III. EU Competition Policy – Main Reference for China's Anti-Monopoly Law

A. Background Information

In 1980, only fifteen countries worldwide had a competition law. Today this number arose to nearly 130. For almost a century the United States had been the unmistakable center for global competition policy since the passage of the Sherman Act in 1890.[42] With the establishment and expansion of the European common market, by the twenty first century , the EU competition law has extended its influence further to other parts of the world and obtained increasing recognition by younger jurisdictions such as China. The transitional process from monopoly to duopoly and to oligopoly has already begun.[43]

Many countries in the world have now introduced their versions of competition laws. With falling trade barriers and tariffs worldwide, particularly under the framework of WTO, increasing number of companies operate on a global scale. They are constantly exposed to legal systems and business practices that exist in different countries. They will appreciate efforts by authorities to harmonise competition law norms. Whereas the US and the EU are founding members of the *informal* International Competition Network (ICN) covering about 120 jurisdictions, China has not yet joined the network.

Given China's growing influence in the world, both the EU and the US experts had been trying to advocate their competition law norms. Finally, the EU competition law became the major reference of China's Anti-Monopoly Law (AML). Yet, the AML is not simply a blueprint of the EU competition law, but also includes its own country specific elements.

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42 William E. Kovacic, *The United States and Its Future Influence on Global Competition Policy,* George Mason Law Review, 2015, 1157 – 1204, available at http://www.georgemasonlawreview.org/wp-content/uploads/22_5_Kovacic.pdf.

43 William E. Kovacic, Dominance, Duopoly and Oligopoly: *The United States and the Development of Global Competition Policy,* Global Competition Review, December 2010.

B. Why the US Competition Law Did Not Serve As the Main Model?

There are numerous reasons which prevented China from taking the US system as reference. The statutory language of the US antitrust law ("Sherman Act") is rather general; it just lays down major principles such as "restraint of free trade" and "monopolization". In the absence of competition institutions or guidance, US judges need to interpret the statutes and articulate the goals of competition law.[44] China is basically a civil law country, and there is no tradition of relying on court rulings for interpreting the law.

In addition, under the influence of the "law-and-economics" approach the US courts interpret goals of antitrust law in a very narrow sense, purely based on criteria of market efficiency.[45] US antitrust policy puts strong belief in self-correction of the market and less intervention. By seeking a single economic objective, other values such as environmental protections, non-discrimination and fairness are often neglected. Competition should be the means to achieve the ultimate goal, i.e. "improvement of well-being", rather than as an aim *per se*.[46] For a transitional economy like China, where market conditions and mechanisms were not yet available as in the US, it would have been too risky to leave everything to the market. The market failure with sometimes disastrous economic consequences for developing countries which mechanically followed the *Washington Consensus* is another proof of great danger in case of simple-mindedly implementation of US ideology without considering the specific socio-economic environment in the country.[47] Arguably, the assumption of "self-correcting"

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44 David J. Gerber, *Constructing Competition Law in China: The Potential Value of European and U.S. Experience,* Washington University Global Studies Law Review, January 2004.

45 *Id.*

46 Stucke, Maurice E., Reconsidering Antitrust's Goals (August 3, 2011). Boston College Law Review, Vol. 53, p. 551, 2012; University of Tennessee Legal Studies Research Paper No. 163. Available at SSRN: https://ssrn.com/abstract=1904686.

47 Washington Consensus refers to a set of free market economic ideas, supported by prominent economists from the US and the EU, and international organisations such as World Bank, International Monetary Fund (IMF) and the US Treasury. The core concept of the consensus is for free markets, free trade and floating exchange rates. From the ten specific policy reforms advocated, one might conclude that the driving forces behind the principles are the interests from large multinationals and financial institutions. It is widely believed that mechanical transplanting the principles led to the macro-economic crisis in Latin America in the 1980s and the seri-

is also composed of rational, self-interested market participants[48] which could create significant political pressure on policy-makers.

