Development of Abuse of Administrative Power to Eliminate or Restrict Competition in the Anti-Monopoly Law of the People's Republic of China and the Impact of Article 106 of EU Competition Law and Free Movement Rules

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Author’s Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Abstract

The Chinese Anti-monopoly Law (AML) entered into force on August 1, 2008 and abuse of administrative power to eliminate or restrict competition is prohibited and dealt in Chapter Five of this law. Abuse of administrative power is one of the most significant ways to eliminate or restrict competition in China. Great concerns had been focused on the rules of abuse of administrative power before the AML was promulgated. However, its progress in practice is slow and experiences difficulties after this law took effect. Little research has been undertaken outside of China on abuse of administrative power to eliminate or restrict competition due to the specific background and situation pertaining in China.

Concerning to abuse of administrative power, the AML have close relationships with EU competition law and free movement rules. This thesis aims to provide a critical comparison between the AML, Article 106 TFEU of EU competition law and free movement rules, and draws on the EU's experience as a source of criticism and guidance in relation to the application of abuse of administrative power to eliminate or restrict competition in the AML.

This study first provides a background introduction on the development of the AML and abuse of administrative power to eliminate or restrict competition and analyses the complicated causes of abuse of administrative power in competition through three areas: the history of China's economic system, economic theory and legislation. The main comparative and critical research are held in Chapters Four and Five which examine the relationships between abuse of administrative power in the AML, Article 106 TFEU and EU free movement rules respectively. In Chapter Six a case study is taken in telecommunications sector. The application of abuse of administrative power provisions of the AML in telecommunications sector is examined through three areas: market access, interconnection and universal services.

Abstract

This thesis concludes by noting that (1) abuse of administrative power to eliminate or restrict competition provisions in the AML should be revised on the content of these provisions and their exemption rules; (2) a dual-structure of controlling abuse of administrative power based on monopolistic conduct and free circulation is held in the AML; (3) the inapplicability of abuse of administrative power provisions in these telecommunications issues requires a revise for abuse of administrative power in the AML.

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List of Abbreviations

3G Third Generation of Mobile Telephony

AIC Administration for Industry and Commerce

AML Anti-Monopoly Law

AUCL Anti-Unfair Competition Law

CAAC Civil Aviation Administration of China

CCCPC Organisation Department of the Central Committee of the Communist Party of China

CCRO Circulation of Commodities Reorganization Office

CERN China Education and Research Network

CHY China Yuan

CJEU Court of Justice of European Union

CPQESN Chinese Product Quality Electronic Supervision Network

DGPT Directorate General of Posts and Telecommunications

DGT Directorate General of Telecommunications

DOF Department of Finance

ECJ European Court of Justice

EU European Union

GATS General Agreement on Trade in Service

LTO Leading Telecommunications Operator

M&A Merger and Acquisitions

MEQRs Measures with equivalent effect to quantitative restrictions

MII Ministry of Information and Industry

MIIT Ministry of Industry and Information Technology

MOFCOM Ministry of Commerce of the People’s Republic of China

MOFTEC Ministry of Foreign Trade and Economic Co-operation

MPT Ministry of Post and Telecom

NAPs National Access Points

NDPC National Development and Planning Commission

NDRC National Development and Reform Commission

List of Abbreviations

NPC the National People's Congress

NRAs National Regulatory Authorities

OECD Organisation for Economic Co-operation and Development

PD Planning Department

PIATS Product Identification, Authentication and Tracking System

PRC People's Republic of China

SAIC State Administration for Industry and Commerce

SAQSIQ State General Administration of Quality Supervision, Inspection and Quarantine

SASAC State-Owned Assets Supervision and Administration Commission of the State Council

SBCP State Bureau of Commodity Price

SCM Agreement on Subsidies Countervailing Measures

SCNPC Standing Committee of the National People's Congress

SDPC State Development Planning Committee

SETC State Economy and Trade Commerce

SGEI Services of General Economic Interest

SGI Services of General Interest

SMP Significant Market Power

SOEs State-owned enterprises

TEEC Treaty Establishing the European Community

TFEU Treaty on the Functioning of the European Union

TIM Telecom Italia Mobile

ITU International Telecommunication Union

US United States

WTO World Trade Organisation

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2005 Measures for the Settlement between the Internet Exchange Centre networks [互联网交换中心网间结算办法] (2005 Settlement Measures) (Repealed)

2006 Measures for the Settlement between the Internet Exchange Centre networks [互联网交换中心网间结算办法] (2006 Settlement Measures) (Repealed)

Administrative License Law [行政许可法]

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Decision on Reorganising and Regulating the Order of Market Economy [关于整顿和规范市场经济秩序的决定]

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Interim Provision of Shanghai Municipality against Unfair Competition [上海市制止不正当竞争暂行规定]

Interim Provisions for Merger and Acquisition of Domestic Enterprises by Foreign Investors [外国投资者并购境内企业暂行规定]

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Interim Regulation for Restructuring the State Owned Enterprises Utilising Foreign Investment [利用外资改组国有企业暂行条例]

Interim Regulation on Prohibition of Monopolistic Pricing Act [制止价格垄断行为暂行规定]

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Joint Notice on Charging Ministry of Charging Installation Fees from New Users of Local Telephony by Ministry of Post and Telecom and the State Bureau of Commodity Price [邮电部、国家物价总局关于对市内电话新装用户收取初装费的联合通知]

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Notice on Management Measures Adjustment of services charges on Fixed-line local telephony and others [关于调整固定本地电话等业务资费管理方式的通知]

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Opinions on the Implementation of Natural Villages Access to Telephony Project during 'the Eleventh-Five Years' Period [关于"十一五"期间自然村通电话工程的实施意见]

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Regulation on Advertisement Administration of People's Republic of China [中华人民共和国广告管理条例]

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Chapter One
Introduction

1. Purpose

This study aims to examine the development of the treatment of the abuse of administrative power to eliminate or restrict competition in China's Anti-Monopoly Law (AML) and the impact of Article 106 of Treaty on the Functioning of the European Union (TFEU) and free movement of goods, services and capital. In particular comparison are drawn between the two approaches, the aim being to establish whether the EU experience may clarify, explain and inform developments in China.

More than two decades were spent formulating the AML, which was finally adopted by the Standing Committee of the 10th National People's Congress (NPC) on August 30, 2007 and took effect on August 1, 2008.[1] In an earlier period, competition rules were rejected because of the weak economy in China and the absence of business operators with strong economic power.[2] However, with significant development of the economy, the necessity of introducing competition law became unavoidable. As stated by Xiaoye Wang, the AML should be formulated so as to create a fair and free competitive environment, if China wished to adopt competition and market mechanisms as the means of resource allocation.[3]

Abuse of administrative power to eliminate or restrict competition was a focus of attention from the first formulation of competition rules in 1980, through a long process generating a series of AML drafts before the AML was finalised.[4] This was because, in China, administrative power generally has great influence on market rules and the market conduct of business operators, in consequence of the earlier centrally planned economic system in China. A long-standing argument on whether or how to regulate abuse of administrative power in the AML existed throughout the process of formulation. The chapter on abuse of

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1 The earliest competition-related regulation can be traced to 1980. The promulgation of Interim Provisions on Carrying Out and Protecting Socialist Competition [关于开展和保护社会主义竞争的暂行规定] was published on October 17, 1980 by the State Council and repealed by State Council's Decision on Repealing Some of Administrative Regulation Published before the End of 2000 [国务院关于废止 2000 年底以前发布的部分行政法规的决定] on October 6, 2001.

2 X. Kong, *Principles of Antitrust Law*, (1999) Leal Constitutions Press, at 49.

3 X. Wang, *Explanation on People's Republic of China Anti-Monopoly Law [中华人民共和国反垄断法详解]*, (2008) Intellectual Property Publishing House, p1.

4 A series of drafts of the AML were formulated by the Standing Committee of the National People's Congress (SCNPC) from 1994 to 2007.

administrative power was even wholly removed from a draft of the AML in 2005 and returned in the next draft in 2006.[5] However, only a little research has been carried out on the area of abuse of administrative power.

EU competition law is an important model of a system of laws designed to prevent anti-competitive activities and protect competition in the market. Article 106 TFEU focuses on the anti-competitive effect of State measures in respect of public undertakings, undertakings with special or exclusive rights and undertakings entrusted with services of general economic interest. There are a series of cases applying Article 106 TFEU in the past 15 years, for example, *Höfner*,[6] *Corbeau*,[7] *Ambulanz Glöckner*[8] and *Re Electricity Imports*.[9]

There are some similarities and a close relationship between EU competition law and the AML. China drew from the experience of EU competition law in the process of formulating the AML.[10] In terms of the abuse of administrative power, Article 36 of the AML, similarly to Article 106 TFEU, regulates the anti-competitive effect of the conduct of public authorities on undertakings. In terms of eliminating or restricting obstacles in the competitive market, there may be some common background between the EU and China.[11] Moreover, EU free movement rules may also have some similar characteristics to Articles 33 to 35 of provisions of the AML relating to the abuse of administrative power. As a result, this study relies on EU competition law, especially Article 106 TFEU, and EU free movement rules as a comparison and example to analyse and discuss the further development approaches to the abuse of administrative power to eliminate or restrict competition taken in the AML.

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5 The 2005 draft was circulated with limited scope. For analysis of the draft, see H. Stephen, 'The Making of An Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China', (2006) 7 *Chicago Journal of International Law*, p169. The 2006 formal discussion draft was submitted on June 24, 2006. The content of this draft is available at: http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374671.htm (last visited March 1, 2012).

6 Case C-41/90, *Höfner v. Macrotron* [1991] ECR I-1979, [1993] 4 CMLR 306.

7 Case C-320/91, *Corbeau* [1993] ECR I-2533, [1995] 4 CMLR 621.

8 Case C-375/99, *Ambulanz Glöckner v. Landkreis Südwestpfalz* [2001 ECR I-8089, [2002] 4 CMLR 726.

9 Case 157/94, *Commission v. Netherlands (Re Electricity Imports)* [1997] ECR I-5699.

10 See Xiuhong Ma, vice minister of Department of Commerce in her speech on EU-China Conference on Competition Policy in 2005. See: http://it.people.com.cn/GB/3346561.html (last visited March 1, 2012).

11 'In this respect the situation (China's provinces and cities may engage in protectionism) may not be unlike that which existed in the early years of the EC, where various measures were employed to remove the obstacles to the creation of the common market.' See M. Furse, 'Competition Law Choice in China' (2007) 30(2) *World Competition* p323 at 327.

Five main questions will be examined in this study:

(1) what is the relationship between EU competition law, especially Article 106, and provisions in the AML relevant to the abuse of administrative power to eliminate or restrict competition?

(2) can China, in this respect, learn from the EU, and if so, how?

(3) what is the relationship between free movement of goods, services and capital rules and abuse of administrative power to eliminate or restrict competition provisions?

(4) can China learn from the EU's experience on free movement of goods, services and capital rules, and, if so, how? and

(5) as a case study, how do the abuse of administrative power to eliminate or restrict competition rules of the AML apply to the telecommunications sector?

2. Structure

This study is structured in seven chapters. Chapter One is the introduction. Chapter Two explains the general background and historical development the AML. Chapter Three examines the basic definitions to the abuse of administrative power in the AML which are the basis of the further comparative study. The complicated causes of the abuse of administrative power in China will be further analysed in three aspects: the history of the economic system, economic theory and legislation.

Chapters Four, Five and Six form the central part of this thesis. These three chapters present comparative research on the relationships between provisions on the abuse of administrative power in the AML and the EU experience. Chapter Four examines the relationship between the approach to the abuse of administrative power in the AML and Article 106 TFEU of EU competition law and the impact of Article 106 TFEU. Chapter Five examines the relationship between Articles 33 to 35 of provisions on the abuse of administrative power and EU free movement provisions on goods, services and capital and the impact of the free movement provisions. Chapter Six explores application of the abuse of administrative power provisions in the telecommunications sector and draws on the previous chapters.

Chapter Seven presents some key findings and recommendations in four areas: (1) the content of abuse of administrative power provisions in the AML; (2) the dual-structure of abuse of administrative power in the AML; (3) exemptions; and (4) the effect of abuse of administrative power provisions in the telecommunications sector. There is also some discussion of areas requiring further research.

3. Literature Review

There are four research areas which are relevant to this study: the content of abuse of administrative power provisions in the AML; the possible impact of adopting approaches developed under Article 106 TFEU and the EU free movement rules on the approach to the abuse of administrative power; and abuse of administrative power in the telecommunications sector in the EU and China.

The formulation, promulgation and further development on the AML have gained great attention both inside and outside of China. Several books and thousands of articles in China's academic journals have been published in the last ten years. Leading scholars in this area included, for example, Xiaoye Wang, Xianlin Wang, Guangyao Xu, Baoshu Wang, Yanbei Meng, and Liangchun Yu. Some books and a great number of articles have also been published outside of China.[12]

[12] M. Williams, *Competition Policy and Law in China, Hong Kong and Taiwan*, (2005) Cambridge University Press; M. Furse, *Antitrust Law in China, Korea and Vietnam*, (2009) Oxford University Press; B. Song, 'Competition Policy in a Transitional Economy: The Case of China', (1995) 31 *Stanford Journal of International Law*, p387; S. Snell, 'The Development of Competition Policy in the People's Republic of China', (1995) 28 *New York University Journal of International Law and Politics*, p575; M. Williams, 'Competition Law Developments in China', (2001) May *Journal of Business Law*, p273; X. Wang, 'The Prospect of Antimonopoly Legislation in China', (2002) 1 *Washington University Global Studies Law Review*, p201; Y. Jung and Q. Hao, 'The New Economic Constitution in China: A Third Way for Competition Regime?', (2003) 24 *Northwestern Journal of International Law & Business*, p107; L. Ross, 'Anti-Monopoly Regulation in the People's Republic of China: Recent Developments', (2003) 5 *International Business Law Journal*, p525; X. Wang, 'Issues Surrounding the Drafting of China's Antimonopoly Law', (2004) 3 *Washington University Global Studies Law Review*, p306; L. Chen, 'The Current State and Problems of Antimonopoly Legislation in the People's Republic of China', (2004) 3 *Washington University Global Studies Law Review*, p307; B. Owen, S. Sun and W. Zheng, 'Antitrust in China: The Problem of Incentive Compatibility', (2005) 1(1) *Journal of competition Law and Economics*, p123; K. Li, P. Che and M. Du, 'Antitrust Control of Mergers and Acquisitions: A Case Study of China', (2005) September *Journal of Business Law*, p597; J. Tang, 'Chinese Law on Competition Loom', (2006) 9(6) *Global Competition Review*, p21; M. Furse, 'Competition Law Choice in China', (2007) 30(2) *World Competition*, p323; K. Li and M. Du, 'Does China Need Competition Law?', (2007) March *Journal of Business Law*, p182; N. Bush, 'Implementing China's New Antimonopoly Law', (2008) May *Global Competition Review*, p29; G. Li and A. Young, 'Competition Laws and Policies in China and

In terms of abuse of administrative power in the AML, Pengcheng Zheng analysed of abuse of administrative power before the AML was enacted.[13] He suggested that abuse of administrative power needed to be regulated under a cooperative system including constitutional law, the AML, administrative and other procedural laws, fiscal and tax laws. Liangchun Yu collected a series of articles relating to the legal or economic discussion of abuse of administrative power from different scholars.[14] Baoying Guan, Hui Huang and Jie Cao described the issue of abuse of administrative power from the view of administrative law.[15] Furthermore, hundreds of articles have been published in China's academic journals. Most of these articles focused on understanding and analysing of the theory of abuse of administrative power in the AML. Only a few articles took the form of comparative studies on regulating administrative power in the context of competition law between different competition regimes, and none took the EU as an example.[16]

Moreover, there has been no systematic introduction and discussion of the abuse of administrative power provisions of the AML outside China.[17] Considering the specific structures and practices in China's government and the distinction between economic monopoly and abuse of administrative power, scholars appear to have avoided the issue of abuse of administrative power when they introduced or discussed the development of the

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Hong Kong: a Tale of Two Regulatory Journeys', (2008) 7(2) *Journal of International Trade Law and Policy*, p186; G. R. Brierre and A. Lunel, 'China's New Anti-Monopoly Law: Towards a New Competition Regime', (2008) 2 *International Business Law Journa*l, p185; R. Knox, 'China's Competition Bar', (2009) November *Global Competition Review*, p17; H. Ha, G. O'Brien and H. Hai, 'China: Antimonopoly Law', (2011) April *Global Competition Review*, p46; H. Wang and C. Levin, 'China's New Competition Rules', (2011) 10(5) *Competition Law Insight*, p9.

13 C. Zheng, Legal Control Research of Administrative Monopoly [行政垄断的法律控制研究], (2003) Perking University Press.

14 L. Yu (ed), Research on Anti-Administrative Monopoly and Promoting Competition Policy [反行政性垄断与促进竞争政策前沿问题研究] (2008) Economic Science Press.

15 B. Guan, H. Huang and J. Cao, *Administrative Monopoly Regulated by Administrative Law [行政垄断之幸政法规制]*, (2008) China University of Politic Science and Law Press.

16 For example, X. Wang, 'Legal Regulating of An Administratively Restricted Competitive Act [依法规范行政性限制竞争行为]' (1998) 3, *Journal of Law*, p89; Z. Lin, 'US's Administrative Monopoly Regulation Reform and its Lessons [美国行政垄断规制改革及其启示]', (2008) 1 *Economist*, p108; Z. Lin, 'Japan's Administrative Monopoly Regulation Reform and its Lessons [日本行政垄断规制改革及其启示]', (2007) 12 *Economist*, p62.

17 The International Bar Association's Antitrust Committee had article-by-article comments and recommendations on the drafts of the AML, including the issue of abuse of administrative power. See Working Group's comments on the Draft Anti-Monopoly Law of The People's Republic of China, at: http://www.ibanet.org/Document/Default.aspx?DocumentUid=47CC9943-4FD4-4E6F-A0D7-EA11F674AB03 (Last visited March 1, 2012).

AML. However, scholars have discussed 'how the AML should treat the administrative monopolies in China after the law was passed'.[18]

In terms of the potential impact of approaches developed under Article 106 TFEU and the EU rules on free movement on the development of Chinese law and practice, there are very few studies. To some extent, this lack is based on the fact that few scholars have expertise on this topic in the context of both China and the EU. Some conditions restrict the studies in this area. Firstly, the AML is still relatively new in China. In particular in the issue of abuse of administrative power, there are limited regulations, materials and cases for scholars inside and outside of China to analyse. Studies on abuse of administrative power in the AML have a long way to go. Secondly, Chinese scholars have mainly focussed on the rules of Articles 101 and 102 TFEU and the EU Merger Regulation when referring to EU competition law.[19] Much less attention is focused on Article 106 TFEU. Thirdly, the EU free movement rules are not a part of the EU competition law, and although there is a close relationship between them few studies have realised the connection between the EU free movement rules and the regulations on the abuse of administrative power in the AML. The absence of literature in this area shows how original and innovative this thesis is.

The approach to be taken to the competition-related issues in the telecommunications sector in the EU and China is an important topic since a gradual development from state monopoly to a competitive market in the telecommunications sector has been an inevitable trend in the EU and will also happen in China. Bernd Holznagel, Xu Junqi and Thomas Hart compared the regulations on telecommunications between the EU and China, although it did not deal with competition rules.[20] Some studies have analysed the application of competition rules from the perspective of the application of Article 106 TFEU.[21] They

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18 G. Li and A. Young, 'Competition Laws and Policies in China and Hong Kong', (2008) 7(2) *Journal of International Trade Law and Policy*, p191.

19 For example, Guangyao Xu published a series of books in regards to introduce the theories, legislation and cases of EU competition law. These books generally include three areas: Article 101 TFEU, Article 102 TFEU and Merger. G. Xu, *The EU Competition Law Legislation [欧共体竞争立法]*, (2006) Wuhan University Press; G. Xu, *The Theories of the EU Competition Law [欧共体竞争法通论]*, (2006) Wuhan University Press; and G. Xu, *Typical Case Studies on the EU Competition Law [欧共体竞争法经典判例研究]*, (2008) Wuhan University Press.

20 B. Holznagel, J. Xu, and T. Hart (ed), *Regulating Telecommunications in the EU and China: What Lessons to be learned?* (2009) LIT Verlag.

21 L. Garzaniti and M. O'regan, *Telecommunications Broadcasting and the Internet EU Competition Law and Regulation*, (2010) 3rd Edition, Sweet & Maxwell and C. Koenig and A. Bartosch, *EC Competition and Telecommunications Law*, (2009) 2nd Edition, Kluwer Law International. There are also some more relative books, for example, M.B. Nenova, *EC Electronic Communications and Competition Law*, (2007)

provide references for the application of the abuse of administrative power provisions on the telecommunications sector in China. In China, some articles have focused on regard to the application of competition rules to the telecommunications sector.[22] However, there are few studies focused on the issue of abuse of administrative power of the AML in telecommunications.

4. Research Methodology

The thesis is based on library research and uses both a comparative approach and a case-study approach. The comparative approach is widely used in Chapters Four to Six to explore the relationships between provisions on the abuse of administrative power to eliminate or restrict competition in the AML, and relevant EU legislation, and comparative studies in the telecommunications sector. The case-study approach is relied upon in Chapter Six on the telecommunications sector. This study presents a series of data and the current situation of legal regulations on the development of the telecommunications sector. Through the analysis and evaluation of the above resources, Chapter Six explores the impact of the abuse of administrative power on the telecommunications sector, especially in the areas of market access and interconnection in the basic telecommunications services market, and the extent to which the provisions of abuse of administrative power in the AML can be applied to this sector.

This study also focuses on analysing both primary and secondary sources in three areas: China's AML; EU legislation on Article 106 TFEU and free movement of goods, services

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Cameron May Ltd.; N. T. Nikolinakos, *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors*, (2006) Kluwer Law International; P. Nihoul and P. Rodford, *EU Electronic Communications Law: Competition and Regulation in the European Telecommunications Market*, (2004) Oxford University Press. N. E. Zevgolis, 'Anti-competitive Conduct from Public or Privileged Enterprises: Towards a per se Abuse of Dominant Position? Applicability of the Provision of TFEU article 106(2) by National Competition Authorities', (2012) 33(2) *European Competition Law Review*, p84. U. Muller and A. Rodenhausen, 'The Rise and Fall of the Essential Facility Doctrine', (2008) 29(5) *European Competition Law Review*, p310. B. Doherty, 'Competition Law and Sector-Specific Regulation', (2001) 7(8) *Computer and Telecommunications Law Review*, p225.

22 Q. Zhang and S. Mao, 'Regulations on the Monopoly upon Chinese Telecommunications Service Market [中国电信服务市场的法律规制]', (2004) 2 *Journal of Wuhan University (Philosophy & Social Science Edition)*, p236. G. Ding, 'Regulating Abuse of Dominant Position in Telecommunications Sector: Monopoly-Related Cases on China Telecom and China Unicom [电信业滥用市场支配地位的法律规制-以电信联通涉嫌垄断为例]', (2012) 3 *Jiang-Huai Tribune*, p132. D. Ding, 'The Absence of Judicature under the Administrative Regulation: A Probe into the Dispute Settlement System Concerning the Interconnection between Public Telecom Networks in China [行政管制下的司法缺位-对我国公用电信网间互联互通争议解决机制之探讨]', (2005) 5 *Law Science*, p89.

and capital; and the telecommunications sectors in China and the EU. The primary recourses in this thesis mainly include: the AML, the drafts of the AML, the TFEU (and earlier EEC and EC Treaties), Commission Directives, and Council Regulations; competition-related legislation in China, the EU and its Member States; telecommunications-related legislation in China, the EU and its Member States; WTO agreements; and cases and official publications or reports from governments and their departments or other statutory authorities.

In terms of cases, two specific features are important. Firstly, unlike case law in the EU, cases in China are not considered as sources of law. A court's decision is not a legal reference in following cases and is generally not cited in later judgments. Secondly, there is no completed database for judgments in China. The Chinese cases quoted in this thesis have two sources: a judgment which can be read directly from official databases and whose which cannot to be found directly in official databases but which are referenced from secondary sources.

The secondary sources in this thesis can be divided into four categories: academic textbooks, legal journals, comments or general reports of governments or organisations (for example Organisation for Economic Co-operation and Development (OECD)), and news from internet websites. Academic textbooks and legal journals are the main sources widely used throughout this thesis. The materials of internet websites are not only from websites of professional associations and governmental organisations, such as the European Commission, the OECD and the American Bar Association, but also from some standard news websites both in China and the EU.[23]

[23] Some pieces of legislation, case judgments, official publications or reports from governments and their departments, academic textbooks, journal articles, comments and general reports of governments, and news from internet website in China may not be available in English.

Chapter Two

The Background of Chinese Anti-Monopoly Law

1. The Context of Competition in China

The notion of competition has developed progressively for a long period in China. To a certain degree, the absence of competition is one of the root causes in the delay of the appearance of the Chinese Anti-Monopoly Law (AML), since the AML is against anti-competitive conduct in the market. Therefore, in this chapter, a basic understanding of the development of competition in China will be analysed through the movement towards political, economic and legal reforms.

In the period before 1978, competition was characterised as a waste of productive resources and social resources.[1] The majority of production was distributed and prices were controlled by the government in the centrally planned economy in China.[2] For example, most enterprises were State owned or collectively owned. Their producing and selling tasks were framed and monitored by the State planning agencies. 'According to China's State Statistics Bureau, in 1978, private enterprises accounted for only 0.2% of China's national industrial output, while State-owned enterprises (SOEs) and collectively owned enterprises controlled the rest of the economy.'[3] However, many small-sized factories producing similar products were built as a result of the self-sufficiency policy adopted in China. There was no need for a factory in a locality to compete with factories in other districts since its production was designed to satisfy the needs only of that locality. The self-sufficiency policy also caused the problem of over-duplication which had significant negative effects on market competition going forward. As a result, prior to 1978, there was no economic sense of 'competition' in China's centrally planned economy.

From 1978 to 1992, with the announcement of economic reforms and the policy of opening up to the outside world,[4] competition was initiated in some industries, even though the SOEs still dominated or wholly controlled the economic infrastructures. At the beginning

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1 M. Williams, 'Competition Law Developments in China', (2001) 5 *Journal of Business Law* p274.

2 See K. X. Li and M. Du, 'Does China Need Competition Law?', (2007) 3 *Journal of Business Law* p183.

3 See B. M. Owen, S. Sun and W. Zheng, 'Antitrust in China: The Problem of Incentive Compatibility' (2005) 1(1) *Journal of Competition Law and Economics* p123 at 127.

4 The 'Economic Reform and Open Door Policy' was proclaimed in the 3rd Session of the 11th Central Committee of the Communist Party of China in 1978.

of the reform, the collective enterprises developed fast and played a very important role in the national economy. As mentioned in Article 15 of the 1982 People's Republic of China Constitution, the State accepted the effect of market adjustment, and foreign investments were allowed to enter the domestic market by virtue of Article 18.[5] Moreover, the 1988 Constitution Revision added a provision for privately owned enterprises and clearly defined the legal status and the national policy on privately owned enterprises in the legislation.[6] Along with the entry of privately owned enterprises and foreign investment, competition developed fast in the domestic market.

Significant steps were taken in the development of competition as further economic reforms were accelerated in 1992. Even now, reforms are still in progress. In the 1993 Constitution Revision, the socialist market economy replaced the previous planned economy.[7] The enterprises and other economic organisations were conferred with active status to operate under the market condition of supply and demand and competition principles. Furthermore, the task of managing and monitoring the market economy was transferred from administrative to legal agencies. At the end of the same year, the theory of the Modern Enterprise System was adopted.[8] This theory focused on enterprises, and especially on the SOEs. It separated ownership of enterprises from daily management and specified the related rights and responsibilities. These modern enterprises became the main participants of market competition. Moreover, with four modifications to the Constitution since 1982, the private economy progressively owned rights equal to the publicly owned enterprises in the market. Due to these developments in the national policy and legal context, the private economy grew rapidly. By 2001, there were three million enterprises existing in China. The proportion of the SOEs and the State-controlled enterprises was

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5 Article 15 of People's Republic of China Constitution 1982 states: 'The state maintains the pro rata concerted development of national economy through the integrated balance of planning economy and the assistant effect of market modulation.' Article 18 states: 'The People's Republic of China allows foreign enterprises and other economic organisations or personality to invest in China, or to cooperate with China's enterprises and other economic organisations in various forms, complying with the laws of People's Republic of China.'

6 Article 1 of the Constitution Revision 1988: 'Article 11 of the Constitution shall include a new paragraph which reads: "The state permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The state protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy".'

7 Article 7 of the Constitution Revision 1993 states: 'Article 15 of the Constitution: "[t]he State implements planed economy on the basis of socialist public ownership…" is modified to "[t]he State implements socialist market economy…".'

8 The Modern Enterprises System was put forward in 'The Decision of Central Committee of the Chinese Communist Party on Some Issues of Establishing the System of Socialist Market Economy' in November 1993 in the 14th Central Committee of the Chinese Communist Party. It aimed at establishing enterprises system on the basis of completed legal person system.

reduced to 56.2% in capital and 49.6% in annual revenue,[9] a big contrast to the position under which 'all enterprises were State-owned before the 1978 reform.'[10] An independent and equal operator in the market economy is a fundamental factor for a competitive environment and for the implementation of AML in the future.

2. Three Stages in the Development of the Anti-Monopoly Law in China

A series of the AML drafts, other related laws, specific regulations and government documents were brought forward throughout a period of more than 20 years before the formal Chinese AML took effect on August 1, 2008. Some affected the operation of anti-monopoly issues; some accelerated the pace of appearance of the actual AML; while some even had no chance of being put into practice. Although these drafts, laws, regulations or government documents worked in a piecemeal mode without a strong theoretical basis and in the absence of procedural regulations on competition policies, they still encouraged and promoted adopting legal measures to prevent harmful anti-competitive conduct in the market before 2008.

The development of the Anti-Monopoly Law can be divided into three stages which will be analysed in the following paragraphs.

2.1 The Germinal Stage: 1987-2000

As early as 1980, the State Council promulgated the first instrument aimed against monopolisation and regional or departmental blockades: the 'Interim Provisions on Carrying out and Protecting Socialist Competition'.[11] This stated in particular that it was illegal to adopt administrative measures to eliminate the free circulation of products.[12] However, the intention to institute and implement provisions on anti-monopoly was

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9 See Section 3 at http://www.stats.gov.cn/tjgb/jbdwpcgb/qgjbdwpcgb/t20030117_61467.htm (last visited on March 1, 2012).

10 Note 3, at 126.

11 Interim Provisions on Carrying Out and Protecting Socialist Competition [关于开展和保护社会主义竞争的暂行规定] was promulgated on October 17, 1980 by State Council and repealed by the State Council's Decision on Repealing Some of Administrative Regulations Published before the End of 2000 [国务院关于废止 2000 年底以前发布的部分行政法规的决定] on October 6, 2001. Article 3 stated that monopolisation and exclusive operation was not allowed except in respect of products exclusively operated by a department and organisation designated by the State, and article 6 required that any administrative regional and departmental organs shall not block markets and were not to prohibit products outside of the local area from being sold in the local area. See also M. Shang, 'Antitrust in China – A constantly Evolving Subject' (2009) February *Competition Law International* p4 at 4.

12 Ibid, Article 6 of Interim Provisions on Carrying Out and Protecting Socialist Competition.

suspended, owing to the controversy on the necessity and feasibility of the anti-monopoly regulations. At that time, the dominant opinion was that adopting anti-monopoly legislation would have a negative effect on China's industrial development because of the low level of the national economy and the absence of monopoly enterprises in the market.[13] As a result, there was no enforcement of the above provisions and few implementing mechanisms to support them. The competition-related issue was not of concern until several regulations were put forward in 1987.

From 1987, a series of competition-related regulations both at the central and local level were promulgated. The Opinions relating to encouraging competition and preventing monopoly were restated in the regulations of Some Opinions of the State Commission for Restructuring the Economic System and the State Economic Commission on the Establishment and Development of Enterprise Groups[14] and the Regulation on Advertisement Administration.[15] Later on, the Regulation on Price Administration[16] was issued by the State Council and Article 29(9) prohibited enterprises and industry associations from colluding on monopolistic prices.[17] This was further supported by Article 30[18] which provided that the relevant supervision and inspection department may impose penalties, fines, or cancel the business licences of those who violated Article 29. In addition, at the local level, Shanghai, as a vanguard of China's economic reform, promulgated the Interim Provision of Shanghai Municipality against Unfair Competition.[19] However, the efficiency and the practice of these regulations were disappointing, due to

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13 X. Wang, 'The Prospect of Antimonopoly Legislation in China' (2002) 1 *Washington University Global Study Law Review* p201 at 226.

14 See Article 5 of Some Opinions of the State Commission for Restructuring the Economic System and the State Economic Commission on the Establishment and Development of Enterprise Groups [国家体改委、国家经委关于组建和发展企业集团的几点意见], which was promulgated in 1987 by State Council Economic System Reform Office and the State Economy Committee.

15 See Article 4 of Regulation on Advertisement Administration of People's Republic of China [中华人民共和国广告管理条例], which was promulgated in 1987 by the State Council.

16 The Regulation on Price Administration of People's Republic of China [中华人民共和国价格管理条例] was promulgated on September 11, 1987 by the State Council.

17 Ibid, see Article 29: '[t]he following acts shall be considered to be illegal pricing acts: … (ix) creating monopoly pricing by reaching an agreement between enterprises or industries'.

18 Ibid, see Article 30: '[i]n case of any acts stated in the previous Article, the price surveillance organ shall impose the following penalties, depending on the circumstances: (i) issue a notice of criticism; (ii) order the violator to return the illicit gains to the buyer or user; (iii) confiscate any illicit gains that can not be returned; (iv) issue a fine; (v) request the administration of industry and commerce to suspend the business license of the offender; (vi) issue a fine to the person held directly responsibility and the person in charge, if the offender is an enterprise or a public institution, and can recommend to the relevant department to take administrative disciplinary action. The above penalties may be imposed simultaneously.'

19 The Interim Provision of Shanghai Municipality against Unfair Competition [上海市制止不正当竞争暂行规定] took effect on October 15, 1987.

the lack of a competition environment, the lack of substantive rules to apply and the lack of procedures to enforce them.[20]

At the same time, the proposed 'Anti-Monopoly and Anti-Unfair Competition Regulation' was listed in the legislative plan of the State Council and a drafting group was formed in the former Legislative Affairs Bureau of the State Council.[21] This was intended to be a combined law with effect against not only unfair trade activities, but also anti-monopoly practices. Notwithstanding the fact that the details of these regulations were significantly enhanced in comparison to the earlier principal provisions, these regulations still lacked substantive rules to determine monopoly status and the procedures to punish the violators.[22] Later on, however, the anti-monopoly part went into abeyance because the provisions regulating the monopoly issues were laid aside. The decision was taken in consideration of the lack of legislative experience on this subject and the current economic realities that the weak economy and the absence of strong entities with economic power did not require the passing of laws against monopolies.[23] Therefore, only the part of anti-unfair competition was adopted and the Anti-Unfair Competition Law (AUCL) was formulated and published in 1993.

The AUCL is one of the most important competition-related pieces of legislation in the pre-AML period. It looked like a single 'consumer protection' law when the part of anti-monopoly was removed.[24] Nevertheless, the AUCL still includes some provisions on anti-monopoly issues. Article 15 deals with restrictions on collusive bidding between bidders, or tenderees and bidders, but does not contain provisions relating to other collusive agreements. Article 6 states that public facility enterprises or other exclusive enterprises authorised by law shall not force others to purchase the prescribed commodities, the dominant position status applying to any of the public facility and authorised monopolistic enterprises. The provisions on predatory pricing and forcing tie-in sales (Articles 11 and 12) apply to any enterprises without mentioning the dominant position. The use of administrative power is addressed in Article 7, but the enforcement is totally under administrative law: the governments or their organs which violate the provision are only

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20 Note 2, at 184.

21 The Regulation on Prohibiting Monopoly and Unfair-Competition (Draft) [反对垄断与不正当竞争条例(草案)] was drafted on 1988 by the former Legislative Affairs Bureau of the State Council. See http://www.czgsj.gov.cn/baweb/show/shiju/bawebFile/132609.html (last visited March 1, 2012).

22 Note 2, at 184.

23 X. Kong, *Principles of Antitrust Law [反垄断法原理]*, (1999) Leal Constitutions Press at 48-49.

24 M. Williams, *Competition Policy and Law in China, Hong Kong and Taiwan*, (2005) Cambridge University Press at 166.

ordered to correct the illegal behaviour or are administratively punished by the organs at the same or the senior level.[25]

Although anti-monopoly issues were dropped from the legislation in 1993, the Chinese central government insisted in 1994 on setting up a working group to continue to examine the possible adoption of a comprehensive anti-monopoly policy. The group was led jointly by the State Economy and Trade Commerce (SETC) and the State Administration Industry and Commerce (SAIC), two departments of the State Council, and also included other members from various industrial ministries and the National People's Congress (NPC) legislative affairs committee.[26] The group not only studied as many alternative systems as possible in the world, but also paid attention to national-specific aspects. The aim was 'compatible with China's socialist-market system, an attempt to create a unified, open and orderly national market by breaking down regional economic boundaries and creating a fair trading environment'.[27] After years of investigation and research, however, substantial questions were still under discussion in the 1999 Draft of AML, for example, the response to the abuse of administrative power, industrial policy, economies of scale and industrial consolidation.

During this period, 1993-2000, a great number of competition-related laws, administrative regulations of central government, ministerial rules and local legislation were enacted to deal with certain aspects of competition rules, to explain specific provisions in implementing laws, or to regulate the competition issues in provincial districts. The Price Law of 1997, [28] for example, states that:

> Operators shall not carry out any of the following unfair pricing acts:
>
> (1) collude with others by controlling market prices to harm the lawful rights and interests of other operators or consumers;
>
> (2) dump merchandise below cost in order to drive rivals away or to monopolise the market, thereby disturbing the normal order of producing and operating and harming the lawful rights and interests of the state and other operators;
>
> …

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25 M. M. Dabbah, 'The Development of Sound Competition Law and Policy in China: An (Im)possible Dream?', (2007) 30(2) *World Competition Law and Economics Review* p341 at p341.

26 Note 24, at 173. Most of the materials on the Anti-Monopoly Law Working Group come from this book, at 172-177.

27 Ibid.

28 Price Law of People's Republic of China [中华人民共和国价格法] was promulgated on December 29, 1997 and took effect on May 1, 1998.

(5) carry out discriminatory pricing to the other operators in the equal business conditions for the same merchandise or service.[29]

The Tender Invitation and Bid Law of 1999 also indicated in Article 32 that collusive bidding is forbidden in the same terms as Article 15 of the AUCL.[30] The Regulation on Telecommunication of 2000 distinctly prohibits the conduct of refusal to deal, forcing deals with designated operators and forcing tie-in sales in the telecommunication service and operations.[31] Furthermore, the provisions of Prohibiting of the District Blockage in Market Economic Activities and the Decision on Reorganising and Regulating the Order of the Market Economy were published by the State Council in 2001.[32] Alongside the above regulations, a series of ministerial rules on detailing and implementing the existing provisions were put forward. Interim Regulations for Restructuring of State Owned Enterprises Utilising Foreign Investment was formulated by the SETC and the SAIC.[33] Over 20 provinces or municipalities have also formulated local regulations supporting the implementation of the AUCL.[34]

Although these miscellaneous provisions played a primary role in regulating the competitive or monopolistic issues in the Chinese market, a series of problems remained. Firstly, some serious problems from the former legislation were inherited, such as the absence of crucial definitions, weak practical implementation of the detailed provisions, and lack of independent enforcement. Secondly, the current legislation was a patchwork rather than a holistic system, with crossed authorities and separate regulations. Therefore, a comprehensive AML was expected.

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29 Ibid, Article 14.

30 The Tender Invitation and Bid Law of People's Republic of China [中华人民共和国招投标法] was enacted on August 30, 1999.

31 See Articles 41 (1) (2) (4) and Article 42 (1) of Regulation on Telecommunication of People's Republic of China [中华人民共和国电信条例], which was promulgated on September 25, 2000 by the State Council.

32 Provisions of the State Council on Prohibiting Regional blockades in Market Economic Activities [国务院关于禁止在市场经济活动中实行地区封锁的规定] was enacted on April 21, 2001 by the State Council and the Decision on Reorganising and Regulating the Order of Market Economy [关于整顿和规范市场经济秩序的决定] was enacted on April 27, 2001 by the State Council.

33 Interim Regulation for Restructuring the State Owned Enterprises Utilising Foreign Investment [利用外资改组国有企业暂行条例] was published on November 8, 2002 and was took effect on January 1, 2003.

34 All the administrative regulations, ministerial rules and local legislation can be found in Law-Star Chinese Legal Sources Search System online at: http://law.law-star.com/html/lawsearch.htm (last visited March 1, 2012). There were 24 provinces or municipalities enacted administrative regulations on the Anti-Unfair Competition Issues.

2.2 The Evolution Stage: 2001-2005

Moves towards competition-related legislation gained even more momentum when China joined the World Trade Organisation (WTO) in 2001. There are two main grounds for this. Firstly, to implement some competition principles or WTO rules, China was required to enact and regulate competition-related laws and regulations. For example, Article 8 stated that the General Agreement on Trade in Services (GATS) prohibits the monopoly supplier of a service from abusing a dominant position to set barriers to entry on trade in a service market.[35] Secondly, foreign products or foreign direct investment will enter the domestic market, by virtue of China's promise to decrease tariffs, to cancel substantive import licences and quota limitations for importers, and to concede the admittance of a trade market in service.[36] Before the entry to the WTO, the market share of the foreign direct investments or enterprises in some industries had reached high occupancy rates.[37]

Based on the above elements, the consideration of competition-related regulations focused on two issues: the administrative power; and the development of domestic enterprises and their relationship with the multinational companies.

2.2.1 Competition-Related Legislation

Administrative power on competition is subject to constant attention in China's competition-related legislation. The State Council issued some regulations on eliminating administrative power in the market economy activities. These regulations not only continued to emphasise the decision on eliminating administrative power in the market and to concentrate on the limitations set out in the AUCL, but also accelerated the rules for the market in response to the requirements of the WTO. Provisions on Prohibiting Regional

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35 Article 8 of GATS states: '[e]ach member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that member's obligations under Article II and specific commitments.'

36 See the Protocol on the Accession of the People's Republic of China [中华人民共和国加入议定书] which took effect on December 11, 2001. Also see a series of annexes of this Protocol, for example, Annex 3: Non-Tariff Measures Subject to Phased Elimination, Annex 8: Schedule CLII People's Republic of China, and Annex 9: Schedule of Specific Commitments on Services List of Article II MFN Exemptions.

37 X. Wang, 'Two Questions of China's Anti-Monopoly Law in the Background of Entrance to the WTO ['入世'背景下制定我国反垄断法的两个问题]', (2003) 5 *Law Comments* p15 at 16. The Anti-Monopoly Department of the Fair Trade Bureau of the State Administration for Industry and Commerce, 'The Restricting Competition Behaviours of the Multinational Companies in China and the Countermeasures [在华跨国公司限制竞争行为表现及对策]', (2004) 5 *Administration for Industry and Commerce* p42 at 43.

