



COMPETITION POLICY AND REGULATION

Recent Developments in
China, the US and Europe

EDITED BY
MICHAEL FAURE
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Competition Policy and Regulation

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Europe

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NOTE

- * Since it is customary in China to put family names first we have, for all authors (Chinese, European and American) put family name first and then the first name.

Abbreviations

AAC	Average Avoidable Costs
AB	Anheuser Busch
AML	Anti-Monopoly Law
AQSIQ	Administration of Quality Supervision Inspection and Quarantine
ASEAN	Association of Southeast Asian Nations
CASS	Chinese Academy of Social Sciences
CGI	Corporate Governance Index
CICPA	Chinese Institute for Certified Public Accountants
CLPA	Chinese Licensed Pharmacists Association
CPA	Certified Public Accountant
CSD	Carbonated Soft Drinks
DADR	Draft Abuse of Dominance Regulation
DAPMR	Draft Anti-Pricing Monopoly Regulation
DMAR	Draft Monopoly Agreements Regulation
DSB	Danske Statsbaner
EC	European Commission
ECJ	European Court of Justice
ECR	European Court Reports
EU	European Union
FFAD	Entreprenørforeningens Affalds/Miljøsektion
GDP	Gross Domestic Product
GM	General Motors
HDI	Human Development Index
HHI	Herfindahl-Hirschman Index
IPR	Intellectual Property Right
ISCP	Institution Structure Conduct Performance
JUFE/JXUFE	Jiangxi University of Finance and Economics
METRO	Maastricht European Institute of Translational Legal Research
MMA	Methyl Methacrylate
MOC/MOFCOM	Ministry of Commerce
NDRC	National Development and Reform Commission
NTT	Nippon Telegraph and Telephone Corporation

OECD	Organization for Economic Cooperation and Development
PCA	Principal Component Analysis
PHS	Personal Handy-Phone Systems
PIATS	Product Identification Authentication and Tracking System
PPP	Public-Private Partnership
R&D	Research and Development
RAMI	Regional Administrative Monopoly Index
RCRC	Research Centre for Regulation and Competition
RILE	Rotterdam Institute of Law and Economics
SAIC	State-Administration for Industry and Commerce
SDA	State Drug Administration
SEC	Securities and Exchange Commission
SFDA	State Food and Drug Administration
SHUFE	Shanghai University of Finance and Economics
SOE	State-Owned Enterprise
SOX	Sarbanes-Oxley Act
SPAC	State Pharmaceutical Administration of China
SSNIP	Small but Significant and Non-Transitory Increase in Prices
TFEU	Treaty on the Functioning of the European Union
TRISC	Tangshan Renren Information Service Co.
UIBE	University of International Business and Economics
UK	United Kingdom
UN	United Nations
US	United States
WTO	World Trade Organization

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1. Introduction/editorial foreword

Michael Faure and Xinzhu Zhang

1.1 REASONS FOR THIS BOOK

After long preparations during the 29th session of the Tenth National People's Congress on 30 August 2007 China adopted an Anti-Monopoly Law. Almost one year later, on 1 August 2008 this law entered into force.

During the preparation of this act a highly transparent consultation procedure was followed whereby various stakeholders, but also academics were asked for their opinions concerning an efficient competition law and policy. A question that, *inter alia*, arose was whether an Anti-Monopoly Law in China should follow more the American approach of the Clayton and Sherman acts or whether the example of European competition policy would be a more appealing model for China. Drafts of the Chinese Anti-Monopoly Law were discussed, *inter alia*, from the perspective of law and economics.¹ The new competition law has meanwhile been promulgated and entered into force and the first antitrust cases have already been brought.² The first cases show that the law, which is rather general in scope, still has a lot of theoretical and practical issues that need to be answered, for example concerning the enforcement of competition law, but also related to the question of how an Anti-Monopoly Law can be applied in a legal system where many, if not most enterprises are state-owned and where many economic activities are subject to administrative monopolies. This poses quite particular challenges within this political-institutional context and tradition of China.

This book considers competition policy and regulation in the light of the new Anti-Monopoly Law in China. The goal of this book is to address the relevance of competition policy for China from a broader theoretical and practical perspective. This is done by bringing together lawyers and economists who adopt an integrated approach – called law and economics – to competition policy. The combination of these economic and legal insights may be highly useful for the specific case of China since law and economics scholars have gained a lot of experience on how the particular institutional

shape and structure of competition policy may be able to reach the goals the policymaker wishes to achieve.

