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Merger control under competition law in the EU and China

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Dongkun Liu

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Univ-Prof. Dr Fridel Weiss

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Zusammenfassung

Rechtstransplantationen spielen bei der Verbesserung der Gesetzgebung eines Staates eine große Rolle. Allerdings bedeutet die Transplantation rechtlicher Bestimmungen nicht die Übernahme eines Rechtssystems, und die Übernahme der Regelung eines Rechtsgebiets bedeutet nicht dass sie in verschiedenen Jurisdiktionen dieselbe Funktion übernimmt.

Chinas Transplantation des Fusionskontrollsystems der EU ist ein Musterbeispiel einer Rechtstransplantation. Das chinesische Fusionskontrollsystem wurde 2007 nach der Promulgierung des Anti-Monopolgesetzes geschaffen und basiert in vielerlei Hinsicht auf dem etablierten Gesetzesbestand des EU Wettbewerbsrechts. China schuf dieselbe Prozedur zur Untersuchung von Fusionen und die rechtlichen Bestimmungen zur Fusionskontrolle sind ähnlich. Allerdings zeigt sich anhand der zwei Fusionen, die MOFCOM nach Etablierung des Fusionskontrollsystems gestoppt hat und der allgemeinen Bestimmungen des Anti-Monopolgesetzes das China dieselben Regelungen in unterschiedlicher Weise auslegt. Gesetze dienen zur Implementierung bestimmter Zielsetzungen der Regierung, und das Wettbewerbsrecht bildet hierbei keine Ausnahme, weshalb die Analyse der Ziele der Fusionskontrolle wichtiger ist als die Analyse einzelner gesetzlicher Bestimmungen.

Nach Ausweis einschlägiger Fälle und der früheren Gesetzgebung in EU und China sind die Ziele der Fusionskontrolle kontinuierlich enger geworden und das Hauptziel hat sich gemeinsam mit der Entwicklung des Rechtsgebietes der Fusionskontrolle verändert. In jeder Jurisdiktion haben die Gesetzgeber der Fusionskontrolle mehrere Ziele vorgegeben: In Gesetzgebung und Praxis der EU Fusionskontrolle spielen wirtschaftliche Zielsetzungen die Hauptrolle, wohingegen in der chinesischen Gesetzgebung und Praxis nicht-wirtschaftliche Ziele wichtig sind. Ein Horizontalvergleich der Ziele der Fusionskontrolle in der EU und in China und ein vertikaler Vergleich der Ziele in jedem der beiden Systeme zeigen dass die chinesischen Ziele den Zielen der EU in der Anfangsphase ähneln, weshalb auf dieser Basis erwartet werden kann dass die Entwicklung der chinesischen Fusionskontrolle dem Muster der Entwicklung der Fusionskontrolle in der EU folgen könnte.

1. In a broad sense, Competition Law in China includes the Anti-Unfair Competition Law came into force in 1st, December 1993 and the Anti-Monopoly Law entered into force in 1st, August 2008 and their respective regulations. While under the EU, Competition Law only refers to AML and regulations. The thesis here adopt the narrow sense, Competition Law only refer to the AML and related regulations, and do not include the Anti-Unfair Competition Law and its related regulations.

2. China here only refers to the mainland and not to the Hong Kong and Macau SAR or Tai Wan province.

Abstract

Legal transplantation plays an important role in improving certain country's legislation. However, the transplantation of legal provisions does not equal to the transplantation of a specific regulation, further, the transplantation of a specific regulation by one jurisdiction from another jurisdiction does not mean that the regulation can incur same application in both jurisdictions.

China's transplantation of merger control system from the EU is a paradigm of legal transplantation. The merger control system of China was established in 2007 after the Anti-Monopoly Law was promulgated, it has in many ways based on the established body of the EU competition law.³ China established the same procedure of merger examination and formulated similar legal provisions of merger control with the EU, however, seen from the only two mergers that blocked by the MOFCOM after the merger control system was established, and the general provisions of the Anti-Monopoly law, China is practicing the same rules in its own way. Laws are made to fulfill certain goals of the government, competition law is of no exception. Therefore, the analyses of goals of merger control are more important than the analyses specific legal provisions.

Seen from relevant cases and former legislations in the EU and China, the goals of merger control have continued to be narrow down and the major goal has changed along with the development of the merger control legal system. In each jurisdiction, the lawmakers have set multiple goals of merger control. The difference lies in the importance of economic goals: under EU's merger control legislation and practice, economic goal plays the most important role; whereas under China's merger control legislation and practice, non-economic goals are being taken seriously. By horizontal comparison of merger control goals in the EU and China and by vertical comparison of merger control goals in each jurisdiction, we can find that China's merger control goals have in many ways similar to the goals of EU's early stage, and on this basis, we can anticipate that the development of China's merger control legal system may follow the same route of the EU's.

Key words: Merger, Concentration, Goals, Procedures, Legal Transplantation, Comparison.

³. Mark Williams, 'Competition Policy and Law in China, Hong Kong and Taiwan' (2005) 142, Cambridge University Press.

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Part I. Introduction

1. The background of the research

The world witnessed a big step further that China has gone in the development of Market economy, as well as legal system in the past 20 years. Particularly after China's joining the WTO, which makes China playing a more important role in the globe economic development. Legal development, as a main achievement of the development of economy, continue to increase is global importance, especially in business realm.⁴One of the most important areas of such globe impact is in mergers.⁵

Merger is the corollary of the development of market economy. During the process of competition between market subjects, they prone to gain more profits from the market through merger, which enables them gain more shares on the market and set foot in new business areas. When market subjects trying to merger so as to gain their competitive power in the market, hardly will they consider the problems that their acts would bring to the operation of the market, therefore, it's inevitable that competition will also cause negative effects to the sound development of the market. While the intangible hand, namely, the market, is not able to overcome the defects. The governments have formulated considerable policies to overcome the defects of the intangible hand, among those policies, legislation is regarded as the most effective way for democratic states to regulate the market. Within the competition realm, competition law is formulated to solve the problems and help to maintain the normal function of the market. China follows the main stream, the Anti-Unfair Competition Law of the People's Republic of China (AUCL) came into force in 1st, December 1993 is a typical representative of the tangible hand, which regulates market subjects' competitive behaviors. Acts like passing off, false advertising, lift trade secrets & know-how may fall into the regulation of the AUCL. However, the AUCL have no provisions to govern merger. The Anti-Monopoly Law of the People's Republic of China (AML), which published in 30th, August 2007 and entered into force in 1st, August 2008 is a milestone of China's legislation on merger control. The AML establishes fundamental regulations for the country's market practices and sets restrictions on various business practices.⁶ It is a tremendous leap forward for China to some extent. The AML has many differences with the former AUCL, those differences mainly lays in their different goals, the AML aims to regulate monopoly or the acts that restrict competition. While the AUCL aims to regulate unfair competition, in some countries, those unfair competition behaviors are regulated by civil law. The main connection between the AML and the AUCL is that both of them are belong to competition law in a broad sense. When it comes to merger control, there is no thing to do with the AUCL. The AML and its related regulations are the main legal source.

2. The reasons to compare

China's formulation of AML have in many ways based on the established body of the EU competition law. 'The jurisprudence and policies of EU market integration have had a major

3. See, e.g., Li-Wen Lin & CurtisJ. Milhaupt, We Are the (National)Champions: Understanding the Mechanisms of State Capitalism in China, 65 STAN. L. REV. 697, 699 (2013).

4. D. DANIEL SOKOL, 'Merger Control Under China's Monopoly Law' New York University Journal of Law & Business. Vol10(2013).

5. D. DANIEL SOKOL, 'Merger Control Under China's Monopoly Law' New York University Journal of Law & Business. Vol10(2013).

influence on Chinese policy making.’⁷ The reason of which is that China have the same situation with the early EU (the EC). The EC was constituted by several member states, and each member state has its own competition rules.

[H]owever, myriad national rules and government policies inhibited the creation of a single market, the net effect of the removal of official barriers to trade, vigorous implementation of competition law and more active enforcement of the rules on public procurement and state aids has been substantially to complete the creation of a single EU market.⁸

While China’s AML is formulated mainly to solve the problem of regional protectionism, which has much to do with “administrative monopoly”—the Chinese name for this abuse of governmental power, to built a single domestic market. Given the similar situation between the EU and China, the EU’s legislation is no doubt a good reference. Nevertheless, since there are rather big differences between China and the EU in politic, economy, culture and many other aspects. Therefore, China had not conduct a complete transplant of EU’s legislation. Instead, there are many rules that have modified after transplant to China according to the actual conditions of the country.

That leaves big space for scholars as well as officials of both China and the EU to discuss what differences there have been between China and EU’s competition law rules, and what makes them difference. Further, even some provisions are the same in China and EU’s competition, but the effect may be totally different. It is necessary to find out the differences and analysis the reasons. Since it would not only help us to understand what elements may affect the formulation of a certain rule and the effect of its enforcement, but also help to analysis which factor that can be eliminated or modified to make the law and regulations function better both in China and in the EU. Further, it may also help us to find out the general rules of the transplantations of law.

3. The issues to be compared

In order to make the comparison more completely, this article will compare the merger control goals and concrete merger control policies.

This article aims at outlining the difference of merger control policy under competition law between China and the EU and find out the factors that cause those differences. In order to outline the differences, it is necessary to discuss the similarities of merger control rules between China and the EU. As have stated above, China’s formulation of merger control regulation have in many ways based on the established body of the EU competition law, therefore, the legislation of merger control rules are similar, however, the similar rules do not have the similar effects when enforcing. Therefore, there must have something different that lie behind the written rules, and from my point of view, they are goals. The reason is that laws are formulated to fulfill certain goals of the government. Competition law also embodies certain goal of the government, however, it’s not the logic that the same written rules represents the same goals, most legal provisions are elastic, they can be enforced

⁷ Mark Williams, ‘Competition Policy and Law in China, Hong Kong and Taiwan’ (2005) 142, Cambridge University Press.

⁸ Mark Williams, ‘Competition Policy and Law in China, Hong Kong and Taiwan’ (2005) 142, Cambridge University Press.

differently from state to state by different interpretations, actually, what really important is not the legal provision itself, but the effect of enforcement, whereas the effect of enforcement depends much on the goal the government want to fulfill. Therefore, goals are necessary to analyze when comparing merger control policies.

The importance of comparing merger control goals does not affect the necessity of comparing concrete rules. Even though China's merger control system have transplant much from which of EU, when looking into the legal provisions, we can still find there are many distinctions, we should never expect they are all the same, by comparing the specific rules we can further analyze what makes them difference.

4. The methods to compare

The methods of comparison will be case analysis and law analysis.

Since the two major items, goals and concrete policies, which are to be compared, even though tightly related, cannot share the same comparative reference. Goals are more theoretical, while policies are more practical. Therefore, they will apply different comparative methods.

For the comparison of merger control goals, this article will firstly look into some relevant legal provisions, most of which are provided in the part of general provisions, by analyze those provisions, there will be a primary conclusion of merger control goals, then, this article will analyze some typical cases. By analyzing legal provisions and cases, we can draw a conclusion of the goals of merger control in each jurisdiction.

As regards the concrete policies, this article will largely depend on the analysis of legal provisions, this provisions are provided in specific parts of the relevant regulation. In order to compare the system in each jurisdiction, the analysis of legal provision will be more integral rather than segmental, that means in each part, except for some key concepts, which will be compared detailedly, the comparison of other provisions will be included in the comparison of the merger examination procedure.

5. The structure of this thesis

Part 2 will deal with merger control in the EU, in this part, the discussion will be divided into three sections, the first section will analyze the goals of EU merger control, To discuss the goals, this thesis will analyze the history of the merger control system, and analyze some specific articles of the TFEU. The second section will be the legal basis of EU merger control, In this section, the thesis will discuss relevant articles in the TFEU and regulations of EU merger control, especially the ECMR (EC Merger Regulation). The reason to discuss the TFEU is first because the TFEU is the fundamental legislation of competition rules, in my opinion, we should always first refer to the TFEU when discussing EU policies; second, the TFEU is also applicable in merger cases (I will apply specific cases in the thesis), so, it's necessary to analyze the TFEU. As for the ECMR, it provides concrete policy for merger control, many concepts are defined, like "merger", "turnover", by discussing the ECMR, we can know the system of EU merger control, know what it is. The last section will be the ECMR procedures, this section can be regard as procedure law of merger control, it should take into account to make the discussion completely. Another reason to discuss the procedure is to compare it with Chinese merger control procedure. As for the structure of this section, it will follow the main procedures of the examination of merger in the EU.

The third part of this thesis will be merger control in China, similarly, this part will be divided into three sections, section 1 will discuss the goals of merger control in China, the

analysis of goals will be divided into two stages, namely, 1: goals before the Anti-Monopoly Law (AML) was enacted and 2: goals after the Anti-Monopoly Law was enacted. The reason to divide the discuss into two periods rather than give the goals explicitly in the title is because: a. in each period, merger control has multiple goals, therefore, it will be better not to write the specific goals in each sub-section; b. Except for the comparison of merger control, the thesis will also discuss the change of merger control goals in China, and give my own thought on the development of merger control system. Section 2 will analyze the legal basis of merger control in China, there will be a discussion of the development of merger control legislation in China, and analyze their respective function regarding merger control. Analyze the meaning of the key concepts under the AML. The last section will be AML procedures.

In the fourth part, this thesis will compare the goals of merger control as well as procedures of these two jurisdictions, the comparison will include both differences and similarities, and the differences will be outlined.

The last part offers the conclusion of this thesis, the key points of conclusion are: a. China and EU have the similar rules regarding merger control, but have different results when enforcing the rules, the reason is that they have different goals of merger control; b. The development of merger control regulation, or competition law has its own way, legal transplantation can improve certain country's legislation, but cannot guarantee they have the same effect.

Part II. EU Merger Control

Section I. Goals of EU merger control

Goal makes a significant difference on competition rules, it not only affects the formulation of competition rules, but also affect the execution of those rules. Therefore, it's necessary to analyze the goals before we proceed to discuss specific merger control provisions and rules. What's more, by analyzing the goals of competition rules, we can gain a better understanding of those rules. In this section, this thesis will firstly look into the fundamental treaties and relevant regulations of the EU, then, some typical cases will be introduced to further analyze the goals as prescribed in the treaties and regulations.

