

Introduction/Editorial foreword

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1. REASONS FOR THIS BOOK

During the 29th session of the 10th National People's Congress on 30 August 2007 China adopted a long-awaited Anti-Monopoly Law (AML). Almost one year later, on 1 August 2008 the law entered into force. In December 2009 an international conference 'Regulation and Competition in China' was held in Nanchang, Jiangxi Province, China. That conference brought together legal scholars and economists from China as well as from Europe and the US to provide a combined legal and economic perspective to deal with specific and interesting regulatory and competition policy issues that China was facing. The 2009 conference, which took place just one year after the entry into force of the AML made clear that China has important challenges ahead in how precisely to apply the AML in practice. The results of this first conference were published in a book in 2011.¹ That book made clear that the AML holds many promises concerning the development of an efficient competition policy in China but that at the same time many issues still needed to be resolved. Questions for example arose on the precise objectives that anti-monopoly authorities would be following in China, but also with respect to the specific position of administrative monopolies and state-owned enterprises. Questions also arose on how competition policy would be applied with respect to the traditionally strongly regulated industries in China (such as network industries and utilities). These remaining questions of course in 2009 could only be asked since at that moment there was hardly any practical experience with the AML. Therefore it seemed important to examine three years after the entry into force of the AML how the competition policy under the AML has been developed in practice. That is why it was decided to organise a new conference, again in Nanchang, Jiangxi Province on 3–4 December 2011 with the major goal to look at new developments and empirical evidence concerning the application of the AML. A follow-up conference

¹ Faure and Zhang (2011).

seemed indeed not only important to analyse the first cases and hence to see to what extent the AML really had strong teeth or merely remained a paper tiger; in addition many aspects of competition law still needed further implementation via guidelines of either the Chinese Competition Authorities or the People's Supreme Court. Many of those guidelines have meanwhile been issued and hence it seemed important to organise a second conference to analyse the cases, empirical evidence but also the recent developments.

This book is the result of that conference. It hence considers the AML in China, more particularly paying attention to recent developments and to cases and hence also addressing competition policy from both a theoretical as well as from a practical perspective. The goal is to provide insights in how competition authorities in China have taken up their tasks of developing competition policy and how the AML has been implemented in practice via specific guidelines. Like in the previous book the aim is to take a broader perspective to look at the AML. This is done by bringing together lawyers and economists who adopt an integrated approach (also referred to as law and economics) to competition policy.² Precisely this combination of legal and economic insights will prove to be very useful for the case of China. Law and economics has indeed paid a lot of attention to the question how particular instruments of competition policy may be able to reach the goals the policy-maker wishes to achieve.

The AML itself has drawn strongly on input from comparative law.³ Therefore, as in the previous book we edited, it seemed useful to compare the current practice and implementation of the AML to the practices in the US and in Europe. Hence, the goal of this book is also to address the cases and implementation of the AML in China from a broader comparative methodology by putting them in the framework of experiences in Europe and in the US.

The added value of the current book may be obvious: in the first book, based on a conference that took place one year after the entry into force of the AML we were of course constrained by the fact that not many cases had accumulated, implementing documents were still lacking and hence an empirical analysis of the effectiveness of the AML was to a large extent not possible. The current book hopes to fill this gap by providing insights on the way in which the AML has been implemented since 2008, both via

² Law and economics has now been widely integrated in Chinese academia as well. For a first assessment see Eger, Faure and Zhang (2007), but since that moment law and economics in China has been developing strongly.

³ See for the foreign influences on the China AML *inter alia*, Howell, Wolff, Howe and Oh (2009); Mehra and Yanbei (2009) as well as Gerber (2008).

cases and via guidelines. The AML now receives a lot of attention, also in the US and this is understandable.⁴ Given the large impact of China on the global economy the question of course arises whether institutional structures like competition policy are able to accompany the Chinese miracle of economic growth. Previously Ulen argued that competition policy was apparently not a precondition for economic success since China sustained economic growth for many years even without a competition policy.⁵ However, Ulen equally argued that it may be wise to have a competition policy 'on tap'.⁶ As this book will show competition policy is now 'law in action' given the many cases that have already arisen and hence it is highly interesting for policy-makers but also for scholars interested in law and economics or competition policy to analyse how precisely competition authorities in China apply the powers given to them in the AML to sustain economic growth in China.