Moreover, given the fact that the Anti-Monopoly Law in China was so heavily reliant on a comparative approach, by considering whether the US or rather the European example should be followed, it seems interesting to see, now that the anti-monopoly is in action, how the text and practice of this new Anti-Monopoly Law compares to the practices in the US and in Europe. Hence the goal of this book is to put evolutions in China also in a broader comparative methodology by discussing them within the framework of earlier experiences in Europe and in the US. Particularly since these experiences have to a large extent played a role in the drafting of the Anti-Monopoly Law in China it makes sense to critically examine evolutions in competition law and policy in Europe and the US as well.

One goal of this book is therefore to provide information on the legal and economic aspects of the new Anti-Monopoly Law in China, but another goal is to put evolutions in competition law in China in a broader global perspective by comparing these to the US and Europe. In this way the contributors to the book hope to help in shaping an adequate competition policy in China, but also to draw lessons from the particular features of China for competition policy for other legal systems.

It may be clear that studying this spectacular country and its rapidly growing economy is fascinating for any scholar interested in law and economics. The crucial question is of course to what extent competition policy and regulation are essential tools to explain the success of the economic growth in China. Given the fact that China has largely experienced this spectacular economic growth without any competition law, one could at first blush conclude that institutional structures like competition policy and regulation are not a necessary condition for economic success. Chinese policymakers have apparently (and probably rightly so) decided differently by arguing that for a sustainable economic growth an adequate competition policy is necessary. Hence, there are many reasons to look at the role of competition law and policy in the rapidly growing Chinese economy with all of its (from a western perspective) peculiar features.

1.2 METHODOLOGY

1.2.1 Multidisciplinarity

It may be clear that a complex question such as what legal rules and policy instruments are adequate to promote social welfare within the particular Chinese context needs a multidisciplinary approach. Although one could

imagine many (social) sciences to be involved in answering these types of questions the current book has mainly contributions from lawyers and economists, most of them working in the interdisciplinary field of law and economics. This book hence provides for European and American scholars interested in law and economics an impression of the challenges posed by applying traditional economic models to new fields and opportunities to test those models empirically, given the rich and exciting developments that are currently occurring in China. For the particular Chinese situation, the insights provided by economic theories with respect to competition and regulation can be highly useful now that the rapidly growing Chinese economy is struggling with the need to find and develop legal rules that accompany this economic development in an appropriate way. Challenging questions arise in this respect, *inter alia*, whether it is possible to develop legal and policy instruments that allow the promotion of social welfare, but to do so with respect for the particular Chinese political-institutional context and Chinese traditions.

A particular issue to which a lot of attention is paid in this book is related to the fact that many aspects of the Chinese legal system today may not correspond with what economists would advise as an efficient legal system. For example the fact that, unlike Europe or the US, there is a large degree of state involvement, poses particular questions for the application of the Anti-Monopoly Law. One of the challenges for law and economics scholars is to see whether even within this particular Chinese context (which may not correspond to the assumptions in traditional economic models), law and economics can still contribute to a better understanding of the legal system and whether it can still provide useful policy advice.

1.2.2 Legal Interdisciplinarity

A book on competition policy and regulation cannot only address issues of competition law in the strict sense, but necessarily needs to take a *broader perspective*, also as far as the legal issues involved are concerned. Hence, in addition to traditional competition law, attention will for example be paid to administrative law, when addressing the role of administrative monopolies and state-owned enterprises in the Chinese economy. Furthermore industrial regulation and professional licensing, as well as self-regulation of the professions, can strongly affect the competitive nature of a market and will hence also be taken into account. Moreover, *the effectiveness of a competition law regime may to a large extent depend upon its enforcement*. In that respect sanctioning systems, such as administrative and criminal law, will have to be analysed in their ability to enforce competition law.

1.2.3 Comparative Approach

The necessity of a comparative approach has already been stressed. Evolutions in China will be discussed within the framework of earlier experiences in the US and in Europe. Given the fact that these experiences have to a large extent played a role in the drafting of the Chinese Anti-Monopoly Law, it makes a lot of sense to critically examine evolutions in competition law and policy in Europe and the US as well. Moreover, this comparative approach provides interesting scope for mutual learning whereby on the one hand experiences in the US and Europe may inform Chinese academics and policymakers but where on the other hand the richness of policy experiences and developments in China today may inspire academics and policymakers in Europe and the US.