Blockade in Market Economic Activities[38] and the Decision on Reorganizing and Regulating the Order of Market Economy[39] were promulgated in 2001. The regional blockade was further regulated in detail in these two administrative regulations. The former emphasised the prohibition against any organisations or persons operating barriers to entry in order to restrict competition, and lists in Article 4 the forbidden measures by governments and affiliated departments. It also particularised the detailed procedure to remodel or repeal the violated rules in Articles 5 to 19 and lists the penalties, which included criminal liabilities for the violating activities in Articles 21 to 26. The Decision on Reorganising and Regulating the Order of Market Economy required breaking the regional blockade and industrial monopolies. It also emphasised the reform and recombination of the industrial monopoly to achieve the separating of government functions between enterprise management, and intensifying the competition rules.[40]

On the issue of domestic enterprises and the effect of multinational companies, there are two different tendencies among the attitudes of scholars and officials, which are evidenced in the published regulations. Some scholars and officials renewed the opinions which were discussed in the arguments relating to the AML in 1993.[41] They insisted that there was potential risk existing in the domestic weak economy. The prevalent small- and middle-sized domestic enterprises would be facing much more powerful multinational enterprises which were seeking to monopolise the domestic market. In the light of imbalanced capital back-up, technological capability and management skills between the domestic and multinational enterprises in open competition, there was support for protecting domestic enterprises and national brands from possible monopoly or merger with multinational enterprises. Others argued that the basic principle of competition-related regulations is the fair competition rule. Although it does bring serious challenges to the domestic enterprises, the scale of enterprises is not the most important condition in market competition, and

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38 Note 32, see Provisions of the State Council on Prohibiting Regional blockades in Market Economic Activities.

39 Note 32, see Decision on Reorganising and Regulating the Order of Market Economy.

40 Ibid, Article 11.

41 'Commissioners … considered that the aim to constitute Anti-Monopoly Law is protect the benefits of our country…Our country is developing country. The (domestic) enterprises want to be bigger and stronger, so we can not completely apply the regulations on monopoly and anti-monopoly of developed countries.' The Excerption of the First Discussion Comments of The People's Republic of China Anti-monopoly Law (Draft), see http://www.npc.gov.cn/npc/zt/2006-06/30/content_350218.htm (last visited on March 1, 2012); H. Gong, 'Adjustment and Development of Chinese Anti-trust Law System after China's Accession to WTO [WTO 规则下我国反垄断法律制度所面临的挑战与对策]', (2004) 11 *Hebei Law Science* p151.

partial protection is unfair and not good for the long-term development of domestic enterprises.[42]

The above arguments are reflected in the enacting of official regulations in that several pieces of legislation were promulgated, with inconsistent approaches from 2001 to 2005. Some deal with enterprises according to their sizes[43] and some regulate the relationship between domestic enterprises and foreign investments.[44] A regulation was also adopted to prohibit regional blockades in the market.[45]

2.2.2 Process of Anti-Monopoly Law Drafts

The draft AML appeared in the legislative plan of the Standing Committee of the National People's Congress (SCNPC) in 1994, 1998 and 2003 but was not, on any occasion, further considered.[46] Drafts of the AML were submitted again in 2004 and 2005.

With further discussions and amendments on the AML Draft of 1999, some significant changes occurred in the 2001 Draft modifications.[47] One of the most important changes was the removal of the sectoral exemptions.[48] If taken literally, this showed that the proposed AML would deal with the anti-monopoly issues in all sectors without exception. This change was of particular importance for the area of regulating administrative power

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42 Xiaoye Wang wrote that 'the survival and development of an enterprise depends on many factors, not merely on its scale of production'. Note 13, at 227; Ping Lin insisted that '[to] judge a merger, the important thing is the effect on competition, not the effect on competitors'. See 'Anti-monopoly Control on Chinese Enterprises Merger' [中国企业兼并的反垄断控制], at 13 see http://www.ln.edu.hk/econ/staff/plin/MergerControl(Chinese).pdf (last visited on March 1, 2012).

43 For example, Guiding Opinions of Developing Giant Enterprises Groups with International Competitiveness [关于发展具有国际竞争力的大型企业集团的指导意见], which was jointly promulgated on September 10, 2001; and Law on Promoting Small and Medium Sized Enterprises [中华人民共和国中小企业促进法], which was promulgated on June 29, 2002.

44 For example, Interim Regulation for Restructuring the State Owned Enterprises Utilising Foreign Investment [利用外资改组国有企业暂行规定], which was published on November 8, 2002; Interim Provisions for Merger and Acquisition of Domestic Enterprises by Foreign Investors, Ibid., note 33; Interim Regulation on Prohibition of Monopolistic Pricing Act [制止价格垄断行为暂行规定], which was published on June 18, 2003; and Several Opinions of the State Council on Encouraging, Supporting and Guiding the Development of Individual and Private Economy and Other Non-Public Sectors of the Economy [国务院关于鼓励支持和引导个体私营等非公有制经济发展的若干意见], which was published on February 24, 2005.

45 Note 32. However, this administrative regulation only reaffirmed and detailed the provisions of the AUCL on restricting regional blockages to protect fair competitive markets.

46 See Legislative Affairs Commission Legislation Planning Office of the SCNPC, *Legislation Statistics of the People's Republic of China in 2008 [中华人民共和国立法统计(2008 年版)]*, (2008) Chinese Democracy and Legislation Publishing. Also see http://news.xinhuanet.com/zhengfu/2004-01/09/content_1268128.htm (last visited March 1, 2012).

47 There are no official publications of the Draft modifications of 2001 available in Chinese or in English. It is an internal working document but it is discussed clearly in Mark Williams' book *Competition Policy and Law in China, Hong Kong and Taiwan*.

48 Note 24, at 197.

on competition. Secondly, the independence and inviolability of the authority and its members were threatened. The provisions on 'governing the conduct of investigation, official meetings and voting on authority decisions' were omitted. Moreover, a 'recommendation' and terminated investigation, instead of a public penalty, could be made by the authority in Article 43 of the AML.

In the following years, there were several revisions of the AML draft. In 2002, three drafts appeared in February, April and October.[49] The drafts inherited the general structure and content of the 2001 Draft modifications and especially maintained the shift of implementation without sectoral exemptions. Moreover, in 2003, the proposed AML was treated as a key economic piece of legislation and listed in the 10th Standing Committee of the NPC legislative agenda.[50] Another element which had an effect on the institution of the AML was the 2003 reform of government institutions. The old Ministry of Foreign Trade and Economic Co-operation (MOFTEC) and SETC were abolished and recombined into a new ministry, named the Ministry of Commerce (MOFCOM).[51] As noted by Lu Fuyuan, the ex-minister of the MOFCOM, 'one of the main tasks of the new ministry is to rectify and regulate the order of market competition'; thus, constituting the AML became a priority target of the MOFCOM.[52]

After several revisions circulated with minor changes in the following months, the last draft in November 2005 was circulated by the State Council and had significant differences from all the previous drafts.[53] The previous drafts, using the April 2005 Draft as an example in Chapter 5 had four provisions relating to the prohibition of abuse of administrative power, including forced purchases, regional blockage, forced restrictions on competition, and administrative conduct with general application, and two provisions in

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49 The three drafts were only circulated in a limited scope. The draft in February 2002 was discussed in X. Wang, 'The Entry to the WTO and the Constitution of Chinese Anti-Monopoly Law [入世与中国反垄断法的制定]', (2003) 25(2) *Cass Journal of Law* p122; the drafts in April 2002 and October 2002 were discussed in Y.Jung and Q. Hao, 'New Economic Constitution in China: A Third Way for competition Regime?', (2004) 24 *North-Western Journal of International law & Business* p107 at 129.

50 '*The Timetable of Thirteen Years "Dystocia of Anti-Monopoly Law"*' [反垄断法 13 年'难产'时间表], http://news.163.com/special/00012C6O/mono070830.html (last visited March 1, 2012).

51 'Five Times Reform of Government Institutions from 1982 to 2003 in China' [1982 年至 2003 年中国的 5 次政府机构改革], http://news.xinhuanet.com/misc/2008-03/11/content_7766028.htm (last visited March 1, 2012).

52 'Commerce Ministry Defines its Policy Goals', see http://english.mofcom.gov.cn/aarticle/newsrelease/commonnews/200303/20030300077225.html, (last visited March 1, 2012).

53 The Draft of November 2005 was circulated in a limited scope. The detailed analysis on the draft is available at H. S. Harris, 'Making of An Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China', (2006) 7(1) *Chicago Journal of International Law* p169.

Chapter 7 on penalties for abuse of administrative power. However, the whole chapter and the penal provisions were removed from the November 2005 Draft, although it maintained a declarative principle in the general principles of the proposed AML that '[a]dministrative departments and the organisations authorised by laws and status with the functions of administering public affairs are forbidden to abuse administrative power to implement the conduct of eliminating or limiting competition.'[54] This meant that the proposed AML would not deal with the specific conduct of abuse of administrative power, even though it still persisted with the aim of eliminating abuse of administrative power. The argument as to whether the AML should deal with the abuse of administrative power lasted for more than ten years and the opposing view eventually won. There are several possible reasons for the deletion. Firstly, the legislator tried to let the AML focus on economic monopoly consistent with the general theory on competition law.[55] Secondly, the crucial problem of how effectively to control the conduct of abuse of administrative power was still unsolved. Few feasible measures were provided in the former drafts, which invited comparisons with the ineffective results from a number of regulations on eliminating the abuse of administrative power promulgated previously.[56] Thirdly, it is said that the government wanted to accelerate the adoption of the AML and the controversies on abuse of administrative power would cause delay.[57]

Following thirteen years of debates, preparation and dozens of revisions, the final AML draft was submitted to the NPC.

2.3 The Mature Stage: 2006-2007

During the short period of June 2006 to August 2007, there were three formal drafts submitted to the NPC for further discussion.[58] Some significant changes were made in these drafts. Firstly, the opinion in favour of regulating the abuse of administrative power under the AML was supported. Secondly, some principles favouring economies of scale in domestic enterprises were added into Chapter One of the general provisions in the AML.

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54 '*The Anti-Monopoly Law Draft Burden: Chapter of Administrative Monopoly Has Been Deleted* [反垄断法草案：反行政垄断被整体删除]' on January 11, 2006, see http://www.people.com.cn/GB/54816/54822/4016799.html (last visited March 1, 2012).

55 Ibid.

56 Note 53, at 215.

57 Note 54.

58 The first formal discussion draft was submitted on June 24, 2006. The second one was submitted on June 24, 2007. And the third one was submitted on August 24, 2007.

2.3.1 The Return of the Chapter on Abuse of Administrative Power

The whole Chapter Five of abuse of administrative power to eliminate or restrict competition was placed back in the formal drafts of the AML. This significant reversal showed that the argument on whether abuse of administrative power should be regulated under the AML still existed.

In the statement of the AML drafting group, drafters agreed that the conduct of abuse of administrative power did have great influence on market competition rules.[59] In some situations, administrative restriction orders, but not business operators, play the leading role in the market. They also realised that these provisions in Chapter 5 of the AML were mainly focused on the abuse of administrative power but not monopolistic conduct of business operators which may fall within other areas of the AML. Further economic system reform and administrative management system reform was required. Meanwhile, other laws or regulations, for example, the AUCL, Product Quality Law and Provisions of the State Council on Prohibiting Regional Blockade in Market Economic Activities, already regulated administrative conduct which restricted competition. It was argued that there was no need to repeat these principles in the AML. Finally, restricting administrative power, especially on the regional blockades, was not the main problem that needed to be solved by the AML.

On the other hand, however, it was agreed that administrative conduct which restricted competition was still regularly adopted by administrative organs to protect a business operator or to benefit a certain area. The conduct was capable of hindering the lawful interest of business operators and consumers, distorting competition rules and damaging a unified and fair competitive market: 'as a specialised and basic law on protecting competition, the AML must effectively solve obvious problems having influence on our country's market competition.'[60]

The return of the chapter on abuse of administrative power inherited the traditional opinions from the AUCL and continued to seek to regulate administrative conduct on the grounds that this might eliminate or restrict fair market competition. The drafting

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59 See the report made by Kangtai Cao, the head of Legislative Affairs Office of the State Council, at the 22nd Session of the Standing Committee of the 10th National People's Congress on June 24, 2006, available at: http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374671.htm (last visited March 1, 2012).

60 Ibid.

organisation emphasised society's expectation on regulating the abuse of administrative power in the market and the State's firm attitude on rejecting such conduct. However, there was no further discussion or suggestion on how the AML could work effectively on eliminating or restricting abused administrative conduct, in a way differing from the disappointing results attained under previous laws or regulations.

2.3.2 Articles on Encouraging Domestic Economies of Scale

The conservative approach which was presented in the formal drafts also appeared on the new articles for encouraging domestic economies of scale. Most of them focused on the general provisions chapter in the second formal discussion draft.[61]

2.3.2.1 Article 4 of the AML

The new Article 4 of the second formal discussion draft stated: '[t]he State constitutes and carries out competition rules which accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system.'[62] This article dealt with the relationship between competition policies and other industrial policies and economic policies. It required that this relationship should be comprehensively coordinated under the guidance of the State's macro-control, on the basis of China's actual situation.[63] This article corresponded to the fundamental principle of a socialist market economy that the 'market should have the basic function of the distribution of resources under the macro-control of the socialist country'.[64] In the meantime, it also laid stress on consideration of the State's macro-planning and other industrial policies, especially the economic policies encouraging the adjustment of economic structure. It was insisted that China's developing market economy, with different problems relating to the unbalanced development of undertakings, insufficient market competition and generally weak competitiveness characteristics, required adjustment and regulation within the overall situation of the State economy and industrial development.

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61 The second formal discussion draft was submitted at the 28th Session of the Standing Committee of the 10th National People's Congress on June 24, 2006.

62 This is also Article 4 of the AML.

63 See Law Committee of the NPC's Report on the Amendment Situation of the Anti-Monopoly Law Draft on June 24, 2007, available at: http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374670.htm (last visited March 1, 2012).

64 This fundamental principle was stated in the 14th National Congress of Chinese Community Party on October 12, 1992.

However, competition policies and industrial policies may conflict. Competition policy is adopted under a generally applicable principle without discrimination on undertakings or industries, while industrial policy is a sloping resource distribution measure which has a direct preferred target. They are also operated under separate measures. Competition policy maintains and protects market competition rules and creates better conditions for the market to distribute resources, while industrial policy operates through administrative power, instead of the market, to encourage, protect or eliminate the development of an industry.

There were arguments existing as to which policy should be prioritised when there are conflicts between them. Some Chinese scholars support the view that competition policy should have priority over industrial policies.[65] However, for a long time in reality, industrial policy played a central and important role and government was the leading power in resource distribution and economic development in China. Article 4 did not resolve the disagreement.

2.3.2.2 Articles 5 and 6

The new Article 5[66] of the second formal discussion draft stated that '[b]usiness operators may, through fair competition, voluntary alliance, concentrate themselves according to law, expand the scope of business operations, and enhance competitiveness,' and the new Article 6[67] stated that '[a]ny business with a dominant position may not abuse that dominant position to eliminate, or restrict competition.' At the same time, while Article 6 confirmed that a business operator with a dominant position would not violate the AML, Article 5 encouraged domestic enterprises 'to strengthen and expand (their business), to develop economies of scale, to improve industry concentration and to increase

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65 See X. Wang, 'The Priority of Competition Policy – EU's Competition Policy and Industrial policy [竞争政策优先—欧共体的产业政策与竞争政策]', (2001) 10 *Intertrade* p32. M. Lin and F. Lin, 'Options for China's Competition Policy and Industrial policy under the Progress of Economic Globalisation [经济全球化条件下中国的竞争政策与产业政策的选择]', (2002) 4 *Southeast Academic Research* p2. H. Qi, 'The Relationship between Competition Policy and Industrial policy: the Challenge China Faced with after China Entered WTO and the Japan's Experience [产业政策与竞争政策的关系: 中国入世后面临的挑战与日本的经验]', (2003) 3 *Economic Science* p123. Y. Meng, 'Research on Conflict and Harmony between Antitrust Law and Industrial policy [论产业政策与反垄断法的冲突与协调]', (2005) 2 *Social Science Research* p78. W. Lin, *Legal Research on Conflict and Harmony System between Competition Policy and Industrial policy [竞争政策和产业政策冲突协调制度的法律分析]*, (2005) China Financial and Economic Publishing House. G. Liu, *The Relation Between Competition Policy and Industrial Policy in Antitrust Law [反垄断法中的产业政策与竞争政策]*, (2010) Peking University Press.

66 It is also Article 5 of the AML.

67 It is also Article 6 of the AML.

competitiveness'.[68] This was because China's current situation showed that most enterprises lacked technological capacity and competitiveness, especially when facing competition from foreign undertakings. Economies of scale may help undertakings by cutting costs, increasing investment in technology and strengthening competitive capacity. However, mergers or restructuring are encouraged by the macro-control policies adopted by the government through economic rules, but sometimes operating under the promotion of, or even being forced by, administrative power, especially in the area of State-owned capital.

The Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the State-Owned Assets Supervision and Administration Commission of the State Council (SASAC) about Promoting the Adjustment of State-owned Capital and the Restriction of State-owned Enterprises[69] encourages State-owned capital concentrating on 'major industries and key fields relating to national security and national economic lifelines' and is aimed at creating a number of predominant enterprises with independent intellectual property rights, famous brands and strong international competitiveness. It further required the completion of the policy of an organised oriented shut-down and bankruptcy of a number of SOEs with bad assets by 2008. Opinions of the State Council on Promoting Enterprise Merger and Restructure[70] also laid stress on this kind of industrial policy.[71] There have been many restructures and mergers under the influence of administrative power: for example, telecommunications revolutions were always operated under the instructions of governments, and in 2008, six telecommunications enterprises were restructured and merged into three enterprises: China Telecom, China Mobile and China Unicom, promoted by the Ministry of Industry and Information Technology (MIIT), the National Development and Reform Commission (NDRC) and the Ministry of Finance, under three initiatives in 1994, 1999 and 2001.[72] Sichuan Development Holding Co. Ltd,

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68 See Law Committee of the National People's Congress's Report on the Amendment Situation of the Anti-Monopoly Law Draft on June 24, 2007, note 63.

69 Notice of the General Office of the State Council on Forwarding the Guiding Opinion of the SASAC about Promoting the Adjustment of State-owned Capital and the Restructure of Sate-owned Enterprises [国务院办公厅转发国资委关于推进国有资本调整和国有企业重组指导意见的通知] was issued by General Office of the State Council on December 5, 2006, available at: http://www.gov.cn/zwgk/2006-12/29/content_483477.htm (last visited March 1, 2012).

70 Opinions of the State Council on Promoting Enterprise Merger and Restructure [国务院关于促进企业兼并重组的意见] was issued by the State Council on August 28, 2010. Available at: http://www.gov.cn/zwgk/2010-09/06/content_1696450.htm (last visited March 1, 2012).

71 In this administrative regulation, State Council promotes further focus on key industries' adjustment and revitalisation plans.

72 The Announcement on Deeping Telecommunications System Reform [关于深化电信体制改革的通告] was published by the MIIT, the NDRC and Ministry of Finance on May 24, 2008. Available at:

the biggest Stated-owned enterprise in Sichuan Province, was founded by way of conversion into shares after the pricing of another 22 SOEs in 2008, under the order and approval from the Sichuan provincial government and the Sichuan provincial SASAC.[73] Furthermore, whether this conduct would create a dominant position under the AML, whether it would have a negative effect on market competition, or whether this concentration would reach the threshold of declaration were seldom considered in the operation of restructure or merger, especially when it was promoted by administrative power.

The association or merger between enterprises does not violate the AML directly. However, an article encouraging capital and enterprise concentration seems not to be totally in accordance with the purpose of protecting and maintaining fair competition in the market set out in the AML.

2.3.2.3 Article 7 of the AML

The new Article 7[74] of the second formal discussion draft stated that:

> '[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 implementing exclusive operation and sales according to law, the state protects the lawful business operations conducted by the business operators therein. The state also lawfully regulates and controls their business operations and the prices of their commodities and services so as to safeguard the interests of consumers and promote technical progresses.
>
> The business operators as mentioned above shall lawfully operate, be honest and faithful, be strictly self-disciplined, accept social supervision, shall not damage the interests of consumers by virtue of their controlling or exclusive positions.' [75]

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http://news.xinhuanet.com/tech/2008-05/24/content_8242658.htm (last visited March 1, 2012). The telecommunications revolutions will be further described and explained in Chapter 6.

73 See http://www.scspc.gov.cn/html/zd/dt/2009/1106/60534.html and http://www.chinatimes.cc/yaowen/hongguan/2008-12-13/2001.shtml (last visited March 1, 2012).

74 This is also Article 7 of the AML.

75 'Controlling or exclusive positions' in Article 7(2) is translated as 'dominant or exclusive positions' in the formal translation of the AML. See http://tradeinservices.mofcom.gov.cn/en/b/2007-08-30/9043.shtml (last visited on March 1, 2012). In this Article, 'controlling position' has the same meaning as 'controlled by the State-owned economy' in Article 7(1) but not the general 'dominant position' definition in Chapter 3 of the AML.

There is some disagreement as to the meaning of this article. Some scholars argue that this article was not a protection policy for specific industries.[76] Some industries controlled by the State-owned economy do not violate the AML and meet the requirements of maintaining the steady development of the national economy. Business operators in these industries are not allowed to abuse their dominant position to eliminate or restrict competition and are also regulated by other related laws or regulations, for example the Price Law. However, some scholars argue that this Article may create exemptions for the SOEs from the scope of the AML.[77] There is also another opinion that Article 7 is a result of a compromise between industrial policy and competition policy.[78]

Article 7 provides a conceptual framework to regulate the relationship of industrial policy and competition policy in respect of some specific industries. There are three implications. Firstly, it confirms the legally controlling position of the SOEs in the industries 'concerning the lifeline of national economy and national security and the industries implementing exclusive operation and sales according to law'.[79] This part further explains the State's positive opinion on encouraging economies of scale, especially for SOEs. Secondly, the business operators' conduct in these industries needs to be regulated and controlled. However, the State's regulating or controlling behaviour may depend on the specific industry regulations, but not on competition policies.[80] This may further create a conflict between industrial rules and competition rules. Finally, business operators in these specific industries shall not damage the interests of consumers by virtue of their controlling or exclusive positions. This is the only sentence in Article 7 which may show that business operators' conduct will be regulated by the AML.[81] However, this Article does not use the specific concept of 'market dominance position' set out elsewhere in the AML, but the

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76 Economic Law Office of Legislative Affairs Commission of NPC Standing Committee, '*People's Republic of China Anti-Monopoly Law: Articles Explanation, Legislation Reasons and Related Regulation[中华人民共和国反垄断法：条文解释，立法理由和相关规定]*', (2009) Peking University Press at 33-34; J. Yang, 'Correctly Understanding Some Questions of the AML [准确理解反垄断法的几个问题]' (2008) 5 *Seeking Turth* p34; L. Han, 'The Antimonopoly Law's Role of Supplementing the Industry Policies [反垄断法对产业政策的拾遗补缺作用]', (2008) 1 *Jurists Review* p19.

77 See Y. Huang, 'Regulatory Industry and the Application of Anti-Monopoly Law [管制行业与反垄断法的适用]' *International Business Daily*, October 26, 2007 and L. Han, note 76.

78 J. Zhang, 'On the Application of Antitrust Law in Particular Industries-Review on the Article 7 of Antitrust Law of People's Republic of China [特定行业的《反垄断法》适用研究 -《中华人民共和国反垄断法》第七条评析]', (2007) 4 *Journal of Beijing University of Chemical Technology (Social Science Edition)* p22.

79 See Article 7 of the AML.

80 X. Wang (Ed), '*The Explanation of People's Republic of China Anti-Monopoly Law [中华人民共和国反垄断法详解]*', (2008) Intellectual Property Press at 51-53.

81 There are also a number of general requirements stated in Article 7(2), for example, 'lawfully operation', 'honesty and faith', 'self-discipline and social supervision', besides the industry policies or regulation are laid stress on in Article 7(1). None of these has been defined in the AML.

undefined words 'controlling position' and 'exclusive position'.[82] Moreover, an indistinct phrase, 'interest of consumers,' is used.[83] Further analysis on how to apply this sentence to the relationship between industrial policies and competition policies will be discussed in Chapter 6 of this thesis.

2.4 The Post-Anti-Monopoly Law Era: 2008-March 2012

The AML entered into force on August 1, 2008. Since this date cases have been initiated in the courts and merger cases have been submitted to MOFCOM. A series of supplementary regulations have been issued to support the application of the AML.

2.4.1 Anti-Monopoly Law Cases

Several cases were lodged in a few months after the AML took effect. Ten cases have been heard by courts, according to the statistics.[84]

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82 Unlike the 'exclusive right' definition in EU competition law, there is no concept of 'exclusive position' mentioned in the AML, except in Article 7.

83 It may be better to adopt 'shall not violate the principles of the AML', instead of 'shall not damage the interest of consumers'.

84 See http://cms40.legaldaily.com.cn:7001/servlet/PagePreviewServlet?siteid=4&nodeid=20848&articleid=2264021&type=1 (last visited March 1, 2012). This article was published in Legal Daily on August 29, 2010. Unfortunately, there is no up-to-date statistics published.

Table 2-1: Anti-Monopoly Law Civil Cases

No.	Case	Dates	Reasons	Decisions
1	Li Fangping v. China Netcom Beijing Subsidiary (thereafter CNC Beijing)	Prosecuted on August 1, 2008; Decisions made by the First Intermediate People's Court of Beijing on December 12, 2009 and supported by the Higher People's Court of Beijing on June 9, 2010.	Abusing market dominance to apply dissimilar prices on telephone installation services	The plaintiff's claim was overruled. The Court stated that Li Fangping had not provided abundant evidences to support his claim on market dominance position and CNC Beijing would face operation risk without some limitations to non-Beijing household registered consumers.
2	Liu Fangrong v. Chongqing Insurance Trade Association	Prosecuted on August 1, 2008.	Organising insurance business operators to reach a monopoly agreement	The plaintiff withdrew this lawsuit. Chongqing insurance trade association revised the Automotive vehicle Insurance industry self-discipline agreement and deleted Article 14 which was charged as monopoly agreement provision.
3	Chongqing Western Bankruptcy and Liquidation Ltd. v. Nanping Branch of China Construction Bank[85]	Prosecuted in September, 2008.	Abusing market dominance to refuse to trade, apply dissimilar transaction terms and impose unreasonable trading conditions	This lawsuit was settled and the plaintiff withdrew it.[86]
4	Zhou Zei v. China Mobile and its Beijing Subsidiary[87]	Case accepted on March 30, 2009.	Abusing market dominance to charge monthly fee	This lawsuit was settled.
5	Tangshan Renren Information Service Company v. Baidu[88]	October 31, 2008	Abusing market dominance to shield the webpage of the plaintiff on the results of Baidu Search Engine	The plaintiff's claim was rejected for the reason of lack of evidence to support his claim in relation to the existence of a market dominant position.
6	Beijing Zhongjing Zongheng Information Consult Company v. Baidu[89]	2009	Abusing market dominance to shield the webpage of the plaintiff on the results of Baidu Search Engine	Decision has not yet been made.
7	Beijing	Case accepted	Abusing dominance on	The plaintiff's claim was

85 See http://active.zgjrw.com/News/2008912/zgjrw/260083051100.html (last visited March 1, 2012).
86 See http://ipr.court.gov.cn/cq/bzdjz/200902/t20090219_102388.html (last visited March 1, 2012).
87 See http://news.xinhuanet.com/legal/2009-11/11/content_12430694.htm (last visited March 1, 2012).
88 See http://www.chinacourt.org/html/article/200912/18/386685.shtml (last visited March 1, 2012).
89 See http://beijing.ipr.gov.cn/bj12312/aljx/sf/qt/568818.shtml (last visited March 1, 2012).

	Shusheng Electronic Technology Ltd. v. Shanda Interactive Entertainment Ltd. and Shanghai Xuanting Entertainment Information Technology Ltd.[90]	on April 9, 2009. Decisions made by the First Intermediate People's Court of Shanghai on October, 2009 and supported by the Higher People's Court of Shanghai on December, 2010.	China network literature market to restrict writers' creation.	rejected. The Court stated that the plaintiff lacked evidence to support his claim on relevant market and the market dominance position. The claimed abusive conduct on restricting authors' creation of sequels, which was not the creation of the original novel' author, were legal.
8	Huzhou City Yiting Termite Control Service Ltd. v. Huzhou City Termite Control Research Ltd.[91]	Decisions made by the Intermediate People's Court of Hangzhou on June 7, 2010 and supported by the Higher People's Court of Zhejiang Province on August 27, 2010.	Abusing dominance on Termite Control Market in Huzhou City by its contract with Huzhou City Plan and Construction Bureau	The plaintiff's claim was rejected. The Court confirmed the market dominant position of Termite Control Research Ltd. However, the contract between Plan and Construction Bureau and Termite Control Research Ltd. did not require trade exclusively with a designated business operator.
9	Zheng Mingjie v. VeriSign Statistics Service Technology (China) Ltd. and Internet Corporation for Assigned Names and Numbers (thereafter ICANN)		Abusing their rights as .com domain name registrations to refuse to register .com domain name beginning with letters a-z.[92]	Decision has not yet been made.
10	Zheng Mingjie v. VeriSign Statistics Service Technology (China) Ltd. and Internet Corporation for Assigned Names and Numbers (thereafter ICANN)		Abusing their rights as .com domain name registrations to refuse to register .com domain name beginning with number 0-9.[93]	Decision has not yet been made.

Abusing the dominant position is one of the most significant problems in practice. In the above ten cases, nine were based on abusing market dominance, and only one case was

[90] See http://ipr.court.gov.cn/sh/bzdjz/201001/t20100104_126336.html (last visited March 1, 2012).
[91] See http://www.cqtlaw.com/dxal/html/?409.html (last visited March 1, 2012).
[92] There is no further information available to the public.
[93] There is no further information available to the public.

based on monopoly agreement. Furthermore, the cases suggest a lack of understanding as to the provision of objective supporting evidence.[94] In the four cases where decisions were made by the courts, the plaintiffs' claims were rejected on grounds of insufficient evidence to support the claims, especially in relation to identification of the relevant market or market dominance in these cases. Several cases were resolved by a settlement between the parties or through withdrawal by the claimants following corrective action undertaken by the defendants.

In addition to the cases submitted to the courts, cases on merger control are dealt with by MOFCOM. As stated by Shang Ming, the Director of the Anti-Monopoly Bureau of MOFCOM, the number of cases increased rapidly from 17 in 2008, to 80 in 2009, 117 in 2010, and to 203 in 2011.[95] In most cases mergers are cleared, although there was conditional approval in eleven cases[96] and prohibition in only one case.[97] MOFCOM has made clear statements on competition analysis based on Article 27 of the AML, the relevant elements on examining the concentration of business operators. MOFCOM's decisions have been subject to comment and analysis, particularly so in the case of *Coca-Cola/Huiyuan*. MOFCOM stated that Coca-Cola had the ability to transfer its market dominance in the carbonated soft drinks market to the juice drinks market. Some scholars agreed with this conclusion and argued that this decision corresponded to the theories applied in the EU and the US or the existing foreign cases.[98] Other scholars disagreed.

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94 See Y. Yan, 'Difficulties on Adducing Evidences in the Operation of the Anti-Monopoly Law', October 10, 2010, *China Business Journal*. Available at: http://www.competitionlaw.cn/show.aspx?id=5760&cid=35 (last visited March 1, 2012).

95 See http://www.gov.cn/banshi/2011-09/22/content_1953649.htm and http://www.21cbh.com/2012/jjrb_115/65875.html (last visited March 1, 2012). The number of new merger control cases in 2012 has not been published by March1, 2012.

96 As of March 2, 2012, twelve cases have been conditionally approved. Proclamations in three cases, *InBev v. Anheuser-Busch*, *Mitsubishi Rayon v. Lucite and General Motors v. Delphi*, are not published on the website of the Ministry of Commerce but mentioned by the report of Shang Ming. See http://www.gov.cn/banshi/2011-09/22/content_1953649.htm (last visited March 1, 2012). *Pfizer v. Wyeth*, see http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html; *Panasonic v. Sanyo*, see http://fldj.mofcom.gov.cn/aarticle/ztxx/200910/20091006593175.html; *Novaritis v. Alcon*, see http://fldj.mofcom.gov.cn/aarticle/ztxx/201008/20100807080639.html; *Uralkali v. Silvinit*, see http://fldj.mofcom.gov.cn/aarticle/ztxx/201106/20110607583288.html; *Penelope v. Savio*, see http://fldj.mofcom.gov.cn/aarticle/ztxx/201111/20111107855585.html; *General Electronic Company v. China Shenhua Coal to Liquid and Chemical*, see http://fldj.mofcom.gov.cn/aarticle/ztxx/201111/20111107855595.html; *Seagate v. Samsung Electronics*, see http://fldj.mofcom.gov.cn/aarticle/ztxx/201112/20111207874274.html; *Henkel HongKong v. Tiande Chemical*, see http://fldj.mofcom.gov.cn/aarticle/ztxx/201202/20120207960466.html and *Western Digital v. Hitachi Storage*, see http://fldj.mofcom.gov.cn/aarticle/ztxx/201203/20120307993758.html (last visited March 2, 2012).

97 *Coca-Cola/Huiyuan*, see http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html (last visited March 1, 2012).

98 See S. Sheng and T. Liu, 'Opinions on China's Review on Enterprise Merger Based on the Huiyuan Juice Case [从汇源果汁收购案看中国的企业兼并审查]', (2009) 2 *China Law* p14. Xiaoye Wang stated that there

Ying Pinguang claimed that it was a lawful but unreasonable decision because the concentration would not lead to powerful market control and would not raise barriers to entry.[99] Pan Zhicheng doubted the market analysis in this case and disputed the alleged connection between carbonated soft drinks and juice drinks.[100]

2.4.2 Relevantly Supplementary Regulations of Anti-Monopoly Law

A series of supplementary regulations has been issued since the AML took effect in 2008. These regulations relate to all four kinds of conduct violating the AML, including conduct of reaching a monopoly agreement, abusing market dominance, abuse of administrative power to eliminate or restrict competition, and concentration between business operators.[101]

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was a similar merger case between Coca-Cola and Berri in Australia and Australian Competition and Consumer Commission also prohibited the concentration. See X. Wang, *Wang Xiaoye on the Antitrust Law [王晓晔论反垄断法]*, (2010) Social Science Academic Press at 348-353.

99 P. Ying, 'Some Thoughts about the Proposed Acquisition of Huiyuan by Coca Cola from the Perspective of Antimonopoly Law [可口可乐收购汇源案的反垄断法思考]', (2010) 6 *Journal of Southwest University of Political Science and Law* p42.

100 Z. Pan, 'Justifications for the Ministry of Commerce to Prohibit Coca-Cola's Acquisition of Huiyuan Company [分析商务部禁止可口可乐收购汇源的相关理由]', (2009) 7 *Legal Science* p42.

101 Relevant regulations on monopoly agreement include: Provisions against Price Fixing [反价格垄断规定], which was issued by the NDRC and took effect on February 1, 2011; Provisions for the Industry and Commerce Administrations on the Prohibition of Monopoly Agreements [工商行政管理机关禁止垄断协议行为的规定], which was issued by the SAIC and took effect on February 1, 2011; Procedural Rules by Administration of Industry and Commerce regarding Investigation and Handling of Cases relating to Monopoly Agreement and Abuse of Dominant Market Position [工商行政管理机关查处垄断协议、滥用市场支配地位案件程序规定], which was issued by the SAIC and took effect on July 1, 2009. Relevant regulations on market dominance include: Guidelines on the Definition of the Relevant Market [关于相关市场界定的指南], which was issued by the SAIC and took effect on July 6, 2009; Provisions against Price Fixing; Provisions for the Industry and Commerce Administrations on the Prohibition of Abuse of Dominant Market Position [工商行政管理机关禁止滥用市场支配地位行为的规定], which was issued by the SAIC and took effect on February 1, 2011; Procedural Rules by Administration of Industry and Commerce regarding Investigation and Handling of Cases relating to Monopoly Agreement and Abuse of Dominant Market Position. Relevant regulations on abuse of administrative power include: Provisions against Price Fixing; Provisions for Administrative Authorities for Industry and Commerce to Prevent Abuse of Administrative Power to Eliminate or Restrict Competition [工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定] (Supplementary Provisions on Abuse of Administrative Power), which was issued by the SAIC and took effect on February 1, 2011; Relevant regulations on concentration include: Provisions of the State Council on the Criteria for the Declaration of Business Concentration [国务院关于经营者集中申报标准的规定], which was issued by the State of Council and took effect on August 3, 2008; Notice of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors [国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知], which was issued by the General Office of the State council and took effect on March 3, 2011; Provisions of the Ministry of Commerce on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors [商务部实施外国投资者并购境内企业安全审查制度的规定], which was issued by the Ministry of Commerce and took effect on September 1, 2011; Measures for Calculating the Turnover for the Declaration of Business Concentration in the Financial Industry [金融业经营者集中申报营业额计算办法], which was formulated by the Ministry of Commerce, the People's Bank of China, the China Banking Regulatory Commission, the China Securities Regulatory Commission, and the China Insurance Regulatory Commission and issued on July

The AML contains many principle provisions in respect of which operational details are not spelt out on the face of the legislation. These supplementary regulations can fill up the blanks left by the AML. They were formulated and issued by the anti-monopoly authorities designated by the State Council, for example, the regulation on price fixing was formulated by the NDRC, the regulations on monopoly agreement, market dominance and abuse of administrative power were formulated by the SAIC, and the regulations on business concentration were generally formulated by MOFCOM.

There have been relatively fewer regulations published in the aspects of monopoly agreement, market dominance and abuse of administrative power than in relation to business concentrations. Only a detailed explanation regulation and a procedural rule have been issued, alongside two regulations on clarifying the definitions of the relevant market and price fixing. However, these provisions not only further improve the understanding and operational feasibility in these areas, but also expand the content of articles in the AML. Article 36 of the AML, for example, is the only main article dealing with abuse of administrative power to force business operators to engage in monopoly agreements or abuse of market dominance activities. However, there are four articles[102] and huge detail on restricting abuse of administrative power on the commodities' free circulation activities. In consideration of the imbalance between two kinds of abuse of administrative power, the Provisions for the Industry and Commerce Administrations to Prohibit Abuse of Administrative Power to Eliminate or Restrict Competition has made specific distinctions on activities by reason of administrative restriction, administrative empowerment and

15, 2009; The Measures for the Undertaking Concentration Declaration [经营者集中申报办法], which was issued by the Ministry of Commerce and took effect on January 1, 2010; The Measures for the Undertaking Concentration Examination [经营者集中审查办法], which was issued by the Ministry of Commerce and took effect on January 1, 2010; Interim Provisions on the Divestiture of Assets or Business in the Concentration of Business Operators [关于实施经营者集中资产或业务剥离的暂行规定], which was issued by the Ministry of Commerce and took effect on July 5, 2010; Guiding Opinions of the Anti-monopoly Bureau of the Ministry of Commerce on the Declaration of the Concentration of Business Operators [商务部反垄断局关于经营者集中申报的指导意见], which was issued by the Ministry of Commerce and took effect on January 5, 2009; Operational Guidelines for Anti-Monopoly Review on Business Concentration [经营者集中反垄断审查办事指南], which was took effect on January 5, 2009; Guiding Opinions of the Anti-monopoly Bureau of the Ministry of Commerce on the Declaration Documents and Materials of the Concentration of Business Operators [商务部反垄断局关于经营者集中申报文件资料的指导意见], which was issued by the Ministry of Commerce and took effect on January 5, 2009; Interim Provisions on Assessing the Impact of Concentration of Business Operators on Competition [商务部关于评估经营者集中竞争影响的暂行规定], which was issued by the Ministry of Commerce and took effect on September 5, 2011.

[102] See Articles 32 to 35 of the AML.

administrative regulation.[103] These provisions are analysed where relevant in the following chapters of the thesis.

2.4.3 Enforcement of the Anti-Monopoly Law

A so-called troika structure is adopted for the AML enforcement authorities under the Anti-Monopoly Commission set up by the State Council, according to Articles 9 and 10 of the AML and the provisions on the functions of the three enforcement authorities, the Ministry of Commerce of the People's Republic of China (MOFCOM), the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC).[104] The Anti-Monopoly Commission will organise, coordinate or guide the anti-monopoly work but the three enforcement authorities will separately operate their functions. For example, the Anti-Monopoly Bureau of the MOFCOM focuses on concentrations of business operators, the Price Supervision and Inspection Department of the NDRC regulates monopoly agreements or abuses of market dominance in pricing, and the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of the SAIC is responsible for other monopoly agreements and abuses of market dominance, and abuses of administrative power to eliminate or restrict competition. The troika structure is considered as a compromise between a choice of the existing interest of administrative authorities and the feasibility of anti-monopoly enforcement.[105] However, critisicm of the troika structure has been made by a number of scholars who point to concerns as to the conflicts that may arise in relation to enforcement and cooperation between the different authorities.[106] Another argument relating to the soft-law enforcement of abuse of administrative power is also raised by scholars.[107] The anti-monopoly authority only can put forward suggestions on handling abuse of administrative power issues to the relevant

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103 See Article 5 of Provisions for the Industry and Commerce Administrations to Prohibit Abuse of Administrative Power to Eliminate or Restrict Competition. The analysis and evaluation of this regulation will continue in Chapter 3.

104 The Provisions on the Main Functions, Internal Bodies and Staffing of the Ministry of Commerce [商务部主要职责、内设机构和人员编制规定]，the Provisions on the Main Functions, Internal Bodies and Staffing of the National Development and Reform Commission [国家发改委主要职责、内设机构和人员编制规定] and the Provisions on the Main Functions, Internal Bodies and Staffing of the State Administration for Industry and Commerce [国家工商总局主要职责、内设机构和人员编制规定] which were issued on July 1, 2008, August 21, 2008 and July 26, 2008.

105 Note 59.

106 J. Yang, note 76; Economic Law Office, note 76; and X. Wang (Ed), note 80.

107 X. Wang, 'Highlights of China's New Anti-Monopoly Law', (2008) 1 *Antitrust Law Journal* at 149.

superior authority, according to Article 51 of the AML. This approach further weakens the efficiency and effectiveness of the enforcement authority.[108]

[108] The issue on Anti-Monopoly Enforcement authorities will not be further discussed in this thesis.

Chapter Three
Regulating Abuse of Administrative Power in the Chinese Anti-Monopoly Law

1. Introduction

Chapter 3 will examine four basic areas relating to abuse of administrative power in the AML, including the curial definitions of the AML, the objectives of competition law and abuse of administrative power, the causes of abuse of administrative power on competition, and the feasibility to regulate abuse of administrative power under the AML. Firstly, following the distinction and discussion on abuse of administrative power and administrative monopoly, this thesis' concept of abuse of administrative power are elaborated. Later, Chapter 3 discusses the objectives of competition law in the EU and in Chinese AML, especially on the topic of abuse of administrative power to eliminate or restrict competition. In the coming section, the causes of abuse of administrative power in China are analysed in the institutional, economic and legal areas. After the planned economy and the reforms in the last 30 years, the abuse of administrative power to restrict competition is still a serious problem in the market. In the final section, this chapter has a comparison and evaluation study on the three main opinions of regulating abuse of administrative power.

