercial credit or the reputation of their competitors’ commodities.

81 Article 5 prohibits the forgery of registered trademarks and certificates of quality and origin and the use of a name, package or decoration similar to that of another's famous commodity that would be likely to create confusion among consumers.

82 In this respect, Article 11 reads: “A business operator shall not, for the purpose of pushing out their competitors, sell their commodities at prices lower than costs. Nonetheless, it also introduces a series of exceptions for the sale of fresh products; the disposal of products whose period of validity is about to expire, or of overstocked products; seasonal reductions in prices; and the sale of products at reduced prices to pay off a debt, or due to a change in product lines or the closure of the business.
at provincial, municipality, and county levels that have the power to investigate, to issue warnings, to impose fines and to suspend the business licenses of violators.\textsuperscript{83}

Despite its symbolic importance, the LAUC was not a complete competition statute.\textsuperscript{84} For instance, it failed to address substantial anti-competitive conducts such as abuse of dominance, cartels, and vertical restraints.

Thus, in 1994 the Chinese government decided to establish a committee to draft what would later become the AML.\textsuperscript{85}

To further integrate the content of the LAUC which did not cover price restrictions on competition, in 1998 the Chinese government enacted the \textit{Price Law}.\textsuperscript{86} The primary objective of the \textit{Price Law} is to fight against price fixing and predatory pricing. In this regard, Article 14 of the \textit{Price Law} prohibits a series of price restrictions including collusion aimed to control market prices and harming other business operators and consumer, predatory pricing and price discrimination.\textsuperscript{87} The State Development and Reform Commission (hereinafter, “SDRC”) and its branches at provincial, county, and city levels are the administrative agencies responsible for enforcing it.

In 2001, in order to complement the content of the \textit{Price Law}, the State Council issued the \textit{Rules on Prohibiting Regional Blockades in Market Economic Activities} dealing in particular with the practice of local agencies to discriminate

\textsuperscript{83} SAIC is an administrative agency at ministerial level directly under the State Council that is in charge of market supervision and regulation and related law enforcement through administrative means. Furthermore, it takes charge in business coordination among local Administrations for Industry and Commerce and gives relevant guidance thereof. In 1994, the Fair Trade Bureau was created within SAIC. The Bureau consisted of three sections, responsible for preventing unfair trade practices, investigating monopolies, and consumer protection. SAIC’s other duties included administration of business licenses, registration of trademarks, and enforcement of related laws such as the \textit{Trademark Law} and the \textit{Advertising Law}.

\textsuperscript{84} See also \textit{Certain Provisions on Prohibiting Public Utility Enterprises from Committing Restrictive Acts Against Competition}, promulgated by SAIC on December 24, 1993). Text available at \url{http://www.apeccp.org.tw}.

\textsuperscript{85} The discussion on the drafting process of the AML will be addressed in Chapter II.

\textsuperscript{86} Articles 39 to 46 introduce penalties for violators including fines and the suspension of the business licence. However, criminal penalties are not contemplated.
against products and services coming form other regions. Finally, in 2003 the National Development and Reform Commission (hereinafter, “NDRC”) approved the Provisional Rules on Prevention of Monopoly Pricing to fight against, inter alia, price coordination, bid rigging, vertical price restraint and restrictions on prices perpetrated by State agencies.

The enactment of effective M&A rules is an essential aspect of a modern competition law system. M&A activities may lead to excessive market concentration, restrict competition and, in turn, harm consumers.

Over the years, as a result of its liberalisation policies, China started to become one of the most attractive destinations for foreign investment. Consequently, foreign acquisitions also started to grow as large multi-national corporations decided to pursue the opportunity to move into China’s emerging markets. This trend was consistent with China’s commitments for accession to the WTO requiring greater access to the country’s market. By the time China joined the WTO in December 2001, the purchase of domestic enterprises had become an increasingly attractive strategy of expansion for foreign investors and, in this sense, the Chinese government soon realised the importance to develop a regulatory framework for M&A.

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90 The first pieces of legislation dealing with M&A in China were the Several Opinions Concerning the Organisation and Development of Enterprises Groups in 1987 and the Interim Measures concerning the Merger of Enterprises also referred to the prevention of monopolies. These regulations only consisted of a set of general rules and principles. In particular, they failed to set up concrete criteria to determine when merger transactions could provoke market
For this purpose, in 2003, MOFCOM issued the *Interim Provisions on the Acquisition of Shares or Equity Interests in Domestic Enterprises by Foreign Investors* (hereinafter, “2003 M&A Provisions”). They introduced a review mechanism applicable to transactions undertaken by foreign investors to merge or acquire domestic enterprises and emphasised that M&A activities must not lead to the establishment of monopolies to impair fair competition, or harm the interest of Chinese consumers.

However, as a result of the ever-increasing number of M&A by foreign investors, in 2006 six State authorities jointly promulgated the *Rules on Acquisition and Merger of Domestic Enterprises by Foreign Investors* (hereinafter, “2006 M&A Rules”) to amend the 2003 M&A Provisions. The 2006 M&A Rules imposed a series of new limitations and restrictions on all M&A transactions involving foreign investors. The 2006 M&A Rules aimed to impose a tighter control on those transactions which could possibly constitute a monopoly and undermine national economic security. In this sense, the Chinese authorities demonstrated their intention to supervise more closely the acquisition of enterprises operating in strategic industries or having a well-known Chinese brand.

**Note:**


2.4 Existing problems in China’s competition legislation

The first problem concerned terminology. The Peoples’ Republic of China had neither codified competition law nor an official definition of the term competition law. If compared with the concept used in Europe, in China the term "competition law" was much broader since it covered provisions dealing with both monopolies and unfair trade practices.94

The main goal of legislation against unfair trade practices is safeguarding trade ethics and maintaining fair competition between firms. As it is presumed that free competition on the market already exist, legislation against unfair trading practices should only ensure that business operators engage in "correct" means of competition. The main goal of anti-monopoly legislation, instead, is to ensure that a free and competitive market structure is maintained by preventing undertakings from abusing their market power by, for instance, implementing restrictive agreements, committing abuses of dominant position and provoking an excessive market concentration by means of M&A activities. However, the LAUC mixed together anti-monopoly provisions and provisions against unfair trade practices. In this sense, the term "competition law" as used in Europe or the term "antitrust" as adopted in the US corresponded in China to the term "anti-monopoly law."95

Under China’s planned economy the concept of “competition” itself was almost unknown and it only started to acquire status since 1979 with the beginning of the process of economic reform.96 Moreover, until the 1990s, when China decided to establish a socialist market economy, the term “competition” was used in a pejorative or at least vaguely suspect manner.97 The concept of “competition law” was even less familiar and, consequently, this led to a certain degree of uncertainty also in evaluating and studying foreign legal experience in

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94 Li and Du, supra note 77, at 188.
95 Ibid.
96 Gerber, supra note 5, at 290.
97 Ibid.
this area. Thus, at that time the actual meaning and use of the term “competition law” made it difficult for Chinese decision makers to correctly transpose foreign concepts and terminology into China’s competition legislation and to fully profit from the experience of more advanced systems of competition law.

Second, competition law provisions did not form a uniform legislative system but they were scattered among laws, regulations, circulars and interim rules. In particular a number of State agencies under the State Council were entitled to issue regulations and circulars under their own authority only on the condition that the issues governed by their measures were related to the enforcement of laws, regulations and circulars of the State Council itself and should in no way conflict with the latter. Nevertheless, this entailed in practice the enactment of a myriad of contradictory and conflicting measures.

This problem was further accentuated by the fact that local authorities were empowered to issue competition legislation to be applied under their respective jurisdictions. For instance, in addition to the national LAUC, a number of provinces and major cities implemented their own laws and regulations covering unfair competition. For example, the conduct of price fixing was first made illegal in Guangdong by using implementing regulations on unfair competition, and, in 1994, a few months after the entry into force of the LAUC, Beijing adopted its own local version of the law. Various sectoral regulations such as the Telecommunications Ordinance of the People’s Republic of China also embodied provisions related to competition. Finally, administrative regulations

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98 Ibid. Furthermore, in relation to the linguistic aspect, Professor Dabbah notes that the quality of the language of both Chinese authentic text and English translation of the text was highly questionable. He argues: “The laws and rules in existence contain a number of inadequately defined terms and concepts, and often in practice the meaning of these terms is distorted when translating from Chinese to English. This, in turn, leads to inconsistency when attempting to understand the same rule by reading it in both Chinese and English.” See Dabbah, supra note 98, at 351.

99 Gerber, supra note 5, at 290.

100 Wang, supra note 20, at 291.

101 To further complicate the matter, after the enactment of the LAUC and the Price Law, for instance, a series of ministerial rules were passed to implement their provisions. Over the years, SAIC and SDRC also issued further regulations and circulars. Ibid.

were also enacted by the People's Congress and its standing committees in the provinces, in the autonomous regions, and in the cities directly under the supervision of the Chinese government in Beijing. Although the proliferation of competition measures were useful to clarify and enlarge the scope of application or the content of national competition legislation, the legal hierarchy among the various legislative sources, and in particular between ministerial and local regulations, was far from being clear. As a result, it was very difficult to have a systemic and clear vision of China’s competition law system and to understand what measures would have been applied by Chinese authorities in competition cases.

Ultimately, another major problem concerned competition law enforcement and especially the role of SAIC in this process. SAIC operated under the State Council and its main role was to protect market order. In 1994, the Fair Trade Bureau was established within SAIC to enforce the LAUC. SAIC was also responsible for enforcing the Trademark Law and the Advertising Law. Although after the enactment of the LAUC the vast majority of decided cases were related to trademark infringements or the theft of trade secrets SAIC was also very active in investigating monopolistic practices and, in particular, abuses of administrative power perpetrated by State departments and companies.

Although, SAIC’s policy raised public awareness about the practice of administrative monopolies, its enforcement efforts yielded limited success. State departments under the State Council itself, for instance, controlled the economic activity of many firms. As a consequence, such companies could de facto be exempted from the application of competition rules since they carried out their business activity with the approval or on behalf of the government. Thus, the

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104 Jin and Luo, supra note 47, at 222. Since most rules often overlapped and conflicted, the same type of conduct could be regulated by more than one law or regulation. The final result was that different State departments could be competent to deal with a case, decide it under different rules and, in turn, impose different sanctions. The practice of collusive tendering, for instance, was prohibited under three different national laws and an unspecified number of local regulations. Ibid.
105 Lin, supra note 103, at 81.
provisions of the LAUC that explicitly prohibited State agencies as well as their affiliated companies from engaging in anti-competitive behaviour remained largely unapplied. In this regard, China lacked a strong and independent enforcement authority. SAIC was a governmental department under the State Council with limited authority and independence. When administrative restrictions on competition occurred, it was difficult for SAIC to investigate since other State agencies could easily interfere in order to hinder its activity. In addition to this, the various branches of SAIC at local level had also very limited powers of intervention and lacked independence to punish anti-competitive practices perpetrated under their jurisdiction. Finally, local protectionism and widespread corruption in many regions prevented SAIC’s branches from deciding cases impartially and in accordance with the relevant laws and regulations. As a result, in most competition cases, the decisions adopted by the relevant enforcement authorities failed to provide sanctions for violators.

Despite the many shortcomings of China’s competition regime, the efforts of the Chinese legislator should be applauded. China has made significant progress over the past three decades in setting up its own competition law system. The approval of various pieces of competition legislation, notably the LAUC and the Price Law, laid a solid foundation for enhancing the status of competition law and culture in the country.

With the enactment of the AML, China has now a fairly complete set of competition legislation. Notwithstanding this historical achievement, the road ahead remains paved with obstacles. Although, by embodying rules prohibiting public and private anti-competitive behaviour, the AML may represent a powerful instrument for accelerating the establishment of a competitive market environment, without an adequate legal and institutional infrastructure, China’s ambitious initiatives for market reforms may not achieve the envisaged success. In China’s transitional economy, where economic and legal reforms remain unaccomplished, the aspirations for a vigorous enforcement of competition rules may continue to be greatly frustrated.

106 Wang, supra note 20, at 292.
CHAPTER II

THE SOCIALIST MARKET ECONOMY AND COMPETITION: THE ROLE OF CHINA’S ANTI-MONOPOLY LAW

Introduction

After more than a decade of debating and drafting, on August 30, 2007 China finally enacted the first comprehensive competition code of its legal history: the Anti-Monopoly Law of the People’s Republic of China.107 The principal impetus for the issuance of the AML came with China’s accession to the WTO. Joining the WTO has meant for China the opening of the national market to the outside world and, consequently, the necessity to introduce competition mechanisms into most sectors of the economy. Thus, China had to improve its competition legislation and to promulgate a modern anti-monopoly law to favour the establishment of a competitive market environment for both domestic and foreign business operators and to accomplish its process of transition to a market economy.

The drafting process of the AML was arduous. No later than one year after the adoption of the LAUC in 1993, the Chinese government decided to establish a drafting committee composed of officials coming from the legal sections of the

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State Economic and Trade Commission (hereinafter, “SETC”) and SAIC.\textsuperscript{108} During the first meeting, held in Beijing in May 1994, the committee concluded that the enactment of an anti-monopoly law was necessary to facilitate the establishment of the socialist market economy and to accelerate China’s process of modernisation. The initial deadline for the completion of the first draft of the AML was fixed at the end of 1995. Nevertheless, due to the complexity of the proposed task and, in particular, to the existence of divergent views among the members of the drafting committee and governments officials about the content of the law, the target date of 1995 appeared to be rather optimistic. The first draft of the draft law was finalised only in 1999. Thereafter, various versions of the AML started to circulate for comments and the original text experienced several revisions and amendments. Finally, in 2006, the final draft of the AML was submitted to the Standing Committee of the National People’s Congress (hereinafter, “NPC”) which after several more revisions decided to adopt it in late August 2007.\textsuperscript{109}

The AML contains both substantive and procedural provisions.\textsuperscript{110} The substantive provisions deal with monopoly agreements (Chapter II), abuse of dominant position (Chapter III), concentration of undertakings (Chapter IV), and abuse of administrative power to eliminate or restrict competition (Chapter V). The procedural provisions include the investigation of suspected monopolistic conducts (Chapter VI) and legal liabilities (Chapter VII). With reference to its territorial scope of application, the AML covers monopolistic conducts in economic activities within the People’s Republic of China and monopolistic

\textsuperscript{108} In 2003, SETC was abolished and its responsibilities were taken over by NDRC. Since then, MOFCOM replaced SETC in its role of drafter of the AML.


\textsuperscript{110} The AML consists of 57 Articles divided in 8 chapters.
conducts outside the territory of the People’s Republic of China that eliminate or have restrictive effects on competition on the Chinese market. In this regard, Article 3 clarifies that the term “monopolistic conduct” includes: “(1) conclusion of monopoly agreements by undertakings; (2) abuse of dominant market positions by undertakings; (3) concentrations of undertakings that have or are likely to have the effect of eliminating or restricting competition.”

The AML also applies to the anti-competitive conduct of trade associations and that of undertakings which eliminate or restrict competition by abusing their IPRs, but does not cover “the alliance among or concerted actions by farmers and the farmers’ economic organizations in connection with the production, processing, sales, transportation, and storage of agricultural products and other business activities related to agricultural products.” Finally, Article 7 introduces a special discipline for SOEs operating in sectors “critical to the wellbeing of the national economy and national security” and in “industries in which exclusive operation and exclusive sales are the norm of business in accordance with the law.”

Studying the solutions adopted by the AML is crucial to understand China’s new-born system of competition law. Thus, the first part of Chapter II will provide a study of the text of China’s new competition statute. In doing this, the analysis will privilege a comparative approach with the EU competition law model which appears to have been the main prototype and source of inspiration for the Chinese drafters. This comparative perspective will represent a useful starting point to highlight, in the second part of Chapter II, the unique features of the Chinese competition law system and its relationship with the legacy of socialist ideology and law in an attempt to understand its rationale, its goals and, possibly, its evolution within the context of China’s socialist market economy.

111 Article 2.
112 See Article 55. The complex interface between anti-monopoly legislation and IPRs falls outside the scope of this analysis. For a discussion on this sensitive issue see Mary J. Hanzlik, The implications of China’s Antimonopoly Law for investors, problematic protection of intellectual property rights, Entrepreneurial Business Law Journal, Vol. 3, Issue 1, (2008), 76 - 94.
113 See, respectively, Articles 11, 55 and 56.
114 The discussion about the interpretation of this controversial provision shall be dealt in Chapter IV.
1. The drafting process of China’s Anti-Monopoly Law: the role of international cooperation

China had a limited experience in the area of competition law and, therefore, the drafters of the AML started to take into consideration solutions adopted under foreign jurisdictions. Its drafting required the careful study of various competition law systems around the world to evaluate what model could better fit China’s economic and legal context. In this sense, Xiaoye Wang, Professor of Law at the Chinese Academy of Social Sciences and member of the Expert Advisory Board for Anti-Monopoly Legislation of the State Council and the NPC stated: “In my view, the promulgation of the Chinese AML should thus be regarded as a great achievement of international cooperation.”115 The Chinese committee listened to opinions and suggestions from Chinese and foreign legal scholars and benefited from technical assistance from various international organisations including the Organisation for Economic Cooperation and Development (hereinafter, “OECD”), the World Bank, the United Nations Conference on Trade and Development (hereinafter, “UNCTAD”) and the Asia Pacific Economic Cooperation (hereinafter, “APEC”), and from foreign countries such as Germany, the United States (hereinafter, “US”), Japan, Australia and South Korea.116 With reference to the EU, on May 6, 2004 MOFCOM and the

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Directorate General for Competition of the European Commission initiated a structured dialogue on competition policy (hereinafter, “EU-China Competition Dialogue”) to support China with appropriate competition-related technical assistance and capacity building activities such as the organisation of training, seminars, studies etc.\textsuperscript{117}

In the end, the text of the AML law is largely consistent with the solutions adopted under the EU system of competition law. The European influence appears evident, for instance, in relation to the discipline on monopoly agreements, abuse of dominance and M&A.\textsuperscript{118} Furthermore, by articulating a multiplicity of objectives and by showing special attention not only to economic concerns but also to public policy objectives, the AML reveals the influence of the EU model in identifying competition law goals.\textsuperscript{119}

Arguably, the decision of the Chinese drafters to shape the new AML on the basis of the EU system of competition law was influenced by various considerations. Early versions of the Chinese AML show that with its long tradition and reputation the US's antitrust system has been extensively studied and discussed in China. Nevertheless, in the end the drafting committee considered that the structure and legal framework of the EU model could be more easily adapted to the Chinese context.

On the one side, the drafting process of the AML helps to better understand the internationalisation of competition law within the context of a globalized world and "serves as one good example to illustrate how legal development evolves in an open legal space subject to influence of plural sources of law."\textsuperscript{120} On the other side, “[i]t further raises interesting questions as to how

\begin{itemize}
\item \textsuperscript{117} The primary objective of the EU-China Competition Dialogue was: “to establish a permanent forum of consultation and transparency between China and the EU in this area, and to enhance the EU’s technical and capacity-building assistance to China in the area of competition policy.” See Terms of Reference of the EU-China Competition Policy Dialogue, available at http://ec.europa.eu/competition/international/bilateral/cn2b_en.pdf.
\item \textsuperscript{118} See, respectively, Articles 15, 18 and 19.
\item \textsuperscript{119} See Article 1.
\end{itemize}
the EU competition law, among the plural sources of law, has managed to out win the others in influencing China’s competition law development.”121

There are at least three lines of arguments which may explain why the EU competition law model was privileged by the Chinese drafters of the AML.

First of all, it should be noted that as regards the goals of competition law, even from a cursory reading of the text of the AML, it appears clear that the objectives of competition law in China’s transitional economy are irreconcilable with those traditionally attributed to the US antitrust system. The latter, profoundly influenced by the theories of the “Chicago School of Economics”, identifies economic efficiency as the only legitimate objective of its antitrust regime.122 For instance, the followers of the “Chicago School of Economics” rejected the notion that “big is bad”, that smaller business operators should be protected, or that innovators should share their inventions with their rivals.123 The sole concern of competition law should be to promote economic efficiency for the benefit of consumers. If such result was achieved by dominant or even monopoly undertakings, there should be no violation of competition legislation.124

During their bilateral discussions with their Chinese counterparts, US officials started to raise various concerns about the growing divergences between the US antitrust solutions and those of the AML. Various commentators noted that the Chinese drafters used to refer to concepts and theories bearing a closer resemblance to US antitrust policies of the 1940s through the 1960s than to current ones.125

Instead, by pursuing a wider range of goals and by taking into consideration “fairness” issues, the EU competition system presented a more

121 Ibid.
124 Ibid.
125 This appears evident, for example, in relation to the provisions of the AML on abuse of dominance. For an insightful discussion on this issue, see Thomas R. Howell, Alan Wm. Wolff, Rachel Howe and Diane Oh, China’s new Anti-Monopoly Law: a perspective from the United States, Pacific Rim Law & Policy Journal, Vol. 18, Issue 1, (2009), 53 – 67, at 55.
relevant case study for the drafters of the AML.\textsuperscript{126} The complexity of the Treaty’s normative framework seemed in fact to offer a much more flexible example for China. After all, the absence of a clear hierarchy among its various goals has allowed European decision makers to adopt, according to circumstances, a wider approach in the application of competition law provisions in order to reconcile potentially conflicting objectives.\textsuperscript{127}

Secondly, the 2004 \textit{EU-China Competition Dialogue}, which represented the first EU’s bilateral initiative in the process of internationalisation of European competition law, played a key role in helping and influencing the formulation of the AML and to make the EU competition law system the main reference point for the Chinese legislators.\textsuperscript{128} It is worth noting that, with reference to the US, only two years after the enactment of the AML, on July 27, 2011 the US Department of Justice and Federal Trade Commission signed with the Chinese authorities a “\textit{Memorandum of Antitrust and Antimonostry Cooperation}” to set up a joint dialogue on competition issues.\textsuperscript{129}

Finally, Europe’s civil law tradition has certainly played a major role in persuading the Chinese legislator about the possible success of this legal transplant. China’s backward judicial review system made it difficult to opt for the US court-oriented antitrust model. Rather, the EU style administrative

\textsuperscript{126} See on this point Mark Williams, \textit{Competition policy and law in China, Hong Kong and Taiwan}, Cambridge University Press, (2005), at 34.

\textsuperscript{127} Heike Schweitzer, \textit{Competition Law and Public Policy: Reconsidering an Uneasy Relationship: The Example of Art. 81, EUI Working Papers Law, No. 30, (2007), 1 - 15, at 5. In Europe, the discussion about the goals of competition law has characterised the academic debate for many years. Although the view which appears to have gained the upper hand is that the sole purpose of competition policy in the EU should be to maximise economic efficiency, however, a general consensus does not exist on the matter. Townley, for instance, considers that competition policy cannot be isolated from socio-political considerations. In this respect, he argues: “This dispute, between those that read the competition rules in isolation and those that read the Treaty holistically, goes to the very heart of Treaty interpretation.” See Christopher Townley, \textit{Article 81 EC and Public Policy}, Hart Publishing, (2009).

\textsuperscript{128} For an insightful discussion on this issue, see Wu, supra note 120. This point was also raised in a meeting with Miguel Ceballos Baron, former Director of the Trade and Investment Section of the Delegation of the European Union to China, Beijing, October 2010.


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enforcement system better reflected the country’s existing institutional framework and had the advantage to minimize implementation costs.130

1.1 Challenges in China’s competition policy: some preliminary considerations

Although it is undisputed that EU competition legislation has served as main prototype, the AML does not consist of a mere copy-paste of the EU model. Rather, many solutions adopted in the AML are clearly embedded in China’s current political, economic and social context and reflect the understanding that Chinese decision makers have about the role of competition law and policy in the country.

China has certainly made a lot of progress in the area of competition law since the beginning of the drafting of its AML in 1994. For the first time in China’s legal history, a common playing level field for both domestic and foreign companies has been established and, in this sense, the enactment of the AML is with no doubt a milestone on the path of China’s creation of its socialist market economy.

Yet, despite this progress, China still faces significant challenges in improving its competition law culture. The application of new AML will inevitably encounter several obstacles and its effectiveness will also depend on the implementation of other institutional and legal reforms. The expected challenges are related to the ongoing process of economic transition from the traditional centrally planned economy.

This issue is pre-existing to the enactment of the AML. Thus, although the AML represents a further stimulus to accelerate economic reforms, this should not be seen as an isolated step. More actions such as, for instance, the reform of the public sector are essential for the creation of a competitive market environment in the country. The implementation of the new AML should therefore be carefully

130 Howell and others, supra note 125, at 57. For further discussion on this issue, see Chapter II at section 2.4.
tailored on the basis of China’s economic reality and be an incentive to engage in correlated political and economic interventions which are indispensable to fully achieve China’s competition policy objectives.

2. China’s Anti-Monopoly Law: a textual and substantive analysis

Despite the existence of differences in the economic context of various countries, a certain consensus exists as to what kind of practices competition law should regulate or prevent. First of all, there is the need to prevent undertakings from engaging into anti-competitive agreements either between themselves (horizontal agreements) or between them and third parties (vertical) agreements). Secondly, there is also the necessity to prevent undertakings with a dominant position on the market to engage in practices aimed at restricting or eliminating competition. Finally, M&A may increase the degree of market concentration and lead to the establishment of a dominant position and reduce the competitive pressures within the market. Similar to anti-monopoly legislation in most jurisdictions, the AML embodies provisions dealing with restraints on competition in areas that are usually referred to as the “three pillars” of competition law: monopoly agreements, abuse of dominance and concentration of undertakings. Thus, sections 2.1, 2.2 and 2.3 of Chapter II provide an analysis of the solutions adopted by the AML in these areas. Section 2.4 concludes the first part of Chapter II by discussing the intricate enforcement mechanism of the AML.

2.1 Monopoly agreements
The first objective of the new AML is to prevent and prohibit monopoly agreements.\footnote{Article 1.} In this respect, the Chinese drafters decided to make a distinction between horizontal agreements from vertical ones.\footnote{Some commentators noted the Chinese drafters were influenced by the example of German law, the study of which has a long tradition in China. For discussion, see Wang, supra note 115. Under many competition law systems, restrictions on monopolistic agreements include restrictions on both horizontal and vertical agreements. One of the reasons for making a distinction between the two types of agreements is that vertical agreements are usually not prohibited since they are considered positive for economic development. With reference to the Chinese AML, it appears that the drafting group followed the example of German law, which separates horizontal restrictions and vertical restrictions on competition. Ibid.}

As far as horizontal agreements are concerned, Chapter II of the AML presents various similarities with Article 101 of the Treaty on the Functioning of the European Union (hereinafter, “TFEU”).\footnote{Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union OJ C 115, 9.5.2008.} More specifically, Article 13 of the AML seems modelled on Article 101 TFEU when it states that undertakings shall be prohibited to conclude monopoly agreements in order to eliminate or restrict competition. Furthermore, similarly to Article 101 TFEU, Article 13(3) of the AML clarifies that the expression “monopoly agreements” refers to agreements, decisions or other concerted practices which eliminate or restrict competition on the market.\footnote{Article 101(1) TFEU reads: “The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.”} Finally, most of the prohibited agreements as listed in Article 13 of the AML recall the EU provisions.\footnote{These include: “(1) fixing or changing the price of commodities; (2) limiting the outputs or sales volume of commodities; (3) allocating the sales markets or the raw material purchasing markets; (4) restricting the purchase of new technology or new equipment or restricting the development of new products; (5) jointly boycotting transactions; or (6) other Monopoly Agreements determined by the Anti-Monopoly Law Enforcement Authority under the State Council.”}

The AML makes a distinction between vertical and horizontal agreements. The Court of Justice of the European Union (hereinafter, “CJEU”) in its case law clarified that Article 101 TFEU is indistinctly applicable to all agreements which distort competition within the common market without distinction between
vertical or horizontal agreements. However, the European legislator introduced a specific block exemption system establishing a “safe harbour” for certain types of vertical restrictions.

The AML deals with vertical agreements in Article 14 which reads: “Undertakings are prohibited from entering into Monopoly Agreements with their counter-parties that: (1) fix the resale price of commodities sold to third parties; (2) limit the minimum resale price of commodities sold to third parties [...].” These categories of agreements only refer to price restrictions. On the contrary, EU law takes into account a wider range of restrictive agreements such as, for instance, selective or exclusive distribution agreements. To partially cope with this omission, Article 14(3) of the AML adds that the Chinese enforcement authority may indicate other agreements as prohibited. In this sense, the overall impression is that Chinese enforcement authorities shall adopt a more lenient approach with regards to vertical agreements. This is consistent with the EU competition law which recognises that vertical restraints often have positive effects on market competition by, for example, promoting non-price competition and improving the quality of services.

Similarly to Article 101(3) TFEU, Article 15 of the AML clarifies when agreements between undertakings might be exempted. The article expressly states

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138 In this respect, see Commission notice - Guidelines on Vertical Restraints [2000] OJ C291/1.
139 The assessment under Article 101 TFEU consists of two phases. The first phase consists in assessing whether an agreement between undertakings that is capable of affecting trade between Member States has an anti-competitive object or actual or potential anti-competitive effects. Article 101(3) TFEU only applies when an agreement restricts competition within the meaning of Article 101(1) TFEU. The second phase consists in determining the pro-competitive benefits produced by the restrictive agreement and to evaluate whether these pro-competitive effects outweigh the anti-competitive ones. The balancing between anti-competitive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3) TFEU that introduces four cumulative and exhaustive conditions for this purpose. It is worth remembering that before the coming into force of Regulation 1/2003, only the European Commission was entitled to grant exemptions under Article 101(3) TFEU. Article 101(3) TFEU is now directly applicable and, therefore, also national competition authorities and courts are entitled to apply it. Council Regulation No. 17 of 6 February 1962, OJ 13, 21.2.1962, 204/62. Council Regulation
that the provisions of Articles 13 and 14 shall not apply to agreements among undertakings implemented “(1) for the purpose of improving technology, researching and developing new products; (2) for the purpose of improving the product quality, reducing costs, enhancing efficiency, unifying specifications and standards of products, or implementing division of labour based on specialization; (3) for the purpose of improving operational efficiency of small and medium sized undertakings and enhancing their competitiveness; (4) for the purpose of achieving public interests, including, but not limited to, energy saving, environmental protection, and disaster relief; (5) for the purpose of alleviating serious decreases in sales volume or distinctive production surpluses due to economic depression; (6) for the purpose of safeguarding legitimate interests in foreign trade and foreign economic cooperation; (7) other circumstances as stipulated by laws and by the State Council.”

The first two paragraphs of Article 15 of the Chinese AML reflect the influence of Article 101(3) TFEU and of the Guidelines on the application of Article 81(3) [now Article 101(3) TFEU] of the Treaty. In addition to this, Article 101(3) TFEU and Article 15 require to satisfy a series of conditions to obtain an exemption such as, for instance, that competition should not be substantially restricted in the relevant market and that consumers should be allowed to share the resulting benefits.

Nonetheless, it was noted that the additional requirement according to which the imposed restrictions should be “indispensable” to attain the exempted objectives is missing under the AML. In this sense, Article 15 could be therefore interpreted by the enforcement authorities to justify conducts which are instead prohibited in the EU.

(EC) on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty Establishing the European Community, No. 1/2003, OJ 2003 (L 1)1.  
141 Article 15(2) reads: “If any Monopoly Agreements fall into the circumstances set forth in subclauses (1) to (5) above so that the provisions of Articles 13 and 14 are not applicable, the relevant undertakings must also prove that the agreement so concluded will not materially restrict competition in the Relevant Market and that the agreement can allow consumers to share the benefits generated therefrom.”  
142 Bush, supra note 107, at 7.
More generally, the broad wording of this article reduces legal certainty and may allow discretionary interpretations. For example, Article 15(3) of the AML could be used as a tool by the Chinese government to pursue public and industrial policy objectives, such as, inter alia, the protection of domestic SMEs from the competition of larger foreign corporations. Although in the EU the key role of SMEs in the competition process is undisputed, this is not considered a sufficient argument to justify anti-competitive conducts. In this sense, if the proposed objective of this provision was to protect domestic SMEs, a “de minimis regulation” similar to that adopted in the EU would have been more effective. Finally, some of the exemptions listed in Article 15 of the AML expressly refer to industrial policy concerns. Exemptions for the purpose of energy savings or aimed at facing production surpluses during economic depression are inconsistent with EU practice.

Article 46(2) of the AML introduces a leniency provision. It reads: “If the undertakings, on their own initiative, report to the Anti-Monopoly Law Enforcement Authority information concerning the conclusion of Monopoly Agreements and provide important evidence, the Anti-Monopoly Law Enforcement Authority may reduce the penalty imposed or grant exemption from penalty after weighing the relevant circumstances.”


144 It should also be noted that, unlike the EU legislator, the Chinese legislator fails to provide a definition of SMEs. In the EU, SMEs have less than 250 employees. Furthermore, they can a turnover up to 50 million euro per year or a balance sheet total of no more than 43 million euro. See Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises OJ L 107, 30.04. 1996. This point was also raised in a meeting with Miguel Ceballos Baron, former Director of the Trade and Investment Section of the Delegation of the European Union to China, Beijing, October 2010.

