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Antitrust and Investment*

First Annual Antitrust Symposium

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Frank L. Fine, LL.M., Ph.D.

GENERAL EDITOR



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FRANK L. FINE, LL.M., PH.D.
General Editor

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MATTHEW BENDER

About the General Editor

FRANK L. FINE, LL.M., Ph.D.

Frank Fine has been practicing EC competition law in Brussels since 1986. He is currently Senior Counsel to DeHeng Law Offices, a major Chinese law firm, and Director of EC Competition Law Advocates. He is engaged in the practice of EC competition law before the European Commission and Courts, the provision of adversarial and legislative support services to national competition authorities, and the provision of tactical and logistical support to parties involving in national competition law investigations and antitrust litigation.

Mr Fine is also the Executive Director of the China Institute of International Antitrust and Investment, established in March 2012 under the auspices of the China University of Political Science and Law, where Mr Fine is Visiting Professor of Competition Law.

He is currently the General Editor of the LexisNexis three-volume loose-leaf treatise, *EUROPEAN COMPETITION LAWS*. In 2006, Mr Fine authored a book with Sweet & Maxwell entitled, *THE EC COMPETITION LAW ON TECHNOLOGY LICENSING*. He is also the author of one of the seminal works on EC merger control, *MERGERS AND JOINT VENTURES IN EUROPE: THE LAW AND POLICY OF THE EEC*.

Mr Fine obtained his law degree from Loyola Law School (Los Angeles), where he was Editor-in-Chief of the *LOYOLA INTERNATIONAL & COMPARATIVE LAW JOURNAL*. He subsequently obtained an LL.M. (*with honors*) and Ph.D. in EC Competition Law from the University of Cambridge. He is a Fellow of the American Bar Foundation and has been Vice Chair of the ABA Antitrust Section's Cartel and Criminal Practice, Intellectual Property and International Committees, as well as a member of the Section's Civil Redress Task Force. He also sits on the Advisory Board of the Center for Financial Regulation and Economic Development of the City University of Hong Kong.

Mr Fine is perennially listed in *EUROPEAN LEGAL EXPERTS* (Belgium; EU and Competition).

Preface

10 July 2013, Beijing

The School of International Law of the China University of Political Science and Law is pleased to sponsor the China Institute of International Antitrust and Investment. This is probably the only institution that focuses on the international dimension of competition policy, that is, the impact of the competition regime of a given country on the influx of foreign direct investment.

This book features a collection of selected papers that were presented in the first international conference that the Institute hosted in March 2013, which attracted executives of dozens of multinational corporations and nearly two hundred international lawyers and renowned scholars. Given China's nascent competition regime and its status as a major destination of global foreign direct investment flow, a large portion of the papers are devoted to the study of China's competition policy or/and its impact on foreign direct investment. An equally significant portion of papers are concerned with the competition regimes of other countries and their impact on Chinese enterprises' globalization strategy, having taken into account the fact that China has become a leading source of the foreign direct investment flow.

By offering insights on the evolving competition regimes of various jurisdictions, and presenting firsthand materials, this book will be a useful handbook for corporate executives, practitioners and legal scholars. It is also valuable to legislators and competition law enforcement agencies in that most of the papers offer pragmatic advice concerning the improvement of the competition regimes and their enforcement.

At the time of the publication of this collection of selected papers, I would like to offer my congratulations on the authors. I would also like to give my sincere thanks to the editors, who were also the organizers of the aforesaid international conference. They deserve our applause.

Kong Qingjiang

Dean, School of International Law, China University of Political Science and Law

Preface

The China Institute of International Antitrust and Investment (“CIIAI”) was established in March 2012 by the China University of Political Science and Law (“CUPL”), each of which is based in Beijing. The CIIAI’s goals are to promote due process and transparency in antitrust investigations, as well as policy convergence where it is practical and advisable to do so. It is hoped that by achieving these objectives, the CIIAI may assist companies engaged in inbound and outbound trade and investment.