2. Definition of Terms

The abuse of administrative power is regulated by the AML in Articles 8 of Chapter One setting out a general provision and Articles 32 to 37 of Chapter Five which deals specifically with the abuse of administrative power to eliminate or restrict competition.

2.1 Abuse of Administrative Power in the AML

According to the statement in Article 8 of the AML, 'abuse of administrative power' can be defined as conduct of administrative organs or organisations empowered by a law or administrative regulation to administer public affairs which has the effect of eliminating or

restricting competition.[1] The AML also has a separate chapter which specifically regulates the abuse of administrative power to eliminate or restrict competition. In Chapter Five, the first four articles define the type of anti-competitive conduct of administrative organs or empowered organisations, such as measures which restrict or block free circulation of commodities between different regions. Article 36 regulates abuse of administrative power with an anti-competitive effect on monopoly agreements, abuse of market dominance and concentration of business operators, while Article 37 shows that the 'abstract act of abuse of administrative power'[2] is also regulated under the AML.

These provisions indicate some characteristics of the concept of abuse of administrative power. First, the conduct of government organs and empowered organisations will be controlled under the AML. Second, restricting abuse of administrative power not only aims to regulate regional blockades but also aims to regulate monopolies in government industry departments or empowered organisations. Third, both specific acts and abstract acts of abuse of administrative power may fall within the AML. Administrative Procedure Law only applies to specific administrative conduct and abstract administrative acts were also not within the scope of the competition provisions of the AUCL.[3] The AML transcends Administrative Procedure Law and the AUCL and creates a new regime to regulate administrative acts.

2.2 Some Issues related to the Definition of Abuse of Administrative Power

2.2.1 The Terms of 'Abuse of Administrative power' and 'Administrative Monopoly'

The term 'administrative monopoly' has been widely used in China. Some scholars considered that administrative monopoly was just a simplified form of 'abuse of

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1 Article 8 of the AML: 'No administrative organ or organisation empowered by a law or administrative regulation to administer public affairs may abuse its administrative powers to eliminate or restrict competition.'

2 'Specific administrative acts' (or 'concrete administrative acts') and 'abstract administrative acts' are the definitions in Chinese administrative law. Administrative power is classified into specific administrative acts and abstract administrative acts. Specific administrative acts mean the acts of administrative organs to operate administrative acts or formulate standard documents which relate to specific persons or affairs in administrative management. Abstract administrative acts are the acts of administrative organs to formulate the universal applied standard documents which relate to unspecified person or affairs in administrative management. The acts of formulating provisions on eliminating or restricting competition are included in abstract administrative acts. The term 'abstract administrative act' is broadly used by scholars in China in explaining Article 37 of the AML.

3 See Article 12(1) of Administrative Procedure Law [行政诉讼法], which was issued by the NPC and took effect on October 1, 1990 and Article 7 of the AUCL.

administrative power to eliminate or restrict competition'.[4] Some scholars suggested that the phrase 'abuse of administrative power to eliminate or restrict competition' may lead to a misunderstanding in that the illegality of administrative power focused on the abusive conduct but not the damage to competition.[5]

However, the AML adopts the term 'abuse of administrative power' instead of 'administrative monopoly' in the AML. This is more appropriate. First, monopolies may engage in both legal and illegal conduct, while administrative monopoly appears to relate solely to the illegal administrative conduct to restrict competition, equating to the definition of 'abuse of administrative power'[6].

Second, the 'monopolistic conduct' defined in Article 3 of the AML includes the conduct of business operators in entering monopolistic agreements, abuse of market dominance and concentrations which eliminate or restrict competition or might have such an effect. Literally, administrative monopoly can be explained as the use of administrative power to enact monopolistic conduct. However, the kinds of administrative conduct regulated in Chapter Five of the AML not only include forcing business operators to engage 'in the monopolistic conduct as prescribed in this Law',[7] but also includes a series of measures in restricting, or restricting in a disguised form, entities and individuals in operating, purchasing or using commodities and blocking the free circulation of commodities between regions.[8] Thus, the content of regulated administrative power in Chapter Five is much broader than the general content of 'administrative monopoly', and is more complicated.

2.2.2 The Entities Holding Administrative Power

According to the definition of abuse of administrative power, the entities holding administrative power include administrative organs and organisations empowered by a law or administrative regulation to administer public affairs.

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4 See J. Shi, 'Who does not Like the Word of Administrative Monopoly? [行政垄断这个提法到底讨谁嫌?]' See: http://cdn851.todayisp.net:7751/article.chinalawinfo.com/Article_Detail.asp?ArticleId=65842 (last visited March 1, 2012).

5 See C. Zheng, *Legal Control Research of Administrative Monopoly [行政垄断的法律控制研究]*, (2003) Peking University Press at 30-31.

6 See S. Cao, *Anti-Monopoly Law Research [反垄断法研究]*, (1996) Law Press at 16.

7 See Article 36 of the AML.

8 See Articles 32 to 35.

'Administrative organs' should include local governments and government departments at both central and local levels. There is no clear definition of 'administrative organs' in the AML. Generally speaking, 'administrative organs' include not only central government, but also, the State Council and its departments, commissions, organs directly under the State Council and State bureaus organised by the State Council's departments and commissions, as well as local governments and their subordinate departments.[9] However, in the view of some scholars, the State Council does not fall within the provisions on abuse of administrative power under the AML, since the central government represents the State and operates State functions.[10]

Furthermore, 'the organisations empowered by a law or administrative regulation to administer public affairs' encompasses quasi-administrative organs which have similar functions to administrative organs, but which are empowered by a law or administrative regulation. The empowered organisations are not specified in the AUCL, which only regulates 'governments and their subsidiary departments'.[11] A later regulation on prohibiting regional blockades brought within to scope 'organisations empowered by a law or administrative regulation or entrusted by an administrative organ'.[12] There are six kinds of organisation administering public affairs.[13] The empowered organisations in the AML are those which administer public affairs by a law or administrative regulation.[14]

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9 There is also no clear definition of administrative organs in legislation and scholars have debated the meaning to be given to the term. In the view of Xiaoye Wang, administrative organs only include central government and local governments. See X. Wang, *Explanation on People's Republic of China Anti-Monopoly Law [中华人民共和国反垄断法详解]*, (2008) Intellectual Property Publishing House at 55. However, this thesis follows the opinion held by Shuyi Zhang; see S. Zhang, *Administrative Law [行政法]*, 2nd Edition, (2012) Peking University Press at 68-72. According to the Constitution of the PRC, the Organic Law of the State Council and the Organic Law of the Local People's Congress and Local People's Governments, central government and local governments are administrative organs. Furthermore, according to the Administrative Penalty Law and the Administrative License Law, administrative organs should also include subordinate departments of central and local governments. The Organic Law of the State Council of the People's Republic of China [中华人民共和国国务院组织法] was published on December 10, 1982 and the Organic Law of the Local People's Congress and Local People's Governments of the People's Republic of China [中华人民共和国地方各级人民代表大会和地方各级人民政府组织法] was published on July 1, 1979. The Administrative Penalty Law [行政处罚法] took effect on October 1, 1996. The Administrative License Law [行政许可法] took effect on July 1, 2004.

10 See B. Wang, 'The Anti-Monopoly Law's Regulation on Administrative Monopoly [论反垄断法对行政垄断的规制], (1998) 5 *Academic Journal of Graduate School of China Academy of Social Science* p32; M. Zhong, *Competition Law [竞争法]*, (1997) Legal Press at 324; and X. Wang, note 9, at 55.

11 See Article 7 of the AUCL.

12 See Article 4 of the Provisions of the State Council on Prohibiting Regional Blockades in Market Economic Activities [国务院关于禁止在市场经济活动中实行地区封锁的规定], which was enacted on April 21, 2001 by the State Council.

13 (1) State Administration; (2) the ruling party; (3) group organisations for example, labour union, the Women's Federation and the Communist Youth League; (4) public institutions empowered by a law or

2.2.3 Identifying Abuse of Administrative Power

According to the definition of abuse of administrative power, there are two standards that need to be met. The first is the nature of the administrative conduct. Conduct may be regarded as an abuse of administrative power in the AML, if and only if the conduct has a substantial effect, or potentially threatens to eliminate or restrict competition. The substantial effect or potential threat is on the barriers to the free trade or free circulation of commodities, monopoly agreements, abusing market dominance, and concentrations of business operators.

The abuse of administrative power should be distinguished from the definition in the Administrative Law in China. In the Administrative Law, there are two kinds of unlawful administrative conduct.[15] One is conduct arising out of the organs' functions or without empowerment by a law, administrative regulation or government indication. The other is conduct in violation of the functions or powers. An abuse of administrative power in the AML may be lawful administrative conduct under the Administrative law, but unlawful under the AML where it may have the result of eliminating or restricting competition in the order of functions or powers. The task of identifying the 'abuse' of administrative power in the AML requires an assessment of whether there is substantial effect or potential threat on eliminating or restricting competition, but does not depend on the legitimacy of the conduct under the Administrative Law. In the alternative, the conduct may be attached under other laws, such as the AUCL, the Administrative Law, the Bid Law or the Price Law, but not the AML.

Second, an undertaking engaging in monopolistic conduct is not a necessary condition for the application of the law. This point is one of the most obvious differences between the AML and EU competition law.[16] It is contemplated in Articles 32 to 37 of the AML that some undertakings may have anti-competitive conduct, especially through abusing their market dominance, with the empowerment of administrative power. However, in the sphere of designated transactions or in relation to commodities' free circulation, some

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administrative regulation to administer public affairs; (5) the grassroots self-government organisations under the direction of governments; and (6) social organisations and civilian-run non-enterprise units. See X. Wang, note 9, at 56.

14 X. Wang, note 9, at 56.

15 S. Zhang, note 9, at 23-28.

16 This point will be further discussed in Chapter 4.

undertakings may directly benefit from the operation of the abuse of administrative power while their rivals are damaged or potentially damaged in competition by the same administrative acts. In this situation, the undertakings themselves do not engage in monopolistic conduct. In other words, there is 'acquiescent' and 'passive' anti-competitive conduct which may result in damage or potential damage for undertakings.

2.2.4 The classifications of Conduct Constituting abuse of administrative power

Conduct constituting an abuse of administrative power can be divided into specific acts and abstract acts. This classification comes from the Administrative Law.[17] 'Specific administrative acts' in the administrative law include unilateral actions made by State administrative organs, officials of administrative organs, organisations empowered by a law or administrative regulation and organisations or individuals entrusted by administrative organs through their administrative power in administrative management activities. These actions are targeted at specific issues relating to the rights or obligations of certain citizens, legal persons or other organisations.[18] 'Abstract administrative acts' which do not fall within the Administrative Procedure Law are administrative normative documents of more general applicability published by administrative organs of more general, less specific, scope, including administrative regulations, administrative provisions, administrative measures, and legally binding decisions and orders.[19]

However, there are some differences in content between the AML and the Administrative Procedure Law. A specific act of abuse of administrative power in the AML does not include acts of officials of administrative organs and organisations or individuals entrusted with functions by administrative organs, while an abstract act of abuse of administrative power does not include administrative regulations and administrative provisions.[20] Article 37 of the AML which clarifies the conduct is therefore innovative. This article not only

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17 X. Wang, note 9, at 206.

18 See Article 1 of Opinions of the Supreme People's Court on Several Issues Concerning Implementation of Administrative Procedure Law of the People's Republic of China [最高人民法院关于贯彻执行<中华人民共和国行政诉讼法>若干问题的意见], which was published on June 11, 1991.

19 See Interpretation of the Supreme People's Court of Several Issues concerning the Implementation of Administrative Procedure Law of the People's Republic of China [最高人民法院关于执行<中华人民共和国行政诉讼法>若干问题的解释], which was took effect on March 10, 2000.

20 See Article 4 of Provisions for Administrative Authority for Industry and Commerce to Prevent Abuse of Administrative Power to Eliminate or Restrict Competition [工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定], which is a supplementary provision for the AML on the issue of abuse of administrative power and took effect on February 1, 2011. The means of abstract acts of abuse of administrative power only include decision, proclamation, announcement, notice, opinion and meeting summary.

greatly helps completely to deal with the abuse of administrative power under the AML, but also creates an example for Chinese administrative procedure law.

The forms of the abuse of administrative power can be divided into regional blockades and industrial monopoly. Regional blockades are a focal point of the AML. Regional blockades are a form of local economic protectionism that prohibits or restricts the movement of goods, capital and the operation activities of enterprises. The major implementers are the administrative organs or empowered organisations at a local level. Chapter Five of the AML lists a series of forms of regional blockades in detail. However, it mainly focuses on the restriction or refusal of the movement on the goods, capital or operation activities of enterprises from outside the local area. Free movement is reciprocal; the blockage on free movement from inside to outside also exists: for example, the local government may not allow certain raw materials to be exported to enterprises outside of the locality in order to support the development of local enterprises in the same industry. The scope of industrial monopoly is not precisely defined. Besides the abuse of administrative power by administrative organs, especially government industry departments, the public enterprises and industry associations empowered by a law, administrative regulation, governmental documents or indications to administer public affairs should be also included.

3. Objectives of Article 106 TFEU and Chapter Five of the AML

'Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals?'[21] This starts with a discussion of the objectives of Article 106 TFEU and Chapter Five of the AML.

3.1 The Objectives of Competition Law in the EU

The protection of effective competition and consumer welfare are the objectives of EU competition law, although some arguments remain. The Commission has made various statements as to the role of competition law, including, for example, the Commission Guidelines' statement in 2000 that '[t]he protection of competition is the primary objective of EC competition policy, as this enhances consumer welfare and creates an efficient

[21] R. H. Bork, *The Antitrust Paradox: A Policy at War With Itself,* (1978) Basic Books at 50.

allocation of resources'.[22] A similar statement was adopted in the explanation of the objectives of Article 101 in 2004.[23] The Merger Regulation may lead to the prohibition of a merger where it would 'significantly impede effective competition'.[24] In the case law of the Court of Justice of the European Union (CJEU), maintaining effective competition was in favour in the earlier cases, for example, *United Brands*[25] and *Magill*.[26] Two cases in 2006 suggested that consumer welfare was the sole objective of EU competition law.[27] Advocate General Kokott's Opinion in *British Airways* was that both 'the immediate interests of individual competitors or consumers' and 'the structure of the market' should be protected in Article 102.[28] This opinion was not accepted in the ECJ's judgment in *British Airways* but supported in *T-Mobile Netherlands*[29] and in the appeal from the General Court in *GlaxoSmithKline*.[30]

The approach to consumer welfare in EU competition law focuses on lower prices, greater output, greater choice, higher quality and more innovation.[31] However, there are overtones of the Harvard School approach in EU competition law in that emphasis is put on market structure, with the EU seeking to maintain market structure by supporting competitors,

22 Guidelines on Vertical Restraints, [2000] OJ C291/1, para.7, (repealed).

23 Guidelines on the Application of [Article 101(3) TFEU] [2004] OJ C101/97, para.13. 'The objective of Article [101] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.' This statement was also repeated in the Commission in DG Comp Staff Discussion Paper on the Application of Article [102] of the Treaty to Exclusionary Abuse, Brussels, December 2005, para.4. Available at: http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf (last visited March 1, 2012).

24 Council Regulation 139/2004 [2004] OJ l124/1, Article 2(3).

25 Case 2/76, *United Brands v. Commission* [1978] ECR 207 [1978] 1 CMLR 429. The ECJ stated that an undertaking's power to 'prevent effective competition being maintained on the relevant market' shall be restricted. See para.65.

26 Joined Cases C 241-242/91I *Radio Telefis Eeireann and Independent Television Publications Limited v. EC Commission* [1995] ECR I-743 [1995] 4 CMLR 718, The ECJ supported that 'while the Commission's decision ordering the grant of licences … it is essential in order to maintain effective competition'. See para.134.

27 Case T-213/01 and Case T-214/01, *Osterreichische Postsparkasse AG v. commission and Bank Fur Arbeit und Wirtschaft AG v. Commission* [2006] ECR II-1601, para.15. See also Case T-168/01, *GlaxoSmithKline Services Unlimited v. Commission* [2006] ECR II-2969, para.118.

28 Opinion of Kokott AG in Case C-95/04 P, *British Airways v. Commission* [2007] ECR I-2331, para.86.

29 Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, [2009] 5 C.M.L.R. 11, para.38.

30 Case C-501/06 P, *Commission v. GlaxoSmithKline Services Unlimited* [2010] 4 C.M.L.R. 2, para.63.

31 Guidelines on the Application of [Article 101(3) TFEU], note 23, paras.16, 21 and 25. Guidance on the Commission's Enforcement Priorities in Applying Article [102 TFEU] to Abusive Exclusionary Conduct by dominant Undertakings, [2009/C 45/02], para.5. Guidance on the Assessment of Non-Horizontal Mergers, [2008] OJ C 265/7, para.10.

especially small businesses in the market to get access to resources and compete with dominant undertakings;[32] fair rather than free competition is pursued by the EU.

3.2 The Objectives of Chinese Anti-Monopoly Law

The legislative objective is described in Article 1 of AML: '[t]his Law is enacted for the purpose of preventing and restraining monopolistic conduct, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interest of consumers and social public interest, promoting the healthy development of the socialist market economy.' It seems that the AML has multiple objectives including the economic efficiency objective found so strongly in US antitrust law and also protection of fair competition and consumer welfare in EU competition law.

'Preventing and restraining monopolistic conduct' should be the primary purpose of the AML. With the development of the competitive market since the economic reforms and the Open Door Policy in 1978, different kinds of anti-competitive conduct emerged in the market, for example, abusing dominant positions by predatory pricing, forcing to deal or refusing to deal, market segmentation and anti-competitive mergers. Article 3 of the AML divides targeted conduct into three forms: monopoly agreements reached between business operators, abuses of a dominant market position by business operators, and concentrations of business operators that may have the effect of eliminating or restricting competition.

Second, 'protecting fair competition in the market [and] enhancing economic efficiency' is the combination of fair competition and effective competition. It shows that the AML pays great attention to both fair competition *and* economic efficiency. What do these terms mean in the AML and how will they be applied?

Xiaoye Wang considered that 'economic efficiency' included the efficient allocation of resources and productive efficiency.[33] This understanding is similar to the efficiency objective of US antitrust law in the economic process. As Bork stated, these two efficiencies may determine the level of society's welfare.[34] Another understanding focuses on the whole society's economic efficiency and the individual economic efficiency of, for

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[32] See A. Jones and B. Sufrin, *EU Competition Law: Text, Cases, and Materials*, 4th Edition, (2011) Oxford University Press at 17.

[33] X. Wang, note 9, at 3-4.

[34] Note 21, at 90-91.

example, dominant operators or competitors.[35] Whole economic efficiency corresponds to the individual economic efficiency when competition works well in the market. The increase of individual economic efficiency, especially for dominant operators, is at the expense of the loss of whole society economic efficiency and should be restricted. As a result, when there is a conflict between these two economic efficiencies, the AML should be in favour of whole society economic efficiency by, for example, restricting the conduct of monopoly agreement, abuse of dominant position and concentration.

There are two views in relation to 'fair competition'. Xiaoye Wang agreed with the opinion of some economic scholars that fair competition in the AML should be 'effective competition'. On the one hand, competition should be supported to improve allocative efficiency. On the other hand, monopoly should be allowed to exist in certain markets, in consideration of the lack of technology capacity and competitiveness of most business operators. This corresponds to Article 5 of the AML in that economies of scale are also encouraged to enhance competitiveness.[36] 'Fair competition' may also be explained as creating or maintaining an environment which allows rivals to compete.[37] Some scholars have defined this as substantive fairness or justice.[38] The development of small business operators is also encouraged in the AML. Article 15(3) of the provisions relating to monopoly agreements states that 'for the purpose of enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators', an agreement among business operators shall be exempted from application of articles 13 and 14 of the AML.

Third, 'safeguarding the interest of consumers and social public interest' is the ultimate purpose of the AML. Social public interest can be a type of economic public interest, as well as non-economic public interest, for example conserving energy, protecting the environment and relieving the victims of a disaster.[39] Competition policies in the EU also may take social-political issues into account, especially in relation to the environment or

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35 M. Xu, 'Value and Essence of the Antimonopoly Law [论我国反垄断法的价值与核心价值]', (2008) 1 *Jurists Review* p6. H. Wu and W. Wei, 'On the Value Orientation of Anti-monopoly Law [论反垄断法的价值目标]', (2005) 3 *Jurists Review* p92.

36 See para. 2.3.2.2 of Chapter 2.

37 G. Wu, *Explanation on People's Republic of China Anti-Monopoly Law [中华人民共和国反垄断法释义]*, (2007) China legal Publishing House at 3-5.

38 Note 38.

39 See Article 14(5) of the AML. There is no definition of social public interest in the AML. However, social public interest includes but is not limit to a series of conduct listed in Article 15(4).

employment, according to Article 7 TFEU. Benefiting social public interest is the standard for exemption in the AML.[40]

Finally, 'promoting the healthy development of the socialist market economy' is a general description of the expected result of the application of the AML rather than an objective of the AML.[41] It actually includes restrictions on monopolistic conduct, fair competition in the market, economic efficiency and the protection of consumer interest and social public interest. Just as the EU competition law and policies exist to support the internal market, the AML exists to support healthy developed socialist market economy.[42]

3.3 Objectives of Article 106 TFEU and Chapter Five of the AML

It has been said that 'a competition policy which did not deal with the State in the market place would be incomplete and would disadvantage other undertakings'[43]. Liberalisation policy and privatisation in industries were developed in the context of encouraging competition, improving market structures and the boom of new technologies.[44] More and more traditional public sectors have been opened to private undertakings, for example, air transport, telecommunications, railways, postal services, gas and electricity. While the role of the State has diminished, it has not yet disappeared. Many important cases have arisen after these developments, for example, *Höfner,*[45] *Merici Convenzionali,*[46] *RTT*[47] and *France v. Commission.*[48]

Article 4(3) TEU requires that Member States shall take any appropriate measures to ensure fulfilment of the objectives of the Treaties. This has particular relevance to

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40 Conduct pursuant to the social public interest will not fall within the provisions on business operators' concentration, according to Article 28 of the AML. As mentioned above, some content of social public interest is included in the exemption for monopoly agreement in Article 15(4). The exemption effect of social public interest in abuse of administrative power will be discussed in para.6 of Chapter 4.

41 Note 32, at 18. They considered that 'promoting the healthy development of the socialist market economy' is a purpose of the AML.

42 Article 3(1) (b) TFEU says that 'the establishing of the competition rules' is necessary 'for the functioning of the internal market'.

43 A. Jones and B. Sufrin, *EU Competition Law: Text, Cases, and Materials*, 3rd Edition, (2008) Oxford University Press at 614.

44 See K. V. Miert, 'Liberalization of the Economy of the European Union: The Game is not (yet) Over' in D. Geradin (ed), *The liberalization of State Monopolies in the European Union and Beyond*, (2000) Kluwer Law International at 1.

45 Case C-41/90, *Höfner v. Marcrotron* [1991] ECR I-1979, [1993] 4 CMLR 306.

46 Case C-179/90, *Merci Convenzionali v. Porto di Genova* [1991] ECR I-5889, [1994] 4 CMLR 422.

47 Case C-18/88, *RTT v. GB-INNO-BM SA* [1991] ECR I-5973.

48 Case C-202/88, *France v. Commission* [1991] ECR I-1223.

competition provisions from Articles 101-109 TFEU. To restrict the anti-competitive effect of public or privileged undertakings with exclusive or special rights granted by Member States is the main objective of Article 106 TFEU.[49] Article 106(1) TFEU does not have direct effect since it only refers to other provisions of the Treaties. Thus, the objective of Article 106 TFEU is to be achieved by regulating State measures which illegally or inappropriately grant exclusive or special rights.

In terms of Chapter Five of the AML, there are two routes by which there may be an influence on the competition. The interior element is the anti-competitive conduct of the enterprises themselves; the external element is the operation of administrative power. The influence of administrative power can not be adjusted by the self-regulated character of the market and other laws or regulations.[50] Specific, strong and effective provisions on regulating the negative influence of administrative power to achieve the objectives of the AML are required. Chapter Five aims to regulate a broad range of administrative conduct which may affect the objectives of the AML. Abuse of administrative power which may interfere with fair competition by restricting business transactions or free circulation of the commodities or business operators, falling for example in Articles 32 to 35, also falls within Chapter Five of the AML. These provisions reflect the State attitude to restrict the anti-competitive effect of the abuse of administrative power.[51]

As a result, Article 106 TFEU and Chapter Five of the AML have the similar fundamental aims of preventing non-market based conduct from distorting competition in the market. However, public conduct in a more broad scope is regulated in the AML, compared with Article 106 TFEU.

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[49] C. M. V. Quitzow, *State Measures Distorting Free Competition in the EC*, (2002) Kluwer Law International at 57.

[50] See the discussion on the background of the AML in Chapter 2.

[51] Note 37, at 180-191. Explanation about the People's Republic of China Anti-Monopoly Law (Draft) made by Cao Kangtai on the first formal deliberation on the SCNPC on June 24, 2006.

4. Abuse of Administrative Power, Centrally Planned Economy, and the Reforms

4. 1 The Effect of the Centrally Planned Economy

The Chinese Centrally Planned Economic System was led by administrative orders and administrative directions: [52] economic resources were distributed through national mandatory plans; production prices were fixed by administrative plans; and the income and expenditure of an enterprise were managed jointly.[53] Since economic issues were operated by distributed administrative power from administrative industry departments or administrative regions, generally speaking, the whole economy was a unity consisting of a vertical industrial economy and a horizontal regional economy.

Administrative power had great influence on a centrally planned economy and its impact was inherited by the later market economy. First, administrative power was extremely inflated and was extended into economic markets. Administrative organs may intentionally or accidently abuse their power in markets to protect industrial interests, especially where the SOEs hold dominant positions, or protect local interest through regional blockades on commodities' movement. Second, an industry department in the central government may directly order, guide or support special or exclusive rights operated by certain business operators, mainly SOEs, to enhance their market dominance and pricing monopoly; for example, administrative restrictions on market access, interconnection and pricing measures for China Unicom on the telecommunications market.[54] Meanwhile, a local government may also directly order, guide or support its local enterprises to eliminate or restrict competition at a horizontal level. Thus, two main areas of current abuse of administrative power are regulated under the AML: abusive administrative power on industries and on regional blockages. Third, the government's economic management functions excessively focused on the microeconomic operations which should have been run by market rules. Enterprises did not have the self-determination to decide the production, sale and development of their products. Therefore, the economic function of

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52 See para.1 of Chapter 2.

53 D. Zou and R. Ouyang, *Report on china's Economic Development and Institutional Reform: China: 30 Years of Reform and Opening-Up (1978-2008) [中国经济发展和体制改革报告：中国改革开放 30 年 (1978-2008)]* (2008), Social Science Academic Press at 130.

54 Note 5, at 41-42.

administrative power was redirected to macroeconomic adjustment, market regulation, social management and public service.[55]

4. 2 The Effect of the Reforms

The Chinese Economic Reform and Open Door Policy were proclaimed in 1978. Since then, reforms in several areas, such as politics, economics, and administration, have been carried out gradually. The move from a planned economy to a market economy is a long-term, complicated, top-down process. The government plays the leading role in the 'imposed institutional change' reform. [56]

Since 1982, there have been five fairly large reforms in respect of the administrative system. The last four reforms were closely related with the adjustment of administrative power and the establishment of a market economy in 1988, 1993, 1998 and 2003.[57] Accompanying these, there were also related economic reforms. Table 3-1 clearly sets out the contents of the four reforms.

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55 Note 53, at 98.

56 Y. Lin, 'An Economics Theory of Institutional Change: Induced and Imposed Change' (1989) 9(1) *Cato Journal* p1 at 4. 'Whereas induced institutional change refers to the voluntary change by a group of individuals in response to profitable opportunities arising from institutional disequilibria, imposed change refers to change that is introduced by government fiat.'

57 They also had great connections with the development of China's Constitution. See para.1 of Chapter 2.

Table 3-1: The Contents of Four Administrative System Reforms and Related Economic Reforms[58]

Year	Content	
	Administrative System Reforms	Economic Reforms
1988	Transformation of government functions; separation of the government functions from enterprises; devolution	Separation of proprietary rights from management rights on SOEs
1993	Transformation of government functions; establishing the government macroeconomic adjustment system	Constructing socialist market economy system; establishing modern corporate system, (especially the large and medium-sized SOEs as the pilot objects.)
1998	Separation of the government functions from enterprises; devolution	Establishing modern corporate system; reform on small-sized SOEs; state-owned economy and capital withdraw from the universal competition industries
2003	Separation of the government functions from enterprises; setting up the State-owned Assets Supervision and Administration Commission of the State Council (SASAC); altering the National Development and Planning Commission (NDPC) to the National Development and Reform Commission; building service-oriented governments on the local level	Establishing modern property rights system

In the past 30 years the government has taken significant steps to eliminate interference on the operation of enterprises and in the market by administrative power, and on maintaining a market economy with comparatively fair competition. However, according to the table above, it is obvious that some of the policies were constantly repeated. Transformation of government functions and separation of the government functions from enterprises were put forward in 1988. Disappointingly, they were not effectively operated until the reform in 1998.[59] Until now, the reform on altering and regulating administrative power still faces great obstacles. For example, in the wholesale and retail area of the petroleum industry, although the business was opened to private enterprises gradually since 1992, a document issued in 1999 restricted oil refineries, except the only two large-sized SOEs, China National Petroleum Corporation and China Petroleum Chemical Corporation, from producing wholesale or retail petroleum.[60] In 2001, the control on petroleum market

[58] The materials refer to the reports of annual People's Republic of China National People's Congress (http://www.gov.cn/test/2006-02/23/content_208608.htm); the reports of annual Community Party of China National Congress (http://cpc.people.com.cn/GB/64162/64168/index.html); and note 53, Chapters 3, 4, 5 and 6.

[59] Note 53, at 157, 158, and 160.

[60] Opinions on Clearing and Reorganizing Small-sized Oil Refineries and Regulating the Circulation Order of Crude Oil and Product Oil [关于清理整顿小炼油厂和规范原油成品油流通秩序的意见] was promulgated on June 5, 1999 by General Office of the State Council. The document was formulated by the State Economic and Trade commission.

expanded from wholesale to retail.[61] Although the prohibition for private enterprises on wholesale market of product oil was removed in 2006, the administrative obstacles and the monopoly on this market still exist, since the standard to entry is extremely high and hardly to be reached by private enterprises.[62]

Under the imposed institutional reform, enterprises did not have freedom to choose how to operate on the market. Thus, administrative power still has a huge influence on the operation of enterprises, not only in drafting the reform policies, but also in the detailed operation of the reforms. For example, in 1999, the State Development Planning Committee (SDPC) and the Civil Aviation Administration of China (CAAC) promulgated a policy that no discount on the price of flights was allowed.[63]

Interventions by administrative organs on enterprises or on the economy still exist. In some of the industries or territories, administrative power is not only the game maker, but also the game player; in some of the industries or territories, although interventions from the planned economy are gradually eliminated, new kinds of interventions are created in the process or after the reforms.

5. Economic Theories of Abuse of Administrative Power

There are several causes for the abuse of administrative power to eliminate or restrict competition. Two approaches, the interest group theory and rent-seeking theory, will be discussed.

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61 Opinions on Further Reorganising and Standardising the Market Rules of Product Oil [关于进一步整顿和规范成品油市场秩序的意见] was issued by State Economic and Trade Commission (SETC), State Administration for Industry and Commerce (SAIC), State Administration of Quality Supervision, Inspection and Quarantine (SAQSIQ), Ministry of Public Security and Ministry of Construction on October 25, 2001 to require any new petrol filling stations should be built and fully-invested or holding-invested owned by the two petroleum corporations.

62 See Article 7 of Measures for the Administration of the Product Oil Market [成品油市场管理办法], which was issued by Ministry of Commerce on December 6, 2006.

63 The Notice of State Planning committee and Civil Aviation Administration on Enhancing the Regulation of the Price of Civil Aviation of Domestic Routes and Restraining the Low Fare Selling Conduct [国家计委、民航总局关于加强民航国内航线票价管理制止低价竞销行为的通知] was promulgated on February 1, 1999. The above policy was repealed while the Price Reform Plan on civil Aviation Domestic Air Transportation was promulgated on March 17, 2004.

5.1 The Relationships of Interest Groups

5.1.1 The Introduction of Interest Group Theory

The definition of 'interest groups' varies with the different understandings of scholars' research purposes.[64] However, the common notion is that it is 'a group of individuals or firms' with 'some interest in common' to 'seek to further this interest'.[65] Mancur Olson developed the definitions and pointed out that not all interest groups will act according to their common interest. He argued that large and small groups operate with fundamentally different principles and expressions.

His analysis suggested that small groups can provide themselves with collective interest without any coercive measures or selective incentives.[66] This arises because, in a small group, each member can get a substantial proportion of the total gain exceeding the costs incurred, because of the limited number of members. Furthermore, the greater the interest on the common purpose held by any individual member, the greater the likelihood that that member can achieve a substantial proportion of the benefit. As a result, small groups in the present context can act for the common interest because the group members will be satisfied with their shared proportions.

Olson also pointed out that only with selective incentives would the rational individuals in a large group act in a group-oriented way. In a large group, an individual serving the common interest gained from his sacrifice can only obtain a minute share, while other individuals who contribute nothing to the effort will also get as much as those who made a contribution, because the obtained common interest would be shared with everyone in the group. At the same time, the larger the group the greater are the organisation costs. His conclusion was that 'large groups, at least if they are composed of rational individuals, will

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64 In terms of politics, 'many students of politics in the United States for a long time supposed that citizens with a common political interest would organize and lobby to serve that interest.' See, M. Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities*, (1982) Yale University Press at 17. Harold Laski argued that 'associations exist to fulfil purposes which a group of men have in common'. See H. Laski, *A Grammar of Politics*, 4th Edition, (1939) George Allen & Unwin at 67.

65 M. Olson, note 64.

66 'Selective incentive' is a negative or positive incentive. It is used to treat those who do not join the organisation working for the group's interest, or in other ways contribute to the attainment of the group's interest differently from those who do. See M. Olson, *The Logic of Collective Action*, (1971) Harvard University Press at 51.

not act in their group interest'.[67] Thus, the selective incentive applying to the individuals depends on the mobilisation of the large group's potential power.

To conclude, 'those groups that have access to selective incentives will be more likely to act collectively to obtain collective good (group common interests) than those that do not, and that smaller groups will have a great likelihood of engaging in collective action than larger ones'.[68]

5.1.2 The Introduction of Distributional Coalitions Theory

On the base of Interest Group theory, Olson created the concept of distributional coalitions, a special interest group which seeks a larger share of the social output for itself;[69] such a larger share may be obtained through redistributing the income and wealth of the society.

Within such groups, there are two ways for the groups to earn benefits for their members. One is to promote the members such that they are rewarded with larger slices from the same shares by improving the development of society production; another is to gain larger shares from the same amount of society production. Generally speaking, interest groups prefer to choose the latter.

The harms that may flow from distributional coalitions are:

- 'On balance, special-interest organisations and collusions reduce efficiency and aggregate income in the societies in which they operate and make political life more divisive.

  …
- Distributional coalitions make decisions more slowly than the individuals and firms of which they are comprised, they tend to have crowded agendas and bargaining tables, and more often fix prices than quantities.
- Distributional coalitions slow down a society's capacity to adopt new technologies and to reallocate resources in response to changing conditions, and thereby reduce the rate of economic growth.

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67 M. Olson, note 64, at 18.
68 Ibid, at 34.
69 Ibid, at 44.

- Distributional coalitions, once big enough to succeed, are exclusive, and seek to limit the diversity of incomes and values of their membership.
- The accumulation of distributional coalitions increases the complexity of regulation, the role of government, and the complexity of understandings, and changes the direction of social evolution.'[70]

5.1.3 Administrative Distributional Coalitions in China

The theory of distributional coalitions can be used to analyse the effect of abuse of administrative power to restrict or eliminate competition in the market. First, a group of administrative organs or officials with a common interest may seek to satisfy and maximise their economic or political benefit. They can be treated as a kind of 'interest group'. Second, the administrative interest groups may redistribute their interest through their administrative power. Third, their administrative power may be abused to restrict competition and directly or indirectly damage the interest of other competitors and consumers. The interest to be gained from this conduct generally flows from a larger share of society's output rather than from improvement in society's output. As a result, this thesis expands Olson's definition of distributional coalitions into an administrative aspect, and adopts the term 'administrative distributional coalitions'.[71]

There are interest conflicts between or inside the administrative organs. As described above, the central government, local governments and administrative departments owned the economic management power and sought to enhance the value of their interests by administrative orders and administrative directions in the Planned Economy Period.[72] However, the contest for the interest is much sharper among and inside those administrative organs based on the new administrative decentralisation policies which have given rise to administrative power in relation to the fiscal and taxation system.

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70 Ibid, at 74.

71 The Interest Group theory is already used to analyse China's government regulation problem and related 'administrative monopoly' problems in the economic area, for example, F. Chen, *Deregulation and Strengthening Regulation [放松规制与强化规制]*, (2001) Shanghai Sdxjoint Publishing Company. The definition of administrative distributional coalitions was raised by Chengpeng Zheng. Note 5, at 65-69. This thesis develops this theory not only in administrative distributional coalitions but also between the whole interest groups in the abuse of administrative power relationships.

72 See Chapter 2 and paras.2 and 4 of Chapter 3.

In 1983, the reform of replacing profits earned by SOEs by taxes on SOEs was on trial and large-scale taxation reform was operated the next year.[73] The profit after paying taxes could be allocated by SOEs autonomously. The functions of the State and the enterprises were the first time separated on the basis of the operation of the tax system.

Since 1980, three steps of 'contract-responsibility at various levels' within the fiscal system was introduced.[74] In 1980, the policy of 'division of revenue and expenditure with contracts-responsibility at various levels' was operated, based on the administrative grade relationship between central and local governments. In 1985, the policy moved to 'separating categories of taxes, designating scopes of revenues and expenditures with contracts-responsibility at various levels'. The content of this policy included the separating out the fixed revenue of central and local governments designated by the categories of taxes and the administrative subordinate relationship of enterprises, the shared revenue of central and local governments and the expenditures still designated by the administrative subordinate relationship.

In 1988, the third reform was operated, including six types of central-provincial revenue-sharing with contracted-responsibility applied to a number of provinces.[75] It increased the flexibility of the fiscal system. However, this system was focused on the incentive of revenue at the local level other than at the central level. Local governments could avoid remitting taxes upwards through various means. The ratio of central government fiscal revenue in the state fiscal revenue dropped from the 34.8% in 1985 and 36.7% in 1986 to 22% in 1993.[76] As a result, with significant control over fiscal resources of local governments, the distributed revenue for the central governments declined and the dominated fiscal funds of the State was insufficient. Besides, there were serious disincentives in the intergovernmental transfer system. Finally, the origin-based value added taxes 'created a source of invisible transfers in terms of interregional tax exportation' and 'to be further regressive'.[77]

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73 The Trial Measures for Replacement of Profit by Taxes in State-owned Enterprises [关于国营企业利改税试行办法] promulgated on January 1, 1983, by the State Council.

74 Note 53, at 214-216.

75 Note 5, at 67-68.

76 Note 53, at 216.

77 M. G. Rao, 'Fiscal Decentralization in China and India: A Comparative Perspective', (2003) 10(1) *Asia-Pacific Development Journal* p25 at 28-29.

In 1994, a comprehensive fiscal system reform on taxation-sharing was implemented. The main measures included: (1) establishing a tax distribution system for the central and local governments; (2) reassigning taxes between central and local governments and dividing these into 'central fixed incomes', 'local fixed incomes' and shared revenues according to the categories of taxes; (3) establishing independent central and local tax authority systems; (4) confirming the refunded amount from the central revenues to the local revenues; and (5) adopting an earmarked transfer payment measure to balance the gap between fiscal incomes and expenses in local areas.[78] A more stable inter-governmental fiscal system was created by shifting from an *ad hoc* negotiable system to a rule-based tax distribution system. [79] This new system adopted an effective budget plan and created a more flexible relationship between enterprises, local governments and central government in respect of fiscal incomes.[80] However, it also had a profound effect on the emergence of a form of administrative distributional coalition.

5.1.4 Abuse of Administrative Power on Administrative Distributional Coalitions

The common interest of the government units lies in part in shared perceptions of political and economic benefits. The political benefit is based on the achievement of the administrative organs and the promotion of officials. There are two kinds of economic benefit: the whole economic benefit in the administration scope. [81] and the private economic benefit of the administrative organs.[82] These benefits interact on each other. The possession of administrative power is unavoidably used to protect existing interests or to seek new interests. To maximise the group interest, interest conflicts may exist between government units at different levels and at the same level but in different regions. This may

78 Note 53, at 217-218.

79 Economic and Social Commission for Asia and the Pacific Committee on Poverty Reduction, Policy Dialogue: Decentralization for Poverty Reduction, E/ESCAP/CPR(2)/1, October 6, 2005, at p3. Available at: http://www.unescap.org/pdd/CPR/CPR2005/English/CPR2_1E.pdf (last visit on March 1, 2012).

80 More materials for the 1994 fiscal reform are available in: J. Ma, 'China's Fiscal Reform: An Overview', (1997) 11(4) *Asian Economic Journal* p443; S. Wang, 'China's 1994 Fiscal Reform: An Initial Assessment', (1997) 37(9) *Asian Survey* p801; and J. Knight and S. Li, 'Fiscal Decentralization: Incentives, Redistribution and Reform in China', (1999) 27(1) *Oxford Development Studies* p5.

81 See para. 5.1.2 of this chapter.

82 The private economic benefit includes the benefit for the administrative organs and for the administrative officials.

lead to abuse of administrative power to eliminate or restrict competition in a struggle over 'the contents of a china shop'.[83]

The new fiscal system had two defects. First, local governments had significant control over fiscal resources and extra-budgeted funds. Owing to the fiscal decentralisation and separation, local governments could only generate revenues from the local fixed income, some shared taxes and refund taxes. 'Besides various types of charges and fees collected outside the budgetary system… there are 'voluntary' contributions in cash and kind made by the community at the county…'.[84] Therefore, both central and local governments may focus on developing their fiscal resources to protect and obtain the maximum local group interest. The industrial monopoly, for example, in wholesale and retail petroleum, [85] reflects an interest conflict between central and local revenues; regional blockades are another interest conflict reflecting a drive to enhance and protect local revenues.

Second, in relation to the equity in intergovernmental transfers, the difference between poor regions and rich regions is widening. The ratio of revenues refunded from the central revenues to the local governments in the 1994 reform was based on the statistics on 1993 and was to be annually increased by a fixed proportion. As a result, the interest conflict between administrative distributional coalitions is accelerated.