145 Block exemptions provisions are introduced by Commission Regulation 2790/1999, supra note 137.


147 However, in the so called “crisis cartel” cases, the European Commission relied on industrial policy consideration to grant an exemption under Article 101(3) TFEU. For discussion, see Andre Fiebig, Crisis cartels and the triumph of industrial policy over competition law in Europe, Brooklyn Journal of International Law, Vol. 25, Issue 3, (1999), 607 - 638.
Under the EU leniency policy, the European Commission can only grant immunity from fines when undertakings provide sufficient information for an investigation to be started into a violation of competition rules that was previously unknown. In this regard, the AML differs from the EU system since, even if the enforcement body has already started its investigation, the concerned undertakings remain eligible for immunity. Although this approach gives incentives to report a cartel, Article 46(2) risks being ineffective “...since there are no guarantees for the whistleblower’s legitimate expectation of a milder penalty.”

2.2 Abuse of Dominance


149 Caprile and others, supra note 146, at 331.

150 Ibid. However, on January 4, 2011, NDRC approved the Rules on Administrative Enforcement Procedures for Anti-Price Monopoly (hereinafter, “NDRC’s Rules”) to clarify enforcement issues on price-related conducts under the AML. NDRC’s Rules provide more detail on how leniency should be applied in relation to anti-competitive agreements such as cartels. In this regard, they provide that the first participant reporting a cartel and providing "important" evidence to the enforcement authority "may" be fully exempted from penalties. The second applicant may be granted a reduction of at least 50 percent and later applicants of a maximum 50 percent. However, NDRC Rules leave huge discretion in the hands of the Enforcement authority since they state that this "may" and not "shall" grant leniency. In this sense, this lack of certainty may diminish the incentive to report a cartel. See Peter J. Wang, Sébastien J. Evrard, Yizhe Zhang and H. Stephen Harris, Jr, Antitrust Alert: China Issues Rules for Price-Related Antitrust Enforcement, Jones Day Publication, (January 2011) Available at http://www.jonesday.com/antitrust-alert--china-issues-rules-for-price-related-antitrust-enforcement-01-01-2011/. The text of NDRC’s Rules (in Chinese) is available at NDRC’s website http://www.ndrc.gov.cn/. Two days after NDRC published NDRC’s Rules, SAIC issued the Rules on the Prohibition of Monopoly Agreements (hereinafter, “SAIC’s Rules”). With reference to leniency, these regulations state that undertakings which voluntary terminate monopoly agreement may obtain mitigation or an exemption from penalties at the discretion of the enforcement authority. However, contrary to NDRC’s Rules which say that the first applicant "may" obtain immunity, SAIC’s Rules use the term "should." Thus, they seem to provide greater assurance about the possibility to qualify for immunity. See Peter J. Wang, Sébastien J. Evrard, Yizhe Zhang and H. Stephen Harris, Jr, Antitrust Alert: China’s SAIC Publishes its Final Anti-Monopoly Law Rules, Jones Day Publication, (January 2011), available at http://www.jonesday.com/antitrust-alert--chinas-saic-publishes-its-final-anti-monopoly-law-rules-01-12-2011/. The text of SAIC’s Rules (in Chinese) is available at SAIC’s website www.saic.gov.cn/.
The provisions dealing with abuses of dominant position are also modelled on the basis of EU discipline in this area.\textsuperscript{151} Article 17(2) defines a dominant market position as the market position “held by undertakings who are able to control the price or quantity of commodities, or other transaction terms in the Relevant Market or to block or affect the entry of other undertakings into the Relevant Market.” This definition appears to be consistent with that developed by the Court of Justice in the \textit{United Brands} case.\textsuperscript{152}

However, the test introduced by the AML to ascertain the existence of dominance differs from the European one. Unlike the EU approach, where the ability to prevent or limit effective competition on the relevant market is determined on a case by case basis, Article 19 of the AML set up three different presumptions based on market share to identify single or collective dominance.\textsuperscript{153} Undertakings may be presumed to have a dominant market position if they satisfy any of the following criteria: “(1) the market share of one undertaking in the Relevant Market accounts for 1/2; (2) the joint market share of two undertakings in the Relevant Market accounts for 2/3; or (iii) the joint market share of three undertakings in the Relevant Market accounts for 3/4.” Article 19(2) further clarifies that: “In case of circumstances set forth in the sub-clauses (2) and (3)...

\textsuperscript{151} Article 6 of the AML is the general provision prohibiting the abuse of dominant position while Chapter III of the Law embodies the legal discipline applicable in such cases. Article 6 of the AML reads: “Undertakings with dominant market positions shall not abuse their dominant market positions to eliminate or restrict competition.” Whether this wording is consistent with Article 102 TFEU, the Chinese definition of dominance appears to be less stringent than the European version. Article 6 of the Chinese AML exclusively deals with abusive conduct which actually eliminate or restrict competition but not, contrary to what happens in Europe, with conducts which may potentially achieve a similar result. The other relevant provisions contained in Chapter III include: Article 17(1) containing a non-exhaustive list of possible abuses; Article 17(2) providing a definition of dominant market position; Article 18 listing the main factors for the identifications of a dominant market position; and Article 19 introducing a series of rebuttable presumptions based on market share to determine the existence of single or collective dominance.

\textsuperscript{152} In \textit{United Brands}, the Court of Justice ruled that the dominant position referred to in Article 102 (TFEU): “relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”. See Case 27/76 \textit{United Brands Company v Commission} [1978] ECR 207, para. 65. See also Case C-85/76 \textit{Hoffmann-La Roche v Commission} [1979] ECR 461, para. 4.

\textsuperscript{153} The wording of Article 19(1) of the AML, however, suggests that other elements have to be taken into account to establish the existence of a single or collective dominance.
above, if any of such undertakings has a market share less than 1/10, it shall not be presumed to have a dominant market position.” Various commentators criticised such an approach based on market share presumptions by considering the system too rigid.\textsuperscript{154} It was also noted that the drafters of the Chinese AML probably took inspiration from the German competition law regime which applies this kind of test.\textsuperscript{155} Furthermore, similarly to German law, the Chinese AML indicates that the presumptions are rebuttable.\textsuperscript{156} Therefore, when the abovementioned market shares are met the burden of proof lies within the dominant undertaking and not within the competition authorities. In this regard, Article 19(3) states that: “If an undertaking which is presumed to have a Dominant Market Position presents evidences showing otherwise, it shall not be deemed to have a Dominant Market Position.”

The EU system of competition law does not introduce presumptions based on market share to ascertain dominance. Nevertheless, the EU courts may consider high market shares as one of the factors which identify a dominant position. The European Commission, for instance, argued that market shares of 40 to 50 percent may suggest that an undertaking enjoys a position of dominance, in particular, when its competitors hold a much lower market share.\textsuperscript{157} Furthermore, in \textit{Hilti}, the General Court considered that market shares between 70 and 80 percent were clear indications of a dominant position.\textsuperscript{158} If compared with the European system, the presumptions introduced by the Chinese AML are,

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\item[\textsuperscript{154}] In this regard it was noted: “The solution is intended to facilitate the work of the competent agencies and courts, but it overlooks three key variables: (1) it is often difficult to calculate the relevant market share; (2) the number of competitors (and, consequently, the structure of the market concerned) can vary substantially according to the nature of the goods or services in question; and (3) a market economy may be extremely dynamic (or even volatile). Although it can be argued that flexibility is ensured by the rebuttable nature of the presumptions, 31 the indicated factors make an a priori, one-size-fits-all approach questionable, especially in the absence of a sufficient understanding of economics.” Giacomo Di Federico, The New Anti-monopoly Law in China from a European Perspective, World Competition, Vol. 32, Issue 2, (2009), 249 - 270, at 255. This point was also raised in a meeting with Miguel Ceballos Baron, former Director of the Trade and Investment Section of the Delegation of the European Union to China, Beijing, October 2010.
\item[\textsuperscript{155}] Wang, supra note 115, at 138.
\item[\textsuperscript{156}] Ibid.
\item[\textsuperscript{158}] Case T-30/89 Hilti AG v Commission [1991] ECR II-1439.
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therefore, considerably lower. Finally, similarly to what happens under the EU Competition law system, Article 18 of the Chinese AML provides that other factors may be also taken into consideration in order to ascertain the existence of a dominant position.\(^{159}\)

Despite the lack of a rigid system based on market share presumption, Article 102 TFEU does not expressly allow exemption from abusive conducts for pursuing efficiency, as in the case of agreements covered by Article 101(3) TFEU. The effects-based approach initiated by the European Commission in 2005 aims at contemplating the possibility of a defence based on efficiency also for unilateral conducts. Under the EU Competition Law regime an “exclusionary conduct may escape the prohibition of Article 82 [now 102 TFEU] in case the dominant undertaking can provide an objective justification for its behaviour or it can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition.”\(^{160}\) The burden of proof lies within the dominant undertaking which must demonstrate that four cumulative conditions are fulfilled: “i) that efficiencies are realised or likely to be realised as a result of the conduct concerned; ii) that the conduct concerned is indispensable to realise these efficiencies; iii) that the efficiencies benefit consumers; iv) that competition in respect of a substantial part of the products concerned is not eliminated.”\(^{161}\)

Interestingly, with reference to this issue, the provision on burden of proof as contained in Article 19 of the AML allows a dominant undertaking to put forward a similar efficiency defence.

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\(^{159}\) Article 18 reads: “A finding that certain undertaking has a Dominant Market Position shall be based on the following factors: (1) the market share of the undertaking in the Relevant Market, and the competition conditions in the Relevant Market; (2) the ability of the undertaking to control the sales market or the raw material purchasing market; (3) the financial resources and the technical capacities of the undertaking; (4) the extent to which other undertakings depend on the subject undertaking with respect to relevant transactions; (5) the level of difficulty for other undertakings to enter the Relevant Market; (6) other factors relating to the determination whether the subject undertaking has a Dominant Market Position.”


\(^{161}\) Ibid. at para. 84.
2.3 Concentration of undertakings

Chapter IV of the AML deals with concentrations of undertakings without distinguishing between domestic and foreign companies. The new discipline represents, therefore, a major improvement when compared with the 2006 M&A Rules which only applied to acquisitions of domestic companies by foreign investors.\(^{162}\)

The new regime is modelled upon the *EU Merger Regulation* (hereinafter, “EUMR”).\(^ {163}\) Such similarities with the EU model appear evident not only with reference to the adopted terminology, but also with reference to the actual content of the M&A provisions in relation to the notification system, the two-phase review process and the standard of review.\(^ {164}\) The AML, however, only contains the main principles of China’s new M&A regime. In this regard, to complement the content of the AML the State Council issued on August 3, 2008 the *Regulation on Notification Thresholds for Concentration of Undertakings* (hereinafter, “Thresholds Regulation”).\(^ {165}\) According to Article 21 of the AML, if a transaction meets the thresholds for notification the relevant undertakings shall file a notification to the enforcement authority. Without filing such a notification, the undertakings shall be prohibited from implementing the concentration.

Transactions that meet either of the following two alternative turnover thresholds are subject to a filing obligation:

**Threshold A:** The total worldwide turnover of all parties to the transaction in the previous financial year exceeded CNY 10 billion. The turnover of each of at least two parties to the transaction exceeded CNY 400 million in China.

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\(^{162}\) See for discussion Chapter I, section 2.3.


\(^{164}\) In this regard, it appears that the Chinese authorities largely benefited from the *EU-China Competition Dialogue* started with the EU Commission in 2004.

Threshold B: The combined turnover in China of all parties to the transaction in the previous financial year exceeded CNY 2 billion. The turnover in China of each of at least two of the parties to the transaction exceeded CNY 400 million.\textsuperscript{166}

Article 4 of the Thresholds Regulation provides that the enforcement authority may decide to start an investigation on a transaction which does not meet the indicated thresholds if there is evidence that the operation has or is likely to have the effect of restricting or eliminating competition. Although this provision is consistent with EU practice, it does not clarify what standard of evidence MOFCOM is supposed to adopt to conclude that the transaction is likely to restrict or eliminate competition.\textsuperscript{167}

With reference to the definition of concentration, Article 20 of the AML reads: “Concentration of undertakings means the following circumstances: (1) a merger of undertakings; (2) an acquisition by an undertaking of the control of other undertakings through acquiring equity or assets; (3) an undertaking, by contracts or other means, acquiring control of other undertakings or the capability to exercise decisive influence on other undertakings.”

The Chinese solutions are, therefore, largely consistent with those of the EUMR, since the control of an undertaking includes “(i) the acquisition of securities or assets; or (ii) the acquisition of control over other undertakings by contract or other means.”\textsuperscript{168} If the undertakings implement the concentration in violation of the relevant provisions of the AML, the enforcement authority “shall order the undertakings to stop implementing the concentration, dispose of equity or asset within a specified time limit, transfer their business within a specified time limit or take other necessary measures to revert to the condition of the undertakings before the concentration and may impose a fine of no more than CNY 500,000.”\textsuperscript{169}

\textsuperscript{166} Article 3 of the Thresholds Regulation.
\textsuperscript{167} The discussion on MOFCOM’s standard of review in merger cases shall be dealt with in Chapter III.
\textsuperscript{168} See Article 3 of the EUMR.
\textsuperscript{169} Article 48 of the AML.
With reference to this issue, the AML diverges from EU discipline. The European Commission can decide to dissolve a merger only if the implemented transaction is incompatible with the common market. EU rules are therefore less stringent than their Chinese counterparts since the failure to notify the operation or the violation of the standstill obligation has never resulted in the dismissal of the entire operation. In case of the failure to notify an operation or its implementation before an authorisation or the decision to initiate a second-stage procedure, the European Commission may only, as an exception, impose fines not exceeding 10 percent of the aggregate turnover of the undertaking concerned.\(^\text{170}\) It is therefore likely that the objective of the Chinese provision is to deter any incentive not to notify a transaction in particular by foreign investors.\(^\text{171}\) An important aspect of the EU regime consists in the pre-notification contacts between the European Commission and the notifying parties. The European Commission “will therefore always give notifying parties and other involved parties the opportunity, if they so request, to discuss an intended concentration informally and in confidence prior to notification.”\(^\text{172}\) Pre-notification contacts provide the European Commission and the notifying parties with the possibility to discuss, for instance, jurisdictional and other legal issues. Furthermore, “they also serve to discuss issues such as the scope of the information to be submitted and to prepare for the upcoming investigation by identifying key issues and possible competition concerns at an early stage.”\(^\text{173}\) On November 11, 2009, MOFCOM issued the Rules on Notification of Concentration between Undertaking

\(^{170}\) Article 14 of the EUMR.

\(^{171}\) Furthermore, according to Article 7(3) of the EUMR, the European Commission may, on request, grant derogation from the standstill obligation. This article clarifies that in deciding on this request, “the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. Derogation may be applied for and granted at any time, be it before notification or after the transaction.” The Chinese AML does not contemplate a similar option.


\(^{173}\) Ibid.
(hereinafter, “Notification Rules”) which became effective on January 1, 2010.\footnote{174} The Notification Rules as well appear to have been inspired to the EU model. Article 8 of the Notification Rules provide that, before filing a concentration, the parties to a transaction may contact the enforcement authority for issues related to the notification and state that the enforcement authority will offer guidance to facilitate the filing process.

Moreover, the AML applies a two-stage review procedure similar to that of the EU. According to Article 25 of the AML the enforcement authority: “shall conduct a preliminary review of the reporting undertakings, decide on whether to initiate further review, and notify the undertakings in writing of its decision within 30 days from the date of receipt of the documents and materials submitted by the undertakings in accordance with Article 23.” In addition, according to Article 26, if the enforcement authority decides to initiate further review, it shall complete the review within 90 days but this term may be extended by 60 days if “(1) the undertakings agree to extend the time limit for the review; (2) the documents or materials submitted by the undertakings are inaccurate and need further verification; or (3) material changes have occurred with respect to relevant circumstances since the undertakings filed the notification.” If the enforcement authority makes no decision within the time limit, the undertakings may implement the concentration.\footnote{175}

The duration of the entire process is in line with EU practice. However, unlike to what is provided under the EUMR, the AML does not clarify on the basis of what factors the enforcement authority may decide to initiate a second phase of review. This aspect undermines therefore legal certainty by leaving too much discretion in the hands of the enforcement body. In this sense, some commentators suggested that a clarification of this issue would be beneficial for all parties concerned with a transaction.\footnote{176}

\footnote{174} The text of the Notification Rules (in Chinese) is available at MOFCOM’s website http://www.mofcom.gov.cn/.
\footnote{175} Article 26(3) of the AML.
\footnote{176} Bush, supra note 107, at 8. This point was also raised in a meeting with Miguel Ceballos Baron, former Director of the Trade and Investment Section of the Delegation of the European Union to China, Beijing, October 2010.
Ultimately, similar to the European Commission, the Chinese enforcement authority is also entrusted with broad powers of investigation such as, for instance, entering into business premises of the undertaking being investigated or other relevant places for inspection, questioning the undertakings being investigated, interested parties, and other relevant organisations or individuals, requesting them to clarify the relevant facts and circumstances; and examining or copying relevant documents, agreements, accounting books and other materials of the undertakings being investigated, interested parties, and other relevant organisations or individuals.  

Article 27 of the AML lists the factors that the enforcement authority shall take into consideration in the review of a proposed transaction. These include: “(1) the market shares of undertakings and their ability to control of the market; (2) the degree of concentration in the relevant market; (3) the possible effect of the concentration on market access and technological progress; (4) the possible effect on consumers and other relevant undertakings; (5) the effect that the concentration may have on the development of the national economy; (6) other factors affecting the market competition that the enforcement authority shall deem relevant.” Also with reference to this provision, the listed factors largely correspond with those under the EU M&A regime. Furthermore, the test introduced by Article 28 AML, according to which the enforcement authority may decide to prohibit a concentration “if such concentration has or may have the effect of eliminating or restricting competition”, also recalls the EU approach.

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177 Articles 38-45 of the AML.

178 Article 2(1) of the EUMR states that: “[T]he Commission shall take into account: (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or out the Community; (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition.”

179 Article 2(3) states that: “A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.”
Article 28 of the AML adds that the enforcement authority may decide not to prohibit a concentration if the undertakings can prove that the positive effects of such concentration on the competition obviously outweigh its negative effects or that the concentration is in the public interest.\(^\text{180}\)

The reference to the potential impact that a concentration could have on the development of the national economy and other public policy concerns is inconsistent with the EU regime. This provision leaves huge discretion in the hands of the enforcement authority to take into consideration public and industrial policy concerns when reviewing a merger.\(^\text{181}\)

Another controversial provision is Article 31 which may favour a “patriotic” enforcement of M&A rules. Article 31 reads: “If the merger with or acquisition of domestic enterprises by foreign investors or other forms of concentration involving foreign investors concerns national security, in addition to the review of concentration of undertakings in accordance with the provisions of this Law, it shall be examined for national security review in accordance with relevant regulations of the State.”\(^\text{182}\)

With reference to this issue Article 21 of the EUMR reads: “Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph. Any other public interest must be communicated to the Commission by the Member State concerned and shall be

\(^{180}\) Furthermore, according to Article 29, if the enforcement body decides not to prohibit the concentration, however, it may decide to impose restrictive conditions to reduce the adverse effects of concentration on market competition.

\(^{181}\) For discussion, see Chapter III.

recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.” However, it should be noted that the European Commission takes a very cautious approach in relation to the legitimate interests that member States can invoke to block a merger, including national security.183

2.4 Enforcement procedure

The enforcement mechanism of the AML is formed from two parts: administrative enforcement and judicial enforcement. With reference to administrative enforcement, this consists of two levels. The Anti-Monopoly Commission (hereinafter, “AMC”) established in 2008 under the State Council184 and the Anti-Monopoly Law Enforcement Authorities (hereinafter, “AMEAs”).

The AMC is not directly responsible for enforcing the AML but it has the task of organising, coordinating and providing guidance for its implementation. In this respect, Article 9 of the AML states that: “The Anti-Monopoly Commission shall perform the following duties: (1) to research and formulate competition policies; (2) to organize investigations, assess the overall market competition conditions, and publish the assessment reports; (3) to formulate and promulgate anti-monopoly guidelines; (4) to coordinate the anti-monopoly administrative enforcement work; (5) to undertake other duties as designated by the State Council.”


184 The State Council is the highest executive organ of State power, as well as the highest organ of State administration.
The second level of enforcement consists instead of three enforcement authorities and which share the task to enforce different sections of the AML. These are: MOFCOM, with its Anti-Monopoly Bureau, that is responsible for merger review; NDRC, with its Price Supervision Department, that is responsible for restrictive agreements and abuses of dominant position that are price-related; and SAIC, with its Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau, that is responsible for restrictive agreements and abuse of dominant positions that are not price-related.¹⁸⁵

With reference to judicial enforcement instead, private parties can apply for judicial remedies by means of civil or administrative litigation. Civil litigation is dealt with Article 50 of the AML that reads: “Undertakings that cause loss to others as a result of their Monopolistic Conduct shall be liable for civil liabilities in accordance with the laws.” On July 28, 2008 the Supreme Court promulgated a Circular (hereinafter, “Circular”) requiring courts to accept anti-monopoly related civil cases which shall be decided by their respective IP sections.¹⁸⁶ However, the Circular did not specify procedural rules for private litigation. Therefore, in order to provide guidance in relation to this issue, on 25 April 2011, the Supreme Court published on its website a draft of the Provisions by the Supreme People’s Court on the Issues Regarding the Application of Law in Handling Anti-monopoly Civil Litigation Cases for public comments that deals with private rights of action under the AML and provide detail on issues such as jurisdiction, evidence and burden of proof and remedies.¹⁸⁷

As regards administrative litigation, the situation is more complex.

¹⁸⁵ Interestingly, this division of power among the three agencies reflects the enforcement system before the enactment of the AML. See Chapter I section 2.3.
¹⁸⁷ See Gavin Robert, Yuan Cheng, Jonas Koponen and Simon Poh, China’s Supreme Court issues rules on Private Actions under the Anti-Monopoly law, Links to China, (May 2011), available at http://www.linklaters.com/Publications/AsiaNews/LinkstoChina/Pages/Chinas_Supreme_Court_Is
According to China’s administrative law, private parties who consider that their legitimate rights have been violated by an administrative act may decide to proceed as follows. China’s Administrative Litigation Law (hereinafter, “ALL”) provides that private parties may either apply for administrative reconsideration to the competent administrative agency or start a legal proceeding against the administrative agency before a court. Furthermore, private parties who decide to apply for administrative reconsideration are still entitled to file for administrative litigation if they are not satisfied with the result.188

In this regard, it was noted: “Based on the notion that the judiciary is perceived as a far more impartial arbiter than government agencies, the Administrative Litigation Law contemplates a mechanism under which immediate judicial review of administrative act would be available in most circumstances.”189 Nevertheless, Article 53 of the AML partly derogates from this procedure. On the one hand, administrative decisions on restrictive agreements and abuses of dominant positions fall within the scope of application of the ALL which provides that private parties may choose to either apply for administrative reconsideration or to start an administrative lawsuit. On the other hand, in the area of merger control, it appears that the only immediate remedy for private parties who are dissatisfied with MOFCOM’s decision is to apply for administrative reconsideration. This solution is not without consequences for private parties. Under China’s Administrative Reconsideration Law190 (hereinafter, “ARL”) if a party is not satisfied with a decision made by a section of the State Council, it may apply for administrative reconsideration at the same department. This entails that MOFCOM will be entitled to review its own decisions. The final result is that merging parties will not have the right to apply for judicial review of MOFCOM’s decisions.191

189 Ibid. at 639.
191 Ibid. at 640.
Except for this intricate aspect in the area of merger control, more generally the tripartite enforcement system may create frictions between the AMEAs. As seen, SAIC is responsible for investigating and sanctioning anticompetitive agreements, abuses of dominant position and abuses of administrative power that are not price related, while the NDRC is responsible to deal with the same types of restraints as SAIC but that are price related. In this sense, this may create various problems of coordination between SAIC and NDRC, for example, in relation to restrictive agreements mixing together price related and non-price-related restraints.

With reference to this sensitive issue, Xu Kunlin, Director General of NDRC’s Department of Price Supervision stated: “Since the AML came into effect, NDRC and SAIC have gradually stepped up communications and cooperation, and there is also close cooperation between the provincial price authorities and the local administration for industry and commerce, and such cooperation has been proven effective. For instance, in the drafting of the implementing rules for the AML, the two authorities had many discussions regarding the common areas involving both authorities in anti-monopoly enforcement procedures, and reached a common understanding on those areas. Information and comments are exchanged between the authorities on an ongoing basis at meetings or by other means regarding reported suspected monopolistic activities. In the course of enforcement, NDRC will continue to cooperate with SAIC to explore and set up a case coordination mechanism and it is possible that the two authorities may jointly investigate high profile cases with significant impacts and media attention.”192 Similar considerations were put forward by Ning Wanglu, Director General SAIC’s Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau.193 However, in a recent competition case on anti-

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193 Mr Ning Wanglu stated: “There are clear divisions between SAIC’s and NDRC’s responsibilities in antimonopoly, as mandated by the State Council. The two agencies have smooth information exchange channels and have cooperated closely. In 2010, we have experimented with
competitive bundling (i.e. a non-price-related conduct), surprisingly it was NDRC to intervene instead of SAIC.\textsuperscript{194} In this sense, it appears that a clear division of task between the two enforcement agencies is still controversial.

In general, by looking at the architecture of the enforcement mechanism introduced by the AML, it appears that China has opted for an administrative enforcement system inspired by the EU. The main reason why drafters of the AML opted for this solution is related to the structure of the EU enforcement system. The comparison between the two major competition law jurisdictions, the US and the EU, shows that the former is more court-oriented whereas the latter is more administrative agency-oriented.\textsuperscript{195} The responsibility to enforce antitrust law in the US is conferred upon various parties, public and private.\textsuperscript{196} For example, one of the main enforcement “agency” in the US is the private plaintiff, who may decide to initiate a legal proceeding before a court.\textsuperscript{197} On the contrary, the People’s Republic of China is traditionally the realm of administrative enforcement and, therefore, it would have been difficult to adopt the US enforcement model in the area of competition law. Interferences from State agencies, inter-court and intra-court influence and bribery are still widespread phenomena and, even if the Chinese government has begun to tackle these problems, this fight has often yielded limited success.\textsuperscript{198} As Professor Gerber said: “[In China] the administrative bureaucracy has extensive influence over economic development and, frequently, individual firm conduct. To eliminate its regulatory role completely, and immediately create a U.S.-style court-oriented

\textit{NDRC in setting up a case coordination mechanism. For cases that involve both price and non-price related conduct that require prosecution by both agencies, we would cooperate closely. In fact, our first anti-monopoly case was prosecuted together with NDRC and other relevant departments.”} See Deng Fei and Zhang Yizhe, Interview with Ning Wanglu, Director General of the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau Under the State Administration for Industry and Commerce of People’s Republic of China, The Antitrust Source, (February 2011) available at http://www.nera.com/nera-files/PUB_ATSource_SAIC_0311.pdf.

\textsuperscript{194} Zhang, supra note 188, at 645.


\textsuperscript{196} Ibid. at 428.

\textsuperscript{197} Ibid.

system is likely to be politically difficult, if not impossible. Such a move would be made particularly difficult by the fact that China’s bureaucracy has power and status. It is central to the political system, and it would be in a position to undermine competition law development if that were seen to be inimical to its interests.” In this sense, the EU administrative enforcement model could better fit the Chinese context.

Competition law enforcement in Europe has been traditionally characterised by a centralised model where the European Commission “enjoyed a de facto and in some instances, notably the granting of individual exemptions under Article 81(3) EC [now Article 101(3) TFEU], a de jure enforcement monopoly, while with one or two notable exceptions the role of national legal systems and courts was marginalised.” Nonetheless, in China, the preference for an administrative enforcement model in the area of competition law has also more pragmatic justifications. The decision to assign a limited role to the judiciary in enforcing the new AML does not depend only on the doubts about its independence but also on the fact that Chinese judges often lack experience and training to deal with competition cases. This situation was a further reason not to confer them much authority in enforcing the AML.

3. China’s Anti-Monopoly Law and the legacy of socialist law and ideology

The analysis conducted so far shows that the AML bears the strong mark of the EU competition law model in terms of language, contents and general architecture. Nevertheless the most striking divergence of the Chinese system

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201 This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, May 2010.
with its inspiring prototype consists of a relatively high degree of flexibility, if not vagueness and, at times, opacity of the adopted rules.

This may be partly explained by considering that Chinese legislators conceive the AML as a lex generalis to be integrated by more specific laws, regulations and guidelines. As previously discussed, after the enactment of the AML, the Chinese authorities have been rather active in issuing further legislative measures covering various aspects of the new-born system of competition law. 202

However, more profound reasons seem to justify this choice. Most of the country’s fundamental statutes have traditionally been drafted in general or abstract form. 203 One of the main features of legislative drafting in China is that primary laws should be both “general” (yuanzexing) and “flexible” (linghuoxing). 204 These are intrinsic characteristics of Chinese law making and are usually referred as the policy of “preferring the coarse to the fine” (yicu bu yixi). 205 The underlying rationale of this approach is that so-drafted legislation can be more easily implemented throughout the country and better adapted to local circumstances. 206 As Perry Keller notes: “The principle of generality and flexibility captures the essential concept of Chinese law making that legislation must reflect the unitary nature of the state while satisfying the needs of regional diversity.” 207 Furthermore, “It also accords the principles of legislative stability

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202 For further discussion, see: Di Federico, supra note 154, at 261. For instance, Article 51(2) of the AML expressly states: “if there are other provisions in laws and administrative regulations concerning the regulation of actions eliminating or restricting competition that are taken by administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs that abuse their administrative powers, such other provisions shall prevail.”

203 Perry Keller, Legislation in the People’s Republic of China, University of British Columbia Law Review, Vol. 23, (1988-1989), 653-688. It is worth remembering that the legislative reform programme launched under Deng Xiao Ping’s leadership envisioned the implementation of a system of enforceable rules of universal conduct to progressively limit the discretionary control of government officials. Ibid.

204 Perry Keller, Sources of Order in Chinese Law, American Journal of Comparative Law, Vol. 42, (1994), 711-759, at 750. It was noted that the origin of this vision dates back to Chairman Mao who praised the Chinese Constitution of 1954 for its generality and flexibility. Ibid.

205 Ibid.

206 Ibid.

207 Ibid. at 751.
(wendingxing), as it permits the effective amendment of the law through changes in interpretation rather than through alterations of the actual text.\textsuperscript{208}

Thus, it appears evident that, despite an undisputed openness to novelty and to foreign contaminations, the AML is perfectly in line with the traditional method of Chinese law making. Furthermore, far from being just a matter of style, the flexibility and vagueness of most of its provisions reflect the Chinese legislator’s view about the country’s new economic constitution.

Like most Chinese legislation, the AML finds its place within a wider context of the tradition of socialist law. Of course, China moved away from a planned economy inspired by the Soviet model a long time ago and its decision to embrace the principles of a market economy have demanded the implementation of forms and reforms unknown in the traditional system, however, this does not mean that the socialist framework and ideology have been abandoned.\textsuperscript{209}

Deeply inspired by Marxism, socialist legal theory in Maoist China emphasised the close relationship between the State and law. Law was conditioned by the State and had to be defined by reference to the State.\textsuperscript{210} As summed up by Carlos Wing-Hung Lo: “It took on a political complexion; and legal theorists always had to refer to political theory, or more particularly to ideology. Socialist theory, therefore, was positivistic, seeing law as being laid down by the state and geared to serve the interests of the state until communism saw the state transcended.”\textsuperscript{211} In this regard, as Tay and Kamenka clarify, this vision stressed the accent on the “extra-legal presupposition about the nature and the function of law in the economic context, and in the rejection of law as independent of the state in practice.”\textsuperscript{212}

It would be simplistic to conclude that the enactment of market-oriented legislation based on Western models, in particular for the purpose of developing a

\begin{footnotesize}
\textsuperscript{208} Ibid.
\textsuperscript{209} This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, May 2010.
\textsuperscript{211} Ibid. at 471.
\end{footnotesize}
socialist market economy, made this perspective obsolete. The collapse of the planned system and the epochal economic reforms which followed, may have erroneously persuaded some Western commentators that the underlying philosophy of the Chinese legal system has also changed. However, it should not be overlooked that the concept of socialist market economy “is still bent in the direction of the old statist teleology.”

The analysis of market-oriented legislation in China has often focused on the issue of “how far and how fast” this should be implemented and criticism about reluctance and delays in its implementation by Chinese authorities have mainly been attributed to the country’s immature legal culture. This is undoubtedly true. The re-adaptation of the traditional legal system to the new economic scenario and the deriving challenges have required much time and effort, and it is evident that this could not be done at an accelerated pace by a political leadership educated in legal nihilism.