1. Unify the internal market

The primary goal of EU's competition policy is to establish a unified internal market, this is actually the goal of EU itself. According to the Lisbon Treaty:

[T]he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.⁹

⁹ Article 2(3), Lisbon Treaty

The goal of unifying the internal market vividly reflected in the famous “French Football” case.¹⁰ In 2000, the Commission made a decision against the French Football Association on the abuse of its dominance position.¹¹ In this case, the Committee of France Football Organization (the CFO) was established as a non-profit making organization on 10 November 1992 by the France Football Federation, signed an agreement with the FIFA (International Football Association), specifically for the purpose of carrying on all activities relating to the technical and logistical organization of the 1998 World Cup finals tournament in France, in compliance with various operational constraints laid down by FIFA. When the CFO was selling tickets for the football match, it provided postal service only to French citizens other than citizens from other member states. The result of the case is that the Commission imposed a fine of 1000 Euros on the CFO. Comparing to cases like the merger between the AOL and the Time-Warner Corporation and merger between Vodafone and Mannesmann, this case seems not so important. However, since the ticket policy of football matches is a common concern of football fans among the Community, the significance of the decision of the case is more than the case itself. Even though this case is not a typical merger control case, to a great extent, the case indicates that the competition system of the EC is the best institution to intervene the market compare to other policies, and only through which, the unified internal market can be established effectively.

EU competition law makes the unification of internal market as the primary goal, and the biggest difference with the goal of competition law of member states is that the goal of EU competition law includes the protection of trade between member states, article 101(1) of the TFEU states that

[T]he 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...¹²,

Article 102 TFEU further provides:

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.”¹³

According to these two provisions, if the behavior of undertakings only affects the market of one Member State, then it shall be regulated by competition law of that Member State.

¹⁰ 2000/12/EC: Commission Decision of 20 July 1999 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case IV/36.888 - 1998 Football World Cup)

¹¹ 2000/12/EC: Commission Decision of 20 July 1999 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case IV/36.888 - 1998 Football World Cup)

¹² Article 101(1), TFEU.

¹³ Article 102, *ibid*

2. Maintain effective competition of the common market.

The secondary goal of EU competition law is to maintain effective competition of the common market. This can be seen from the provisions of EU competition legislation. Article 101(1) of the TFEU states that The following shall be prohibited as incompatible with the internal market: ... and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.¹⁴In recital 23 and 25 of the ECMR, to maintain effective competition of the common market also illustrated straightforwardly. Recital 23 says: “It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market...”¹⁵, further, recital 25 states that: “In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets.”¹⁶

However, seen from an economic angle, the fulfillment of effective competition among the common market is a goal of EU competition law, but not the ultimate one. According to the view of a great number of literatures, the purpose of EU’s establishment of the policy to protect effective competition is to improve economic efficiency of undertakings, the Commission have stated in its annual competition policy report that effective competition is the premise of maintaining the development of the common market and improving the international competitiveness of EU undertakings. Therefore, EU competition law bears not only the mission of establishing and maintaining a common market, but also the mission of improving economic efficiency. Although there are different understandings of undertaking’s economic efficiency, generally, it’s the efficiency of resource allocation and the efficiency of productivity.¹⁷

3. Promote consumer welfare

3.1 Consumer welfare

Unlike the other two goals, which are provided in the fundamental treaties, whether the promotion of consumer welfare is a goal of EU merger control does not have a final conclusion, this can be seen from EU case law, “most court decisions formulate the goals of EU competition law differently”.¹⁸

In *Hoechst v. Commission*,¹⁹the Court of Justice noted:

25. As the Court pointed out in the abovementioned judgment of 26 June 1980 (paragraph 20), it follows from the seventh and eighth recitals in the preamble to Regulation No 17 that the aim of the powers given to the Commission by Article 14 of that regulation is to enable it to carry out its duty under the EEC Treaty of ensuring that the rules on competition are applied in the common market. The function of those rules is, as follows from the fourth recital in the preamble to the Treaty, Article 3(f) and Articles 85 and 86, to prevent competition from being

¹⁴ Article 101(1), *ibid*

¹⁵ Recital (23), Council Regulation (EC) No 139/2004 (ECMR)

¹⁶ Recital (25), *ibid*

¹⁷ 王晓晔，多元化目的一欧共体竞争法目的和任务评述。(Xiaoye Wang, Multiple Goal—A Comment on the Goal and Mission of EC Competition Law, available at: <http://www.iolaw.org.cn/showArticle.aspx?id=1255>.)

¹⁸ Roger D. Blair & D. Daniel Sokol, Welfare standards in U.S. and E.U. antitrust enforcement.

¹⁹ *Hoechst v Commission* [1989] ECR 02859

distorted to the detriment of the public interest, **individual undertakings and consumers**. The exercise of the powers given to the Commission by Regulation No 17 thus contributes to the maintenance of the system of competition intended by the Treaty with which undertakings are absolutely bound to comply. The eighth recital states that for that purpose the Commission must be empowered, throughout the common market, to require such information to be supplied and to undertake such investigations 'as are necessary' to bring to light any infringement of Articles 85 or 86.

Under this case, the COJ (Court of Justice) holds that consumer welfare, even though not the only goal, one goal of EU competition law. Public interest was put the foremost, then individual undertakings and consumer the last. Nevertheless, consumer was one of the subject that to be protected in that case.

However, In *Glaxo Smith Kline Services v. Commission*,²⁰ the ECJ noted:

62. With respect to the Court of First Instance's statement that, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as it may be presumed to deprive final consumers of the advantages of effective competition in terms of supply or price, the Court notes that neither the wording of [Treaty on the Functioning of the European Union (TFEU) 101(1)] nor the case-law lend support to such a position.

63. First of all, **there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object**. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, [TFEU 101] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price.

64. It follows that, by requiring proof that the agreement entails disadvantages for final consumers as a prerequisite for a finding of anti- competitive object and by not finding that that agreement had such an object, the Court of First Instance committed an error of law.

Under this case, we can see clearly that the COJ did not recognize that consumer welfare is a goal of EU competition law.

Further, in a more recent case, *Post Danmark A/S v. Konkurrencerddet*,²¹ "this case was seemed to be the first time that the European Court of Justice (ECJ) ever used the term 'consumer welfare'."²²

²⁰ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, 2009 E.C.R. I- 9291.

²¹ Case C-209/10, 2012 ECJ EUR-Lex LEXIS 2559, 142 (Mar. 27, 2012)

²² Roger D. Blair & D. Daniel Sokol, Welfare standards in U.S. and E.U. antitrust enforcement

[I]t is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.²³

Another case that involves consumer welfare is *Konkurrensverket v. TeliaSonera Sverige AB*²⁴, in that case, the court noted:

[A]rticle 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of that internal market. The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, there by ensuring the well-being of the European Union.²⁵

A review of the cases discussed above, it's not difficult to find that consumer welfare, even though the term have not been used until the case *Post Danmark A/S v. Konkurrencerddet*²⁶, has already been a issue to be considered. In more earlier stages, consumer welfare has not been regarded as a goal of EU merger control, but seen from more recent cases, we can see that the courts have already take consumer welfare a goal. The reason for the shifting, as far as I can concerned, it's that the development of competition law. In 1989, the ECMR (EC Merger Regulation) was promulgated, thus perfect the competition system, and along with the development of competition practices, people gradually aware that the aim of formulating the competition is actually protect individuals' interest.

However, the excessive protection of consumer welfare may also have negative effect on the development of economy, and consumers' interest can not be protected in the end. Therefore, the economic analysis was introduced to merger control, so as to balance the relationship between consumer welfare and efficiency.

3.2 Economic analysis in merger control

According to the discussions above, under EU competition law, the goals are not only based on economic analysis, but also on non-economic analysis. The goal of "unify internal market" contains both economic concerns and politic concerns. The unification of internal market depends on the ceding of national sovereignty by the member states, it's hard to believe that a real internal market can be established without restrict the sovereignty of member states. Further, the EU is a supranational organization, it's not only an economic community, instead, it is a politico-economic union of 28 member states that are located

²³ *ibid*

²⁴ Case C-52/09, 2011 E.C.R. I-00527.

²⁵ *ibid*. T 22-23

²⁶ Case C-209/10, 2012 ECJ EUR-Lex LEXIS 2559, 142 (Mar. 27, 2012)

primarily in Europe. The European Union operates through a system of supranational institutions and intergovernmental-negotiated decisions by the member states. Therefore, it's inevitable that EU competition law, as an important policy to maintain the unification of the Union, contains politic goals. However, the goal of merger control tends to be more economical orientated. Evidences are economic analysis is becoming more and more important in merger control.

The 2004 *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* states that: The Commission's assessment of mergers normally entails:

(a) definition of the relevant product and geographic markets; (b) competitive assessment of the merger. The main purpose of market definition is to identify in a systematic way the immediate competitive constraints facing the merged entity. Guidance on this issue can be found in the Commission's Notice on the definition of the relevant market for the purposes of Community competition law. Various considerations leading to the delineation of the relevant markets may also be of importance for the competitive assessment of the merger.²⁷

A review of merger cases also suggests that when assessing merger, economic analysis plays an important role. In *Tetra Laval BV v. Commission*,²⁸ the court noted:

27 In the contested decision, the Commission, in analyzing the compatibility of the transaction with the common market, first describes the liquid food packaging industry and examines the relevant product and geographic markets, and then **assesses the notified transaction from a competition standpoint**. After that analysis, the Commission assesses the scope of the commitments in the light of that prior assessment of competition.

Another evidence that proves economic analysis have becoming more and more important is that the creation within the Directorate-General for competition (DG Competition). "DG Competition of the chief economist position and an economics group that is not subservient to the legal team in its analysis."²⁹ "Since that time, the role of economics (and economists) has grown both within DG Competition and among economic experts who regularly appear before Commission staff."³⁰

3.3 Efficiency as a consideration

"The ECMR explicitly recognizes efficiencies as of the 2004 revisions."³¹ Article 2(1)(b) of the ECMR notes, "In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies

²⁷ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), Para 10.

²⁸ Case T-5/02, *Tetra Laval BV v. Commission*, [2002] ECR II-4381, T27;

²⁹ Luke M. Froeb et al., *The Economics of Organizing Economists*, 76 ANTITRUST L.J. 569 (2009).

³⁰ Roger D. Blair & D. Daniel Sokol, *Welfare standards in U.S. and E.U. antitrust enforcement*.

³¹ *ibid*

put forward by the undertakings concerned.”³² The EC Horizontal Merger Guidelines also provides

[T]hat an efficiencies defense will work in situations where the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro- competitively for the benefits of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.³³

From the two legal provisions as prescribed above, we can see that efficiency is considered as a defense of the undertakings, at least, it is a factor that the merger control authorities ought to take into account. The EC Horizontal Merger Guidelines further specific the condition that efficiency can be construed as a defense – that efficiency should benefit consumers. This view was also reflected in the case *Inco/Falconbridge*,³⁴ “the EC rejected an efficiencies defense (although conditioned approval of the merger-based remedies proposed) because the efficiencies of the proposed merged firm would not be passed through to consumers.”³⁵

Section II. Legal bases of EU merger control

Generally, EU law can be divided into sorted Primary law and Secondary law.

Primary law refers to the Treaties that establishing the European Union, for instance, the TEU (Treaty on European Union) and the TFEU (Treaty on the Function of the European Union), Article 1, paragraph 2. TFEU provides that This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded,³⁶ the protocols annexed to the Treaties are also regarded as Primary law. More over, general principles are also included in the Primary law. General principles are unwritten principles of law underlining rules and explaining their existence. They are developed in ECJ case law.³⁷ The secondary law mainly refers to Regulations, Directives, Decisions and Recommendations as well as Opinions. According to Article 288. TFEU, secondary legislation enacted by the Institutions, and Regulations shall have general application, it shall be binding in its entirety and directly applicable in all Member States. Directives shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Decisions shall be binding in its entirety upon those to whom it is addressed. As for Recommendations and Opinions, they have no binding force and therefore not legally enforceable.³⁸

³² ECMR, Article 2(1)(b)

³³ Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. 2004 No. (C 31/5), Para 71.

³⁴ See Case COMP/M.4000, *Inco/Falconbridge* (July. 4, 2006)

³⁵ Roger D. Blair & D. Daniel Sokol, Welfare standards in U.S. and E.U. antitrust enforcement.

³⁶ Article 1, paragraph 2. TFEU

³⁷ Friedl Weiss, Introduction to the Legal System of the European Union. Page 44.

³⁸ Article 288. TFEU

The legal system of merger control in the EU has established a frame which strictly comply with EU legal system. The legal source of EU merger control, it also includes primary law and second law. Primary law mainly refers to Article 101 and 102 of the TFEU and secondary law mainly refers to the ECMR (European Community Merger Regulation) and the implementing Regulation³⁹. As for the status of Notices and Guidelines published by the Commission, even though they are not regarded as a legal source of EU merger control, the function cannot be ignored, especially for merger control practices.

1. Merger control under the TFEU

As have stated above, within the TFEU, Article 101 and 102 are the main provisions that regulates merger control. However, neither of the two articles have any sentence that regulates merger control directly. Article 101 provides several examples that shall be prohibited as incompatible with the internal market. Such as agreements between undertakings, decisions by associations of undertakings and concerted practices, provided that those agreements, decisions and practices may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.⁴⁰ Article 102 provides the prohibition of abusing of a dominant position.

Notwithstanding that there have no specific provisions concerning on merger control in Article 101 and 102, a review of case law shows that in order to fulfill the goal of protecting competition from distortion, before the ECMR came into force, TFEU is also applicable to merger control.

In *Europemballage and Continental Can v. Commission*⁴¹, the Commission applied Article 86. TEEC (Treaty establishing the European Economic Community), now Article 102. TFEU, for the first time, prohibited merger within the common market. The facts of the case can be summarized as follows:

Continental Can Company Inc. (Continental) of New York (USA), brought its share in Schmalbach-Lubeca-Werke AG (SLW) of Brunswick (Germany) to 85.8% of the nominal capital. During the same year, Continental company contemplated the formation, with The Metal Box Company Ltd (MB) of London, of a European holding company for packaging, in which the licensees of Continental in the Netherlands and in France, Thomassen & Drijver-Verblifa N.V. (TDV) of Deventer was invited to participate. On 16 February 1970, an agreement was signed between Continental and TDV whereby it was agreed: (a) that Continental would set up in Delaware (USA) a company (subsequently called Europemballage Corporation) to which it would transfer its interests in SLW; (b) that Continental would induce Europemballage to offer to the shareholders of TDV a sum of 140 florins cash for each TDV share of 20 florins nominal value.