5.2 Rent-seeking Theory

5.2.1 Rent and Rent Seeking

While the literature related to rent-seeking begins with Gordon Tullock's paper in 1967,[86] the term 'rent-seeking' was coined by Anne Krueger in 1974.[87] She described rent-seeking as a competitive behaviour for the rents which arose from government restrictions upon economic activity. She also distinguished perfectly legal rent-seeking from illegal rent-seeking. The latter included, for example, bribery, corruption, smuggling and black market

83 M. Olson, note 66, at 44.
84 Note 77, at 25.
85 See para.4.2 of this Chapter.
86 G. Tullock, 'The Welfare Costs of Tariffs, Monopolies, and Theft', (1967) 5(3) *Western Economic Journal* p224. This article stated that the invested resources are wasted in unproductive activities such as (i) crime, (ii) lobbying for tariff protection, (iii) lobbying for entry barrios or monopoly privileges.
87 A. Krueger, 'The Political Economy of the Rent-seeking Society', (1974) 64(3) *American Economic Review* p291.

activity. Later on, rent-seeking, as suggested by James Buchanan, was mainly regarded as referring to attempts by groups to achieve profits through the exploitation of government restrictions on entry.[88]

According to rent-seeking theory, the term 'rent' in economics referred to product surplus from the whole income of any factor in a production process above the opportunity cost of the factor.[89] Rent could not be fixed because factors flowed without barriers between industries in the freely competitive market, according to the general equilibrium theory, unless monopolies prevented this. However, new rent can be created and existing rent can be maintained or be redistributed, since no real world market can match this criterion in practice. As a result, in rent-seeking theory, rent, which is extended from considerations of pure economics, to considerations involving the political economy, includes 'not just the monopoly profits, but also subsidies and transfers organised through the political mechanism, illegal transfers organizsd by private mafias, short-term super-profits made by innovators before competitors imitate their innovations and so on.'[90]

Individuals or groups will seek rent to maximise profit when the cost of seeking the rent is less than the returns obtained from investment and the costs of enhancing economic efficiency. Therefore, the concept of rent-seeking not only applies to private economic monopolies but also includes the conduct of individuals or groups attempting to obtain wealth transfers through abuse of administrative power. Both of these methods restrict free competition in the market and lead to an inefficient allocation of economic and social resources.

5.2.2 Rent-seeking and Abuse of Administrative Power in China

Undertakings, as well as administrative organs or empowered organisations, can obtain profit from the abuse of administrative power. This profit is a form of 'rent', and the abusive conduct can therefore be regarded as 'rent-seeking'.

The relationships that arise between administrative power and enterprises, according to the rent-seeking theory, can be listed below:

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88 E. G. Pasour, 'Rent Seeking: Some Conceptual Problems and Implications', (1987) 1 *The Review of Austrian Economics* p123 at 127.

89 Note 87.

90 Note 88, at 129.

Table 3-2: The Relationship between Administrative Power and Enterprises on Rent Seeking Theory

Administrative Power	Enterprises	Results
initiative on setting rent by abuse of administrative power on restricting competition	passivity on obtaining rent	illegal rent-seeking conduct
passivity on setting rent by abuse of administrative power on restricting competition	initiative on obtaining rent	illegal rent-seeking conduct
setting rent without abuse of administrative power	passivity/initiative on obtaining rent	legal rent-seeking conduct

Administrative organs set the rent while enterprises engage in a rent-seeking process. Government rent-setting conduct means the administrative merchants are operated by the government to satisfy rent-seeking, both actively and passively.[91] Administrative power will be operated to set rent actively where potential benefits exist and where government organs seek to obtain these. The rent-seeking conduct will respond to the rent-setting behaviour of the administration. When administrative power is abused to restrict market competition, rent-seeking is harmful, and under the terms of the AML, illegal, and should be prevented. As an alternative, government organs may set rents at the request of rent-seeking individuals or groups. However, as before, once this administrative power is abused, the rent-seeking group should be responsible for the illegal conduct. If there is no abuse of administrative power, no matter how active or how passive the rent-seeking is, the conduct is legal, although it may still have the effect of leading to the misallocation of resources. In general, the initiative of rent-seeking groups is the most common element of these activities. However, the initiatives of government and government organs need special consideration when abuse of administrative power is prevalent.[92]

[91] Wei He, a Chinese economist, divided the government rent-setting activities into three categories: Initiative on rent-setting, passive on rent-setting and non-intension on rent-setting in his book *Rent-seeking Economics*. However, related to abuse of administrative power, the effect but not the intension determines the boundary of legal and illegal conduct. Thus, the government rent-setting activities in this thesis are only divided into initiative and passivity. W. He, *Rent-seeking Economics [寻租经济学]*, (1999) China Development Press.

[92] More materials on rent-seeking in China are available at: A. Young, 'The Razor's Edge: Distortions and Incremental Reform in the People's Republic of China', (2000) CXV(4), *The Quarterly Journal of Economics* p1091.

5.3 Analysis on Administrative Distributional Coalitions and Rent-Seeking

According to Olson's theory of interest groups, three kinds of interest groups may be distinguished: the administrative interest group, the enterprises interest group, and the consumer interest group, based on the common interest of the unit. The administrative interest group, analysed above as administrative distributional coalitions, is the smaller group which will seek the common interest without the selective incentive.

The enterprises interest group owns the common commercial interest. However, this group can be divided into the privileged commercial group and the normal commercial group, according to the power in relation to rent-seeking. The privileged commercial group generally constitutes enterprises with dominant positions or monopoly power in the market, or with a special relationship with administrative power. As the number of enterprises with dominant positions, monopoly power, or special administrative relationship is much less than normal enterprises, the members in the group can obtain relatively larger shares of the common interest than can normal enterprises, and will thus invest in rent-seeking activity.

The normal commercial group which includes most of the enterprises in the market is a larger group. Here the problem of the commons arises, and individual members engaging in rent-seeking behaviour will secure returns below the level of their investment. The members will not seek the common interest without any selective incentive. In the competition of rent-seeking, the normal commercial group is in inferior position.

The consumer interest group is an even larger group. Owing to the asymmetry of information, the demand and dependence in the market, and the tiny interest owned by any one individual, consumers can only protect their common interest through media, industry association, administrative departments and law when the threat to the common interest is large enough to justify such measures.

Administrative distributional coalitions and privileged commercial groups are closely bound together through rent-seeking. In the petroleum industry, for example, an administrative regulation in 2001 stated:

> '[n]ew petrol filling stations in each district should be fully-invested or holding invested built by the CNPC and the CPCC, since the issued date of this Opinion …

> The distribution plan of product oil wholesale enterprises nationwide is formulated by the two corporations and approved by the SETC. New built product oil wholesale enterprises should be reported through the CNPC and the CPCC to be approved by the SETC, since the issued date of this Opinion'.[93]

The result will be the transfer of wealth from the larger groups to the smaller groups. While rent-seeking conduct is operated under the aegis of the abuse of administrative power, free competition in the market and the wealth of consumers will be further damaged. This rent-seeking conduct should be treated as illegal and regulated by laws.

The fundamental reason for the abuse of administrative power is the imbalance between these interest groups. There are two ways to restrict the abuse of administrative power on competition. One is to restrict the power of administrative distributional coalitions and privileged commercial groups to engage in abuse; the other is to enhance the power and incentive of the larger interest groups by administrative or legal measures, for example, improving information exchange, establishing organisations to protect the common interest with the support of the state, or guarding the channels in relation of feedback and regulating by law.

6. The Legal Elements on Abuse of Administrative Power

6.1 The Lack of Related Legislation

Industry reforms in the EU countries are generally carried out under legislation. For example, British Telecom was created to transfer the functions of providing telecommunications services from the postal sector and other operators were allowed to enter into the telecommunications market to run public services, after the promulgation of the British Telecommunications Act 1981.[94] The Office of Telecommunications was set up and the privatisation of British Telecom was also implemented under the promulgation of the British Telecommunications Act 1984.[95] In Germany, the regulatory structure of the electricity sector was provided by the 1935 Federal Energy Law but not regulated by

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93 Note 61, Article 2.

94 British Telecommunications Act 1981 was published on July 27, 1981. Available at: http://www.legislation.gov.uk/ukpga/1981/38 (last visited March 1, 2012).

95 British Telecommunications Act 1984 was published on April 12, 1984. Available at: http://www.legislation.gov.uk/ukpga/1984/12 (last visited March 1, 2012).

government regulation.[96] The fundamental principles and reform frames are primarily fixed through the forms of laws.[97]

In the 'imposed institutional change' reform in China, administrative power and orders were the main measures to lead the operation of reforms. Legislation was absent before and during the process of these reforms. The telecommunications sector has undergone four reforms since 1978.[98] All were guided by administrative organs and the telecommunications law is still in the process of formulation.[99] Furthermore, some laws only have principle regulations, but lack detail which is to be supplied by relevant administrative organs; for example, the definitions of public utilities services, and public welfare services to be applied in Article 23 of the Price law. Administrative organs may abuse their power in deciding whether a pricing issue is included in the content of public utilities services or public welfare services. A number of reform initiatives were directly or indirectly controlled by relevant administrative or commercial interest groups, for example the loss of state assets in the reform of SOEs.[100] As a result, reform generally taking place under plans put forward and controlled by administrative authorities, but not by way of primary legislation, is one of the reasons that administrative organs have great power and influence on business operation in the market.

6.2 The Deficiency of Administrative Procedure Legislation

Legislation related to administrative procedure has been promulgated in the previous 30 years.[101] Much of this was enacted only after reforms had been carried out. The

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96 OECD, '*German – Regulatory Reform in Electricity, Gas and Pharmacies*' (2004). Available at: http://www.oecd.org/dataoecd/7/58/38898598.pdf, at 9-11. (last visited March 1, 2012).

97 Note 5, at 138-142.

98 The four reforms will be further described in Chapter 6 of this thesis.

99 For example, 1998 telecommunications revolution was guided by Notice on Deepen the Reform of Telecommunications System [关于深化电信体制改革的通告] which was formulated and published by Ministry of Industry and Information Technology (MIIT), the NDRC and the MOFCOM on May 24, 2008. Further details will be discussed in Chapter 6.

100 See Y. Wang, 'Legal Measures on Restricting the Loss of State Assets [遏止国有资产流失的法律对策]', (1995) 6 *Law Science* p35. Y. Peng, 'Legal Protection on the Loss of State Assets [国有资产流失的法律防护]' (1994) 3 *Journal of Law Application* p29.

101 Administrative Procedure Law [行政诉讼法], Note 3; Administrative Supervision Regulation [行政监察条例], which was issued on December 9, 1990 and was repealed by Administrative Supervision Law in 1997; Administrative Reconsideration Regulation [行政复议条例], which was issued on December 24, 1990 and was repealed by Administrative Reconsideration Law in 1999; State Compensation Law [国家赔偿法], which was issued on May 12, 1994 and was amended on April 29, 2010; Administrative Penalty Law, note 9; Administrative Supervision Law [行政监察法] was issued on May 9, 1997 and amended on June 25, 2010; Price Law [价格法] was issued December 29, 1997 and took effect on May 1, 1998; Administrative Reconsideration Law [行政复议法] was issued on April 29, 1999 and took effect on October 1, 1999;

implementation of administrative power without reasonable and sufficient regulation or supervision from laws may lead to confusion or abuse.

Furthermore, administrative organs may violate legal procedures in the process of operating administrative power, for example, the price hearing procedure. According to Articles 22 and 23 of the Price law, in the investigation stage public price hearings shall be carried out by administrative pricing departments where the inquiry relates to government pricing or price guidance issues. However, in some circumstances, an over-pricing result was reached by the administrative pricing department without sufficient investigative support and without the legally required public price hearing procedure.[102] Enterprises with market dominance may benefit from over-pricing conduct, such that there is an incentive to engage in rent-seeking favouring privileged commercial groups. [103]

7. The Feasibility of Regulating the Abuse of Administrative Power under the Anti-Monopoly Law

Three main opinions on regulating the abuse of administrative power will be discussed in the following paragraphs.

7.1 'System Reform Theory'

The leading scholars of the 'system reform theory' include Hongwei Wu[104], Minrong Sheng[105] and Xiushan Chen.[106] They reject the approach to abuse of administrative power in the AML. As concluded in the first deliberation by the SCNPC in 2006, '[t]he fundamental solution to administratively restricting competition needs further reforms on the economic and administrative management systems, transformation of government

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Administrative Licence Law, note 9; Regulation on the Implementation of Administrative Reconsideration Law [行政复议法实施条例] was issued on May, 29, 2007 and took effect on August 1, 2007.

102 For example, the sleeper price on China railway high-speed train. See http://news.xinhuanet.com/theory/2009-02/28/content_10915093.htm (last visited March 1, 2012).

103 See Z. Lou, 'Rethinking Enforcement Hearing Procedures and Improvement [执行听证程序的反思与完善]', (2005) 12 *Journal of Law Application* p52. S. Shang, 'Development and Improvement of China Administrative Decision Public Hearing System [我国行政决策听证制度发展与完善]', (2007) 12(1) *Jinling Law Review* p117.

104 H. Wu, 'On Administrative Monopoly and the Countermeasures of Elimination [试论我国行政性垄断及其消除对策]', (2000) 6 *Jurists' Review* p60.

105 M. Shen, *Law's Uncertainty – The Analysis on Anti-Monopoly Law rules [法律的不确定性—反垄断法规则分析]*, (2001) Law Press.

106 X. Cheng, *Modern Competition Theory and Competition Policy [现代竞争理论与竞争政策]*, (1997) The Commercial Press at 224.

functions, enforcement on regulating and supervising the operation of administrative power, and cultivation of independent consciousness of the legal independent operation by market participant.' [107] Xiushan Chen suggested that the reforms started from two relationships: the relationship between the central and the local authorities, and the relationship between governments and enterprises. In respect of the former relationship, the power of the central fiscal authority should be enhanced, while the interest of the local governments should be weakened; the central departments or committees with responsibility for competition in general should be changed into industrial management and coordination organs progressively. In respect of the latter relationship, the suggested method was to establish trans-regional and trans-department enterprises' groups. It was argued that the extra-economic administrative monopoly and competition restrictions, such as regional and department blockages, should be broken gradually.[108]

According to the analysis above,[109] the problem of the state system was one of the most crucial causes of the abuse of administrative power in the competitive market. The abusive conduct would be significantly avoided if completed political and economic systems were established, controlled and regulated. However, this kind of system reform would not be a short-term process. The conduct is comprehensively related to the area of politics, economy, law and culture. The solution required the regulation of administrative distributional coalitions and the balance of interest groups in the political and economic spheres, while the system reform would be an imposed institutional change which led from the central to the local. This would mean that strong interest conflicts would exist in the process. In the light of the development and achievement of the past 30 years' gradual reforms, an even longer time would be required for a relatively completed system.

The role of law is not a crucial part on regulating the illegal conduct in the 'system reform theory', as the theory requires 'adopting the comprehensive measures including Party discipline, political discipline and necessary legal regulation'.[110] However, in a mature state system and market economy, the law, more than the Party, political discipline, or a system rule, would play the leading role in regulating and protecting the operation of the

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107 K. Cao, 'The Illustration on the Draft of Chinese Anti-Monopoly Law' [关于《中华人民共和国反垄断法（草案）》的说明]. See http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374671.htm (last visited on March 1, 2012).

108 Note 106.

109 See para. 4 of this Chapter.

110 Note 107.

society. The scholars advocated an approach of continuing to regulate the abuse of administrative power in a series of laws and regulations, instead of by way of a unified AML.

7.2 'Uniformly Regulating Theory'

This argument is proposed by Jichun Shi and supported by Chuantao Ai. Jichun Shi suggested that, 'any anti-competition or competition conduct against the internal objective requirements of the market, no matter who is the conduct actor, should be included into the sphere of the AML and competition law. There was, he argued, no need to distinguish between "administrative" and "economic" monopolies, or "the State" and non-public right owner monopolies.'[111]

These scholars agree that the abuse of administrative power should be regulated under the AML. However, there would be no need to regulate the conduct with a separate chapter in the AML. First, whether the operation of administrative power is legal or illegal cannot be defined in detail in the form of law. The judgement has to be made according to current policies, exact cost management and the balance of long-term collective interests and short-term partial interests. As a result, the definitions of 'administrative monopoly' and 'economic monopoly' are inseparably related. However, this explanation is merely based on the methodology for judging, but ignores the fundamental difference between the two kinds of anti-competitive conduct: one acting by the administrative organs with the abuse of administrative power, with the other operating only in the area of market rules.

Second, Jichun Shi argued that there was a general consensus for scholars and the public that SOEs and governments cannot be exempted from the competition rules because of their inherent administrative elements.[112] Distinguishing the two definitions in China would be the result of a misunderstanding that competition laws in most of the Western countries only regulate the conduct of economic activity, but not the conduct of government or government departments. However, although EU competition law states that 'Member States shall neither enact nor maintain in force any measure contrary to the

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111 J. Shi, 'Two Basic Questions on the Definition and Subject of Chinese Anti-Monopoly Law [关于中国反垄断法概念和对象的两个基本问题]' in X. Wang (ed), *Anti-Monopoly Law And Market Economy [反垄断法与市场经济]*, (1998) Law Press at 57.

112 Ibid, at 56.

rules contained in this treaty' in Article 106 TFEU, 'public undertakings and undertakings to which Member States grant special or exclusive rights' are restrained by Articles 101 and 102 TFEU.

Third, the AML should not separately regulate economic monopolies and abuse of administrative power by distinguishing their features. Thus Shi and Ai pointed to the fact that government departments, especially the Industrial and Commercial department and Postal and Telecommunications departments, had been sued by enterprises under competition rules. The way to determine whether an action of administrative power would be illegal would be the same as for any other economic monopolies. However, in consideration of the operating measures and the legal responsibilities, these two behaviours have extremely different features. Abuse of administrative power takes several forms, for example administrative regulations, orders, forced (hidden) suggestions, refusal to publish public information. As the governments or administrative organs, it is the State and the national fiscal authorities to undertake the legal responsibilities, especially in respect of compensation, which is broadly applied in response to economic monopoly conduct. This means that the economic punishment in abuse of administrative power in the AML is transferred to the tax payers, including the victim of the abuse of administrative power.

7.3 'Legislation Regulating Theory'

'Legislation Regulating Theory' is the mainstream approach to regulating the abuse of administrative power and is adopted in the AML. Scholars such as Jiafu Wang[113], Baoshu Wang[114], Xiaoye Wang, Duojun Qi[115], Jiemin Sheng[116], Yong Huang and Pengchen Zheng, take this approach. They not only insist that the abuse of administrative power should be restricted by the AML, but also suggested that a separate chapter was required in the legislation.

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113 J. Wang, 'To Facilitate the Progress of Chinese Anti-Monopoly Legislation [加快中国反垄断立法的进程]' in X. Ji, *The Research of Chinese Anti-Monopoly Law [中国反垄断法研究]*, (2001) Court Press, at 3.

114 B. Wang, Note 10.

115 D. Qi, 'On the Enactment of Anti-Monopoly Law in China' [中国反垄断立法问题研究] (1997) 4 *Law Review* p54.

116 J. Sheng, 'Regulating Administrative Restricting Competition Conduct is the Inevitable Mission of Chinese Anti-Monopoly Law [规制行政性限制竞争行为是中国《反垄断法》的必然使命]', (2001) 9 *Administration for Industry and Commerce* p17.

An opposing view states that the AML generally regulates economic monopoly but not administrative power. In including regulations on administrative power the AML deviates from the general principles of competition law.[117] The 'Legislation Regulating Theory' agrees that the AML cannot by itself solve the problem of the abuse of administrative power. However, it is possible for the AML to regulate the abuse of administrative power at the current stage. First, there is a widespread danger that administrative power may be employed to distort fair competition in the market and to harm the interest of competitors and consumers. Second, administrative power is difficult to restrict by administrative measures and cannot be controlled by system reform in the short-term. The AML is a feasible and effective measure to eliminate the abuse of administrative power. Third, as a specific and fundamental law to protect fair competition, the AML is a good choice of instrument under which to aim for comprehensive regulation.

However, as analysed above,[118] the abuse of administrative power has certain differences from the economic monopoly, and as a result, the two kinds of conduct have to be treated separately. An independent chapter in the AML is required to elaborate the different styles of abuse of administrative power conduct on competition, and the specific legal responsibilities of administrative organs or the persons directly responsible for.

Some scholars also argue that the legitimacy of the administrative power cannot be assessed under the AML, and that any such judgment should be based on the Constitution and the administrative law. China is still in the process of system reforms, and conduct flowing from the operation of the administrative power in the economic sphere, has still been treated as legal by the current laws, but may be regarded as abusive and illegal according to the principles of the AML, such that there may be conflict between the AML and other legislation. This argument doubts the relationship between the AML and the administrative law and relates to the nature of the Anti-Monopoly Commission and the Anti-Monopoly Authority. The AML and the up-to-date regulations have not indicated clearly how the Anti-Monopoly Commission and Authority will identify illegal administrative conduct based on the AML. Nevertheless, flowing from the articles relating to legal liability, the administrative law and other laws have priority over the AML to deal

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117 M. Sheng, Note 105, at 243; and K. Xue, 'Administrative Monopoly should not be Regulated by the Anti-Monopoly Law [行政垄断不应由反垄断法调整]', (2001) 2 *Journal of Shanxi Normal University (Social Science Edition)* p27. This view was also adopted in November 2005 the Anti-Monopoly Law draft. See para.2.2.2 of Chapter 2.

118 See 4.2 of Chapter 4, the operating measures and the legal responsibilities.

with organisations empowered by a law or administrative regulation to administer public affairs which abuses its administrative power to eliminate or restrict competition. Where there is a conflict, the Authority only has the right to put forward suggestions to the relevant superior authority.[119] This is a significant defect in relation to the regulation of the abuse of administrative power on competition under the AML.

As a result, although this thesis generally supports the 'Legislation Regulating Theory', and although the acceptance of the theory is made implicit in the enaction of the AML, there still are some unsolved issues. As a pressing requirement, is the regulation of abuse of administrative power in relation to competition a temporary or transitional measure in the AML? The theory is that the AML and the up-to-date regulations still only indicate several examples of abusive conduct. But the details of regulating the abusive conduct and the application of these limited details in practice are still absent. In searching for a comprehensive solution, how should China deal with the relationship between the AML and other related laws and legislation? These questions are discussed in Chapter 5.

[119] Article 51 of the AML: Where any administrative organ or an organisation empowered by a law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order it to make correction and impose punishments on the directly liable person(s)-in-charge and other directly liable persons. The anti-monopoly authority may put forward suggestions on handling according to law to the relevant superior authority.
Where it is otherwise provided in a law or administrative regulation for the handling the organisation empowered by a law or administrative regulation to administer public affairs who abuses its administrative power to eliminate or restrict competition, such provisions shall prevail.

Chapter Four
Abuse of Administrative Power in EU Competition Law and the Anti-Monopoly Law

1. Introduction

Article 106 of the Treaty on the Functioning of the European Union (TFEU) which concerns State measures under EU Competition law has some similarities with the abuse of administrative power regulations in Chinese Anti-Monopoly Law (AML).

State measures which create or maintain public undertakings and which grant undertakings special or exclusive rights to violate Article 18 and Articles 101 to 109 TFEU may fall within Article 106(1) TFEU. Article 106(2) TFEU provides exemptions permitting an undertaking to which the article otherwise applies to escape the application of Article 106(1) TFEU. Article 106(3) TFEU confers legislative powers on the Commission to ensure the application of Article 106 TFEU.

The provisions on the content of abuse of administrative power in the AML are wider in scope than those of Article 106 TFEU. Article 32 of the AML regulates administrative power in respect of designated business operations; Articles 33 and 35 regulate the administrative barriers on the free circulation of commodities and unequal treatment in investment between regions; Article 36 regulates abuse of administrative power which has the effect of forcing business operators to engage in monopolistic conduct; and Article 37 targets administrative regulations directly. The objective of these provisions is to eliminate regional trade barriers and to maintain the competition rules on the market.

This chapter will focus on comparing Article 106 TFEU and the provisions relating to the abuse of administrative power in the AML and will examine the relationships in the following four aspects: Member States and administrative power, undertakings and business operators, relationships between undertakings and public authorities and

exemptions.

2. Member States and Administrative Power

Member States in the EU, and under the AML administrative organs, and empowered organisations, are the public authorities which may create or maintain the anti-competitive influence of undertakings on competitive markets through the operation of public power. While these provisions have some similar effects on undertakings, and while some conduct may fall within competition provisions, the contents of the legislation are not identical, based as they are on the different legal systems in the EU and China.

2.1 Member States and Measures

'Member State', in the context of EU competition law, especially within Article 106 TFEU, 'covers public authorities at all levels, including regional and local bodies, and generally all public bodies of a Member State to the extent that they are involved in the exercise of State authority.'[1] Not only all the official administrative organs, but also national and regional parliaments are included within this definition.[2] Thus, for example, in *Paul Corbeau*[3] (*Corbeau*), the monopoly in the postal industry was conferred under the Belgian Act of 26 December 1956. The Belgian Act was found to be a 'measure' within the meaning of Article 106 TFEU. Judicial organs can also grant special or exclusive rights under Article 106(1) TFEU. In *Almelo*[4], the Court concluded that the exclusivity in respect of conduct on the distribution of electricity by local or regional public authorities would constitute a right falling within Article 106(1) TFEU.[5] Finally, all national, regional and local authorities are included in the definition of 'Member State'.

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1 J. L. Buendia. Sierra, *Exclusive Rights and State Monopolies under EC Law*, (1999) Oxford University Press, at 132.

2 Ibid. 'Legislation passed by a regional parliament or a local authority can be 'measures' within the meaning of Article 86(1) to the same extent as a statute passed by a national parliament or a decree approved by central government'.

3 Case C-320/91, *Paul Corbeau*, 19 May 1993, [1995] 4 CMLR 621.

4 Case C-393/92, *Gemeente Almelo and Others v Energiebedrijf ljsselmij* NV [1994] ECR I-1477.

5 Ibid., paras. 30-31.

'Measures' in Article 106(1) TFEU, as well as in Articles 24 and 34 TFEU (previous Articles 10 and 28 of the EC Treaty), are instruments adopted by Member States. This was defined as referring to 'laws, regulations, administrative provisions, administrative practices and all instruments issued from a public authority, including recommendations' in Commission Directive 70/50/EEC.[6] Moreover, it should be realised that measures need not have binding effects on the conduct of traders and consumers in the State. This principle was explained in *Buy Irish.*[7] The Irish Government, which took a series of 'soft' measures[8] to promote Irish products, was regarded as being in breach of its Treaty obligations by facilitating a campaign to promote the sale and purchase of Irish goods within its territory.[9]

Whether national measures breach Article 106(1) TFEU varies from case to case. In *Höfner*, a national measure conferring a dominant position by granting exclusive rights to an undertaking was not incompatible with the Treaty.[10] While the measure at issue conferred an exclusive right and created a situation in which the agent could not avoid infringing Article 102, the measure breached Article 106(1) TFEU.[11] Under Article 106 TFEU, the measure does not have to actually affect trade between Member States. Conduct need only be 'capable of having such an effect' would be enough.[12] However, in *ERT*,[13] followed in *Merci Convenzionali*,[14] the national measure was prohibited as the granted exclusive right was liable to create a situation in which the undertaking would necessarily

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6 Commission Directive 70/50/EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions [1970] OJ Spec. Ed. 17. The Directive further explained the definition of 'administrative practice' and 'recommendations'.

7 Case C-249/81, *Commission v Ireland* [1982] ECR 4005, [1983] 2 CMLR 104. 'Even measures adopted by the government of a Member-State' which do not have binding effect may be capable of influencing the conduct of traders and consumers in that State and thus of frustrating the aims of the Community as set out in Article 2 and enlarged upon in Article 3 of the Treaty." See para. 28.

8 Ibid., para. 3.

9 Ibid., para. 30.

10 Case C-41/90, *Höfner v. Marcrotron* [1991] ECR I-1979, [1993] 4 CMLR 306, para. 29. This principle was also upheld by other cases, for example, Case C-179/90, *Merci convenzionali Porto di Genova v. Siderurgica Gabrielli SpA* [1991] ECR I-5889, [1994] 4 CMLR 422, para. 16; Case C-320/91, *Paul Corbeau* [1993] ECR I-2563, [1995] 4 CMLR 621, para. 11; C-323/93, *Societe Civile Agricole du Centre d'insemination de la Crespelle v Cooperative d'elevage et d'insemination Artificielle du Departement de la Mayenne* [1994] ECR I-5077, para. 18; Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-6025, [2000] 4 CMLR 446, para. 93.

11 Case C-41/90, *Höfner v. Marcrotron*, note 10, para. 34.

12 Case C-41/90, *Höfner v. Marcrotron*, note 10, para. 32.

13 Case C-260/89, *Elliniki Radiophonia Tileorassi Anonimi Etaira (ERT) v Dimotiki Etairia Pliroforissis (DEP)* [1991] ECR I-2925, [1994] 4 CMLR 540, para. 38.

14 Case C-170/90, *Merci convenzionali Porto di Genova v. Siderurgica Gabrielli SpA*, note 10, para.19.

infringe Article 102. In *RTT*[15], a measure granting special or exclusive rights extended the dominant position of a public undertaking and therefore was held to constitute an infringement of Article 106 TFEU.

2.2 Relationship between Member States and Administrative Power

The content of 'administrative power' in the AML has been explained above.[16] It is clear that administrative organs are regulated both in Article 106 TFEU and Chapter Five of the AML. However, other forms of Member States in EU competition law, such as parliaments and judicial power, are not included in administrative power in the AML while EU competition law in turn has not clarified the position of organisations empowered by a law or administrative regulation to administer public affairs.

What is the position of the State Council in the AML? There is no official statement on this question. As suggested by Xiaoye Wang, the State Council is not included as falling within the administrative organs covered by the AML.[17] However, the State Council is more than a central government representing a sovereign state to operate. It is an administrative organ and its fundamental function is to regulate the social public affairs by operating administrative power.[18] The State Council should fall within the term of administrative power in the AML, in a way that Member State governments do under Article 106 TFEU; exemptions could be available in situations when the State Council engages in public affairs for the interest of the public and the State.

There has been debate as to of the extent to which abstract acts of abuse of administrative

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15 Case C-18/88, *RTT v. GB-INNO-BM SA* [1991] ECR I-5973, prar. 21.

16 See para. 2.2.2 of Chapter Three of this thesis.

17 X. Wang, *Explanation on People's Republic of China Anti-Monopoly Law [中华人民共和国反垄断法详解]*, (2008) Intellectual Property Publishing House, at 55. She also agreed with the statement of US Supreme Court in *Parker v. Brown* that '[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.' *Park v. Brown*, 317 U.S. 341, at 350-351. See http://supreme.justia.com/cases/federal/us/317/341/case.html (last visited on March 1, 2012).

18 The State Council is also the highest State Administrative Organ in China. See Article 65 of Constitution Law of People's Republic of China [中华人民共和国宪法], which was issued on December 4, 1982 and revised on March 14, 2004.

power are regarded under Article 37 of the AML. In Article 37, abstract administrative conduct include 'provisions' set down by administrative organs. The content of these 'provisions' is defined in the supplementary provisions on abuse of administrative power and is limited to decisions, proclamations, announcements, notices, opinions and meeting summaries.[19] This means that Article 37 of the AML only applies to general normative documents, excluding administrative legislation, such as administrative regulations of the State Council, administrative rules of departments or commissions of the State Council and local governments.[20] Scholars have argued that administrative legislation was included in the broad definition of law and should be regulated according to the principles and procedures of the Legislation Law.[21] However, administrative regulations and rules are still abstract administrative conduct in nature and occupy a lower position in the legal hierarchy than the AML.[22] They may also contain anti-competitive provisions to protect certain industries or regional interests. It follows therefore that, administrative regulations and rules should also be fall within the content of Article 37 of the AML.[23] In accord with the principles in the Legislation Law and the Administrative Procedure Law,[24] the anti-monopoly authority could confirm the situation of abuse of administrative power to eliminate or restrict competition and put forward suggestions on handling according to law to the relevant superior authority.[25]

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19 See Article 4 of Provisions for Administrative Authority for Industry and Commerce to Prevent Abuse of Administrative Power to Eliminate or Restrict Competition [工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定] (Supplementary Provisions on Abuse of Administrative Power), which was published by the SAIC and entered into force on February 1, 2011. This Article also expands abstract administrative acts into administrative documents set down by administrative empowered organisations.

20 In the theory of Chinese Administrative law, abstract administrative conduct has two kinds of provisions. One is administrative legislation including administrative regulations and rules; the other is general normative documents including other forms listed in Article 4 of the supplementary provisions. See C. Zheng, *Legal Control Research of Administrative Monopoly [行政垄断的法律控制研究]*, (2003) Peking University Press, at 59. The content of 'provisions' in Article 37 also consists with the content of 'provisions' in Article 7 of Administrative Reconsideration Law [行政复议法], which was issued on April 29, 1999.

21 X. Wang, note 17, at 207-209. Also see Articles 56, 71 and 73 of the Legislation Law[立法法], which was issued on March 15, 2000.

22 Note 21, Article 79 of the Legislation Law.

23 Related cases in telecommunications sector will be discussed in Chapter Six of this thesis.

24 Note 21, Articles 56, 71 and 73 of the Legislation Law and Article 12 of the Administrative Procedure Law, see para. 2.1 of Chapter Three of this thesis.

25 This procedure is similar to the way the anti-monopoly authority handles with abuse of administrative power in Article 51 of the AML. Moreover, judicial examination on abstract administrative acts gradually becomes a popular view for scholars of administrative law. A great number of articles support this view, for example, J. Liu, 'On Judicial Examination of the Abstract Administrative Act in China [论

3. Undertakings and Business Operators

3.1 Economic Activities and Undertaking in EU Competition Law

The definition of 'undertaking' is crucial in EU competition law. Articles 101 and 102 TFEU apply only to undertakings. Article 106 TFEU applies to public undertakings or undertakings granted special or exclusive rights by Member States.

An entity can only be an 'undertaking' while it is engaged in economic activity. 'Economic activity' is a core element of the definition of undertaking. In order to establish an 'economic activity', two conditions should be fulfilled: (1) the activity could, at least in principle, be operated by a private undertaking;[26] (2) the activity offers goods or services on the market.[27] In *Höfner*, an undertaking was defined as encompassing 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.'[28] This definition is commonly accepted within EU competition

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我国抽象行政行为的司法审查]', (1999) 6 *Modern Law Science* p 69; D. Liu and J. Huang, 'Administrative Action Should Be Brought into the Jurisdiction of Administrative Procedure [抽象行政行为应纳入行政诉讼受案范围]', (2000) 3 *Modern Law Science* p56; D. Ma, 'The Analysis on the Necessity of Brought Abstract Administrative act into the Jurisdiction of Administrative procedure [析抽象行政行为纳入诉讼范围之必要性]', (2001) 10 *People's Procuratorial Semimonthly* p13; J. Hu, 'On Judicial Review of Abstract Administrative Act in China [论我国抽象行政行为的司法审查]', (2005) 5 *Journal of Renmin University of China* p15; B. Jiang, 'Administrative Procedure Law and Abstract Administrative Act [《行政诉讼法》与抽象行政行为]', (2009) 3 *Administrative Law Review* p15.

[26] See Case C-41/90, *Höfner v. Marcrotron*, note 10, para.22; Case C-6/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustri*, [1999] ECR I-5751, [2000] 4 CMLR 446, Jacobs AG, para. 331.

[27] Case C-205/03, *Federacion Nacional de Empresas de Instrumentacion Cientifica, Medica, Tecnica y Dental (FENIN) v. Commission* [2006] ECR I-6295, paras. 25-26; Case C-35/96 *Commission v. Italy* [1998] ECR I-3851, [1998] 5 CMLR 889, para. 36; Case C 180-184/98, P*avlov v Stichting Pensioenfonds Medische Specialisten* [2000] E.C.R. I-6451; [2001] 4 CMLR 1 at para.75; Case C-475/99 *Ambulanz Glöckner v. Landkreis Sudwestpflaz* [2001] ECR I-8089, [2002] 4 CMLR 726, para. 19; Case C-49/07, M*otosykletistiki Omospondia Ellados NPID (MOTOE) v Greece* [2008] 5 CMLR 11 at para.22; and Case C-113/07 *SELEX Sistemi Integrati SpA v. Commission*, [2009] 4 CMLR 24 para. 69. This thsis agrees with the opinion in Alison Jones and Brenda Sufrin's book. They suggest that 'the characteristic feature of an 'economic activity' is (1) the offering of goods or services on the market, (2) where that activity could, at least in principle, be carried on by a private undertaking in order to make profits'.' See A. Jones and B. Sufrin, *EU Competition Law – Text, Cases, and Materials*, 4th Edition, (2011) Oxford University Press, at 12-125. However, there are some other arguments. K. P. E. Lasok defined the concept of carrying on an economic activity as the entity's outputs. See K. P. E. Lasok, 'The When is an Undertaking not an Undertaking?', (2004) 25(7) *European Competition Law Review*, p383; O. Odudu classified to three conditions: 'offer goods or services to the market; bear the economic or financial risk of the enterprises; and have the potential to make profit from the activity.' See O. Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81*, (2006) Oxford University Press, at 26.

[28] Case C-41/90, *Höfner v. Marcrotron*, note 10, para.21.

rules.[29]

There are two characteristics of an 'undertaking' which need to be clarified. First, various kinds of entities can be treated as undertakings, and the legal status of the entity is irrelevant. Jones and Sufrin summarise the concept in the following way, stating:

> 'natural persons, legal persons and State bodies are potentially caught (into undertakings). As well as companies and partnerships, individuals, sporting bodies, trade associations, agricultural cooperatives, P & I clubs, and professional bodies have been held to be undertaking for the purposes of the rules.'[30]

Second, the same entity can be classified as an undertaking or not depending on the different activities the entity engages in. Generally, the activity of a public entity which fulfils a social function duty is not an economic activity.[31] However, where the public entity engages in purchasing of goods and services for the purpose of offering those goods and services on a given market, it will be regarded as 'undertaking'. In *FENIN*[32], the Spanish Health Service (SNS) participated in the management of the public health service and was alleged to be guilty of having abused its dominant position. The Court of Justice of the European Union (CJEU) upheld the decision of the Commission and the judgement of the General Court to the effect that the SNS was an undertaking only if performing an activity 'consisting in offering goods and services on a given market [as] that is the

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29 This definition was repeated by a great number of cases, for example, Cases C-159-160/91, *Poucet and Pistre v. Assurances Generales de* France [1993] ECR I-637, para. 17; Case 362/92, *SAT Fluggesellschaft v. Eurocontrol* [1994] ECR I-43, [1994] 5 CMLR 208, para. 18; Case C-218/00, *Cisal di Battistello Venanzio & Co v. Istituto Nazionale per L'Assicurazione Contro Gli fortune Sul Lavoro* (INAIL) [2002] ECR I-691, [2002] 4 CMLR 24, para. 22; Case C-264/01, 306/01, 354/01, and 355/01, *AOK Bundesverband and Others v. Ichtyol-Gesellschaft Cordes and others* [2004] 4 CMLR 1261, para. 46. The definition is also accepted by scholars, for example, J. L. Buendia. Sierra, note 1, at 32; A. Jones and B. Sufrin, *EC Competition Law – Text, Cases, and Materials*, 4th Edition, (2011) Oxford University Press, at 125; R. Whish, *Competition Law*, 6th Edition, (2009) Oxford University Press, at 84; K. P. E. Lasok, 'The When is an Undertaking not an Undertaking?' (2004) 25(7) *European Competition Law Review*, p383.

30 A. Jones and B. Sufrin, note 27, at 126. Similar statement is also mentioned by Jose Luis Buendia Sierra. See J. L. Buendia. Sierra, note 1, at 32.

31 See Case C-107/84, *Commission of the European Communities v Germany* [1985] ECR 26 paras 14-15; Case C-362/92, *SAT Fluggesellschaft v. Eurocontrol* [1994] 5 CMLR 208, para. 30; Case C-49/07, *MOTOE* [2008] 5 CMLR 11, para. 24; Case T-155/04 *SELEX Sistemi Integrati SpA v. Commission* [2009] 4 CMLR 24, para. 70.

32 Case C-205/03 P, *Federacion Espanola de Empresas de Tecnologia Sanitaria (FENIN) v Commission*, note 27.

characteristic feature of an economic activity'[33]. The purchasing activity cannot constitute an economic activity without being examined together with the subsequent provided service.[34]

However, the discussion on whether an activity falls within the exercises of public powers or not is still in debate. In *Eurocontrol*,[35] the Commission concluded that Eurocontrol was not an undertaking. There were three reasons: (1) Eurocontrol acts in co-operation with the civil and military authorities of the Contracting States in the field of air navigation to provide maximum freedom for all air space users consistent with the required level of safety; (2) the responsibility for establishing and collecting the route charges was granted by the Contracting States and the rate was not fixed by Eurocontrol, but by each of the Contracting States for the use of its air space; and (3) Eurocontrol could only carry on the operational exercise at the request of the Contracting State. As a result, the disputed activity was not of an economic nature and the EU competition rules did not apply.[36] In *SELEX*,[37] the activities of providing assistance to national administrations by Eurocontrol were regarded as economic activities, although the technical standardisation activities and research and development activities were not economic activities.[38] Consequently, in the exercise of economic activities, Eurocontrol was an undertaking within the meaning of Article 102. However, on appeal to the CJEU,[39] the Court indicated that the assessment of the General Court in relation to activities assisting national administrations was erroneous. The activities were connected with the exercise of public powers and, therefore, were not

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33 Case C-205/03 P, *Federacion Espanola de Empresas de Tecnologia Sanitaria (FENIN) v Commission*, note 27, para. 25; Case C-35/96, Commission v Italy, note 27, para. 36.

34 Case C-205/03 P, *Federacion Espanola de Empresas de Tecnologia Sanitaria (FENIN) v Commission*, note 27, para. 27.

35 Case C-362/92, *SAT Fluggesellschaft v. Eurocontrol*, note 31.

36 Ibid., paras 19-32.

37 Case T-155/04 *SELEX Sistemi Integrati SpA v. Commission*, note 31; Case C-113/07 *SELEX Sistemi Integrati SpA v. Commission*, note 27.

38 Case T-155/04 *SELEX Sistemi Integrati SpA v. Commission*, note 31, paras. 63-68, 74-77, 86-91. The reason that activities of providing assistance to national administrations by Eurocontrol was economic activities was concluded that 'the fact that an activity may be exercised by a private undertaking is a further indication that the activity in question may be described as a business activity, the fact that activities are normally entrusted by public offices cannot necessarily affect the economic nature of such activities and the fact that the assistance provided is not remunerated may constitute an indication that it is not an economic activity, although it is not in itself decisive, as may the fact that that assistance is given in pursuit of a public service objective.' see Case C-113/07 *SELEX Sistemi Integrati SpA v. Commission*, note 27, para. 20.

39 See Case C-113/07 *SELEX Sistemi Integrati SpA v. Commission*, note 27.

in themselves economic in nature.[40] Such that Eurocontrol was not an undertaking in this context. In *Cali*[41] the Court adopted the same approach as in Eurocontrol and held that anti-pollution surveillance is a part of the essential function of the State and that the accused entity (Servizi ecologici porto di Genova SpA, 'SEPG') was a public authority.[42]

3.2 Public Undertaking in EU Competition Law

The term 'public undertaking' is used in Article 106 (1) TFEU and its meaning derives from that given to 'undertaking' in Article 101 and 102 TFEU. A 'public undertaking' has been defined in Article 2 of the Transparency Directive[43]. Although the description was challenged by several Member States, it was upheld by the CJEU.[44] 'Public undertaking' is defined as:

> any undertaking over which the public authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein of the rules which govern it.
>
> A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking:
>
> (a) hold the major part of the undertaking's subscribed capital; or
>
> (b) control the majority of votes attaching to shares issued by the undertaking; or
>
> (c) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.[45]

To be a 'public' undertaking, the entity must first be an undertaking: 'public' undertakings are therefore a subset of undertakings. Second, an undertaking should meet the conditions

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40 See Case C-113/07 *SELEX Sistemi Integrati SpA v. Commission*, note 27, para. 82. The reasons for this decision were listed at paras. 72-79.