However, as famously noted by Stanley Lubman’s in relation to the methodological problems in the study of Chinese law: “[M]ajor obstacles to [this] study are created by the object of study itself […] [f]oreign observers create additional difficulties by not being self-conscious enough about their own theoretical assumptions. Both extreme cultural relativism and insistence on intellectual categories derived from Western legal systems have threatened to skew study, with the latter trend more evident in recent years.” Thus, China’s cautious openness to foreign legislative experience in various areas, including competition law, finds also specific theoretical justifications.

Law reform in China has never been intended by its leadership as a means to alter the country’s political and ideological foundations. Rather, Western legal

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213 Wing-Hung Lo, supra note 210, at 471.
215 Ibid. at 476.
216 Lubman, supra note 3, at 295. Lubman further considers that: “[B]oth the problems inherent in the subject-matter and in the foreign students’ methodology may be more manageable in a research strategy that would aim at searching for institutional functions while widening the study of Chinese law to include Chinese legal culture.” Ibid at 294.
concepts and traditions have been adapted within the wider framework of socialist law and have been accommodated to the basic principles of Chinese socialism.\textsuperscript{217}

4. China’s socialist market economy: the role of the State

On October 18, 1992, Jiang Zemin, at that time President of the People’s Republic of China, addressed the participants at the Meeting of the 14th National Congress of the Communist Party: “The purpose of the Socialist Market Economic System, which China is going to establish, is, under the macro-economic control of the socialist state: to give full play to the basic role of the market in the allocation of resources; to ensure that economic activities are carried out in accordance with the law of value and adapted to the changes in between supply and demand; to use the lever of price and the competition mechanism to allocate resources to the places where they can produce the best economic results; to implement the system of selecting the superior and eliminating the inferior so as to give pressure and impetus to the enterprises; to promote the timely adjustment of production and demand by taking advantage of the sensitivity of the market to various economic signals.”\textsuperscript{218}

Chinese scholars, in an attempt of mitigating Western scepticism in relation to China’s decision to embrace a market economy, have always emphasised the goals of the new economic model as listed by Jiang Zemin to demonstrate that the basic mechanisms under a market economy, including market and competition mechanisms, also constitute the basis of China’s socialist market economy.\textsuperscript{219} However, what has perhaps been overlooked is Jiang Zemin’s

\textsuperscript{217}Wing-Hung Lo, supra note 210, at 472.
\textsuperscript{219}Wang, supra note 42, at 214. In their view, it followed that since the Chinese socialist market economy was a market economy, Chinese decision makers should enhance competition in the market. On the one hand, competition mechanisms was supposed to help the elimination of low-efficiency enterprises and unreasonable production procedures. On the other hand, market competition should encourage enterprises to update their technology and products, and to improve management. Ibid.
premise to his reasoning when the Chinese leader expressly states that the new economic system will continue to operate “under the macro-economic control of the socialist state.” The role of the State within a socialist context is therefore the key element which distinguishes Chinese market economy from Western market economy.220

As previously discussed, an essential aspect of China’s reform process has been the expansion of the role of the market and the reduction of the role of the State into the economy.221 Since the late seventies, the Chinese government has pursued a process of market reform within a context of political and social stability by giving priority to the regulative role of the law in the socialist market economy and by implementing specific economic legislation. However, the transformation of a planned economy into a more market oriented one has required more than the dismantling of the traditional economic apparatus. Market rules can have a dramatic impact on the distribution of resources into the Chinese society. Thus, the way these rules are drafted and implemented assumes immense importance. The decision to expand the role of the market was only the first of many critical decisions taken by the Chinese government in its attempt to move away from the failure of the Marxist economic model. When implementing new legislation and, in particular, economic legislation, Chinese leaders have therefore been confronted with unprecedented policy choices such as the necessity to reconsider the nature and the extent of the control of the State over the market.222

Leading Chinese scholars agree that: “over the years all Chinese leaders have made it quite clear that the country’s cultural and ideological purity may not be sacrificed for temporary economic growth and, in this regard, the authority and validity of socialist thought appears therefore to stand beyond challenge.”223

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221 See discussion in Chapter I.
222 This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, May 2010.
223 Wing-Hung Lo, supra note 210, at 485.
It follows that China’s market economy is not intended to be an economy free of State regulation. The process of delineation of new market rules has been considered by the Chinese government in its own way as a new form of State intervention not so dissimilar from that under the traditional planning system. The expression coined during the reformation period to explain this vision was: "the state regulates the market, and the market guides the enterprises" (guojia tiaojie shichang, shichang yindao qiye). Thus, the reform of the existing economic system has only modified the traditional view about the role of planning and markets.

Arguably, nowadays, the Chinese government still aims to retain control over the economy in order to pursue specific policy goals, such as promoting strategic industries, protecting the development of domestic SMEs and ensuring social stability.

Macroeconomic policy instruments have therefore become its primary tools to intervene into the economy. In this respect, the Chinese government has been modifying its activity from directly planning and redistributing economic resources to managing ad hoc policies in order to adjust those resources and the market. Over the years, the State has therefore progressively become “more flexible, entrepreneurial, legalistic and technocratic” and, although it does not monopolise economic development as in the past, it intervenes into China’s economy by means of macroeconomic policies which are critical to it. Far from repudiating the central role of the State into the economy, this approach privileges

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224 This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, May 2010.
226 Ibid. at 289.
230 Ibid.
a more detached and indirect control of economic development through policies and legislation, including competition legislation.\textsuperscript{231} In this respect, the analysis of China’s economic law, notably competition law, cannot ignore the nature and the degree of State intervention into the market.

5. China’s socialist market economy: the role of the Communist Party

In China, terms such as State, government, leadership are almost always synonymous to indicate the CCP. Far from being a party in the traditional sense the CCP controls most aspects of social life in China by means of a capillary structure of power.\textsuperscript{232} Since law represents the main instrument to govern the Chinese society, the role and influence of the CCP are therefore immense and critical also over legislation. In this regard, an analysis of Chinese law, including competition law, cannot disregard the relationship between the CCP, State institutions and legal system.

The relationship between the CCP and State institutions with reference to the law-making process in post-Maoist China has been a highly debated issue among Chinese scholars. It should be noted that following the reform of the legislative process initiated in the late seventies, State institutions have replaced the CCP as the main source of Chinese legislation. The legislative role of the Party is apparently no longer prominent as it once was. However, the influence of the Party’s policies and directives in the new legal system remains controversial.\textsuperscript{233}

\textsuperscript{231} This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, May 2010.
\textsuperscript{232} For an insightful discussion about the history and the characteristics of the Chinese Communist Party, see Zou Keyuan, \textit{China’s Legal Reform Towards the Rule of Law}, Martinus Nijhoff Publishers, (2006).
\textsuperscript{233} For a review of Chinese literature and an insightful discussion on this issue, see Keller, supra note 203.
The debate over this issue has been summed up in the following question: “Is Law or the Party superior?” (dang da haishi fa da). Although, the CCP is not formally empowered with the task of enacting legislation, the Chinese Constitution in its preamble acknowledges the Party an undisputed authority for leading the country and the society. This questionable and cumbersome legal basis has been considered more than sufficient to justify the pervasive involvement of the CCP in the enactment, interpretation and enforcement of the law.

For Western legal scholars educated in the doctrine of the separation of powers, the close relationship existing between the Party Constitution and the Constitution of the State seems ambiguous. Although, the Constitution of the State does not clarify what role the CCP should play in constitutional changes, “However, due to the one-party rule in China, which is usually defined as a party-state, the Party directs the adoption of the State Constitution and subsequent changes, and tries to harmonise the State Constitution with the Party Constitution in reality.” This situation perpetuates the subordination of the content of the law to Party directives and policy which continue to maintain their innate superiority, although they are formally ineffective before being transposed into legislation by State institutions.

The process of transposition of Party policy into law deserves further attention. Since 1978, when the CCP decided that economic development should become the priority in its political agenda, the role of law as an instrument also shifted from serving class struggle to pursuing the new goal of economic development. However, unlike what happens in Western democracies, where law relates to concepts such as freedom, justice and individual rights, the primary source for law in China remains “actuality” (shiji) as determined by the

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234 Ibid.
235 For discussion, see Randall Peerenboom, Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China, Cultural Dynamics, Vol. 11, (1999), 315-351.
236 Keyuan, supra note 232, at 47.
237 Keller, supra note 204, at 730.
Communist Party. \(^{239}\) “Actuality”, which is now indentified by the Party leadership with economic development, is therefore relied on in most political speeches, almost as a mantra, as a justification for most legislation. \(^{240}\) It was noted, that the idea that “actuality” produces law comes from the traditional Marxist doctrine which emphasises the necessity for the State to pursue continual legal reform. Each phase of China’s social development should be accompanied by the enactment of ad hoc legislation. Law should adapt to the development and change of the political, economical and social context. Only by doing this “there be harmony and consistency between the different laws and regulations and society. When changes arise in society, the law should change to re-harmonise the internal relations within society.” \(^{241}\)

However, the intrinsic vagueness of this concept allows the Party huge discretion to justify all actions. Through “actuality” the CCP inextricably links law to its policy. \(^{242}\) The shift from the idea of law as an instrument of class struggle to the idea of law as an instrument of economic development exemplifies this link. The Party first determines what “actuality” is, then by means of policy, issues appropriate legislation. \(^{243}\) Although in recent years, also as a result of more openness to Western legal theory and external pressure from international institutions, notably the WTO, requiring more transparency and commitment to the rule of law on behalf of Chinese institutions, the debate in academic and government circles in China about the proper relationship between law and Party policy has been reopened and the most conservative views have partly been softened, the dominant position still holds that the CCP policy is the foundation of law and it contains its guiding principles. \(^{244}\)

The understanding of the nature and the role of the Constitution itself in China has a different meaning from that usually given to it under Western

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\(^{239}\) Xingzhong, supra note 238, at 42.


\(^{241}\) Xingzhong, supra note 238, at 43.

\(^{242}\) Ibid. at 47.

\(^{243}\) Ibid.

\(^{244}\) For further discussion, see Pitman B. Potter, Legal Reform in China: Institutions, Culture and Selective Adaptation, Law & Social Enquiry, Vol. 29, Issue 2, (April 2004), 465-495.
democracies. Despite the fact that the Chinese Constitution is considered the highest sources of law, it represents a statement of the current policy of the Party. As Professor William C. Jones noted: “When the policy changes, the law ipso facto changes.”

6. China’s Anti-Monopoly Law and the role of the Communist Party’s policy

Similar considerations also apply in relation to all other branches of Chinese law, including competition law. Thus, the study of competition law in China should take into consideration how the new AML relates to the political, economic and social context existing when the law was enacted and to the related actions and policies taken by those who enacted it.

The general provisions contained in the preamble of the AML, in consequence, are perhaps the most clarifying part of the law since they contain a general summary of the CCP policy. The AML has a close and continuing relationship with these policies and it will likely evolve accordingly. The AML should, in consequence, be considered as part of a wider process whose understanding can help to better clarify the patterns and the evolution of Chinese competition law. Presumably, this is the most correct way of looking at competition law in a country like China where the CCP de facto detains legislative power.

The AML, as most other laws, formalises the Party’s current policy in a more particularised way and it may serve as an instrument to exert economic and social control in the socialist market economy. Arguably, ideological and political statements assume, in China, greater importance than elsewhere because they often become the basis for the formulation of policies and legislation.


246 Ibid.

247 This point was raised in a meeting with Professor Chenying Zhang and Chenghuang Wang at the School of Law of the Tsinghua University, Beijing, 2010.
Although, these statements should not be overestimated or considered as permanently valid or binding, if they seem to reflect China’s current conditions, they represent a useful indication of what the Chinese government considers to be a priority for the country.\textsuperscript{248} In this sense, referring to official statements may sometime be of more value than a detailed analysis of competition rules.

The close relationship between the wording of various articles of the AML and the vocabulary normally used by government officials in their policy statements further confirms the instrumental nature of the AML’s language.\textsuperscript{249} Thus, in many instances, the provisions of the AML should also be read in relation to current governmental policies.

7. China’s Anti-Monopoly Law and its goals: between East and West

As Bork noted: “Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or several? If by several, how is he to decide cases where a conflict in values arises? Only when the issues of goals have been settled is it possible to frame a coherent body of substantive rules.”\textsuperscript{250}

Interestingly, similar questions have also surfaced in developing countries which have recently decided to establish their own system of competition law. The process of formulating goals is an essential aspect in the drafting of a new competition statute. Different competition law systems can conceivably pursue different goals and, in this sense, transitional economies with their limited experience and culture in the area of competition law do not necessarily consider

\begin{footnotes}
\item[248] Ibid,
\item[249] This use of language still reflects the legacy of socialist ideology. For further discussion, see Chen, supra note 238.
\item[250] Bork, supra note 123, at 50.
\end{footnotes}
economic efficiency or consumer welfare as the main objectives of their competition law regimes.\(^{251}\)

Similarly to other Asian countries, in this transitional phase to a market economy, China conceives competition law as an instrument to pursue a multiplicity of objectives including public and industrial policy goals.\(^{252}\) This is made immediately clear by the text of new Chinese AML which at Article 1 reads: “This law is enacted for the purposes of preventing and prohibiting Monopolistic Conduct, protecting fair market competition, promoting efficiency of economic operation, safeguarding the interests of consumers and the public interests, and promoting the healthy development of the socialist market economy.”

The enactment of the new AML in 2008 has reinvigorated the traditional debate on the interface between competition law enforcement and the pursuit of public and industrial policy objectives in China.\(^{253}\) Similarly to what happens in other transitional economies, one main debated issue is in fact whether a stringent enforcement of competition rules may compromise the achievement of industrial policy goals.\(^{254}\)

With reference to the objectives of industrial policy in transitional economies, it was noted that these countries: “have in mind the potential for long run productivity growth improvements. However, in most cases industrial policy is pursued with multiple objectives, increasing short-term employment, increased output, better income distribution and enhancing technological capacity. They are often also, rightly or wrongly, non-economic objectives of national pride and


\(^{252}\) Ibid. at 19.

\(^{253}\) For discussion, see Jiang Xiaojuan, supra note 17.

\(^{254}\) This issue has also been addressed in regional fora and within the context of multilateral organisations such as the WTO, where, inter alia, the opportunity to introduce competition law provisions within the framework of international trade agreements has been discussed. See Simon J. Evenett, Would enforcing competition law compromise industry policy objectives?, in S. Evenett and D. Brooks (eds.), Competition Policy and Development in Asia, Routledge, (2005), 1 – 41.
prestige, as well as the perceived need to promote ‘strategic’ domestic industries.”

Furthermore, “These objectives are further confused to the extent that many developing economies have taken the view that ownership of assets matter. There is a concern that foreign ownership may not always fit in well with broader development objectives, including enhancing domestic capabilities. In some cases, foreign ownership could crowd out domestic firms. Thus, even if the World Bank definition is adopted...the fact remains that developing countries have raised concerns about the source of growth.”

These considerations perfectly reflect China’s current approach to the matter. In recent years, a series of government interventions aimed at maintaining State ownership of strategic sectors of the Chinese economy, establishing national champions and promoting “indigenous innovation” confirm the country’s renovated faith in industrial policies. In this respect, various government official and scholars have recently addressed the issue about the role that industrial policy considerations should play in the enforcement of the new AML.

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255 Bijit Bora, Peter J. Lloyd and Mari Pangestu, Industrial Policy and the WTO, Policy Issues in International Trade and Commodities, UNCTAD Policy Issues in International Trade and Commodities, Study Series No. 6, (1999), 1 – 45, available at http://r0.unctad.org/ditc/tab/publications/itcdtab7_en.pdf. These authors also noted that the term “industrial policy” is not well-defined in relation to the objectives, the industries that are covered and the instruments that are used. The World Bank (1993) formulated a working definition of this expression as “government efforts to alter industrial structure to promote productivity based growth”. In this regard the concept of industrial policy so defined has been considered rather useful “since focuses on the objective of economy-wide factor productivity growth rather than on merely changing the structure of industrial outputs.” Ibid. at 1. In general, see also, World Bank, The East Asian Miracle: Economic Growth and Public Policy, Oxford University Press, (1993).

256 Ibid. at 1 - 2.

257 In February 2006, the State Council issued: “The Guiding Principles of Program for Mid-to-Long Term Scientific and Technological Development (2006-2020)” and a notification about a series of accompanying policies for implementing the program. In this regard, the improvement of “indigenous innovation” has become one of the key aspects of all science and technology related work. Furthermore, the promotion of “indigenous innovation” is supposed to be carried out by means of tax incentives, financial support and technological investment. For an insightful analysis of this policy, see James McGregor, China’s Drive for “Indigenous Innovation” A Web of Industrial Policies, Report of the U.S. Chamber of Commerce, (July 2010), available at http://www.uschamber.com/sites/default/files/reports/100728chinareport_0.pdf.

258 This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, January 2011.
Mr. Zhao Xiaoguang, Director of the Department of Industry, Transport, and Commerce of the Legislative Affairs Office of the State Council, noted that the AML: “should be classified as one of the basic laws of the state which is vital to safeguard and promote the sound development of market economy.”

Nevertheless, considering that the size of Chinese companies is still relatively small and their competitiveness on the market is still rather limited, argued: “The industrial policy of the state is to encourage companies to develop themselves and become bigger and stronger through means such as mergers and restructuring, to develop the economies of scale, increase economic efficiency, strengthen enterprise innovation ability, and thus increase the overall developing level and international competitiveness of our economy.”

He further added: “Therefore, the guiding role and regulatory functions of the Anti-Monopoly Law have to be exercised, make the Anti-Monopoly Law a powerful policy tool of inhibiting monopoly, encouraging competition, increasing the quality of introduced foreign investment, and promoting the adjustment of the economic structure and the development of economies of scale.”

Chinese authorities face therefore the challenge to find a balance between the necessity to introduce more competition into the market and the intention to pursue industrial policy goals. The new AML represents a powerful instrument to coordinate competition concerns and industrial policy considerations. Yet, as a consequence of China’s immature competition culture and the country’s ideological framework, it may instead be used to favour the implementation of those policies identified as priorities by the Communist Party.

This risk is made more concrete by the text of the AML itself. As seen in Article 1 of the AML, by articulating a multiplicity of objectives a huge discretion is left in the hands of the enforcement authorities to determine the enforcement priorities of the law according to circumstances. Furthermore, Article

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259 Zhengxin Huo, supra note 109, at 44.
261 Ibid.
4 of the AML points out that: “The State shall formulate and implement competition rules suitable for the socialist market economy to improve control of the macro-economy and to strengthen a unified, open, competitive, and orderly market system.”

As Nathan Bush noted: “China’s competition authorities will inevitably confront conflicts between promoting consumer welfare and economic efficiency and achieving the immediate objectives of Chinese industrial policy. The text of the AML invites antitrust enforcers to consider non-antitrust goals; in Beijing’s current policymaking environment, on some occasions this invitation may not be easily refused.”

China has embraced the idea of a “socialist market economy”. Such an economic model has its roots in an ideological framework which tends to minimise the intrinsic value of competition. Within this context, competition is therefore mainly valued for its capacity of promoting economic development in line with governmental policies. Furthermore, the concepts of “competition” and “competition law” still have negative associations, because prior to the late seventies they had been considered as antithetical to the triumph of Chinese communism.

In this sense, although China’s attitude towards competition has undergone a definite reversal, even if its positive valuations tend to be principally instrumental to the achievement of the goals set by the CCP. This vision does not easily value a law such as the AML, whose expected aim should be to protect the competition process, “other than for purely instrumental reasons.”

It follows that until such an instrumental view of competition predominates, the AML will not enjoy a completely autonomous status, and, most likely, it will continue to be viewed as complementary to other policies which are considered by

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263 Gerber, supra note 5, at 291.
264 Ibid.
265 Ibid.
the CCP as more effective for pursuing the goal of economic development at a particular time.\footnote{Ibid. Bush further notes that: “This does not, however, necessarily imply that industrial policy will drive competition policy in all circumstances. In the absence of overriding industrial policy goals, the antitrust enforcement authorities retain considerable discretion to follow their default competition rules.” Bush, supra note 260, at 13.}
CHAPTER III
THE “CHINESE” WAY TO MERGER POLICY

Introduction

In recent years, various issues have emerged in relation to China’s merger policy. Economic theory alone is not sufficient to explain China’s competition law system. Its goals, its scope of application and its “raison d’être” are firmly rooted in its political, economic and social history which also charts the course of its future development and targets. In order to fully understand China’s competition legislation and, notably, its AML, it is necessary to consider the underlying economic and regulatory context as resulting from the ongoing process of transition from a planned to a market economy. The enforcement of the AML also relates to the perception that Chinese decision makers have about the role of competition law in China’s economic development and social stability.267

Yet today, more than thirty years after the decision to shift to a more market oriented economy, the general attitude towards competition law is still rather ambivalent. On the one hand, the Chinese government has recognized the negative effects of market fragmentation, administrative monopolies and concerted practices for the establishment of fair and free competition in the country. Anti-competitive practices such as administrative monopolies have been fiercely criticised by Chinese scholars and, over the years, a general consensus has also grown about the necessity to introduce more competition into those Chinese industries traditionally dominated by the State.268

On the other hand, however, Chinese leadership continues to express its concerns about the growing number of acquisitions of domestic companies by foreign investors.

267 This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, January 2011.
268 See Chapter I, section 1.4.
As a consequence of China’s accession to the WTO in December 2001, the Chinese government made a series of commitments to open up various sectors of its economy. Following this wave of reforms, multinational corporations started to strengthen their position on the Chinese market and to expand their business by acquiring domestic companies. The ever-increasing number of M&A by foreign investors started to raise major concerns among Chinese government officials. In their view, the presence of large foreign companies dominating the market could have serious consequences on the capacity of domestic SMEs to develop and on their ability to compete at national and international level.  

In 2004, SAIC issued a report entitled *The Competition-restricting Behaviour of Multinational Companies in China and Countermeasures.* In this report, SAIC asserted that various foreign companies were abusing their dominant position to curb competition on the market through the implementation of anti-competitive conducts such as predatory pricing and ties in sales.

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269 Since the early stages of the economic reform process, foreign investors have played a key role in China’s economic development. After a first period, between the late 1970s and the mid-1980s, of gradual and limited opening, the Chinese government initiated a more active promotion of foreign investment. In this sense, foreign enterprises willing to invest in the Chinese market could benefit from a special legal regime and granted with a preferential tax treatment. The enactment of ad hoc policies to attract foreign investment was considered, in fact, an essential factor to accelerate China’s economic revival and, consequently, the country was soon transformed by Chinese decision makers in one of the preferred destinations for foreign capital. China’s economic growth has also favoured foreign M&A activities. In 2001, the epochal entry of China into the WTO accelerated this trend and several foreign investors started to implement targeted investment strategies to match new business opportunities. Acquiring domestic firms represented an increasingly profitable alternative to more traditional forms of investment. Yet, opening up the market has also signified for China new challenges since the process of modernisation of the legal system has been much slower than economic development. Foreign business operators have often been subject to restrictive investment rules and burdensome procedures. Furthermore, there still is a high level of government intervention in most M&A transactions. In this sense, the poor institutional framework and excessive bureaucracy have also created various risks for foreign investors. For discussion, see Françoise Nicolas, *China and Foreign Investors The End of a Beautiful Friendship?*, IFRI – Asie Visions 4, (April 2008), 1 - 40, available at [www.ifri.org/downloads/Asie_Visions_4_Nicolas.pdf](http://www.ifri.org/downloads/Asie_Visions_4_Nicolas.pdf).


271 The report was the first of this kind in China and it showed that major multinational corporations were using their market advantage to restrict competition. The Microsoft and Eastman Kodak cases were the most evident. With reference to the Kodak case, SAIC reported the agreement concluded in 1998 between Kodak, SDRC, SETC and MOFTEC according to which Kodak invested approximately $2 billion to acquire all imaging factories in the country, except those of Lucky Film. In return, the Chinese authorities prohibited the establishment of any other joint venture in the imaging sector for a period of three years. In 2004, Kodak possessed more than
After the publication of the report, various government officials expressed the view that although attracting foreign investment was still strategic for the healthy development of the Chinese socialist market economy, the potentially negative consequences deriving from the predatory behaviour of most foreign corporations had to be seriously taken into account and, consequently, the government should promptly intervene to protect domestic business operators.\(^\text{272}\)

They were firmly convinced that the revision of the existing competition law system and the approval of the long-awaited AML were essential legislative steps to better deal with the anti-competitive practices perpetrated by foreign companies. In their view, the AML could also be used not only to fight against such abuses but also to limit the expansion of foreign corporations into the Chinese market. Thus, in light of China’s intention to limit foreign investment in certain industries, State authorities could be tempted to use competition law as a tool to achieve such an objective.\(^\text{273}\)

From a legislative perspective, the promulgation of the 2006 M&A Rules was interpreted as a step in this direction.\(^\text{274}\) The 2006 M&A Rules introduced a new regulatory framework for foreign investors acquiring domestic companies.

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50 percent of the market. Fujifilm, Kodak’s main competitor, possessed 48 percent of the market until 1998, but in 2003 its market share dropped to only 15 percent as a consequence of Kodak’s expansion. Interestingly, Kodak’s anti-competitive agreement was the result of an open negotiation with various government departments. For a discussion on this issue, see Lin, supra note 103, at 98.

\(^{272}\) Over the years, the Chinese government has been implementing a series of \textit{ad hoc} policies to restructure the public sector and foreign investment has played an essential role in this process. In particular, on November 8, 2002, SETC, the Ministry of Finance, SAIC and the SAFE issued the \textit{Using Foreign Investment to Reorganize State-owned Enterprises Tentative Provisions} which came into force on January 1 2003. According to Article 1, the Provisions were formulated pursuant to the \textit{Company Law}, the \textit{Contract Law} and other laws and regulations concerning foreign investment and administration of public assets “\textit{in order to attract and regulate the Use of Foreign Investment to Reorganize State-owned Enterprises, promote the strategic restructuring of the State-owned economy, accelerate the pace at which State-owned enterprises establish modern corporate systems and safeguard social stability}”. The text of the Provisions (in Chinese) is available at \url{http://www.gov.cn}.

\(^{273}\) Lu Fu, Professor at the China University of Political Science and Law, argued that SAIC’s report demonstrated the need to urgently implement a series of laws to tackle this kind of anti-competitive practice. Professor Fu was firmly convinced that the Government had to focus its attention on the potentially negative effects deriving from the market conduct of multinational corporations and should take steps, such as issuing the new AML and revising the LAUC, to fight against these practices. Lin, supra note 103, at 98.

\(^{274}\) See for discussion Chapter I, section 2.3.
Article 12, in particular, stated that the acquiring parties must report for review to MOFCOM all transactions related to strategically important industries having an impact on the safety of the national economy or to domestic companies with well-known trademarks or with Chinese traditional brand-names. Since the criteria to determine what could be considered a strategic industry or to assess when the safety of the national economy could be affected were rather vague, the 2006 M&A Rules conferred upon the enforcement authority a wide discretionary power. For instance, they could be used to allow a certain degree of interference in market transactions by State authorities in case of a conflict with industrial policy goals. The idea of some State agencies to rely on competition law to monitor the penetration of foreign business operators into the Chinese market presented therefore another major challenge in light of the future enactment of the new AML.

One major dilemma was whether, once approved, also the AML should primarily address the market behaviour of foreign companies or whether it should be equally applied to both foreign and domestic enterprises. Many Chinese officials, for example, insisted on the necessity to focus on the market behaviour of large foreign corporations and to overlook those of domestic SMEs.

However, the anti-competitive conducts of Chinese enterprises have the same pernicious effects on market competition than those perpetrated by foreign companies. Moreover, a “patriotic” enforcement of the AML could risk slowing down the already tortuous process of liberalisation of Chinese industries. Thus, the decision to enforce the AML one way or another could further delay the establishment of a competitive market environment in the country.\textsuperscript{275}

In this context, foreign companies have also started to express some concerns about the possibility of losing some of their privileges and to be treated less favourably than domestic enterprises.\textsuperscript{276}

\textsuperscript{275} See Owen and others, supra note 44, at 129.
\textsuperscript{276} The first symptom of China’s growing economic nationalism has been associated with the initiatives implemented by the Chinese government to promote the establishment of national champions and to boost Chinese investments abroad under the so called “going global” policy. The second symptom refers to a more cautious approach which reflects China’s reluctance to let foreign business operators to expand their presence on the market and its willingness to reduce its
A series of laws and regulations recently approved by the Chinese government has been interpreted as a possible sign of this mutated attitude. Some of these new rules such as, for instance, the new Enterprise Income Tax Law and the new Labour Contract Law have had a significant impact on the tax rates and the labour costs of foreign companies operating in China.277

Furthermore, in 2007 the Chinese government revised the Catalogue of Industries for Guiding Foreign Investment (hereinafter, “Catalogue”).278 The Catalogue fixes the tax benefits, the approval requirements and the market entry criteria for foreign investors in China by listing the sectors of the Chinese economy that are open to foreign investment. In this regard, the new version of


277 On March 16, 2007, the National Peoples’ Congress promulgated the new Enterprise Income Tax Law which became effective on January 1, 2008. Before its enactment, domestic and foreign firms were subject to different fiscal regimes. Under the previous system, the income tax rate for domestic companies was twenty-three percent, whereas the rate applied to foreign invested enterprises was eleven percent. The new law has unified the tax rate for both domestic and foreign invested enterprises at twenty-five percent. Furthermore, some preferential tax treatments which were applicable to foreign investors under the old tax regime are no longer available. Although the Chinese authorities, with a view to mitigate this fiscal “shock”, have introduced additional tax incentives, transitional tax rates and a preferential rate for high/new technology enterprises through the law and further regulations, foreign investors have expressed their concerns about the potentially negative impact of the new regime on their business activities. Furthermore, on June 29, 2007, the Standing Committee of the National People’s Congress promulgated the new Labour Contract Law which took effect on January 1, 2008. The law is an attempt to reform the legislation on employment relations in China. In this regard, the main purposes of the law are to improve the existing labour contract system, to clarify the rights and obligations of the parties, and to provide a better legal protection for employees by, for instance, introducing the obligation for the employer to set out a written labour contract. The enactment of this law demonstrates a growing sensibility for social rights but it has also raised doubts in relation to the sustainability of economic growth in China. Many economists and experts criticised the decision to approve the law by stating that it would have raised costs for employers. One of the main issue was that the law could affect in a negative way China’s economy at a time when export-oriented companies, and in particular labour-intensive ones, were facing economic difficulties as a consequence of various factors including the appreciation of the Chinese Yuan and the rise of production costs. See Disputes over new Labour Contract Law, foreign business groups threaten to withdraw investment, China Labour Bulletin, June 7, 2006, available at http://www.clb.org.hk/en/node/38245/print.

the Catalogue has partially redefined the areas of the economy that are encouraged, restricted or prohibited to foreign investors. Consequently, foreign companies must now adapt a more restrictive environment for their investments.279

As mentioned, before the enactment of the AML, foreign companies must file notifications for M&A transactions according to the 2006 M&A Rules. The AML has now replaced those notification requirements. In this regard, Chapter IV of the AML states that when certain thresholds are met the parties to a proposed transaction must notify MOFCOM which shall decide whether the operation has or may have the effect of eliminating or restricting competition. Yet, the AML does not distinguish between domestic and foreign companies and, in this sense, new rules should be seen as a significant improvement if compared with the previous system which only targeted foreign companies.

M&A represent a major instrument to achieve economies of scale, improve industrial structures and enhance the competitiveness of enterprises. However, as a result of their impact on the structure of markets, they may also affect competition and the number of market competitors. In this sense, merger rules represent an essential aspect of a country’s competition legislation.

It is worth noting that since the enactment of the AML in 2008, China’s competition authorities have actively implemented the new provisions on M&A while less actively enforced the rules related to monopoly agreements and abuse

279 On October 31, 2007, NDRC and MOFCOM jointly revised the Catalogue which became effective on December 1, 2007. The Catalogue reflects a substantial change in China’s policy towards foreign investment. In this regard, the content of the Catalogue is in line with the 11th Five Year Plan (2007-2012) issued by the Chinese government in 2006 which emphasises the necessity to focus on the quality rather than on the quantity of foreign investment. According to the Catalogue, industrial sectors falling within different categories have also different investment policies for foreign investors. In this regard, the revised Catalogue continues to divide Chinese industries into three different categories: encouraged, permitted and prohibited industries. If compared with the 2004 version, the revised Catalogue principally focuses on the necessity to upgrade the structure of Chinese industries through technology transfers, in order to preserve non-renewable resources and to protect the environment. The main purposes of the revised Catalogue are to enhance the technological development of the Chinese economy, to promote environmental protection, to develop the renewable energy sector and, as a complementary goal, to protect national economic security. Consequently, the revised Catalogue improves access for foreign investors operating in the commercial and financial services sector, in high technology and innovative products which contribute to environmental protection and to the development of energy saving technologies.
of dominance. To date, the most prominent part of China’s competition law enforcement remains merger review. According to the figures released by MOFCOM, till the end 2012 its Anti-Monopoly Bureau reviewed more than 600 transactions.280

Thus, in order to understand the patterns and implications of China’s new competition regime, Chapter III shall provide a thorough study of some major merger cases decided by MOFCOM.