The CIIAI’s core management determined at the outset that a valuable means of stimulating dialogue aimed at achieving its objectives was to sponsor a high-level two-day symposium in Beijing, where regulators, in-house lawyers, private practitioners and scholars could freely discuss the antitrust issues facing Chinese companies in China’s main overseas markets and, at the same time, discuss barriers to foreign companies operating in China.

Our first annual symposium, which took place in Beijing on March 21–22, 2013, involved a broad spectrum of the relevant constituencies and interest groups. As the Chairman of this event, I was astonished by how openly frank many of our speakers were and, moreover, by how accepting the Chinese regulators were of the prevailing openness. The pinnacle of the event was the government roundtable at the end of the second day, at which I had the opportunity to test the openness of three senior PRC antitrust officials representing MOFCOM, SAIC and the NDRC. I encourage you to flip through to the transcript of that roundtable discussion. It is filled with valuable information and insights, but it was also a microcosm of the good will and positive feelings evidenced at the symposium.

In order to reinforce the intellectual tenor of the symposium, we asked our speakers to submit papers to us for inclusion in an eventual book to be published by LexisNexis. This book is the result of that process. Shortly after the conference, we decided that the book would be greatly enhanced if we solicited papers from experts whose jurisdictions were not represented in our panels. This effort resulted in the submission to us of a number of topical papers from around the world—and on relatively short notice. It is worth restating: these experts did not speak at the symposium, but they nevertheless drafted original, outstanding papers for us. Accordingly, it was decided that these experts would become *Fellows* of the CIIAI for 2013–14. The entire CIIAI team wholeheartedly thanks our Fellows for their contribution to the Institute and to this book: Jon Turner QC (United Kingdom), Kaoru Hattori (Japan), Tamara Dini (South Africa), Maurizio Pappalardo (Italy), Alf-Henrik Bischke (Germany), Gina-Cass Gottlieb (Australia), Peter Waters (Australia and Hong Kong), Sangwook Daniel Han (Korea), Lim Chong Kim (Singapore), Omar Guerrero (Mexico) and Neil Campbell (Canada).

It was because of the generous contributions received from our sponsors that the CIIAI had the necessary funding to organize its first symposium. Our sponsors were: AirFrance/KLM, Apple, Applied Materials, Clifford Chance, Compass Lexecon, Cooley LLP, DeHeng Law Offices (PRC), ExxonMobil, Freshfields, FTI Consulting, General Motors, George Washington University Law School, Global Law Office (PRC), Grandall Law Firm (PRC), IAG (parent of BA/Iberia Airlines), Intel, Kirkland & Ellis, Microsoft, Morrison & Foerster, Paul Hastings, Procter & Gamble, Qualcomm, RBB Economics, Siemens, Skadden Arps, Tian Du Law Office (PRC), and Unilever. Some of these sponsors serve on our Board of Trustees. They are: Compass Lexecon, DeHeng Law Offices, Freshfields, GW Law, IAG, Qualcomm, RBB Economics, and Skadden.

Preface

This Preface would be incomplete if I failed to give credit to Professor Qi Huan and Liu Hua, respectively our Managing Director and Administrative Manager. They dealt patiently with our donors and speakers and provided all of the operational and logistical support that one could have hoped for—everything from designing our initial website to the massive undertaking of assembling a global database. They are to be highly commended for their service to the Institute, and we are very grateful to have them. Moreover, not to be outdone by our Fellows, they have written excellent papers, which are included in this book.

Lastly, I wish to thank the Dean and Vice Dean of the School of International Law, respectively Professors Kong Qingjiang and Zhang Liying (Lily), for their vision in bringing the CIIAI to fruition.

Frank L Fine
Executive Director, CIIAI
12 July 2013

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CHAPTER 1

CIIAI – Keynote Speech

Prof. Huang Jin*

Officials, Ladies and Gentlemen, Good morning everyone!