On 20 February 1970, a company called Europemballage Corporation (Europemballage) was set up in Wilmington, under the legislation of the state of Delaware. This company

³⁹ **Commission Regulation (EC) No 802/2004** of 7 April 2004 implementing Council Regulation (EC) No 139/2004 (published in OJ L 133, 30.04.2004, p.1) amended by Commission Regulation (EC) No 1033/2008 of 20 October 2008 (published in OJ L 279, 22.10.2008, p. 3) – Consolidated version of 23 October 2008

⁴⁰ Article 101. TFEU

⁴¹ Case 6/72, *Europemballage v. Commission*, 1973 E.C.R. 215: CMLR 199

opened an office in New York and another in Brussels; On 8 April 1970, Europemballage carried out the purchase of the shares and debentures of TDV offered up to that date, thus bringing the initial share of Continental in TDV to 91.07%.⁴²

From the facts of this case, it's easy to conclude that the acts of Continental Can Inc. might fall within the scope of EU competition law for merger. However, in the time of this case, there have no merger control regulations within EU competition legislation. However, because of the market share that Continental Can Inc. held and the amount of share that it purchased from TDV, it might fell within the scope of Article 102. TFEU for the abuse of a dominant position by Continental Can Inc., and the Commission applied this Article to deter the merger.

It is found that Continental Can Company Inc. of New York, which holds through the medium of its subsidiary, Schmalbach-Lubeca-Werke AG of Brunswick, a dominant position over a substantial part of the Common Market on the market for light packaging for preserved meat, fish and Crustacea and on the market in metal caps for glass jars, has abused this dominant position by the purchase made in April 1970 by its subsidiary Europemballage Corporation of approximately 80 % of the shares and convertible debentures of the Dutch undertaking Thomassen & Drijver-Ver-blifa N.V. of Deventer. "This purchase has had the effect of practically eliminating competition in the above-mentioned packaging products over a substantial part of the Common Market."⁴³

This merger was deterred by a decision made by the Commission and the decision was annulled by the court, but seen from the court's statement, Article 86 EC (Article 102 TFEU) is applicable in the context of a proposed merger if that merger strengthens the dominant position of the undertaking in question.

28. The Commission based its decision, inter alia, on the thesis that the acquisition of the majority holding in a competing company by an undertaking or a group of undertakings holding a dominant position may, in certain circumstances, amount to an abuse of this position. **This is the case, according to the Commission, if an undertaking in a dominant position strengthens such position through a merger in such a way that real or potential competition in the goods concerned is in practice eliminated in a substantial part of the Common Market.**⁴⁴

In *British American Tobacco Co Ltd v. Commission*⁴⁵, the Philip Morris Incorporated purchased 30% of the shares of Rembrandt Group Limited and obtained 24.9% of the voting rights therein. The parties agreed that when one of them intends to sell its share, the other should have the priority to buy. As for the management of Rembrandt Group Limited, the agreement stipulates that Philip Morris Incorporated neither have the right to designate any representative in the board of directors of the Rembrandt Group Limited, nor will it participate in the management of

⁴² Case 6/72, *Europemballage v. Commission*, 1973 E.C.R. 215: CMLR 199, Judgment.

⁴³ Case 6/72, *Europemballage v. Commission*, 1973 E.C.R. 215: CMLR 199, Judgment.

⁴⁴ Case 6/72, *Europemballage and Continental Can v. Commission*, [1973] E.C.R. 215: CMLR 199, Judgment, T28. (emphasis added)

⁴⁵ Case 142/84, *British American Tobacco Co Ltd v. Commission*, [1987] E.C.R. 4487: CMLR 24.

Rembrandt Group Limited. The commission exempted the agreement. However, the British American Tobacco Company Ltd and R. J. Reynolds Industries Inc. brought two actions for the annulment of the decision made by the Commission. The court dismissed their application and supported Commission's decision. The court acknowledged that Article 85 EC (now Article 101 TFEU) could be violated by the acquisition of a minority shareholding in a competing company. The court stated:

37. [A]lthough the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition, such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business.⁴⁶

38. [T]hat will be true in particular where, by the acquisition of a shareholding or through subsidiary clauses in the agreement, the investing company obtains legal or *de facto* control of the commercial conduct of the other company or where the agreement provides for commercial cooperation between the companies or creates a structure likely to be used for such cooperation.⁴⁷

39. [T]hat may also be the case where the agreement gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company. Account must be taken not only of the immediate effects of the agreement but also of its potential effects and of the possibility that the agreement may be part of a long-term plan.⁴⁸

2. Merger control under the ECMR

In 1989, the EU enacted the first merger regulation, the ECMR (European Community Merger Regulation) and amended in 2004. Unlike the general rules as prescribed in the TFEU, the ECMR provides concrete provisions concerning on merger control. In order to make the ECMR be applied more correctly by the Commission as well as merger parties, some implementing regulations were formulated, such as the Commission Regulation (EC) No 802/2004.⁴⁹ For the purpose of making the discussion more clearly, the implementing regulations and relevant notices are also included in this section.

As have stated above, the ECMR is the main legal source of EU's merger control legislation, Under the ECMR, the term used in preference to 'merger' is 'concentration'.

2.1 "Concentration" under the ECMR

2.1.1 the concept of concentration under the ECMR

Concentration is first defined in recital (20) of the ECMR, according to recital (20), concentration is operations which will bring about a lasting change in the control of the undertakings concerned as well as in the structure of the market. Joint ventures performing all the functions of an autonomous economic entity on a lasting basis are also included. Further, in Article 3, paragraph 1 of the ECMR, a more concrete definition was given.

⁴⁶ Ibid T37

⁴⁷ Ibid T38

⁴⁸ Ibid T39

⁴⁹ **Commission Regulation (EC) No 802/2004** of 7 April 2004 implementing Council Regulation (EC) No 139/2004

Article 3, paragraph 1 of the ECMR provides that:

A concentration shall be deemed to arise where a change of control on a lasting basis results from:

- (a) the merger of two or more previously independent undertakings or parts of undertakings, or
- (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

This article shows that the ECMR considers that not only two or more undertakings which previously independent merger will cause a concentration, but two or more parts of undertakings which previously belong to independent undertakings merger will also cause a concentration. What's more, that will also include the situation that an entire undertaking merger with a part of an undertaking. Further, according to the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), the merger here includes a legal merger (a *de jure* merger) and a *de facto* merger.⁵⁰ A *de jure* merger includes the situation that two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities as well as the situation that an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity. A *de facto* merger may arise where in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of a single economic unit.⁵¹ For instance, where undertakings arrange for common management through a contractual arrangement, even if they retain their legal personalities.⁵²

Further, article 3 (1)(b) prescribes another form of concentration: direct or indirect control of another undertaking or other undertakings partly or wholly by one or more persons or undertakings which are already controlling at least one undertaking. That's logically, because this situation enables those persons or undertakings to control another one or more undertakings, as a result, those undertakings, as well as the undertakings which the persons or undertakings are controlling are all become controlled by them, which will bring about a lasting change in the control of the undertakings concerned as well as in the structure of the market.

2.1.2 acquisition of control

Since article 3 (1)(b) provides another form of concentration, and in essence, control. Article 3 (2) of the ECMR offers two forms of 'control'. First, the rights under the contracts concerned are held or enjoyed by persons or undertakings paragraph 1(b) refers to. Second, the power to exercise the rights deriving from the contract are enjoyed by those persons or

⁵⁰ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, (2008/C 95/01). *Official Journal of the European Union* 2008/04/16, C95/5.

⁵¹ *ibid*

⁵² Mark Furse, *The Law of Merger Control in the EC and the UK* (2007, Hart Publishing) 82

undertakings even though they are not the holders of such rights or not entitled to the rights under such contracts. That may be the case, for example, where an undertaking uses another person or undertaking for the acquisition of a controlling interest and has the power to exercise the rights conferring control through this person or undertaking, i.e. the latter is formally the holder of the rights, but acts only as a vehicle. In such a situation, control is acquired by the undertaking which in reality is behind the operation and in fact enjoys the power to control the target undertaking⁵³

Under this article, the term 'person' extends to public bodies (public body here including the state itself) and private entities, as well as natural persons. Acquisitions of control by natural persons are only considered to bring about a lasting change in the structure of the undertakings concerned if those natural persons carry out further economic activities on their own account or if they control at least one other undertaking.⁵⁴

As regards the means of control, the two major means are control by acquisition of shares or assets and control by contract. Control by acquisition of shares, in essence, is to acquire majority of the voting rights of an undertaking. What really important is the voting rights rather than the shares of the company, because in some circumstances, a minority shareholder may also enjoy majority of the voting rights of the company, as would be the case where the shares were preferential and allowed the minority shareholder to determine the strategic commercial behavior of the target company. "This would be the case, for example, were the shareholder in a position to appoint more than half the members of the board."⁵⁵In another situation, where a listed company's shares are widely dispersed, thus, a minority shareholder may achieve relatively majority of the voting rights of the company. This is the most common means for the acquisition of control, and possibly, that may be combined by the acquisition of assets. The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly attributed.⁵⁶

Control can also be acquired by contract. In order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterized by a very long duration (ordinarily without a possibility of early termination for the party granting the contractual rights). Only such contracts can result in a structural change in the market.⁵⁷

2.1.3 JV (Joint Venture) as a form of concentration

⁵³ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, (2008/C 95/01). *Official Journal of the European Union* 2008/04/16, C95/5

⁵⁴ *ibid*

⁵⁵ Mark Furse, *The Law of Merger Control in the EC and the UK* (2007, Hart Publishing) 84

⁵⁶ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, (2008/C 95/01). *Official Journal of the European Union* 2008/04/16, C95/5

⁵⁷ *ibid*

According to Article 3(4) of the ECMR, the creation of a JV (Joint Venture) can also constitute a concentration if it fulfills two conditions: firstly, the JV shall perform all the function of an autonomous economic entity. That can be construed that it has sufficient resources to carry out business independently.⁵⁸ Secondly, it shall perform on a lasting basis. If the JV does not qualified to be an autonomous economic entity, then, it may fall within the scope of Article 101, TFEU. This Article provides that ‘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 common market...’⁵⁹, and if the JV does not perform on a lasting basis, it will not ‘bring about a lasting change in the control of the undertakings concerned as well as in the structure of the market’.

According to Article 3(4) of the ECMR, JV as mentioned here ‘shall constitute a concentration within the meaning of paragraph 1(b)’⁶⁰, that is to say the JV here is a kind of control, but this kind of control is a ‘joint control’ by two or more parent companies. The ‘joint control’ here can also be established on both legal and de facto bases.⁶¹

2.2 Community dimension

The definition of concentration made in the ECMR shall fulfill the requirement of a community dimension. According to article 1 (1) of the ECMR, “the regulation shall apply to all concentrations with a community dimension”. Other wise, the concentration would not fall within the scope of TFEU or ECMR.

The concept of ‘community dimension’ was specified in article 1 of the ECMR, according to this article, whether or not a concentration have a community dimension mainly judged by the turnover of the undertakings concerned. Article 1, paragraph 2 provides that a concentration may have a community dimension if the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million, and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million. However, each of the undertakings concerned should not achieve more than two-thirds of its aggregate community-wide turnover within one and the same member state. Paragraph 3 of article 1 provides that in certain circumstances even though the turn over of undertakings concerned have not meet the threshold laid down in paragraph may still have a community dimension if

- (a) The combined aggregate world-wide turnover of all the undertakings concerned is more than EUR 2 500 million, and
- (b) In each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million, and
- (c) In each of at least three Member States included for the purpose of the second point above, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million, and
- (d) The aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million.

⁵⁸ See the *Commission Notice on the concept of full-function joint-ventures* [1998] OJC 66/1

⁵⁹ Article 101, TFEU

⁶⁰ Article 3(4), ECMR

⁶¹ Mark Furse, *The Law of Merger Control in the EC and the UK* (2007, Hart Publishing) 84

Unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.⁶²

As regards the 'turnover', the following issues should be clarified:

- (a) It shall be obtained from ordinary activities and be calculated after turnover taxes;
- (b) When acquiring part of undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regards to the seller(s);⁶³
- (c) It shall comprise the amounts derived by the undertakings concerned in the preceding financial year.⁶⁴

According to article 1, paragraph 5, the thresholds may be revised following the report on the operation of the thresholds and criteria made by the Commission and according to a proposal from the commission.⁶⁵ Where a concentration has not met the thresholds as prescribed hereby, the concentration would not be regarded to have a 'community dimension', it may, neither be cleared or fall within the scope of Member States' competition rules.

Whether a concentration has a Community dimension can be seen from the following figure⁶⁶.

However, the fulfillment of turnover threshold is not the only element for the decision of a Community dimension. Under certain circumstances, even though the turnover has not reached the threshold as prescribed in Article 1 of the ECMR, there still has the possibility for the concentration to obtain a Community dimension. According to Article 4(5), ECMR, if a concentration does not have a Community dimension within the meaning of Article 1, however, the concentration is capable of being reviewed under the national competition laws of at least three member states, the persons or undertakings in question may, before any notification to the competent authorities, inform the Commission by means of a reasoned submission that the concentration should be examined by the Commission.⁶⁷ In this case, according to Article 4(5), subparagraph 2, the Commission shall transmit this submission to all member states without delay. If the member states competent to examine the concentration under its national competition law do not express their disagreement as regards the request to refer the case within the period of 15 working days, then, the concentration shall be deemed to have a Community dimension.⁶⁸ Article 22 of the ECMR expresses the same meaning.⁶⁹

⁶² *ibid*

⁶³ EU Competition Law Rules Applicable to Merger Control.

⁶⁴ Article 5, paragraph 1, EC Merger Regulation.