This analysis shall help to clarify a series of aspects related to competition law and policy in China, including: the criteria and the economic approach adopted by MOFCOM in its decisions; the potential influence of industrial policy objectives; the assessment of MOFCOM’s role and powers as a competition authority; and finally, the challenges deriving from the application of China’s new M&A rules.

1. The InBev/Anheuser-Busch merger

_InBev/Anheuser-Busch_ was the first merger decision made public by MOFCOM under the AML.281 On November 18, 2008, the Anti-Monopoly Bureau of the Chinese Ministry of Commerce published its decision to approve with conditions the acquisition of Anheuser-Busch Companies, Inc. (hereinafter, “AB”) by InBev NV/SA (hereinafter, “InBev”) and, on November 21, 2008,

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280 However, it is worth noting that MOFCOM only makes public decisions blocking a merger or imposing remedies.

281 Decision of 18 November 2008 on the proposed acquisition of Anheuser Busch by InBev. The text of the decision (in Chinese) is available at MOFCOM’s website [http://www.mofcom.gov.cn/](http://www.mofcom.gov.cn/) On July 13, 2008, Belgian-based brewer InBev, the owner of Stella Artois, and the US-based brewer Anheuser Busch (AB), the owner of Budweiser, announced InBev’s intention to acquire AB for $ 49.91 billion. The turnovers of InBev and AB’s in the People’s Republic of China amounted in 2007 respectively to CNY 5.76 billion and CNY 4.49 billion and, therefore, the transaction met the notification thresholds set up by China’s new M&A regime.
posted on its website an interview with Mr. Shang Ming, Director of the Bureau, providing more details about the transaction.\footnote{282}{The text of Mr. Shang Ming’s press conference (in Chinese) is available at MOFCOM’s website at \url{http://www.mofcom.gov.cn}. The Director clarified that although this was the first decision published by the Anti-Monopoly Bureau of the Chinese Ministry of Commerce, this was not the first case that had been decided since the enactment of the AML. At that time, MOFCOM had already accepted 13 cases and decided 8. Interestingly, Article 30 of the AML states that the enforcement authority: "shall publicize in a timely manner its decisions to prohibit the concentration of undertakings or to impose restrictive conditions on the concentration of undertakings." Therefore, there is no obligation to publish decisions unconditionally approved and, in this sense, the provision has been literally interpreted by MOFCOM.}

MOFCOM explained its decision by stating that the operation would have not eliminated or restricted competition on the Chinese beer market. However, because of the huge size of the transaction, the market share of the parties and their enhanced competition ability after the merger, it decided to limit InBev’s possibility to expand its market share by imposing some conditions on the acquisition of AB. More specifically, MOFCOM has required InBev-AB to obtain its prior approval in case the company should decide to increase AB’s equity share in Tsingtao Brewery, to increase InBev’s equity share in Zhujiang Brewery or to purchase any stake in China Resources Snow Breweries or Beijing Yanjing Brewery, two of the largest brewery companies in China. In addition to this, InBev-AB must also notify MOFCOM of any change in its controlling shareholders or the shareholders of InBev’s controlling shareholders.

Nonetheless, the text of the decision was rather laconic and provided little guidance to understanding the criteria adopted by MOFCOM to clear the deal. In this regard, the combined analysis of the provisions of the AML, of the Notification Rules\footnote{283}{See for analysis Chapter II at section 2.3.} and of the statements of the Director of the Anti-Monopoly Bureau may be useful to clarify some of these issues.

As a preliminary point, with reference to the duration of the clearance, it should be noted that the merging parties submitted information and responded to MOFCOM’s requests before entering the preliminary 30 day phase indicated in the AML. Furthermore, they had the opportunity to express their views in relation
to potential remedies.\textsuperscript{284} This demonstrates the importance of that phase and it is in line with the \textit{Notification Rules} which provide that before filing a concentration, the parties may contact MOFCOM to discuss issues related to the notification and to receive guidance in order to facilitate the filing process. As discussed in Chapter II, this procedure appears inspired by the EU regime where the pre-notification contacts allow the European Commission and the merging parties to discuss jurisdictional and legal issues and, in particular, \textit{“they also serve to discuss issues such as the scope of the information to be submitted and to prepare for the upcoming investigation by identifying key issues and possible competition concerns at an early stage.”}\textsuperscript{285} The willingness of the Chinese Ministry of Commerce to pursue this preliminary dialogue has to be judged positively since it appears inspired by the principles of transparency and loyal collaborations between the filing parties and the enforcement authority.

As far as the content of the decision is concerned, the main critical issue of MOFCOM’s decision relates to the lack of the definition of relevant market. Although, the Anti-Monopoly Bureau refers to the terms \textit{“market”} and \textit{“market share”}, neither the text of the decision nor Mr. Shang Ming’s statements provide further explanation on how these concepts were defined.

It is not clear, for instance, the definition of geographic market. Some commentators noted that identifying the geographic market is essential in the beer industry.\textsuperscript{286} As a consequence of its special distribution system and a series of contractual arrangements between producers and distributors, the relevant geographic market should be defined as regional.\textsuperscript{287} The manufacturers sell the product to the distributors, which, in turn, sell it to the retailers. Express

\textsuperscript{284} The merging parties submitted their documentation to the Chinese Ministry of Commerce on September 10, 2008 and, at its request, they submitted supplementary information twice in October. As said, MOFCOM issued its decision on November 18, 2008. The clearance was therefore within the time limit indicated in the AML. In his interview, Mr Shang affirmed that the parties consulted MOFCOM long before the official filing also to discuss possible remedies and this facilitated and accelerated the review process.


\textsuperscript{287} Ibid.
contractual prohibitions to sell beer outside their respective territories are contemplated for the distributors. Since the producers can sell beer at different prices in different regions without any chance for the distributors to challenge this conduct, the relevant geographic beer market is essentially regional. Due to this characteristic, it is possible to assume that competition conditions may highly differ across the various regional markets. Consequently, the possibility for the new entity to acquire further shares in its competitors would have not necessarily had a negative impact on competition in all the regional markets. In this sense, the proposed remedies should only concern those regional markets where there are risks of market foreclosure.

This discussion introduces a second critical point in MOFCOM’s decision. The Chinese Ministry of Commerce failed to explain what criteria it adopted to assess the impact of the proposed merger on market competition. MOFCOM’s decision appears partly contradictory. On the one hand, it considered that market competition in China’s beer market would have not been affected by the transaction. Yet, on the other hand, MOFCOM expressed serious concerns about the possible acquisitions of InBev/AB after the merger.

With reference to this issue, it was noted that: “economic analysis should be conducted to show to what extent ownership connection between InBev–AB and its rivals reduced competition and whether entry conditions such as efficient scale of production and brand effect would function as barriers. Meanwhile, economic analysis is needed to prove that beer purchasers are unlikely to cut their purchases in response to a small but significant and non-transitory increase in the price of beer to an extent that would make such a price increase unprofitable.”

MOFCOM’s analysis should have focused, for instance, on the “special” barriers to entry existing in most Chinese industries and, notably, in the beer

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288 Ibid.
289 Ibid.
290 Ibid. at 489.
sector as a result of local protectionism. As previously discussed, this practice consists of acts of local governments that either prohibit products from entering the local market or prevent raw materials from flowing into other parts of the country, thereby fragmenting the national market into several narrow local markets. The main reason behind such behaviour is that since the beginning of the economic reform process and the separation of the financial powers between central and local authorities, the local governments started to develop independent interests from the central government. As a consequence, this conflict of interest has favoured the emerging of local protectionism. Local governments refuse, for instance, to issue business licenses to companies operating in other regions or they confiscate their goods and impose fines. Furthermore, they set up checkpoints at the regional borders to physically prohibit access to certain commodities. Examples of this phenomenon are common in the beer industry as well. Some of them became classics of China’s academic literature in the area of competition law. During the famous 1994 beer war in the Jixi Region of the Helongjiang Province, for instance, the counties and cities surrounding the Jixi City set up checkpoints and confiscated thousands of crates of bottled beer produced in the city for several months.

All these factors should be taken into account when reviewing a transaction in China. Even though, Mr. Shang Ming clarified that the Anti-Monopoly Bureau gathered information through phone calls, meetings and public hearings with several interested parties, including State agencies, local authorities, major national beer producers, suppliers and distributors, it is not completely clear to what extent and the method of these consultations. Various doubts remain whether these data were principally used as a basis for a rigorous economic analysis of China’s beer industry or, whether they were used to help MOFCOM take a more balanced and politically oriented decision in order not to create discontent among small local beer producers. Furthermore, the Chinese Ministry


\[292\] Wang, supra note 42, at 211.
of Commerce appears to have considered the trend of increasing concentration and the high level of concentration already existing in some regions. Such concerns may therefore explain the decision to impose restrictions on the Inbev-AB deal. As a result, it is arguable that the Chinese Ministry of Commerce attached great importance to the minority interests of the merged company in its competitors.293 Market reports indicate that the beer sector in China is expected to further expand. Large beer producers could easily monopolise the beer industry and, consequently, small regional beer companies could be “kicked out” of the market.294

MOFCOM’s decision in the InBev case seems to reflect this concern. Since the transaction would have significantly increased the market share of the new entity, this could have an impact on the competitiveness of other beer producers, such as, Tsingtao Brewery and Zhujiang Brewery. This could be likely whether post-merger the company would have been allowed to acquire further shares in its competitors. InBev and AB, in fact, already possessed respectively 29 percent stake in Zhujiang Brewery and 27 percent stake in Tsingtao Brewery before the transaction. Moreover, market competition could be further reduced if the new entity was left free to acquire shares in other Chinese beer producers as well. The decision suggests that MOFCOM feared the reduced competition capacity that other companies could have. The remedy imposed on InBev to limit the possibility to increase its existing share in domestic competitors depended therefore on the idea that these companies should be able to compete with InBev post-merger despite InBev’s share in them.

In order to assess the consistency of MOFCOM’s solution with international practice, it may be useful to refer to the decisions adopted in other jurisdictions in this case. The same transaction was cleared in the US and in the United Kingdom (hereinafter, “UK”). Nevertheless, competition authorities in the US and in the UK applied a different approach to evaluate the regional aspects of the deal. In the US, the Department of Justice (hereinafter “DOJ”) forced InBev to

293 Zhang and others, supra note 286, at 7.
294 Ibid.
sell its subsidiary, Labatt USA. On the contrary, the Office of Fair Trade (hereinafter, “OFT”) in the UK decided to approve the transaction without imposing any condition.

Simon Pritchard OFT’s Senior Director of Mergers, stated: “In a merger case featuring products like Stella and Budweiser, the intuitive temptation is to assume we know the answers based on personal consumer preferences. Instead, at the OFT, we analyse internal documents, customer views, and economic evidence before forming a judgment. The evidence in this case showed that despite some high shares on certain candidate market definitions, there was no realistic prospect that drinkers of Stella, Beck's or Bud would pay more as a result of this merger. Given the reassuringly extensive evidence to support this view, the right answer is therefore to clear this acquisition.”

It is not completely clear whether MOFCOM’s approach was principally aimed at protecting market competition and consumer welfare or protecting domestic competitors. It is worth remembering that Article 20 of new AML expressly states that one of the factors to be taken into account by MOFCOM when reviewing a transaction is the impact of the operation on the development of the Chinese economy. This provision may be subject to an extensive interpretation to pursue industrial policy objectives such as protecting Chinese SMEs from the competition of larger foreign corporations. If on the one hand, the wording of the decision may favour this interpretation, on the other hand, the absence of more precise information about MOFCOM’s economic analysis does not allow a univocal answer.

What is indisputable in the InBev case is a certain lack of transparency in the review process. The conclusions that can be drawn from this first merger case are that although in the end MOFCOM’s decision can be considered de facto consistent with those adopted under other jurisdictions, in reality it is very

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difficult to assess whether the Chinese solutions stem from accurate economic theories and market analysis or they stem from other factors, such as industrial policy concerns.

As mentioned, the failure to provide a definition of relevant market in the InBev decision does not help to shed light on this point. In this sense, there is the risk that after all the years spent drafting the AML, the amendments to its text and the discussions on its importance for the Chinese economy, the main problem still is the lack of transparency in judicial and administrative decisions that too often have been used by Chinese authorities to preserve their ambiguity and discretion in legal cases. The absence of a clear commitment to transparency gives the impression that China’s competition authorities are oriented to take into account arguments such as the usual public interest goal and the healthy development of the national economy when deciding competition cases. The publication of decisions and, in particular, the reasoning behind them are therefore essential steps towards the establishment of a modern and credible competition law system in China.

2. The Coca-Cola/Huiyuan merger

On March 18, 2009, in its first prohibition under the AML, MOFCOM decided to block Coca-Cola’s planned acquisition of China Huiyuan Juice Group (hereinafter, “Huiyuan”).\textsuperscript{296} The Chinese Ministry of Commerce considered that the merger would have restricted competition in the national fruit juice market leading to higher prices for fruit juices and to a reduced variety of products for consumers. On September 2, 2008, Coca-Cola offered to buy Huiyuan Juice Group for $2.4 billion. The acquisition would have represented the largest acquisition by Coca-Cola in the country and would have been the second largest globally. The operation was therefore carefully monitored by scholars and legal

\textsuperscript{296} Decision of 18 March 2009 on the proposed acquisition of Huiyuan Juice by Coca-Cola. The text of the decision (in Chinese) is available at MOFCOM’s website http://www.mofcom.gov.cn/.
practitioners in China in order to understand MOFCOM’s approach in relation to the acquisition of domestic companies with a well-known Chinese brand by foreign corporations.

On September 18, 2008 Coca-Cola filed its pre-merger notification and, at MOFCOM’s request, supplemented the filing four more times. The review process officially started on November 20, 2008 but after the initial 30-day review phase, MOFCOM decided to enter the second 90-day phase. Finally, on March 18, 2009, the Chinese Ministry of Commerce issued its decision to block the proposed acquisition of Huiyuan by Coca-Cola for the following reasons.

First of all, post-merger Coca-Cola could have leveraged its dominant position in the carbonated soft drink market to the fruit juice drink market, this could have eliminated other fruit juice companies, restricted competition and, in turn, harmed the interests of Chinese consumers. Even though the decision failed to explain how Coca-Cola could have extended its position in the carbonated soft drink market, MOFCOM’s spokesman clarified during a press release that Coca-Cola could have implemented a series of anti-competitive practices such as, for instance, tie in sales, bundling and other types of exclusive dealing.

Secondly, Coca-Cola could have enhanced its market power on the juice market by controlling two famous brands such as Meizhiyuan (the Chinese version of Minute Maid) owned by Coca-Cola and Huiyuan. The operation would have further foreclosed the fruit juice drink market by significantly raising entry barriers for other competitors.

Finally, the merger would have affected the activities of Chinese SMEs by narrowing their space and reducing their opportunity to compete and to independently innovate in the fruit juice drink market. Consequently, the proposed transaction would have been harmful for market competition and would have had a negative impact on the sustainable and healthy development of the Chinese fruit juice industry.297

297 The decision states that the merging parties proposed a series of remedies but MOFCOM considered that they were not sufficient to mitigate the anti-competitive concerns of the operation. Press reports indicate that the Chinese Ministry of Commerce took the initiative and, similarly to
The Coca-Cola merger was the first transaction blocked by MOFCOM since the enactment of the AML. An important aspect of the operation referred to the identification of the relevant market. Considering that both Coca-Cola and Huiyuan competed in the fruit juice sector, the Anti-Monopoly Bureau identified the relevant product market in the fruit juice market. MOFCOM concluded that fruit juice drinks were highly substitutable among each other despite the different percentage of juice content in their composition but they were not substitutable with carbonate soft drinks. With reference to the market share of the merging parties post-merger, this would have been of 28.99 percent and, therefore, the new entity would have become the largest fruit juice company in China.

As discussed in Chapter II, the AML introduced a series of presumptions based on market share to ascertain the existence of single or collective dominance. According to Article 19, companies may be considered to have a dominant market position if they satisfy any of the following conditions: “i) the market share of one undertaking in the Relevant Market accounts for 1/2; ii) the joint market share of two undertakings in the Relevant Market accounts for 2/3; or iii) the joint market share of three undertakings in the Relevant Market accounts for 3/4.” Article 19(2) further clarifies that: “In case of circumstances set forth in the sub-clauses i) and iii) above, if any of such undertakings has a market share less than 1/10, it shall not be presumed to have a dominant market position.” Ultimately, Article 19(3) states that: “If an undertaking which is presumed to have a Dominant Market Position presents evidences showing otherwise, it shall not be deemed to have a Dominant Market Position.” Post merger the market share of Coca-Cola/Huiyuan's would have not met these thresholds. Therefore, it is not clear how the Chinese Ministry of Commerce was able to assess the existence of this market power by means of its ex ante analysis. However, by taking into account the carbonate soft drink market, it found that Coca-Cola’s market share of 60.6 percent met the AML’s thresholds and, therefore, it considered that Coca-Cola was dominant in the relevant market.

what happened in the Inbev/Anheuser-Busch case, proposed to Coca-Cola to divest the Huiyuan brand as a condition for approving the deal.

298 See Chapter II, section 2.3.
These conclusions led MOFCOM to presume that post-merger Coca-Cola could have been able to leverage its dominant position into the juice market as well. By using its market power in the carbonate drink market, Coca-Cola could have easily implemented various anti-competitive conducts to restrict competition in the fruit juice market at the expense of potential competitors and, finally, consumers.

Nevertheless, consistently with MOFCOM’s practice in previous merger cases, the text of the decision is rather short and does not provide clear information about the economic analysis adopted. As a matter of fact, it does not explain how the concept of relevant market was defined nor discusses the market shares of the merging parties and their rivals. The decision fails to formulate a theory which explains the potential harm for market competition that could justify the prohibition of the operation. Furthermore, although MOFCOM emphasised that it did not take into account non-competition concerns in its analysis, the explicit reference to the effect of the merger on domestic SMEs and to the concept of sustainable and healthy development of the Chinese fruit juice drink sector suggests that industrial policy goals may have played a role in the review process.

What is clear from the text of the decision is that the main reason to block the transaction was based on the idea that the elimination of market competition in the fruit juice market would have depended on the existing market power of Coca-Cola in the carbonate soft drink market. Thus, MOFCOM considered the transaction to be a conglomerate merger.

In this regard, various commentators noted that the arguments used by MOFCOM to block the Coca-Cola/Huiyuan transaction recall the well-known “portfolio effects” doctrine adopted by the European Commission in a series of merger cases. 299

The “portfolio effects” theory finds its basis in the assumption that a company with a dominant position in a certain market by acquiring a company operating in a related market, post-merger could be able to expand and likely to

abuse its power in that related market where before the transaction it was not dominant. In Europe, this theory was first adopted by the European Commission in a series of conglomerate merger cases in the beverage industry. A conglomerate merger is a merger between firms which do not compete with each other in any product market and does not entail vertical integration. Conglomerate mergers are usually divided into three different categories:

- product line extensions which refer to the situation when one firm acquires another to add related products to its existing line of production;
- market extensions, when the merged parties sold the same products but in different geographical markets;
- pure conglomerates when there is not any functional link between the merged firms.

Under EU law, conglomerate mergers are defined in the Guidelines on the Assessment of Non-Horizontal Mergers (hereinafter, “Non-Horizontal Merger Guidelines”) as: “mergers between firms that are in a relationship which is neither horizontal (as competitors in the same relevant market) nor vertical (as suppliers or customers). In practice, the focus [...] is on mergers between companies that are active in closely related markets (e.g. mergers involving

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300 Richard Whish and David Bailey, *Competition Law*, Oxford University Press, (2012), at 879. In this regard it was noted that: “the anti-competitive likelihood of portfolio effects is based on the proposition that the combined portfolio of products/brands of the merged firm represents an essential facility for the downstream agents in a manner that the individual product lines of the undertakings pre-merger did not.” Dimitri Giotakos, Member of the DG Competition, as cited by Thibaud Vergé in Portfolio Effects and Entry Deterrence, paper prepared for the CRESSE Conference in Corfu in July 2006, (January 2007), 1 - 18, at 1, available at http://83.145.66.219/ckfinder/userfiles/files/pageperso/tverge/PortfolioCRESSE.pdf.


302 Whish, supra note 300, at 880.

303 Ibid.

suppliers of complementary products or products that belong to the same product range).”

The Non-Horizontal Merger Guidelines point out that the main source of anti-competitive effect that is typical of horizontal mergers is absent in conglomerate mergers because they do not entail the loss of direct competition between the merging parties in the same relevant market.

Nevertheless, there are circumstances in which the merger may significantly restrict competition, in particular, by creating or strengthening a company’s dominant position or its market power. This may be the case when the merger modifies the capacity to compete on the part of the merging parties and their competitors in ways that cause harm to consumers. The main concern in a conglomerate transaction is therefore the foreclosure which may derive from the ability and the incentive of the merged entity “to leverage strong market position from one market to another by means of tying or bundling or other exclusionary practices.” Even though these practices do not often have anti-competitive consequences, under certain circumstances, by affecting the competitive skills of other competitors, they may reduce the competitive pressure on the merged company and, thus, allow it to increase prices.

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305 Ibid. point 5.
306 Ibid. point 12.
307 Ibid. point 15.
308 Ibid. point 93.
309 Ibid. It should be noted that the European Commission’s approach in conglomerate merger cases is not consistent with the test currently adopted by the US antitrust authorities. As a result of the influence of the “Chicago School of Economics”, most theories developed during the 1960s and 1970s in the US about the anti-competitive effects of conglomerate mergers such as deep pocket reciprocal dealing and entrenchment were completely abandoned. The focus of antitrust enforcement in the US shifted towards consumer welfare and efficiency. The US antitrust authorities persuaded themselves not to interfere with conglomerate mergers. A general consensus started to grow about the benefits of conglomerate mergers in terms of management efficiency and the ability to face economic fluctuations through diversification. Under the US antitrust law, market dominance may not be used as an argument to restrict a firm’s decision to increase the efficiency of its production or the ability to develop complementary products. Unless a firm protects its existing dominance or unless there is a concrete risk that it may monopolise a neighbour market, the US courts permit to use market power to obtain a competitive advantage in a related market. It is worth remembering that the European Commission’s approach on conglomerate mergers and, in particular, its prohibition of the GE/Honeywell’s transaction raised actual tension between the European the US competition authorities which had instead approved the operation. “It’s a long way from Chicago to Brussels” was the expression coined by William J. Kolasky, the US Deputy Assistant Attorney General for International Antitrust, in a speech given
Back to MOFCOM’s analysis in the Coca-Cola case, the first argument that post-merger Coca-Cola would have been able to leverage its dominant position in the carbonated soft drink market to the fruit juice drink market, thus, eliminating and restricting competition from other fruit juice producers and, in turn, harming consumer interest, reflects the line of reasoning adopted by the European Commission in its decisions on conglomerate mergers.  

Furthermore, MOFCOM’s second concern that Coca-Cola’s market power in the fruit juice market would have been enhanced by controlling Meizhiyuan and Huiyuan and that the transaction would have significantly raised entry barriers for potential competitors in this sector also corresponds to the European Commission’s interpretation of the “portfolio effects” theory.

Similarly, the Chinese Ministry of Commerce emphasised the possibility that post-merger Coca-Cola could engage in tying, bundling or other forms of exclusive dealing. As a result of the portfolio power and the foreclosure effects on other competitors, entry of new products are likely to be more difficult.


310 This was, for example, the line of reasoning applied by the European Commission in Tetra Laval/Sidel to block the proposed acquisition by Tetra Laval BV of the French company Sidel S.A. See Tetra Laval/Sidel (Case COMP/M.2416) Commission Decision [2004] OJ L38/1. For further discussion about thus case see Maher M. Dabbah, Opinion: Tetra Laval v. European Commission, Competition Law Journal, Vol. 3, (2004), 234 – 250.

311 On this point see Zhang, supra note 299, at 101. In Guinness/Grand Metropolitan, the European Commission noted that the holder of a portfolio of leading brands may enjoy various advantages and “[i]n particular, his position in relation to his customers is stronger since he is able to provide a range of products and will account for a greater proportion of their business, he will have greater flexibility to structure his prices, promotions and discounts, he will have greater potential for tying, and he will be able to realize economies of scale and scope in his sales and marketing activities. Finally the implicit (or explicit) threat of a refusal to supply is more potent.” See Para. 38 of the Decision.
on the alleged ability of a dominant firm in one market to leverage its market power in a related market.

Furthermore, similarly to the European Commission, the Chinese Ministry of Commerce adopted an *ex ante* and not an *ex post* approach in reviewing mergers which are expected to give rise to exclusionary practices.\(^{312}\)

There are at least two advantages to the adoption of an *ex post* approach in relation to mergers which are expected to generate exclusive practices. First of all, before the transaction, it is very difficult to predict whether this will in fact occur (this is more of a disadvantage for *ex ante* than an advantage for *ex post*).\(^{313}\) Secondly, post-merger it is possible to assess the situation on the basis of actual market conditions which facilitate competition analysis.\(^{314}\) The decision to adopt an *ex post* or an *ex ante* approach, however, may vary from one transaction to another and it depends on a series of factors. For instance, this may depend on the enforcement authority’s idea on the short and long term effects of a certain transaction or in its future capacity to indentify promptly the anti-competitive conduct post merger and to apply effective remedies.\(^{315}\)


\(^{314}\) Ibid.

\(^{315}\) However, as Dimitri Giotakos, former Member of the DG Competition noted: "A decision about whether to prohibit a merger because of the potential range of effects must [...] weigh the costs and benefits of waiting until after the merger to prosecute any illegal behavior. However, in the EU, a "wait-and-see" strategy may be costly in cases in which the competitive harm is one that is in essence irreparable. More generally, it should not be taken for granted that an enforcement agency will be effective and efficient in "regulating" company behavior ex post." Dimitri Giotakos, *GE/Honeywell: A Theoretical Bundle Assessing Conglomerate Mergers Across the Atlantic*, University of Pennsylvania Journal of International Economic Law, Vol. 23, Issue 3, (2002), 469 - 511, at 505. There are also other reasons which may justify the differences across
China’s new M&A regime embodies concepts and procedures which have been developed under foreign jurisdictions. In this sense, the Chinese Ministry of Commerce in its role of enforcement authority is faced with the difficult task to adapt the new rules to China’s economic reality. Furthermore, this effort is made even more onerous by the fact that most of the adopted solutions have been originally conceived to be applied in market economies. In China’s transitional economy market mechanisms are still immature and the main goal is still the establishment and not the maintenance of a competitive market environment. In this regard, it appears that MOFCOM prefers to adopt a cautious approach when reviewing merger transactions. Faced with an increasing number of notifications the Anti-Monopoly Bureau is still trying to develop its capability to formulate accurate economic analysis in complex merger cases.

Furthermore, MOFCOM’s issuance of additional regulations and guidelines to integrate the content of Chapter IV of the new AML demonstrates that the current set of rules still falls short of a systemic and comprehensive merger control system.316

On the one hand, MOFCOM is unsure of its capacity to predict the potential consequences of proposed transactions in the long run and, on the other hand, fears that China’s existing competition legislation may not be an effective deterrence for the implementation of anti-competitive conducts by large foreign corporations. Therefore, an *ex ante* approach when reviewing mergers similar to the European one better meets the standards of China’s current competition law system.

316 Jurisdictions about the decision to adopt an *ex post* instead of an *ex ante* approach in mergers involving portfolio effects. Some jurisdictions which decide to authorise rather than to block a transaction may in fact experience some difficulties in sanctioning post-merger anti-competitive conducts. This would be the case if courts found that the conduct was reasonably certain to have occurred at the time the operation was cleared. This could be used to imply that the competition authorities did not consider it to have anti-competitive effects. This situation would be even more problematic if the merger were approved considering that it did not create a dominant position but dominance is a necessary pre-condition for intervening. See OECD Roundtable on Portfolio Effects in Conglomerate Mergers, supra note 312.
316 For discussion see Chapter II at section 2.3.
The critical point of China’s merger policy does not lie in the decision to opt for an *ex ante* or *ex post* approach. Rather, what is highly controversial is the burden of proof adopted by MOFCOM.317

It appears evident that the burden of proof adopted by the Chinese Ministry of Commerce was dramatically low. The decision only referred to Coca-Cola’s enhanced market power through the acquisition of two other famous juice brands to presume the raising of entry barriers. Furthermore, it did not provide any analysis about the ability of the firm to foreclose the market and, thus, marginalise its competitors. In this sense, MOFCOM seems to ignore the importance of a thorough economic analysis when reviewing conglomerate mergers. In these cases the analysis is necessarily prospective since it is not possible to refer to pre-existing overlaps or vertical relationships.318 Therefore, the

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317 It is worth remembering that similar problems emerged in the EU as well. The General Court annulled the decision of the European Commission to prohibit the Tetra Laval/Sidel merger. Case T-5/02 Tetra Laval v Commission [2002] ECR II-4381. In its judgment the Court found that the Commission failed to prove that the transaction would have allowed the new entity to obtain a dominant position on any market for PET equipment, or that the merger would have increased Tetra Laval’s market power on any carton packaging market. The General Court considered that the Commission could not simply base its analysis on the assumption that, post-merger, the new entity would have engaged in leveraging conducts in breach of article 102 TFEU. The European Commission appealed the judgment, but, in 2005, the CJEU confirmed the decision of the General Court. Case C-12/03 P Commission v Tetra Laval [2005] ECR I-987. It explained that this review was particularly important in relation to conglomerates since it was not possible to take into account existing overlaps or vertical relationships to establish anti-competitive effects. The CJEU therefore concluded that this type of transactions could only be blocked on the basis of highly convincing evidence that such effects would have occurred. For an insightful discussion on this case see Matteo F. Bay and Javier Ruiz Calzado, *Tetra Laval II: the Coming of Age of the Judicial Review of Merger Decisions*, World Competition, Vol. 28, Issue 4, (2005), 433 - 453. The General Court found that the European Commission had committed manifest errors of assessment of the portfolio effects in its *GE/Honeywell* decision as well. Joined Cases T- 209/01 and T-210/01 Honeywell and GE v Commission [2005] ECR II-5527. As in *Tetra Laval/Sidel*, the General Court drew a distinction between the ability to conduct anti-competitive behaviour and the incentive to do so and held that the European Commission: “must quantify those effects and show that they will result from the merger rather than from pre-existing market conditions.” See Para. 78 of the Decision. In the Court’s view, the European Commission failed to provide convincing evidence that the predicted behaviour would have been likely to occur. However, in the end, the Court dismissed the arguments of the Commission on vertical foreclosure and conglomerate effects but ruled in favour of its horizontal concerns. For further discussion, also in relation to the transatlantic divergence on conglomerate mergers, see William Kolasky, *GE/Honeywell: Narrowing, But Not Closing, the Gap, Antitrust*, ABA Section of Antitrust Law, (2006), 69 - 76.

318 See Catriona Hatton, Aymeric Dumas-Eymard and Jean –Michel Coumes, *European Court of Justice confirms that the European Commission was wrong to block Tetra/Sidel merger*, EU Bulletin – Hogan & Hartson LLP, (March 2005), 1 - 3, at 1, available at http://www.hoganlovells.com/files/Publication/d27d5b3f-a1b9-48d6-bdff-
Chinese Ministry of Commerce should provide convincing factual evidence to demonstrate the anti-competitive effects of a proposed operation. It cannot simply base its analysis on the unverified assumption that the merged entity will engage in leveraging practices or on the mere assertion that entry barriers will be raised. This low burden of proof therefore affects the credibility of the MOFCOM as an enforcement authority. The main divergence with the European approach is not on the fundamental principles of the portfolio effect theory. Rather, the main objections relate to MOFCOM’s lack of any explanation about the criteria and the findings of its economic analysis.\(^{319}\)

Some commentators pointed out that the most controversial of the three reasons proposed by the Chinese Ministry of Commerce to block the Coca-Cola deal was the third one according to which the transaction would have represented a threat for Chinese SMEs and would have affected the structure of competition in China’s juice drink market.\(^{320}\) In the Coca-Cola case MOFCOM may have sent a negative message to the business community and, in particular, to foreign business operators suggesting that domestic SMEs may be granted with some sort of protection from the enforcement authorities of the AML.\(^{321}\)

In this respect it was further noted that: “The loss of Huiyuan to Coca-Cola would have removed one of the only large, domestically controlled fruit juice enterprises from the market, leaving China with hundreds of small and medium enterprises to compete against Coca-Cola and other international competitors. The reality that Huiyuan would become controlled by Coca-Cola and that China
would lose a highly successful brand that had been able to compete against global beverage giants provides reasonable concern that China was protecting an important domestic brand rather than truly focusing on the effects the Coca-Cola merger might have had on competition in the fruit juice industry. ³²²

The text of MOFCOM’s decision makes no reference to this aspect. Furthermore, in his press release on the Coca-Cola case the spokesman of the Anti-Monopoly Bureau made it clear that the prohibition of the proposed deal was purely based on anti-competitive concerns. Again, MOFCOM’s failure to disclose precise information about the criteria adopted in its economic analysis makes it difficult to understand, in practice, how influential the aforementioned concerns may have been in the review of the Coca-Cola deal.