Apart from the sole aim of US antitrust law, US courts are the main implementers and enforcers of the law. The US experience is no valuable reference for China, whose administrative powers are strong at both central and local levels. Also China's current socio-economic environment does not allow it to focus only on market efficiency.

In comparison with the US, the EU competition regime has been relying more on legislative processes. The market integration of EU Member States by using competition policy as a vehicle can bring valuable experience to overcome China's artificial regional restrictions of trade and business. In addition, ten new European countries joined the EU in 2004, most of them being former communist countries.[49] Privatizing, reforming and integrating these countries' state-owned companies into a market system under the EU competition rules could provide valuable expertise for China.

The US and EU competition regimes differ greatly as they are embedded in different political, economic and cultural environments, and resulting in different enforcement agencies. In the following, a few aspects of similarities and differences between the EU and Chinese competition law systems are analysed in more detail.

C. Comparison Between EU and Chinese Competition Regimes

1. Multiple goals

The EU competition policy was significantly influenced by German competition law. The early form of German competition law, the *Kartellverordnung,* played an important role in German economic and legal

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ous economic crisis in South East Asia in the 1990s. See also Tejvan Pettinger, *Criticism of IMF*, November 28, 2012, available at http://www.economicshelp.org/blog/glossary/imf-criticism/ and *Washington Consensus – Definition and Criticism*, April 25, 2013, available at http://www.economicshelp.org/blog/7387/economics/washington-consensus-definition-and-criticism/.

48 *Supra* note 46.

49 Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

regimes during the Weimar Republic.[50] The primary aim of the German legislation was to put powerful corporations under control so that the competition process including small business and consumers should not be harmed.[51] The German history after the World War II also demonstrated that the state government strongly promoted a "social market economy". The German ideology of giving everybody equal chances to develop is engraved in the society. Doubtlessly, a nation's history, political and economic forces may subsequently predetermine certain features of its competition law system.[52] The German Unfair Competition Law (*Gesetz gegen den Unlauteren Wettbewerb - UWG*) is another good example to protect consumers as well as to promote fair competition. Small and medium-sized companies should have a fair chance to participate in economic activities. No wonder, the single concern of market efficiency of the US antitrust law cannot be attributed to German competition law. Similar to Germany, social democratic politicians in numerous other European countries also attach great value to equal opportunity, and to consumer and employee protection.

Against this European socio-economic and political background, and in view of multi-level governance and the desire of economic integration of the Member States, the European Commission and Courts have devised a specific European Community competition policy with multiple objectives. Apart from efficiency consideration, i.e. enhancing consumer welfare by stimulating both allocative and productive efficiency, the European competition policy protects freedom of individual rights and economic freedom of market competitors as well as broader public interests.[53] According to the EU Commission Annual Report on Competition Policy 2010, multiple objectives of competition regime were explicitly recognized: "… *two clearly identifiable threads run through the entire history of EU competition policy: its contribution to the construction and preservation of the internal market and its contribution to consumer welfare. At the same time, competition policy has supported the main objectives of the Union as set out in the Treaties: a competitive market, economic, social*

50 David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, (Oxford University Press, 1998) 69 – 114.

51 *Supra* note 44.

52 *Supra* note 42.

53 Wolf Sauter, *Competition Law and Industrial Policy in the EU (*Oxford University Press, 1997) 116-117.

and territorial cohesion and sustainable development"[54] The establishment and expansion of the European Union is a constant process of integrating new member states and balancing a variety of interests among different countries.

Like the EU competition law system, the Chinese AML also confers multiple objectives to its competition regime. Art. 1 of AML lists a series of objectives: protecting fair market competition, promoting efficiency, safeguarding consumer interests and the public interest, and "promoting steady development of the socialist market economy". In comparison with the objectives of the EU competition policy, the core language of the AML such as protection of competition and efficiency, safeguarding interests of consumers and the society, promotion of development bears strong resemblance to EU practice.