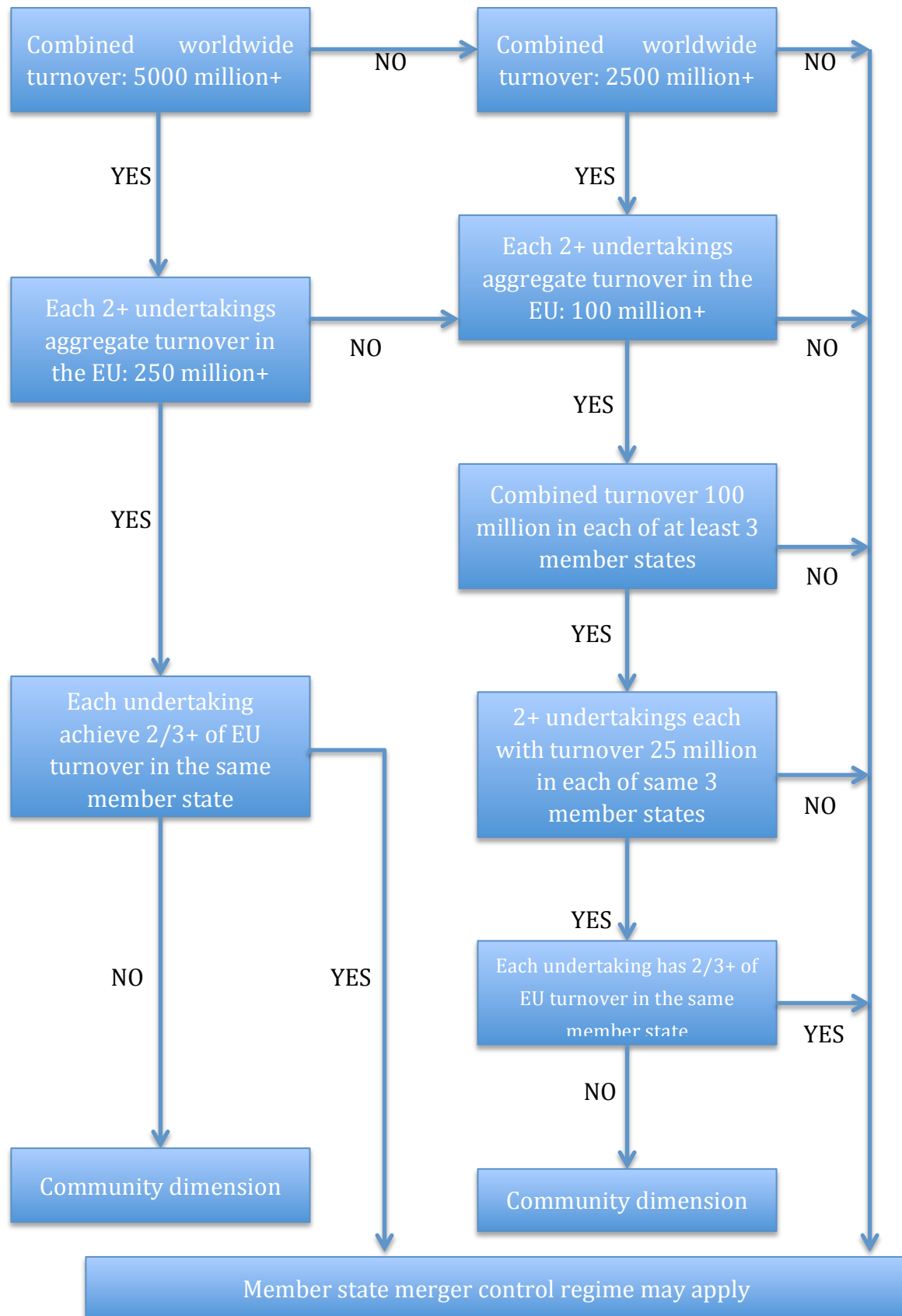
⁶⁵ *ibid*

⁶⁶ Mark Furse, *The Law of Merger Control in the EC and the UK* (2007, Hart Publishing) 76

⁶⁷ ECMR, Article 4(5).

⁶⁸ *Ibid*

⁶⁹ ECMR, Article 22.



(Chart I)⁷⁰

⁷⁰ Mark Furse, *The Law of Merger Control in the EC and the UK* (2007, Hart Publishing) 80.

2.3 Turnover

Whether the concentration has a Community dimension largely depend on the turnovers of the undertakings in question. Therefore, the importance of the calculation of turnover can never be underestimated.

Article 5 of the ECMR provides the method of calculating the turnovers. The general rule (also the concept) is that aggregate turnover comprises the amounts derived by the undertaking concerned in the preceding financial year from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover.⁷¹ It will be noted that turnover under the meaning of this Article refers to 'ordinary activities'. It generally excludes those items which are listed under the headers 'financial income' or 'extraordinary income' in the company's accounts. Such extraordinary income may be derived from the sale of businesses or of fixed assets.⁷² Further, The turnover to be taken into account is 'net' turnover, after deduction of a number of components specified in the Regulation. The aim is to adjust turnover in such a way as to enable it to reflect the real economic strength of the undertaking.⁷³

Paragraph 2, subparagraph 1 of Article 5, ECMR provides that in the case of acquiring part of an undertaking, only the turnover relating to the parts which are the subject of concentration shall be taken into account with regard to the sell or the sellers.⁷⁴ The turnover here shall also comply with the general rule set forth above.

The second incident of Paragraph 2, subparagraph 1 of Article 5, ECMR provides that where transactions take place over a two-year period between the same persons or undertakings shall be treated as one and the same concentration.⁷⁵ Although the Commission recognizes that in some cases the staggering of transactions is entirely legitimate, and best serves the interests of the relevant parties, it also recognizes the danger that some parties may stagger transactions in an attempt to avoid the jurisdiction of the ECMR. "This means that where a series of transactions take place with the transaction which lifts the overall series into the relevant thresholds."⁷⁶

Specified rules are made concerning on the financial and insurance undertakings where sales are not an appropriate measure of turnover. In the case of financial institutions, the turnover shall comprise the income items as prescribed in Article 3, ECMR. For insurance undertakings, according to the ECMR, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and para-fiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums.

⁷¹ Article 5(1), ECMR

⁷² Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01)

⁷³ Ibid

⁷⁴ Article 5(2), ECMR

⁷⁵ Ibid

⁷⁶ Mark Furse, *The Law of Merger Control in the EC and the UK* (2007, Hart Publishing) 78

Article 5(4), ECMR sets out the scope of the undertakings as regards the turnover to be included, the ECMR provides:

[W]ithout prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation shall be calculated by adding together the respective turnovers of the following: (a) the undertaking concerned; (b) those undertakings in which the undertaking concerned, directly or indirectly; (i) owns more than half the capital or business assets, or (ii) has the power to exercise more than half the voting rights, or (iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or (iv) has the right to manage the undertakings' affairs; (c) those undertakings which have in the undertaking concerned the rights or powers listed in (b); (d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b); (e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).⁷⁷

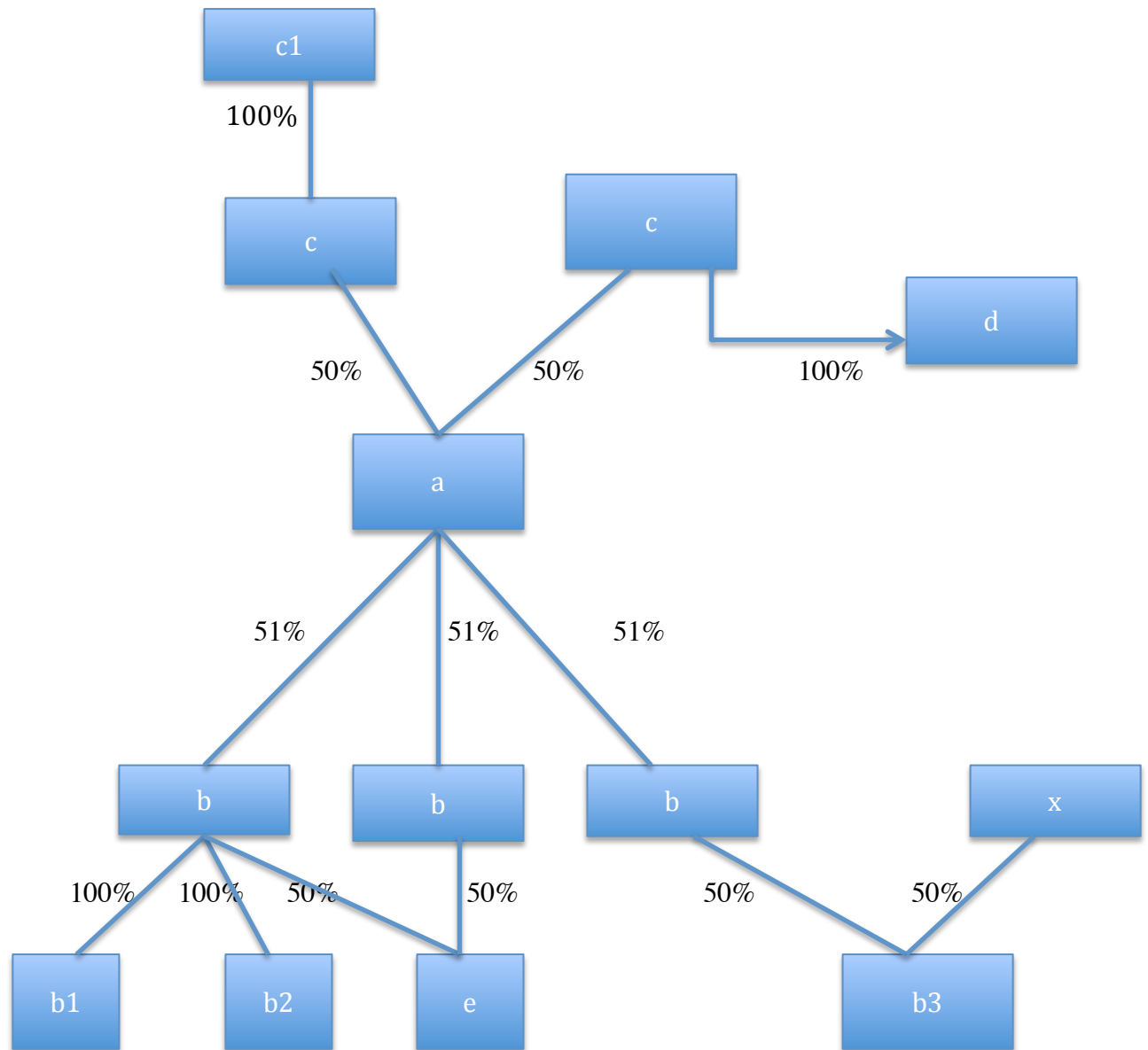
A graphic example (chart 2) given as follows is to clear the relationship among the undertakings mentioned above.

Where calculating aggregate turnover of undertakings which have joint rights or powers, Article 5(5), ECMR provides that:

(a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4(b) to (e); (b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned. ⁷⁸

⁷⁷ ECMR, Article 5(4).

⁷⁸ ECMR, Article 5(5).



(Chart II)⁷⁹

- a. The undertaking concerned
- b. Its subsidiaries, jointly held companies together with third parties (b3) and their own subsidiaries (b1 and b2)
- c. Its parent companies and their own parent companies (c1)
- d. Other subsidiaries of the parent companies of the undertaking concerned
- e. Companies jointly held by two (or more) companies of the group
- x. Third party

⁷⁹ EU Competition Law Rules Applicable to Merger Control (situation as at 1 April 2010), 134.

Section III. ECMR procedures

This section will discuss the procedure law of EU merger control, as have discussed above, the major legal basis for merger control is the ECMR. The ECMR provides specific rules for the procedure of the examination of merger. When a transaction constitutes a “concentration” as prescribed in article 3 of the ECMR, and fulfill the threshold of turnover provides in article 1 of the ECMR, it’s compulsory for the undertakings concerned to notify the transaction prior to the implementation of the concentration. After the notification, the competent authority will examine the concentration, in the EU, the competent authority for the examination of merger is the Commission. The examination may contain two stages according to the result of the first stage examination.

1. Notification of concentration

Notification is the first and essential step for undertakings conducting mergers that fall within the scope of the ECMR. According to Article 4 (1) of the ECMR, undertakings shall notify the concentration to the Commission as soon as the agreement is concluded, the public bid is announced, or the controlling interest is acquired. Under certain circumstances as prescribed in Article 4 (1)(2), “if the intended agreement or bid would result in a concentration with a Community dimension”,⁸⁰ the undertakings concerned may also notify the concentration. Therefore, according to subparagraph 3 of Article 4 (1), the “concentration” shall also cover intended concentration. As regards the parties who are responsible to make the notification, in paragraph 2 of this article, it provides that the notification shall be made jointly by the parties to the merger or “by those acquiring joint control as the case may be”.⁸¹

If the undertakings concerned failed to notify the concentration according to Article 4 of the ECMR, the Commission may impose fines on those undertakings. According to Article 14 (2)(a) of the ECMR, “the Commission may by decision impose fines ... on the undertakings concerned where, intentionally or negligently, they fail to notify a concentration in accordance with Article 4 or 22 (3) prior to its implementation”.⁸²

According to Article 7 of the ECMR, generally, the concentration must be suspended “either before its notification or until it has been declared compatible with the common market ”.⁸³ However, if there is a public bid or a series of securities transaction, the implementation may not be suspend if the concentration is already notified to the Commission duly or the “acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments”.⁸⁴ Therefore, under certain circumstances, the derogation should be granted according to the

⁸⁰ ECMR, Article 4 (1)(2).

⁸¹ ECMR, Article 4 (2).

⁸² ECMR, Article 14 (2).

⁸³ ECMR, Article 7 (1).

⁸⁴ ECMR, Article 7 (2).

evaluation of the effects of suspension on the undertakings concerned or on third parties and the threat to competition posed by the concentration.⁸⁵

2. The preliminary test under the ECMR

As have stated above, the examination of merger will contains two stages, the first stage is the preliminary test. The purpose of the preliminary test is to examine whether the concentration fall within the scope of the ECMR and whether it raise “serious doubts” as to its compatibility with the common market. If the Commission finds that the concentration notified dose not fall within the scope of the ECMR, or the concentration do not have serious doubts that it’s incompatible with the common market, then the examination stops and the concentration is cleared. As for those concentrations that may cause serious doubts to be incompatible with the common market, the undertakings concerned are given to another chance to modify the concentration. according to Article 6(2), if the Commission finds that after modification by the undertakings concerned, a notified concentration no longer raises serious doubts, it shall declare the concentration compatible with the common market.