There is an old Chinese saying, “It’s happy to see friends from afar.” I am so glad today to see so many distinguished guests from all over the world to participate in this unprecedented conference, hosted by the China Institute of International Antitrust and Investment. On behalf of China University of Political Science and Law, I would like to welcome you all! Also on behalf of China University of Political Science and Law, I would like to express my thanks to officials of antimonopoly law enforcement agencies from international organizations, foreign countries, and China!

As the “Economic Constitution”, it is said that antitrust law plays two different roles: it is a safeguard for fair competition in traditional market economy countries, but for countries under economic transition, it is a law aiming at creating a fair competition environment. I would like to point out that, in fact, the goal is the same, that is, to achieve fair market competition. On August 1, 2008, China’s Anti-Monopoly Law formally came into force and now nearly five years has passed. Tracing back these five years, what struck me most is that Anti-Monopoly law is more and more relevant to peoples’ lives and its effect on economic development is becoming more and more active. From Coca Cola purchasing Huiyuan; to the administrative monopoly case in which four enterprises from Beijing brought a lawsuit against the General Administration of Quality Supervision, Inspection and Quarantine; from Google’s acquisition of Motorola and Wal-Mart’s acquisition of No.1 Store this year, to the several hundred millions of fines imposed on Samsung and other well-known overseas enterprises by relevant enforcement agencies, anti-monopoly law has gradually come into our vision and is attracting increasing attention.

In the past five years, China’s anti-monopoly legislation, enforcement and research have experienced significant growth and development. Of course, there are still problems in China’s Anti-Monopoly law. For example, its implementation rules need to be improved; its enforcement needs further coordination; it should positively respond to the practical issues in the development of China’s market economy. From my perspective, the topic of today’s symposium, “*The First Five Years of AML: Present and Perspective*”, is marvelous. We are standing right on the foothold that

* The President of China University of Political Science and Law; Welcoming Speech given at the First Annual Antitrust Symposium of the China International Institute of Antitrust and Investment (CIIAI) held at the Friendship Hotel, Beijing on 21st March 2013 thru 22 March 2013.

serves as a link between the past and the future. With the increase of China's economic share in the global market and the expansion of its investment, we need, on the one hand, to gain a deeper insight into the anti-monopoly system of every trade partner and relevant rights and obligations, and, more importantly, to establish a connection between the Chinese system and those of other countries; on the other hand, each important trade partner is in urgent need of a further understanding of China's anti-monopoly system, from concentration of undertakings to abuse of dominance, from monopoly agreements to administrative monopoly.

As everyone has seen, the China Institute of International Antitrust and Investment (CIIAI) of CUPL provides a precious platform which, by holding high-end academic symposiums, enables Chinese and foreign public officials, specialists and scholars, industry associations, business managers and legal practitioners to gather and exchange ideas extensively, aiming at improving anti-monopoly legislation of China, enriching enforcement experiences, and advancing the internationalization process of anti-monopoly policies of each country. It is evident enough that such a platform has attracted much attention since so many Fortune Global 500 enterprises, globally renowned law offices and economic consulting companies have arrived here today.

I hope that everyone can speak out freely, brainstorm anti-monopoly issues and spark inspirations in the following two days. It is my great honor to announce the opening of the first annual conference of CIIAI, and I wish the conference a complete success!

Thank you all!

CHAPTER 2



United States of America Federal Trade Commission

The Never-ending Yet Vital Pursuit of Greater Cooperation, Convergence, and Transparency

Maureen K. Ohlhausen*

Good morning. It is my great pleasure to be here at the First Annual Symposium held by the China Institute of International Antitrust and Investment (CIIAI). I would like to thank Frank Fine, the Executive Director of the CIIAI, for graciously inviting me to speak at this inaugural symposium. Frank and his colleagues at the Institute should be commended for establishing the first globally-oriented antitrust think tank in Asia. Along with other observers of competition law and policy developments, I look forward to the great work and programs the Institute will produce in the future.