It is useful for young jurisdictions to learn from the experience and know-how of more mature jurisdictions, which have already gone through a "trial and error" process.[55] Even borrowing the language of the legislation is important, because certain terms have been proved to be effective and are accorded specific meanings. This tends to give more predictability and legal certainty.[56]

Statute language is one aspect, and effective enforcement of legislation is another. Statutes and implementing institutions is one of the three basic elements for a competition law system.[57] Enforcing the law and regulations in a consequent and consistent manner is essential for market participants. This involves well-trained administrators and experienced judges, but for a young jurisdiction this is not an easy task, let alone other structural and economic impediments entrenched in a society like China.

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54 European Commission, *Report on Competition Policy 2010*, available at http://ec.europa.eu/competition/publications/annual_report/2010/part1_en.pdf.

55 *Supra* note 44.

56 *Supra* note 44.

57 *Supra* note 42. Competition law systems have three basic elements: statues and implementing institutions, applied analytical methods and procedures, and know-how accumulated during the course of implementing the statute framework and relevant rules.

2. Institutional design and enforcement

2.1. Significance of administrative route for both jurisdictions

At their early stages, competition law systems in many European countries were just a marginal element within the framework of general economic policy. These systems were embedded in economic regulatory frameworks, which were rarely supported by significant political, economic or intellectual forces.[58] It is noteworthy that German *Ordoliberalism* has far-reaching impact on the competition policy in the European common market. This concept assumes that the objective of competition policy should be to protect the independence of the activities of companies and that economic efficiency is a derivative of this aim.[59] *Ordoliberalism* emphasizes the need for the state to create proper legal environment for the economy and maintain a healthy level of competition. Consequently, the starting point for competition law development in Europe involved economic controls supervised by a group of administrators.[60] These administrators with high social status and usually political power would naturally make competition rules that rely on administrative enforcement.[61]

Ordoliberalism became not only the basis for the new German competition law in 1957[62], but also a useful tool for the European Community to eliminate obstacles for trade across national borders.[63] To this end, the European Commission is the body who has the responsibility to develop rules and principles, and to ensure the effective applications of the EU competition policy. Decisions of the Commission are subject to judicial review by the European Court of Justice and the Court of First Instance.

The above points, particularly advocacy for state interference, have extensive reference value for Chinese decision-makers. In view of the fact that the Chinese government and local bureaucracies have strong power to control Chinese economic development and reform process, institutional

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58 *Supra* note 44.

59 W Möschel, "Competition Policy from an Ordo Point of View", A Peacock and H Willgerodt (eds), *German Neo-Liberals and the Social Market Economy* (Macmillan, 1989).

60 *Supra* note 44.

61 *Supra* note 44.

62 The German competition law *Gesetz gegen Wettbewerbsbeschränkungen* became effective on January 1, 1958. The latest amended version was made in 1998.

63 *Supra* note 44.

design for enforcement would consequently rely on administrative organs rather than on judicial decisions. Chinese policy-makers were able to draw on the experience and knowhow from the European competition policy for privatization and elimination of trade barriers by using competition policy as an effective vehicle. As discussed in Part II, the enacted AML adopted a tripartite enforcement system based on each agency's traditional jurisdictional competence.[64]

2.2. Growing importance of private actions in both jurisdictions

Apart from public administrative enforcement, private court actions are a complementary mechanism to ensure effective enforcement of competition law. In comparison with the US competition regime, the EU Commission acknowledges certain weaknesses in the enforcement system due to shortage of private actions. Giving victims of anticompetitive conduct the possibility to claim compensation for losses is probably one of the most effective ways to deter anticompetitive conducts. The staggering figure of Euro 3.7 billion fines imposed by the European Commission in 2016[65] on violators of competition rules sets a sign for further strengthening of the competition enforcement. To this end, the European Union issued the new *Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* (Damages Directive).[66] The *Damages Directive* makes it much easier for victims of anticompetitive violations to claim compensations. It is poised to fine-tune the interplay between private damages claims and public enforcement.[67]