41 Case C-343/95 *Cali* [1997] ECR I-1547.

42 Ibid., paras.22-23.

43 Commission Directive (EEC) 80/723 on the transparency of financial relations between Member States and public undertakings [1980] OJ L195/35-37 amended by Commission Directive (EEC) 85/413 [1985] OJ L229/20 and by Commission Directive (EEC) 93/84 [1993] OJ L254/16.

44 See Cases C-188-190/88, *France, Italy and the UK v Commission* [1982] ECR 2545.

45 It also defined the concept of 'public authorities' in Article 2: the State and regional or local authorities.

of being controlled by public authorities.

In the traditional national economic structure, public undertakings existed widely in the public sectors, for example, gas, electricity, telecommunications and railways. With the privatisation processes, the structure of the traditional public sectors was substantially changed and the number of public undertakings has rapidly declined. However, due to the special nature of public undertakings, they may carry out some regulatory functions, as well as economic activities. According to the above analysis of the term 'undertaking', where a public undertaking is exercising regulatory functions, this should not be treated as economic activity; where an activity is of an economic nature, the public undertaking in this context is an undertaking within the meaning of Article 102. In *British Telecommunication,*[46] British Telecommunication (BT) was the holder of a statutory monopoly for the running of telecommunications systems in the United Kingdom, with the obligation of providing telex and telephone services. BT was granted regulatory powers in relation to telecommunications services in respect of the charges and conditions. The Italian Republic argued that the activities of BT were 'rule-making activities carried out by virtue of the Post Office Act 1969 and the British Telecommunications Act 1981'[47] and should be considered under Article 90 or 169 of the Treaty (now Articles 106 and 185 TFEU). However, the Court supported the submission of the United Kingdom and the Commission. The Court declared that 'notwithstanding its status as a national undertaking, BT's activities in operating public telecommunications installations and making them available to users in return for payment of charges, do indeed constitute activities of an undertaking'[48] and 'the powers conferred on BT to make regulations are strictly limited to provisions for the sole purpose of prescribing the tariff and other particulars and conditions of the services which it supplies to users….the British legislature has not in any way laid down in advance the content of the regulations in issue, which remain to be determined freely by BT.'[49] The conclusion showed that a public undertaking with statutory rule-making power may still be subject to Article 102 of the competition law.

[46] Case C-41/83, *British Telecommunications* [1985] ECR 873; [1985] 2 CMLR 368; [1985] FSR 510.
[47] Ibid., para. 16.
[48] Ibid., para. 18.
[49] Ibid., para. 19.

3.3 Business Operators in the AML

As defined in Article 12(1) of the AML, business operator refers to 'a natural person, legal person, or any other organisation that is in the engagement of commodities production or operation or service provision'. The requirement for business operators to engage in commodities production or operation or service provision shows that the operation of economic activities is also a character of business operators in the AML.

Furthermore, 'natural person, legal person or any other organisation' has a scope similar to that of the term 'undertaking' in the EU.[50] Business operators falling within the AML should have self-governing power in management which requires independence in respect of legal form and economic activity.[51] A government can also be a business operator, once the government engages in economic activities and independently provides goods or services in the market. However, agricultural cooperatives formed by 'agricultural producers and rural economic organisations' will not fall within the AML, according to the exemption created by Article 56 of the AML.

Finally, both private and public entities are included, although the AML does not directly clarify the context of 'private' or 'public'. As discussed before, Article 7 may create exemptions for business operators in the industries 'controlled by the State-owned economy and concerning the lifeline of the national economy and national security or the industries implementing exclusive operation and sales according to law', which generally are State-owned enterprises (SOEs).[52] However, this does not mean that SOEs will not be regulated under the AML. Xiaoye Wang insisted that SOEs and enterprises granted with exclusive or special rights by the State falling within 'business operators' in the AML.[53] SOEs not only fall within the provisions on monopoly agreement, abuse of market dominance and concentrations, but are also the subject of the provisions relating to the abuse of administrative power due to their close relationship with administrative power. As

50 See para. 3.1 of this chapter.
51 X. Wang, note 17, at 79.
52 See para. 2.3.2.3 of Chapter Two of this thesis.
53 X. Wang, note 17, at 80.

a result, the term 'business operators' in the AML in essence mirrors that of the term 'undertaking' in EU competition law.

4. The Relationships between Undertakings and Public Authorities

4.1 Special Rights and Exclusive Rights in the EU Competition Law

Special rights and exclusive rights are jointly mentioned in Article 106(1) TFEU. They are the core elements of Article 106 TFEU. The two concepts were jointly defined in an EU Commission Directive that 'the rights granted by a Member State or a public authority to one or more public or private bodies through any legal, regulatory or administrative instrument reserving them the right to provide a service or undertake an activity.'[54] However, The Court declined to treat the two concepts as synonymous, and instead decided to distinguish special rights from exclusive rights in the following cases.[55]

4.1.1 Special Rights

The concept of 'special rights' was defined in the *Telecommunications Equipment*[56] and *Telecommunications Services* cases.[57] The Commission decided in Directive 88/301/EEC[58] to withdraw special or exclusive rights granted to undertakings 'for the importation, marketing, connection, bringing into service of telecommunications terminal equipment, and/or maintenance of such equipment from Member States'. In *Telecommunications Equipment*, the CJEU, in the context of special rights, declared that Directive 88/301/EEC was void and that neither the provisions of the Directive nor the preamble thereto specified

54 Commission Directive 90/388/EEC on competition in the markets for telecommunications services [1990] OJ L192/10-16. See Article 1.

55 See Case C-202/88, *France v Commission of the Communities* [1991] ECR I-1223; Joint Cases C-271, 281 and 289/90, *Spain, Belgium & Italy v Commission of the European Communities* [1992] ECR I-5833.

56 Case C-202/88, *France v Commission of the Communities*, note 55.

57 Joint Cases C-271, 281 and 289/90, *Spain, Belgium & Italy v Commission of the European Communities*, note 55.

58 Commission Directive 88/301/EEC on competition in the markets in telecommunications terminal equipment [1988] OJ L131/73. See Articles 1 & 2.

the type of rights violated in the various provisions of the Treaty.[59] In later cases, the Court made it clear that Directive 90/338/EEC applied only in relation to exclusive rights, and the Directive was annulled in so far as it purported to govern special rights.[60]

The term 'special rights' was finally defined in the field of telecommunications in Directive 94/46/EC[61]:

> Special rights are in practice rights that are granted by a Member State to a limited number of undertakings, through any legislative, regulatory or administrative instrument which, within a given geographical area.
>
> - limits to two or more the number of such undertaking, otherwise than according to objective, proportional and non-discriminatory criteria, or
>
> - designates, otherwise than according to such criteria, several competing undertakings, or
>
> - confers on any undertakings or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to engage in any of the abovementioned activities in the same geographical area under substantially equivalent conditions.

Although in Directive 94/46/EC, special rights were defined in relation to the telecommunications field, the definition also applies to other fields.[62] There are two important requirements to this definition. First, the rights should be granted to a limited number of undertakings, which means at least two undertakings. The rights granted to a sole undertaking are not in the content of special rights. Second, the undertakings to which the special rights have been granted should be competing undertakings in the same geographical area and under substantially equivalent conditions.

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59 See Case C-202/88, *France v Commission of the Communities*, note 55, paras. 45-47.

60 See Joint Cases C-271, 281 and 289/90, *Spain, Belgium & Italy v Commission of the European Communities*, note 55, paras. 28-34.

61 Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications.

62 See A. Jones and B. Sufrin, note 27, at 575-576.

4.1.2 Exclusive Rights

Similarly, like special rights, exclusive rights were separately defined in *Telecommunications Equipment* and *Telecommunications Services* cases. As mentioned above, the CJEU in *Telecommunications Services* alleged that the definition of 'special and exclusive rights' was only in relation to exclusive right.[63] However, the concept of exclusive rights was not clearly re-defined, even though exclusive rights were separately used in several cases, for example, in *Ahmed Saeed*,[64] *Höfner*, *Merci Convenzionali*, *RTT*, *Corbeau*.

The concept of exclusive rights was modified in Directive 94/46/EC. It stated in Article 2 that:

> '[e]xclusive rights' means the rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide a telecommunication service or undertake an activity within a given geographical area.

However, there is a defect in this definition. The contested activity of the undertaking's reserved exclusive right should be an economic activity. Conduct of an undertaking which is contrary to the rules of Articles 101 and 102 is the basic requirement of Article 106(1) TFEU. According to the analysis of the concept of public undertaking above, a public undertaking sometimes may have an obligation to undertaking social functions and in this context, the public undertaking does not fall within the meaning of 'undertaking' under Articles 101 and 102. Furthermore, a private undertaking can also operate under the principle of 'solidarity', and in such cases the activity is not considered an economic activity. As a result, to constitute 'exclusive rights', it should be made clear that the activity in question should be an economic activity of an undertaking granted exclusive rights.

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63 See para. 1.3.3.1

64 Case C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v Zentrale zur Bekampfung Unlauteren Wettwerbs eV* [1989] ECR 803, [1990] 4 CMLR 102.

To distinguish 'exclusive rights', there are five other conditions to be highlighted. Firstly, the right is granted by Member States through State measures. Second, the owner of the rights should be an undertaking engaged in an economic activity. The rights enjoyed by a single undertaking, either private or public, for the social functions or solidarity principle, are not 'exclusive rights' in the context of Article 106 TFEU. Third, there is only one beneficiary of the contested exclusive rights in a single case.[65] In most cases, only a single undertaking was granted with exclusive rights.[66] However, there are two exemptions. In the *Greek Oil Monopoly* case,[67] the State had a refining monopoly to control both the volume of imports of crude oil intended for refining and the conditions under which those imports were carried out. Companies engaged in the distribution of petroleum products were required to obtain their supplying rights exclusively from the State. In the *FFAD* case,[68] there were three undertakings which shared exclusive rights of collecting waste for recycling in Copenhagen.[69] The final aspect is the effect of exclusive rights. While an exclusive right is granted to an undertaking, this right *cannot* be granted to any other undertakings. An undertaking with exclusive rights can deny the benefits conferred by the rights to its competitors, although the undertaking may also have the right to allow the existence of competitors. Moreover, exclusive rights may not lead to a dominant position of an undertaking. A dominant position of an undertaking also depends on the content of the relevant market in specific cases. Creating a dominant position by the grant of the exclusive right may not be contrary to the Treaty.[70] To conclude, exclusive rights are the rights granted by the State to an undertaking for carrying out of economic activities on an

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65 For example, Alison Jones and Brenda Sufrin defined 'exclusive rights' that '[t]hey exist where a monopoly has been granted by the State to one entity to engage in a particular economic activity on an exclusive basis' in their book, A. Jones and B. Sufrin, note 27, at 575; Jose Luis Buendia Sierra stated as 'a measure taken by a Member State in the exercise of its functions as a public authority, by which exclusivity is granted through any legal instrument in favour of a single undertaking, public or private, …' in his book, J. L. Buendia. Sierra, note 1, at 6.

66 See Case C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v Zentrale zur Bekampfung Unlauteren Wettwerbs eV*, note 64; Case C-41/90, *Höfner v. Marcrotron*, note 10; Case C-260/89, *Elliniki Radiophonia Tileorassi Anonimi Etaira (ERT) v Dimotiki Etairia Pliroforissis (DEP)*, note 13; Case C-179/90, *Merci Convenzionali v. Porto di Genova*, note 10; Case C-18/88, *RTT v. GB-INNO-BM SA*, note 15; and Cases C-320/91 *Corbeau*, note 10.

67 Case C-347/88, *Commission of the European Communities v Hellenic Republic* [1990] ECR 4789.

68 Case C-209/98, *Entreprenorforeningens Affalds (FFAD) v Kobenhavns Kommune* [2000] ECR I-3743, [2001] 2 CMLR 936.

69 It also mentioned in A. Jones and B. Sufrin, note 27, at 575.

70 This principle is already discussed in para. 1.3.2.

exclusive basis.[71]

4.2 Granting Rights and Restricting Rights in the AML

'Granting' and 'restricting' rights are the two significantly different concepts between Article 106 TFEU and Chapter Five of the AML. 'Granting' special or exclusive rights means that rights are transferred from Member States to the undertaking concerned. An undertaking has the freedom to choose whether or not to apply these rights, although generally the initiative will be applied with the consideration of market benefit from the rights thereof. 'The Treaty nonetheless requires the Member States not to adopt or maintain in force any measure which might deprive that provision of its effectiveness.'[72] However, an undertaking may also be 'forced' to apply the granted special or exclusive rights in EU competition law. Where an undertaking is granted a social obligation, and without a provision allowing an undertaking to operate the special or exclusive rights, the performance, in economically balanced conditions, of that task of general interest would be jeopardised, such that the undertaking may be 'forced' to use the rights and to abuse its dominant position.[73] The 'forced' activities are driven by general economic considerations and economically balanced conditions, but not by the power of Member States.

In Chapter Five of the AML, the abuse of administrative power does not mainly focus on granting rights, but rather on measures relating to designated purchase obligations, restrictions on the freedom of circulation, the operation, and the purchase or use of businesses. The words 'restrict', 'block', 'hamper', 'reject' or 'force' with strong enforcement effect are broadly used in Articles 32 to 36 of the AML. A result of the legacy

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71 There is an argument raised by Jose Luis Buendia Sierra. Generally exclusive rights are granted directly by Member States to an undertaking. However, whether exclusive rights or a part of exclusive rights, in the context of Article 106 TFEU, can be obtained or subcontracted to an undertaking from another undertaking with the exclusive rights granted from Member States? Which Article, Article 31 or Article 86, should be applied to? It seems that there is still no clear answers. However, the author stated that '[i]n many cases a certain grey area will exist in which the joint application of both Articles could provide a reasonable solution.' See by J. L. Buendia. Sierra, note 1, at 24.

72 See Case C-147-8/97, *Deutsche Post AG v Gesellschaft fur Zahlungssysteme mbH (GZS) and Citicorp Kartenservice GmbH* [2000] ECR I-825, [2000] 4 CMLR 838, para. 39; as well as Case C-260/89 *ERT v. DEP*, note 13, para. 35; and Cases C-320/91 *Corbeau*, note 10, para. 11.

73 See Case C-147-8/97, *Deutsche Post AG*, note 72, para. 50.

of approaches to economic control in China has been that most of the administrative power involves itself in and interferes in the competitive market by the means of measures of administrative restriction.[74] The SAIC realised the tendentiousness on 'restricting' rights of administrative power and specifically distinguished this power from the responsibilities of business operators in the AML under administrative restrictions or administrative empowerment in its supplementary provisions on abuse of administrative power under the AML.[75] However, it should be noted that this article is unable to revise the mandatory effect of administrative power in Article 36 of the AML, although the phrase 'administrative compulsion or compulsion in a disguised form' in the consultative paper was deleted. Moreover, this article only applies to Article 36 of the AML on monopolistic conduct of business operators. It further explains that business operators in abuse of administrative power in the AML are generally restricted by abuse of administrative power provisions but that they do not operate under administrative empowerment.

4.3 Relationship with Undertakings

In terms of Article 106(1) TFEU, the starting point is the activity of an undertaking in question infringing Article 101, especially Article 102 TFEU in the competition.[76] In such cases the interests of competitors and consumers, and the illegality of the State measure will be examined. Finally, the illegal State measure should be amended or repealed. The result of the procedure is that the undertaking in question will lose the excuse of reliance on law and recover the non-privileged participant status held by other competitors.

However, uncertainty still exists in relation to this procedure. Different requirements were adopted to apply both Article 106(1) and Article 101 or 102 TFEU when examining State measures was examined to fall within Article 106(1) in a series of cases.

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74 See Chapter Two of this thesis.

75 See Article 5 of Provisions for Administrative Authority for Industry and Commerce to Prevent Abuse of Administrative Power to Eliminate or Restrict Competition [工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定], note 19.

76 Other provisions, such as Articles 18, 103-109 TFEU are not included in this study.

The CJEU in *Höfner* pointed out that the mere creation of a dominant position by granting an exclusive right within the meaning of Article 106(1) TFEU is not incompatible with Article 102 TFEU.[77] This principle was accepted in a chain of cases, although some of them applied to different conditions.[78] *Höfner* also stated that a Member State might breach these two provisions 'only if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position.'[79] In this case, the impossibility of satisfying market demand was further required.[80] The Court in *Job Centre*[81] and the Commission in *Slovakian Hybrid Mail Services*[82] also adopted the requirement of incapacity to satisfy demand in the application of Article 106(1).[83]

Instead of the condition of 'unable to avoid abusing its dominant position', *ERT* required that the exclusive right should be liable to create a situation in which an undertaking was led to infringe Article 102 TFEU 'by virtue of a discriminatory broadcasting policy which favours its own programmes.'[84] In *Merci Convenzionali*, the Court listed several circumstances which should be treated as 'abuse' under Articles 102 and 106(1) TFEU.[85] In *RTT*, it was held that an undertaking, holding a legal monopoly granted by a State measure, reserving to itself a neighbouring but separate market without any objective necessity may also constitute an abuse in Article 102 TFEU.[86] This principle was also

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77 Case C-41/90, *Höfner v. Marcrotron*, note 10, para. 28.

78 See Case C-179/90, *Merci Convenzionali*, note 10, para.17; Case C-323/93, *La Crespelle*, note 10, para. 18; Case C-67/96, *Albany*, note 10, para. 93; Case C-18/88, *RTT*, note 15, para. 23; Case C-49/07, *MOTOE*, note 27, para. 49; Case C-475/99, *Ambulanz Glöckner*, note 27, para.39.

79 Case C-41/90, *Höfner v. Marcrotron*, note 10, para. 28.

80 Ibid, para. 34.

81 Case C-55/96, *Job Centre Coop. arl* [1998] 4 CMLR 708.

82 COMP/39.562,Appeal Case T-556/08, *Slovenskian Law on Hybrid Mail Services* [2009] 4 CMLR 13.

83 See Case C-55/96, *Job Centre Coop. arl*, note 81, para.38; COMP/39.562,Appeal Case T-556/08, *Slovenskian Hybrid Mail Services*, note 82, paras. 144-154.

84 Case C-260/89, *ERT*, note 13, para. 37. These two conditions were both accepted in *La Crespelle*, see Case C-323/93, *La Crespelle*, note 10, paras. 18 & 20.

85 Case C-179/90, *Merci Convenzionali*, note 10, para. 19. The circumstances included 'either to demand payment for services which have not been requested, to charge disproportionate prices, to refuse to have recourse to modern technology, which involves an increase in the cost of the operations and a prolongation of the time required for their performance, or to grant price reductions to certain consumers and at the same time to offset such reductions by an increase in the charges to other consumers.' 'Unfair purchase prices or other unfair trading conditions, inlimiting technical development, to the prejudice of consumers, or in the application of dissimilar conditions to equivalent transactions with other trading parties' in subparagraphs (a), (b) and (c) of Article 102(2) TFEU were also mentioned in para. 18.

86 Case C-18/88, *RTT*, note 15, paras. 19-21.

adopted in *Ambulanz Glöckner*,[87] *Connect Austria*[88] and *Greek Lignite*.[89]

'Inequality of opportunity' was adopted in *Connect Austria*.[90] In this case, the situation in which additional Frequencies in the DCS 1800 band could be allocated free of charge to the public undertaking in a dominant position whereas the new entrant had to pay a fee for its DCS 1800 licence was found to create an inequality of opportunity for economic operators in the market at issue and to lead to a breach of Articles 106(1) TFEU in conjunction with 102 TFEU.[91] 'Inequality of opportunity' was also one of the reasons that the Court found the Greek Road Traffic Code infringed Articles 106(1) and 102 TFEU in *MOTOE*.[92]

However, a relatively different decision was made in *Corbeau*. The Court considered that a the simple fact that the exercising of exclusive or special rights granted by a State measure deprives the effectiveness of the Treaty and may infringe Article 106(1) TFEU.[93] Next, Article 106(2) was examined without a clear discussion on the application of Article 106(1).[94] In *La Crespelle*, the decision in *Corbeau* was abandoned. The examination of abuse was required and exorbitant prices charged by the insemination centre which was granted the exclusive right to provide insemination services was treated as infringement of

87 Case C-475/99, *Ambulanz Glöckner*, note 27, paras. 40-43.

88 Case C-462/99, *Connect Austria Gesellschaft Für Telekommunikation GmbH v. Telekom-Control-Kommission* [2005] 5 CMLR 6, see paras 82 and 85-87.

89 Case T-169/08, *Dimosia Epicheirisi Ilektrismou AE (DEI) v. European Commission* [2012] 5 CMLR 21, see para. 106.

90 In *Re Telecommunications Terminal Equipment* and *RTT*, the Court had stated that equality of opportunity shall be secured between the various economic operators to guarantee a system of undistorted competition. See Case C-202/88, *France v Commission of the Communities*, note 55, para.51 and Case C-18/88, *RTT*, note 15, para. 25.

91 Case C-462/99, *Connect Austira*, note 88, paras. 84-87.

92 Case C-49/07, *MOTOE*, note 27, para. 51. 'Inequality of opportunity' was also adopted by the Commission in the argument of the infringement of Articles 106(1) in *Greek Lignite*, although the Court did not support the opinion of the Commission. The Court claimed that there was no sufficient evidence 'to establish that a State measure distorts competition by creating inequality of opportunities between economic operators.' See Case T-169/08, *Greek Lignite*, note 89, para.105.

93 Case C-320/91, *Corbeau*, note 3, paras. 11-12.

94 Ibid, paras. 13-14. It is said that Corbeau is a case of reversal of the burden of proof since exclusive right are not prima facie legal, but prima facie illegal unless they are objectively justified or fulfil the Article 106(2) criteria. J.L. Buendia Sierra, 'Article 86 – Exclusive Rights and Other Anti-Competitive Measures' in J. Faull and A. Nikpay (eds.), *The EC Law of Competition*, 2nd Edition (2007) Oxford University Press; N.E. Zevgolis, 'Anti-Competitive Conduct from Public or Privileged Enterprises: Towards a *per se* Abuse of Dominant Position? Applicability of the Provision of TFEU Article 106(2) by National Competition Authorities', (2012) *European Competition Law Review*, at 87; A. Jones and B. Sufrin, *EU Competition Law*, 4th Edition (2011) Oxford University Press.

Article 102 and Article 106(1), although this practice was not an unavoidable consequence of the national law.[95] In *Silvano Raso*[96] the conditions adopted in *La Crespelle* were applied and it was further stated that a conflict of interest was created between the reconstituted dock-work company and its competitors in dock services by imposing unduly high costs for the supply of labour or by supplying them with suitable labour.[97] *Dusseldorp*[98] is another case with a significant distinction in the application on Article 106(1). The grant of exclusive right to AVR Chemie CV was treated as a favour for the national undertaking 'by enabling it to process waste intended for processing by a third undertaking' and directly resulted in a breach of Articles 106(1) and 102 TFEU,[99] although the application of both Articles 106(1) and 102 TFEU was mentioned and the damage to consumers was considered.[100] In two further cases, *Albany* and *Deutsche Post*, the Court followed the steps adopted in Corbeau to examine the justification under Article 106(2) and its application without an abuse being confirmed.[101]

It is obvious that the simple fact of creating a dominant position by granting an exclusive or special right within the meaning of Article 106(1) TFEU is not as such incompatible with Article 101, and especially Article 102 TFEU in most cases.[102] The uncertainty in the procedure generally focuses on the different conditions which may constitute an abuse under these provisions. There are two main kinds of State measures which may fall within Article 106(1) TFEU in conjunction with Article 102 TFEU. One is a measure such that an undertaking, merely by exercising the exclusive or special right granted to it, cannot avoid abusing its dominant position. The other is a measure such that an undertaking, granted with exclusive or special right, operates in the market by virtue of abusing its dominant

95 Case C-323/93, *La Crespelle*, note 10, paras. 18-22.
96 Case C-163/96, *Silvano Raso and Others* [1998] 4 CMLR 737.
97 Ibid,, paras. 27-31.
98 Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV and Others v. Minister Van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] 3 CMLR 873.
99. Ibid., para. 63.
100 See Case C-203/96, *Dusseldorp*, note 98, paras. 61-63 of and Case T-169/08, *Greek Lignite*, note 89, para. 114.
101 See Case C-67/96, *Albany*, note 10, paras. 95-98 and Case C-147-8/97, *Deutsche Post*, note 72, paras. 48 & 49.
102 See note 78. Also see Case C-55/96, *Job Centre*, note 81, para. 36; Case C-163/96, *Silvano Raso*, note 96, para. 27; Case C-462/99, *Connect Austria*, note 88, para. 80; even in Case C-203/96, *Dusseldorp*, note 98, para. 93. This principle repeated this principle in the recent case *Greek Lignite*. Only in two cases, *Corbeau* and *Dusseldorp*, the Court ignored this principle in their decisions.

position. Different conduct may fall within these two results, for example, the circumstances described in subparagraphs (a), (b) and (c) of the second paragraph of Article 102 TFEU in *Merci Convenzionali*,[103] the incapability of satisfying market demand in *Höfner*, *Job Centre* and *Slovakian Hybrid Mail Services*, the extension of exclusive rights in downstream or neighbouring but separate markets in *RTT*, *Ambulanz*, *Connect Austria* and *Greek Lignite*, conflicts of interest between the undertaking in the dominant position and other economic operators in *RTT*, *ERT*, *Silvano Raso* and *MOTOE*. More than one circumstance may appear in a case. All these measures may create inequality of opportunity for economic operators and then distort competition in the market.[104]

However, although Article 106 TFEU and provisions on abuse of administrative power in the AML both deal with the relationship between the conduct of public authorities and undertakings; they deal with such issues via different mechanisms.

In terms of abuse of administrative power, the concern underlying Article 106 TFEU is not mentioned in the provisions. It is not clear whether the business operators obtaining benefit from the abuse of administrative power or operating anti-competitive conduct under compulsion which is an abuse of administrative power will be regulated by the general competition rule.[105] A monopolistic conduct of a business operator is not a necessary condition for an abusive conduct of administrative power falling within Chapter Five of the AML.

4.3.1 Identifying Three Kinds of Conduct of Abuse of Administrative Power

There are three kinds of conduct of abuse of administrative power. One is abuse of

[103] Article 102 TFEU: '…(a) directly or indirectly imposing unfair purchase of selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage….' These circumstances are also available in *Silvano Raso*, *La Crospelle*, *Connect Austria* and other cases.

[104] Only a short analysis on case law has been discussed since this thesis mainly focuses on the policy than practice of Article 106 TFEU.

[105] The general competition rules mean the regulations in Chapters Two, Three and Five of the AML.

administrative power to restrict, or restrict in a disguised form, entities and individuals to operate, purchase or use the commodities provided by business operators designated by the holder of the administrative power or to block the free circulation of commodities between regions.[106] Cases under this provision do not require that a business operator act in a monopolistic fashion.

> **Case 1:** A county government in Anhui province published a Meeting Summary on the Topic of Compound Fertilisers Operation in the County Territory and required that any business operators from outside of the county could not sell chemical fertilisers, except urea and phosphate compounds, in that country. On April 13, 2001, the county's Circulation of Commodities Reorganisation Office (CCRO) instructed the county's Administration for Industry and Commerce (AIC) to withdraw an undertaking's business licenses in regards to four direct sales locations. The AIC in Anhui province investigated and decided that the Meeting Summary had created administrative regional blockages and district protection on chemical fertilisers and had violated Article 7 of the AUCL stating that the government and its organ shall not abuse its authority to prohibit outside commodities from going into the home market.[107]

The administrative regional blockage conduct in this case may also have violated Article 33(4) of the AML on setting barriers or taking other measures so as to hamper commodities from outside the locality from entering the local market. First, the county AIC is an administrative organ and operated its administrative power to hamper the selling of chemical fertiliser in the locality by withdrawing business licences.[108] Second, preventing business operators from outside of the county selling chemical fertiliser products

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106 See Articles 32 to 35 of the AML.

107 See Case 40. Fair Trade Bureau of State Administration for Industry and Commerce and Research Centre of International Law of Chinese Academy and Social Science, *Typical Cases of Anti-Monopoly and Executable Investigation on Chinese Anti-Monopoly*, *[反垄断典型案例及中国反垄断执法调查]*, (2007) Law Press, at 101-103. The name of the county was not stated. This case was dealt under the AUCL in 2001. However, it is cited here because it has specific characters relating to the abuse of administrative power in the AML and until now there is no existing case relating to the abuse of administrative power in the AML published. Other cases discussed in the following paragraphs are also in the same situation.

108 The CCRO should be an organisation under the county government empowered by an administrative regulation. However, there is no further information given about administrative regulation setting up this office.

constituted the administrative conduct of blocking the free circulation of commodities between regions and had the effect of eliminating or restricting competition in the chemical fertiliser market in this county territory. Third, a business operator engaging in monopolistic conduct prescribed in the AML is not required to apply Article 33(4). A chemical fertiliser undertaking was restricted to selling products in the county and there was no monopolistic conduct in this case.

Abuse of administrative power to force business operators to engage in the monopolistic conduct as prescribed in the AML in Article 36 of the AML is the second kind of conduct. The existence of a business operator engaging in monopolistic conduct is an indispensable condition for its application. In terms of Article 36, there are some similarities between Article 106 TFEU and Chapter Five of the AML. However, as discussed above, whether a compulsion effect of the abuse of administrative power should be considered is in doubt.[109]

> **Case 2**: Four anti-counterfeiting undertakings brought proceedings in the Beijing First Intermediate Court and claimed that the State General Administration of Quality Supervision, Inspection and Quarantine (SAQSIQ) imposed undertakings by joining a Chinese Product Quality Electronic Supervision Network (CPQESN) and restricted the fair competition on anti-counterfeiting market.[110] The SAQSIQ published a notice and required that 69 products in nine categories must have an electronic supervision barcode to produce and sell since July 1, 2008.[111] This electronic supervision code was authorised by the CPQESN which was operated by CITIT Guojian Information and Technology Company (CITIT). This case was dismissed by the Court for the reason of exceeding legal proscription term.[112]

This case is important because it is the first case relative to abuse of administrative power after the AML came into effect. The four anti-counterfeiting undertakings would not be

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109 See para.1 of Chapter Three of this thesis.

110 See http://finance.people.com.cn/GB/1037/7601259.html (last visited March 1, 2012).

111 Notice on Carrying out the Operation of Product Qualification Electric Supervision of the Specific Provisions on the State Council of Enhancing Product Safety Supervision and Management on Food and Others [关于贯彻《国务院关于加强食品等产品安全监督管理的特别规定》实施产品质量电子监管的通知] was published by the SAQSIQ on November 29, 2007.

112 See http://news.xinhuanet.com/legal/2008-09/05/content_9773194.htm (last visited March 1, 2012).

supported by the Court although it had been dismissed by the Court for the reason of exceeding legal proscription terms. The CITIT was granted exclusive rights to operate the CPQESN and may have had dominant market power on the electronic product quality supervision market. However, its electronic supervision barcode not only had an anti-counterfeiting effect. There was no evidence provided to show that the CITIT had a dominant position in the anti-counterfeiting market. It is hard to identify the monopolistic conduct of the CITIT and the administrative conduct of the SAQSIQ may not fall within Article 36 of the AML.

The abstract abuse of administrative power in Article 37 of the AML is the third kind of conduct. Article 37 states that '[a]ny administrative organ may not abuse its administrative power to set down such provisions in respect of eliminating or restricting competition.' 'Such provisions' which refer to the administrative provisions in the form of decision, proclamation, announcement, notice, opinion, meeting summary and administrative regulation may apply to undertakings whose identity is not determined at the time of promulgation.[113] Those administrative regulations were non-actionable under the Administrative law and the AUCL during the time prior to the implementation of the AML.[114] According to Article 106 TFEU, EU competition law does not regulate this kind of provision since a specific undertaking or public undertaking should be granted exclusive rights or special rights.

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[113] See Article 4 Provisions for Administrative Departments of Industry and Commerce to Prevent Acts of Abuse of Administrative Power to Eliminate or Restrict Competition, note 19. Although Article 4 enumerates the kinds of provisions falling within Article 37 of the AML, administrative regulation should also by regulated by Article 37, according to the discuss on the definition of 'administrative organ' and the sphere of 'such provisions' in Chapter Three of this thesis.

[114] Article 2 of the Administrative Procedure Law [行政诉讼法] states: '(I)f a citizen, a legal person or any other organisation considers that his or its lawful rights and interests have been infringed upon by a specific administrative act of an administrative organ or its personnel, he or it shall have the right to bring a suit before a people's court in accordance with this Law.' Only a specific administrative act can be brought a suit before a people's court in accordance with the Administrative Procedure Law. 'Specific administrative act' was defined in Article 1 of Opinions on Some Problems of Operating the Administrative Procedure Law (On Trail) that it is 'an unilateral act operates administrative functions in administrative management activities on the rights and obligations of certain citizens, legal persons or other organisations by the State administrative organs, officials of administrative organs, organisations empowered by a law or an administrative regulation and organisations or individuals entrusted by administrative organs, for a specific issue, to specific citizens, legal persons or other organisations.' This definition is still adopted, although this regulation was repealed on 10, March 2000. Opinions on Some Problems of Operating the Administrative Procedure Law (On Trial) [关于贯彻执行中华人民共和国行政诉讼法若干问题的意见(试行)] was on trial since 11, July 1991. The AUCL does not refer to the administrative regulation on restricting competition.

The term 'eliminating or restricting competition' is not defined in the AML. According to Article 106(1) TFEU in the EU, no State measure should be 'contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109'. In terms of EU competition law, no State measure can grant exclusive or special rights to undertakings by enacting or maintaining in force anything contrary to Articles 101 and 102. Concerning the AML, an adjunct regulation first clearly states that a business operator cannot conduct itself so as to set a monopoly agreement and to abuse its dominant market position, even though the conduct takes place under administrative compulsion or compulsion in a disguised form.[115] Furthermore, Articles 32 to 35 set out a list of conduct which an administrative organ or an organisation empowered by a law or administrative regulation to administer public affairs cannot engage in by abusing its administrative power. As a result, the definition of 'eliminating or restricting competition' will include the activities regulated in both Chapters Two and Three and Articles 32 to 35 in Chapter Five of the AML.

In the aforementioned chemical fertilisers case in China,[116] the administrative regional blockages conduct in this case may also violate Article 37 of the AML on setting down such provisions in respect of eliminating or restricting competition. First, the meeting summary was formulated and published by the county government which is an administrative organ and was a type of provision included in Article 37. Second, the meeting summary included content on blocking free circulation of chemical fertiliser products and preventing other business operators from entering into the local market to trade. Provisions in this meeting summary had the effect of eliminating or restricting competition and should fall within Article 37.

4.3.2 Legal Responsibilities for Business Operators

[115] See Article 5 of the consultative paper of Provisions for Administrative Departments of Industry and Commerce to Prevent Acts of Abuse of Administrative Power to Eliminate or Restrict Competition, note 19.

[116] See Case 1.

There was no clear legal responsibility for a business operator under Chapter Five when the AML came into effect in 2008. On the one hand, as discussed above, the existence of a business operator engaged in monopolistic conduct is not always a condition to fulfil an abuse of administrative power under the AML, especially in Articles 32 to 35. Sometimes, legal responsibility for a business operator is unnecessary since there is no empowered or benefited business operator mentioned in cases.[117] On the other hand, it was not clear whether a business operator should be responsible for its monopolistic conduct when it was 'forced' to operate in this way by the abuse of administrative power.

However, the provisions on a business operator's legal responsibility are added into the supplementary provisions on abuse of administrative power.[118] Article 5 of the supplementary provisions states that a business operator operating any conduct of setting monopoly agreements and abusing its dominant market position shall fall within the provisions of monopolistic conduct, no matter whether this be by reasons of administrative empowerment, administrative restriction or administrative regulation.

> **Case 3:** In 2000, Xinjiang Wu Su Lu Yun Beer Limited Liability Company (the WSLY Beer) made a complaint to the AIC of Urumuqi City that a sub-district office of Government in Xinshi Disctrict in Urumuqi City signed a contract with Xinjiang Beer Group Company (the Xinjiang Beer) to grant an exclusive right of beer selling at a night market of the Railway Bureau. The sub-district office notified all the business operators in the night market that they were not allowed to sell other brands of beer. The AIC concluded that, as a branch organ of a district government, the sub-district office abused its administrative power to grant an exclusive right on beer selling to one undertaking and to restrict the competition in the market with other competitors and violated Article 7 of the AUCL.[119]

The sub-district office of government was an organisation empowered by administrative

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117 For example, case 1.

118 Provisions for Administrative Departments of Industry and Commerce to Prevent Acts of Abuse of Administrative Power to Eliminate or Restrict Competition, note 19.

119 See Case 35 of Fair Trade Bureau of State Administration for Industry and Commerce and Research Centre of International Law of Chinese Academy and Social Science, note 107, at 90-93.

regulation to administer public affairs in the AML. The contract with Xinjiang Beer was an administrative conduct but not an economic activity of the organisation, since the sub-district office designated an exclusive business operator through its administrative function. Furthermore, there was no need to set such an exclusive right on beer selling which would restrict competition on the beer market. However, the beer selling in the night market of the Railway Bureau was unable to be considered as an independent relevant market under the AML and Xinjiang Beer was not regarded as having a dominant market power and could not therefore be abusing its dominant market power to restrict competition, although Xinjiang Beer owned the exclusive right to sell in the night market. Consequently, the administrative conduct of granting an exclusive selling right to Xinjiang Beer would not fall within Article 36 of the AML but still violated Article 32. Moreover, there was no business operator's legal responsibility for Xinjiang Beer under the AML.

As a result, the relationship between a business operator and a public authority in the AML is different from the relationship in Article 106 TFEU in which an undertaking will generally violate Articles 101 and 102 TFEU when a State measure falls within Article 106(1) TFEU. A conduct of abuse of administrative power to eliminate or restrict competition may be constituted without a monopolistic conduct operated by a business operator. At the same time, in current regulations, a business operator may fall within the provisions of monopoly agreement and abuse of dominant market power under the operation of administrative power but the administrative power may not violate Article 36 because of its unenforceable effect.

5. Exemptions

5.1 Services of General Economic Interest in EU Competition Law

Article 106(2) TFEU provides two general exceptions to the application of Article 106(1) TFEU. Article 106(1) does not apply to an undertaking with the character of a

revenue-producing monopoly or to an undertaking providing Services of General Economic Interest (SGEI). An undertaking having the character of a revenue-producing monopoly operates its exclusive right to raise revenue for the State. This kind of undertaking will not be discussed in this thesis.

The concept of SGEI is referred to in Articles 14 and 106(2) TFEU and is related to the internal market and competition rules in the EU. The term SGEI has not been defined in the TFEU or in any secondary legislation. In the 2001 Communication on Services of General Interest,[120] it was stated that SGEI consisted of 'market services which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion. This would tend to cover such things as transport networks, energy and communication'.[121] In the Green Paper,[122] a number of common elements from existing EU legislation which were helpful to define an EU concept of SGEI were listed and included 'universal service, continuity, quality of service, affordability, as well as user and consumer protection.'[123] The following White Paper upheld the idea in the 2001 Communication on SGI and stated that this term was broadly agreed in EU practice, although the economic nature of services were emphasised and the phrase 'market services' was removed.[124]

Generally speaking, 'services' not only covers the kind of service benefiting from the free movement provisions in Article 57 TFEU,[125] but also includes any activities of undertakings on both economic and non-economic basis.[126] However, only a kind of

120 Communication from the Commission: Services of General Interest in Europe [2001] OJ C17/4.

121 Ibid., Annex II.

122 Green Paper on Services of General Interest COM [[2003] 270 final.

123 Ibid., para. 49.

124 '[S]ervices of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term also extends to any other economic activity subject to public service obligations.' See the White Paper on Services of General Interest COM [2004] 374 final, Annex I.

125 Article 57 TFEU states: '[s]ervices shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. 'Services' shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of professions.'

126 This is the services defined in 'Services of General Interest'. In the 2001 Communication on SGI and the

'services' with an economic nature will fall within the context of SGEI. In considerin SGEI, it is the 'service', rather than the 'interest' which should be of an economic nature; there is however an opinion that 'it is more appropriate to speak of 'economic services of general interest' than of 'services of general economic interest.'[127]

Furthermore, although SGEI encompasses services with an economic nature, the final purpose of that service is still for the public or social interest. This kind of service aims to 'ensure objectives such as economic efficiency, social or territorial cohesion and safety and security for all citizens', as well as more specific obligations based on the characteristic of the sectors.[128] As a result, the Court has accepted SGEI as one of the forms, through economic instruments, of reaching an administrative result.[129]

According to Article 106(2) TFEU, the provision of SGEI is one of the important conditions to be met in order for an exemption to apply. To satisfy the requirement, the activity of an undertaking should be of an economic nature and contrary to Articles 101 or 102. This being the case, the special or exclusive rights granted by Member States should be judged as illegal in the context of Article 106(1) TFEU. Next, this activity will be examined as to whether it is included in the content of SGEI and finally, the special or exclusive rights will be assessed to determine whether they can be subject to the rules contained in the Treaties, in particular to the rules on competition.[130] The third step is to prove an economic activity to be SGEI. In *Albany*, the Court held that the supplementary pension scheme fulfilled an essential social function within the Netherlands pensions system.[131] In *Corbeau*, which related to the obligation of providing basic or universal

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White Paper, the services include both 'market and non-market services which the public authorities class as being of general interest and subject to specific public service obligations.' See para. 49 of the White Paper, note 124. Also see the statement in 2007 Communication on SGI that: 'they can be defined as the services, both economic and non-economic which the public authorities classify as being of general interest and subject to specific public service obligations'. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Services of General Interest, Including Social Services of General Interest: A New European Commitment, COM(2007) 725 final, para. 2.

127 J. L. Buendia. Sierra, note 1, at 278.

128 See para. 49 of 2007 Communication on SGI, note 126.

129 A. Jones and B. Sufrin, note 27, at 601-606. Also at 569, 'Serivces of general economic interest are therefore services which belong to the market, but to which others, 'non-market', values are applied. '

130 For example, see Cases C-320/91 *Corbeau*, note 10, paras. 7-21.

131 See Case C-6/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustri*, note 10,

postal services by the Régie des Postes, the activity constituted a service of general economic interest. In *Almelo*, because the undertaking had been given the task, through the grant of a non-exclusive concession governed by public law, of ensuring the supply of electricity in part of the national territory, this undertaking was considered to be entrusted with the operation of services of general interest.[132] It appears therefore that SGEI generally will be found to exist in relation to basic utilities, for example gas, water electricity, telecommunications and waste treatment, and the performance of essential social functions in a Member State.[133]

However, this does not mean that a special or exclusive right entrusted to an undertaking will become exempt from Article 106(2) TFEU, even where this activity is determined to be a service of general economic interest. Further conditions need to be fulfilled according to the case law.

In some cases, the Court suggested that SGEI would be found to exist only in situations in which a restriction of competition was essential in order to permit the task to be performed. The Court stated in *Höfner* that 'a public employment agency…remains subject to the competition rules pursuant to [Article 106(2) TFEU] unless and to the extent to which it is shown that their application is incompatible with the discharge of its duties.'[134] In *Merci Convenzionali*, the activity of this undertaking was found not to be of a general economic interest. However, the Court still insisted that, 'even if it were, [it must be held that] the application of the rules of the Treaty, in particular those relating to competition and freedom of movement, would be such as to obstruct the performance of such a task.'[135] A similar ruling was made in the *Almelo* and *Albany* cases as well.[136] is whether the

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para. 105.