This morning, I would like to address three goals that competition agencies have pursued for many years: cooperation, convergence, and transparency. Much has been accomplished in these areas by agencies around the world. Much like the goal of perfection, however, the pursuit of greater cooperation, convergence, and transparency is a never-ending one. We can always seek greater cooperation among competition authorities, particularly those that have arrived on the scene more recently. We can always work toward closer harmonization of the process and substance of our competition analyses. And, we can always provide greater transparency and guidance to those following and affected by our enforcement and policy decisions. Nonetheless, each of these goals is essential to a well-functioning system of global competition authorities.

In my remarks, I will discuss my expectations for the Federal Trade Commission's (FTC or Commission) priorities in the areas of cooperation and convergence, as well as my own thoughts on the importance of transparency. I will also touch on some recent developments—in both the United States and China—in each of these three areas.

Before I proceed any further, let me take the opportunity to clarify that I am speaking only for myself in presenting these remarks; I am not speaking for the entire Federal Trade Commission. Nonetheless, I can say without hesitation that there is a high degree of continuity in the FTC's international antitrust agenda. The FTC is institutionally structured

* **Commissioner, Federal Trade Commission.** Remarks presented at the First Annual Symposium — China Institute of International Antitrust and Investment — China University of Political Science and Law, Beijing, China. March 22, 2013

to ensure continuity, with Commissioners from both of the two major U.S. political parties and staggered seven-year terms for the Commissioners that transcend the election cycle. Also, the priorities of Democratic and Republican Commissioners and administrations in the international area have been remarkably consistent, emphasizing bilateral and multilateral cooperation and seeking convergence toward sound competition policy.

This commitment to fostering international cooperation—stretching back over many administrations and several FTC Chairmanships—has enabled the FTC to strengthen its ties with our international partners, play a lead role in multilateral fora, such as the International Competition Network (ICN), and expand our program of international technical assistance. Whatever policy differences sometimes divide us domestically, Republicans and Democrats have largely shared an international vision and a strong commitment to the role of the FTC in building stronger international antitrust relationships.

SYNOPSIS

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§ 2.02 Convergence

- [1] Benefits of Convergence by Competition Authorities
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§ 2.01.1 Cooperation

[1] Benefits of Cooperation Among Competition Authorities

With that introduction, let me start with the important goal of increased cooperation among competition agencies. To make what I think is by now a fairly well established point, inter-agency cooperation on competition cases is critical given the global nature of many businesses and transactions and the inter-connected nature of the global economy. There are now well over 100 jurisdictions enforcing competition laws. Cooperation among those agencies can mean many different things, including discussions of substantive competition law, economic analysis, and procedural issues; the sharing of general knowledge about a particular industry; and, of course, coordinating on a specific investigation. To be clear, however, cooperation does not necessarily mean consistent results in every case; that is simply not a realistic goal.

Cooperation among competition authorities benefits the agencies involved in the cooperative efforts, the businesses and other parties subject to competition laws, and the economies of the countries involved in the cooperation. Cooperation allows agencies to identify issues of common interest, to improve their analyses, and to avoid inconsistent outcomes. The more cooperation there is across agencies, the more those agencies can deepen relationships with their counterparts—at both the staff and supervisory levels. Even in situations where detailed specifics of an investigation cannot be shared, it is useful for competition authorities to be able to share their experiences—both good and bad. Further, cooperation on cases helps businesses around the globe by providing more consistent outcomes on a particular case, as well as enhanced certainty, which in turn facilitates greater investment and innovation by all businesses. Finally, cooperation facilitates the effective and efficient enforcement of competition laws, which helps to maintain competitive markets and thus a more attractive investment climate.

The most commonly cited example of inconsistent outcomes in the competition area involves merger remedies, or restrictive conditions, as they are often called here in China. Cooperation can help avoid situations in which remedies imposed or accepted by one agency are inconsistent with those imposed by an agency in another jurisdiction. Cooperation can also be beneficial when agencies are coordinating the announcement of their respective merger remedies.