As regards the time limits of the preliminary test, generally, the Commission shall decide whether to approve or initiate further testing procedure within 25 working days after the receipt of the notification. However, if the Commission receives the application from member states that the concentration should be examined by domestic competent authorities, or under the circumstance that the undertakings concerned make promises to make the concentration compatible with the common market, the Commission can extend the period to 35 working days.

After the preliminary test, the Commission may make the following decisions: a. the concentration does not fall within the scope of the ECMR, the Commission therefore does not have jurisdiction over the concentration; b. the notified concentration falls within the scope of the ECMR, but it can be judged to be compatible with the common market and does not need further testing; c. the notified concentration falls within the scope of the ECMR, and it cause serious doubts to be incompatible with the common market, the concentration will proceed to further testing.

3. The substantive test under the ECMR

For those concentrations that have serious doubts of incompatible with the common market, the Commission must conduct substantive test, this is the second stage of merger examination. In this stage, the period of examination is 90 working days, but in the situation that the undertakings concerned make promises according to the additional conditions and obligations came out by the Commission in its last decision, if the promises are made within 55 working days from the day the investigation commences, the period of investigation can be extend to 105 working days. If the undertakings concerned request for elongating the period within 15 working days from the day the investigation commences, the period

⁸⁵ ECMR, Article 7 (3).

thereto can also be extend to 105 working days. In this stage, the Commission will analyze the influence that the concentration will cause to the common market in detail.

Generally, the Commission will apply the following ways to conduct the investigation: a. contract with undertakings concerned or third party by making phone calls or convene meetings; b. request for information by questionnaire or simple request; c. conduct inspections by enter the premises of undertakings and examine the books and other records related to the business, more over, the officials of the Commission can take or obtain relevant copies of those books and records; d. collecting information by inquiry other organizations of the EU or competition departments of member states.

After inspection, the Commission can make the following decisions: a. Declare the concentration is compatible with the common market. If the Commission affirms that the concentration will not seriously injure effective competition of the common market, it will declare the concentration is compatible with the common market, so as to clear the concentration. Generally, if the merger parties' market share is less than 25%, the Commission will clear the concentration. More over, the Commission may also impose additional conditions and obligations to the undertakings concerned according to Article 8 (2) of the ECMR, for instance, the Commission may require the undertakings modify the plan of concentration, restrict the shares hold by the controlling undertaking; forbid the undertakings concerned from operating certain businesses; b. Forbid the concentration. If the commission affirms that the concentration will seriously injure the effective competition of the common market, and cannot be relieved by imposing additional conditions and obligations, the Commission will forbid the concentration.

4. Simplified procedure

According to Article 11 of the ECMR, the Commission may request the undertakings or individuals concerned to provide information by sending a simple request or by decision. This is the simplified procedure of the examination of concentration. The *Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004* set specific rules for the simplified procedure, and set conditions of application for the procedure.

For certain concentrations that do not have the possibility to cause serious injure to the effective competition of the common market, the simplified procedure can release the burden of the undertakings concerned as well as the Commission itself. Those concentrations can be summarized as follows: a. "the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory."⁸⁶b. "two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographical market, or in a product market which is upstream or downstream of a product market in

⁸⁶ *Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, Para 5.*

which any other party to the concentration is engaged.”^{87c}. In horizontal mergers, the combined market share is less than 15%, and less than 25% in vertical mergers; d. “ a party is to acquire sole control of an undertaking over which it already has joint control.”⁸⁸

The simplified procedure does not need specified information of the undertakings and individuals concerned, since the Commission will not conduct market investigation, therefore, it greatly shorten the period of examination, if the Commission decide to apply simplified procedure, the procedure will be finished within 25 working days.

5. Judicial review

According to Article 13(8) of the ECMR, “the lawfulness of the Commission’s decision shall be subject to review only by the Court of Justice.”⁸⁹Article 16 further provides that “the Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.”⁹⁰ However, compared to litigation, parties are prone to negotiate with the Commission, anyway, the COJ provides the last relief to examine the Commission’s decision.

Part III Merger Control in China

Section I Goals of Merger Control

As have stated above, the analysis of goals of merger control is very important. Under the circumstance of China, the importance appears to be more obviously. Firstly, China’s Anti-Monopoly system is relatively a new one, there may be many cases that the Anti-Monopoly Law have no specific provisions to regulate them, in that situation, the antitrust authority should be able to make decisions by a reasonable analysis of the goals of the Anti-Monopoly Law. Secondly, China’s Anti-Monopoly Law itself have a strong sense of industrial policy, when the antitrust authorities examining mergers, both competition policy and industrial policy will be taken into consider, and the law have no provisions that indicates competition policy prevails to industrial policy. Thirdly, the lack of independence of antitrust authorities makes it more necessary to analysis the goals properly, or otherwise any ministry may claim his interest when the antitrust authority conducting merger examinations. A common situation is when the interest of consumers is conflict with such of state owned enterprises, the authority should be able to decide which side to stand by analyzing the goals.

In this section, the discussion of the goals of merger control will be divided into two parts, the first part is the discussion of goals before the (AML) Anti-Monopoly Law was enacted, in this part, the discussion will depend much on relevant competition rules which was effective before the AML came into force. Because before that time, an integral merger control system have not been established, and there have no relevant cases available. In the second part,

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ ECMR, Article 13(8).

⁹⁰ ECMR, Article 16.

there will be a specific discussion on the goals after the AML came into force, both legal provisions and relevant cases will be included into the discussion.

1. Goals before the Anti-monopoly Law was enacted

March 1993, the 8th National People's Congress adopted a constitutional amendment, Article 15 of the Constitution concerning on the planned economy rules amended as follows: "The state practices socialist market economy", the same year on November, the Third plenary Session of the 14th adopted the "CPC Central Committee decision on a number of issues of the establishment of a socialist market economic system", establishing the principle of market economy in China. Since then, the market economy of China began to grow, market competition rules were gradually established.

Before the AML was enacted, there has no specialized law in China to regulate antitrust matters, the relevant rules were scattered in several laws and regulations. For instance, the *Anti-Unfair Competition Law of the PRC* promulgated in 1993 and the *Price Law of PRC* came into force in 1998. Regulations are the *Interim Provisions on Preventing the Acts of Price Monopoly* and the expired *Interim Provisions for Foreign Investors to Merge Domestic Enterprises* came into force in 2006. The only legislation concerning on merger control is *Interim Provisions for Foreign Investors to Merge Domestic Enterprises* because at that time, the market economic in China was at the initial stage of its development. Almost all the bigger enterprises were SOEs (State Owned Enterprises), no private firms had the ability to conduct merger or acquisition. The mergers and acquisitions were conducted only by foreign companies. The possibilities of conducting those businesses for foreign companies were owing to China's Reform and Opening Policy.

The goals of merger control before the AML came into force can be seen from the *Interim Provisions for Foreign Investors to Merge Domestic Enterprises*, Article 1 of the *Interim Provisions for Foreign Investors to Merge Domestic Enterprises* states:

[T]he present provisions are formulated in accordance with the laws and administrative regulations on foreign-funded enterprises and other relevant laws and administrative regulations with a view to **promoting and regulating foreign investors' investments in China, absorbing advanced technologies and management experiences from abroad, improving the level of utilizing foreign investments, realizing reasonable allocation of resources, ensuring employment, as well as maintaining fair competition and state economic security.**⁹¹

From this article, we can find that there is a multiple goal under China's merger control regime. Both competition and non-competition goals were taken into consideration, and non-competition goals were the mainstream, competition goals were more complementary. Since the *Interim Provisions for Foreign Investors to Merge Domestic Enterprises* was the only legal source of China's merger control before the AML came into force. Therefore, the goals of this regulation can certainly be regarded as the goals of China's merger control at that time.

⁹¹ Article 1, *Interim Provisions for Foreign Investors to Merge Domestic Enterprises* (Emphasis added).

1.1 Non-competition goals

From Article 1 of the *Interim Provisions for Foreign Investors to Merge Domestic Enterprises*, Non-economic goals includes promoting and regulating foreign investors' investment in China, absorbing advanced technologies and management experiences from abroad, improving the level of utilizing foreign investments, realizing reasonable allocation of resources, ensuring employment and maintain economic security. Almost all the non-competition goals listed in this article indicate an industrial policy in China's merger control. Actually, industrial policy has been stated explicitly in Article 4 of this regulation. It says "Foreign investors shall, when merging domestic enterprises, conform to the requirements in Chinese laws, administrative regulations and departmental rules on the investors' qualification and industrial policies"⁹². The reason for the Chinese government paid so much attention to industrial policy is firstly because China has become a member of WTO in 2001, and the market economic system had just be established 8 years ago in 1993. The weak domestic enterprises were not able to compete with strong foreign companies. The major task of the *Interim Provisions for Foreign Investors to Merge Domestic Enterprises* is to protect domestic enterprises, and the protection is positive protection rather than passive protection. That can be seen from the goals of absorbing advanced technologies and management experiences from abroad, the Chinese government wants domestic enterprises to have better development by obtaining advanced technologies and management experiences. Another major goal is to promote and regulate foreign investors' investment in China, that also indicates the reality of China at that time, China owns the biggest population in the world, after practice market economic, thousands of SOEs were bankrupt, that leaves a big problem for the Chines government, namely, the unemployment. Foreign investors' investment could help to solve the problem to some extent. Excluding industrial policy goals, there also have a politic goal, namely, the maintenance of economic security. That, to some extent, reveals the imperfection of China' legislation, since the protection of economic security should be regulated by other legal departments rather than competition law.

All the non-competition goals provided in this article reveals China' social economy reality at that time on the one hand and the imperfection of legislation on the other. However, to a certain extent, it's reasonable for a developing country whose market economic system has just be established less than 10 years and joined the WTO with weak domestic economy.

1.2 Competition goals

Notwithstanding that almost all the goals set in the *Interim Provisions for Foreign Investors to Merge Domestic Enterprises* are non-competition goals, as the first regulation to regulate merger and acquisition, competition goal is indispensable. According to Article 1, the only competition goal set is to maintain fair competition. Unlike in the EU, the terminology in competition law is "effective competition". The terminology "fair competition" utilized here seems to justify the industrial policy goals in this Article. Fair competition requires the government to utilized its power to intervene competition in the market, to prevent companies to abuse their market position. when competition is between domestic companies and foreign companies, it's hard to say the interference of the government can ensure "fair competition". However, given the fact that China's domestic enterprises were

⁹² Ibid, Article 4.

too weak, they were not able to compete with foreign companies, therefore, it's necessary that the Chinese government set up the goal of "fair competition" rather than effective, the former concentrate more on government's interference, the latter stress on freedom competition of the market.

2. Goals after the Anti-Monopoly Law came into force

China's antitrust reform began in 1994. After 13 years' drafting, China's Anti-Monopoly Law (AML) finally became effective on August 1, 2008. That makes the AML has the longest drafting period of any legislation in modern Chinese history until now.

Along with the AML was promulgated, a specific merger control system was also established, as a major part of the AML, the goals of merger control shall also includes the goals of the AML. The goals of China's competition law are provided in Article 1 of the AML, it says

[T]his Law is enacted for the purpose of preventing and curbing monopolistic conducts, protecting fair market competition, enhancing economic efficiency, maintaining the consumer interests and the public interests, and promoting the healthy development of socialist market economy⁹³.

2.1 Competition goals

The goals most as prescribed in Article 1 of the AML are completion goals, the goals of preventing and curbing monopolistic conducts, protecting fair market competition, enhancing economic efficiency and maintain the consumer interests are all set as economic goals.

Preventing and curbing monopolistic conducts are the direct goals of the AML. Protecting fair market competition, enhancing economic efficiency and maintaining the consumer interests and public interests are the final goals. In another way, the direct goals are the methods, and the final goals are the purpose. Here, we only focus on the final goals of the AML.

2.1.1 Economic efficiency and consumer welfare

Economic efficiency can be interpreted as efficiency of allocation resources and efficiency of production. This includes a border sense and narrow sense of economic efficiency. The border sense of economic efficiency is to make full use of the country's economic resources, while the narrow sense of economic efficiency is to enable enterprises lower down the cost of production.

Under the market economic, competition plays an important part in allocation of resources. After China established the market economic system in 1994, the allocation of resources mainly depend on the function of the market rather than the interference of the government. The advantage of allocating resources by exercising the function of the market is obviously, enterprises can decide where and when to invest freely depending on the information of the market, as a result, the resources are allocated reasonably. Market competition can also help to improve enterprises' efficiency of product. Under the circumstance of a competition market, enterprises are prone to do their best in cutting off

⁹³ Article 1, Anti-Monopoly Law of PRC

the costs of production and improve the efficiency of product. Thus irritate them to develop new technology.

Consumer welfare is also a goal of market competition. Without competition, consumers will not have the chance to chose. As a result, the quality as well as quantity of goods and services provided in the market will not be improved. Further, without competition, enterprises will not have the motivation to cut don the costs of production, the price of goods or services will never be reduced.

However, a review of prevails cases indicates that under Chinese competition law, efficiency is often prior to consumer welfare, even though the pursue of efficiency may not necessarily injure consumers' interest in a short period of time, but in the long run, consumer's interest will be negatively effected for the lost of chances to chose. The priority of efficiency has much to do with the a strong industrial policy in Chinese competition law. (Industrial policy in Chinese competition law will be discussed specifically later.) In a recent case, the China South Rail (CSR) merged China North Rail (CNR) by absorption and merged into a company called CRRC Corporation Limited (CRRC) in June 1st, 15. Making it the world's biggest rail conglomerate and the only railway company in China. Even though the government announced that price of tickets will not be increased,⁹⁴ however, the merger will eliminate the last competition between the two former rail companies, namely, the CSR and the CNR, as a result, there will no competition in the railway industry any more. There is no doubt that consumers' interest will be damaged because of the reduction of motivation in technical improvement. Further, the merger of the two railway companies will also have a negative effect on the competition in the downstream industry, that will also incur a damage on consumers' interest for the possibility of lower quality of facilities provided by downstream suppliers.