Likewise in China, it is possible to bring anti-monopoly lawsuits to a competent court pursuant to Art. 50 of the AML, and Articles 1 and 2 of the *Supreme People's Court Provisions on Monopolistic Conduct*. Private actions in China were further encouraged after the issuance of the

64 See Part II, D1.

65 Cartel Statistics, available at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

66 DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014.

67 European Commission, Competition Policy Brief, The Damages Directive, January 2015, available at European Commission, Competition Policy Brief, January 2015.

Monopoly Case Provision by the Supreme People's Court (SPC) in 2012.[68] The burden of proof to be brought by the victims of anticompetitive conduct has been alleviated considerably in recent years in China. For instance, in the case of horizontal agreements defendants bear the burden of proof. But for vertical agreements, the burden of proof lies with the plaintiff, unless under special circumstances courts may order defendants to provide evidence.[69] Stipulations in the EU *Damages Directives* also give victims easier access to evidence needed to prove the suffered damages.

Similar to the EU, administrative decisions from the competition authorities in China are subject to judicial review, and a follow-on civil action can be filed at a competent court.Neither the EU nor Chinese competition regime includes criminal liability for violation of competition laws, and both systems rely on fines.

3. Legal framework and comparison of stipulations

The legal structure of the enacted Chinese AML is comparable to that of the EU, in which three areas are regulated: anticompetitive agreements, abuse of market dominance and mergers. In the EU competition regime, the general principles of these three mentioned areas are laid down in Articles 101 and 102 in the *Treaty on the Functioning of the European Union* (TFEU). Detailed guidance on implementation of these principles is given in numerous Council Regulations of the EU. One example is the Commission Regulation on Technology Transfer Agreements[70] which gives guidance on implementing Art. 101(3) TFEU.

Like in the EU and many other jurisdictions, the Chinese AML is also rather general.[71] In order to apply the AML consistently, all three Chinese competition agencies and the Supreme People's Court have released vari-

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68 *Supra* note 39.

69 *Supra* note 39.

70 Commission Regulation (EU), 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.

71 For instance, Art. 1 sets multiple goals for Chinese competition policy. One of them is public interest. Yet, no definition on public interest is made. Art. 2 sets forth "extraterritoriality" principle, but it is very too broad. "…*this Law shall apply to monopoly acts outside the People's Republic of China which eliminate or*

ous provisions and regulations for implementing the AML in their specific jurisdictions. For instance, the *State Council Guideline on Definition of Relevant Market*[72], released on July 7, 2009 follows closely the *Commission Notice on Definition of Relevant Market* (EC Notice) released in 1997.[73] The Chinese guidelines include well-established EU principles, although they are less detailed and certain aspects are not covered.[74] Conclusively, the Chinese legal hierarchy between primary law (AML) and the secondary legislation (implementing rules and regulations) is similar to the EU competition regime.

Articles 13 and 14 of the AML govern horizontal and vertical monopolistic agreements respectively. The combined content of these two stipulations is derived from Article 101 (1) TFEU. But their enumerations are non-exhaustive. Owing to the tradition, in China more discretionary power is conferred to the administrative authorities. Interestingly, the enumerations in Articles 101 (1) and 102 TFEU are also open-ended.[75]

Art. 15 of the AML resembles 101(3) TFEU closely, but it provides much broader exemptions than the exemption rules under 101(3) TFEU.

The EU competition policy clearly acknowledges that some restrictive agreements may generate economic benefits which outweigh negative effects of the restriction of competition. Pursuant to the guidelines on the application of Art. 101(3) TFEU, an agreement must satisfy four cumulative conditions as follows:

– It must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress,
– Consumers must receive a fair share of the resulting benefits

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restrict market competition in China". Art. 55 concerns the interface between competition law and IPR which is just a very general statement (cf. Page 19).