3. The Mitsubishi Rayon/Lucite merger

On April 24, 2009, the Anti-Monopoly Bureau of the Chinese Ministry of Commerce decided to approve, with condition, the proposed acquisition of Lucite International Group Ltd. (hereinafter, “Lucite”) by Mitsubishi Rayon Co. (hereinafter, “Mitsubishi”).³²³ Interestingly, neither Mitsubishi nor Lucite were based in China, though they had significant business activities in the country. Nevertheless, China's new M&A regime provides that MOFCOM may intervene to review a transaction where business operations in China of one or more parties reach a certain threshold.

In the review process, MOFCOM found that various anticompetitive effects had to be taken into consideration. First, the two parties were horizontal competitors and after the merger they would have reached a combined market share of 64 percent. Second, since Mitsubishi competed in the market of methyl methacrylate (hereinafter, “MMA”) and in two other downstream markets, after

the merger the new entity would have been able to restrict access to MMA to those companies competing in the downstream markets. MOFCOM concluded therefore that the merger would have eliminated or restricted competition in the Chinese MMA market and in its downstream market.

After this first phase, MOFCOM started to evaluate the effectiveness of the remedies proposed by the parties. In the end, the transaction was approved under the following conditions: i) the possibility to purchase 50 percent of Lucite’s (China) annual MMA production for five years at production cost must be divested to a third party; ii) Lucite (China) must operate independently from the MMA monomer business operations of Mitsubishi in China with independent management and board of directors between the closing of the transaction and the completion of the divestment; iii) for a period of five years after the closing of the transaction, Mitsubishi Rayon must obtain the prior consent of MOFCOM, in order to acquire any manufacturer of, or to establish any new plant for, MMA monomer, polymethyl methacrylate polymer (hereinafter, “PMMA”), or cast sheet in China.

With reference to the duration of the review process, in September 2008, the Japanese chemical company, Mitsubishi officially announced its intention to buy Lucite. In December 2008, Mitsubishi started to file materials to MOFCOM and in January 2009 the Anti-Monopoly Bureau initiated the review. Similar to the InBev deal, Mitsubishi submitted materials and responded to MOFCOM’s requests before entering the review process. MOFCOM seems therefore to use this preliminary stage to ask and collect information on specific points which may have an impact on the timetable of the review process.

The Mitsubishi Rayon/Lucite deal had a global dimension and, consequently, was reviewed under other jurisdictions including the EU.\(^{324}\) Whereas all other competition authorities approved the operation without reservation, MOFCOM opened a second round of investigations.

As seen, the AML introduces a two-stage review procedure shaped on the European M&A regime. In February 2009, after the expiration of the first 30-day phase, the Anti-Monopoly Bureau decided to start an additional 90-day review. The deadline for the final decision was extended and on 24 April 2009 MOFCOM finally approved the operation subject to a series of conditions. The procedure is largely consistent with EU practice. Yet, unlike what was indicated under the EUMR, the AML fails to clarify what factors the MOFCOM may take into consideration to initiate a second phase of review. This aspect undermines legal certainty since it leaves too much discretion in the hands of the enforcement authority. Nonetheless, in these early merger cases, it is more likely that the decision to initiate a second phase of investigation was due to MOFCOM’s cautious approach when applying the new M&A rules which embody concepts and language coming from foreign legal system. This extension allowed MOFCOM to complete its analysis of the concerned industry. This interpretation is further supported by the fact that the Chinese Ministry of Commerce was particularly active in consulting trade associations and chemical companies.

MOFCOM considered that the proposed transaction could have adverse effects on competition from at least two perspectives.

Firstly, from a horizontal perspective, the market share of Mitsubishi in the MMA market would have reached 64 percent. This percentage was much higher than those of Jilin Petrochemical Co., Ltd. and Heilongjiang Longxin Company, two of the main competitors in this sector. This market share would have created a dominant position which could enable Mitsubishi to restrict the business activities of other competitors.

Secondly, from a vertical perspective, considering that Mitsubishi operated in both the MMA market and the two downstream markets, post-merger Mitsubishi would have been able to foreclose its downstream rivals by leveraging its dominant position. In the end, however, MOFCOM accepted the remedies provided by the merging parties and approved the transaction subject to the abovementioned conditions.
With reference to the first condition, MOFCOM imposed on Lucite a “divestiture period”. The Company has to divest 50 percent of its annual MMA production capacity to one or more third party buyers for a period of five years. During this period, the buyers may purchase up to 50 percent of its MMA products at cost price. In addition to this, Mitsubishi must complete the divestiture within six months from the closing of the operation. Should not the divestiture be completed within the prescribed time, MOFCOM can authorise an independent trustee to start a “full divestiture” by selling the 100 percent shares of Lucite (China) to third party buyers.

Within the period from the closing of the proposed transaction to the completion of the divestiture, Mitsubishi and Lucite’s MMA monomer activities in China must be conducted independently with distinct management and board. Both companies must sell their products on a competition basis, and they must not implement common policies on prices and customer strategies or to have any other exchange of information related to the Chinese market. Finally, MOFCOM may decide to impose a fine between CNY 250,000 and CNY 500,000 in case of violation of these restrictions.325

The remedies imposed by MOFCOM raise some concerns. First of all, the prohibition for the new entity to expand its business is rather controversial.

325 When the decision was released, China had not approved any disinvestment legislation yet. The first piece of legislation in this area, the Provisional Rules on Implementing Divestiture of Assets or Businesses (hereinafter, “Divestment Rules”), was issued by MOFCOM only on July 5, 2010 (effective on the same day). Divestment may be imposed by MOFCOM as a remedy to deal with the potential anti-competitive effects of concentrations. The Divestment Rules introduce a two stage process to conduct divestments. The first one is a "voluntary divestment" phase. In this stage, the divestment obligor is responsible to find a buyer and to conclude the required agreements, within a time limit fixed by the Chinese Ministry of Commerce and under the supervision of a trustee. In case the divestment obligor would not find an appropriate buyer, the divestment process would enter the second stage defined "entrusted divestment". During this phase, a divestment trustee is in charge to find an appropriate buyer and to conclude the sale agreement on behalf of the divestment obligor. Once these operations are terminated, MOFCOM shall require to the divestment obligor to complete the transfer of the divested activities to the buyer within a period of three months. The Divestment Rules are largely consistent with the EU discipline in this area and recall the solutions that the Chinese Ministry of Commerce applied in other merger transactions occurred since the enactment of the AML. This further demonstrates MOFCOM’s ongoing study of foreign competition law systems and its capacity to adapt foreign solutions to Chinese context. See Best Practice Guidelines: The Commission’s Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation, available at http://ec.europa.eu/competition/mergers/legislation/note.pdf.
MOFCOM’s attempt to protect other competitors appears in this case even more explicit than in the *InBev* decision. It is far from being clear whether this solution shall be beneficial for effective competition and consumer welfare or not.

The most critical issue refers to the right for third party buyers to purchase MMA products from Lucite at price cost. This remedy is highly questionable and casts a shadow on MOFCOM as a competition enforcement agency. The Chinese Ministry of Commerce imposed a sort of price regulation solution which may constitute a risky precedent in a country with a long tradition for State control on prices like China.

Chinese scholars still have a vivid memory about the famous “*industrial self-discipline prices*” case as the best example of State intervention in price competition among undertakings. In 1998, with the purpose to end the fierce competition on prices among Chinese enterprises, SETC issued the *Opinions on Self-Discipline Pricing for Certain Industrial Products* (hereinafter, “*Opinions*”). Following the *Opinions*, Chinese producers had to sell their products at the minimum price fixed by their trade associations which fixed the price without the prior consent of the enterprises, which were forced to sell their products at those co-ordinated prices. This favoured the creation of a binding cartel on prices. The price fixed by the competent authorities actually exceeded the production cost of most enterprises. Most efficient producers were highly penalised since their possibility to compete on the market by means of price reduction was restricted and their production could not be expanded. The final result was the survival of several low-efficiency enterprises and the difficulty for efficient firms to effectively compete on the market. Ironically, this disastrous situation was the consequence of an *ad hoc* governmental action implemented to help the modernisation of Chinese enterprises. These kinds of policies were principally the consequence of the distorted vision about the role of competition law and the limited experience on competition analysis that most government officials had at that time. Although, the situation has improved since MOFCOM’s personnel is

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327 Ibid. at 273.
now composed of qualified and trained staff, the decision in Mitsubishi Rayon/Lucite still carries with it the echo of this inglorious past. Fixed prices represent an evident deviation from the principles of a market economy, and in any case it is not the task of a competition authority to intervene as a market regulator.\textsuperscript{328}

4. The Seagate/Samsung merger


China’s merger review process begins with a preliminary notification by the parties that, usually after they fulfil MOFCOM’s request for additional information, is accepted as complete by the Chinese Ministry of Commerce that initiates a first 30-day review phase followed by a second 90-day phase. However, transactions which raise serious competitive concerns may be moved into a third and final 60-day phase. The Seagate/Samsung’s deal followed this scheme as well. After having received Seagate’s draft filing on May 19, 2011, MOFCOM requested additional material, it formally accepted the proposed transaction on June 13, 2011, it then moved into the second 90-day phase and it finally published its decision at the very end of the third 60-day phase. In its most detailed decisions so far, MOFCOM focused its attention on multiple aspects of the notified operation.

MOFCOM identified the relevant geographic market with the worldwide HDD market as HDD’s supply and sale are carried out globally. The Chinese Ministry of Commerce also noted that the HDD market could be further divided

\textsuperscript{328} The text of the new AML also reflects this tendency. Article 16 of the AML prohibits, for instance, dominant firms from selling or buying commodities at too high or too low prices. In this sense, this prohibition could be read to empower Chinese authorities to act as a price regulator.

\textsuperscript{329} Decision of 12 December 2011 on the proposed acquisition of Samsung Electronics by Seagate Technology. The text of the decision (in Chinese) is available at MOFCOM’s website http://www.mofcom.gov.cn.
into narrower product markets according to the end use. However, in its economic analysis it decided to focus only on the HDD market without taking into account the structure of these other sub-markets.\textsuperscript{330} With reference to the market structure of the HDD’s market, MOFCOM identified five global competitors including Seagate (33%), Western Digital (29%), Hitachi (18%), Toshiba (10%) and Samsung (10%). It also found that the HDD market is rather transparent and, therefore, HDD manufacturers can easily obtain information about their competitors’ technology and business.

MOFCOM found that large computer manufacturers often adopt a confidential bidding procedure by means of seasonal bilateral negotiations with HDD manufacturers. In order to ensure continuity and security of supply, computer manufacturers usually purchase from two to four HDD makers on the basis of the offered price and other conditions. The most competitive HDD bidder generally receives the largest order, the second a smaller one, and the remaining bidders may not receive any order. The Chinese Ministry of Commerce concluded that such a purchase system favours price competition in the HDD market.\textsuperscript{331} MOFCOM also found that, as a consequence of the increase of market demand, the capacity utilisation rate of HDD makers is very high.\textsuperscript{332}

The Chinese Ministry of Commerce emphasised that innovation represents a crucial factor in the HDD sector. As a result of innovation, profit margins quickly reduce in the HDD industry, and, therefore, manufacturers aim to reduce costs by constantly innovating. MOFCOM also noted that competition and innovation in the HDD sector are intrinsically connected and, consequently, any reduction of market competition would substantially reduce HDD’s manufacturers’ incentive to innovate. Finally, MOFCOM found that, due to intellectual property and technological expertise, the HDD market is characterised

\textsuperscript{330} These sub-markets include HDDs for servers, desktop computers, laptops and consumer electronics.

\textsuperscript{331} MOFCOM also noted that large computer manufacturers are generally indifferent to the increase of prices because they can easily pass this price increase to final consumers who have little countervailing buying power. Furthermore, HDD manufacturer usually direct pricing for distributors who do not have insufficient purchasing power to oppose price increases.

\textsuperscript{332} Capacity utilisation rate amounted to approximately 90 percent during the fourth quarter of 2010.
by significant barriers to entry and there has been no new entry into the HDD industry in the past ten years.

On the basis of these findings, MOFCOM considered that the proposed transaction would eliminate one of the main competitors, alleviate competitive pressure on the other HDD manufacturers and enhance their capacity to obtain purchase orders under the existing bidding system. As a consequence of the relative transparency of the HDD market, which allows HDD manufacturers to predict the market behaviour of their rivals, the proposed operation would have enhanced the probability of coordination among competitors to restrict or eliminate competition. Therefore, the Chinese Ministry of Commerce concluded that the proposed transaction would have negatively affected the interests of Chinese personal computer consumers.

MOFCOM decided to impose the following conditions: i) Seagate shall adopt a series of measures to maintain Samsung's HDD business as an independent competitor. These measures will include: the establishment of an independent subsidiary which shall set the price of Samsung’s products and conduct their sales in an independent way; the establishment of firewalls to impede the exchange of competitive information between Seagate's and Samsung's sales teams; and the prohibition for Seagate to restrict the production of Samsung; ii) Seagate shall keep its promise to expand the Samsung production capacity within six months of the decision, and reasonably determine the production capacity and volumes of Samsung's products thereafter. Both Seagate and Samsung shall report their production capacity and volumes to the monitoring trustee; iii) Seagate is prohibited from substantively changing its current business model by forcing customers to purchase HDD products from Seagate or any entity controlled by Seagate; iv) Seagate shall not force TDK China to supply HDD heads to Seagate or other entities controlled by Seagate or restrict the amount of HDD heads that TDK China supplies to other HDD makers; v) Seagate shall invest at least $800 million annually for three years in innovation to ensure that it shall provide more innovative products and solutions to consumers; vi) finally, MOFCOM’s decision includes a review clause which allows Seagate to apply to
the Chinese Ministry of Commerce to seek release from the first two conditions after 12 months.

The Seagate/Samsung transaction had a transnational dimension and, consequently, it had to be cleared from the competition authorities of various jurisdictions including the EU, the US and Japan. With reference to the EU, in April 2011 the European Commission received two notifications of proposed transactions in the HDD industry. The first notification, received on April 19, 2011, concerned the proposed acquisition of the HDD business of Samsung by Seagate. The second one, received on April 20, 2011, referred to the proposed acquisition of Viviti Technologies Ltd (hereinafter, “Hitachi”) by Western Digital Corporation (hereinafter, “Western Digital”).

It is worth noting that, pursuant to a priority rule based on the date of notification, the European Commission began to assess the Seagate/Samsung operation by taking into account the market situation existing before the notification of the Western Digital/Hitachi deal. Although the proposed transaction would have further consolidated markets that were already concentrated, the European Commission concluded that the merger would not significantly restrict market competition in the EU. The European Commission’s analysis demonstrated the existence of separate worldwide markets for HDD based on their end use application. It also identified a separate market for external hard disk drives that was downstream from hard disk drives.

The major impact of the proposed operation would have been on the markets for 3.5" desktop HDD and 2.5" mobile HDD where the conducted investigation showed that Samsung was not a particularly strong competitor. Three strong suppliers would remain on the 3.5" desktop market (the merged entity, Western Digital of the US and Japan's Hitachi Global Storage Technologies), and four strong suppliers on the 2.5" mobile market (the three plus Toshiba, also from Japan). The presence on the market of three suppliers would

333 Both transactions were cleared by the European Commission during Phase II of Investigation.
have guaranteed for customers an opportunity to retain sufficient possibilities to switch suppliers. The European Commission also found that the elimination of Samsung was not likely to increase the risk of coordination among the remaining HDD suppliers.

The European Commission further stated that the operation would not jeopardise the business activity of Japan's TDK, an independent supplier of heads for HDDs, as the new entity would continue to purchase components from TDK post-transaction. Finally, the European Commission found that there would be no impact on the market for external hard disk drives since non integrated suppliers of external HDD would still have sufficient alternative sources for HDD.335

By referring to the European Commission’s decision in the Seagate/Samsung transaction, some commentators noted that the Chinese Ministry of Commerce may have reached an inconsistent conclusion in considering that computer manufactures adopt a sophisticated system to ensure the most economic yet secure supply of an essential input such as HDD, but show little incentive to oppose price increases.336 In this regard, MOFCOM may not have considered that computer manufacturers have the possibility to pass price increases to final users, as a result of existing downward trend in computer retail prices.337

As previously noted, in Seagate/Samsung, MOFCOM provided for the first time the possibility for concerned parties to be relieved from some of the imposed conditions. Should MOFCOM decide to waive the first two conditions after one year, this would entail the elimination of all constraints for potential coordinated competitive behaviours by Seagate. In this regard, it was noted that, this would have the result to simply delay the completion of the operation by 12 months and it would give MOFCOM the opportunity to maintain its jurisdiction over the deal that otherwise would pass to NDRC or SAIC.338 However, the fact

335 Ibid.
337 Ibid.
338 Ibid.
that the Chinese Ministry of Commerce failed to provide any indication about the standards for reviewing its decision after one year is highly controversial since it leads to legal uncertainty for the merged entity and it undermines the credibility and the effectiveness of China’s new merger system.

Further criticism relates to MOFCOM’s conditions in relation to TDK. The decision of the Chinese Ministry of Commerce seems to suggest some concern about the possibility of Seagate to gain an advantage over its rivals through the control of an input. However, on the basis of MOFCOM’s decision, all manufacturers of HDD heads should also be subject to similar conditions. 339 Finally, explicit reference in the decisions to the fact that China in one of the main personal computer consumer countries seems also to reflect MOFCOM’s concern about the impact of the transaction over domestic manufactures of computer components and facilities.

After the prohibition of the Coca-Cola/Huiyuan deal, the approval of various acquisitions by foreign investors of well-known Chinese brands, including Yum!/Little Sheep340 and Nestlé/Hsu Fu Chi341, has partially mitigated the impression that the new merger rules may have been interpreted by the Chinese Ministry of Commerce in a way to shield domestic companies from the competition of large foreign corporations. However, the imposition of significant conditions in Seagate/ Samsung made some commentators sceptical about MOFCOM’s impartiality in particular in light of the emphasis given to the safeguard of the interests of Chinese consumers.342

5. The Western Digital/Hitachi GST merger

339 Ibid at 21.
340 Decision of 8 November 2011 on the proposed acquisition of Little Sheep by Yum!. The text of the decision (in Chinese) is available at MOFCOM’s website http://www.mofcom.gov.cn/.
341 Decision of 6 December 2011 on the proposed acquisition of Hsu Fu Chi by Nestlé. The text of the decision (in Chinese) is available at MOFCOM’s website http://www.mofcom.gov.cn/.
In March 2011, Western Digital announced its intention to acquire Hitachi GST for $3.5 billion and Western Digital stock, valued at $750 million at that time. The proposed operation also included a reverse breakup fee of $250 million to be paid to Hitachi in case of non-approval by the competent competition authorities. Due to its transnational dimension, the proposed transaction had to be cleared by various authorities around the world, including in the EU, the US, Australia, Canada, Japan, Korea, Mexico, New Zealand, Singapore and Turkey.

With reference to the EU, the European Commission approved the proposed transaction subject to the condition imposing on Western Digital to divest Hitachi GST assets related to the production of 3.5” HDDs to Toshiba Corporation.343

On March 2, 2011, the Chinese Ministry of Commerce also released its conditional approval of the operation.344 Similarly to what stated in Samsung/Seagate, in Western Digital/Hitachi GST MOFCOM concluded that the transaction would have anticompetitive effects by reducing the number of market competitors, reducing competition and innovation, and, increasing the risk of coordination among the remaining competitors as a result of the high degree of market transparency in the HDD industry. In this regard, despite accepting the divesture imposed upon Western Digital by the EU and the US competition authorities, the Chinese Ministry of Commerce considered it necessary to impose a series of additional conditions. More specifically, under the supervision of a trustee and MOFCOM itself: i) Hitachi GST shall continue to operate as an independent competitor in the global HDD market; ii) Hitachi shall continue to market HDD products independently by its original sales team, under the same brands as before transaction; iii) Western Digital shall not exercise its shareholder rights in Hitachi GST in an anticompetitive way; iv) a firewall shall be created to prevent the exchange of information between the two entities; v) both entities shall maintain their respective level of investment level in research and development; vi) Western Digital and Hitachi GST shall monthly report to the

343 See Commission Decision, supra note 334.
344 Decision of 2 March 2011 on the proposed acquisition of Western Digital by Hitachi GST. The text of the decision (in Chinese) is available at MOFCOM’s website http://www.mofcom.gov.cn/.
trustee about their capacity and volume of production; vii) Finally, the decision includes a review clause which allows Western Digital to apply to the Chinese Ministry of Commerce to seek release from the listed conditions after a period of two years.

The approach of the Chinese Ministry of Commerce largely differs from that of the European Commission and the Federal Trade Commission that only imposed on Western Digital to divest Hitachi GST assets related to the production of 3.5” HDDs to Toshiba Corp. Furthermore, although MOFCOM’s analysis in Western Digital/Hitachi GST recalls that in Seagate/Samsung, the imposed conditions are substantively more stringent.

The conditions imposed by MOFCOM in Seagate/Samsung and in Western Digital/Hitachi GST seem rather unusual in that, on the one hand, they allow the concerned parties to conclude the operation, but, on the other hand, they prohibit them from integrating the acquired businesses and require the acquired businesses to operate in a separate way.

Both of these operations can be classified as “horizontal mergers”. It is worth noting that, in the EU, when horizontal operations are supposed to raise competition concerns, competition authorities usually opt for the imposition of structural remedies, such as, for instance, divestitures or, in extreme cases, prohibiting the transaction in its entirety.345 Instead, the Chinese Ministry of Commerce opted for the imposition of significant behavioural remedies to limit the anticompetitive effect of the horizontal merger of two competitors. Some commentators noted that the imposed remedies are likely to create serious burdens on the concerned entities.346 For instance, they may effectively impede Western Digital from achieving the efficiency and synergy that it expected through the operation, at least until MOFCOM’s future decision to waive the condition to

345 For discussion, see Whish, supra note 300, at 880-881.
346 See David Polk, Client memorandum, Chinese Antitrust Authorities Approve Western Digital/Hitachi GST Deal with Significant Conditions, (March 9, 2012), available at http://www.davispolk.com/sites/default/files/files/Publication/02eb877-46da-4ecd-bdaf15b4120c8c2d/Preview/PublicationAttachment/f7c56be9-b90c-48c0-bb6c-17b6e5e4302a/030912_PRCUpdate.pdf.
maintain Hitachi as a competitor. In general, MOFCOM’s approach seems to be rather “solomonic”. On the one hand, by imposing remedies that go far beyond those of the European Commission, it appears that MOFCOM had serious concerns about the proposed transaction, but, on the other hand, it may have been persuaded not to entirely prohibit an operation which had been approved by all other jurisdictions around the world. In this regard, MOFCOM’s decision in Western Digital/Hitachi GST further confirms the increasingly critical role that China’s merger policy may have on worldwide transactions.

6. The Wal-Mart/Yihaodian merger

On August 13, 2012, the Anti-Monopoly Bureau of the Chinese Ministry of Commerce conditionally approved Wal-Mart’s acquisition of Shangai Yishiduo E-Commerce Co., Ltd (hereinafter, “Yihaodian”), the largest online retailer in the People’s Republic of China. In 2011, Wal-Mart, through its wholly owned subsidiary GEC 2, decided to increase its stakes in Yihaodian’s parent company, Niuhai Holdings Ltd, from 17.7 percent to 51.3 percent. Niuhai Holdings is the indirect subsidiary of Niuhai Information Technology (Shanghai) Co., Ltd. that, in turn, controls Yihaodian.

On December 16, 2011 the proposed transaction was notified to the Chinese Ministry of Commerce which officially accepted it on February 16, 2012. On March 16, 2012 the case entered into Phase II and, on July 3, 2012, during the extended Phase II, the concerned parties submitted their remedies. MOFCOM’s decision was issued at the end of the extended Phase II. That was approximately 8 months later the notification of the deal.

With reference to MOFCOM’s competition analysis, the Chinese Ministry of Commerce identified the relevant product market in the B2C online retail market and China as the relevant geographic market. It found that Wal-Mart’s main business activity consisted of brick-and-mortar supermarket retailing. On the

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347 Ibid.
contrary, Yihaodian engaged in two distinct, but related, business activities: i) online direct sales and ii) Value Added Telecommunications Business (hereinafter, “VATB”) by providing an e-commerce platform for other sellers and consumers.

However, the Chinese Ministry of Commerce did not clarify how the relevant market was defined. For example, it failed to explain if the B2C online retail market covered both Yihaodian’s online direct sales and VATB businesses. The Chinese Ministry of Commerce concluded that the proposed transaction could have the effect of restricting or eliminating competition in the B2C online retail market in China for various reasons. First of all, Wal-Mart would have been able to leverage its competitive advantages in brick-and-mortar retailing into Yihaodian’s online direct sales business activity. MOFCOM stated that as a result of its advanced system of distribution, its articulated channels of supply and its brand recognition, Wal-Mart would have the ability to leverage its competitive advantages in the brick-and-mortar stores market into the online retail market and increase, post-transaction, the competitive strength of the new entity in the latter market.

Secondly, Wal-Mart would have been able to leverage the competitive advantages deriving from both the brick-and-mortar retailing and the online direct sales business activity into the VATB market. In this regard, the Chinese Ministry of Commerce also considered the impact on the national VATB market and concluded that, if Wal-Mart had the opportunity to enter the VATB market through Yihaodian, it would have the ability to leverage the combined competitive strength deriving from its business activities to establish a dominant position in China's VATB market by increasing its bargaining position over the users of the

349 It was noted that the decision does not explain whether the Chinese ministry of Commerce found an horizontal overlap between Wal-Mart and Yihaodian, or whether it focused on the business of Yihaoian as the target. Susan Ning, Hazel Yin ,and Han Wu, MOFCOM Approved Wal-Mart’s Acquisition of Controlling Stake in Yihaodian but Said NO to VIE Structure, China Law Insight, (August 20, 2012), available at http://www.chinalawinsight.com/2012/08/articles/corporate/antitrust-competition/mofcom_approved-walmarts-acquisition-of-controlling-stake-in-yihaodian-but-said-no-to-vie-structure/. It is also worth noting that, the imposed remedies concern the online direct sales market and the VATB market, but they do not refer to the B2C online retail market, that is the relevant product market identified in the decision. Ibid.
e-commerce platform, and, consequently, by eliminating and restricting competition in the VATB market.

In order to address the abovementioned competition concerns, MOFCOM imposed the following remedies on Wal-Mart: i) the scope of the acquisition by Wal-Mart shall be limited to the online direct sales business of the existing network platform of Yihaodian; ii) after the completion of the proposed transaction, Niuhai Information Technology (Shanghai), the subsidiary company of Yihaodian which would be under Wal-Mart’s control, shall not be allowed to provide VATB to third parties without the prior approval of Chinese authorities; iii) after the completion of the proposed transaction, Wal-Mart shall be prohibited from operating Yihaodian’s VATB through a Variable Interest Entity (hereinafter, “VIE”) structure.

It is worth noting that in Wal-Mart/Yihaodian the Chinese Ministry of Commerce referred to the “leverage effect doctrine”. As previously discussed, in Coca-Cola/Huiyuan, MOFCOM decided to prohibit the proposed transaction on the basis that Coca-Cola would have had the ability to leverage its dominant position from the carbonated soft drinks market to the fruit juice market and, thus, restricted competition. Similarly, in Wal-Mart/Yihaodian, it considered that Wal-Mart would have been able to leverage its market power in the brick-and-mortar supermarket business into the online retail market and, then, into the VATB’s one.

However, the failure to provide a detailed analysis of the market definition does not help to clarify on what grounds MOFCOM reached these conclusions. Furthermore, the decision limits itself to describe Wal-Mart as a major market player in the global and Chinese retail markets but it does not explain how Wal-Mart had a dominant position in the brick-and-mortar supermarket market. If compared with its previous conditional approvals, in Wal-Mart/Yihaodian MOFCOM did not provide any indications about the market share of Wal-Mart and its rivals. Finally, even assuming Wal-Mart’s market power in the brick-and-mortar supermarket market, the Chinese Ministry of Commerce did not provide any evidence of Wal-Mart’s ability to leverage its dominant position from the
brick-and-mortar supermarket market into the Chinese online retail and VATB markets.

In Wal-Mart/Yihaodian, for the first time, the Chinese Ministry of Commerce took into account the sensitive issue of VIEs in relation to a merger transaction. A VIE structure entails for a foreign investor the necessity to establish a wholly foreign-owned enterprise (hereinafter, “WFOE”) in China that will, in turn, control the business activity of a domestic firm by the foreign investor’s nominee (hereinafter, “Operating Company”). The Operating Company shall then detain all the operating licenses and permits necessary for the operation of the concerned business activity which would otherwise be prohibited to foreign investors in China.350

The WFOE and the Operating Company, together with other concerned parties, will enter into a series of contractual arrangements to enable the WFOE (and, in an indirect manner, the foreign investor) to exercise an effective control over the Operating Company and to allow the foreign investor to obtain the economic benefits generated by the Operating Company (often in the form of “service fees” payable by the Operating Company to the WFOE).351

In this respect, “MOFCOM’s prohibition to VIE structure by Wal-Mart to operate the VATB business of Yihaodian in this decision, while not an express declaration as to the illegality of the use of the VIE structure, indicates MOFCOM’s negative attitude towards the use of VIE structures”. 352

350 In China, online direct sales belong to the restricted industry for foreign investors.
351 For further discussion, see Ning and others, supra note 349. The VIE structure was used for the first time by Sina Corporation in 2000. Since then, it has been extensively adopted, particularly in the value-added telecoms industry to circumvent China’s restrictions preventing foreign investors from holding controlling stakes in this sector. Despite their widespread use, the legality of the VIE structure in China has long been uncertain. For an insightful discussion on this issue, see David Roberts and Thomas Hall, VIE Structures in China: What You Need to Know David Roberts and Thomas Hall, Topics in Chinese Law, An O’Melveny & Meyers LLP Research Report, (October 2011), available at http://iis-db.stanford.edu/evnts/6963/TICL - VIE Structures in China.pdf.
352 Michael Han, MOFCOM Conditionally Clears Wal-Mart’s Acquisition of Yihaodian, Freshfields Bruckhouse Deringer, (August 30, 2012), available at http://www.freshfields.com/en/knowledge/MOFCOM Conditionally Clears Wal-Mart Acquisition of Yihaodian/. Furthermore, “A most recent attack of VIE is the national security review mechanism enacted in 2011, which banned the adoption of “other structures” to evade the national security review. This condition suggests that MOFCOM is taking a negative approach towards VIE and companies whose operations involve the use of VIE may encounter
MOFCOM’s decision suggests the existence of various concerns about the VIE structure that could potentially get around China’s restrictions on foreign investment related to VATB.  

In this regard, some commentators noted that MOFCOM’s attitude has at least two major implications. Firstly, if an operation that is subject to merger review includes a legacy VIE structure, while the Chinese Ministry of Commerce, as competition authority, may not scrutinise the legality of the previous VIE structure, it may decide to prohibit the new foreign buyer from taking benefit of the previous VIE structure to circumvent foreign investment rules. Secondly, MOFCOM’s negative attitude towards VIE structures, within the merger review context, seems also to reflect a modification in the Chinese government’s attitude towards these structures. In this regard, it was noted that: “As MOFCOM would need to consult with other relevant sector regulators during the merger review process (in this case, the Ministry of Industry and Information Technology, the telecom regulator), MOFCOM’s position in this decision regarding the VIE structure may be supported by as yet undeclared policies (for example, foreign investment policies) as formulated by other regulators.”

7. Assessment of China’s merger policy

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Yingxi Fu-Tomlinson and Steven R. Wright, MOFCOM’s conditional approval of Wal-Mart’s acquisition—what does it mean for Wal-Mart and Yihaodian and for the future of the VIE structure?, Kaye Scholer LLP, (September 27, 2012), available at http://www.lexology.com/library/detail.aspx?g=eb8c873a-a623-4f3f-b54b-b08ac351835a. However, it is worth noting that the Chinese Ministry of Commerce seems to have intentionally avoided engaging in a general discussion about the legitimacy of the use of a VIE structure by foreign investors. Ibid  

Michael Han, supra note 352.  
Ibid.  
Ibid.
First of all, statistics show that the percentage of notified transactions which were conditionally approved or prohibited by the Chinese Ministry of Commerce is lower than that under other jurisdictions. For instance, if compared with the data in the EU, where remedies were imposed in 5 percent of the notified transactions, MOFCOM only challenged around 3 percent of notified operations.\textsuperscript{357}

However, although this may suggest the adoption of a more lenient approach to merger control by the Chinese authorities, most commentators agree that such data principally depends on the existence of relatively low thresholds for notification under the Chinese AML. Furthermore, it is worth noting that MOFCOM imposed remedies on operations which were unconditionally cleared by other competition authorities.