2.1.2 Fair competition

As have stated above, fair competition have became a goal of Chinese competition law before the AML came into force. The term "fair competition" is relatively special for China since the term utilized in other countries' competition legislation are often "free competition", examples are Japanese and Korean antitrust law, and the term of EU' competition is "effective competition". In essence, they contain the same meaning under the competition system. However, there also have some delicate difference between them.

Fair competition first requires free competition, since the market economic will not exist without free competition. However, fair competition is more than free competition, it stress the function of the government in the course of competition. The government will not only consider the function of the market, but also exercise public powers to protect competition. This is the conception of combine the intangible hand and tangible hand during the regulation of the market. The term remains the Chinese government's application of public power to interfere the market economic. But the utilize of public power shall be strictly limited, or other wise it will cause the abuse of administrative power, the market can not fully function. Compare to the same term utilized in the *Interim Provisions for Foreign Investors to Merge Domestic Enterprises*, the term here stress more on "competition", whereas the later stress more on the interference of the government, that can be construed

⁹⁴ Available at: <http://v.ifeng.com/news/society/201503/01003867-5a27-4b7a-a2c6-5557b546242a.shtml>, logged in at 15:18, June 13, 15.

by the different process of the development of market economic and the purpose of legislations.

The reason for China utilize the term of “fair competition” in the AML is firstly because the Chinese legislation is affected by its traditional ideology. “Fair’ have long been a value system of Chinese, any legislation shall take the domestic value system in to consideration, even though the jurisprudence and policies of market integration have had a major influence on Chinese policy making”⁹⁵. The second reason is that China’ politic system make it necessary to retain government’s interference in the market economic. Under a system of public ownership, fair is a major goal.

2.2 Non-competition goals

Notwithstanding that the AML is a modern economic legislation of China, and is based substantially on the established body of the EU antitrust law, it is not a complete transplant of EU’s system. Rather, the AML’s provisions reveal interesting ambiguities and uncertainties regarding some basic antitrust issues. This provisions also reflect Chinese political and economic concerns.⁹⁶

2.2.1 Public interest

The goals as stated in Article 1 of the AML are obviously different from which provided in the *Interim Provisions for Foreign Investors to Merge Domestic Enterprises*, almost all the goals set here are competition goals. However, within this article, we also find the goal of maintaining the public interests, the term “public interest” has long been a question in China’s legislation, almost all of the laws enacted contain a close of “public interest”, however, seldom of them provide an interpretation of it. Under Chinese competition rules, there have no specific provision to interpret the term “public interest”. But Article 15 of the AML listed some examples that may be regarded as “public interest”, Article 15(4) says “for the purpose of realizing public interests such as conserving energy, protecting the environment and providing disaster relief”⁹⁷. Meanwhile, Article 28 provides that merger parties can apply “public policy” as a defense to apply for an exemption of a merger which have the effect of eliminate or restrict competition. Public interest can not equal to consumer’s interest, its vague meaning is often abused by the Chinese government to block or to clear a merger, this includes not only an economic concern, but also a politic one.

To be sure, China’s AML is not the only antitrust system that explicitly articulates non-economic goals. Yet, unlike other major jurisdictions with multiple goals in both statute and case law, China’s merger control in practice is a system in which these political factors may be used extensively.⁹⁸

Again, the merger of CSR and CNR completed in June 1st, 2015 would never have been approved by the antitrust authority without concerning to Non-competition goals. The CSR and the CNR constitute all the market shares of China’s railway transportation. However, the merger was approved by Chinese government. There is no doubt that the merger will cause competition problems, not only within the railway transportation industry, but also in its downstream industries. Competition will cause a waste of resources to some extent, but it’s

⁹⁵ Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (first published 2005, Cambridge University Press) 142

⁹⁶ D. Daniel Sokol, *Merger Control Under China’s Anti-Monopoly Law*, New York University Journal of Law & Business, Fall, 2013.

⁹⁷ Article 15(4), AML

⁹⁸ Ibid, 80

forgivable concerning on its function on the market. There are certainly many reasons for the clearance of this merger, the reasons that relate to political economy are:

(1) To establish a number of world-class companies.

China now ranking the first in the trade of goods among the world, however, it can still not be considered as a manufacturing power. In order to become a manufacturing power, it must establish a number of world's leading companies.

The domestic merger of leading companies can increase the power for the merged company to compete with foreign companies in the international market.

(2) To gain a favorable position in the international division of labor.

For a long time, China has lied in a lower position in the international division of labor. Export processing is the main business of Chinese foreign trade corporations. Since the process of the rebalancing of the world economy is also the process of rebuilding the international division of labor. China has to seize the chance. In the process of regional liberalization, China needs to establish a number of powerful multinational companies to occupy a high-end position in the world's industrial chain. Therefore, the strategy of the establishment of large companies is an important step for China to occupy the commanding heights of the international division of labor.

(3) To achieve national political strategy.

Whether a new pattern of relationship can be established between China and the US still unknown, and whether can China achieve a "peaceful rise" is still suspense. But the export of capital by multinational companies as a means of gaining world impact is a new national strategy. Since the large companies have considerable power, their investment and trade projects in the host country are relatively large, thus their influence on local political should not be overlooked. China can take advantage of the reputation gained from the utilization of large companies' operating to gain world economic impact.

2.2.2 Industrial policy

"Industrial policy lacks an agreed upon definition."⁹⁹ It can be government facilitated creation of structural changes in the economy,¹⁰⁰ or to promote outcomes in particular sectors of the economy.¹⁰¹ Within the classification of "non-economic" goals of antitrust, a number of factors account for such goals in merger review. Some of this is due to particular language in the enacting legislation that provides for multiple and sometimes competing goals.¹⁰²

A survey of competition policies in the EU, US and China conducted by Daniel Sokol in 2013, he utilized a unique practitioner survey of antitrust lawyers across multiple jurisdictions. One conclusion of the survey is that Chinese antitrust law is more concerned

⁹⁹ Howard Pack & Kamal Saggi, *Is There a Case for Industrial Policy? A Critical Survey*, 21 WORLD BANK RES. OBSERVER 268 (2006).

¹⁰⁰ See, e.g., Thomas A. Pugel, *Japan's Industrial Policy: Instruments, Trends, and Effects*, 8J. COMP. ECON. 420 (1984).

¹⁰¹ D. Daniel Sokol, *Anticompetitive Government Regulation*, in THE GLOBAL LIMITS OF COMPETITION LAW (Ioannis Lianos & D. Daniel Sokol eds., 2012); Damien M.B. Gerard, *A Global Perspective on State Action*, in THE GLOBAL LIMITS OF COMPETITION LAW (Ioannis Lianos & D. Daniel Sokol eds., 2012).

¹⁰² D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, New York University Journal of Law & Business, Fall, 2013.

with industrial policy concerns.¹⁰³ Within the AML, notwithstanding that there have no industrial policy revealed in Article 1, public policy can be seen from several provisions. Article 4, 5 and 7 as prescribed in the general provisions all indicates an industrial policy.

Article 4 provides that “The State shall make and implement competition rules suitable for the socialist market economy, perfect the macro control, and improve a united, open, competitive and well-ordered market system.”¹⁰⁴ From this Article, macro control is actually a goal of the Chinese competition law. “Macro control refers to the use of direct government intervention by the central government of the People’s Republic of China to regulate the economy”. The policy was first introduced in 1993 by Zhu Rongji, Premier of the People’s Republic of China and Governor of the People’s Bank of China at the time.¹⁰⁵ The improvement of a united, open, competitive and well-ordered market system state explicitly the industrial goal.

Article 5 of the AML says: “Business operators may, through fair competition and voluntary association, get together according to law, to expand the scale of their business operations and enhance their market competitiveness.”¹⁰⁶ This article indicates a strong industrial policy mindset since it support merger to a certain extent. It is correspond with the political economic goal as stated above, since the support of merger is also a way to establish world-class enterprises.

Another article indicates industrial policy is Article 7 (1), this paragraph states:

[W]ith respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries lawfully enjoying exclusive production and sales, the State shall protect these lawful business operations conducted by the business operators therein, and shall supervise and control these business operations and the prices of these commodities and services provided by these business operators, so as to protect the consumer interests and facilitate technological advancements.¹⁰⁷

It indicates government’s attitude towards SOEs and protectionism of Chinese competition law can be concluded from this Article. In China, SOEs constitute a significant percent of all Chinese firms. Given the importance of SOEs, merger control rules are not always applicable to them. Mergers of important SOEs are often according to government’s decisions rather than according to the AML. An example is the merger between the CSR and CNR.

A review of cases also indicates the goal of industrial policy within Chinese merger control. From the date the AML came into force in August 1, 2008 to date. Only two mergers were blocked by the Ministry of Commerce of China (MOFCOM).

¹⁰³ D. Daniel Sokol, *Merger Control Under China’s Anti-Monopoly Law*, New York University Journal of Law & Business, Fall, 2013.

¹⁰⁴ Article 4, AML

¹⁰⁵ See, https://en.wikipedia.org/wiki/Macroeconomic_regulation_and_control. logged in at 21:47, June 13, 2015.

¹⁰⁶ Article 5, AML

¹⁰⁷ Ibid, Article 7

The first merger blocked by the MOFCOM is *Coca-Cola/Huiyuan*.¹⁰⁸ The fact is that Coca-Cola intended to merge China's biggest Juice production company – Huiyuan, to gain larger market shares in pure juice industry in China. The result is that merger was blocked by the MOFCOM based on:

(1) Coca-Cola's post-acquisition ability to leverage its dominant position in carbonated drinks to fruit juice, thus affecting other fruit juice competitors and harming competition and consumers; (2) the potential of the merged entity to eliminate competitors, limit competition, and harm consumer welfare by tying, bundling, and other exclusionary practices; (3) the increased entry barriers resulting from the control that Coca-Cola would have on two major juice brands, Minute Maid and Huiyuan, when coupled with its position in carbonated drinks that may increase its dominance in juice; (4) the decreased opportunities for domestic small and medium-sized juice businesses to compete and innovate; (5) the adverse impact on competition in the China juice market and development of the Chinese juice industry; (6) the lack of offsetting positive effects or public interest; and (7) the lack of adequate remedies offered by Coca-Cola.¹⁰⁹

However, the economic analysis was universally criticized. The driving force behind blocking the deal was the acquisition of a famous brand by a foreign firm.

[M]any practitioners suggested that the nature of the reasoning that MOFCOM needs to undertake for politically sensitive deals. That is, MOFCOM knows the outcome that it wants to undertake (largely because of institutional constraints from other parts of China's government) and creates a set of economic theories to back into this conclusion. MOFCOM thus serves as a filter for other agencies/ministries that have concerns about non-competition industrial policy factors.¹¹⁰

Another merger blocked by the MOFCOM is the so-called P3 shipping alliance.¹¹¹ The fact of the case is a proposal of operating joint venture proposed by three large global shipping companies. Namely, the CMA CGM, Maersk Line and MSC Mediterranean Shipping Company, they agreed in June 2013 to establish a long-term operational alliance on East – West shipping routes, to be called the P3 Network. According to published reports, “the P3 Network was intended to operate a capacity of 2.6 million TEU (initially 255 vessels on 29

¹⁰⁸ [Ministry of Commerce of the People's Republic of China, Public Statement No. 22 [2009] (Statement on the Decision to Prohibit Coca Cola Company's Acquisition on China Huiyuan Group)] (Mar. 18, 2009)

¹⁰⁹ Yee Wah Chin, M&A Under China's Anti-Monopoly Law, *Business Law Today*, September 2010.

¹¹⁰ D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, *New York University Journal of Law & Business*, Fall, 2013.

¹¹¹ 商务部公告2014年第46号 商务部关于禁止马士基、地中海航运、达飞设立网络中心经营者集中反垄断审查决定的公告 (*Announcement of the Decision of Anti-monopoly Review of Concentration of Undertakings by MOFCOM on Prohibition of the Establishment of a Network Center by A.P. Maersk A/S, MSC Mediterranean Shipping Company S.A. and CMA CGM S.A.*, June 17, 2014.), available at: <http://www.antimonopolylaw.org/CommentShow.asp>, logged in at 23:34 June 13, 2015

loops) on three trade lanes: Asia – Europe, Trans-Pacific and Trans-Atlantic”. MOFCOM found that the P3 Alliance did amount to a merger and that the merger “would lead to a substantial lessening of competition” and therefore could not be allowed to proceed. This decision has caused a shock in the shipping industry, since both US and EU competition approved the P3 alliance, they considered the possible anticompetitive effects of the P3 Alliance but both found that this was unlikely to result in a reduction in competition at least for the time being. The alliance did not constitute a merger, but rather a cooperative agreement designed to reduce over capacity on shipping routes.

[I]n coming to this conclusion, MOFCOM defined the product market as the international container liner shipping service market and the geographic market as Asia-Europe. In looking at the Asia-Europe route, they concluded that the arrangements to be put in place under the P3 Alliance were different from the traditional loosely structured shipping alliances, and instead suggested that a more “closely-coordinated” alliance using integrated lines was being proposed. Arranged in this way, the P3 Alliance would account for over 40% of the international container liner service. MOFCOM went on to say that this increase in concentration may make it difficult for others to enter the market. MOFCOM reasoned that if increased concentration led to fewer shipping services operating on the route, then this might lead to a knock-on effect on consumer pricing and possibly much increased bargaining power by the P3 Alliance in their dealings with the ports.¹¹²

MOFCOM did not explain why, in its view, the cost savings and other pro-competitive synergies emphasized by the parties did not outweigh the anticompetitive concerns it expressed. Similarly, the MOFCOM decision does not address the parties’ efforts to structure a joint venture which, while it integrated capacity, left marketing, sales, and pricing decisions to the three entities acting independently. In short, the parties structured an alliance which was not a complete merger, but MOFCOM treated the P3 alliance as if it were a complete merger. No explanation is provided for why the separate pricing and marketing mechanisms did not adequately address concerns about increased concentration and about increased bargaining power *vis a vis* customers and ports.