132 See Case C-393/92, *Gemeente Almelo and Others v Energiebedrijf ijsselmij NV*, note 4, paras. 46-47. While the Court already held that the conduct of this undertaking was assessed with regard to the provisions of Articles 101 and 102, (see paras. 33-45) the conduct must by an economic activity. As a result, the undertaking was not only entrusted with operation of services of general interests, but granted with operation of SGEI.

133 Also see Commission of the European Communities, *XXth Report on Competition Policy*, (1991) Luxembourg, at 12.

134 See Case C-41/90, *Höfner v. Marcrotron*, note 10, para. 24.

135 See Case C-179/90, *Merci Convenzionali v. Porto di Genova*, note 10, para. 27.

136 See Case C-393/92, *Gemeente Almelo and Others v Energiebedrijf ijsselmij NV*, note 4, para. 49; and Case C-6/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustri*, note 10, para.

restriction of competition is necessary to enable the holder of an exclusive right to perform its task of general interest in economically acceptable conditions. the Court considered whether and what kinds of effect the restriction on competition would had on the holder of an exclusive to undertake its general interest task in economically acceptable conditions was an important condition to determine the

In some cases, for example, *Corbeau, Deutsche Post*[137] and *Ambulanz Glöckner*[138], the Court considered an important condition to determine the holder's obligation on SGEI for its exclusive right was whether and what kinds of effect the restriction on competition would have on the holder of an exclusive to undertake its general interest task in economically acceptable conditions. The principle was first propounded in *Corbeau*, in which the Court held that while it was possible to offset less profitable sectors against the profitable sectors, restricting competition was justified. The condition could allow the holder of the exclusive right to perform its task under economically acceptable conditions.[139] In *Deutsche Post*, the Court considered that the performance of the task of general interest, in economically balanced conditions, would be jeopardised if Deutsche Post was not allowed to be financially compensated for all the costs occasioned by the obligation.[140] Similarly, in the *Ambulanz Glöckner* case, the Court followed the method used in *Corbeau* and decided that the revenue from non-emergency transport helped to cover the costs of providing the emergency transport service and it followed that it was reasonable to restrict competition to enable the holder of an exclusive right to perform SGEI in economically acceptable conditions.[141]

5.2 Exemptions for Abuse of Administrative Power

Exceptions to the basic principles of the AML exist throughout the legislation in respect of

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137 Case C-147-8/97, *Deutsche Post*, note 72, see para. 49.

138 Case C-475/99 *Ambulanz Glöckner v. Landkreis Sudwestpflaz*, note 27, see para. 57.

139 See Cases C-320/91 *Corbeau*, note 10, paras. 16-19.

140 See Case C-147-8/97, *Deutsche Post*, note 72, para. 50.

141 See Case C-475/99 *Ambulanz Glöckner v. Landkreis Sudwestpflaz*, note 27, paras. 57-58.

almost all categories of otherwise prohibited conduct. The first, set out in Article 7, is the possible exemption for business operators in the industries controlled by the State-owned economy and concerning the lifeline of the national economy and national security or the industries implementing exclusive operations and sales according to law.[142] Second, Article 55 points out that intellectual property rights exercised by business operators under laws and relevant administrative regulations on intellectual property rights do not fall with the AML.[143] Article 56 creates exemptions for the alliance or concerted actions of agricultural producers and rural economic organisations in respect of economic activities. Third, Article 15 lists a series of circumstances in which an agreement among business operators shall be exempted from the application of Articles 13 and 14 on monopoly agreements. In Article 28, exemptions are created for the concentration of business operators when the business operators concerned can prove that the concentration will bring a more positive than negative impact on competition, or the concentration is pursuant to the public interest. However, in Chapter Five of the AML, there is no exemption set out in relation to the abuse of administrative power.

It may be argued however that Chapter Five *should* permit in practice the maintenance of some exemptions relating to the abuse of administrative power. The AML is enacted for the purpose of preventing and restraining monopolistic conduct and protecting fair competition in the market.[144] However, this does not mean that competition should be maintained in each market for all industries. In certain circumstances, eliminating or restricting competition may bring benefits by safeguarding the interests of consumers and the social public interest. In basic utilities industries, for example, providing universal services in postal, electricity, and telecommunications industries, competition may lead to limited or even no services supplied in high-cost/low-benefit areas. In the EU, SGEI has been accepted by the Court as a major waterway of administration and this concept is applied in and beyond the basic utilities.[145] Similarly in China, the industries related to the provision

142 See the discussion in para. 2.3.2.3 of Chapter Two of this thesis.
143 However, Article 55 also states that 'business operators' conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed' by the AML
144 See Article 1 of the AML.
145 See A. Jones and B. Sufrin, note 27, at 602. Cases in different industries and aspects are listed, for

of basic utilities, for example, the postal industry, are required to provide a universal service to all the citizens.[146] Thus, SGEI in EU competition law may be a reference for the exemptions in abuse of administrative power in the AML. What kinds of exemptions should be adopted in Chapter Five of the AML?

5.2.1 Public Interest as a Possible Choice for Exemptions

According to provisions in Chapter Five of the AML, an abuse of administrative power to eliminate or restrict competition does not depend on the basis of a certain business operator's economic activity. A business operator's economic activity with an anti-competitive effect may not exist or may not need to be considered, when the administrative conduct of restricting transactions or blocking free circulation is examined under Articles 32 to 35 and when provisions in respect of eliminating or restricting competition which apply to unspecified business operators or individuals fall within Article 37.[147] SGEI, applying on the basis of economic activity, may not be sufficient to create exemptions to apply in AML cases.

The public interest, including economic and non-economic interests, may be a more

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example, non-economically viable air routes, the electricity supply network, the basic, as distinct from extra 'added-value', postal service, mooring services in ports, the treatment of waster, sectoral supplementary pension funds, obligations flowing from the Universal Postal Convention and emergency ambulance services.

146 See Articles 3, 6, 11, 13 and 22 of the Post Law [邮政法], which was issued on December 2, 1986 and revised on April 24, 2009. Article 3: The postal enterprises attached to the competent department of postal services under the State Council are public enterprises, owned by the whole people, operating postal businesses. According to stipulations of the competent department of postal services under the State Council, postal enterprises shall establish branch offices that operate postal businesses. Article 6: Postal enterprises shall provide users with fast, accurate, safe and convenient postal services. Article 11: Postal enterprises shall establish branch offices, postal kiosks, newspaper and periodical stands, mailboxes, etc., in places convenient to the masses, or provide mobile services. Residents' mailboxes for receiving letters and newspapers shall be installed in residential buildings in cities. Places shall be provided for handling postal business in larger railway stations, airports, ports and guest houses. Article 13: Postal enterprises and their branch offices shall not arbitrarily close down postal businesses that must be handled according to the stipulations made by the competent department of postal services under the State Council and the regional administrative organ of postal services. And Article 22: Postal enterprises and their branch offices shall deliver postal materials within the time limits laid down by the competent department of postal services under the State Council. The Standard for Universal Postal Service was published by the State Post Bureau on 18, September 1999 and was carried out on 1, October 1999. See: http://www.chinapost.gov.cn/folder2/folder16/folder22/folder24/2009/09/2009-09-2940222.html.

147 See paras. 5 and 6 of this chapter.

suitable basis for exemptions, by placing the focus of examination on the legality of both the economic activities of business operators and the conduct of administrative power.

First, the public interest has been accepted as a basis for exemption in other provisions of the AML. Article 15(4) states that a business operator's agreement which fulfils the purpose of achieving a public interest, for example by conserving energy, protecting the environment, or providing relief to the victims of a disaster, will not fall within Articles 13 and 14. Article 28 points out that a concentration which is pursuant to the public interest will not be prohibited. In Article 1 of the AML there is reference to both the social public interest as well as the consumers' interests.

Second, in terms of regulating the abuse of administrative power, the AML mainly focuses on the anti-competitive effect of the abuse of administrative power conduct but not on the business operator's behaviour which is the focus in Article 106 TFEU. The existence of an undertaking with an anti-competitive effect is not a necessary condition for a finding that there is conduct in abuse of administrative power.[148] In consideration of the public services obligation to be met in the use of administrative power, an exemption based on purely economic criteria *cannot* comprehensively describe a reasonable excuse for an otherwise abusive administrative conduct. The difference between the approach taken to exemptions in Article 106 TFEU and in the provisions relating to the abuse of administrative power in the AML is caused by the different focuses of the two competition law systems.

Third, as mentioned above, the maintenance of SGEI is for the purpose of achieving or protecting public or social interests.[149] The maintenance of SGEI, as is the case with the public interest provisions in the AML, is to seek the best allocation of social resources and the most reasonable balance between society as a whole, and individuals including business operators and consumers. In terms of the final objective of exemptions, there is, it could be argued, no significant difference between SGEI in Article 106 TFEU and the public interest in Chapter Five of the AML.

[148] See para. 4 of this chapter.
[149] See para.5.1 of this chapter.

5.2.2 The Content of Public Interest as an Exemption under Chapter Five of the AML

There is no clear definition made either in the AML or in any other legislation as the meaning of the term 'public interest'. The content of 'public interest' has been enumerated in some laws; for example, in the Trust Law,[150] Article 60 makes reference to the public interest, including:

(1) relief for the poor;

(2) relief assistance to people suffering from the effects of disasters;

(3) helping the disabled;

(4) developing education, science, technology, culture, art and sports;

(5) developing medical and public health services;

(6) developing environment protection services and maintaining ecological environment, and;

(7) developing other public welfare services.

A similar approach is also adopted in Article 3 of the Public Welfare Donation Law[151] and Article 12 of the Administrative License Law.[152] On the contrary, in some other laws, for example, the Real Right Law,[153] there is only a reference to the public interest without any detailed explanation of the term, and without examples being given.[154]

In the context of the AML, it has been suggested that the public interest is the consumer interest, while some consider it to be the State interest.[155] It has also been suggested that the public interest includes improving the development of the national economy and the

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150 The Trust Law of the People's Republic of China [中华人民共和国信托法] was promulgated by the Standing Committee of the National People's Congress (SCNPC) and took effect on October 1, 2001.

151 Public Donation Law of the People's Republic of China [中华人民共和国公益事业捐赠法] was promulgated by the presidential order of the PRC and took effect on September 1, 1999.

152 Administrative License Law of the People's Republic of China [中华人民共和国行政许可法] was promulgated by the presidential order of the PRC and took effect on July 1, 2004.

153 Real Right Law of the People's Republic of China [中华人民共和国物权法] was promulgated by the presidential order of the PRC and took effect on October 1, 2007.

154 Ibid., see Articles 7, 42 and 148. However, the enumeration of public interest was provided in the draft of the Real Right Law and raised an important debate on this issue. The draft states: '[p]ublic interest is public road traffic, public health, the prevention and cure of disaster, science, culture and education undertakings, the protection of environment, the protection of culture relics, heritages and landscapes, the protection of public water sources and diverting and draining water areas, the protection of forest, and other public interest regulated by national laws'. This draft is not published to the public.

155 See X. Wang, note 17, at 9-11.

international competitiveness of domestic enterprises, protecting trade, social employment, protecting the environment and other natural resources, and relieving the victims of a disaster.[156] This concept is similar to 'services of general interest' (SGI) in the EU, although the term SGI does not appear anywhere in EU competition law or in the EU Treaty.[157] However, the Commission explained SGI in the 2007 Communication on SGI,[158] stating that:

> '[t]hese services are essential for the daily life of citizens and enterprises, and reflect Europe's model of society. They play a major role in ensuring social, economic and territorial cohesion throughout the Union and are vital for the sustainable development of the EU in terms of higher levels of employment, social inclusion, economic growth and environmental quality…. They can be defined as the services, both economic and non-economic, which the public authorities classify as being of general interest and subject to specific public service obligations.'[159]

The concept of 'public interest' in the AML should consider three characteristics: commonality, reasonableness, and legitimacy. Commonality requires that the interest be directed universally, and not to a specific 'stakeholder' or 'stakeholders'. Generally, the public interest cannot be owned by a group of people or interest groups. Reasonableness relates to the balance between this public interest and other private or public interests which may be jeopardised in the attainment of the public interest. Finally, legitimacy requires that a public interest should be based on the need of the universal public and should correspond to regulations in substantive law and procedural law.

A particular focus should be applied when the public interest is treated as a ground for exemption for abuse of administrative power under the AML. The public interest includes economic and non-economic interests. The public interests listed in Article

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156 Economic Law Office of Legislation Committee of Standing Committee of the National People's Congress, *Provision Explanation, Legislating Reasons and Relative Regulations about the People's Republic of China Anti-Monopoly Law [《中华人民共和国反垄断法》条文说明、立法理由及相关规定]*, (2007) Peking University Press, at 3.

157 See A. Jones and B. Sufrin, note 27, at 569.

158 Note 126.

159 Ibid., para.2. This concept was also used in 2001 Communication on SGI, see note 120.

15(4) of the AML, such as conserving energy, protecting the environment and relieving the victims of a disaster, are generally non-economic interests, while the term public interest in Article 28 relates more specifically to economic matters, for example optimisation of production, and improving an undertaking's competitiveness in international markets.[160]

Any reliance on the public interest as a basis for exemption should be justified strictly. The public interest is generally the aim and reason for governments to adopt or pursue a policy or measure, but any such measures are operated and further explained in practice through the use of administrative power. There is an ever-present risk that in purporting to apply the public interest, the Administrative power-holder may adopt some illegal or inappropriate actions.

In the instance of the Chinese AML, the protection of the 'lawful business operation conduct' of SOEs in industries concerning the lifeline of the national economy and national security or in industries implementing exclusive operations and sales according to law may also be a 'public interest'.[161] In 2006, the State-Owned Assets Supervision and Administration Commission of the State Council (SASAC) published a notice on encouraging the adjustment and reorganisation of large SOEs to improve international competitiveness.[162] In 2010, the State Council published another document to re-emphasise this policy.[163] None of these concentrations between the large SOEs made under the directions of administrative power have been reviewed by the AML authority.[164]

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160 See X. Wang, note 17, at 9-11.

161 See Article 7 of the AML.

162 The Guidance Opinion about Promoting the Adjustment of State-owned Capital and the reorganisation of State-owned Enterprises [关于推进国有资本调整和国有企业重组指导意见] was published by the SASAC and forwarded by the General Office of the State Council on December 5, 2006.

163 Opinions of the State Council on Promoting Enterprise Merger and Restructuring [国务院关于促进企业兼并重组的意见] was published by the State Council on August 28, 2010.

164 Until November 2011, the number of Central SOEs had reduced from 196 to 117. See: http://www.gov.cn/jrzg/2011-11/14/content_1992430.htm (last visited March 1, 2012). However, there is no record about the review of business operator's concentration relating to two SOEs by the Anti-Monopoly Bureau. See: http://fldj.mofcom.gov.cn/static/ztxx/ztxx.html/1 (last visited March 1, 2012), especially cases of the concentration between China Unicom and China Netcom in 2008, Power Construction Operation of China and China Energy Engineering Group Co. Ltd in 2011. See http://xxgk.sasac.gov.cn/gips/contentSearch?id=13877803; http://finance.sina.com.cn/chanjing/gsnews/20090501/02536174627.shtml (last visited March 1, 2012).

In practice, the purported purpose of 'improving optimum distribution of SOEs resources and international competitiveness' actually becomes subsumed within the 'public interest' rubric, and the abuse of administrative power in this context becomes exempt from the application of the AML. Whether a conduct of an administrative power has legitimately or reasonably complied with the content of public interest in legislation is a key issue of evaluating administrative conduct in China. As a result, a requirement for strict justification may avoid the excessive reliance on the public interest by administrative power holders.

In terms of applying an exemption in Chapter Five, the public interest is not the only condition that needs to be fulfilled. The case law of SGEI can be a useful reference point for the AML in the analysis. The public interest should be an exemption for reasonable economic activities or in relation to the conduct of administrative power but should not be abused in its application. A careful examination between the balance of the effects of the public interest justification, and competition rules should be considered. Similarly as determined in EU case law, the public interest should only provide an exemption for the activities violating provisions in Chapter Five of the AML when a restriction of competition is essential to allow performance of the designated legitimate task.[165] The application of the public interest as an exemption to the abuse of administrative power under the AML will be further analysed in the next chapter with the consideration of free circulation provisions in the AML.

6. Summary

This chapter is based on the comparison between Chapter Five of the AML and Article 106 TFEU and a series of suggestions have been provided. Table 4.1 provides a comparative schematic of the two systems, and it can be demonstrated that Article 106 TFEU and Article 35 of the AML have significant elements in common. The public authorities' actions are both operated by administrative organs; there are rights granted to undertakings

[165] See para. 5.1 of this chapter.

or restrictions forced on business operators; activities with the effect of restricting competition are enacted by undertakings or business operators; and finally, to satisfy the requirements of the two articles, there should be a relationship with other related articles in the TFEU or the AML. In such cases, the significant experience in EU competition law may have important lessons to impart when considering the operation of the AML. Such similarities between Article 106 TFEU and Chapter Five of the AML provide the basis to make a comparison of the two different competition law systems and appropriate suggestions for rectifying the abuse of administrative power in the AML.

Table 4-1: Comparison between the Chapter Five of the AML and Article 106 TFEU.

	Article 106 TFEU	Chapter Five of the AML		
		Articles 32-35	Article 36	Article 37
Public Authority	Member States (including administrative organs and other forms of Member State such as parliaments and judicial power)	administrative organ or organisation empowered by a law or administrative regulation to administer public affairs	administrative organ or organisation empowered by a law or administrative regulation to administer public affairs	administrative organ
Undertaking /Business Operators	undertaking	with or without business operator	with business operator	with or without business operator
Effect	violating Articles 101 and 102 TFEU	restricting or eliminating Competition by blocking free circulation	restricting or eliminating Competition by monopolistic conduct	by blocking free circulation and monopolistic conduct
Exemptions	SGEI	social public interest	social public interest	social public interest

It might also be argued that Articles 33 to 35 of the AML have significant differences from Article 106 TFEU. Administrative restrictions on business operators are the core measures at which the provisions in the AML related to the abuse of administrative power are directed. A business operator engaging in monopolistic conduct generally is not in consideration or even does not exist in the examination of an abuse of administrative power. The possibility of business operators being restricted and harmed by an abuse of administrative power and the effect of blocking free circulation of commodities between regions are the main elements to be considered. Therefore, a further analysis on the characteristics of Articles 33 to 35 of the AML will be discussed in Chapter Five, through the comparison with the EU approach to the internal market and in particular the four free movement provisions.

Chapter Five

EU Free Movement Rules and Abuse of Administrative Power in the Anti-Monopoly Law

1. Introduction

As discussed in Chapter Four, provisions on abuse of administrative power to eliminate or restrict competition in Chapter Five of the AML have some similarities with Article 106 TFEU of EU competition law. More common elements especially appear in Article 36 of the AML and Article 106 TFEU. This chapter will examine the relation between free movement rules of goods, services and capital in the EU and abuse of administrative power provisions in the AML, especially Articles 33 to 35 of the AML. Although the rules relating to free movement are not within the scope of EU competition law, there is a correspondence between these and the provisions relating to abuse of administrative power in the AML. Free movement rules and their relation with the EU competition law will be first introduced. The overlap of free movement rules and abuse of administrative power provisions within the comparative framework adopted in this thesis will then be discussed.

2. Free movement of Goods, Services and Capital

The free movement rules includes the provisions in four aspects: free movement of goods,[1] persons,[2] services[3] and capital.[4] This chapter will focus on the free movement of goods, services and capital since the 'commodities' referred or implied refereed in Articles 33 and 34 of the AML which includes free circulation provisions in goods and services and 'local investment and setting up branches' referred in Article 35 of the AML is related to free circulation of capital the AML.[5] Free circulation of persons is not mentioned and included

1 Articles 34-36 TFEU.
2 Articles 45-55 TFEU.
3 Articles 56-62 TFEU.
4 Articles 63-66 TFEU.
5 See Articles 12 and 33-35 of the AML.

in Chapter Five of the AML and will not be discussed in this chapter.[6]

2.1 Free movement of Goods

'Goods' in the free movement provisions in the EU are defined in *Commission v Belgium*[7] as 'objects which are transported over a frontier in order to give rise to commercial transactions are subject to Article 34 TFEU, irrespective the nature of those transactions'.[8] 'Goods' are material objects and include valuable objects and non-recyclable and non-reusable waste. [9]

In *Dassonville*,[10] the Court explained the kinds of measure which were regulated by the free movement of goods rules. Measures with equivalent effect to quantitative restrictions[11] (MEQRs), as well as quantitative restrictions[12], may fall within Articles 34 to 36 TFEU. In this test the effect of obstacles on intra-community trade is a necessary condition of the application of these provisions. This opinion was also stated in a series of

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6 The free circulation of persons is restricted by the Regulation on Residential Permission Registration which is regulated by administrative public security organs. Regulation on People's Republic of China Residential Permission Registration [中华人民共和国户口登记条例] was issued by the People's Republic of China Presidential Order on January 9, 1958. Besides the residential permission system, a number of other rules or systems, for example, social security, education, residence requirements, which refer to movement of population, are also not regulated by the AML. Some scholars propounded an Employment Non-discrimination Law to regulate the free employment of workers. The scholars, for example, Cai Dingjian, Liu Zi, Liu Xiaolan, Wang Fuping, Zhang Qianfan, drafted an Employment Non-Discrimination Law [反就业歧视法] on March 5, 2009. The version is available on: http://www.e-cpcs.org/newsinfo.asp?Newsid=18738 (last visited March 1, 2012).

7 Case C-2/90, *Commission v Belgium* [1992] 1 CMLR 365.

8 Ibid., para 26.

9 The material nature of goods was stated in *Sacchi*. The Court states: 'a television broadcast must, because of its nature, be regarded as a supply of services' and 'trade exchanges involving all materials, sound tapes, films and other products used for the broadcasting of television programmes, are subject to the rules relating to the free movement of goods'. See Case 155/73, *The State v Sacchi* [1974] 2 CMLR 177, paras. 6 and 7. 'Valuable object' of goods was mentioned in *Commission v Belgium*. The Court stated that: 'it must be concluded that waste, whether recyclable or not, should be regarded as a product the movement of which must not in principle, pursuant to Article 30 EEC, be impeded'. See Case C-2/90, *Commission v Belgium*, note 7, para. 28.

10 Case 8/74, *Procureur du Roi v Dassonville* [1974] 2 CMLR 436.

11 Ibid., para. 5. 'All trading rules enacted by member-States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.'

12 Quantitative restrictions, as interpreted in *Fiseria Luigi Geddo v Ente nazionale Risi*, are measures which amount to a total or partial restraint on imports, exports or goods in transit. Case 2/73, *Fiseria Luigi Geddo v Ente nazionale Risi*, [1973] ECR 865

cases.[13] However in *Dassonville*, nor was 'a means of arbitrary discrimination' allowed in trade between Member States.[14]

Cassis de Dijon[15] improved free movement of goods rules from removing trading discrimination to obstacles. Cassis de Dijon, a blackcurrant liqueur containing 15 to 20 percent alcohol proof in France, was not allowed to be sold in Germany because German law required any fruit liqueurs to be at least 25 percent proof. A product standard which was equally applicable to domestic and imported products was examined to determine whether it fell within the scope of Article 34 TFEU. A non-discriminatory standard was not considered in *Dassonville*.[16] It was named an 'indistinctly applicable measure' which the Court stated that 'the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 30'.[17] Discrimination or even indirect discrimination is not considered in this case when a rule equally affecting domestic and import goods may also breach Article 34 TFEU, although the dual-burden rule on import goods may be akin to indirect discrimination.

Keck[18] further develops the test applying Article 34 TFEU to a group of measure called selling arrangements. The Court held that it is not a kind of MEQRs when they have equal effect on domestic and import goods. The Court decided to narrow the scope of MEQRs in consideration of selling arrangements with equal effect on both domestic and imported goods without the effect of preventing access to the market or impeding access on import goods which is more than the case in domestic goods.[19] This rule is also built on the basis

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13 Case C-88/07, *Commission v Spain* [2009] 2 CMLR 52, para. 82; Case C-319/05, *Commission v Germany* [2008] 1 CMLR 36, para. 80; Case C-24/00, *Commission v France* [2004] 3 CMLR 25, para. 22; Case C-192/01, *Commission v Denmark* [2003] 3 CMLR 29, para. 39; Case C-383/97, *Re Arnoldus Van Der Laan* [2000] 1 CMLR 563, para. 18.

14 See Case 8/74, *Procureur du Roi v Dassonville*, note 10, para. 7. 'Even without having to examine whether or not such measures are covered by Article 30, they must not, in any case, by virtue of the principle expressed in the second sentence of that article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

15 Case 120-78, *Rewe Zentrale AG v Bundesmonopolverwaltung fur Branntwein* [1979] 3 CMLR 494.

16 D. Chalmers, G. Davies and G. Monti, *European Union Law*, 2nd Edition, (2010) Cambridge University Press, at 760.

17 See Case 120-78, *Rewe Zentrale AG v Bundesmonopolverwaltung fur Branntwein*, note 15, para. 14.

18 Case C-267/91, *Criminal Proceedings against Keck*, [1995] 1 CMLR 101.

19 Ibid., para. 16.

of non-discrimination condition.[20]

The rules of free movement of goods mainly focus on removing all obstacles to trade in the EU. Although discrimination does have restricting effect on free movement in trade, the tests of whether a state measure should fall within Article 34 TFEU may not consider the factors of direct or indirect discrimination.

2.2 Free Movement of Services

'Services' in the free movement rule are defined in Article 57 TFEU as activities normally provided for remuneration[21] and include the characters of industries, commerce, craftsmen and the professions. However free movement of service rules only apply when other free movement rules are not appropriate.[22] Similar to the examination on free movement of goods, a test based on trade obstacles but not discrimination applying to Article 56 TFEU was adopted by the Court, although case law's development in the field of services is slower than in the field of goods.

Article 56 TFEU requires that all restrictions on the freedom to provide services shall be abolished. However Article 61 TFEU emphasises that '[a]s long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56'. These provisions show that before a regulation shall be abolished on the basis of restricting effect on free movement of services, it is still important to follow the rule of non-discrimination

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[20] The decision of *Keck* are criticised by amount of scholars. See L. Russi, 'Economic Analysis of Article 28 EC after the *Keck* Judgment' (2006) 7(5) *German Law Journal* p479; L. Gormley, 'Two Years after *Keck*' (2006) 19 *Fordham International Law Journal* p866; S. Weatherill, 'After Keck: Some Thoughts on How to Clarify the Clarification' (1996) 33 *Common Market Law Review*, p885; J. Steiner and L. Woods, *EU Law*, 10th Edition, (2009) Oxford University Press, at 427. However the basis of removing obstacles on free movement of goods is beyond question and this case is still 'a pillar of the Court's case law'. See D. Chalmers, G. Davies and G. Monti, note 16, at 776.

[21] Also see Case C-275/92, *H.M. Customs and Excise v Gerhart and Jorg Schindler* [1995] 1 CMLR4, para. 26. The Court states: '[s]ervices shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration'.

[22] See Article 57 TFEU.

on applying.

Case law plays a decisive role in the development of freedom of services. An obvious watershed is *Sager*[23]. Abolishing discrimination was the requirement to apply free movement of services rules in many cases before *Sager*. For example, *Van Binsbergen*[24] explained Article 56 TFEU (ex Article 49 EC, Article 59 EEC) as a provision abolishing 'all discrimination against the person providing the service by reason of his nationality or the fact that he is established in a member-State other than that in which the service is to be provided'[25] and the statement was adopted in *Van Wesemael*[26] on 'directly and unconditionally applicable' essential requirements of Article 56 TFEU (ex Article 49 EC, Article 59 EEC).[27] *Koestler*[28] stated that while there was no discrimination the Treaty did not impose any obligation more favourably on the treatment of a foreign services provider than a person providing services established in the member State.[29] Subsequently, the Court in *Commission v Germany* (Insurance)[30] ruled that 'all restrictions' should be removed, besides all discrimination based on nationality.[31] However, the kind of 'restrictions' which are 'imposed by reason of the fact that he is established in a member-State other than that in which service is to be provided'[32] show that the test is still based on discrimination on nationality.

With *Sager*, the Court finally established 'a coherent approach to indistinctly applicable rules in the field of services parallel to that pioneered in the sphere of goods in the 1970 in *Dassonville* and *Cassis de Dijon*'.[33] Dnnenmeyer & Co. Ltd was a UK company providing patent renewal services in Germany. Sager, a German patent agent, argued that

23 Case C-76/90, *Manfred Sager v Dennemeyer & Co. Ltd* [1993] 3 CMLR 639.
24 Case 33/74, *J.H.M. Van Binsbergen v Bestuur Van de Bedrijfsvereniging voor de metaaInijverheid* [1975] 1 CMLR 298.
25 Ibid., para.25.
26 Jointed Cases 110 and 111/78, *Ministere Public and Chambre Syndicale des Agents Artistiques et Impresarii de Belgique, asbl v Willy van Wesemael and others* [1979] 3 CMLR 87.
27 Ibid., paras. 26 and 27. Also see note 24, the statement in para.25 of Case 33/74, *Van Binsbergen* was referred.
28 Case C-15/78, *Societe Generale Alsacienne de Banque v Koestler* [1978] ECR 1971.
29 Ibid., para. 5.
30 Case 205/84, *Re Insurance Services: EC Commission v Germany* [1987] 2 CMLR 69.
31 Ibid., para. 25.
32 Ibid.
33 J. Steiner and L. Woods, note 20, at 501.

Dnnemmeyer's services in Germany were prohibited under German legislation requiring a licence for a person attending to the legal affairs of third parties. In this case the Court pointed out that those restrictions shall be abolished although they applied equally to services providers both from the home country and another member State. It is stated that:

> 'Article 59 EEC requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other member-States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another member-State where he lawfully provides similar services.'[34]

Although discrimination was still mentioned, it was just a part of the reasons of infringing Article 56 TFEU (ex Article 49 EC). Similar to *Cassis de Dijon*, a dual-burden rule on service providers established in other member States was also a kind of potentially indirect discrimination, owing to the different requirements between German legislation and UK law.

In *Schindler*, the Court went even further in the choice of approaches to restrict discrimination or obstacles. The Court simply deleted the words referring to the second part of the statement in *Sager*[35] and focused on the obstacles to free movement of services without discrimination.[36] The United Kingdom legislation on lotteries was found to be an obstacle to the freedom to provide services on prohibiting the holding of lotteries in a Member State.[37] However, whether there was dual-burden on the intra-Community lotteries providing service in this case is not clear since the Court did not scrutinise of substitutability.[38] The statement of *Schindler* has been cited in a series of cases on free

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34 See Case C-76/90, *Manfred Sager v Dennemeyer & Co. Ltd*, note 23, para. 12.

35 Ibid.

36 See Case C-275/92, *Schindler*, note 21, para. 43. The Court states: '[a]ccording to the case law of the Court (see Case C-76/90, *Sager v Dennemeyer*) national legislation may fall within the ambit of Article 59 of the Treaty, even if it is applicable without distinction, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services'.

37 Ibid., para. 45.

38 However, this point without examination of discrimination on selling arrangements is argued by scholars. See J. Snell, *Goods and Services in EC Law*, (2002) Oxford University Press, at 85; and I. Higgins, 'The

movement of services and obstacles on free movement of services are accepted as an examination on whether to apply Article 56 TFEU.[39]

2.3 Free movement of Capital and Establishment

Article 64 TFEU states that free movement of capital applies to 'direct investment – including in real estate – establishment, the provision of financial services or the admission of securities of capital market', although there is no clear definition of the word 'capital'. The Court in *Trummer*[40] accepted a list of categories of capital in Directive 88/361/EEC.[41] The movement of capital is related to commercial transaction in the expectation of profit, for example, direct investment, investment in real estate, operation in securities normally dealt in on the capital market, operation in units of collective investment undertakings, operation in securities and other instruments normally dealt in on the money market. Other measures, including operations in current and deposit accounts with financial institution, credits related to commercial transactions or to the provision of services in which a resident is participating, financial loan and credits, sureties, other guarantees and rights of pledge, transfers in performance of insurance contracts, may also fall within the former group. Personal capital movements, whether by physical import and export of financial assets, or by other means, are not undertaken in the expectation of profit.

Free and Not so Free Movement of Goods since *Keck*' (1997) 6(2*) Irish Journal of European Law* p166 at 172-173.

39 For example, Case C-124/97, *Laara v Kihlakunnansyyttaja (Jyvaskyla)* [2001] 2 CMLR 14; Case 67/98, *Questore di Verona v Zenatti* [2000] 1 CMLR 201; Case C-243/01, *Gambelli and Others* [2006] 1 CMLR 35; and Case C-153/08, *Commission v Spain* [2010] 1 CMLR 30.

40 Case C-222/97, *Re the Application to Register Land by Manfred Trummer and Pepter Mayer* [2000] 3 CMLR 1143.

41 Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, Official Journal L 178, 08/07/1988 p5, see Annex I. The capital includes direct investment, investment in real estate, operation in securities normally dealt in on the capital market, operation in units of collective investment undertakings, operation in securities and other instruments normally dealt in on the money market, operation in current and deposit accounts with financial institutions, credits related to commercial transactions or to the provision of services in which a resident is participating, financial loan and credits, sureties, other guarantees and rights of pledge, transfers in performance of insurance contracts, personal capital movement, physical import and export of financial assets, and other capital movements. It was also pointed out that this was not an exhaustive list for the notion of capital movements.

Free movement of establishment is not defined in the Treaties or other legislation but in the case law. *Factortame*[42] suggested that free movement of establishment is 'the actual pursuit of an economic activity through a fixed establishment in another member-State for an indefinite period'.[43] This definition not only includes undertakings setting up a fixed establishment for economic activities, but also includes a person who pursuit of a professional activity on a stable and continuous basis.[44] The relevant law extends to restrictions on the setting up of agencies, branches or subsidiaries by nationals.[45]

There is an obvious change in the wording of the provisions. Article 63 TFEU prohibits all restrictions on movement of capital and payment while the original Article 67 EEC also contained that 'any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested'[46] should be progressively abolished. It seems that Article 63 TFEU has removed the discriminating approach to applying restrictions of movement of capital. Nevertheless, two cases, *Konle*[47] and *Portuguese (Golden Shares),*[48] show that the Court sometimes not only accepts State measures with discriminatory effect on grounds of nationality but also restrictions on free movement of capital, even though without any discrimination. In *Spain (Golden Shares)*[49] and *United Kingdom (Golden Shares),*[50] the Court further held that the relevant restrictions on investment operations still affected access to the market, although these restrictions had

42 Case C-221/89, *Regina v Secretary of State for Transport* [1991] 3 CMLR 589.
43 Ibid., para. 20.
44 See Case C-55/94, *Reinhard Gebhard v Consiglio Dell'Ordine degli Avvocati E Procuratori di Milano* [1996] 1 CMLR 603, para. 28; also see J. Fairhurst, *Law of the European Union,* 7th Edition, (2009) Longman at 430.
45 See Article 49 TFEU.
46 See Article 67 EEC.
47 Case C-307/97, *Klaus Konle v Austria* [2000] 2 CMLR 963, paras. 23 and 24: 'Section 10(2) of the TGVG 1993 … creates a discriminatory restriction against nationals of other Member States in respect of capital movements between Member States. Such discrimination is prohibited by Article 56 EC, unless it is justified on grounds permitted by the Treaty'.
48 Case C-367/98, *Re Golden shares: EC Commission v Portugal* [2002] 2 CMLR 48, paras. 44 and 45. 'Article 73b of the Treaty lays down a general prohibition on restrictions on the movement of capital between Member States. That prohibition goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets. Even though the rules in issue may not give rise to unequal treatment, they are liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings.'
49 Case C-463/00, *Commission v Spain (Re Golden Shares)* [2003] 2 CMLR 18.
50 Case C-98/01, *Commission v United Kingdom (Re Golden Shares)* [2003] 2. CMLR 19.

no discriminative treatments to both residents and non-residents.[51]

Cases on free movement of establishment, for example *Fearon*[52] in 1985, *Commission v Belgium*[53] in 1988 and *Commission v Greece*[54] in 1991, show that restrictions without discrimination will not fall within Article 49 TFEU. However in other cases, for example, *Klopp*[55] in 1984, *Stanton*[56]in 1988 and *Kemmler*[57] in 1996, the Court changed its mind that Article 49 TFEU would not apply unless the exercise of the rights of establishment 'is discriminatory or constitutes an obstacle which is manifestly excessive or objectively contrary to the public interest'[58] and considered that national legislation maybe apply without distinction to all self-employed persons working in another member State and discrimination based on nationality of those person.[59] From the dates of those judgments, it is clear that the examination standards of the Court were not always unanimous. In *Gebhard* the Court finally accepted the non-discrimination approach instead of the discrimination approach and it has been affirmed in a series of later cases.[60]

The objective of the application test in free movement of capital and establishment cases is similar to the development of free movement on goods and services and has moved from a discrimination-based to a non-discrimination approach. However the processes in capital and establishment are more complex than others because the Court did not have a clear dividing line on distinguishing between restrictions and discrimination when the judgements were made.[61]

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51 See Case C-463/00, *Spain (Re Golden Shares)*, note 49, para.61 and Ibid., para. 47.
52 Case 182/83, *Fearon v Irish Land Commission* [1985] 2 CMLR 228, para. 11.
53 Case C-221/85, *Commission v Belgium* [1988] 1 CMLR 620, paras. 10 and 11.
54 Case C-305/87, *Commission v Greece* [1991] 1 CMLR 611, para. 20.
55 Case 107/83, *Ordre des Avocats v Klopp* [1985] 1 CMLR 99.
56 Case 143/87, *Stanton v INASTI* [1989] 3 CMLR 761.
57 Case C-53/95, *INASTI v Kemmler* [1996] ECR I-703.
58 See Case 107/83, *Klopp*, note 55, para. 7.
59 See Case 143/87, *Stanton v INASTI*, note 56, para. 9.
60 See Case C-55/94, *Gebhard*, note 44, para. 37. Cases applied by the decision in *Gebhard*, for example, Case C-282/07, *Belgium v Truck Center SA* [2009] 2 CMLR 14, para. 33; Case C-470/04, *N v Inspecteur van de Belastingdienst Oost/Kantoor Almelo* [2006] 3 CMLR 49, para. 43; Case C-8/02, *Leichtle v Bundesanstalt fur Arbeit* [2006] 3 CMLR 4, para. 32; and Case C-212/97, *Centros Ltd. V Erhvervs-og Selskabsstyrelsen* [1999] 2 CMLR 551, para. 34. There are some other cases listed in P. Craig and G. Burca, *EU Law: Text, Cases and Materials*, 4th Edition, (2008) Oxford University Press, at 804.
61 See J. Steiner and L. Woods, note 20, at 388.

2.4 Measures Falling within Free Movement

Free movement of goods, services and capital provisions apply to the measures adopted by Member States.[62] In *Aragonesa de Publicidad*[63], for example, the ECJ held that '[Article 36 TFEU] may apply to measures adopted by all authorities of the Member States, be they central authorities, the authorities of a federal state, or other territorial authorities.'[64] Law-making, judicial or administrative bodies of a Member State are also included in 'all authorities of the Member States'.[65] Free movement of services not only applies to the actions of public authorities of Member States but extends to 'rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner'.[66] Decisions of the Bar of the Netherlands in *Wouters*[67] did not fall within provisions on freedom of establishment because the Bar of the Netherlands was defined as an 'association of undertaking' but neither exercised a public law function nor a social function when it adopted the national regulation. Besides Member States, European Union (EU) measures also fall within the free movement provisions.[68]

Only a national measure dealing with trade with a cross-border element will invoke the free movement provisions, according to the wording of Articles 34, 49, 56 and 63 TFEU.[69]

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62 See S. A. Vries, *Tensions with the Internal Market*, (2006) Europa Law Publishing, at 33.

63 Joined Cases C-1/90 and C-176/90, *Aragonesa de Publicidad v Departmento de Sanidad* [1994] 1 CMLR 887.

64 See Ibid., para. 8.

65 See Case 434/85, *Allen & Hanburys Limited v Generics (U.K.) Limited* [1988] 1 CMLR 701, para. 25 and Case C-227/06, *Commission v Belgium* [2008] ECR I-46, para. 37.

66 See Joined CasesC-51/96 and C-191/97, *Deliege v Ligue Francophone de Judo et Disciplines Associees Asbl and Others* [2002] 2 CMLR 65, para. 47. The similar statements were also cited in other two previous cases, see Case 36/74, *Walrave and Koch v Association Union Cycliste Internationale* [1975] 1 CMLR 320, para.17-18 and Case C-415/93, *Football Association (Asbl) and Others v Jean-Marc Bosman* [1996] 1 CMLR 645, para. 82-83.

67 Case 309/99, *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] 4 CMLR 27.

68 See Case C-415/93 *Union Royale Belge des Societes de Football Association (ASBL) v Bosman* [1996] 1 CMLR 645, para. 81. 'Finally, the principle of subsidiary, as interpreted by the German Government to the effect that intervention by public authorities, and particularly community authorities, in the area in question must be confined to what is strictly necessary, cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty.' Also see S. A. Vries, note 62, at 33. 'The Treaty provisions on free movement are primarily aimed at measures adopted by Member States. …The extent to which the Treaty provisions on free movement are relevant for Community measures and therefore also directed at Community Institutions,…'.

69 Obstacles 'between Member States' are stated in Articles 34 and 63 TFEU. The movement from one Member States to another is also mentioned in Articles 49 and 56.

A matter relating solely to internal trade in a Member State will not fall within these free movement provisions. However restrictions on free movement between Member States and other third party countries will also fall within the provisions on freedom on services and capital.[70] The cross-border condition in free movement provisions is an obvious difference from the cases applying to EU competition law.

3. Free Circulation Articles in Chapter Five of the AML

3.1 The Content of Free Circulation in the AML

Articles 33 to 35 in Chapter Five of the AML refer to the anti-competitive effect of abuse of administrative power in the context of free circulation. The abuse of administrative power in restricting free circulation is generally referred as 'regional block' in China.

3.1.1 Article 33 of the AML

Article 33 of the AML applies to the abuse of administrative power to block free circulation of commodities between regions. Understanding of this article requires the specifying of two elements.

First, 'commodities' in Article 33 of the AML includes goods and services. In the definition of 'relevant market', Article 12 of the AML states that commodities or services are generally referred to as 'commodities' in the AML. This expression term is further defined in Article 11 of the Supplement Provisions.[71] Thus Article 33 of the AML jointly regulates the free circulation of goods and services.[72]

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70 See Articles 56 and 63(1) TFEU.

71 Provisions for Administrative Authority for Industry and Commerce to Prevent Abuse of Administrative Power to Eliminate or Restrict Competition [工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定] (Supplementary Provisions on Abuse of Administrative Power) was published by the SAIC and took effect on February 1, 2011. Article 11: 'Commodities mentioned herein shall include services'.

72 For the purpose of distinguishing the three concepts, this thesis adopts the word of 'goods' for the pure commodities excluding services in the AML.