A second noteworthy issue refers to the length of the review process. The analysis of the decided cases demonstrates that MOFCOM enjoys certain flexibility in extending the timeline contained in the AML. Data show a delay in accepting notifications, thus triggering the beginning of the first review phase up to 60 days. Even the \textit{InBev/AB} case, which was decided during the first phase, the time for review exceeded the expected 30 days.

In general, it appears that the Chinese Ministry of Commerce often doubled the original timeline of the first phase. In addition to this, it is worth noting that most transactions were approved only during the second phase and those which raised major competition concerns required a four-five up to eight month review process. This is probably the consequence of a series of factors, including a rapidly increasing number of notifications, limited staff and the necessity for the personnel to become familiar with China’s new merger regime. However, this may also depend on MOFCOM’s desire to collect data and opinions from other governmental agencies, trade associations, domestic companies and customers.\textsuperscript{358}

\textsuperscript{357} See \url{http://ec.europa.eu/competition/mergers/statistics.pdf}.
\textsuperscript{358} Peter J. Wang, \textit{Lessons from Four Years of Antitrust Enforcement in China}, Jones Day, (September 2012), available at \url{http://www.jonesday.com/lessons_from_four_years/}. 

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The decided cases also show that since the initial phase of its enforcement activity the Chinese Ministry of Commerce was confronted with a variety of merger cases ranging from horizontal to non-horizontal ones. This fact put more pressure on MOFCOM’s personnel and it has presumably favoured the substantial improvement of its analytical skills and reaction time. Furthermore, as previously discussed, the merging parties always got in touch with MOFCOM to file information and to discuss possible remedies before entering the first-30 day phase. These preliminary contacts were therefore very useful to facilitate the review process and demonstrate MOFCOM’s openness to let the parties propose specific remedies.

Thirdly, it appears that in reviewing merger transactions the Chinese Ministry of Commerce took the solutions adopted under other jurisdictions into consideration. In the attempt to improve its enforcement capacity, it is very instructive for MOFCOM to refer to concepts and methods applied by more experienced competition law agencies.\footnote{359}{This is certainly an imperative in today’s global economy, where “many sizeable transactions involving international businesses are likely to be subject to review by the EU and by the US. Where the US and EU are reviewing the same transaction, both jurisdictions have an interest in reaching, insofar as possible, consistent, or at least non-conflicting, outcomes. Divergent approaches to assessment of the likely impact on competition of the same transaction undermine public confidence in the merger review process, risk imposing inconsistent requirements on the firms involved, and may frustrate the agencies’ respective remedial objectives.” See US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigation. US-EU Merger Investigations, available at http://ec.europa.eu/competition/mergers/legislation/eu_us.pdf.}

Since the Chinese Ministry of Commerce has a limited experience in this area, it appears to opt for a prudent “wait and see” attitude to keep itself in the rift of international practice and to enhance its credibility as a newly-established enforcement authority. In general, it is arguable that most of the MOFCOM’s solutions were de facto consistent with those adopted under other jurisdictions.\footnote{360}{The same conclusion can be drawn also in relation to MOFCOM’s prohibition of the Coca Cola/Huiyuan deal. Although the use of the controversial “portfolio effects” doctrine in merger analysis has in fact been criticised, it is worth remembering that in 2003, the Australian Competition and Consumer Commission prohibited the acquisition of Berri Limited, the national fruit juice producer, by Coca-cola on the basis of similar leveraging concerns. For discussion, see Zhang, supra note 300, at 117-118. This point was also raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, January 2011.}

Furthermore, when foreign solutions do not fully fit the Chinese context,
MOFCOM seems to prefer to impose upon the merging parties a series of remedies rather than blocking the proposed transaction.\(^{361}\) However, MOFCOM’s reluctance to openly disregard international practice or to behave independently from the competition authorities of other jurisdictions may sometime lead to controversial decisions. For instance, various commentators consider that in Seagate/Samsung and Western Digital/Hitachi, instead of imposing so stringent and unusual conditions, the Chinese Ministry of Commerce should have prohibited the proposed operation although such an outcome would have been diametrically opposed to the decisions adopted by the EU and the US competition authorities.\(^{362}\)

A further controversial aspect is that, although a transaction is considered to be approved if MOFCOM fails to intervene within the time frame indicated by the AML, the Chinese Ministry of Commerce may de facto block an operation by simply refusing to accept a notification and therefore to initiate the review process. In this regard, it was noted that: “MOFCOM may have exercised such a “pocket veto” to deter transactions that it does not want to approve, without publishing any reasons. A pocket veto may achieve non-competition policy goals without creating any record of AML enforcement outside the mainstream of competition law.”\(^{363}\)

One of the most critical aspects of China’s merger policy remains MOFCOM’s failure to disclose the details of its economic analysis.\(^{364}\) With

\(^{361}\) This approach appears evident, for example, in the MOFCOM’s two major 2009 cases such as InBev/AB and Mitsubishi Rayon/Lucite.

\(^{362}\) Wah Chin, supra note 336, at 8-9.

\(^{363}\) Ibid. at 9.

\(^{364}\) As seen, in cases such as InBev/AB and Wal-Mart/Yihaodian, for instance, the Chinese Ministry of Commerce provided little guidance to understand how the concept of relevant market was defined or how its analysis was conducted. Furthermore, in InBev/AB MOFCOM imposed remedies despite the fact that it found the transaction would have not eliminated or restricted competition in the Chinese beer market. By imposing a series of restrictive conditions on the possibility of the merged entity to expand by means of future acquisition, it appears that the Chinese Ministry of Commerce was therefore mainly concerned with the size of the new entity post-merger rather than with the existence of concrete risks for competition. See Kexian Ng, Intern, Brief note on the recent landmark decisions in China’s Anti-Monopoly Law, Commercial Division, International Bar Association, (2010), 1 - 7, at 4, available at http://www.globalcompetitionforum.org/regions/asia/China/Brief_note_on_recent_landmark_decisions_in_china's_anti-monopoly_law%20(2).pdf.
reference to the issue of transparency, it is worth noting that the text of most of MOFCOM’s decisions only consists of a few pages containing limited details on the substantive analysis. MOFCOM’s public notices merely summarise the procedural phases of the review process, recite the statutory factors, present the conclusions, and discuss remedies without any detailed explanation of the economic analysis and findings.\textsuperscript{365} Finally, no public record exists of the formal written submissions, hearings, or \textit{ex parte} communications from the merging parties. Transparency and public scrutiny are essential aspects of a modern competition law regime. Similar to what happens under other jurisdictions, the Chinese merger control system should therefore be inspired by the principles of transparency and legal predictability and, in this regard, MOFCOM should issue motivated and articulated decisions and to make them public, irrespective of whether it approves, prohibits or imposes restrictive conditions.\textsuperscript{366}

This lack of transparency has also given rise to growing concern that China’s new M&A rules have been used to monitor the activities of foreign corporations. As previously discussed, if compared with the previous system, the new M&A regime certainly represents a more advanced phase in the development of China’s merger policy. However, various commentators remain persuaded that although the new regime formally applies to both foreign and domestic companies indistinctively, MOFCOM has principally intervened in cases involving foreign firms.\textsuperscript{367}

An argument supporting this view is that although Chinese media have reported various mergers transactions involving Chinese firms and SOEs, it appears that the vast majority of these transactions were not reviewed by the Chinese Ministry of Commerce. The most striking example remains the \textit{China Netcom/China Unicom} merger in October 2008 when China Netcom Group Corporation (Hong Kong) Ltd was fully incorporated into China Unicom Ltd.

\textsuperscript{365} Ibid.
\textsuperscript{367} For discussion, see Wah Chin, supra note 336.
establishing the new China Unicom (Hong Kong) Ltd. Although this was the biggest transaction in China’s history, MOFCOM was never notified. 368

Thus, the opacity of MOFCOM’s public enforcement record “shields from public scrutiny questions concerning the AML’s applicability to recent consolidations of state-owned enterprises (SOEs) in key strategic sectors.” 369 Furthermore, the difficulty in understanding China’s existing merger policy also depends on ambiguous notices by the Chinese government. For example, in 2008, SASAC released a notice suggesting that the M&A provisions of the AML would have not been applicable to transactions involving SOEs under the control of the central government since these operations would have been reviewed by the State Council itself. 370 Official statements emphasize that the Anti-Monopoly Bureau applies the same review standard to all types of transaction without taking into account if they involve foreign, domestic or State-owned companies.

However, the only public notices available are those related to the prohibited or conditionally cleared transactions which, rather suspiciously only refer to foreign companies. In this sense, it was correctly noted that: “the fact that not one M&A between Chinese firms has been the subject of adverse decision might bear testimony to the under-enforcement of the current merger control regime.” 371 In conclusion, some commentators consider that China’s merger rules have also been used as an instrument for the country’s main economic goals including the monitoring of the merger activities of foreign companies, the development of domestic SMEs and the restructuring of SOEs. 372

In general, since MOFCOM’s 2009 decisions, various scholars and legal practitioners have been very critical about the potential negative impact of China’s merger policy for international merger review. For instance, Christopher

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370 Ibid.
372 In this regard, it was noted that: “MOFCOM appears to accommodate non-competition values sub silentio since it is actually able to say it has unconditionally cleared a transaction, when in fact it has effectively imposed conditions.” Wah Chin, supra note 336, at 10.
Hamp Lyons noted: “Chief among the concerns of international businesses and commentators regarding the AML is the possibility that China will, in important cases, implement the AML in a parochial way to block mergers that have a net positive effect on competition in order to advance its own strategic goals. This is particularly troubling because when there is disagreement over the competitive effects of a merger, the jurisdiction taking the most restrictive view will control. Thus, the AML enables China to block worldwide mergers based on China’s own special interests.”

By taking into consideration China’s goal to establish a socialist market economy and its ambition to build an “harmonious” society, it appears that the goals of its merger policy may differ from those of Western market economies. This divergence is likely to affect the market strategies of multinational corporations trying to expand worldwide by means of merger activities. Whether some of the objectives China aims to pursue are perfectly legitimate in light of its economic transition, they are not consistent with those of well developed market economies. Thus, there is the concrete risk that China may externalise the costs of its merger policy on to the rest of the international economy.

8. Concluding remarks

As a new member of the competition law club and a major economic power, China’s competition law regime has attracted the attention of legal scholars and practitioners from all over the world. Various commentators agree that China is expected to become an active participant in international

374 Ibid, supra note 373, at 1599-1600.
convergence by taking into consideration solutions adopted by competition authorities with a longer experience in merger enforcement.\textsuperscript{375}

In today’s globalised economy, cross-border M&A represent an essential aspect of competition law enforcement. On the basis of this economic reality, the AML targets domestic economic activities as well as economic activities outside China’s territory. However, the extra-territorial dimension of China’s competition law will be mainly achieved by means of international convergence/cooperation on competition policy.

China’s current merger enforcement procedure is consistent with that of more mature jurisdictions. Furthermore, MOFCOM’s enactment of a variety of secondary legislation and guidelines has enhanced the efficiency, transparency and predictability of China’s M&A regime.

This gradual convergence to international practice is to be applauded. However, a number of differences still remain. MOFCOM continues to privilege a cautious approach when enforcing M&A rules in situations which may be sensitive to the current state of the Chinese market by “using competition law as a flexible instrument to achieve a diversity of objectives.”\textsuperscript{376}

This demonstrates the necessity to reduce potential tensions and the attempt to harmonise the standards of review adopted by competition agencies under other jurisdictions.

By being in its infancy stage, China’s M&A regime still lacks a substantial track record. Thus, the decision to adopt a “wait and see” attitude in merger enforcement appears to be partly justified. Although, all competition law systems may share similar challenges, competition law enforcement also depends on the stage of economic development of the concerned jurisdiction. China’s merger


policy reflects most of the concerns faced by other Asian transitional economies that decided to implement competition legislation.377

As previously discussed, China’s M&A regime has substantially borrowed from the EU competition law system which will certainly continue to serve as a major source of inspiration for Chinese competition authorities. However, China will have to face the challenges deriving from its unique economic, political, legal and social context.

Following a “development approach”, instead of a pure “efficiency approach”, China has chosen to pursue a path of soft convergence with international practice.378 Such strategy offers Chinese competition authorities the flexibility to make adjustments and exceptions when required. For instance, China’s focus on the establishment of a “harmonious society” suggests that goals such as maintaining employment and social stability are also top priorities for Chinese policymakers.379 Thus, where competition agencies in Western market economies would probably disregard the job losses resulting from a merger if consumers could benefit with lower prices or if the operation produced significant economic efficiencies, Chinese competition authorities might also decide to take into account in their merger analysis the impact of the transaction on “social harmony”.380

Furthermore, it is worth remembering that unlike enforcement agencies under other jurisdictions that are independent from their respective government, MOFCOM is subject to the State Council, China’s chief administrative body, responsible for implementing most of the CCP’s directives and policies. In this

377 This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, January 2011.
379 This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, May 2010.
regard, MOFCOM’s merger policy has also to be read within the wider perspective of national economic policies.  

Although, MOFCOM’s standard of review in merger transactions is formally in line with that of more mature jurisdictions, the Chinese Ministry of Commerce still operates in light of the “healthy development of the socialist market economy”. When assessing if a transaction is capable of eliminating or restricting competition, MOFCOM continues to consider factors such as market share, the degree of market concentration, the impact on market access and the effects on consumers, through the lens of China’s socialist market ideological framework. In this regard, it was noted that: “Similar to “fusion” cuisine, MOFCOM practices “fusion” merger control as it blends two aspects: its mandate under the AML [...] , and the antitrust theories of other jurisdictions.”

From a theoretical point of view socialist legal tradition, orientated at not separating theory from practice, perfectly matches the innate pragmatism of Chinese policymakers. Thus, it is likely that MOFCOM’s standard of merger review will continue to adapt in a very pragmatic and experimental way to the constantly evolving scenario of China’s transitional economy. However, in the long run, in light of China’s commitment to market reforms, MOFCOM’s merger policy should gradually move towards a more efficiency-based approach to enhance the vision of a market characterised by well-functioning market mechanisms and less State intervention.

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381 This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, May 2010.
382 Ibid.
383 Becky Koblitiz, supra note 378.
384 This point was raised in a meeting with Professor Chenguang Wang and Weizuo Chen at the School of Law of the Tsinghua University, Beijing, June 2010.
CHAPTER IV

ADMINISTRATIVE MONOPOLIES, STATE-OWNED ENTERPRISES AND COMPETITION

Introduction

The analysis conducted so far leads to the interim conclusion that three main forces have contributed to shape competition law and policy in China: China’s transition from a planned to a market economy, its market structure and the pervasive control of the State over the economy. In this respect, various commentators emphasise that, since State intervention still permeates various aspects of China’s economic life, the primary goal of the AML should be to correct governmental distortions on competition rather than focus on private restraints.

After thirty years of economic transition, China continues to face two major problems inherited from the Maoist era. Firstly, the pernicious practice of administrative monopolies and, secondly, the huge number of SOEs which monopolise important sectors of the national economy.

As previously discussed, administrative monopolies originated during China’s transition process from a planned to a market economy can be defined as monopolistic activities perpetrated by the Chinese government, at all levels, by abusing its regulatory or administrative power. The widespread phenomenon of administrative monopolies is particularly pernicious at local level. It obstructs the

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386 Huang, supra note 189, at 120. With reference to this issue it was noted that: “One has to bear in mind that the AML is not merely designed to restore competition but also to take affirmative actions to create competition. This unique feature distinguishes it from competition laws in most other jurisdictions.” Ibid.

387 See Chapter I section 1.4.
establishment of an integrated national market and it impedes a rational allocation of economic resources since in most occasions it protects from competition inefficient enterprises at the expense of more efficient ones.

Although, administrative monopolies represent one the most serious obstacles to the creation of a competitive market environment in China, their elimination is still not an undisputed goal. It is worth remembering that during the drafting process of the AML, for instance, the decision to include specific provisions dealing with administrative monopolies faced fierce opposition from many government departments and officials. Even though the prohibition of administrative monopolies appeared in the various versions of the draft AML released for comments in 2002, in December 2005 the State Council decided to delete from an internal draft the entire section of the AML dealing with administrative monopolies and it only kept a general provision prohibiting them. In June 2006, the State Council officially approved a further version of the AML without the chapter on administrative monopolies. Yet, a few months later, when the revised draft was finally submitted to the Standing Committee of the NPC for final review, the provisions on administrative monopolies were added back in.

In this regard, one of the most interesting parts of the AML is Chapter V: *Abuse of Administrative Power to Eliminate or Restrict Competition*. This section of the AML aims at preventing governmental bodies from abusing their power to interfere in market competition.

A further noteworthy issue refers to the “national security review” provision contained in Article 7 of the AML stating that industries critical to the well-being of the national economy and national security shall be protected by the State, provided that their business activities are in accordance with the law so as to protect the interests of consumers and to promote technological progress.

The AML may represent the long-awaited instrument for the rationalisation of a competition law system characterised by a history of ineffective and unenforced competition rules. Yet, as with any major process of legal reform, the path ahead is uncertain. The tortuous drafting process of the AML demonstrated the existing tensions among the various levels of the Chinese
government about the phenomenon of administrative restraints. Most likely, these tensions will also emerge in relation to the enforcement of the AML. Thus, Chapter IV of the Thesis shall provide an analysis of Chapter V of the AML and related provisions to understand whether these fears are well-founded. In doing this, the Chapter will try to frame the discussion regarding the relationship between competition law and State-restraints on competition, within the contextual need to pursue further legal and institutional reforms, including the restructuring of China’s State bureaucracies.

1. China’s Anti-Monopoly Law and administrative monopolies

Article 8 of the AML is the general provision prohibiting the abuse of administrative power to eliminate or restrict competition, whereas Chapter V comprehends most of the applicable provisions in such cases (Articles 32-37).\footnote{Article 8 of the AML reads: “Administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs shall not abuse their administrative power to eliminate or restrict competition.”}

For instance, Article 32 points out that administrative bodies empowered with the function of administrating public affairs shall not abuse their administrative power to require other organisations or individuals to purchase or use commodities supplied by undertakings designated by them. Furthermore, according to Article 36, these administrative bodies are prohibited from abusing their administrative power to compel undertakings to engage in anti-monopoly conducts.

Typical examples of these anti-competitive practices are when an administrative agency requires other administrative departments under its control to sell or to purchase goods only from designated enterprises or when an industrial association introduces a self-disciplinary mechanism forcing its members to purchase raw materials or other components only from certain producers.\footnote{Since China’s accession to the WTO, various governmental agencies have been restructured or even cancelled. As a result, industrial associations started to play an important role of}
Although this practice is apparently not related to other forms of administrative monopolies, it often leads to the phenomenon of regional blockades. Administrative agencies often provide a favourable treatment to designated enterprises to serve local interests or the interests of a certain department. Preferential treatment to affiliate enterprises may also be granted by means of administrative regulations and, in this respect, Article 37 of the AML states that: “Administrative agencies shall not abuse their administrative powers to make regulations that contain provisions eliminating or restricting competition.” The reason for this prohibition is that administrative agencies are often entitled to issue binding rules to regulate the activities of their inferior departments and units without effective supervision and restriction mechanisms.

In this regard, administrative monopoly actions may be classified into two main categories: specific administrative monopoly actions and abstract administrative monopoly actions.

Specific administrative monopolies consist in administrative measures addressed to specific departments or units by their superior agencies. Their content is concrete and definite, and, consequently, their effect is to directly restrict competition in the targeted market. Abstract administrative actions refer instead to the adoption by administrative organs of normative measures with intermediation between the various levels of the Chinese government and enterprises. However, the process of restructuring of industrial associations is far from being achieved. Most industrial associations which were established from governmental institutions or from SOEs still operate according to rules and mechanisms typical of the planned economy and in performing their functions, they often abuse their regulatory power by deviating from the principles of a market economy. For an insightful analysis on the issue of industrial associations in China, see Zhao Jianhong and Bi Wenhong, The roles and function of Chinese industrial associations in dealing with abroad technical barrier, Management Science and Engineering, Vol. 2, Issue 1, (2008), 60 - 65. In order to cope with this situation, the AML at Article 11 states: “The trade associations shall strengthen the self-discipline of industries to lead undertakings within their respective industries to carry out lawful competition and to maintain the order of market competition.” Furthermore, Article 16 adds: “The trade associations shall not organize undertakings within their industries to engage in Monopolistic Conduct […].” Finally according to Article 46(3) “If trade associations organize undertakings within their respective industries to conclude Monopoly Agreements in violation of this Law, the Anti-Monopoly Law Enforcement Authority may impose a fine of no more than RMB 500,000; if the circumstances are serious, the authority in charge of registration and administration of social organizations may revoke the registration of the trade organizations in accordance with the law.”

391 Ibid. at 4
general applications. Their content and scope is rather broad and they are often deemed to be legitimate since they fall under the regulatory power conferred upon the agency by other laws and regulations.\textsuperscript{392} Articles 32 and 37 reflect therefore the awareness of the drafters of the AML about the importance to outlaw both legislative and non-legislative abuses of administrative power.

Articles 33, 34 and 35 deal with the phenomenon of regional monopolies by means of local protectionism. In this respect, Article 33 prohibits the abuse of administrative power to hinder the free movement of goods across Chinese regions and enumerates a series of prohibited practices including the imposition of discriminatory fees or discriminatory prices to commodities originated from other regions and technical requirements or inspection standards different from those applied to similar local commodities; and the implementation of special administrative licensing measures applicable only to commodities originated from other regions, so as to restrict the entry of commodities originated from other regions into the local markets.\textsuperscript{393}

Finally, Article 35 prohibits local authorities from restricting investment in their region or prohibits the establishment of subsidiaries by undertakings from other regions by treating them less favourably than local firms.

Although the decision to introduce in the Chinese AML an entire Chapter dealing with administrative monopolies clearly represents a step forward in the development of China’s competition law regime, the current system presents a series of deficiencies.

In this respect, the most critical provision is Article 51 which casts a shadow on the effectiveness of the provisions on administrative monopolies.

Article 51(1) states that if a State agency abuses its administrative power and engages in activities eliminating or restricting competition, its relevant superior authority will order it to intervene. Furthermore, the chief officer directly

\textsuperscript{392} Ibid.
\textsuperscript{393} Article 34 further prohibits the abuse of administrative power: “to exclude or restrict the participation of undertakings from other regions in local bidding activities by means such as prescribing discriminatory qualification requirements or standards or by not publishing information according to law.”
responsible and other persons who are directly responsible will be subject to disciplinary sanctions in accordance with the law. Finally, competition authorities may propose to the relevant superior administrative authority as to address the issue in accordance with the laws.  

It was noted that there are at least two main reasons why State agencies at the highest level may face some difficulties in combating administrative restrictions created by state departments at a lower level.

First of all, an abuse of administrative power is often perpetrated to benefit local authorities or affiliated enterprises. It is therefore rather difficult and sometimes counterproductive for a department to be impartial in a dispute between an inferior section and a private business operator. Secondly, it is important to take into consideration the actual capacity of administrative agencies to deal with competition cases. Due to the so-called “higher-level agency” system, any agency could be in charge to intervene. However, the personnel of most administrative departments, in particular at a local level, still lack training and experience to effectively decide competition disputes.

Moreover, the fact that administrative agencies are entitled to interpret the content of competition legislation may favour the emergence of divergent interpretations in relation to similar issues. Consequently, this situation may jeopardise the achievement of common competition law goals. In this sense, various authors consider that a better clarification and separation of the enforcement prerogatives among the various agencies and the issuance of specific guidelines would be necessary to ensure the effectiveness of the provisions of Chapter V of the AML.

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394 However, Article 51(2) adds that: “If there are other provisions in laws and administrative regulations concerning the regulation of actions eliminating or restricting competition that are taken by administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs that abuse their administrative powers, such other provisions shall prevail.”

395 Wang, supra note 115, at 149.

396 Ibid.

397 Ibid.

398 With reference to the necessity to integrate the rules on administrative monopolies, some commentators noted that the provisions contained in Chapter V of the AML: “are some principled articles lacking in operation, which make the judiciary and law enforcement agencies difficult to
A further controversial issue during the drafting process of the AML was the division of authority to enforce the law. China’s three main competition agencies, SAIC, MOFCOM and NDRC all asserted authority over its enforcement.\textsuperscript{399} In this sense, various Chinese scholars emphasised the necessity to create a new agency at ministerial level reporting directly to the State Council.\textsuperscript{400} The enforcement of the AML should have been conferred upon an independent body in order to limit interventions from governmental agencies or trade associations. However, in the end, as a result of the struggle for power among the three agencies, the Chinese drafters decided to opt for a compromise solution according to which the existing competition authorities should enforce different parts of the AML.

In this regard, the relatively low hierarchy of China’s enforcement bodies in the country’s bureaucratic system may weaken enforcement initiatives against large SOEs and local administrative agencies, and “may render competition decisions more susceptible to the influence of factors unrelated to competition issues.”\textsuperscript{401} For instance, it is worth remembering that NDRC is also in charge of formulating industrial policies, while MOFCOM is also responsible for deciding international investment and trade policies. Thus, these parallel prerogatives may distinguish. And many abstract concepts such as what extent can achieve administrative monopoly, and what is that the abuse of administrative power to block the free circulation of commodities cannot be defined clearly in only five legal articles, so the catchwords of anti-administrative monopoly appear incapable.” See Ling Wang, Legal Regulation of Administrative Monopoly As Viewed from Chinese Antimonopoly Law, Journal of Politics and Law, Vol. 2, Issue 4, (2009), 72 - 76, at 73.

\textsuperscript{400} Ibid.
\textsuperscript{401} Peter J. Wang, H. Stephen Harris Jr. and Yizhe Zhang, Structure and Responsibilities of Enforcement Agencies Under China Anti-Monopoly Law Clarified, Jones Day Publications, (July 2008), available at http://www.jonesday.com/newsknowledge/publicationdetail.aspx?publication=5372. Under China’s tripartite enforcement system, SAIC and NDRC share the enforcement power in relation to administrative monopolies in the same way as they share their enforcement prerogatives in relation to monopoly agreements and abuse of market position. The SAIC and the NDRC (together with their provincial branches) are in fact respectively responsible to deal with non-price related and with price related administrative monopolies.
interfere with the role these bodies play as enforcers of the AML and the pursuit of competition law goals.\textsuperscript{402}

Finally, the enforcement mechanism is further loosened since, under Article 51, SAIC and NDRC are not entitled to directly impose sanctions against administrative authorities perpetrating abuses of administrative power but they can only inform the relevant superior authority and propose solutions on how to deal with the case.

1.1 China’s Anti-Monopoly Law and administrative monopolies: learning from the EU model?

As Professor John Haley noted: “The enactment of competition legislation has become a global phenomenon. Competition law has, in effect, become the latest fashion.”\textsuperscript{403} Over the past two decades, various jurisdictions around the world, including Asian jurisdictions, have implemented comprehensive competition legislation.\textsuperscript{404}

There are a number of reasons explaining this global proliferation of competition law. First of all, developing countries with their emerging market

\begin{footnotesize}
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\item\textsuperscript{402} Ibid.
\item\textsuperscript{403} Haley, supra note 4, at 2. For an insightful discussion on the role of competition policy and law in developing countries, see Maher M. Dabbah, \textit{Competition law and policy in developing countries: A critical assessment of the challenges to establishing an effective competition law regime}, World Competition, Vol. 33, Issue 3, (2010), 457 - 475.
\item\textsuperscript{404} It was noted that competition law has now been implemented in more than one hundred countries. For a discussion on this issue see Keith N. Hylton and Fei Deng, \textit{Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects}, Antitrust Law Journal, Vol. 74, Issue 2, (2007), 271 – 341. In Europe, after the fall of the Berlin wall, for instance, Central European countries started to implement competition legislation to accelerate the transition from a command-and-control economy to a market economy. Furthermore, the goal of membership to the EU gave further impetus to this process. See: Eleanor M. Fox, \textit{The Central European Nations and the EU waiting room - Why Must the Central European Nations Adopt the Competition Law of the European Union?}, Brooklyn Journal of International Law, Vol. 23, (1997), 351 - 365. For an analysis on the recent efforts of some Asian countries to implement competition legislation, see, for instance, Mark Furse, \textit{Antitrust Law in China, Korea and Vietnam}, Oxford University Press, (2009).
\end{enumerate}
\end{footnotesize}
economies began to recognise that competition law could be highly beneficial for accelerating economic transition and development.\textsuperscript{405}

Secondly, transitional economies often consider competition law not only as a tool to foster market efficiency but also as an instrument to check the behaviours of large foreign corporations in recently privatised sectors of the national economy.\textsuperscript{406}

Finally, the enactment of competition statutes has also depended on the external pressure applied to these countries as a consequence of international trade considerations since: “There is a recognition that opening a market to cross-border trade by way of a bilateral free trade agreement, or a multilateral arrangement at the government level, is only one side of the story. One needs to ensure the actions of private parties cannot serve to close markets which governments have agreed to open – and that is where competition law comes in. Typically, trade agreements feature a competition chapter for this very reason.”\textsuperscript{407}

In this regard, with reference to the People’s Republic of China, its accession to the WTO in December 2001 has also brought with it further stimulus to implement its long awaited AML. Joining the WTO has signified for China the opening of the national market to the outside world and, consequently, the necessity to introduce competition mechanisms into most sectors of the economy.

As previously discussed, in deciding what kind of competition model could better fit the Chinese context, the drafters of the AML started to study solutions adopted under Western systems of competition law. Thus, if compared with China’s traditional lack of transparency in the law making process, this openness reflected the political intention of the Chinese government to receive

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\textsuperscript{406} Ibid.
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substantial contributions from outside and to take into consideration foreign experience in formulating the AML.

Because of China’s limited experience in the area of competition law, borrowing terminology and concepts from other jurisdictions presented numerous advantages. Many countries have a long experience in this area and have implemented competition legislation to establish and maintain a competitive market environment. The enactment of comprehensive competition law statutes allowed jurisdictions such as the EU and the US to achieve the objective of an integrated and flexible domestic market where the economic actors are free to compete on merits. In this sense, China was willing to emulate these results. The careful study of foreign competition law models could be very useful for Chinese decision makers to assess the potential relevance and the viability of foreign solutions to the Chinese context. Ultimately, the use of well-known terminology and concepts would have certainly increased the perceived legitimacy of the new Chinese AML at international level.408

Effective borrowing of terminology and concepts, however, is not an easy task because this “[...] is akin to using tools without knowing what they were designed for or exactly how they have been used in the past. In order to assess the value and utility of these legal tools and to use them effectively, therefore, it is important to “recontextualize” them by examining how and why they were created, how they have developed, what their relationship is to other elements of the system, and what consequences they have produced.”409

This process is particularly important when drafting a new competition statute since the adopted structure and procedures may affect the future development and enforcement of the entire competition law system.

As previously discussed, in the end the AML’s provisions on monopoly agreements of and abuse of dominance borrowed heavily from Articles 101 and 102 TFEU and the new provisions on mergers are modelled upon the EUMR. Thus, given the prominence and salience of the provisions inspired by EU

408 See David J. Gerber, supra note 199, at 315.
409 Ibid.
competition legislation, the AML can be viewed as a legal transplant of the EU competition law model.

Interestingly, most provisions on administrative monopolies contained in Chapter V of the AML also show the influence of the EU legal experience. Articles 33 and 35, for instance, hark back Articles 34, 49 and 56 TFEU. Article 36 of the Chinese AML evokes the jurisprudence of the CJEU on the joint applicability of Articles 4 TEU and 101 TFEU.

In Europe, the elimination of artificial borders and protectionist policies implemented by Member States restricting the free movement of goods and services has been essential for the establishment of a competitive market environment. Furthermore, the reduction of national restrictions to intra-community trade was also favoured by a stringent enforcement of competition rules including rules dealing with privileges conferred by Member States to certain categories of undertakings and with State aids.