[F]inally, MOFCOM revealed that the parties had put forth proposals to address the allegedly anticompetitive aspects of the proposed joint venture, but the remedies offered were deemed insufficient to alleviate MOFCOM’s concerns. No details were provided as to the remedial measures discussed.¹¹³

¹¹² The failed P3 shipping alliance – the challenge of dealing with global antitrust enforcement Briefing COMPETITION, REGULATION & NETWORKS, Watson, Farley & Williams LLP, available at: <http://www.wfw.com/wp-content/uploads/2014/09/WFW-CRN-TheFailedP3ShippingAllianceAndTheChallengeOfDealingWithGlobalAntitrustEnforcement.pdf>

¹¹³ MOFCOM Blocks “P3” Shipping Joint Venture, Davis Polk & Wardwell LLP, available at: http://www.davispolk.com/sites/default/files/2015_01_27_China_Antitrust_Review_2014.pdf

In light of MOFCOM's failure to address the effort to adopt a structure which would preserve competition among the would be alliance partners, its decision already has been interpreted in some quarters as driven by an effort to protect domestic shipping companies from what would have been three more efficient rivals.¹¹⁴

From the only two mergers blocked by the MOFCOM, a goal of industrial policy is not hard to find. Apart from the two blocked mergers, other mergers, even cleared, also reveal the industrial policy goal. Therefore, even though the AML is relatively a modern economic legislation of China, considering that China's market economic system has just been established 1993, it is inevitable that the government would take non-economic factors into consideration. Further, China has a tradition of intervening the market by public power, this tradition would impossible to be eliminated within several decades.

Section II Legal basis of merger control in China

In China, merger control as a policy has not been formulated until the AML was enacted. However, before the AML was enacted, some regulations were made to regulate certain kinds of mergers and acquisitions. The *Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors*, which was promulgated in 2003 and revised in 2009, was made especially for foreign investors to merge and acquire domestic enterprises. After the AML was promulgated, the State Council formulated the *Provisions of the State Council on the Threshold for the Reporting of Undertaking Concentrations*, specify the threshold for undertakings reporting concentration.

1. Merger control under the *Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors*.

In 2003, the former FETC (Ministry of Foreign Trade and Economic Cooperation), the SAT (State Administration of Taxation), the SAIC (State Administration for Industry and Commerce), as well as the SAFE (State Administration of Foreign Exchange) jointly formulated the *Interim Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors*. It was revised into the *Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors* by the MOFCOM (Ministry of Commerce of the People's Republic of China) in 2006, a further revision was made in 2009 by the MOFCOM.

This regulation provides two kinds of M&As, one is equity M&A, and the other one is asset M&A, it mainly regulates the specific methods for foreign investors to merge and acquire domestic enterprises. The only provisions made for Anti-Monopoly is that is the foreign investors acquire the controlling position, they shall notify the MOFCOM under the followings circumstances: (1) the M&A refers to key industries; (2) it raises factors that affects or may affects the state's economic security; (3) it incurs the transfer of controlling power of enterprises that possess well-known trademarks or "China time-honored brands". Without prior notification, the MOFCOM may, accomplished by relevant departments, require undertakings concerned stop transacting, or take steps to transfer its shares, for the purpose of eliminating its negative effects on the economic security.

As regards the 2009-revised version, there have no provisions that refer to antitrust due to the enacted AML. Article 51 of this regulation notes

¹¹⁴ See, e.g., n.2 *supra*.

[I]n accordance with the provisions of the Anti-monopoly Law, where the merger or acquisition of domestic enterprises by foreign investors satisfy the reporting standards as stipulated in the Provisions of the State Council on the Threshold for the Reporting of Undertaking Concentrations, the foreign investors shall report to the Ministry of Commerce beforehand, and no transaction shall be conducted without reporting.¹¹⁵

Therefore, after the *Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors* was revised in 2009, the only legal bases of merger control in China are the AML and the *Provisions of the State Council on the Threshold for the Reporting of Undertaking Concentrations*.

2. Merger control under the AML

As have stated, Chinese merger control system has not been established until the AML came into force in 2007. The AML provides major provisions on the control of mergers. The merger control rules were provided in the third chapter of the AML, they specify the following policies:

(1) “Concentration” under the AML

Like as in the EU, the term “merger” under the AML is “concentration”. The definition of “concentration” is provided in Article 20 of the AML, under this provision, concentration shall contain 3 situations, they are: (1) Merger between undertakings; (2) the acquisition of control by one undertaking in the way of acquiring shares or assets of another undertaking; (3) one undertaking, by means of contract, obtain controlling rights in another undertaking or can exercise decisive influence on another undertaking.¹¹⁶

Seen from this article, we can find under Chinese merger control system, “merger” is a narrow sense, since it was included in the bigger concept of “concentration”. Apart from merger, concentration also contains “acquisition of control”, control can be acquired by means of contracts and obtaining shares and assets.

(2) Exemptions of notification

The AML regulates that where concentration by undertakings fulfill the threshold which provided by the State Council, undertakings shall notify the antitrust authority of the State Council prior to its conduction of concentration, no undertaking shall conduction concentration without prior notification.¹¹⁷

However, the AML also provides two exemptions of notification. Article 22 provides:

[W]here one of the following is the case relevant to an operator consolidation, declaration to the anti-monopoly law enforcement authorities is not required: (1) One of the parties to a consolidation holds assets or shares that grant at least 50% voting rights in each of the other operators; or (2) For in each of the parties to a consolidation, assets or shares that grant 50% voting rights in said operators are

¹¹⁵ *Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors*, Article 51.

¹¹⁶ AML, Article 20.

¹¹⁷ AML, Article 21.

held by the same operator which is not party to the consolidation.¹¹⁸

These two situations can be regarded as reorganization of one undertaking, it will not lead to the change of market share within the industry, therefore, they do not have the risk to cause any competition problem.

3. Merger control under the *Provisions of the State Council on the Threshold for the Reporting of Undertaking Concentrations*

Even though the AML is the main legal source of Chinese merger control system, it does not provide the threshold for the reporting of the concentration, instead, the threshold is provided in the *Provisions of the State Council on the Threshold for the Reporting of Undertaking Concentrations*. Under the Chinese legal system, laws are made by the NPC (National People's Congress) and the Standing Committee of the NPC, regulations are made by the governments. Legal problems that do not have any provisions prescribed in laws will specified by regulations, generally, legal problems that solve by regulations need to be amended and regulated within a short term, so as to lower the cost of legislation. When it comes to the threshold for reporting concentrations, it's better to be regulated by regulations considering that the threshold should be adjusted according to the change of the market.

The *Provisions of the State Council on the Threshold for the Reporting of Undertaking Concentrations* only has 5 legal provisions. Article 3 provides the threshold for reporting the concentration. Under this article,

[W]here the concentration of business operators satisfies any of the following threshold, the business operators shall file an application to the department in charge of commerce of the State Council in advance, otherwise, no concentration shall be carried out: (1) The total amount of the global turnover realized by all business operators participating in the concentration during the previous accounting exceeds CNY 10 billion with at least two business operators each achieving a turnover of more than CNY 400 million within China during the previous accounting year; (2) The total amount of the turnover within China realized by all business operators participating in the concentration during the previous accounting year exceeds CNY 2 billion with at least two business operators each achieving a turnover of more than CNY 400 million within China during the previous accounting year.¹¹⁹

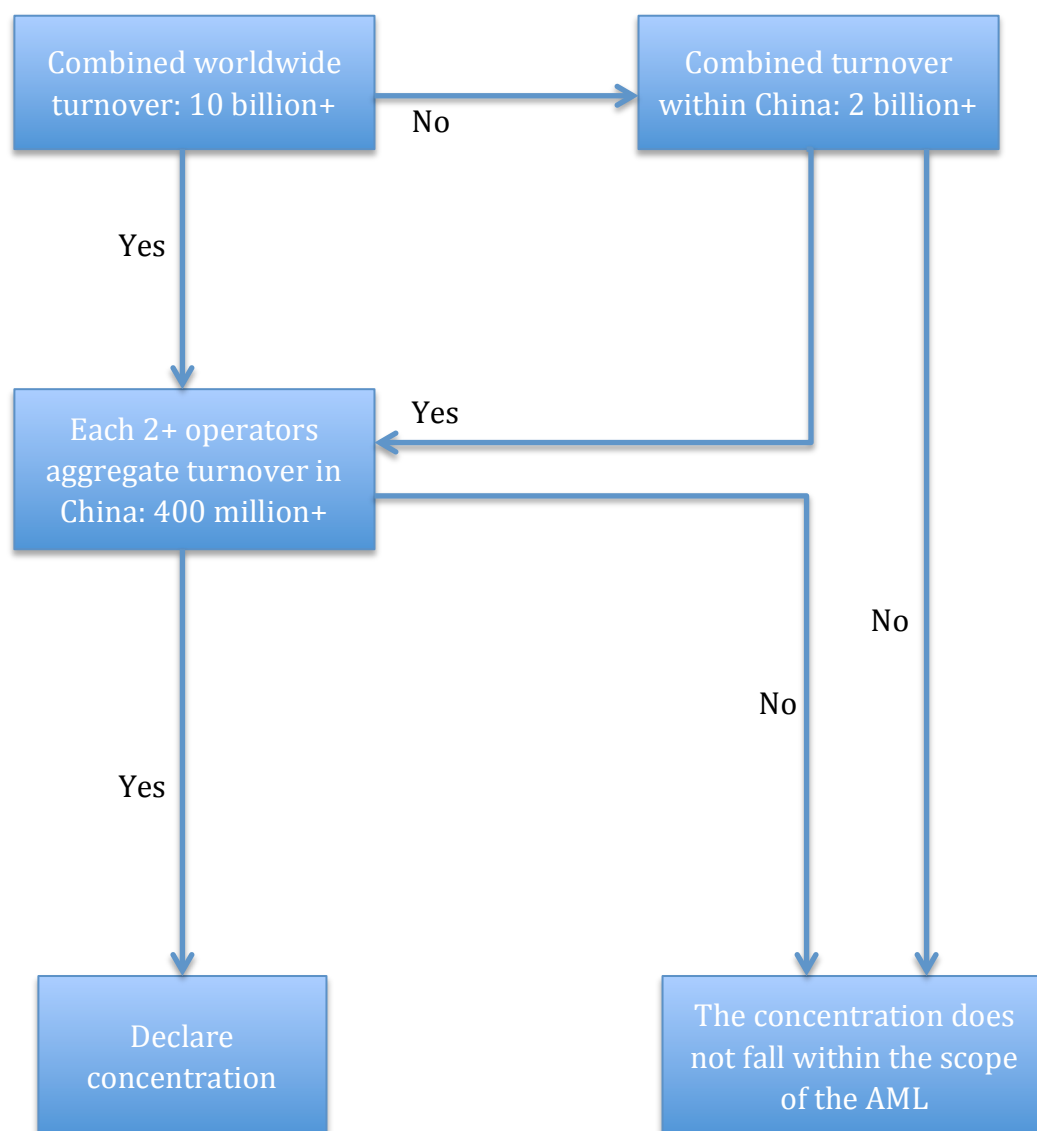
For the purpose of calculating the turnover, the actual situation in special industries and fields such as banking, insurance, securities, futures, etc. shall be taken into account. The specific measures shall be other wise formulated by the department in charge of commerce of the State Council jointly with other relevant departments of the State Council.

Chart III shows the threshold for reporting the concentration.

¹¹⁸ AML, Article 22.

¹¹⁹ *Provisions of the State Council on the Threshold for the Reporting of Undertaking Concentrations*, Article 3.

Under certain circumstances, the concentration may also be tested even though the turnover of undertakings concerned does not achieve the threshold for reporting the concentration. According to Article 4 of the *Provisions of the State Council on the Threshold for the Reporting of Undertaking Concentrations*, if the concentration of business operators does not satisfy the threshold for reporting specified in Article, but the facts and evidence collected pursuant to the prescribed procedures show that the said concentration has or might have the effect of excluding or restricting competition, the department in charge of commerce of the State Council shall conduct an investigation in accordance with the law.¹²⁰



(Chart III)

¹²⁰ *Provisions of the State Council on the Threshold for the Reporting of Undertaking Concentrations*, Article 4.

Section III, AML procedures

In this section, the thesis will discuss the procedure law of Chinese merger control. As have stated in last section, the AML is the main legal basis of merger control, the procedure of merger investigation is also provided in the AML. Like as in the EU, the AML also provides two kinds of tests, namely, the preliminary test and the substantive. Notification is also the essential procedure.

1. Notification

Article 21 of the AML states explicitly that concentrations achieve the threshold provided by the State Council, undertakings concerned shall notify the anti-monopoly enforcement authority of the State Council prior to the conduction of concentration.¹²¹ This is a mandatory provision, unless the concentration full within the scope of exemption as prescribed in Article 22 of the AML.

Undertakings should provide the following documents when making notifications to relevant authorities: (1) A notification form; (2) An explanation of the effect of the concentration on market competition; (3) The concentration agreement; (4) The financial and accounting statements of the undertakings concerned for the preceding fiscal year, audited by an accounting firm; and (5) Other documents and materials prescribed by the anti-monopoly law enforcement authorities. As regards the notification form, it shall indicate the name, place of business, and operational scope of each party to the concentration as well as expected date of concentration any other items required by the anti-monopoly law enforcement authorities.¹²²

It's very important to make the notification documents well prepared, or other wise the concentration may be deemed a failure to notify. According to Article 24 of the AML, if the documents and materials provided by undertakings are incomplete, the missing items shall be submitted within a time limit prescribed by the anti-monopoly law enforcement authorities; in the case where undertakings fail to provide the missing documentation before the date, it shall be deemed a failure to declare.¹²³

2. The preliminary test under the AML

The preliminary test is the first stage of merger investigation, it is also an essential stage before the substantive test. In this stage, the antitrust authority's investigation will depend on the documents that the parties of the concentration offered. In accordance with Article 27, when testing concentrations, the antitrust authority shall take into account the following factors: (1) The relevant market share of undertakings concerned as well as their ability to control the market; (2) The degree of concentration in relevant markets; (3) The effect of the concentration on market entry and technology advance; (4) The effect of the concentration on consumers and other undertakings; (5) The effect of the concentration on national economic development; and (6) Other factors that the State Council anti-monopoly law enforcement authorities regard as worth consideration.¹²⁴

¹²¹ AML, Article 21.

¹²² AML, Article 23.

¹²³ AML, Article 24.

¹²⁴ AML, Article 27.

Since the test in this stage is a preliminary test, and the investigation will mainly depend on the documents the parties offered, therefore, the period for the investigation only lasts 30 days from the date the documents as stated above offered completely. The antitrust authority shall make a decision of whether to forward to the substantive test or not within the period, and inform the parties in writing. Before the decision is made, the concentration shall not be carried out. However, if the antitrust authority failed to release a decision prior to the deadline, the undertakings may conduct the concentration.