2. METHODOLOGY

2.1 Multi-disciplinarity

As we already made clear addressing the implementation of the AML, new developments, and also looking at cases, deserve a multi-disciplinary perspective. The questions that arise in this respect have been analysed in this book by lawyers and economists, many working in the interdisciplinary field of law and economics. To a large extent the book uses well-known insights from economics, also based on experiences in Europe and in the US to examine competition policy in China.⁷ Moreover, the recent developments and cases in China are not only analysed from a theoretical economic perspective, but also from an empirical methodology. It is for example interesting to acquire insights on how strong and effective administrative monopolies in China are, but also to analyse the role of regulated industries like the telecommunications or electricity sector based on economic methodologies. Economics is not only used as a method to analyse developments in the implementation of the Chinese AML; critical reflections will also be provided on the way competition policy is practised

⁴ See for the impact of the AML on companies also outside of China, Farmer (2011).

⁵ Ulen (2011a).

⁶ Ulen (2011b).

⁷ See further on the economic background of the implementation of the AML in China Zheng (2010).

in Europe and the US. Competition policy has traditionally always been a domain where legal and economic insights have been integrated. It was probably one of the first domains where lawyers looked for economic insights, e.g. when a relevant market (in order to determine a dominant position) had to be defined. Today economics still plays a crucial role, for example, in determining this relevant market, as many contributions in this book will show. At the same time some also critically reflect precisely on the usefulness of using the relevant market as a criterion e.g. in merger control.

2.2 Legal Interdisciplinarity

The current book addresses the implementation of the AML in China, but of course not only focuses on competition law in the strict sense. In China (and to a large extent also in Europe and the US) competition policy and the efficient functioning of markets are not only dependent upon the working of competition law in the strict sense. If one wishes to examine the efficient functioning of markets in China attention will also have to be paid to other legal domains, for example administrative law, in order to examine the role of administrative monopolies and state-owned enterprises in the Chinese economy. Crucial questions in that respect also arise with respect to the role of the rule of law in the Chinese legal system. Especially in regulatory reforms related to network industry for example, administrative law will play a crucial role in China and will therefore also have to be considered. Moreover, industrial regulation and professional licensing, as well as self-regulation of the professions, can have a strong impact on the competitive nature of a market and will therefore have to be considered as well. Moreover, competition policy will in the end be strongly dependent upon enforcement for its effectiveness. Hence, attention will also have to be paid not only to the possibilities of administrative and criminal enforcement, but increasingly also to the question whether private law remedies can be used in enforcing competition policy as well.

2.3 Comparative Approach

We have already stressed the importance of a comparative approach when analysing the AML. Not only is the AML itself strongly based on experiences with competition policy in Europe and in the US; given the large experience in these legal systems with competition policy there is a large scope for mutual learning. After all, in the US and in Europe competition policy is also always in full evolution. The reasons why policy-makers continuously seem to change the institutional and legal framework with

respect to competition policy may also provide useful insights for Chinese policy-makers on the relative effectiveness of particular institutional arrangements that were chosen earlier in Europe and in the US.

As this book will show, the Chinese AML is now actively and critically followed by American and European scholars as well. Hence, many of the contributions discussing evolutions in the implementation of the AML are written, not by Chinese, but by American or European scholars who not only discuss these recent evolutions in China, but also use their comparative benefits to critically reflect upon the evolutions in China and formulate in some cases policy recommendations for amendments or improvement.

2.4 Topics

As we already mentioned above, the reason for this book is more particularly that there is now several years of experience with the AML since its entry into force on 1 August 2008 and that in the meantime several guidelines have been published. Hence, the topics to be discussed in this book logically follow from these recent developments which will be carefully analysed.

A first important goal, and Part II will be totally devoted to this, is to analyse the cases that have been decided. Whereas the previous book was written after slightly more than one year of AML experience, there is now much more case law which can be reported on. Several merger cases have been published. The same is true for decisions on monopoly agreements and on abuse of dominance. In addition, some of these cases have received a high profile in the Chinese media also (like the Baidu case, which concerns a popular internet provider in China). One goal of the book is therefore to discuss the cases and to analyse them.

A second topic to be addressed is which type of tools competition authorities in China precisely use and more particularly to what extent economic analysis is used. Economic analysis now seems to have made its way into the decision-making by competition authorities in China, although there seem to be differences. MOFCOM might be the more advanced in terms of using analytical tools, publishing information and, more interestingly, seeking collaboration with outside economists. In some cases MOFCOM called on independent economists to prepare a complete separate case analysis. The question arises to what extent economics is now used in decision-making by Chinese competition authorities and how one can judge the way in which economic insights are used.

A third topic to be addressed is certainly the implementation of the AML via guidelines. MOFCOM has chosen a very general guideline

and the other competition authorities, SAIC and NDRC have published enforcement guidelines on monopoly agreements and abuse of dominant position. They obviously merit a careful analysis.

Related to the powers of the competition authorities is of course the issue of enforcement. With three competing agencies to enforce the AML in different fields, coordination may be a serious problem. For example questions can arise on how to differentiate a pricing case (which falls under the responsibility of NDRC) from a non-pricing case (which is the responsibility of SAIC). This raises the question whether in practice difficulties of delineation between the different competition authorities have arisen.