There are no further definitions of 'goods' or 'services' in the AML, or in any related legislation or cases in China. The contents of 'goods' or 'services' under WTO agreements may be refers to China since China signed the protocol on the accession of the WTO.[73] The term 'goods' in the sense of Agreement on Subsidies and Countervailing Measures[74] (ASCM) means 'tangible or moveable personal property other than money; (especially) articles or items of merchandise (goods or services)'.[75] However this definition focuses on the material element of 'goods' but ignores the commercial element in economic activity. A product only for personal use but not for the purpose of commercial transaction will not fall within Article 33 of the AML. The concept of 'goods' in the EU, which includes both material and commercial characteristics, may be a better reference for the definition in the AML.

'Services' is not defined comprehensively and accurately in the General Agreement on Trade in Services (GATS).[76] To distinguish them from goods, services generally have the character of 'intangible, invisible and perishable'.[77] In EU free movement rules, the definition of 'services' further lays stress on the objective of remuneration. Intangibility is the most obvious difference between goods and services. Providing services is not only a process of creating value but also value consumption. The temporary nature of services is also mentioned in the EU and is treated as a condition distinguishing services from establishment.[78] Services under the AML should also be a kind of economic activity. Thus, services in Article 33 could include the characters of non-material, intangibility and profitability.

Second, there are two kinds of measures hampering the free circulation of commodities in

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73 China signed the Protocol on the Accession of the People's Republic of China on November 10, 2001. Marrakesh Agreement Establishing the World Trade Organisation has become a legal resource of legislation in China.

74 Available at: http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm (last visited March 1, 2012).

75 See Article 1.1(a)(1)(iii) of ASCM.

76 Article 1:3(b) only states that 'services' include 'any service in any sector except services supplied in the exercise of governmental authority'.

77 See C. Fink and M. Jansen, 'Services Provisions in Regional Trade Agreements: Stumbling or Building Blocks for Multilateral Liberalization?' Available at: http://www.wto.org/english/tratop_e/region_e/con_sep07_e/fink_jansen_e.pdf (last visited March 1, 2012). Also see N. Munin, *Legal Guid to Gats*, (2010) Kluwer Law International BV, p6.

78 J. Snell, note 38, at 9.

Article 33 of the AML. One is indirect measures which create obstacles for commodities from outside the locality to get access to a local market by tightening regulatory requirements, for example, applying discriminatory charging, pricing and standards or by postponing the entry, for example, applying repeated inspections or certifications. The other is direct measures which hamper commodities from free circulation between regions by bare administrative restrictions, for example, setting specific administrative licences or barriers. These measures are adopted by administrative powers and apply directly to a specific or a series of nonspecific business operators.

3.1.2 Article 35 of the AML

Article 35 regulates the imposition of unequal treatments of non-local as compared with local business operators in relation to investing or setting up branches in the locality.

Investment, in economics, generally includes direct investment, in which funds are directly used to establish and purchase fixed and liquid assets, and indirect investment, which includes credit investment and securities investment.[79] Methods of investment have changed in China. In 2006 insurance funds were allowed indirectly to invest in infrastructure debt.[80] In 2010 the State Council passed another regulation further expanding the scope of private investment in most infrastructure and public service industries.[81] Similar to the content of free movement of capital in the EU, restrictions on investment under Article 35 of the AML maybe also include restrictions on direct asset investment and other credit and securities investment.

'Branches' in Article 35 of the AML are generally organisations without the status of legal persons and their own civil liabilities which are set up by natural persons, legal persons or

[79] See B. Li, X. Yu and B. Dong (Editors), *Investment Economics [投资经济学]*, (2009) Qinghua University Press, at 5.

[80] Administrative Regulation on management indirectly Investing the Insurance Funds in the Infrastructure Pilot Projects [保险资金间接投资基础设施项目试点管理办法] was promulgated and took effect by China Insurance Regulatory Commission on March 14, 2006.

[81] Several Opinions on Encouraging and Guiding the Healthy Development of Private Investment [关于鼓励和引导民间投资健康发展的若干意见] was promulgated by State Council on July 5, 2010.

any other organisations.[82] First, branches are set up by non-local business operators under Article 35 of the AML for the purpose of investment or business operations. Second, unlike the content of freedom of establishment in the EU, subsidiaries, as organisations having independent legal status and undertaking their own civil liabilities, are not branches within Article 35 of the AML. Third, a person's professional activity on a stable and continuous basis in the EU is also not included in this article.

The abuse of administrative measures on restricting investment and establishment of branches maybe directly restrict investment and competition from non-local business operators. In compound fertilisers' case, for example, the government refused to allow non-local undertakings to invest in and operate a chemical fertiliser business except in urea and phosphate compound and to set up branches by withdrawing businesses licenses in four direct selling points.[83] In some circumstances a series of discriminatory standards or requirements are set up by abuse of administrative power. Wang Xiaoye listed a series of discriminatory investment measures generally adopted in China.[84]

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[82] Business operators in the AML include nature persons, legal persons and other organisations. See Article 12 of the AML. There is no unified concept of 'branch' in Article 35 of the AML. Generally a branch is an organisation without the status of independent legal person. For example, a branch of an enterprise, defined by the SAIC is an economic organisation invested and set up by an enterprise as a legal person, without the status of legal person and the civil liabilities undertook by its belonged enterprises as a legal person. See the Response of the SAIC on the definition of branch in Article 35(1) of Regulations of the People's Republic of China for Controlling The Registration of Enterprises as Legal Persons [国家工商行政管理局关于《中华人民共和国企业法人登记管理条例》第三十五条第一款中分支机构含义界定的答复] which was published on September 2, 1997, available at: http://www.saic.gov.cn/zcfg/xzgzjgfxwj/199709/t19970902_46661.html (last visited March 1, 2012). A branch of a social organisation is a part of the social organisation without the status of legal persons. See Article 19(2) of Regulation on Registration and Administration of Social Organisations [社会团体登记管理条例] which was published on October 25, 1998.

[83] See Case 1 in para. 4.3.1 of Chapter Four of this thesis.

[84] See X. Wang, *Explanation on People's Republic of China Anti-Monopoly Law [中华人民共和国反垄断法详解]*, (2008) Intellectual Property Publishing House, at 203. The discriminatory measures include: (1) local taxation differences; (2) specific local stockholder requirements in investment; (3) restrictions on product; (4) local market sale requirements; (5) non-local market sale requirements; (6) local procurement requirements on raw materials or semi-finished products; (7) restrictions on the number of branch, the amount of investment or branch asset, the quantity of product or the number of employee of non-local undertakings in the manners of quantity quota or economic requirement determination; (8) specific requirements on legal entity or structure of joint enterprises; (9) restrictions on the maximum ownership ratio or the amount of non-local investment.

3.1.3 Article 34 of the AML

Article 34 of the AML regulates abuse of administrative power in rejecting or restricting non-local business operators from participation in local tendering and bidding by such means as imposing discriminatory qualification requirements or assessment standards or releasing information in an unlawful manner.

Openness and transparency in tendering procedure, competitiveness in bidding procedure, and fairness and impartiality in the whole tendering and bidding procedure are required for fair tendering and bidding. However in reality, administrative power has great influence on the operation of tendering and bidding in China, especially involving local and non-local bidders, for the purpose of protecting local business operators and economy or rent-seeking. A secret tendering procedure or a limited tendering advertisement to local enterprises may apply. On the qualification of business operator, for example, first-grade qualification enterprises are imposed on the non-local enterprises while second-grade qualification local enterprises are allowed. Frequent apparent of abuse of administrative power in tendering and bidding becomes an important task to regulating the abuse of administrative power under the AML.[85]

In *Horse-race betting licences*[86] in the EU the Italian Government approved a plan to increase the number of betting shops on horse-races across the whole of Italy but the 329 existing old licences were renewed without inviting any competing bids. The Court decided that 'Italy failed to fulfil its obligations under Articles [49 and 56 TFEU] and, in particular, infringed the general principle of transparency and the obligation to ensure a sufficient degree of advertising'.[87] In China tendering and bidding may concern the free circulation of goods, services or capital. An administrative power imposition of discriminatory qualification requirements or assessment standards may also constitute a

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85 See G. Wu, *The Explanation of the Anti-Monopoly Law in People's Republic of China [中华人民共和国反垄断法释义]*, (2007) China Legal Publishing House, at 98-99.

86 Case C-260/04, *Commission of the European Communities v Italy (Denmark and Another, intervening)* [2007] 3 CMLR 50.

87 Ibid., para. 38.

restriction on free circulation of goods, services or capital. For example, discrimination on tendering and bidding for a government procurement contract on office supply may fall within provisions of free circulation of goods; a tendering and bidding of the operating right on intramural public transport may refer to free circulation of services; and a tendering and bidding of hydraulic and hydroelectric project may refer to free circulation of investment.

Unlike Articles 33 and 35 of the AML, tendering and bidding in Article 34 is a specific means of transaction and is included in provisions of free circulation of goods, services and investment based on its specific content. This is no need to list tendering and bidding separately as an article under Chapter Five of the AML.

To summarise there are common features in EU rules on free movement of goods, services and investment and free circulation provisions under the AML, although the EU free movement rules in some circumstances are broader than the area regulated in the AML, for example, freedom in the setting up of subsidiaries and persons' professional activity in establishment. The following comparison and discussion will focus on the common rules below:

Table 5-1: Putative Corresponding Rules to be compared of EU free movement rules and China's AML

EU Free movement Rules	China's Anti-Monopoly Law
Goods	Articles 33 and 34
Services	Articles 33 and 34
Capital and Establishment	Articles 34 and 35

3.2 Aim

Regional blockage is a serious problem in China.[88] Under the AUCL and a series of related statutes, prohibition of regional blockage is already one of the most important aims to maintain the order of the market.[89] Nowadays, this aim has continued into the AML, especially represented in Articles 33 to 35. They require the free circulation of goods,

[88] This issue has been analysed in para. 3 of Chapter Three of this thesis.
[89] See para. 2.2.1 of Chapter Two of this thesis.

services and investment in the market without regional blockage and finally to achieve 'a unified, open, competitive and orderly market system'.[90]

Articles 33 to 35 have a similar objective to that of the EU free movement rules: to maintain an internal market without discrimination and internal frontiers. An 'internal market' without the intervention of an abuse of administrative power within a geographical area of China is also pursued. The achievement of the internal market in the EU is an encouragement and source of experience for the development of the AML.

3.3 Scope of Application

Articles 33-35 of the AML concern to the free circulation of goods, services, tendering and bidding, investment or the setting up of branches between regions. This delimitation is based on the territory of a certain administrative power. 'Locality' is a changeable area: if a public action is effected at the level of a city, the local market is an area covered by the city's regionalisation; if a public action is effected at the level of the province, the local market is a corresponding area covered by provincial regionalisation.

In the EU free movement rules only apply to trans-frontier trade between member States. The difference in the market boundaries on free movement in the EU and free circulation in China is decided by the difference of the State in the EU but the administrative authority in the AML. Customs duties are unavoidably national matters and this kind of discrimination on the basis of location is considered to be the most common problem in relation to the free movement rules in the EU.[91] The free circulation of domestic commodities within a national boundary will not be affected by custom duties discrimination. Customs duties are not regulated by the AML but by Customs Law and related regulations. Local tax policy, for example income tax, value-added tax and business tax will be regarded as local administrative measures and fall within the free circulation provisions in the AML, similar to fiscal barriers such as indirect taxation, mentioned in the

[90] See Article 4 of the AML.
[91] See D. Chalmers, G. Davies and G. Monti, note 16, at 809.

1985 White Paper may constitute obstacles to free movement in the EU. Local tax policy, for example income, value-added, or business tax will fall within the free circulation provisions in the AML.

4. Objectives of EU Free movement Rules and Free Circulation Provisions of the AML

4.1 The Objective of EU Free movement Rules[92]

Scholars recognise different objectives of free movement rules. On the one hand, free movement rules aim at the abolition of protectionism. This objective is based on direct or material discrimination effected in states of origin, or in disparities between national measures. If a measure does not concern discrimination or state protectionism, a Member State is free to adopt it even where it may have an effect on trade between Member States. On the other hand it is argued that free movement policies pursue restrictions of any kind in state measures likely adversely to affect trade. The Court only examines whether a state measure will make transnational trade more difficult.[93] This target is consistent with the objective of the creation and maintenance of an internal market without internal frontiers in the Union. The EU has a broad power or burden to evaluate and control state measures on

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92 Three terms have been used at various times that relate to this concept: 'the internal market', the 'common market' and the 'single market'. These are not necessarily precise synonyms. The term 'common market' was described as '[t]he objective of a common European market must be to create a vast zone of common economic policy, constituting a powerful unit of production, and making possible continuous growth, an increase in stability, an accelerate raising of the standard of living and the development of harmonious relations between the State which it unites'[92] in the *Rapport des Chefs de Delegation aux ministres des affaires etrangeres*. The application mainly fulfilled the requirements on the freedom of movement between member states. Other policies, such as agricultural policy, competition policy and state aids, are also included in the boundary. See K. Mortelmans, 'The Common market, the Internal Market and the Single Market, What's in a Market?' (1998) 35 *Common Market Law Review* p102. The term of 'single market' was used in a series of reports at the same period, for example, The Impact and Effectiveness of the Single Market COM(96)520 final in 1996 and Action Plan for the Single Market SEC(97)1 final in 1997. By virtue of no distinction made between the two concepts of 'internal market' and 'single market', and the content seems do not have much difference, it is generally suggested to be synonymous. Kamiel Mortelmans considered that the two terms are used interchangeably; Paul Craig and Grainne De burca used the two terms without distinction; and Sybe A. de Vries only analysed the terms of 'common market' and 'internal market' and treated them as interchangeable. See K. Mortelmans, note 92, at 108; P. Craig and G. Burca, note 60, at 631; and S. A. Vries, note 62, at 13.

93 See P. Maduro, *We The Court: The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty*, (1998) Oxford University Pressing, at 59; J. Snell, note 38, at 2.

marketing free of obstacles. Sybe states without any further discussion that the two approaches exist,[94] while Jukka elaborats the two different idealised readings, naming them 'anti-protectionism reading' and 'an economic freedom reading'.[95]

Both understandings have been accepted by the Courts in different cases.[96] Directive 70/50[97] provides guidance in distinguishing different sorts of state measures especially those distinctly applicable measure, which may breach [Article 34 TFEU], although measures which are equally applicable to domestic and imported products are also covered by Article 3 of the Directive. Distinctly applicable measures, which are based on a discrimination test and only apply to imported or exported goods as distinguinct from the domestically produced goods, are encountered in several cases; for example, *Commission v Italy*[98], *Procureur de la Republique Besacon v Bouhelier*[99], *Commission v France*[100], *Schmidberger*[101] and *Commission v Ireland*[102]. However an effects-based test, that is '[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.'[103], was created in *Dassonville*. The subsequent case *Cassis de Dijon*[104] reaffirmed the test in *Dassonville*.[105] Indistinctly applicable measures applying both to imported and domestic goods were discussed in

94 See S. A. Vries, note 62, at 14.

95 The former is a narrow reading with a decentralised approach while the latter is a wide reading which produces a centralised unitary system. Jukka further compares and evaluates the two readings and concludes that '[f]or the Community, a fairly decentralized approach enabling regulatory competition is preferable' and argued that 'the court ought to adopt a relatively narrow reading of Article [34 and 56 TFEU]'. See J. Snell, note 38, at 48.

96 See J. Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' in P. Craig and G. Burca (Editors), *The Evolution of EU Law*, (1999) Oxford University Press, at 351-360.

97 Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, *Official Journal of the European Union*, L013, p 29-31. This Directive is no longer of legal effect now.

98 Case C-154/85, *Commission of the European Communities v Italy* [1988] 2 CMLR 951.

99 Case C-53/76, *Procureur de la Republique Besacon v Bouhelier* [1977] 1 CMLR 436.

100 Case C-265/95, *Commission of the European Communities v France* [1997] ECR I-6959.

101 Case C-112/00, *Eugen Schmidberger Internationale Transporte Planzuge v Austtria* [2003] 2 CMLR 34.

102 Case C-249/81, *Buy Irish Campaign, Re* [1983] 2 CMLR 104.

103 See Case 8/74, *Procureur du Roi v Dassonville*, note 10, para. 5.

104 Case 120/78, *Rewe Zentrale AG v Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649; [1979] 3 CMLR 494.

105 Ibid., para. 14.

Cassis de Dijon and the later case of *Keck*[106].

Objectives of the EU free movement rules changed gradually from the view of regulating discrimination to removing obstacles to trade. These latter objective was established or confirmed especially in *Dassonville*, *Casis de Dijon* and *Keck* in freedom of goods, *Sager* and *Schindler* in freedom of services, *Spain (Golden Shares)* and *United Kingdom (Golden Shares)* in freedom of capital and *Gebhard* and subsequent cases in freedom of establishment.[107] Discrimination is still generally treated as actual or apparent in State measures, but not a necessary standard of a test identifying the measures falling within free movement provisions.

4.2 The Objective of Free Circulation under the AML

4.2.1 Discrimination in Free Circulation under the AML

The specific objective of Articles 33 to 35 of the AML is the abolition of discriminatory administrative measures of unequal treatment between local goods, services, investments or establishment and those from outside the locality in the local market. First, the provisions distinguish commodities and business operators from within and outside the locality. Competition between commodities or business operators both from the locality or both from outside the locality will not fall within these provisions.

Second, blocking, rejecting or restricting requirements adopted to against free circulation between regions are deemed discriminatory treatments. Article 33 refers to the discriminatory charges or standards, prices, technical requirements or inspection standards, double burden of inspection or certification and extra administrative licensing, barriers or other measures on commodities from outside the locality, while Articles 34 and 35 refer to discriminatory qualification requirements or assessment standards, unlawful released information and unequal treatment on the business operators from outside the locality. The

106 Case C-267/91, *Criminal Proceedings against Keck*, note 18.
107 See paras.2.1, 2.2 and 2.3 of this chapter.

condition of ‘other conduct for the purpose of hampering commodities’ is also stated in Article 33 (5). This standard which is not limited to the word ‘discrimination’ may imply that on the free circulation of goods and services, all obstacles, not merely discriminatory restrictions, will be controlled under Article 33. However this standard will not affect the fact that discriminatory standards are the objective of the free circulation provisions. In addition, this potential non-discrimination manner in Article 33 does not apply to the free circulation of investment and setting up of agencies in Article 35.

Third, the provisions only regulate administrative measures in the local market. If commodities outside the locality compete with the local commodities in a non-local market, or local commodities face disadvantage conditions from administrative measures in the market from outside the locality, the relevant administrative measures will not fall within Article 33, but may be considered under Articles 35 or 36 on the basis of abuse of administrative power to force business operators to engage in monopolistic conduct as prescribed in the AML or other law or regulation.

Fourth, the provisions ignored another kind of discrimination that the commodities or business operators from outside the locality may receive better treatment more favourable than that generally applied to local commodities or business operators. Supra-national treatment of foreign undertakings or investors is also included. For example, for the purpose of attracting investment, foreign investors or investors from outside the locality may obtain more favourable treatment on local tax policies, for example, reduction of income, value added or business tax, a period of tax-exemption, low-tax rate, expanding investment and reinvestment subsidies, investment amortisation than is given local investors. In this case, it is local commodities or business operators facing discriminative measures. Discrimination may be bidirectional, not merely on commodities or business operators from outside the locality.

4.2.2 More Suitable Objective: Discrimination or Obstacle?

As explained above free movement rules in the EU has gone through a developing process from discrimination to obstacle.

First, the scope of 'obstacles' is broader than that of 'discrimination'. While discrimination is in the light of the disparity of national measures applying unequal treatments to goods, services, workers and capital on the ground of nationality, obstacles restricting free movement on a non-discrimination basis include discrimination on the ground of nationality, indirect discrimination which applies equally to objects but with discriminatory effect, for example double burden effect, and obstacles which apply equally to import and domestic objects without discriminatory effect but restrict free movement. A discriminatory measure without any justification[108] definitely has a restricting effect and is a kind of obstacle for free movement. However, a measure falling within the obstacles on the basis of non-discrimination may not a discriminatory measure.

The relation is also available in the free circulation provisions in the AML. For example, a product of an undertaking which is established in district A is delivered for sale in district B. The technical standard applied in district B differs from that applied in district A. The product has to satisfy the technical standard in district B if it is intended to be sold in this district. In this case, although the technical standard in district B equally applies to any similar product sold in the local market without distinction on grounds of the origin of products, the product has to be subjected to a double-burden on technical standards. This situation is similar to that in *Cassis de Dijon* in the EU.

Guangdong Province Detailed Rules on Tentative Measures for the Administration of Financing Guarantee Companies[109] require that:

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108 The justifications will be discussed in the section. 3.2.6 of this chapter.

109 Guangdong Province Detailed Rules on Tentative Measures for the Administration of Financing Guarantee Companies [广东省融资性担保公司管理暂行办法实施细则] which is formulated by Guangdong Province People's Government was promulgated on September 27, 2010 and was operated since November 1, 2010.

> Article 10 … The minimum amount of registered capital of the financing guarantee companies in first class districts shall not be less than 100 million RMB Yuan, and the minimum amount of registered capital of the financing guarantee companies in second class districts shall not be less than 50 million RMB Yuan.
>
> Article 12 The following requirements must be met when a financing guarantee company applies for their subsidiaries and affiliates: … (2) The minimum amount of registered capital of the financing guarantee companies in first class districts shall not be less than 200 million RMB Yuan, and the minimum amount of the registered capital of the financing guarantee companies in second class districts shall not be less than 100 million RMB Yuan.

It is argued by some guarantee companies that the minimum amount in the standard is too high and that lots of private guarantee companies cannot meet the standards and they cannot access the market.[110] Meanwhile, Tentative Measures for the Administration of Financing Guarantee Companies[111] only requires 5 million RMB Yuan as the minimum amount of registered capital of the financing guarantee companies.[112] To form a hypothesis in this case, if the minimum amount standards can actually constitute a restriction to access to a market without any justification, this regulation may create obstacles to free circulation in setting up branches without any discrimination against operators from outside Guangdong province, as well as business operators resident Guangdong province. While free circulation in the AML merely focuses on the objective of removal of discrimination, such a case could not fall within and be regulated under Article 35 of the AML.

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110 See http://finance.sina.com.cn/roll/20100928/06343467177.shtml (last visited on March 1, 2012).

111 Tentative Measures for the Administration of Financing Guarantee Companies [融资性担保公司管理暂行办法] which was jointly promulgated and issued by China Banking Regulatory Commission, National Development and Reform Commission of the People's Republic of China, The Ministry of Industry and Information Technology of the People's Republic of China, the Ministry of Finance of the People's Republic of China, the Ministry of Commerce of the People's Republic of China, People's Bank of China and the State Administration for Industry and Commerce of the People's Republic of China on March 8, 2010.

112 Ibid., Article 10.

A specifically related regulation focusing on free circulation between regions[113] already contains the discrimination and obstacles approaches. The list of detailed manners in which conduct of regional blockade is constituted mainly focuses on the discrimination approach, as do the provisions in the AML.[114] However Article 3, a general provision on goods and services, states that

> '[a]ny institutions or individuals may not infringe the regulations of laws, administrative laws and regulations of State Council to obstruct or intervene goods or project construction services (thereafter services) from outside the locality to enter the local market, or to connive, shelter or restrict fair competition by any means as obstructing or intervening goods or services from outside the locality to enter the local market'.[115]

It is clear that any measure obstructing or intervening in the exchange of goods and services may constitute regional blockade conduct, without applying the discrimination approach.

Second, as stated above, there is an argument for prohibiting discrimination and unhindered trade. Some scholars conclude that prohibiting discrimination which can bring maximum discretion to member States can constitute a power decentralisation model while unhindered trade which may maximise free trade is a kind of power centralisation model.[116] The inefficiency and restriction on regulatory competition between legal orders is the main disadvantage of the power centralisation model.[117]

Centralisation can lead to an excessively uniform regulation in a Union with different

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113 Provision on Prohibiting Regional Blockade in Market Economic Activities [关于禁止在市场经济活动中实行地区封锁的规定] was published by State Council and was promulgated on April 21, 2001.

114 Ibid., Articles 4 and 10-16.

115 This article should be a general provision for all kinds of regional blockade conduct. Unfortunately, in the content, goods and services are particularly stated. This confused expression may create indistinct understanding in practicing.

116 See para. 2.2 of this chapter. Also see J. Snell, note 38, at 2-3.

117 Meanwhile, the advantages of the power centralisation model are accepted that '[a] centralized system can be politically stable, which also brings benefits of economic stability and predictability. Centralisation reduces transaction costs of private operators, who only have to familiarize themselves with one set of regulations. A centrally run system can also cope with distortions caused by market failures, such as negative externalities'. See J. Snell, note 38, at 35-48.

levels of performances on background in member States. For example, some industries in less developed member States may have to accept a heavy regulatory burden which is normal for developed Member States. Not only may less developed States lose their competitive advantage, but also investors or consumers lose their choices in a diverse environment. It is true that being completely freedom from obstacles may increase a gap in competition between districts at different levels of development because of the law of survival of the fittest. However, this kind of disadvantage is a short-term effect that maintenance of difference will keep away from the latest development.

Third, discrimination involves a comparison of measures and treatments of objects while restricting obstacles concentrates on the effect on a market. Especially in the AML these provisions will merely apply when an administrative measure distinguishes or discriminatorily treats goods, services or investment from outside of the locality. Without a compared object, it is hard to judge whether a measure should fall within these provisions. However obstacles to trade will be analysed by the effect on competition or access to a market. This is a universally applicable test involving economic judgements.

Standardisation may be a typical example of distinctions between discrimination and obstacles. There are national, trade, local standards and standards for enterprises according to Standardisation Law.[118] Local standards may be formulated in provinces, autonomous regions and municipalities directly under Central Government, in the absence of national or trade standards and standards for enterprises only applying to enterprises themselves.[119] An administrative measure on standardisation may be regarded as illegal only when different local standards between the locality and the original district apply to an object in movement. The local standard may be directly discriminatory in itself or impose a double burden on the object. However, few national and trade standards is presented in reality and

[118] Standardisation Law [标准化法] which was promulgated on December 29, 1988 the Standing Committee of the National People's Congress of the People's Republic of China (SCNPC).

[119] Ibid., Article 6. The local standards are limited for the safety and sanitation requirements for industrial goods which need to be unified. In reality, this restriction on industrial goods is out of date and a new Standardisation Law is required. A consultative paper of the new Standardisation Administration Law which removes this limitation was issued but not available for the public.

only a few local standards exist.[120] Once a certain kind of goods is prohibited when it moves from its original district without any local standard to another district with a high-level standard, an evaluation under the obstacle-restricting approach with a view to the effect on access to a market might be a better choice.

Finally, the approach of restricting obstacles to free circulation will be more consistent with other provisions in the AML. Chapters Two and Three of the AML regulate monopoly agreement and abuse of dominant position, similarly to Articles 101 and 102 TFEU. The analysis referring to undertakings' performance in a relevant market and the restricting effect on competition in the market is on a basis of economic principles. Meanwhile, Article 36 of the AML, which is similar to Article 106 TFEU, prohibits abuse of administrative power to force business operators to engage in the monopolistic conduct. This provision should also deal with the analysis of competition effect in a market.

The restricting obstacles approach generally focuses on the effect of an administrative measure on trade whether a measure will create barriers to entering a market or to competition in a market, while the conduct of a business operator is not a crucial element in this test.[121] Especially in the EU, in some situations, if companies or individuals act in a way that excludes foreign products, the Court may see this as a matter of competition law.[122] Since free circulation provisions and other anti-monopoly provisions are in the same AML, it is even more important for them to be linked. The objective of prohibition of obstacles will promote interrelation of free circulation and anti-monopoly, in particular on abuse of administrative power.

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120 For example, national and trade standards in medical cold china logistics are blank or some is in process of draft. Only a few districts have their local standards. See: http://ccn.mofcom.gov.cn/spbg/show.php?id=10433&ids=5; in the industry related with water, there is no compulsory national standard. See: http://www.standardcn.com/article/show.asp?id=31984; in the industry of automobile, the standard system is incomplete with low standard coverage. See: http://www.standardcn.com/article/show.asp?id=35038. Until now, China is in low level standardisation overall, has slow speed on standards draft, lack of high technique standards, incomplete safety standard system, out of date standards on resources economy. See: http://www.standardcn.com/article/show.asp?id=6124. (last visited on March 1, 2012).

121 See D. Chalmers, G. Davies and G. Monti, note 16, at 757.

122 Ibid.

To summarise, unlike the objectives of prohibiting discrimination and obstacles, the existing standard of discrimination against free circulation in the AML may not comprehensively prevent different kinds of blocking of the free circulation. Maintaining free circulation based on prohibiting obstacles is not only a more fundamental approach with economic analysis but also improves the combination structure with other anti-monopoly provisions in the AML.

5. Mandatory Measures Required?

5.1 Mandatory Effect in EU Free movement Rules

Whether a State measure falling within free movement provisions should be obligatory is not clearly explained in EU regulations. However, there is an important case *Buy Irish* which discussed this issue on freedom of goods. [123] In this case the Commission charged that the Irish Good Council's adopting conduct in the form of campaign to promote the sale and purchase of Irish domestic products infringed Article 28 TFEU. The Irish government argued that a measure falling within Article 28 TFEU should be a measure with exclusive right with a binding effect from a public authority. The government also considered that the Irish Good Council was not a public authority but 'a private company controlled by Government-appointed directors' with an arrangement for Irish industries to co-operate for their common good and the campaign was a recommendation without a binding effect. The Court rejected these opinions and concluded that 'measures adopted by the government of a member-State which do not have binding effect may be capable of influencing the conduct of traders and consumers in that State' and 'cannot escape the prohibition laid down by Article 30 of the Treaty': [124] besides which the Irish Goods Council could be treated as a private company. [125] A State measure without binding effect,

123 See Case 249/81, *Buy Irish*, note 102. *Buy Irish* is the first case to consider the position of a measure without binding effect. See the opinion of Advocate General Sig. Francesco Capotori that 'it is true that all the cases in which the Court has established the existence of measures having equivalent effect within the meaning of Article 30 have related to legislative or administrative measures which were to some extent legally binding; but it is equally true that until now the Court of Justice [the CJEU] has not been called upon to determine whether Article 30 applies to state initiatives which have no binding force.'

124 Ibid., para. 28.

125 Ibid., paras. 10-15.

whose potential effect on imports is liable to affect the volume of trade between member States, will be within the scope of provisions governing free movement of goods.

Subsequent cases, *Apple and Pear Development Council*[126] and *AGM*[127] adopted similar opinions on the issue of free movement of goods. However whether this principle extends to other free movement rules is not so clear because cases referring to other free movement rules do not rule on the issue. Some cases were concerned with the extent of 'public authorities' and 'measures'. Concerning freedom of services the Court in *Deliege*[128] considered that 'the Community provisions on the free movement of persons and services not only apply to the action of public authorities but extend also to rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner'.[129] And in *Federation v Viking Line Abp*[130] on free movement of establishment, collective action initiated by a trade union or a group of trade unions might infringe provisions of free movement of establishment because this industrial action was intended to induce an undertaking's entering into a collective agreement.[131] As a result, although associations, organisations, a trade union or a group of trade unions with their legal autonomy are not regulated by public law, their actions with effect on obstacles to free movement might still infringe the provision of free movement. Due to those actions generally not required for a binding nature, it can be said that measures without mandatory effect may not be excluded from the scope of free movement provisions.

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126 Case 222/82, *Apple and Pear Development Council v K.J. Lewis Ltd and Others* [1984] 3 CMLR 733, para. 17. A publicity campaign to promote the sale and purchase of domestic products may fall within the prohibition contained in Article 28 TFEU of the Treaty. , in certain circumstances, fall within the prohibition contained in Article 30 of the Treaty

127 Case C-470/03, *AGM-COS.MET Srl v Suomen valtio and Tarmo Lehtinen* [2007] 2. CMLR 41, para. 66. Statements by an official are also can be treated as measures infringing free movement of goods provisions. Also see N. Reich, '*AGM-COS.MET* or Whoe is Protected by EC Safety Regulation?'(2008) 31 *European Law Review* p 85; and S. De Vriies, 'Annotation of AGM' (2008) 45 *Common Market Law Review* p 569.

128 Joined Cases C-51/96 and C-191/97, *Deliege vLigue Francophone de Judo et Disciplines Associees Asbl and Others*, note 66.

129 Ibid., para. 47. This statement was cited from the judgments of previous cases. See Case 36/74, *Walrave and Koch v Association Union Cycliste Internationale*, note 66, paras. 17-18; and Case C-415/93, Union *Royale Belge des Societes de Football Association (Asbl) and Others v Jean-Marc Bosman*, note 66, paras. 82-83.

130 Case C-438/05, *The International Transport Workers' Federation v Viking Line Abp* [2008] 1 CMLR 51.

131 Ibid., para. 55.

5.2 Mandatory Effect in Free Circulation provisions in Chapter Five of the AML

Likewise in the AML, there is also no clear wording on the mandatory conditions of abuse of administrative power in the free circulation provisions. Measures with or without binding effect are hardly distinguished by scholars.[132] Some scholars consider that a measure imposing merely with mandatory conditions will constitute an abuse of administrative power restricting or eliminating competition.[133] Article 36 of the AML requires that when business operators are forced to engage in monopolistic conduct, an abuse of administrative power of the AML will be constituted. However the harm to free circulation from administrative measures that are not binding is more serious in China than in the EU.

There are two main reasons for the harm of administrative measures without binding effect in China. On the one hand, the administration is always a leading governing power in the social life in China.[134] Administrative measures have great influence on economic activities, including trade activities between business operators and between business operators and consumers, no matter a measure with or without binding effect. On the other hand, administrative power may be abused to adopt mandatory actions in practice, although these measures are merely unenforced administrative directions,[135] for example,

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[132] Most of definitions on administrative monopoly or abuse of administrative power to restrict or eliminate competition do not distinguish whether or not a measure should have mandatory conditions. However most of cases referred in these books or articles are with mandatory conditions. See P. Zheng, *'The Definition and Characters of Administrative Monopoly [论行政垄断的概念与特征]'* (2000) 3 *Journal of Shanxi Normal University* p39; B. Wang, *'Discussing the Operation of Anti-Monopoly Law on Administrative Monopoly [论反垄断法对行政垄断的规制]'* p123; R. Zhang, *'Several Things on Administrative Monopoly [关于行政垄断的若干思考]'*, p162, in X. Wang (Editor), *Anti-Monopoly Law and Market Economics [反垄断法与市场经济]*, (1998) Law Press.

[133] Zhong Mingzhao explains that an undertaking will be mandatorily punished by State power if this undertaking ignores the existence of administrative monopoly or escapes or refuses the mandatory power of administrative monopoly. See M. Zhong, *Competition Law [竞争法]*, (1997) Beijing University Press, at 316. Also see Q. Gao, 'On Administration Monopoly and Rules of Law [论行政垄断及其法律规制]' (2002) 1 *Journal of Hubei Administration Institute p85*. Y. Zhu and X. Zhu, 'Harm and Legal Regulation on Administrative Monopoly [行政垄断的危害及其法律规制]' (2005) 20 *Economic Forum*, p4.

[134] The position of administration in China has been discussed in Chapters Two and Four of this thesis.

[135] Administrative direction, as defined in administrative law theory, has common characteristics that administrative subjects adopt non-binding effect measures to induce or promote counterparts to do or not to do a certain conduct, on the basis of legal principles, rules and policies in the function of administration. See H. Luo, *Administration Law [行政法学]*, (1996) Beijing University Press, at 275; R. Guo and G. Song, 'On the Interpretation of Concepts of Administrative Directions [行政指导概念界探]' (2000) 23(2) *Journal of Shanxi University* p3; Y. Mo, 'On the Category of Administrative Direction – the Concept of Administrative Guidance and Several Related Issues [行政指导范畴论-行政指导的概念与若干相关问

suggestions, recommendations or warnings. If a measure without mandatory effect is not carried out following the requirements, a business operator may be issued or threatened with administrative punishment, or even be required to face deliberate obstacles or critical requirements on other related issues. There is a possible result that business operators may be subject to pressures in choosing whether to follow or to be directly refused by an administrative measure. A measure which should be non-binding actually becomes a mandatory requirement in effect. For instance, an administrative direction may also be published as a guide encouraging a high-technical or high-standard environmental protection manufacture to invest or set up subsidiaries in the local district. However, the fact is that manufacturers from outside the locality in some industries where development of local manufacture is supported are restricted or refused entry to this district. For this reason, owing to particularity in the nature of administrative power administrative measures without binding effect may also create obvious obstacles to hinder free circulation. Accordingly either administrative measures with or without mandatory conditions should be considered to be regulated under the AML.

Another question raised is the level at which administrative measures should be regulated. In the EU an effects-based test on measures having an effect equivalent to quantitative restrictions was created in *Dassonville*. Measures hindering trade 'directly or indirectly, actually or potentially' will be considered.[136] In *Van de Haar*,[137] the Court further explained that the degree to which trade was affected did not need to be distinguished: 'even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways'.[138] In contradistinction to *Van de Haar*, in *Peralta*,[139] the Court ruled that 'too uncertain and indirect' effect on restrictions shall not be regarded as being of a nature to hinder trade. The so-called *quasi de minimis* rule was also commonly accepted

題]' (2001) 1(1) *Jinlin Law Review* p 145.

136 See Case 8/74 *Procureur de Roi v Dassonville*, note 10, para. 5.

137 Joined Cases 177/82 and 178/82, *Officier Van Justitie v Van de Haar and Kaveka de Meern B.V.* [1985] 2 CMLR 556.

138 Ibid., paras. 13 and 14.

139 Case C-379/92, *Criminal Proceedings against Peralta* [1994] ECR I-3453, paras. 3 and 4.

in subsequent case law on goods and other free movement.[140]

Articles 33 to 35 on free circulation do not contain any words on whether potential effect or actual influence is one of the conditions fulfilling their criteria. Business operators or consumers may be forced by obligatory administrative measures to adopt certain activities resulting in a blockade of free circulation. These measures cannot be refused or escaped, or else punishment may be imposed on proof of the infringement. Thus the abuse of administrative power with binding effect will have strict pressure and may inevitably harm trade. These measures, which are proved actually to harm, as well as those which are capable of harming trade on free circulation should be governed by Articles 33 to 35 of the AML.

In contradistinction to mandatory measures, abuse of administrative power provisions without binding effect may allow counterparts to choose to follow or to refuse the requirements on directions. Not all non-binding measures will have sufficient influence on trade. Some of them may create obstacles to free circulation but actually have uncertain, slight or too indirect an effect or may threaten trade, while others may have the actual effect of blocking market access or other restricting competition effect. The test for applying non-binding measures to free circulation provisions should be effect-based. A non-binding measure with uncertain, slight or too indirect effect or threat may not fall within Articles 33 to 35 of the AML; while a non-binding measure with obvious threat, or inevitable consequence of blocking free circulation should fall within Articles 33 to 35 of the AML. For example, an Industry and Commerce Bureau of a city circulates an administrative directive on a certain product of some undertakings which do not meet a local standard for the purpose of rectifying unqualified products and protecting consumer's interest. When undertakings from outside the locality are merely listed in this administrative directive, meeting of the local standard in point is not obligatory. The effect is that those undertakings' reputations are destroyed and hardly accepted by the local market. This administrative directive should be regarded as infringing free circulation of

[140] See D. Chalmers, G. Davies and G. Monti, note 16, at 754.

goods under the AML because the actual effect or even purpose of this administrative directive is to hinder the free circulation of goods from outside the locality from entering the local market.

In summary, there are two suggestions made on the mandatory conditions of abuse of administrative power. First, administrative measures obligatory and voluntary should be contained in Articles 33 to 35 of the AML. Second, different levels of the test should apply to administrative both kinds of measures. Actually and potential harm or threat to trade on free circulation should apply to mandatory measures, while the standard with obvious threat, effect or fact should apply to abuse of administrative power without non-binding effect.

6. The Relation between Free Circulation Provisions and Those Governing Abuse of Administrative Power in the Anti-Monopoly Law

As discussed above, Articles 33 to 35 of the AML relating to free circulation are similar to the free movement provisions in the EU, and Article 36 of the AML is closer in content to that of Article 106 TFEU. Since free movement rules and competition law rules are two separate parts and regulating theories in the EU, what is their legal relation in the EU? What is the relation between Articles 33 to 35 and Article 36 of the AML? How do they work under a unified chapter controlling abuse of administrative power to eliminate or restrict competition in the AML?

6.1 Free movement Rules and Article 106 in the EU

6.1.1 Difference

There are significant differences between Article 106 and free movement provisions. First, Article 106 concerns anti-competitive conduct and effect of an undertaking itself, especially in relevant to Articles 101 and 102 TFEU, although it does regulate the

measures enacted or maintained in force by Member States. However the EU free movement rules mainly cover public actions by the authorities of the Union and the Member States. Competition law is a branch of private law, while free movement is within public law.

Second, cross-border is a strict condition of an activity's falling within free movement of goods, services and capital provisions.[141] In EU competition law, 'relevant market' is an important criterion for identifying conduct falling with its provisions. The territorial scope of the 'relevant market' generally should be examined under two aspects under an economic analysis: product and geography.[142] A case falling within Article 106 may also come under free movement provisions only if a cross-border business is restricted to take part in competition in other Member States.[143] Only a few cases relating to Article 106 or free movement provisions can fulfil both of the requirements and are regulated.

6.1.2 Convergence and Interface

The EU Free movement provisions and competition law also have many points of convergence and interface. Gyselen has considered that a same legality standard should apply in the rules of competition and the provisions on free movement when applied to the examination of environmental measures.[144] Schmid has discussed whether a *Cassis*-type

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141 See para. 2.4 of this chapter.

142 The product market is determined by the swap of the product. In *United Brands*, It said that '[f]or the banana to be regarded as forming a market which is sufficiently differentiated from other fruits it must be possible for it to be singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible.' The geographical market requires the identification of an area which is equally or sufficiently homogeneous to the relevant products or services in the competition market. See Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, paras. 22 and 44-53.

143 See paras. 219-223 of Commission Decision on Pursuant to Article 86(3) of the EC Treaty [Article 106(3) TFEU], on the Special Rights Granted to La Banque Postale, Caisses d'Epargne and Crédit Mutuel for the Distribution of the *Livret A* and *Livret Bleu*. C(2007) 2110 Final, Brussels, 10 May 2007. The special right granted by the French authority on distribution of the *Livret A* and *Livret Bleu* was decided as having 'the effect of making less attractive to operators established in the Community outside France the exercises of the freedom of provide liquid banking savings products to private individuals in France.'