3. The substantive test under the AML

If the antitrust authority decides to conduct further investigation, the investigation shall be completed and a decision on whether or not to prohibit the concentration shall be made within 90 days from the date the original decision was made, and shall inform the undertakings concerned in writing. However, the investigation period may be extended under the following circumstances: (1) The undertakings concerned consents to an extension of the inspection period; (2) There are inaccuracies in documents provided by the undertakings which require further verification; or (3) A major change has taken place with regard to the undertakings in the time since the notification is initiated. The extension period shall not exceed 60 days, if the antitrust authority failed to release a decision before the deadline, the undertakings may conduct the concentration.

In this stage, the contents of investigation is the same with the preliminary test, the difference lies in the way the antitrust inspects the concentration. In the preliminary stage, the investigation mainly depends on the documents, whereas in this stage, the antitrust may conduct investigation in the business place of the undertakings. Further, whether or not to conduct the substantive test depends on the result of the preliminary test, at least there exists reasonable doubt that the concentration will exclude or restrict competition of the market, therefore, in this stage, the antitrust will pay much attention to investigate the concentration in detail.

After substantive test, the antitrust may make the following decisions: a. the concentration will not exclude or restrict market competition, it will not be prohibited; b. the concentration will not seriously exclude or restrict the competition of the market, the concentration will be imposed on several conditions to eliminate the negative effects of the concentration; c. the concentration will seriously exclude or restrict market competition, it will be prohibited.

According to Article 30, "State Council anti-monopoly law enforcement authorities shall promptly make public any decision to prohibit undertakings concentration or to place restrictive conditions on the concentration which diminish its negative effects on market competition",¹²⁵

Part III Comparison

Section I Comparison of goals of merger control

From the discussion above, it's not hard to conclude that there have both similarities and dissimilarities in the goals of merger control between the EU and China. For similarities, they

¹²⁵ AML, Article30.

both set several goals in the merger control system rather than a unitary goal; politic issues are both considered by the antitrust authorities; for economic elements, efficiency is an element that effect their decision. Generally, similarities are the mainstream of China and EU merger control. The distinction lies in the importance of each goal concerned by the authorities. The following will provide a specific discussion of them.

1. Similarities

As stated, generally, the goals of merger control in the EU and China are the same. However, the following items deserve to have a more specific analysis.

1.1 Multiple goals

Almost all of the legislations will take into account several factors. In democratic states, legislation have to go through a certain procedure, it have to be approved by several authorities. Since different authority may represent different interest, a law is promulgated to fulfill different interests, and thus, a multiple goal is inevitable. However, it doesn't mean that a multiple goal is goals mixed with politic, economic or social goals, the division of legal system is to make sure that they function in a well-organized way. Generally, economic laws shall only take into account economic elements. Within the system of merger control, both the EU and China involve politic element in. However, merger control, as an antitrust policy, should only consider economic element, more specifically, it shall only include competition considerations. As Roger D. Blair and D. Daniel Sokol said in their paper:

[W]e prefer that the antitrust system be technocratic in the sense that antitrust be defined narrowly to examine only those issues that are purely within anti-trust's ability to be measured and understood using industrial organization as the basis for economic analysis. This technocratic approach moves noncompetition economic considerations to areas such as sector regulation, the legislative process, or executive fiat. Such areas are better equipped than antitrust to deal with political trade-offs between law and policy because of their ability to deal with conflicting policy issues, whether based on legitimate goals or rent seeking.¹²⁶

1.2 Political considerations

There is no doubt that legislation itself contains a politic concern, in essence, legislation is a mean for the government to fulfill certain politic goals. Merger control, established as a system for the government to regulate the market, have no exception. Therefore, no matter EU or China, expressed its politic goals in their early competition legislation. For the EU, the politic goal is to establish a supranational organization, and the unification of the internal market is a significant premise for the organization to be established. For China, the politic goal is to protect domestic enterprises and establish super companies to compete with foreign companies within the international market. After the decision of practice market economy was made in 1993, the Chinese government had the concern of its weak economic power and weak domestic enterprises, if they were not protected well by public power, the domestic economic will likely to collapse, and the Communist regime would be under threat. For more than 15 years' practice of market economic, China has become a major economic entity in the world, but the government acknowledges that this position will not last long if

¹²⁶ Roger D. Blair & D. Daniel Sokol, Welfare standards in U.S. and E.U. antitrust enforcement.

China continues to develop in low-end industrials. China needs to improve its international position by further develop its economy. However, as have stated in 1.1, politic consideration should not expressed in economic legislations. Those issues shall be included in other department of laws. After all, politic considerations included in competition to some extent reflects the imperfection of laws.

1.3 Efficiency

Both EU and China express the pursuance of efficiency in its competition law, under Chinese merger control system, efficiency can be an exemption of merger. Article 28 of the AML states:

[W]here the concentration of business operators will or may eliminate or restrict competition, the Anti-monopoly Law Enforcement Agency under the State Council shall make a decision to prohibit the concentration. However, **if the business operators can prove either that the favorable impact of the concentration on competition obviously exceeds the adverse impact**, or that the concentration meets the public interests, the Anti-monopoly Law Enforcement Agency under the State Council may decide not to prohibit the concentration.¹²⁷

As regards efficiency in the EU, The ECMR explicitly recognizes efficiencies as of the 2004 revisions. It notes:" In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned." The EC Horizontal Merger Guidelines further notes:

[t]hat an efficiencies defense will work in situations where the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro- competitively for the benefits of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.¹²⁸

2. Discrepancies

The discrepancies mainly lie in the importance of goals set in EU and Chinese competition law. The discussion here will analyze the politic issues and the role of efficiency as well as industrial policy play in their respective merger control system.

2.1 Politic goals and industrial policy

Both of EU and Chinese merger control system set politic goals. However, the role of politic goal is not of equally importance.

Under EU's merger control system, politic goal is less emphasized within the course of competition law reform. Before the ECMR was promulgated in 1989, along with other regulations that relevant to the establishment of a unified internal market, merger control

¹²⁷ AML, Article 28, (emphasis added).

¹²⁸ Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. 2004 No. (C 31/5) 77.

bears the task of establishing a supranational organization. However, after a specialized legislation of merger control—the ECMR was enacted, politic goal have wiped out from the regulation. The main concerns of the ECMR are economic issues. Whereas in China, before the AML came into force, the merger control system have not been established, the only legislation regard to merger is the *Interim Provisions for Foreign Investors to Merge Domestic Enterprises*, this regulation was made to only to regulate foreign companies' merger and acquisition of domestic enterprises, therefore, politic goal is inevitable to set in such a regulation. After the AML was enacted, Article 1 have no reference to politic goals, but the term “public interest” leaves the government space to fulfill politic goals by execute the AML, and cases have indicate the existence of a politic goal in Chinese merger control system.

The goal of industrial policy have many in common with politic goals, industrial policy was also a goal under EU competition law before the specialized legislation of merger control, the ECMR was enacted, the purpose is to establish a unified internal market. Industrial policy under Chinese competition law also serves as a mean to fulfill politic goals.

2.2 The role of efficiency and consumer welfare

Efficiency is more stressed in Chinese merger control system, the goal of efficiency has been set before the AML was enacted. However, the goal of consumer welfare was just set by the AML, and in reality, efficiency is prior to consumer welfare. Whereas in the EU, consumer welfare prevails, even though efficiency was provided as a condition of exemption, but the efficiency defense must “benefit consumers”. “As a result of the language from the ECMR and the Merger Guidelines, it seems to be the case that the welfare standard for an efficiencies defense in Europe is consumer welfare.”¹²⁹

Section II. Comparison of substantive rules

1. Concentration

Both China and EU use the term “concentration” in preference to “merger” in their respective competition legislations and it has the similar connotation in the two jurisdictions: they both include the situations of “merger” and “acquisition of control”. However, there also have some distinctions that cannot be overlooked.

Firstly, “merger” has broader implication under the ECMR than that under the AML. According to the ECMR, merger not only includes mergers between two or more independent undertakings or parts of undertakings. Therefore, under the ECMR, “merger” actually contains two situations, one situation is merger between two or more previously independent undertakings and the other situation is merger between two or more parts of undertakings, this situation happens, for instance, two undertakings A and B, both of them are soft drink producers, C is a special section of A which producing fruit juice, and D is a special section which belongs to B also produce fruit juice, now A and B enter into an agreement to consolidate C and D to a new company E, both A and B are shareholders of E, if the combined turnover of C and D fulfill the threshold as prescribed in the ECMR, then, the consolidation of C and D is also a kind of concentration.

Secondly, although China’s AML also provides three main situations of concentration, it actually only contains two situation. The second situation of concentration is the acquisition of control by acquiring shares or assets of another company or other companies, and the

¹²⁹ Roger D. Blair & D. Daniel Sokol, Welfare standards in U.S. and E.U. antitrust enforcement.

third situation is the acquisition of control by contract, these two situations can be regarded as the situation of acquisition of control. In essence, the acquisition of control is the obtaining of rights, the purpose of the acquisition of shares and rights is also the acquisition of rights. Therefore, JV (Joint Venture) is not a kind of concentration under the AML, whereas under the ECMR, JV is an important circumstance of concentration.

2. Authorities

In the EU, the Commission is the major authority which is competent to initiate anti-monopoly investigation, including merger control and the abuse of a dominant position. Whereas under China's competition legal system, there are several authorities that are competent to initiate anti-trust investigation. Article 10 of the AML states:

[T]he authorities responsible for enforcement of the Anti-monopoly Law specified by the State Council (hereinafter referred to, in general, as the authority for enforcement of the Anti-monopoly Law under the State Council) shall be in charge of such enforcement in accordance with the provisions of this Law.¹³⁰

However, The AML does not have provisions to further interpret the meaning of the "authorities". In 2008, the State Council promulgated *The Provisions on the Main Functions of Internal Organizations and Manning Quotas of the National Development and Reform Commission*, *The Provisions on the Main Functions of Internal Organizations and Manning Quotas of the MOFCOM* and *The Provisions on the Main Functions of Internal Organizations and Manning Quotas of the State Administration of Industry and Commerce*, regulate the functions of the NDRC (the National Development and Reform Commission), the MOFCOM and the SAIC (the State Administration of Industry and Commerce) and their respective powers of initiate anti-trust investigation. The NDRC is competent to investigate price monopoly, the MOFCOM is competent to investigate concentration, and the SAIC is competent to investigate the abuse of a dominant position.

It seems that China's anti-monopoly legal system has provide a perfect organization of authority to regulate anti-monopoly proceedings and enforce the AML. However, within the competition legal system, sometimes it's hard to say a certain action by undertakings belongs to concentration or price monopoly, it might violates the concentration regulations and price monopoly regulations at the some time, then, two or more authorities will organize the investigation. It will not only make the investigation inefficient, but also cause unfairness. Each authority may consider more on its own interests, the decision is not easy to be made timely.

3. Legislative Forms

Even though China's merger control system has in many ways based on the established system of the EU, the legislative forms of merger control still have many differences.

First, China does not have a unified law which regulates concentration. Under China's competition legal system, the regulations of merger control is a part of the AML, the AML does not only contains merger control, but also includes other regulations such as price

¹³⁰ Article 10, Anti-Monopoly Law

monopoly, administrative monopoly as well as the abuse of a dominant position. Whereas in the EU, the Parliament and the Council promulgated the ECMR jointly, specifically for merger control. Thus, the regulation of merger control in the EU is more systematic and completed.

Second, China has enacted regulations of merger control specifically for foreigner investors. In 2003, the former FETC (Ministry of Foreign Trade and Economic Cooperation), the SAT (State Administration of Taxation), the SAIC (State Administration for Industry and Commerce), as well as the SAFE (State Administration of Foreign Exchange) jointly formulated the *Interim Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors*. It was revised into the *Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors* by the MOFCOM (Ministry of Commerce of the People's Republic of China) in 2006, a further revision was made in 2009 by the MOFCOM. This regulation provides two kinds of M&As, one is equity M&A, and the other one is asset M&A, it mainly regulates the specific methods for foreign investors to merge and acquire domestic enterprises. Whereas in the EU, there has no specific regulation that regulates merger by foreign investors.

Part IV Conclusion

The transplantation of law is an important way for a certain country to improve its ability of legislation. China has long been a planned economy country, modern legislation of economic law lacks a social basis, and transplant laws from advanced country can help to harmonize law with the development of economy. The legislation of the AML is a successful transplant of EU competition rules, making it the first modern economic law of China. However, the transplantation of legal provisions does not mean that the legal provision can exercise the same function. It cannot deny that the same or similar legal provisions can result to some similar effects, to be sure, the enforcement of the AML have many in common with EU competition rules, the competition goals set in the AML also helped to improve competition within the market, which is also a function of EU competition rules. However, the effect of law has much to do with many factors, for instance, the political system, the social basis or culture and so on. Notwithstanding that the legal provisions of merger control have many similarities, and that the same provisions have the same outcomes to some extent, the different outcome is still the main part. Seen from the cases discussed above, China and EU competition law set the similar goals, but the outcomes are often different with each other, the reason is that China and EU stress on different goals, the prevail goals are not the same, each jurisdiction have to select the goals that are more suitable for its development and more coordinate with its economic reality. Further, we can find that the factors China considered have many in common with that of EU in its 1970s, both of them take into account many non-economic elements, it indicates that even though the law transplanted from another country is its latest version, the effect of the transplanted law may not the same. Especially for economic law, the effect of the enforcement of them depend much on a certain country's economic reality. China has just practice market economy for about 20 years, but the law transplanted is the outcome of EU's 70-year experience in practicing market economic. As with merger control, the outcome of the P3 alliance case was

entirely different in the EU and China, it also reveals that newly established regulators may be stricter in their approach than the more experienced regulators.

Along with the development of market economy and increasing experiences of practicing market economy, the goal of merger control has continues to narrow down. This reveals the perfection of legislation of the EU and China. In essence, merger control belongs to economic law, the goal set by an economic law should only concern economic matters, other concerns like economic security should be governed by other department of law. Have a glimpse of EU's competition legislation, we can anticipate that China will follow the same route.

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