As far as enforcement is concerned questions also arise on the design of optimal merger enforcement guidelines, for example bringing in international experiences, but also concerning private enforcement. In this respect the Supreme People's Court, after a few drafts, just published guidelines in a so-called judicial interpretation on private enforcement of competition law. These guidelines of course merit a careful analysis both from an economic as well as from a comparative perspective.

Finally there are several issues in regulation and regulatory reform that merit careful analysis. We already mentioned that the traditionally regulated industries in China like telecom and electricity have been the realm of regulation. Regulatory reforms have taken place and the question arises whether these have had the desired effects in terms of increased competitiveness and efficiency. Striking differences also occur in the sense that initially some regulatory reform initiatives were taken, but that some of those reforms seemed to have stalled. For example there seems little progress concerning regulatory reform in the railway sector in China; there was a 2002 reform in the electricity market, but further reforms stopped; the same seems true in the telecom sector where there is recently rather a regulatory standstill than a reform. Hence the question arises how these reforms (initiatives), some of which took place at the beginning of this century, had an economic effect, how the need for new regulatory reforms of these utilities can be analysed and if there is any role for competition policy to play, by combining with regulatory policies, to promote competition in these regulated industries.

These and many other topics will be discussed in the various chapters in this book.

2.5 Framework and Partners

This book emerged from a collaboration between Michael Faure from the Maastricht European Institute of Transnational Legal Research

(METRO)⁸ and the Rotterdam Institute of Law and Economics (RILE)⁹ and Xinzhu Zhang from the Research Center of Regulation and Competition of the Jiangxi University of Finance and Economics (JUFE) in Nanchang (Jiangxi, China) and the Research Center for Regulation and Competition (RCRC)¹⁰ of the Chinese Academy of Social Sciences (CASS). These institutions joined forces to organise the conference where the contributions to this book were first presented. The Research Center for Regulation and Competition of the Jiangxi University of Finance and Economics (JUFE) kindly hosted an international conference on regulation and competition policy: new developments and empirical evidence on 3–4 December 2011 where the drafts of the chapters in this book were first presented.

To some extent the scholars who participated in the 2009 conference and the subsequent book also contributed to this book. This is the case both for Chinese scholars (such as Fuliang Chen, Liangchun Yu and Xinzhu Zhang) as well as for European scholars (Michael Faure, Niels Philipsen and Stefan Weishaar); but many new collaborations were sought as well. Many of the non-Chinese scholars already had long-standing relationships, *inter alia*, via their participation in the annual conferences of the European Association of Law and Economics.¹¹ Many of the METRO-researchers had worked earlier on projects regarding the economic analysis of law in China, following an earlier conference held at Fudan University Law School in March 2006.¹² In this case, moreover, several American scholars participated as well (Beth Farmer and Mel Marquis) as well as scholars from Israel (Hila Nevo and Sharon Oded).

3. STRUCTURE OF THIS BOOK

This book is divided into four parts: Part I deals with recent developments in the AML. Strikingly two American and one Israeli scholar address the AML and recent developments, of course using a comparative perspective, analysing how developments in the AML can be considered in the light of similar developments in Europe and the US. Chapters in this part hence provide an integrated comparative approach. Chapters in the later Part III also address the AML, but their focus is mainly developments

⁸ <http://www.rechten.unimaas.nl/metro>.

⁹ http://www.esl.eur.nl/arw/sectie_rechtseconomie/rotterdam_institute_of_law_and_economics_rile/.

¹⁰ <http://www.rcrc.net.cn>.

¹¹ <http://www.eale.org>.

¹² This led to the publication by Eger, Faure and Zhang (2007).

in European competition policy, analysing to what extent some of those European developments may provide interesting lessons for China.

This Part I starts with Chapter 1 by Susan Beth Farmer who discusses recent developments in regulation and competition policy in China and more particularly trends in private civil litigation. She discusses in detail the various court cases that have been filed as private civil actions and also discusses the earlier drafts and the current version of a judicial interpretation provided by the Supreme People's Court explaining under what conditions private actions for competition law violations can be filed in China. Chapter 2 by Mel Marquis is called 'Abuse of administrative power to restrict competition in China: four reflexions, two ideas and a thought'. He pays attention to a particularly important issue from the perspective of the AML (and so far largely neglected in the literature), being to what extent competition law can be used to remedy anti-competitive government measures. He discusses how these issues are dealt with in China and then analyses to what extent anti-competitive abuse of administrative power could be enforced under the AML or under administrative law. Chapter 3 by Sharon Oded also discusses an interesting and important aspect of the enforcement of competition law, being to what extent a leniency policy can be adopted. He critically discusses the implementation rules that were promulgated in December 2010 by the NDRC and the SAIC in the light of experiences in the US and in Europe and provides important recommendations for fundamental reforms.