1.3 FRAMEWORK AND PARTNERS

This project emerged from a collaboration between Michael Faure from the Maastricht European Institute of Transnational Legal Research (METRO)³ and the Rotterdam Institute of Law and Economics (RILE)⁴ and Xinzhu Zhang from the Research Centre for Regulation and Competition of the Jiangxi University of Finance and Economics (JUFE) in Nanchang (Jiangxi, China) and the Research Centre for Regulation and Competition (RCRC)⁵ of the Chinese Academy of Social Sciences (CASS). These institutions joined forces to organize a conference where the contributions to this book were first presented. Hence a further cooperation was sought with Professor Fuliang Chen of the Research Centre for Regulation and Competition of the Jiangxi University of Finance and Economics (JUFE) in Nanchang (Jiangxi, China) who kindly hosted an international conference on 'Competition Policy and Regulation in China' on 5–6 December, 2009 where drafts of the chapters in this book were first presented.

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.⁶ Moreover, some American contributors, like Thomas Ulen, had earlier contacts with China since his famous handbook (co-authored with Robert Cooter)⁷ has also been translated into Chinese. 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 2006.⁸ The current book is in that respect building upon earlier projects with Edward Elgar presenting the results of research collaboration in the social sciences between European and Chinese scholars.⁹

1.4 TOPICS

As was mentioned above, the 2009 conference should be seen as the follow-up to an earlier conference (in March 2006) which was devoted to the broad area of the economic analysis of law in China. In the more recent conference, a particular focus takes place on the law and economics of competition and regulation. These topics have been selected because they are of particular interest for the cooperating research institutes and because they are closely linked. The way in which market forces and competition interact with regulation is one of the crucial issues within the context of the rapidly growing Chinese economy, and the interest in competition is clearly linked to China's Anti-Monopoly Law, which entered into force in August 2008. However, many questions still arise, *inter alia*, with respect to the question of how this Act will be implemented in practice. This topic is especially exciting given the particular role of so-called administrative monopolies and the specific role of the state in the Chinese economy. The question thus arises whether the new legislation is able to provide the correct institutional context for competitive behaviour, also taking into account the particular situation of administrative monopolies.

The role of the state is equally an interesting issue as far as corporate governance is concerned. The Chinese corporate structure is characterized by a large involvement of state actors which makes it extremely difficult to apply classic ideas of corporate governance to corporate actors. Also as far as corporate law is concerned, in 2005 a legislative change took place whereby corporate law has been fundamentally reformed. There again, the question can be asked to what extent the corporate law reform has been an example of a successful institutional change allowing Chinese corporate actors on the one hand to attract foreign capital and on the other hand to compete efficiently in a global market.

Both in the area of competition law and in corporate governance the traditional dichotomy between antitrust and regulation through government involvement always plays a role. Whereas government involvement through regulation may traditionally have been strong in China, in recent years, especially as far as the organization of the market is concerned, radical deregulations have taken place. Again, the question arises to what extent theories concerning regulation of markets can be used to test recent developments in China.

Some specific topics will be more particularly addressed. For instance, various authors examine whether traditional models on, for example, enforcement of regulation can also work within a context where an effective legal protection might not immediately be at hand. Also, chapters address whether the traditional choice of legal and policy instruments as

discussed in the choice of instruments literature should lead to differing results within a context where legal instruments are still developing. Some contributors, for instance, address the consequences of still existing limitations in the Chinese legal context, for instance, with respect to the right to own property or real estate.

In addition to the more general topics to be discussed in this book, the brief history of the Chinese Anti-Monopoly Law shows that various more specific issues at least merit some attention. The editors have invited contributors to deal with those topics, from a Chinese and a European/or American perspective. The following topics are of importance as far as the Chinese Anti-Monopoly Law is concerned:

- the application of the Chinese Anti-Monopoly Law to administrative monopolies;
- material competition law: control of vertical, horizontal and other restrictions on competition;
- local monopolies, state aid, barriers to entry and market integration;
- application of the anti-monopoly legislation to self-regulatory bodies;
- enforcement of competition law and policy;
- merger control: substantive regulation and cases;
- discussion of current cases in China.

These topics can all be found in the various chapters included in this book.

1.5 STRUCTURE OF THE BOOK

The book is divided into six parts: Part I deals with general issues. It includes Chapter 2 by Thomas S. Ulen called 'The uneasy case for competition law and regulation as decisive factors in development: some lessons for China'. In Chapter 3 Yong Huang and Zhe Zhang present a 'Study on frontier issues and the future road of regulation over monopoly agreements in China'. A next general issue is presented in Chapter 4 by Roger Van den Bergh and Michael Faure, which discusses 'Critical issues in the enforcement of the Anti-Monopoly Law in China' from a law and economics perspective.

Part II focuses on the, for China, very important situation of administrative monopolies and state-owned enterprises. In Chapter 5, Liangchun Yu and Donghua Yu discuss 'The measure of regional administrative monopoly in China'. Stefan Weishaar focuses in Chapter 6 on 'Administrative monopolies, state aid, barriers to entry and market integration' as