On the basis of these arguments, various scholars have engaged in studying why the EU legal experience was privileged by the drafters of the AML to tackle the problem of administrative monopolies in China. Professor Eleanor Fox, for example, noted that EU law has: “four trade-or-competition windows through which one may attack European state (i.e., national) measures and acts of state-owned or state-privileged enterprise.” See, Eleanor M. Fox, An Anti-Monopoly Law for China – Scaling the Walls of Protectionist Government Restraints, New York University School of Law - Law & Economics Research Paper Series - Working Paper No. 7, (July 2007), 1-30, at 17, available at http://www.usasialaw.org/wp-content/uploads/2009/06/fox-2.pdf. The first window consists of the provisions in the area of the free movement of goods and, in particular, of Articles 34 and 35 TFEU. The second window is Article 4 TFEU requiring Member States to take all appropriate measures to ensure the fulfilment of the Treaty obligations and to “facilitate the achievement of the Union’s tasks.” Article 101 TFEU prohibits anti-competitive agreements and Article 102 TFEU prohibits abuse of a dominant position. In its case law, the Court of Justice ruled that Articles 4 TFEU, 37, 101, 102, and 106 TFEU must all be read together. As a consequence of this systemic interpretation of the Treaty, Member States are prohibited from authorising private undertakings to implement anti-competitive behaviours. The third window consists of rules against State aid. Articles 107 and 108 TFEU are based on the rationale that State intervention may result in distortion of the market. The fourth window consists of those provisions underlying the mixed economy model upon which the process of European integration has been largely built on. Firstly, there is Article 37 TFEU. Such a provision, once described as a provision of “obscura clarité”, it is an attempt to adjust, rather than abolish, state monopolies as to ensure free movement of goods. See Claude - Albert Colliard, L’obscura clarité de l’Article 37 du Traité CEE, Recueil Dalloz, Chronique XXXVII, n. 40, (1964), at 263. For further discussion, see also Francoise Blum and Anne Lugue, State Monopolies Under EC Law, European Law Series, (1998).

A second provision to be mentioned in this context is Article 106 TFEU. This article states that public undertakings and undertakings granted with exclusive or special rights shall be considered to be in the same position as private undertakings in particular in relation to competition rules. Such a provision can be viewed as an additional safeguard with regards to the abuse by State authorities of their legislative powers in economic life. Although Article 345 TFEU clarifies the
Although the People’s Republic of China is a unified country, as a consequence of the widespread phenomenon of local protectionism the national market is highly fragmented. What in China is defined as administrative monopoly is not the conduct of private enterprises but rather the abuse of power by public authorities that prevent the establishment of an integrated and competitive market environment. In particular, the harmful practice of local protectionism is now made illegal by the AML that prohibits local authorities from abusing their administrative power by means of measures and practices which hinder the free circulation of commodities and services between regions. In this regard, as Professor Mark Williams noted, this is also a single market issue and not just a competition matter.411

In the eyes of the Chinese drafters, one of the most distinctive features of EU competition law was to conceive competition legislation as a tool to achieve market efficiency and market integration based on regional trade liberalisation.412 In particular, in the course of the bilateral meetings within the context of the EU-China Competition Dialogue initiated in 2004 EU officials had the opportunity to illustrate to their Chinese counterparts the European competition model within the wider context of trade liberalisation and to promote the European integration process as a unique reference for a country like China which has been unsuccessfully pursuing the goal of an integrated national market for decades.413

“Treaties shall in no way prejudice the rules in Member States governing the system of property ownership”, this does not exclude public undertakings from being subject to normal market conditions, thus, putting private undertakings in a disadvantaged situation.

411 Mark Williams, *Competition policy and law in China, Hong Kong and Taiwan*, Cambridge University Press, (2005), at 278.

412 Wu, supra note 120, at 463. See also Francis Snyder, *The European Union and China: 1949-2008 Basic Documents and Commentary*, Hart Publishing, (2009), at 807. As Professor Dabbah notes: “There are many characteristics to EU competition law which make it a unique type of law especially when compared to the competition laws of other regimes. EU competition law is enforced in a special context, namely the goal of market integration and therefore it has a market-integrating aspect. In this context, the law belongs to a wider “system”, designed to eliminate barriers between EU member states and enhance the creation of a single (internal) market.” See Maher M. Dabbah, *International and Comparative Competition Law*, Cambridge University Press, (2010), at 164.

1.2 The curious case of Article 106(1) TFEU and Chinese competition law

Among all provisions of the EU Treaties whose relevance for China could have been studied, most attention of Chinese legal scholars, such as Cheng, has curiously focused on Article 106(1) TFEU.\(^\text{414}\) This choice appears justified by considering that Article 106 TFEU reconciles divergent pulling forces such as market integration and State prerogatives.\(^\text{415}\)

In general, the relevance of Article 106(1) to the Chinese case, lays in the fact that this provision has been used in Europe “as a means of liberalizing markets.”\(^\text{416}\) According to the case law of the CJEU, the mere existence of exclusive rights, when the specific task assigned can be performed without the necessity to grant these rights, may be in breach of the rules of the Treaty. More specifically, the Treaty’s rules are infringed if the grant of exclusive rights results, directly or indirectly, in a discriminatory treatment between domestic and imported products, in an impediment on the free movement of goods or services, or in a violation of competition rules.\(^\text{417}\) This Article has therefore been used by European policy makers as a powerful instrument to liberalise markets including telecommunications, energy and postal services.\(^\text{418}\)

The analysis of the case law of the CJEU shows that State measures conferring exclusive rights may infringe Article 106(1) in three types of situations. First of all, as in Hofner\(^\text{419}\), when the undertaking granted with exclusive rights, is not able to satisfy the demand of the market for a certain kind

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Miguel Ceballos Baron, former Director of the Trade and Investment Section of the Delegation of the European Union to China, Beijing, October 2010.


415 In this sense, Article 106(1) has been defined as a “persistent irritant” provision. See Mario Monti, A New Strategy for the single Market, at the service of Europe’s Economy and Society, Report to the President of the European Commission, (May 9, 2000), available at [http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf](http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf), at 73.


417 Ibid.


of activity, is in a situation in which it has no alternative but to commit an abuse. Secondly, as in the ERT\textsuperscript{420} case, when the grant of exclusive rights placed the undertaking in a conflict of interest situation. Finally, as in RTT\textsuperscript{421}, under the “extension of a dominant position” doctrine when, without an objective justification, an undertaking with a dominant position on a particular market reserves to itself an ancillary activity which might be carried out by other undertakings as part of their activities on a neighbouring but separate market, with the possibility of eliminating all competition from other undertakings.\textsuperscript{422}

Cheng notes that this jurisprudence may offer an interesting case study for Chinese competition authorities in enforcing the provisions of the AML against administrative monopolies.\textsuperscript{423}

In Hofner, by examining whether the grant of certain exclusive rights to a public body was contrary to Article 106(1) and 102 TFEU or not, the Court of Justice found that an abuse was committed because the concerned body was unable to satisfy consumer demand on that market.

To better clarify this issue, it may be useful to focus on the Opinion of Advocate General (hereinafter, “AG”) Jacobs in the case.\textsuperscript{424} AG Jacobs considered that, as a result of the limited capacity of the public body to provide the required service, consumers were not receiving the sort of service which they “almost certainly would receive if the sector in question were subject to the system of free competition envisaged by the Treaty.”\textsuperscript{425}

He further added that: “As an objective notion, an abuse may exist independently of any element of fault on the part of the dominant undertaking. Article 86 [now Article 106 TFEU] is therefore, in my view, capable of being

\textsuperscript{420} Case C-260/89 Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etaireia Pliroforissis (DEP) and Sotirios Kouvelas [1991] ECR I-2925.
\textsuperscript{422} For an insightful discussion on this issue, see Jose Luis Buendia Sierra, Exclusive Rights and State Monopolies under EC Law, Oxford University Press, (1999).
\textsuperscript{423} Cheng, supra note 414, at 26-27.
\textsuperscript{425} Para. 45 of the Opinion.
properly applied to a situation such as the present one.” Interestingly, in Hofner, the undertaking granted with exclusive rights did not actually commit an abuse but this was the result of the measure of the State which created a situation of monopoly under those conditions.\footnote{Para. 47.}

Cheng considers that this approach may be very instructive for Chinese competition authorities. It is common in China that State agencies and local authorities confer upon SOEs and former SOEs (on which they retain control) special or exclusive rights. As seen, the interest in doing this depends on the fact that, as a result of the decentralisation of the fiscal system, local authorities financially depend on the performances of local enterprises and, in particular, with those affiliated with them.\footnote{See Kelyn Bacon, State Regulation of the Market and EC Competition Rules: Articles 85 and 86 compared, European Competition Law Review, Vol. 18, Issue 5, (1997), 283-291, at 287.}

Similar to the situation in Hofner, the exclusive rights granted to certain undertakings by public authorities place these undertakings in a dominant position in a specific market. Although most of these companies are largely inefficient and are not able to meet consumer demand, local authorities retain some powers to restrict the possibility of other undertakings to enter the market. For instance, they often refuse to issue business licences to other operators which could offer the same service at the same or even more competitive price. Protected from market competition and lavishly funded by local SOEs banks, undertakings granted with special rights have no incentive in restructuring and becoming more efficient.

The central government in Beijing has realised the negative effects of this situation for market competition and is willing to tackle these conducts. Furthermore, Chinese consumers have become more and more dissatisfied with the low quality of the services provided and it is now much more common to file official complaints to denounce the deficiencies of this system. By following the approach adopted in Hofner, a likely solution would be for Chinese competition

\footnote{Similarly, in the Transparency Directive Case, the Court of Justice noted that: “The reason for the inclusion in the Treaty of Provisions of Article 90 [now Article 106 TFEU] is the influence which the public authorities are able to exert over the commercial decisions of public undertakings.” See Joined cases 188 to 190/80, France, Italy and United Kingdom v Commission (Transparency Directive) [1982] ECR 2545, Para. 4 of the judgment.}
authorities to consider the incapacity of these undertakings to meet market demand in order to violate competition rules.

The enforcement authorities could decide to intervene not only when an undertaking granted with exclusive rights commit an abuse but also when it is placed in a situation where it has no alternative to do so by, for instance, not being able, to cover the demand of the market for the activity required.

By doing this, in reality, the enforcement authority would attack the behaviour of local governments which created the monopoly under these conditions. Local authorities would therefore be forced to let other undertakings enter the concerned market.

The jurisprudence of the Court of Justice in *ERT* would be also very instructive for China. Under the “conflict of interest situation” doctrine, the conferral by public authorities of exclusive or special rights amounts to an abuse of administrative power, if it establishes a market structure which favours or induces abusive conducts.

Cheng makes an interesting example of the emergence of a similar situation in China: “As an example, assume that there are only five companies in a certain municipality that are qualified to install and repair residential telephone equipments and that the municipal government has licensed all these five local companies to install and repair residence telephone equipments in the region. In exercising its municipal authority to regulate local telephone services, the municipal government refused to license other out-of-town operators who provide comparable services.

Assume further that three of the five service providers are also local producers of telephone equipments. Despite that the five installation and repair service providers are in a position to satisfy the local market demands, the municipal government has nonetheless abused its administrative powers because the five providers are likely to conspire to purchase their requirements only from the three local providers who are also the three equipment producers.”

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429 Cheng, supra note 414, at 47.
In *ERT* the CJEU pointed out that the way in which the monopoly in the area of television broadcasting was organised or exercised could lead to an infringement of Treaty rules. This was a consequence of the fact that the concentration in one enterprise of the right to broadcast national programmes and to retransmit foreign programmes could lead to the possibility to discriminate foreign ones.\(^{430}\) Again, the Court focused on how the monopoly was organised and not on the actual conduct of the undertaking granted with exclusive rights.

By applying this approach to the Chinese case, the enforcers of the AML could therefore question the content and the extension of the privileged rights conferred by the local government to certain undertakings to assess whether these may lead to the possibility of abusive behaviours.

Finally, under the "extension of a dominant position" doctrine as applied in *RTT*, the AML could be used to contest the decision of public authorities to grant to an undertaking (in addition to special rights) other ancillary rights in a separate market without an objective justification.

This solution would have beneficial effect on market competition because it would secure conditions of equality between local economic operators and operators coming from different regions that would decide to enter the local market.

By adopting their own "extension of a dominant position" doctrine, Chinese competition authorities would contribute to the achievement of a more integrated market where the free flow of goods and services would be ensured.\(^{431}\) In this regard, the underlying rationale of Article 106(1) would serve as an inspiration for Chinese decision makers to engage in a process of liberalisation of closed sectors.

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\(^{430}\)In the *Transparency Directive* case, the Court also stated that it was for the national court to examine whether the restrictions could be justified under Article 106(2) TFEU. Para. 33 of the judgment.

\(^{431}\)Interestingly, in *ERT* and *RTT* the contested measures resulted in the undertaking enjoying exclusive rights which infringed the fundamental freedoms and the competition rules without an objective justification. See Blum and Logue, supra note 410 at 14 - 15.
1.3 So close, so far: the feasibility of a legal transplant

China is the latest major country to adopt a comprehensive anti-monopoly law which, to a large extent, bears the hallmarks of a legal transplant. But, are legal transplants really effective?

Such an issue has been extensively discussed by generations of legal scholars with some asserting the feasibility of legal transplants since “legal rules are not peculiarly devised for the particular society in which they now operate [...]” and with some others insisting instead on their impossibility.433

Different opinions also exist in relation to the possibility of transplanting competition law. On the one hand, jurisdictions with a longer history in this area, such as the EU and the US advocate the advantages of implementing their competition law models. At the same time various international organisation such as the OECD and the International Competition Network (hereinafter, “ICC”) have been promoting a harmonisation of competition rules. In this regard, it was noted that: “The implicit assumption in both sets of efforts, it seems, is that a particular competition rule would function equally well, or at least in an acceptable manner, in different settings.”434 On the other hand, more critical views highlight the limits of conventional competition legislation, in particular, contexts and the necessity for competition to adapt to the characteristics of the adopting jurisdiction.435

The competition law system of each country substantially differs with respect to its tradition, goals and procedures. The enactment of a competition code is in fact a long process reflecting internal divisions and political compromises.

433 See Pierre Legrand, The Impossibility of Legal Transplants, Maastricht Journal of European and Comparative Law, Vol. 4, (1997), 111-124. Legrand disagrees with Watson’s formalist view of law in regard to legal transplants. He states: “Anyone who takes the view that “the law” or “the rules of the law” travel across jurisdictions must have in mind that law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage. Indeed, how could law travel if it was not segregated from society? I wish to question this vision of law and, specifically, this understanding of rules which I regard as profoundly lacking in explicatory power. Rules are just not what they are represented as being by Watson. And, because of what they effectively are, rules cannot travel. Accordingly, legal transplants are impossible.” Ibid. at 114.
434 Zheng, supra note 385, at 650.
435 For discussion, see Schwindt, supra note 405, at 34-36.
Furthermore, competition law experiences different evolutionary phases closely correlated with the domestic economic context.

Certainly, it is likely that Chinese decision makers will be faced with challenges and questions similar to those previously addressed under Western jurisdictions. A longer tradition also results in greater experience and effectiveness when applying anti-monopoly legislation in concrete cases.\textsuperscript{436}

However, Western competition law models were conceived to function in advanced capitalist economies where the influence of private actors on the market already played a prominent role.\textsuperscript{437} Furthermore, as Professor Haley noted: “\textit{None of these models were concerned with state power or the need of the state to create conditions for effective market competition. [Since they] do not adequately address the basic underpinnings of monopoly power and barriers to free and competitive markets in East Asia or in most other developing states.}”\textsuperscript{438}

Despite a formal correspondence with the EU, because China’s economic, political, and legal situations are so different from those of European market economies; Chinese competition law regime differs accordingly.\textsuperscript{439} Thus, the efforts to implement competition legislation and trade regulatory policies in the mould of the EU legal system in China face substantial challenges. A successful legal transplant requires specific legal and institutional prerequisites. Instead, there appears to be many reasons for concerns about the outlook for the advancement of legal reforms in China and for the country’s capacity to leave behind the legal and institutional infrastructures inherited from the Maoist era.\textsuperscript{440}

\textsuperscript{436} For example, with reference to the development of anti-monopoly legislation in the US, it was noted that this “\textit{is a checkered saga in which a variety of political, social, moral and ideological considerations gradually gave way to a rational system of commercial regulation based on widely-accepted, modern economic principles.}” Howell, supra note 125, at 57. For a discussion on the origins of antitrust law in the US see Lawrence A. Sullivan and Wolfgang Fikentscher, \textit{On the Growth of the Antitrust Idea}, Berkley Journal of International Law, Vol. 16, (1998), 192 - 214.

\textsuperscript{437} Zheng, supra note 385, at 650.


\textsuperscript{439} For discussion, see Chapter II.

\textsuperscript{440} The discussion on the limits of China’s legal and institutional reforms will be addressed in subsequent sections of this Chapter.
2. The Role of SOEs

A second main aspect that Chinese decision makers inherited from the planned era refers to the huge number of SOEs which monopolise key sectors of the economy.

As previously discussed\textsuperscript{441}, in the late 1970s with the decision to abandon the planned economy, the Chinese government initiated a wave of economic reforms including the privatisation of most SOEs. This process regarded in particular small and medium SOEs. One of the prominent aspect of the reform was the so called “holding the big and letting go the small” policy, according to which the government would have kept control on large SOEs operating in key sectors of the national economy by developing them into large group of enterprises, whereas it would have reorganised smaller enterprises by, for instance, selling them to private investors.

Despite these interventions, however, by the early 1990s SOEs still accounted for a high percentage. The government still controlled market entry in most industries and competition in the Chinese market was very limited and distorted since SOEs often abused their market power to the detriment of Chinese consumers. In 1992, the decision to establish a “a socialist market economy” brought with it further stimulus to foster competition into the SOEs sector and, therefore, the Chinese government started to actively pursue the policy to break up large monopolies of SOEs in smaller companies to let them compete with each other.\textsuperscript{442}

Nowadays, after two decades of reforms, even though their number have been reduced, SOEs in China still control a significant part of the national economy and their size is much bigger than that of private enterprises. SOEs still account for one third of China’s industrial production, possess more than half of total assets and are responsible for over half of total investments. In particular, SOEs are still dominant in most sectors of the Chinese economy and play a

\textsuperscript{441} For discussion, see Chapter I at section 1.5.
prominent role in terms of fiscal revenue for the government, employment and social services.  

In this regard, the Chinese government seems to pursue two contradictory objectives for SOEs. On one hand, it aims at reconsidering the extent of monopolistic power granted to SOEs by means of the enforcement of the AML and other reforms; on the other hand, it is willing to retain absolute control of SOEs in certain strategic industries. The issue of how to reconcile these two conflicting goals contributed to delay the approval of the AML. Now, that the AML has been enacted, finding the right balance between these two objectives when enforcing the AML shall determine, to a large extent, the effectiveness of China’s new competition code.

This ambivalence is reflected by the text of the AML itself that at Article 7(1) reads: “With respect to industries that are controlled by the state-owned economy and that are critical to the wellbeing of the national economy and national security, as well as industries in which exclusive operation and exclusive sales are the norm of business in accordance with the law, the State shall protect the lawful business activities of the undertakings in such industries. The State shall regulate and supervise the business activities of such undertakings and regulate the prices of commodities and services provided by such undertakings in accordance with the law so as to protect the interests of the consumers and to promote technological progress.”

The wording of this provision is rather ambiguous. Not only does it seem to suggest that certain categories of undertakings may be exempted by the application of competition rules but, by adopting a broad and opaque formulation, it also leaves a huge discretion in the hands of Chinese authorities to decide according to circumstances which are the categories of enterprises that can benefit from an exemption.

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443 Ibid.
444 Owen and others, supra note 44, at 133.
445 This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, May 2010.
When referring to SOEs, in their official statements, Chinese authorities often stress the accent on their importance for the healthy development of the national economy by using a variety of expressions such as “backbone enterprise” (gugan qiye), “pillar industry” (zhizhu chanye), “central enterprise” (zhongyang qiye) and “key industry” (zhongdian hangye). Nonetheless, these expressions belong more to the language of politics than to that of law.

Furthermore, in 2006, SASAC issued a notice listing seven strategic sectors, including national defence, electricity, petroleum and petrochemicals, telecommunications, coal, civil aviation, and waterway transportation, in which the Chinese government decided to inject a huge amount of financial resources and to keep absolute control.

The strategic sectors listed by SASAC clearly fall within the scope of application of Article 7. In this sense, various authors have fiercely criticised this provision since: “Article 7 may, ironically, derail general competition rules in many of the most inefficient sectors of the economy. It may also gut the rules against administrative monopoly in the sectors where they are needed most.”

However, Paragraph 1 only indicates the State’s intention to protect these categories of SOEs. It does not state that they shall be shielded from competition rules. Paragraph 1 simply makes clear that the State shall supervise SOEs’ market conduct pursuant to law in the interest of Chinese consumers. Furthermore, Article 7(2) of the AML tries to refute the idea of a milder application of competition rules to SOEs by stating that the concerned enterprises: “shall conduct their business in accordance with the law” and “shall not harm the interests of consumers by utilizing their controlling positions or their status as the exclusive provider of certain services or products.” Thus, this provision explicitly prohibits enterprises in strategic industries from abusing their market power.

447 Ibid.
448 Bush, supra note 366, at 5. Other commentators do not agree with this position. By considering the language of Article 7, Professor Eleanor Fox noted that SOEs operating in strategic sectors are: “[A]ll but exempted from the prohibitions of the AML.” However, she further added that: “[T]he state—and not the anti-monopoly agencies—has jurisdiction to control, or not, the anticompetitive behaviour of the most powerful state monopolies.” Fox, supra note 410, at 8.
Arguably, this controversial issue has been resolved by the recent investigation of NDRC on China Telecom and China Unicom, two of the three major SOEs dominating the Chinese telecommunication sector. On November 9, 2011, the NDRC officially announced an investigation of these two companies in relation to alleged abuse of dominance in the broadband market. The contested practices included the imposition of discriminatory charges of internet service providers for the interconnection with the two firms’ network and the failure to fully integrate their networks.

On December 2, 2011, the two companies announced filing an application to NDRC in order to suspend its investigation by promising to readjust their prices for internet access and to overhaul their broadband services. It is worth noting that China Telecom and China Unicom’s application to NDRC for suspension of investigation was filed pursuant to Article 45 of the AML. According to Article 45(1) if the undertakings being investigated commit themselves to take specific measures within the time limit approved by the competition authorities to eliminate the effects of their conduct, the enforcement authorities may decide to suspend the investigation.

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450 Ibid.

451 See Article 45(1). Furthermore, according to Article 45(2), the decision to suspend an investigation shall expressly state the specific commitment made by the undertakings. If the competition authorities decide to suspend the investigation, they shall monitor the undertakings’ compliance with their commitments. Finally, if the concerned undertakings fulfil their commitments, the enforcement authorities may decide to terminate their investigation. In this regard, it was noted that: “If an application is successful, the company that applied for suspension can benefit from relatively speedy closing (at least temporarily) of the investigation. Moreover, we understand it would be reasonable to infer that once an application is granted, the company will not be imposed antitrust fines that could have ranged from 1-10% of its turnover for the previous year. Nevertheless, it is not entirely clear under the AML what implications the company’s undertakings may have in an AML private litigation. We however notice that the draft rules governing AML private actions released by the Supreme People’s Court in April [2011] expressly provided that such commitments made by a company cannot be used in support of direct presumption of monopolistic conducts.” See Susan Ning, Sun Yiming, Liu Jia and Yin Ranran, China Telecom and China Unicom Seek to Settle Antitrust Probe, China Law Insight, (December 12, 2011), available at [http://www.chinalawinsight.com/2011/12/articles/corporate/antitrust-competition/china-telecom-and-china-unicom-seek-to-settle-antitrust-probe/](http://www.chinalawinsight.com/2011/12/articles/corporate/antitrust-competition/china-telecom-and-china-unicom-seek-to-settle-antitrust-probe/). See also Susan Ning, Sun Yiming and Liu Jia, Chinese Antitrust Enforcement Agencies Ready to Show Teeth to Large State-owned Enterprises, China Law Insight, (September 26, 2011), available at [http://www.chinalawinsight.com/2011/09/articles/corporate/antitrust-competition/chinese-antitrust-enforcement-agencies-ready-to-show-teeth-to-large-stateowned-enterprises/](http://www.chinalawinsight.com/2011/09/articles/corporate/antitrust-competition/chinese-antitrust-enforcement-agencies-ready-to-show-teeth-to-large-stateowned-enterprises/); Susan Ning,
On March 13, 2012, Mr. Zhang Guangyuan, Director of the Anti-monopoly Bureau of NDRC stated that China Telecom and China Unicom had completed at that time 100G bandwidth expansion and committed to a further reduction of internet access services. Furthermore, he announced that in February 2012 both companies had submitted an update about their compliance with the agreed commitments and he added that China Unicom also agreed to popularise the 4 MB and above rate bandwidth for at least 50 percent of public users by the end of 2012.452

Such a case has an indisputable relevance for China’s competition law. NDRC’s investigation made it clear that the provisions of the AML also apply to SOEs operating in those sectors identified as strategic by SASAC. Thus, the main issue is now to see whether competition rules shall be stringently enforced to other SOEs.

Despite the fact that over the years Chinese authorities have implemented various policies to introduce more competition in the stagnant SOEs sector and the prevailing trend has been to reduce the control of the State over the economy, this process has proceeded at a slow pace. Furthermore, in recent years growing criticism of excessive privatisation, stricter controls on foreign investors, the establishment of national champions and the strengthening of the role of the State in strategic sectors of the economy are all factors which demonstrate a mutated attitude towards openness.453 In this sense, there is a risk that Chinese authorities may opt for a relaxed approach towards the anticompetitive conducts of SOEs.


453 For discussion, see Chapter III.
Instead, the trend initiated in the telecommunication sector should also be extended to other Chinese industries.\textsuperscript{454} Chinese authorities should realise that the decision to retain public ownership is not incompatible with the goal of promoting competition. Maintaining public ownership in a sector should not necessarily coincide with the grant of a monopoly to certain undertakings. It would be possible to keep State ownership in a sector, and at the same time to have State ownership distributed in a number of SOEs competing against each other and against private undertakings. Moreover, if Chinese authorities should decide to grant a special status to certain SOEs, this should not be seen as a green light for committing abuses.\textsuperscript{455}

2.1 Public utility enterprises and competition

In China, SOEs operating in the public utilities sector are responsible for the most serious distortions of market competition. It is worth nothing that their market power is often the result of a natural monopoly or of the administrative protection granted by State authorities at national and, in particular, at local level.\textsuperscript{456} In this sense, these enterprises have become synonyms of Chinese monopolistic forces and their market behaviour negatively affects private competitors and consumers.\textsuperscript{457}

\textsuperscript{454} In general, the reform of China's telecommunications sector represents an interesting case to study the change of the role of the government, the introduction of competition in the public-service sector and the influence of interest groups in the process of reform. In 1994, the Chinese government ended the monopoly of China Telecom by establishing China Unicom which started to compete with it on market. Other rounds of liberalisation followed and in 1999 and 2002, China Telecom was further broken up into other smaller companies. For an insightful analysis of the reform of China’s telecommunication industry see Zhou Fang, \textit{The Deregulation of Chinese Economy —The Case of Telecommunications Industry}, Chinese Public Affairs Quarterly, Vol. 2, Issue 1, (2005), 1 - 14.

\textsuperscript{455} Owen and others, supra note 44, at 245.


\textsuperscript{457} Ibid.
In particular, access and quality deficiencies are more serious in the countryside, implying the necessity for the Chinese government to implement policies specific to rural areas. At the same time, the process of rapid urbanisation is accelerating the need for more infrastructures to accommodate migrating populations. Quality is also a crucial aspect of the public utilities sector. Unfortunately, low levels of investments in operation and maintenance are rather common in China. Thus, this trend should be corrected since the impact and productivity of investment often depends on its quality and upkeep. Finally, a further issue refers to affordability which represents a key aspect for allowing poor people’s access to public utilities services. In this sense, in China it would be crucial to take into account the extent to which the price and quality of the offered services are consistent with the consumers’ ability to pay for them.458

Certainly, the issue of the reform of PUEs is common to most developing countries. In these countries, factors hindering the regulation of the public utilities sector are often connected with the system of governance. For instance, the lack of an effective system of control, the weakness of the rule of law and a limited separation of powers among different organs of the State increases the risk of interferences and pressure by various interest groups. Furthermore, the absence of political democracy and well-functioning institutions favours the uncertainty and opacity of regulations and hampers the possibility for regulatory bodies to set and implement long-term strategies and policies. Finally, also as a result of all these shortcomings, the process of liberalisation and deregulation of public infrastructures in developing countries fails to attract high levels of foreign investment.459

In addition to these issues, the structure of regulatory agencies in the People’s Republic of China has special characteristics. In general, China presents a mixed system of regulatory agencies composed of industry-wide and sectoral agencies at both central and regional level. Under Chinese law, the State Development and Planning Commission (hereinafter, “SDPC”) is the government body responsible at national level for regulating price, market entry and investment in the public utilities sector. However, other sectoral agencies such as ministries or their departments are in charge of complementing the activity of SDPC as well.

However, the main critical issue refers to the hierarchical structure existing between regulatory agencies at central and local level. Following the classic model of the Chinese administrative system there is a duplication of SDPC along each layer of governments. Furthermore, additional agencies are also present at each local government level. In general, with reference to the differentiation of task between regulatory bodies agencies at national level are usually responsible for supervising the activities of local bodies in relation to large projects, and local agencies are in charge of similar tasks in relation to smaller projects.

Similarly to what happened in the process of reform of the legislative system, when restructuring the role and prerogatives of regulatory agencies the chosen approach of the central government has been to progressively transfer more and more regulatory powers to local authorities. Although as a result of this process of decentralisation, some public utilities sectors in China have witnessed a series of beneficial effects in terms of increased production capacity and elimination of shortages, regulatory bodies at local level started to increase their

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462 For instance, this is the case of the Ministry of Industry and Information Technology which complements the activities of SDPC.
463 For instance, national SDPC reviews the proposal for price adjustment in the public utilities sector submitted by local SDPC. See Laffont, supra note 460, at 189.
discretionary powers in relation to price regulation, market access and investment criteria. 463

In addition to this, a further major concern refers to corruption. 464 In China various factors make regional regulators an easy prey for corruption. For instance, regulatory agencies at central levels have a very limited power of control over local regulatory bodies while local governments may easily interfere and influence their policy choices to favour local companies attached to them. Making decision more transparent would help to minimise the risk of corruption. In order to increase the participation of private investors into the public utilities sector it would be crucial to establish a transparent regulatory framework, including competent regulatory bodies. Though such bodies do exist in China, they lack adequate capacity.

Furthermore, Chinese authorities impose elevated administrative costs to private investors willing to enter the public utilities sector and tend to be highly intrusive in firm operations. Administrative costs are closely correlated with poor governance and corruption. In the Chinese public utilities sector where, in particular at local level, it usually takes excessive time and costs to fulfil all the administrative requirements necessary to establish and operate a business, private investors may decide not to pursue their investment projects. Despite the relevance of this issue, there have been only limited efforts by the central government to cope with this situation. Certainly, the regulatory framework has evolved from a scenario of absolute monopoly and public ownership towards a system characterised by the participation of private firms and where competition and regulation play complementary roles. However, competition law and culture,

463 For instance, in the energy sector, in order to introduce incentives for the regions to investment in electric power, the central government allowed local authorities to approve entry and investments in electric generation. Furthermore, it also authorised them to negotiate price purchase arrangements with independent power producers, subject to the approval of SDPC. As a consequence of decentralisation of this regulatory power, installed generation capacity has substantially increased so that the problem of energy shortage has been progressively solved. Laffont, supra note 460 at 192.

in particular at local level, are still far from being a pivotal feature of the public utilities sector in China.

A pertinent example is the development of the energy sector with the establishment of small-sized power stations. As a consequence of loose regulations on entry, in various regions small coal-fired plants and hydro plants have been created. These plants are not only largely inefficient but also produce high levels of pollution. In order to cope with this problem, the central government issued a series of regulations to close down most of these plants. However, these regulations have not been strictly implemented. The main problem is that local authorities exert their influence on the local regulatory bodies for not implementing the directives of the central government. The incentives of local authorities to support local generation plants come from the fact that local production helps maintain employment and increase local tax revenues which are essential for the career advancement of local officials.465

Institutional capacity building should represent a priority for a possible reform agenda of the national government.466 Quality deficiencies, resource waste, excessive costs and restrictions for private investors in China can be mainly traced to limited institutional capacity. Efficiency in the public utilities sector would require the existence of State authorities capable to improve governance in order to mobilise resources and to conclude intergovernmental arrangements for sharing investment costs. However, as a result of urban growth and fiscal decentralisation, the decisional power for public utilities servicing planning, financing, and management is currently in the hands of local governments, most of which lack the required capacity and have no immediate interest in acquiring it.

2.2 China’s Anti-Monopoly Law and public utility enterprises

Under China’s current legal system, laws and regulations dealing with SOEs and in particular with PUEs fall far short from a modern set of rules. In general, these provisions may be divided into two main categories. The first category consists of general competition laws and regulations, the second in industrial laws and regulations. With reference to this second category of rules, for example, over the years the State Council, NDRC and other State agencies have issued a series of general regulations covering various sectors. However, since most public utility sectors such as water supply, gas supply, and cable TV have been usually operated by enterprises under the control of local governments, the rules applicable to these sectors were developed by them and not by national regulators.

The current system presents therefore various shortcomings. First of all, some of these regulations were issued many years ago, and, consequently, they are not able to deal with the current situation of the Chinese market. Secondly, most regulations were drafted by local authorities and, thus, often tend to protect their interests. Third, most of these rules fail to clarify whether a PUEs should operate like a normal undertaking with profits and losses. Finally, since Chinese legislation fails to provide a clear definition of the special legal status of PUEs, it is difficult to formulate special laws and regulations in order to protect the interests of private investors in these enterprises.