Part II contains five chapters written by Chinese scholars and all providing some empirical perspective on the practical experience with the AML. Shi-Ji Gao and Yan Wan deal in Chapter 4 with 'Market, regulation and state building in China' and sketch how through various sectoral regulatory reforms (*inter alia* in the electricity and telecommunication sectors) China is moving from an administrative state with discretion towards a state built on the rule of law. In Chapter 5 Liangchun Yu and Wei Zhang provide 'Research on the intensity and effects of industrial administrative monopoly in China'. They deal with the important role of industrial administrative monopolies and in fact show that many industries make large losses. Chapter 6 by Fuliang Chen and Tao Xu deals with 'A comparative study on welfare results of non-linear and linear pricing'. They deal with the pricing problem within natural monopolies such as public utility and discuss the consequences of adopting a non-linear pricing strategy. Chapter 7 by Shilin Zheng and Xinzhu Zhang discusses 'The effect of the Chinese telecommunications reform on industrial growth: 1994–2007'. Using an econometric analysis (using provincial panel data) they analyse the effects of the regulatory reforms on the productivity in the telecommunications area. In Chapter 8 Tao Wu analyses the 'Relevant product

market definition of anti-trust cases in the internet industry: taking the Baidu cases as example'. He analyses the high profile Baidu case to illustrate how competition authorities in China have dealt with the definition of the relevant market in the internet industry.

Part III provides European perspectives on the AML. Firat Cengiz discusses in Chapter 9 'The modernisation of the EU competition law regime: institutional design. Lessons for China?'. She shows the substantive and procedural modernisation that the EU competition law regime has gone through and since the Chinese competition law regime has been greatly influenced by the European model she discusses to what extent China can draw lessons from the reforms that took place in Europe. In Chapter 10 Hila Nevo deals with 'Market definition under attack: how relevant is the relevant market?'. She shows that the traditional market definition methodology used by courts is increasingly coming under attack both in Europe and in the US. Stefan Weishaar in Chapter 11 discusses 'Competition law and market integration – A European perspective'. He deals with the important question how competition law can be used on territorial restraints as a tool to foster market integration. It is a topic that has received a lot of attention in Europe and could also be an issue to be considered by the Chinese legislator. Finally Niels Philipsen deals in Chapter 12 with the case of 'Competition advocacy and case law in Europe: The case of the liberal professions'. He shows that increasingly competition authorities have been interested in applying competition rules also to liberal professions (subject to licensing regimes) and that this may be an important development for China as well.

Part IV (Conclusions: future look) consists solely of Chapter 13 which offers concluding remarks by the editors.

4. CONTRIBUTORS

The contributors to this book are, as was made clear, from various universities in China, Europe, Israel and the US. Michael Faure, Niels Philipsen and Stefan Weishaar were all from the METRO Institute of Maastricht University, co-organiser of the conference that preceded this book. Stefan Weishaar is currently working at the University of Groningen. Michael Faure and Sharon Oded also work at the Rotterdam Institute of Law and Economics (RILE) in Rotterdam (the Netherlands). Firat Cengiz is equally from the Netherlands and working at the faculty of law at the Centre of Law of Economics from Tilburg University. Hila Nevo is from the law school of the University of Haifa. Mel Marquis is connected to the European University Institute in Firenze and the University of Verona.

Susan Beth Farmer is a professor of law and international affairs at Pennsylvania State University, Dickinson School of Law in the US.

Xinzhu Zhang and Fuliang Chen are both from the Jiangxi University of Finance and Economics, the host of the conference. Xinzhu Zhang is also director of the Research Center for Regulation and Competition of the Chinese Academy of Social Sciences. Shiji Gao is connected to the Development Research Center of the State Council and to the Beijing Normal University. Yan Wan is from the Beijing University of Posts and Telecommunications. Liangchun Yu and Wei Zhang are both from the School of Economics of Shangdong University in the Shandong Province. Shilin Zheng is, like Xinzhu Zhang, connected to the Chinese Academy of Social Sciences. Tao Wu is from the Law School of the Central University of Finance and Economics in Beijing.

A complete list of contributors and their affiliations is provided after the table of contents.

5. ACKNOWLEDGEMENTS

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Finally we are grateful to our publisher Edward Elgar for their kind and professional support in the publication of this book.

Texts were finalised in April 2012 and for that reason developments after that date have, with a few exceptions, not been treated. An exception constitutes Chapter 1 by Beth Farmer who discusses the recent judicial interpretation provided by the Supreme People's Court which was issued on 3 May 2012.

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