72 Chinese version available at http://www.gov.cn/zwhd/2009-07/07/content_1355288.htm.

73 Official Journal of the European Communities, 97/C 372/03, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN.

74 For example, in the EC Notice it is recognized that in the case of primary and secondary markets and chains of substitution, the usual principles need to be applied cautiously. EC Notice acknowledges that a definitive conclusion on market definition may not be required in every case, while Chinese regulations are silent on that. See also Yvonne Percival et al, *Comments on China's Guidelines on Market Definition*, available at https://www.lexology.com/library/detail.aspx?g=8013ec2d-b9b7-4acc-b109-199ab0236816.

75 *Tetra Pak International v. Commission*, C-333/94 P, [1996] ECR I-05951 [37].

– The restrictions must be indispensable to the attainment of these objectives, and
– The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.[76]

The conditions laid down in Art. 101(3) must be met *cumulatively*, otherwise no exemption will apply. In contrast thereto, Art. 15 of the AML provides that monopolistic agreements caught under Articles 13 and 14 of the AML may be exempted based on *one of the five following grounds*: (1) technological improvement (2) improvement of product quality and efficiency (3) market inclusiveness of small and medium-sized companies (4) public interest such as energy conservation, environmental protection, disaster relief, etc. (5) mitigating severe decrease in sales volume during economic recessions. Factors (6) and (7) in the list provide protection of legitimate interests in foreign trade, and any other circumstances stipulated by the State Council respectively. The first three conditions are modelled after Art. 101(3) TFEU, although the wording adopted by the AML is slightly different.

Pursuant to Art. 15 AML, each of the aforementioned five conducts is procompetitive, which will set off the negative anticompetitive effect of a monopolistic agreement. Art. 15 (4) concerns public interest, and the list of factors given therein is not exhaustive. There are concerns that such broad exemptions provided in Art. 15 would significantly limit the applicable scope of the AML.[77] Yet, Art. 15 also specifies that business operator must prove that the agreement "*will not severely restrict competition in the relevant market, and will allow consumers to benefit from the interests arising therefrom*". Contents of these two mentioned criteria reflect part of the four conditions set by the Art. 101(3) TFEU. But the indispensability of the restrictions to achieve the objectives is missing here, which subsequently makes the exemption rules less strict. Furthermore, based on Art. 101(3) TFEU, consumers must obtain a "fair share of the resulting benefit", while the AML omits the adjective "fair" without further specifying the degree of participation by consumers.

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76 *Exempted Agreements (Article 101(3) TFEU)*, available at http://ec.europa.eu/competition/antitrust/legislation/art101_3_en.html.

77 Peter J. Wang et al., New Chinese Anti-Monopoly Law, October 2007, available at http://www.jonesday.com/New_Chinese_Anti-Monopoly_Law/.

Conditions (6) and (7) specified in Art. AML 15 are elements which do not appear in the EU competition law. Arguably, Art. 15 (6) may be interpreted as a stipulation to enable Chinese companies to compete in international trade.

D. Dynamics of Competition Policy

The AML appears to be a successful legal transplant from the European competition law into China based on the country's socio-economic environment. Political and economic interests confer competition policy with different priority goals at different stages. This makes competition law a very dynamic regime. A holistic viewpoint is helpful to understand various paradigms of competition policy. From the EU experience it could be argued that competition policy evolves in close relationship with the development of the European common market. Thus, the primary goals of the EU competition law have also been altered in the last decades. Up to the 1990s the main objective of the EU competition policy was to support efforts of market integration. Once that phase was more or less concluded, the Commission and the Courts seem to be more willing to embrace the Chicago and post-Chicago insights, which only focus on economic aspects of market efficiency. Hitherto, there are reasons to believe that the Chinese competition law will in future be more effectively and objectively enforced with the deepening of the country's economic and legal reforms.