Within this context, it appears evident that the enforcement system introduced by the new AML is largely ineffective to cope with this situation. Article 51(2) of the AML by recognising primacy to local regulations, as lex specialis, over the provisions of the AML, as lex generalis, de facto confirms the validity of the existing system of sources of law.

As said, in China the existence of monopolies by SOEs does not only depend on the monopolist nature of PUEs but also from the establishment of administrative monopolies by State authorities. The structure of regulations itself

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467 Wen, supra note 456, at 155.
468 Ibid.
469 Ibid.
often prevent competition in certain industries. The administrative authority responsible for a certain sector is usually also the regulator and beneficiary of that sector’s State-owned assets.\textsuperscript{470} For instance, in the railroad transport sector, the railroad department also receives the gains of this industry’s assets.\textsuperscript{471} Thus, without a clear distinction between the role of State authorities and PUEs, it is very difficult for Chinese competition authorities to intervene for punishing abuses.

Furthermore, as previously discussed, Article 51(1) further reduces the possibility of a stringent enforcement of competition rules towards administrative agencies. This provision does not confer upon the enforcement authorities of the AML the power to sanction an administrative agency committing an abuse, but it only recognises them the possibility to propose to the relevant superior agency, to which the violator belongs, how to address the problem or to suggest remedies.\textsuperscript{472}

Finally, frictions would be even more evident as a result of the impact of the various other laws which may affect competition such as, for instance, railroad and telecommunications laws.\textsuperscript{473} In this regard, some commentators noted that in order to improve this situation, the AML should at least pre-empt these other laws and give competition agencies the independence and power to challenge any disputes before an independent court with authority to make a final decision on the matter.\textsuperscript{474}

3. Competition authorities and sectoral regulators

\textsuperscript{471} Ibid.
\textsuperscript{472} This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, May 2010.
\textsuperscript{473} Wen, supra note 456, at 170.
\textsuperscript{474} Ibid. For discussion see also Zhou Hanhua, \textit{Power Distribution Between the Supervisory Agencies and the Antitrust Agencies}, China Economic Daily, (June 22, 2001).
A further aspect that it is worth taking into account is the interplay between competition policy and other public policies that in the People’s Republic of China is not dealt with by competition authorities in isolation.

As said, various sectors of the Chinese economy are still regulated by multiple ministries and agencies enjoying tremendous discretion in approving criteria for market access and investment. However, it appears evident that, when enforcing competition law, competition authorities might interfere with sectoral regulators’ policies.475

In order to reduce possible frictions between them, early drafts of the AML entrusted regulatory agencies with the power to enforce the provisions of the AML within the sectors under their supervision, thereby implicitly recognising the possibility of a discretionary application of competition rules.476 Despite this, the final version of the AML leaves no trace of the proposal; competition policymaking and enforcement is now under the guidance of AMC of the State Council that consists of a committee composed by representatives of various governmental bodies with powers and interests in various Chinese industries.477

Such a system seems to reflect the idea of the Chinese government that, in this phase of the country’s economic transition competition, policy should be considered within the wider context of other governmental policies.478 This vision is, for instance, reflected by the approach of MOFCOM which routinely collects the views of relevant sector regulators and trade associations when reviewing a merger.479

However, in some circumstances, problems of coordination may arise between sectoral regulators and competition authorities. This might happen when sectoral regulators decide to directly step in competition cases. The most interesting example is the dispute that occurred between two major Chinese

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475 This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, May 2010.
477 For an analysis of the enforcement system of the new AML, see Chapter II section 2.4.
478 For discussion, see Chapter II.
479 For discussion, see Chapter III.
companies operating in the internet sector: Qihoo 360 Technology Co., Ltd. (hereinafter “Qihoo”) and Tencent Inc. (hereinafter, “Tencent”).

Tencent provides QQ, the most popular instant messaging (hereinafter, “IM”) service in China with over 700 million users. It also provides information security products, search engine, e-commerce online media, etc. Qihoo is the largest provider for security products and services in China with over 400 million users.

The two companies offer rival security software for QQ users. In September 2010, a dispute began between them as a consequence of Tencent invitation to QQ users to download an upgraded version of its security software. Qihoo accused Tencent of scanning its users’ computers for private data and then released a new version of its security software, stating that this software could speed up QQ and protect QQ users’ private data. In response, Tencent affirmed that Qihoo’s software had caused QQ to malfunction and, then, invited its users to uninstall it otherwise Tencent would have interrupted its QQ software service.

In December 2010, Tencent decided to sue Qihoo before Beijing’s people court for unfair competition under the LAUC. In April 2011, Qihoo lost the lawsuit and was ordered to compensate Tencent with CNY 400,000. However, in October 2011, Qihoo, which had filed a different compliant before the High People’s Court of Guangdong Province against Tencent’s two wholly-owned parent companies, Tencent Technology (Shenzhen) Co., Ltd. and Tencent Computer System Co., Ltd. under the AML, asked the court to stop Tencent’s alleged anticompetitive conduct and claimed damages for CNY 150 million. Finally, in March 2013, the Guandong court stated in its decision that Tencent did not create a monopoly and ordered Qihoo to pay CNY 790,000 in legal fees.480

In November 2010, the Ministry of Industry and Information Technology (hereinafter, “MIIT”), the national regulatory agency of China’s information technology sector, openly intervened in the dispute. MIIT publicly stigmatised both companies’ immoral business conduct and it decided to consult the State

Council on the matter for possible actions. Later on, MIIT issued a Notice to condemn both Qihoo and Tencent for their anti-competitive behaviour and for the “harmful social effects” of their dispute. MIIT also requested both litigants to issue public apologies, stop attacking each other and re-establish the compatibility of their software. MIIT further clarified in its notice the intention to pursue further investigation about the case together with other competent agencies in order to determine whether any violation of law had been perpetrated by the two companies.481

After MIIT’s notice, Qihoo and Tencent publicly apologised, but it is not clear if in the end any formal investigation has been pursued by the Ministry. It is worth noting that although representatives of MIIT sit in the AMC, the Ministry itself does not enjoy any kind of enforcement power under the AML. Instead, SAIC and NDRC, the two competent enforcement agencies, did not look at the dispute from the standpoint of Chinese competition law. In this regard, as Nathan Bush noted, it appears that: “Any direct clashes between antitrust enforcers and sector regulators are likely to be resolved behind closed doors through the AMC or the general political process, assuming that the antitrust enforcers are willing to invest political capital and resources in challenging a sector regulator on its own turf.”482

To further complicate matters, in January 2011, MIIT released the Draft Measures for the Supervision and Administration of the Internet Information Service Market Order483 (hereinafter, “Draft Measures”) in order to prevent further disputes similar to that which occurred between Tencent and Qihoo. The Draft Measures establish a framework for the regulation of abusive behaviour by internet information service providers in relation to online information services and products, and introduces a dispute resolution mechanism. Prohibited conducts

481 Ibid.
482 Bush, supra note 260, at 11.
include those deemed to perpetrate unfair competition practices, infringe users’ rights and fail to protect users’ private data.\(^{484}\)

Although MIIT’s intervention in Tencent and Qihoo’s dispute can be considered as expedient, the issuance of the *Draft Measures* have *de facto* displaced the evolution of Chinese competition law in China’s information technology sector.\(^{485}\)

Under the *Draft Measures*, internet industry associations are required to establish bodies responsible for offering mediation services between providers and to formulate and implement their own set of disciplinary rules. Furthermore, MIIT and its provincial branches are now competent for supervising and coordinating the settlement of disputes between internet providers. Thus, on the one hand, the *Draft Measures* perpetuate uncertainty about the division of enforcement tasks between sectoral regulators and competition authorities, and, on the other hand, they further promote the proliferation of multiple, at times contradictory, regulatory sources.\(^{486}\) In conclusion, by paraphrasing a famous Mao’s quote, it may be said that: “*[Still] great is the confusion under the sky [of Chinese competition law].”*

### 4. The State and competition: China’s unaccomplished reforms

Arguably, from a liberal democratic perspective, the success of legal reforms in China in the past three decades is highly questionable. Chinese leaders have mainly pursued legal reforms to foster economic development, maintain public order and to enhance China’s credibility at international level. Although these goals have supported what can been defined as a “*thin*” theory of the rule of


\(^{485}\) Bush, supra note 260, at 13.

\(^{486}\) This point was raised in a meeting with Miguel Ceballos Baron, former Director of the Trade and Investment Section of the Delegation of the European Union to China, Beijing, March 2011.
law, they have not introduced a liberal democratic vision of law.\textsuperscript{487} Indeed, China’s rising middle class may have an interest in a less instrumental and more transparent use of law, but substantial political, social and cultural barriers seems to hinder any concrete steps in this direction.\textsuperscript{488}

The general shortcomings of China’s legal system are perfectly reflected in its competition law regime, notably, in relation to the phenomenon of administrative monopolies. The theme of the relationship between competition law and administrative monopolies is linked to the more general constitutional issue about the necessity to redefine and limit the powers of Chinese administrative bodies.

As seen, the Chinese legislator has failed to provide a comprehensive and organic system of competition rules capable of effective enforcement. The enactment and interpretation of the provisions of Chapter V of the new AML on administrative monopolies mainly occur through the use of administrative and regulatory powers by central and local authorities. In this sense, the prerogatives of these administrative organs are not affected by competition rules which instead may easily be interpreted to their advantage. Thus, the consistency of content and interpretation between national and local sources of law remains a matter of major concern in light of the attempt to effectively fight against the practice of administrative restraints on competition in China.\textsuperscript{489}

China’s legal culture still supports the view that government bodies should enjoy huge discretionary powers in enforcing legislation.\textsuperscript{490} As previously discussed, flexibility is still viewed as an indispensable instrument to promptly react to unforeseen situations and to adapt to the constantly evolving economic scenario.\textsuperscript{491} Arguably, Chinese scholars still believe that at the present stage of

\textsuperscript{487} For discussion, see Peerenboom, supra note 235.
\textsuperscript{488} For instance, there continues to be debate as to whether law should be superior over governmental policies. The debate focuses on the unsolved tension between the supreme status of the CCP and the concept of supremacy of law.
\textsuperscript{489} This point was raised in a meeting with Professor Chenguang Wang at the School of Law of the Tsinghua University, Beijing, June 2010.
\textsuperscript{490} This point was raised in a meeting with Professor Chenyin Zhang at the School of Law of the Tsinghua University, Beijing, May 2010.
\textsuperscript{491} For discussion, see Chapter II.
China’s political and economic transition, flexibility takes precedence over legislative transparency and stability.\textsuperscript{492} Furthermore, the refusal of the Beijing’s government to embrace a federal system of governance makes flexibility and discretion the only viable solution to adapt general policies and laws to local circumstances and, thus, to defuse tensions between central and regional authorities.\textsuperscript{493}

In this sense, the problem of law enforcement, including competition law enforcement, finds its roots in the structure of China’s legislative system. It is worth noting that since the beginning of the reformation period, the complexity of China’s legislative hierarchy has represented a major obstacle to the establishment of an organic and coherent system of sources of law.\textsuperscript{494} The proliferation of regulatory and law making powers in the hands of a myriad of State agencies has brought the problems of Chinese bureaucracy directly into the legislative structure.\textsuperscript{495} In this regard, most administrative bodies have been able to enhance their position through the enactment of policies and related regulations. Under China’s authoritarian system, political and legal decentralisation has actually become “the primary strategy for improving governance through soliciting voluntary compliance from local state agents motivating their actions toward location-specific growth-oriented policies and institutional innovations.”\textsuperscript{496}

Furthermore, the NPC, China’s main legislative authority, has not been successful in implementing rules to limit this “bleeding” of legislative and regulatory power from the centre to the regions.\textsuperscript{497}

The national legislator has actually failed to develop a system of sources of law to set the scope of legislative competence and the exact hierarchy of Chinese norms.\textsuperscript{498} For instance, the Legislation Law, issued by the NPC in 2000, also in light of China’s WTO accession, aimed to move toward a rationalisation of the

\textsuperscript{492} Ibid.
\textsuperscript{493} Lin, supra note 8, at 80.
\textsuperscript{494} Keller, supra note 204, at 733.
\textsuperscript{495} Ibid.
\textsuperscript{496} Lin, supra note 8, at 75.
\textsuperscript{497} Ibid.
\textsuperscript{498} This point was raised in a meeting with Professor Chenguang Wang and Professor Weizuo Chen at the School of Law of the Tsinghua University, Beijing, June 2010.
legal system, to clarify the legislative hierarchy and to consolidate its authority over other law-making institutions.\textsuperscript{499} However, despite the NPC’s efforts, the Legislation Law made little progress in limiting the legislative autonomy and discretion of other governmental agencies and in establishing effective mechanisms of controls.\textsuperscript{500} Furthermore, while the Legislation Law has formally given an answer to some constitutional issues related to the sources of law in China, in reality, the absence of further structural reform, has made the Law “\textit{a victim of the system it was intended to reshape}.”\textsuperscript{501}

Various issues remain unsolved. For instance, the characterisation of the hierarchical relationship between national sources of law reflected by the duality of the NPC law and the State Council regulations, is mirrored on a smaller scale at regional level. The structure of the Chinese State symmetrically replicates the institutions of the central government at local level.\textsuperscript{502} One of the main critical issues is that since the 1980s local Party’s authorities have been issuing more and more regional legislation to give formal legal status to local Party’s policies. In this regard, there is not a clear hierarchal and functional division between national and regional law sources on the one hand, and between different local sources on the other hand.\textsuperscript{503} China’s existing legislative structure has its origins in the communist administrative system which, despite the enactment of more contemporary mechanisms and practices, continues to operate and to permeate various aspects of the country’s political and economic life. As a consequence, the role and power of traditional administrative bureaucracies in the Chinese legal system has remained unchanged.

\textsuperscript{500} Ibid. at 318. Furthermore, it was noted that: “\textit{While many debates that emerged during the Legislation Law’s drafting revealed a genuine recognition of the problems and resulted in some innovative proposals, especially on supervision, the extreme sensitivity and volatility of the issues at hand meant the carving away of the draft Law’s most substantive portions}.” Ibid.
\textsuperscript{501} Ibid.
\textsuperscript{502} For discussion, see Keller, supra note 204, at 736.
\textsuperscript{503} Ibid. At 736-737.
A further aspect of this administrative dominance arises from China’s law making process itself. In China, most legislation, regardless of its hierarchical status is usually drafted by State bureaucracies. At central level, ministerial agencies not only are entitled to issue their own regulations but they are also responsible for drafting State Council’s administrative regulations and NPC’s main laws. At local level, the various administrative departments of the People’s Governments enjoy similar prerogatives in drafting regional government regulations and regional regulations. Such a pervasive control of law drafting by administrative agencies has not parallel in other legal systems. In China, law-making bodies have progressively increased their role and their control over the legislative process is largely ineffective. Arguably, under China’s current system of governance there is still no single institution having the authority to put some order in the fragmented legal system and, obviously, administrative agencies themselves do not have the power or interest of doing this.  

Within this context, Article 37 of the AML prohibiting administrative bodies not to abuse their power to issue regulations containing provisions restricting competition appears to be nothing more than a guideline. Similarly, this situation also explains the loose enforcement system introduced by Article 51 of the AML according to which violations of competition rules by administrative agencies are *de facto* treated as disciplinary matters internal to the concerned agencies. Thus, it is possible to share the view of leading Chinese competition law scholars who consider that, in relation to the phenomenon of State restraints on competition, the AML is “a tiger without teeth.”

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505 This point was raised in a meeting with Professor Chenying Zhang at the School of Law of the Tsinghua University, Beijing, May 2010.

506 Huo, supra note 109, at 33.
CONCLUSIONS

This thesis attempted to answer a series of questions related to the nature and development of competition law in China. In order to answer the research questions, this work focused on the study of specific aspects of the 2008 AML which virtually amended or newly created all parts of the Chinese competition law system.

One of the first conclusions that can be drawn from the conducted analysis is that many of the problems, with respect to the establishment of a competitive and integrated market environment in China, are due to the fact that the country is still in a phase of economic transition. The analysis demonstrated that this is particularly evident in relation to the eradication of one of China’s most distinctive anti-competitive practices: administrative monopolies. In this regard, the thesis offered an assessment of the AML’s provisions dealing with State-restraints on competition, and of their capacity to overcome the hurdles deriving from the legacy of the Maoist era.

Such an investigation revealed that the outcome of the solutions adopted by the AML is largely ambivalent. On the one hand, the AML provides a rationalisation and simplification of the norms dealing with the harmful practice of administrative monopolies by listing and classifying most of the prohibited conducts within the context of Chapter V of the law.

On the other hand, the enforcement system contained in Article 51 of the AML is rather lenient. Contrary to the general expectation, this provision indicates that competition authorities are not entitled to impose sanctions on administrative entities violating competition rules. They can only offer advice on how to address the matter to the superior administrative agency to which the violator belongs. However, considering the existing situation of China’s administrative system, superior agencies lack interest and impartiality to intervene
in cases where abuses of administrative power have been perpetrated to benefit local authorities or their affiliated enterprises. Furthermore, the interpretation and the implementation of the prohibitions listed in Chapter V of the AML are left in the hands of administrative entities which may easily interpret competition rules to their advantage.

In reality, the analysis revealed that direct reference to the context of China’s legal system will continue to be the best means of understanding the relationship between competition law and State-restraints on competition.

In this respect, the opacity of China’s law making process, the absence of a rational system of sources of law and the failure to redefine the normative and regulatory power of State bureaucracies and local authorities are the major obstacles to the establishment of effective rules to fight against administrative monopolies.

Generally speaking, China’s accession to the WTO has promoted transparency in the legislative process mostly in relation to trade-related matters. Although progress has been slow and the high expectations of foreign observers have been partly frustrated, China’s WTO commitments of transparency have stimulated further governmental initiatives to widen public consultation and to abate the opacity of the law making process, particularly with reference to the approval of laws of national relevance. As the drafting process of the AML demonstrates, although the passage of national legislation is still long and tortuous the level of access is higher and input is sought from a variety of sources including international organisations and foreign countries.

Yet, the lack of transparency in relation to the issuance of secondary sources of law, such as regulations by administrative bodies and local authorities, is still vast. Although, national law, notably the Legislation Law, calls now for the publication of all draft legislation and for open hearings in order to increase law awareness by the public, most normative and regulatory documents still remain inaccessible. In the best case scenario, as foreign legal practitioners often lament, local regulations are only made public through publications in obscure local newspapers.
A second major critical issue is the failure of the national legislator to develop a rational and coherent system of sources of law. China’s legal system lacks a hierarchal and functional classification between national and local norms on the one side, and between different local sources on the other.

Finally, Chinese administrative bodies and local authorities still enjoy enormous normative and regulatory power whose limits remain unclear. The uncontrolled proliferation of rules further exacerbates normative confusion and results in the approval of local regulations which often contradict the content and undermine the objectives of national legislation. Despite a drastic reduction of their numbers, their mass continues to be huge and recent years have witnessed a revival of this normative hyperactivity.

In this respect, although diminished in their harshness by two decades of legal reforms, the words pronounced in 1994 by Perry Keller on the disarray of Chinese law sources still sound loud: “[T]he disparate mass of laws and regulations which makes up the formal written sources of Chinese law does not possess sufficient unity to be regarded as a coherent body of law. […] [They] seem barely capable of providing the basic point of reference which all complex systems of law require.”507

One must therefore conclude that, although there is nothing uniquely Chinese about State-restraints on competition, and certainly their elimination has also represented an arduous task for the legal systems in Western market economies, notably in the EU, it is important to appreciate that China’s current legal framework still falls short from the requirements needed for an effective enforcement of competition rules against these harmful phenomenon.

Two other main research questions that the thesis tried to answer concerned the type of competition law that Chinese policymakers intended to create through the enactment of the AML and the status of competition law in China’s socialist market economy, both ideologically and practically.

In order to answer the research questions, the thesis engaged in a textual and substantive analysis of the AML.

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507 Keller, supra note 204, at 711.
This study demonstrated that, from a formal point of view, the AML bears the strong mark of the EU competition law model in terms of language, contents and general architecture with reference to the three main classical areas of competition law: monopoly agreements, abuse of dominance and concentration of undertakings. However, from a substantive stand point, the provisions of the AML present a higher degree of generality, flexibility and, at times, opacity than its inspiring prototype.

The conducted analysis revealed that this drafting-method has both practical and theoretical justifications. From a practical point of view, generality and vagueness reflect in many instances a certain lack of experience of the Chinese drafters regarding competition law matters and the need to mediate the conflicting interests and positions of governmental bodies at all levels. From a theoretical point of view, the study demonstrates that, traditionally, one of the main characteristics of legislative drafting in China is that national laws should be both “general” (yuanzexing) and “flexible” (linghuoxing). The principles of generality and flexibility captures the underlying philosophy of China’s law making according to which legislation is expected to reflect the unitary nature of the State while serving the needs of regional diversity.

China is as vast as a continent that is currently undergoing epochal economic and social changes. The economic and social conditions in the poor and underdeveloped inland regions considerably differ from those in the advanced and rich costal cities. Thus, the AML, as with most national law, is drafted in broad terms to be adaptable in a flexible manner to local circumstances. Moreover, so drafted, the AML helps to preserve the principle of legislative stability (wendingxing) as it allows the Chinese legislator to amend the law by modifying its interpretation rather than by intervening on its actual text.

The conclusion that can be drawn from the analysis of the AML is that, despite the extensive study and the heavy borrowing of competition law principles and concepts from Western jurisdictions, the AML reflects the continuity with China’s traditional law drafting method.
The conducted study further demonstrated that, in effect, far from being just a stylistic choice, the flexibility and vagueness of the provisions of the AML also reveal the actual view of the Chinese legislator about the nature and role of China’s new economic constitution, within the framework of the socialist market economy.

By studying the historical, political and social context in which competition rules have been developed, one can conclude that the adoption of market oriented legislation which inspired the Western model did not make the socialist perspective obsolete. In reality, Chinese leaders have excluded the possibility to sacrifice China’s cultural and ideological purity for the pursuit of temporary economic growth and, in this respect, the authority and legitimacy of socialist ideology still stands beyond challenge.

To put it bluntly, China’s socialist market economy is not intended to be an economy free of State regulation. On the contrary, the formulation and the enactment of market rules, including competition rules, is viewed by Chinese policymakers in their own way as a new form of State intervention.

However, the analysis demonstrated that State intervention in China assumes a very peculiar form. This mainly depends on the Chinese authoritarian system of governance in which the CCP continues to set the pace and parameters of economic and legal reforms.

More specifically, The CCP considers legal reforms; including competition law ones, as integral to the establishment and prosperity of the socialist market economy. In practice if not in theory, the AML, as with other national laws, is viewed as instrumental to carry out the CCP policy goals. In this respect, by failing to value competition law per se, the CCP does not give the AML a completely autonomous status, but it considers it as a tool to complement and achieve the policy objectives that it prioritises at a particular time.

Certainly, an instrumental approach to competition law has been common to most jurisdictions which have used competition legislation also as an instrument to achieve economic and social goals.
With reference to the EU, for instance, as famously stated by former Competition Commissioner Karel van Miert: “Competition policy has so long been a central Community policy that it is often forgotten that it is not an end in itself but rather one of the instruments towards the fundamental goals laid out in the Treaty […]. Competition therefore cannot be understood or applied without reference to this legal, economic, political and social context.”

However, an instrumental use of competition law for pursuing public policy goals, (to be acceptable, or at least tolerated), calls for some prerequisites such as, the existence of a legal system sufficiently independent from the political process to set the boundaries of the sphere of action of the political leadership. Only in such a way, can competition law enjoy a autonomous status and become a source of normative order and legitimacy.

The conducted analysis demonstrated that, although there has been a move from the situation in Maoist China where “Party policy was the soul of law”, the control that the CCP continues to exert over the legislative bodies and the judiciary indicates that it is still much too difficult, if not dangerous, to challenge the supremacy of the Party’s policy choices in the name of legality. The CCP’s nomenklatura still dominates all of China’s major legislative organs and key governmental posts through the absolute control of the appointment system. Furthermore, although direct intervention over the judiciary has lessened, the CCP still exerts an indirect influence on courts by setting general policies and directives that judges are expected to take into account, if not follow, when deciding cases.

Although care should be taken not to overstate the extent to which competition rules may be passed and enforced under the undue influence of the CCP, it should also not diminished the importance that the party’s policy goals play over China’s competition policy.

509 Wing-Hung Lo, supra note 210, at 92.
The conducted analysis made it clear that this situation is the result of China’s authoritarian system of governance combined with an instrumental vision of law, typical of Chinese socialist legal theory.

In Western democracies, “law” incorporates concepts such as freedom, justice and individual rights. In China, the primary source for law remains “actuality” (shiji) as determined by the CCP. The idea that “actuality” produces and justifies the content of law originates from traditional socialist legal theory which emphasises the need for the State to pursue continual legal reform. In this regard, Chinese legislation is expected to continuously adapt to the development and change of the economic and social scenario in order to maintain accord and consistency between law and society. When society changes, the law should also change to re-harmonise the internal relations within Chinese society.

In its most extreme interpretation, such a legal theory considers that the purpose of law is to finalise and standardise those governmental policies, which have been proven to be correct and effective for the healthy and harmonious development of Chinese society. Needless to say that such an assessment remains an exclusive prerogative of the CCP’s leadership which, in the end, as a result of the intrinsic generality and vagueness of the concept of “actuality” enjoys almost unlimited discretion to justify its actions.

Considering that Party policy is the foundation of law and contains most of its guiding principles, the AML is also expected to formalise the CCP policy in a more particularised way as it is viewed as a tool to exert economic and social control of China’s socialist market economy.

The close relationship between the wording of various provisions of the AML and the content of most policy statements of CCP’s leaders, further support the view of the instrumental nature of the AML’s language. Thus, in order to better understand the role played by competition law in China, it would be useful to read the provisions of the AML also in relation to current governmental policies. In conclusion, “actuality” as determined by the CCP favours an instrumental, pragmatic and, often, experimental interpretation and enforcement of Chinese competition law.
One pertinent example is merger policy. Generally speaking, M&A represent a powerful tool to serve a multiplicity of objectives including the achievement of economies of scale, the improvement of industrial structures and the enhancement of the competitiveness of firms. However, by having the potential to affect the structure of markets, M&A may restrict competition and reduce the number of competitors. In this regard, M&A rules are unanimously recognised as a vital part of a modern competition law system.

In China’s transitional economy, concerns about national security and excessive foreign ownership on the one hand, and the willingness to promote indigenous innovation and to establish national champions on the other hand, may also play a substantial role in merger policy either explicitly or implicitly.

In this respect, in trying to understand what purposes are served by enforcing Chinese competition law, the thesis focused on the assessment of China’s merger policy as implemented by MOFCOM in its double role of competition authority and executive arm of the State Council; China’s chief administrative organ responsible for the enactment of most of the CCP’s directives and policies.

The study revealed that the AML introduced a new M&A regime modelled upon the EUMR. In this regard, when certain thresholds are met, the parties to a proposed transaction must notify MOFCOM which will assess whether the proposed operation has or may have the effect to eliminate or restrict competition on the Chinese market. From a formal point of view, by abandoning the distinction adopted under China’s former M&A regime between transactions operated by domestic and foreign firms, the new M&A rules represent a significant improvement in terms of consistency with international practice. From a practical point of view, however, MOFCOM appears to apply a different standard of review according to the nationality of the parties participating in a merger transaction.

Most merger transactions which should have triggered merger review, were never subject to MOFCOM scrutiny. Curiously, however, all cases referred to situations in which the concerned operation involved exclusive participants of
Chinese firms and SOEs. In this respect, one can conclude that the Chinese Ministry of Commerce seems to have instrumentally applied, (or, better yet not applied) M&A rules to serve some of China’s current policy goals, such as the development of domestic SMEs and the restructuring of SOEs. The method adopted by MOFCOM for accommodating non competition values and for limiting possible external interferences or criticism was silence. Thus, the opacity of its public enforcement record shielded many questions from public scrutiny concerning China’s merger policy such as, for example, the applicability of merger rules to the consolidation of SOEs operating in strategic sectors of the Chinese economy.

MOFCOM’s merger policy with reference to merger transactions operated by foreign companies willing to acquire domestic firms has however been different, particularly in relation to the clearance of transnational mergers.

When reviewing M&A deals involving multi-national corporations, competition agencies often trigger complex evaluations of international business operations in various countries, uncertain enforcement solutions, and conflicts among the competition policies of different jurisdictions. Thus, over the years efforts have been made by most competition authorities around the world to approximate the content of their M&A legislation and to converge on similar criteria for their standard of review.

Similarly, Chinese competition authorities are fully aware that when reviewing transnational mergers they may externalize the costs of China’s merger policy and cast shadows of uncertainty on foreign investors about the outcome of their operations in the country.

In this respect, MOFCOM adopted a very cautious approach. It is fair to say that MOFCOM’s merger policy in relation to cross-border mergers has gone beyond a simple instrumental convergence with the CCP policy goals. Although instrumental and pragmatic concerns such as the intention to protect the development of domestic SMEs remain, in the attempt to improve its enforcement capacity and to build up its international credibility as a competition agency, MOFCOM de facto conformed its standard of review to international practice.
Certainly, if compared to merger policy under more mature competition law jurisdictions, MOFCOM’s merger policy reflects most of the concerns faced by other Asian transitional economies which decided to implement competition legislation, and, consequently, it adopts a “development” approach instead of a pure “efficiency” one. In this regard, MOFCOM is using competition rules as a flexible instrument to achieve multiple objectives. My perception is that the chosen strategy of soft convergence with international standards has the double advantage; to grant MOFCOM with flexibility to make adjustments and exceptions when required, and to reduce potential tensions with other competition agencies around the world as a consequence of its divergent solutions. Thus, instrumentalism and pragmatism here have been applied in a much broader and sophisticated sense, as a tool for achieving economic modernisation.

Yet, it has been difficult for MOFCOM to break away from some traditional plagues of competition law enforcement. The lack of transparency and public scrutiny remains in fact an endemic problem. For instance, on the one hand, MOFCOM’s decisions only summarise the procedural phases of its review process, list the statutory factors, present the conclusions, and discuss remedies without disclosing any substantial information about the conducted economic analysis. On the other hand, no public record exists of the formal written submissions, hearings, or ex parte communications from the parties of a proposed transaction. In this respect, various commentators express a moderate pessimism towards MOFCOM’s merger policy by emphasizing the opacity which continues to characterise the application of China’s new M&A rules.

In conclusion, it is my opinion that competition law may assume different meanings in different countries. Most Western jurisdictions, for example, share the view that competition law embodies liberal values and calls for a democratic system of governance based on the principles of rule of law and separation of powers.

China’s leadership, however, remains opposed to this vision. Certainly, contemporary China has been experiencing epochal economic and social changes whose ultimate outcome is still uncertain. China’s unprecedented openness of the
outside world has not only brought with it economic development, but also substantial modifications to the structure of Chinese society. Eventually, China’s raising middle class may demand the recognition of some liberal democratic values and a less instrumental interpretation of law, but there are still substantial political and cultural obstacles to any immediate step in this direction. Furthermore, in recent years Western liberal democracies and their economic models have lost some of their appeal by showing the striking contradictions of societies who often put first the interests of the few to the detriment of the many.

Thus, not only as a result of different economic conditions but also of historical, ideological and cultural ones, it should come as no surprise that China’s understanding of competition law differs from those of Western countries.

However, the development of a modern system of competition law in China, (though with Chinese characteristics), requires a reconsideration of instrumentalism and pragmatism as they are applied today by China’s leadership. If the CCP continues to use competition law as instrumental to the realisation of its policy, the regulative function of competition law in China’s socialist market economy will remain elusive. To assume an autonomous and independent status, competition law should be progressively freed from the restraints of policy. An instrumental use of competition law may have appeal in the short term, (and certainly flexibility and pragmatism in interpreting and enforcing competition rules have well served the current needs of China’s transitional economy), but in the long term such an approach may undermine the authority and legitimacy of Chinese competition law. The risk is that the development of competition law in China will continue to depend on the change in direction of governmental policies.

At the same time, Chinese political leadership should renew emphasis on the importance of embracing those principles of legal justice, common to Western liberal democracies that have been largely overlooked. During my research period at the Tsinghua University of Beijing, I perceived a growing demand among Chinese legal scholars for setting the basis of a new legal theory upon which to base a competition law system with Chinese characteristics. Yet, it remains rather
difficult to leave behind the legacy of traditional legal theory, at least, so long as the role and status of the CCP remain unchallengeable.

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Rules on Acquisition and Merger of Domestic Enterprises by Foreign Investors jointly issued by MOFCOM, the State-owned Assets Supervision and Administration Commission (SASAC), SAT, the SAIC, CSRC; and SAFE issued on August 8, 2006 and effective on September 8, 2006, available (in Chinese) at http://www.gov.cn


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