[2] FTC Developments and Priorities in the Area of Cooperation

The FTC works bilaterally with a large and growing number of jurisdictions on case cooperation and assistance.

The United States government has bilateral cooperation agreements with eight jurisdictions: Australia, Brazil, Canada, the EU, Germany, Israel, Japan, and Mexico. In addition, the U.S. antitrust agencies—the FTC and the U.S. Department of Justice Antitrust Division (Antitrust Division)—have entered into Memoranda of Understanding (MOUs) with the competition agencies in Chile, Russia, India, and of course China.¹

Pursuant to these agreements, or often without an agreement in place, the staff of the FTC cooperates with foreign competition agencies on individual cases and on developing competition policy. The agencies frequently exchange investigative information, for example, when the FTC and a foreign agency review a case that raises competition concerns in one or both jurisdictions. The agencies may exchange both public information and what we often refer to as “agency confidential” information—that is, information that the agency does not routinely disclose to outside parties, but may disclose under federal law. Examples of agency confidential information include staff views on market definition, competitive effects, and remedies, as well as the fact that the FTC is investigating a particular party.

To mention a few of our ongoing cooperation efforts, we continue to have frequent

¹ Fed. Trade Comm’n, International Antitrust and Consumer Protection Cooperation Agreements, <http://www.ftc.gov/oia/agreements.shtm>.

opportunities to work with our colleagues in the Canadian Competition Bureau and the Directorate General for Competition at the European Commission (DG Comp). Following the enactment of Canadian rules aligning their merger review procedures more closely with the U.S. system, the FTC has worked closely with Canadian officials to ensure maximum interactivity between our systems. We hold regular in-person roundtables between case handlers. We also have had a series of staff exchanges, made possible by the US SAFE WEB Act,² a statute that enables the FTC to host foreign competition (and consumer protection) agency officials and, in appropriate circumstances, provide them with access to non-public materials, allowing them to gain valuable experience by working with case teams at the FTC.

We have worked closely with DG Comp on merger investigations for many years. More recently, the FTC and DG Comp have cooperated on numerous unilateral conduct investigations, including the recent *Google* search bias and standard-essential patent matters. Although cooperation in conduct cases is more challenging—given that they are not subject to the same time constraints as mergers and parties may not have the incentive to facilitate cooperation—coordination on these matters is important and we are committed to making that happen with the EC and other agencies whenever possible and appropriate.

In recent years, we have seen the emergence of many new competition laws and merger control regimes across Asia, Latin America, and Africa. This presents opportunities to spread the benefits of sound competition policy, but also raises challenges to both cooperation and convergence. New laws and MOUs, combined with increased cross-border business activity, are laying the foundation for broader cooperation, and we have had opportunities to cooperate productively with jurisdictions such as Mexico. The FTC has worked closely with the Mexican Federal Competition Commission to strengthen its capacity to evaluate and address anticompetitive practices. This has included coordinating a series of judicial education programs featuring prominent U.S. jurists, as well as tightening our coordination in merger reviews. Our relationship with the Mexican competition agency is strong and has provided a bridge to other agencies in Latin America. Brazil, for example, has made major institutional reforms and adopted major legislative changes, including to its merger review system.

From experience, we know that bilateral case cooperation, while distinct from convergence, also facilitates greater understanding and can create a foundation of legal convergence as well. As our cooperation extends to newer agencies and additional types of cases, we hope that we will build a better foundation for deeper substantive and procedural convergence. I expect that finding solutions to practical problems agencies face will build stronger relationships as we learn from each other and assist each other in improving our performance and effectiveness.

Nonetheless, there are certain challenges that we are likely to encounter in our

² Undertaking Spam, Spyware, and Fraud Enforcement with Enforcers beyond Borders Act, Pub. L. No. 109-455, 120 Stat. 3372 (2006).