144 L. Gyselen, 'The Emerging interface between Competition Policy and Environmental policy in the EC' in J. Cameron, P. Demaret and D. Geradin (Editors), *Trade and Environment: The Search for Balance*, (1994) Williams Gaunt & Sons, p242. Also see K. Mortelmans, 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?' (2001) 38 *Common Market Law Review* p 613.

exemption possibly applies to the competition rules in the context of book price fixing.[145] Mortelmans has analysed the possible convergence between the provisions on free movement and the rules on competition and concluded that although full convergence was not possible and not desirable, 'some degree of convergence already exists and that this may be developed further in the future.'[146] Waelbroeck and Lane elaborated the 'privatisation' of free movement and 'publicisation' of competition law.[147] These discussions have provided the possibility of shifts in the application of the two sets of rules on the addressees to conduct falling within the prohibitions. Cruz and Davies respectively discussed the overlap between the rules on competition and the provisions on free movement.[148]

EU competition and free movement provisions are 'inextricably linked in a functional sense'.[149] Internal market is mentioned in Article 26(2) TFEU as comprising 'an area without internal frontiers in which the free movement of goods, persons, services and capital'.[150] Maintaining free movement between Member States is intended to establish an internal market in the EU. Article 3 TFEU also states that 'the establishing of the competition rules necessary for the functioning of the internal market' is within the exclusive competence of the Union. EU competition law deals with matters which 'would affect the operation of the internal market by causing market position and success to be determined not just by the commercial merit of the undertaking, but by other factors'.[151]

Competition law may prevent undertakings erecting trade barriers in the internal market, while free movement rules ensure free internal frontiers in the trade between Member

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145 C. Schmid, 'Diagonal Competence Conflicts between European Competition Law and National Regulation – A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing', (2000) 8(1) *European Review of Private Law* p155.

146 See K. Mortelmans, note 144, at 645-646.

147 See J. B. Cruz, *Between Competition and Free Movement*, (2002) Hart Publishing, at 87; and R. Lane, 'The Internal market and the Individual', in N. N. Shuibhne (Editor) *Regulating the Internal Market*, (2006) Edward Elgar, at 254-271.

148 J. B. Cruz, note 147; and G. Davies, *EU Internal Market Law*, 2nd Edition, (2003) Cavendish Publishing Limited, at 138.

149 J. B. Cruz, note 147, at 86.

150 In the previous EC Treaty, Article 3(1) also stated that the Community shall establish 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'.

151 G. Davies, note 148, at 136.

States. The two rules combine the intertwined aspects of a consistent objective: the development and maintenance of a competitive internal market. Both are ways of securing the internal market in the EU.

The two sets of provisions relate to economic activities. Under competition law, only an economic activity engaged in by an undertaking will be subject to the rules. In the context of free movement, an analysis of the potential economic effect of the activity is required to determine whether an action will fall within the regulated area.[152] In *Humbel*,[153] because of the absence of the essential characteristic of remuneration and public funds for the education system, the courses provided in a technical institution as a part of secondary education under the national education system were not regarded as gainful activity but a duty in the social, cultural, and educational fields. Thus, these courses did not fall within statutory provision of free movement of services. As in *Wirth*[154], a course provided by an institute financed mainly out of private funds, in particular by students or their parent, to make a commercial profit was a kind of service against remuneration. The courses in this institution are economic activities and can fall within Article 50 of the free movement of services. The economic character of an activity is also required in the education area in the free movement of establishment.[155]

In view of case law it is arguable that the competition rules apply indirectly to the activities of public authorities while private conduct may fall within the scope of free movement provisions. In *Meng*[156] the Court recognised 'the application of Articles 3(1)(9), 10 [EC] and [Article 101 TFEU] to acts of public authorities where they have an effect on competition which, if the source of the restriction had been private, would have been subject to the competition rules.'[157] However in that case the new norm was not found to have been violated. Fairhust pointed out that '[w]here the private body enjoys a monopoly

[152] Although different from competition rules, an 'insignificant or merely potential' economic effect may fall within free movement rules. See J. B. Cruz, note 147, at 86.
[153] Case C-263/86, *The State (Belgium) v Rene Humbel* [1989] 1 CMLR 393.
[154] Case C-109/93, *Wirth v Landeshauptstadt Hannover* [1993] ECR I-6447.
[155] Case C-153/02, *Neri v European School of Economics* [2004] 1 CMLR 16.
[156] Case C-2/91, *Meng*, [1993] ECR I-5751.
[157] K. Mortelmans, note 144, p 619.

conferred on it by the state, which enables it to restrict the import of foreign products by virtue of that monopoly, there may be an overlap between [Articles 34 and 102 TFEU]'.[158] In Davies' opinion, both the activities of private undertakings and public undertakings exercising a government's function in relation to economic activities or with a majority share or *de facto* control held by the State, may not only restrict free movement but also have anti-competitive effects.[159] According to Cruz, the overlap between the two sets of provisions is demonstrated in three forms: '(i) private conduct hindering free movement; (ii) public behaviour negatively affecting competition; and (iii) behaviour of economic actors which are not clearly public nor private, or mixed situations in which different actors intervene, and which present either a free movement or a competition problems, or both'.[160]

There is further overlap between competition rules and free movement provisions. Both Article 106 TFEU and the free movement provisions concern public actions. Under Article 106 TFEU, a public action adopted by a Member State which grants special or exclusive rights to undertakings or public undertakings, may enact or maintain in force a violation of Article 18 and Articles 101 and 109 TFEU. Arguably, where an undertaking exercises the granted special or exclusive rights to restrict competition, free movement restrictions may follow. This public action could also be subject to free movement provisions. The two sets of provisions have similar objects.

6.2 Free Circulation Provisions and Abuse of Administrative Power under the Anti-Monopoly Law

Different from the positions of Article 106 TFEU and EU free movement rules, rules regulating free circulation and regulating abuse of administrative power to force business operators to engage in monopolistic conduct as prescribed in the AML are together applied under the content of abuse of administrative power to eliminate or restrict competition in

158 J. Fairhust, *Law of the European Union*, 7th Edition, (2010) Pearson Education Limited, at 606.
159 G. Davies, note 148, at 138.
160 J. B. Cruz, note 147, at 87.

the AML. In the following paragraphs, the relation between Articles 33 to 35 and Article 36 will be evaluated.

6.2.1 Cases Study in Free Circulation Provisions

Until now, no case relating to free circulation in abuse of administrative power to eliminate or restrict competition has been made under the AML.[161] Some cases involving this issue and falling within Article 7 of the AUCL will be examined in this section.[162]

Case 1: China Travel Service (CTS), China Youth Travel Service (CYTS) and Huatian International Travel Service (HTITS) were National Tourism Administration approved agent points from which self-financed outbound tourists could organise tours in a province. The provincial Tourism Administration approved China International Travel Services (CITS) establishment of a second outbound department and required the customers of the above three travel services outside of the city to deal with exit procedures through the second outbound department of the CITS, before applying for passports. 250 RMB Yuan was charged for the application service. On July 17, 2000, the municipal Administration of Industry and Commerce (AIC) issued an administrative admonition to the provincial Tourism Administration requiring it to correct its action of restricting the fair competition of the CTS, the CYTS and the HTITS, contrary to Article 7(1) of the AUCL. The provincial Tourism Administration also supported this administrative decision.[163]

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[161] However there are several cases referring to other issues of the AML being made, for example, monopoly agreement to divide the concrete sales market, see: http://www.saic.gov.cn/ywdt/gsyw/dfdt/xxb/201101/t20110126_103772.html (last visited March 1, 2012); abuse of market dominance on serial right of network literature, see: http://ipr.court.gov.cn/sh/bzdjz/201001/U020110420340291408519.pdf (last visited March 1, 2012); and a series of cases on examination of merges and acquires, see: http://fldj.mofcom.gov.cn/zcfb/zcfb.html (last visited March 1, 2012).

[162] The AUCL and the AML have similar provisions on the issues of abuse of administrative power to eliminate or restrict competition. Furthermore the practical experience on the AUCL has great exploration effect on the practice of the AML in the future. In the interview with the person in charge of Competition Enforcement Organisation of State Administration for Industry and Commerce on three regulations referring to the Anti-Monopoly Law, it is said that according to the provisions of the AML, these regulations are formulated on the basis of practice on preventing governments' and their departments' acts of abuse of administrative power to eliminate or restrict competition. See: http://www.saic.gov.cn/gzhd/hdzb/xxb/201101/t20110107_103389.html (last visited March 1, 2012).

[163] Fair Trade Bureau of State Administration for Industry and Commerce and Research Centre of

Case 2: A beer factory, one of the major local taxpayers, reported to its county government that their sales of beer had dropped because of the flood of beers coming from outside the locality. In consideration of the fiscal revenue, the office of the government, in the name of the local government, had released a document which required the local wholesalers, retailers and other business operators exclusively to sell local beers from July 15, 1996. Meanwhile, beers sellers from outside were forced to sell at a reduced price before that day. A beer factor from outside reported this matter to the superior municipal AIC in October 1996. The AIC investigated and considered that the county government's conduct of abuse of administrative power to eliminate or restrict the commodities from outside the locality from entering the local market fell within Article 7 of the AUCL and reported to its municipal government. The municipal government adopted the opinion and ordered this county government to make correction and imposed punishment on the persons directly liable.[164]

Comparison of the above two suggests, there are points that need to be recognised. In the first case exit procedure application assistance was a kind of service provided for remuneration and beer in the second case is a kind of valuable material in commercial transactions. Both fell within 'commodities' in Article 33.

In contradistinction to the cross-border requirements in the EU, 'locality' and 'outside the locality' are the important elements in these cases. Service in the first case was created for outbound tourists outside the city who were the customers of the other three travel agents. The boundary in this case was the 'city'. Beer in the second case from outside the county in issue met barriers to free circulation and sale in this county, because of an administrative document issued a government.

Finally, in the first case, when they received outbound trip arrangement services, tourists

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International Law of Chinese Academy and Social Science, *Typical Cases of Anti-Monopoly and Executable Investigation on Chinese Anti-Monopoly [反垄断典型案例及中国反垄断执法调查]*, (2007) Law Press, at 99-101.

164 Jiangsu Province Bureau of Industry and Commerce Administration, *Typical Cases Analysis on Anti-Unfair competition [反不正当竞争典型案例评析]*, (2003) China Industry and Commerce Press at 68-71.

from outside of the city had to face barriers of a more complicated application procedure and were charged an extra fee by the provincial Tourism Administration. This case brought trade barriers to the CTS, the CYTS and the HTITS in terms of providing services in the market from outside the locality and should fall within Article 33 of the AML, imposing discriminatory charge and setting barriers to services from moving outside the local region.[165] As both administrative actions constructed prima facie abuse of eliminate or restrict the free circulation and competition in the market, Article 7 of the AUCL should apply to these two cases. And in case of the AML, both cases should also fall within Article 33 of the AML.

6.2.2 Common Characteristics

The convergence between free movement and competition rules in the EU may also apply to the relation between Articles 33 to 35 and Article 36 of the AML. First and the most important, similar to the application to public authorities in free movement rules and Article 106 TFEU, Articles 33 to 36 regulate administrative conduct. They have a common prerequisite that 'any administrative organ or organisation empowered by a law or administrative regulation to administer public affairs' fall within these provisions. A case merely relating to business operators but not administrative power will not be considered under these provisions.

Second, Articles 33 to 35 and Article 36 of the AML require 'a unified, open, competitive and orderly market system'. Articles 33 to 35 aim to secure it by controlling abuse of administrative power in setting regional blockages to restrict free circulation in the local market, while Article 36 controls according to effect of abuse of administrative power on monopolistic conduct of business operators. A fair and competitive business should be maintained in the market, although a 'relevant market' is defined on the commodity scope

[165] In the specific conditions on the free circulation provision, Article 33 mostly focuses on the 'import' of commodities from outside the locality, but has limited regulations on the 'export' problem of local commodities, although there is a residual condition in Article 33(5), other conduct for the purpose of hampering commodities from free circulation between regions. This case also violated designated purchase in Article 7(1) of the AUCL, as well as Article 32, the similar designated purchase provision in the AML.

or territorial scope for specific commodities in Article 36 while a 'local market' which is more favourably examined by the territorial scope of administrative influence of an public authority is required in Articles 33 to 35.

Third, cases falling within Articles 33 to 36 should be relative to economic activities. As stated previously, 'monopolistic conduct' in Article 36 must be economic activities.[166] No matter the free circulation of commodities in Article 33, tendering and bidding in Article 34 or investment and setting up branches activities in Article 35, relates to activities with economic element.

6.2.3 Differences

There are two significant differences between Articles 33 to 35 and Article 36. They impose different requirements of business operators. Article 36 concerns the existence or potential effect on business operators. Abuse in administrative conduct should have an adverse effect on a specific business operator for the provision to apply to its monopolistic conduct. Apparent administrative restriction or empowerment is a necessary condition of the application of Article 36. Articles 33 to 35 focus on the restriction of free circulation of abuse of administrative power, without a direct requirement of business operators' anti-competitive conduct. An influence or potential influence of free circulation restriction is sufficient for an administrative conduct to constitute a violation of Articles 33 to 35.

Articles 33 to 35 and Article 36 have differently direct effect on abuse of administrative power. Articles 33 to 35 require direct effect of restriction of free circulation of goods, services, tendering and bidding, investment or establishing branches activities between locality and outside the locality. Article 36 requires a direct effect on monopoly agreement and abuse of market dominance, the monopolistic conduct as prescribed in the AML. The effect of 'eliminating or restricting competition' in Chapter Five of the AML includes these

[166] See para. 4 of Chapter Four of this thesis.

two direct effects in different provisions.[167] Nor is freedom of movement is a general characteristic of anti-competitive conduct in EU competition law.

The Supplementary Provisions' effort to combine these articles in a united provision is merely a kind of formalism but will not have any effect on harmonisation of the content of the rules of free circulation and provisions on abuse of administrative power on monopolistic conduct. It should be recognised that the two significant distinctions indicate the gap between these two rules, although they do have several common characteristics. Separate consideration of Articles 33 to 35 and Article 36 should be applied.

7. Exceptions in EU Free movement Rules and the Free Circulation Provisions of the AML

7.1 EU Examples

7.1.1 Exceptions from Treaty Provisions

Exceptions to free movement of goods, services and investment in the EU appear in two areas. One is generally applied exceptions listed in Treaty provisions and the other is the 'rule of reason' principle in case law. The former category includes Article 36 TFEU on goods, Article 52 TFEU on establishment and services,[168] and Article 65 on capital. In Article 36 TFEU, 'public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property' may provide grounds for exception to free movement of goods provisions in both distinctly applicable or indistinctly applicable measures. Article 52 TFEU also requires that 'law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health' shall be the

[167] See para. 3.3 of Chapter Three of this thesis.
[168] Article 62 TFEU on freedom of services states: '[t]he provisions of Articles 51 to 54 shall apply to the matters covered by this chapter.'

exceptions on freedom of establishment and services. Discriminatory actions may be justified under this provision. Article 65 TFEU has two kinds of exception: differential fiscal treatments on residents and non-residents and restrictions on grounds of public policy or public security. Both kinds of exception in capital movement are different from the other exceptions in that they merely apply to non-discrimination measures.[169]

It is clear that most of the exceptions are based on public interest. This public interest as distinct from the 'services of general economic interests' in Article 106 TFEU[170] cannot be purely economic.[171] The extent of public interest should be interpreted narrowly based on listed excuses in each provision. This principle is broadly accepted in all the free movement provisions.[172]

7.1.2 Exceptions from Case Law

The 'Rule of reason' exceptions which are created in case law are expressed as 'mandatory requirements', 'objective justification', or 'overriding requirements of public interest' in the Court's judgments. The principle of mandatory requirements was introduced in *Casis de Dijon*. The Court ruled that 'effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer' measures can be justified.[173] The mandatory requirements are also expanded into environmental protection,[174] protection of national, cultural and social value protection[175] and national or

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169 See Article 65(3) TFEU that '[t]he measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.'

170 See Chapter Four of this thesis.

171 For example, in the case of *Campus Oil*, the Court confirmed that [Article 36 TFEU] refers to non-economic matters, and decided that in this case, 'the aim of ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations and thus as capable as constituting an objective covered by the concept of public security.' See Case 72/83, *Campus Oil Limited and Others v Minister for Industry and Energy and Others* [1984] 3 CMLR 544, para. 35. In *Verkooijen*, the Court also pointed out on freedom of capital that 'aims of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty.' See Case C-35/98, *Staatssecretaris Van Financien v Verkooijen* [2002] 1 CMLR 48, para. 48.

172 See J. Fairhurst, note 158, at 628; P. Craig and G. Burca, note 60, at 727; and S. A. Vries, note 62, at 50.

173 See Case 120/78, *Rewe Zentrale AG v Bundesmonopolverwaltung fur Branntwein*, note 104, para. 8.

174 The protection of the environment was considered in *Association de Defense des Brulerus D'Huiles Usagees* as a justified exception. *Commission v Danmark* further confirmed that 'protection of the environment is a mandatory requirement which may limit the application of [Article 36 TFEU] of the

regional socio-cultural characteristics.[176] Objective justification on freedom of services was established in *Van Binsbergen*. The Court stated that the imposition of a residence requirement could be justified since it ensures 'observance of professional rules of conduct connected, in particular, with the administration of justice and with respect for professional ethics'.[177] However the Court did not identify the exact content of objective justification in this case; it sets up the test for justification in *Van Binsbergen*, as well as in *Alfred John Webb*.[178] A similar approach was also adopted in freedom of capital. An objective justification in the public interest could constitute a justified reason for a measure's falling outside Article 63 TFEU.[179]

The context of exceptions in the 'rule of reason' partly coincides with the exceptions listed in the Treaty provisions. Both of them concern public interest. However it is said that the former are not a broader interpretation of the latter, but create a new extent of exception to free movement provisions.[180] As with the exceptions in provisions, a measure satisfying the rule of reason should not be a matter of pure economic interest. Finally, the rule of reason principle only applies to indistinctly applicable measures. A measure with directly discriminative effect will not be considered. The Court stated that measures 'without discrimination to both domestic and imported products'[181] will be applied and this

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Treaty'. See Case 240/83, *Association de Defense des Brulerus D'Huiles Usagees* [1985] ECR 531 and Case 302/86, *E.C. Commission v Danmark* [1989] 1 CMLR 619, paras. 7-9. This exception also available in Case C-463/01, *Re Verpack V: Commission of the European Communities v Germany* [2005] 1 CMLR 34, paras. 76-77 and Case C-320/03, *Re Ban on Night Lorry Traffic: Commission of the European Communities v Austria* [2006] 2 CMLR 12, paras. 70-73.

175 See the creation of cinematographic works issue in Cases 60 and 61/84, *Cinetheque S.A. and Others v Federation nationale des Cinemas Francais* [1986] 1 CMLR 365, para. 23.

176 See the opening hours of retail premises issue in Case 145/88, *Torfaen Borough Council v B&Q Plc* [1990] 1 CMLR 337, paras. 12-14.

177 Case 33/74, *J.H.M. Van Binsbergen v Bestuur Van de Bedrijfsvereniging voor de metaalnijverheid*, note 24, para. 14.

178 Case 279/80, *Alfred John Webb* [1982] 1 CMLR 719. The test for justification will be discussed in the following paragraphs.

179 See Joined Cases C-515, 519-524, and 526-540/99, *Feisch and Others v Burgermeister Der Landeshauptstadt Salzburg and Another* [2004] 1 CMLR 44, paras. 33-34 and Case C-213/04, *Burtscher v Stauderer* [2006] 2 CMLR 13, paras. 44-46.

180 See D. Chalmers, G. Davies and G. Monti, note 16, at 767. The standard of public interest in rule of reason in free movement will be much broader than the exceptions adopted in provisions, since exceptions in provisions should be strictly adopted based on the exact listed areas.

181 See Case 788/79, *Italian State v Herbert Gilli and Paul Andres* [1981] 1 CMLR 146, para.6.

condition is adopted on a number of occasions. [182]

7.1.3 Procedures in Justifying Exceptions

The test on determination of exceptions which applies to both approaches generally includes three steps. First, a measure should satisfy a legitimate public interest. 'A legitimate public interest' has distinct content according to the different freedoms and approaches applying in a case. The exceptions in provisions in specific freedoms have different requirements and the standards between the exceptions in provisions and in rule of reason also have their own requirements. Measures of a purely economic nature cannot be considered for exception. Both kinds of exception have this characteristic. Second, whether there is a distinctly applicable measure or an indistinctly applicable measure in a case? This should be distinguished because the exceptions regulated by provisions in freedom of goods, establishment and services both to measures with and without discriminative effect. However the exceptions regulated by freedom of capital provisions, as well as the rule of reason, merely apply to measures equally applicable to both original state and other member states.

The third condition of this test is the proportionality principle. This principle also contains three elements. One is an authentically causal connection between an adopted measure and the aim pursued. In *Commission v Belgium*,[183] although the Belgian government argued that the measure which preserved fiscal coherence should be justified under [Article 65(1) (b) TFEU], the Court followed the Advocate General's opinion that 'there is no direct link between any fiscal advantage and a corresponding disadvantage which ought to be preserved in order to ensure fiscal coherence'.[184] Therefore, the contested measure in this case could not be justified. The second is the necessity to apply the contested measure to ensure a legitimate aim. In *Re Golden Shares*,[185] the Court required that 'the national

[182] For example, Case 113/80, *Re Restrictions on Importation of Souvenirs: E.C. Commission v Ireland* [1982] 1 CMLR 706, Case 33/74, *Van Binsbergen*, note 24, and Case C-213/04, *Burtscher*, note 179.
[183] Case C-478/98, *Loans by Belgian Residents: E.C. Commission v Belgium* [2000] 3 CMLR 1111.
[184] Ibid., para. 35.
[185] Case C-503/99, *Re Golden Shares: E.C. Commission v Belgium* [2002] 2 CMLR 50.

legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it',[186] besides confirmed a direct link between the deductibility of contributions and the liability to tax the sums payable by insurers under pension and life assurance contracts. If the restriction is out of proportion to the legitimate aim, a national measure may be justified disproportionate. The third condition is that there be no alternative and less restrictive choice available. In *Van Binsbergen*, the Court pointed out that if the public interest in the administration of justice could be satisfactorily achieved by a measure which was less restrictive, the contested measure would be incompatible with the proportionality test.[187] And then the Court provided an alternative of choosing of an address for service from a place of residence approach. Thus while a State measure cannot be replaced by an alternative choice which has the same effect but is less restrictive of free movement, this measure will satisfy the proportionality test. However, it should also be noted that the Court rarely applies all three elements and on some occasions the proportionality principle may even not be considered.[188]

7.2 The Effect on the AML

As explained in Chapter Four of this thesis, there are no exceptions created in provisions in Chapter Five of the AML.[189] Whether any exception should be required for the free circulation rules in Chapter Five of the AML, and if so, how it should be established will be discussed below.

7.2.1 Necessity

It is necessary to adopt exceptions particularly those applying to free circulation. The fundamental reason is the balance of economic and social interest. Free circulation provisions in the AML are to maintain a free market and fair competition in the market economy, so as to protect consumer interest, while exceptions on grounds of public interest

[186] Ibid., para. 45.
[187] See Case 33/74, *Van Binsbergen*, note 24, para. 16.
[188] See Sybe A. de Vries, note 62, at 56.
[189] See para. 5 of Chapter Four of this thesis.

are to avoid damage to entire social public interest. In some circumstances the disadvantages of a discriminatory or restrictive measure on economic elements may be weaker than the damage to public interest brought by adopting a discriminatory or restrictive measure. In terms of the growth and decline of the relative benefit, abolishing a discriminatory or restrictive measure may cause greater loss than maintaining the contested measure. Exceptions can avoid the negative effect of free circulation provisions. On the one hand, the current provisions mostly focus on directly discriminatory measures. Prohibition of a directly discriminatory action may also lead to damage to social public interest, although discriminatory action is by definition unfair and anti-competitive. On the other hand, in the light of the above discussion of objectives of free circulation under the AML,[190] not only directly discriminatory measures, but also obstacles restricting free circulation should be regulated under free circulation provisions. The exceptions to provisions on obstacles to restrict free circulation are more reasonable, because direct discriminatory measures themselves have obvious unfair characteristics, but the nature of obstacles is based on the effect of certain measures. The evaluation of exception is a comparison of conflicts of interests, but does not include consideration of the unfairness inherent in direct discrimination.

7.2.2 Exception Test

Merely abuse of administrative power conduct with directly discriminatory effect will fall within Articles 33 to 35 of the AML. Indirect discriminatory measures or obstacles restricting free circulation effect are automatically not regulated by these provisions. However the following discussion on an exception test will be based on objectives including both directly discriminatory and obstacles restricting free circulation administrative conduct which is a proposal suggested in this thesis.

As discussed in Chapter Four of this thesis, the public interest is a reasonable excuse exception for controlling abuse of administrative power in the AML. In consideration of

[190] See para. 4 of this chapter.

the specific characteristics of free circulation provisions in Articles 33-35 of the AML, will public interest also apply as the exception?

Articles 33 to 35 of the AML focus on the restricting of free circulation or anti-competitive effect of abuse of administrative power. Monopolistic conduct prescribed in the AML is not required.[191] Determination of the intention or effect of a business operator in restricting free circulation is even not a necessary condition of identifying an abuse of administrative power falling within these articles.[192] The public service obligation of administrative power requires properly consideration of the legal, reasonable and essential elements of their conduct as made applicable under free circulation provisions in the AML.

Adoption of the exception test applying in the EU free movement rules could have a positive effect on the development of exceptions in the AML. Public interest in the free movement provisions in the EU is similar to the public interest suggested as exception from abuse of administrative power in the AML.[193] 'Public interest' concerns public morality, public policy, public health and security, protection of the environment, the protection of culture and education, and may provide grounds for an exception from the EU free movement provisions.[194] Commonality, reasonability and legitimacy are their common characteristics.

Several elements should be recognised when public interest is applied. First, an abuse of administrative power which is considered a candidate for exception should already be determined to be conduct with discriminatory effect or restricting free circulation and falling within Articles 33-35. Only a measure which should be regulated under free circulation provisions in the AML may constitute an exception.

Second, only if a measure corresponds to legitimate public interest can it constitute an exception from free circulation. 'Legitimate public interest' in the EU is defined in Treaty

191 See para. 3.3 of Chapter Four of this thesis.
192 See para 3 of this chapter.
193 See para. 5.2 of Chapter Four of this thesis.
194 See para. 6.1 of this chapter.

provisions on free movement and the 'rule of reason' principle in case law.

Third, whether the discriminative conduct and the obstacles of restricting free circulation should be distinctly justified should be answered? As discussed above, direct discriminatory measures and creating obstacles to free circulation have a distinguishing effect on the appearance and influence as well as the cost on affected interest. In the EU, as a result, there are fewer exceptions for direct discriminatory measures which merely stated in provisions. However at the same time, there are more exceptions applying to distinctly applicable measures, including the exceptions listed in provisions and the rule of reason test in case law. China is a statute legal system. Exceptions can only be created by legislation. Both discriminatory conduct and obstacles to free circulation have great impact on the abuse of administrative power and on the competition market. Generally applying a common requirement of law could be a better way to control both kinds of measures restricting free circulation. Meanwhile a related legal interpretation [195] should be formulated to apply stricter conditions to directly discriminatory measures than non-discriminatory obstacles to justify the exceptions to free circulation provisions.

Finally, public interest should be justified strictly and not be the only condition to be fulfilled when an exception is examined under abuse of administrative power as well as free circulation rules in the AML.[196] As stated in the discussions on the further test in respect of SGEI in Article 106 and on public interest in the free movement rules, there are three possible alternatives: essential requirement, economically acceptable conditions and proportionality principle.[197]

The proportionality principle should be adopted in the exception test on free circulation in the AML. On the one hand, it is necessary to use this principle to justify

[195] Legal interpretation right is vested to Standing Committee of the National People's Congress (SCNPC), according to Article 42 of Legislation law of the People's Republic of China. Judicial interpretation is a kind of legal interpretation and vested to the Supreme People's Court and the Supreme People's Procuratorate by Article 2 of Resolution of the Standing Committee of the National People's Congress Proving an Improved Interpretation of the Law [全国人民代表大会常务委员会关于加强法律解释工作的决议] which is published and took effect on June 10, 1981.

[196] See para. 5.2.2 of Chpater Four of this thesis.

[197] See para. 5.1 of Chapter Four of this thesis and para. 7.1.3 of this chapter.

whether an administrative measure can be regarded as an exception. Proportionality can not only make sure an administrative measure has the aim of public interest operating in a reasonable degree, but can also avoid putative abuse of administrative power's exceeding a reasonable degree to constitute an exception by reason of public interest, and damage the free circulation in the market. On the other hand, it is feasible to adopt the proportionality principle in the test. It is widely discussed in the field of Administrative Law. Lots of scholars insist that the proportionality principle should be primary in Administrative Law and combined with reasonableness as a primary principle,[198] although some argue that this principle should be a specific but not a primary principle in administrative legislation[199] and some disagree to adopt the proportionality principle.[200]

However, similar principles have been adopted in legislation and in practice. For example, Article 28(3) (5) of the Administrative Reconsideration Law[201] states that if a specific administrative act is obviously inappropriate, the administrative reconsideration organ can annul, alter or confirm it as illegal by decision. 'Obvious inappropriateness' includes an equivalent standard that the level of an administrative action should be proportionate to the degree of harm of contested conduct.[202] Another concept in Administrative Law is 'obviously unfair' in Administrative Procedure Law[203] which also states that 'if an administrative sanction is obviously unfair, it may be amended by judgment.'[204] Unfortunately, no concept or clear explanation of these principles has been clearly stated in administrative law or other laws in China.[205] But the Supreme Court went a little bit

198 See Y. Zhou, *The Origin of Administrative Law [行政法原论]*, (2000) China Fangzheng Press; Z. Cui, *A New Introduction of Administrative Law*, (2004) Chinese Science and Techonology Press; and J. Hu, *Administrative Law [行政法学]*, (1998) Law Press. Two generally accepted primary principle of administrative law are legality principle and reasonableness principle.

199 For example, B. Ye, *Administrative Law [行政法学]*, 2nd Edition, (2003) Wuhan University Press.

200 For example, H. Yang and Z. Zhang, *The Basic theory Research on Chinese Administrative Law [中国行政法基本理论研究]*, (2004) Beijing University Press; and M. Jiang, *Administrative Law and Administrative Procedure Law [行政法与行政诉讼法]*, 3rd Edition, (2007) Beijing University Press and Higher Education Press.

201 Administrative Reconsideration Law of the People's Republic of China [中华人民共和国行政复议法] was promulgated by Order No. 16 of the President of the PRC and took effect on October 1, 1999.

202 See:http://www.chinalaw.gov.cn/article/dfxx/dffzxx/yn/200707/20070700021253.shtml (last visited on March 1, 2012).

203 Administrative Procedure Law of the People's Republic of China [中华人民共和国行政诉讼法] was promulgated by Order No. 16 of the President of the PRC and took effect on October 1, 1990.

204 See Article 54(4) of Administrative Procedure Law.

205 See T. Liu, 'The Proportionality Principle Research in Administrative Law [行政法的比例原则研究]', (2012) 1 *Legal and Economy* p8; W. Cheng, 'Introduction of the Proportionality Principle from the

further and considered a similar principle in a judgement in 1999.[206] It stated that '[t]he planning department shall order Huifeng Company to adopt corresponding corrective measures depending on the level of its influence. These measures shall not only achieve the administrative management objective, but also protect the interest of the other party. These measures shall be operated in the context of the objective and target of administrative enforcement and shall apply the minimum harm to the interest of the other party.' Compared to the proportionality principle in the EU law, a legitimate aim and minimum restrictive choice were stressed by the Supreme Court in this judgement.

Although Administrative Law and abuse of administrative power provisions in the AML are operated according to different departments of law, they have an important common ground that abuse of administrative power is going to be controlled. These smiliar principles in administrative legislation still face difficulties in application, due to the lack of clarity in the concepts and a standard test. Thus the experience of the proportionality principle in the EU will also have a positive effect on the exception test in free circulation rules under the AML.

To summarise, the AML should learn from the experience of applying exception and tests on free movement in the EU. They should have a similar method with consideration of legitimate public interest and the proportionality principle. However there are two differences in the procedures of justifying exceptions on free movement. First, different from the distinct treatments on distinctly applicable and indistinctly applicable measures in the EU, the test for exceptions is better to treat both kinds of administrative conduct with unified conditions in the AML. Second, legitimate public interest generally equally applies

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Administrative Legislation in Abroad [从国外行政法法规看比例原则之引入]', (2008) 31 *Legal System and Society* p13; H. Li, 'Research on Administrative Proportionality Principle [行政比例原则探析]', (2008) 5 *Administrative Tribune* p67; D. Xu, 'Introduction and Application of the Proportionality Principle in China's Administrative Law [比例原则在我国行政法上的引入和应用]', (2006) 8 *Public Administration and Law* p89.

206 *The Appeal case of Administrative Penalty between the Planning Department of Harbin City Heilongjiang Province and Huifeng Industrial Development Corporation Limited*, The People's Supreme Court Administrative Litigation Judgment (1999) Final No. 20, available at http://202.113.28.107/jingpingke/Law/panliziliao4.html (last visited March 1, 2012). Also see Z. Zhan, 'Proportion Principle in Administrative Law and Its Judicial Application [行政法上的比例原则及其司法运用]', (2003) 1 *Administrative Law Review* at 69.

to all kinds of free circulation in the AML, while the four freedoms have distinct treatments on provisions and on case law.

8. Summary

To compare the relation of abuse of administrative power in competition between EU and China, it is necessary to examine the regulations on free movement in the EU and the relation with Article 106 TFEU, since the theory of abuse of administrative power to eliminate or restrict competition includes not only the content of competition rules but also the regulations of free circulation.

This chapter starts with the close correspondence of rules governing free movement and competition rules in the EU, especially the common objective of State measures' falling within the scope of Article 106 TFEU and the free movement provisions. The common basis of free movement rules in the EU and rules governing abuse of administrative power under the AML has been discussed. Both the EU and China seek to eliminate trade barriers, to promote free movement and to establish a single competitive market. In terms of territorial scope, both the market boundaries are the territory of administrative powers, although EU free movement rules focus on trans-frontiers trade while the AML flexibly applies based on the affecting area of a public authority in a single case. With the exception of measures concerning free movement of persons and fiscal barriers, free movement provisions in the EU and Articles 33 to 35 under the AML have similar classification of goods, services, capital and establishment.

Distinctions on the basis of common theory of free movement rules in the EU and provisions in the AML are also compared and analysed. This comparison is an important part of this chapter. First, the existing requirements of discrimination in the AML may not comprehensively maintain the free circulation market. Prohibiting obstacles may be a better approach to regulating free circulation and to improve the combination structure with other anti-monopoly provisions in the AML. Second, Articles 33-35 of the AML

should apply to administrative measures, no matter whether a voluntary or obligatory effect exists. However due to the different influences of subjective activities, different tests should be considered. Third, the AML should follow the experience on application in practice of exception in the EU and create exceptions on grounds of legitimate public interest and the proportionality principle to apply the regulations on free circulation.

Chapter Six

Case Study: Abuse of Administrative Power to Eliminate or Restrict Competition in the Telecommunications Sector

1. Introduction

Having discussed of the background and development of the China's AML, and having compared it with EU competition law and other legislation on the issue of abuse of administrative power to eliminate or restrict competition, we turn to a case study of abuse of administrative power to eliminate or restrict competition in the telecommunications sector.

The telecommunications sector is one of the biggest markets in China. Its importance can be seen from the following figures. By the end of 2010, the value of transactions in the telecommunications business in China reached 3,095.5 billion Yuan,[1] the number of telephone subscribers was up to 1.15 billion, and the income of telecommunications value-added services was 217.5 billion Yuan.[2] The telecommunications sector has gradually transferred from a State-owned monopoly to a competitive market in the last 17 years, and has completed four reorganising reforms.[3] Telecommunications is one of the most significant cases through which to analyse administrative conduct on the competitive market under the AML. Meanwhile, the competition revolution in the telecommunications sector in the EU has been ongoing since 1987.[4] The experience of the EU telecommunications sector may provide valuable lessons for its development in China.

This chapter will be divided into four parts. The first presents the development of the EU telecommunications revolution. Second, the background of China's telecommunications

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1 That is around 300 billion pounds.

2 See 'Statistical Communiqué on the 2010 State Telecommunication Sector' by Ministry of Industry and Information Technology of the People's Republic of China at http://www.gov.cn/gzdt/2011-01/26/content_1793136.htm (last visited March 1, 2012).

3 The fifth reorganising reform is even suggested by some scholars. See: http://news.xinhuanet.com/2011-02/25/c_121121229.htm (last visited March 1, 2012).

4 'Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunication services and Equipments', COM(89) 290 Final. (1987 Green Paper) This document can be considered as 'the starting point of a systematic European policy for the telecommunications sector.' See note 4 of L. Garzaniti and M. O'Regan, *Telecommunications, Broadcasting and the Internet EU Competition Law and Regulation*, 3rd Edition, (2010) Sweet & Maxwell.

revolution and the experience of the EU will be discussed. Third, the question of how the AML applies to the China telecommunications sector will be answered. To correspond to Chapters Three, Four and Five of this thesis, this chapter will also present analysis of telecommunications relating to the background of abuse of administrative power to eliminate or restrict competition discussed in Chapter Three, and the issues of applying provisions on abuse of administrative power in the AML discussed in Chapters Four and Five.

2. Developments in the Telecommunications Sector in the EU

2.1 Background of the EU Telecommunications Sector

The development of EU Telecommunications has gone through a gradual process from state monopoly economy to a competitive market. Before 1987 a majority of Member States of the EU ran a nationalised monopoly in the telecommunications sector.[5] At that time many Member States insisted on state ownership of telecommunication services, because the telecommunications sector was regarded as a public service with important social benefits, whose regulation should depend on government policy.[6] Later in 1987, a Green Paper on Telecommunications[7] was adopted progressively to introduce 'full Community-wide competition to the terminal market and as far as possible and justified at this stage, to telecommunication services'[8] and finally to develop 'a strong telecommunications infrastructure' and 'efficient services' in the Community.[9] The Commission stated that 'an open, competitive market for new service providers and terminal manufacturers can make a substantial contribution to the spread of the new services, under the conditions of rapid development of technology and market opportunities.'[10] The proposals provided by the 1987 Green Paper can be summarised as a three-pronged approach: (1) liberalisation of most telecommunication services and terminal equipment; (2) harmonisation and open access conditions for telecommunications

5 The UK was the only Member State which had already started the process of liberalisation and privatisation. See L. Garzaniti and M. O'Regan, note 4, para. 1-003.
6 OECD Competition in Telecommunications, OCDE/GD(96)114.
7 1987 Green Paper, note 4.
8 Ibid., at 15.
9 Ibid., See Figure 13. It further explained that the objective includes 'providing the European user with a broad variety of telecommunication services on the most favourable terms, ensuring coherence of development between Member States, and creating an open competitive environment, taking full account of the dynamic technological developments underway.'
10 Ibid., at 52.

networks; and (3) Separating the regulatory and operational functions of Telecommunications Administrations and applying competition provisions.[11]

Separating the regulatory and operational functions of telecommunications administrations is a basic requirement in a fair and competitive market. While telecommunications administrations play both the roles of regulator and market participant, they may discriminate against new participants or place private participants at a competitive disadvantage in the market. The operation of regulatory functions was considered a major obstacle to introducing competition in the telecommunications market.[12]

A number of directives were adopted to achieve the purposes of the 1987 Green Paper of liberalisation of most telecommunication services and terminal equipment.[13] A distinction between 'reserved services' and other competitive services was maintained before 1998, although the sphere of reserved services was narrowed step by step. Exclusive or special rights in specific areas of telecommunications were gradually abolished by these directives and full liberalisation in telecommunications was reached in 1998. The 2002 Liberalisation Directive extended the principle of full liberalisation to all the markets of telecommunication services, including broadcasting services and Member States were required to inform the Commission of the measures adopted in their national legislation by July 24, 2003.

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11 Ibid., at 14-15, Figure 13, at 184-185. Also see L. Garzaniti and M. O'Regan, note 4, para. 1-004; and J. D. Braun and R. Capito, '*The Emergence of EC Telecommunications Law as a New Self-Standing Field within Community Law'*, in C. Koenig, A. Bartosch, J. Braun and M. Romes, '*EC Competition Law and Telecommunications Law'*, 2nd Edition, (2009) Wolters Kluwer Law & Business, at 42-47.

12 See L. Garzaniti and M. O'Regan, note 4, para.1-009.

13 Commission Directive (88/301/EC) of May 16, 1988 on Competition in the Markets in Telecommunications Terminal Equipment, O.J. 1988 L131/73 (1988 Terminal Equipment Directive). Commission Directive (90/388/EC) of June 28, 1990 on Competition in the Markets for Telecommunication services, O.J. 1990 L192/10 (1990 Services Directive). Commission Directive (94/46/EC) of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications OJ [1994] L268/15 (1994 Satellite Directive). Commission Directive (95/51/EC) of 18 October 1995 amending Directive 90/388 with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunication services OJ [1995] L256/49 (1995 Cable Television Network Directive). Commission Directive (96/2/EC) of 16 January 1996 amending Directive 90/388 with regard to mobile and personal communications, OJ [1996] L20/59 (1996 Mobile Directive). Commission Directive (96/19/EC) of 13 March 1996 amending Directive 90/388 with regard to the implementation of full competition in telecommunications markets, OJ [1996] L74/13 (1996 Full Competition Directive). Commission Directive (2002/77/EC) of September 16, 2002 on Competition in the Markets for Electronic Communications Networks and Services, O.J. 2002 L249/21 (2002 Liberalisation Directive).

2.2 Technology Development for the Competitiveness of Telecommunications Sector

The development of telecommunications technology is an important motivator of change in the telecommunications sector from state monopoly economy to an open and competitive market. The development of telecommunications in the EU is a good example.[14]

First, more advanced technologies in basic telecommunication services were introduced, for example - from the Commission's research - digitisation, optical fibres, the integration of micro-electronics components and software, and the development of cable and satellite links.[15] These technological innovations could process much more sophisticated data and transmit information at considerably higher rates and at much lower cost, universally replacing early-stage technologies and reducing the barriers facing new operators entering the telecommunications market. The Commission finally concluded that, 'the resulting convergence of telecommunications, data-processing and audio-visual media will alter the nature of telecommunications and considerably widen the range of services proposed.'[16]

Second, 'the emerging new telecommunication services – and notably so-called value-added and information services – will have a major impact on the future trade ability of services in general and on the location of economic activates.'[17] Four main technological developments were concluded in the Green Paper.[18] Traditional fixed-line voice services were not fully satisfied, and basic mobile and internet services and other related so-called value-added services was further required,[19] for example EDP time-sharing, database services, videotext services, ticket reservation, automatic bank tellers and other financial services, other retail services including telephone shopping, electronic data interchange within industries, mailbox services, word-processing and related services.[20] It is difficult

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14 Telecommunications technology development emerges world-wide, not only in the EU. The Green Paper states that '[t]his world-wide transformation is due to the profound technical change which is currently taking place: the progressive merger of telecommunications and computing technology, and the growing integration of spoken, written and audio-visual communication.'

15 See Progress Report on the Thinking and work Done in the Field and Initial Proposals for an Action Programme, Communication from the Commission to Council on Telecommunications COM(84)277 final, 18 May 1984, at 4.

16 Ibid.

17 1987 Green Paper, note 4, at 4.

18 Ibid., at 28.

19 Actually, there is no clear distinction between 'basic services' and 'value-added services' in the EU telecommunications sector. Ibid., at 36.

20 Ibid., at 51.

for a single monopolised enterprise to provide all types of telecommunication service required. This presents an opportunity for new operators to participate in the telecommunications market and improve effective development in this sector.

Third, new telecommunication services operators can provide more telecommunication services, especially so-called value-added services, relatively independently or outside the infrastructure network, through new sophisticated terminal equipment.[21] This trade is not bound by existing basic telecommunications networks or operators. A free and competitive market is created.

In the period of rapid spread of telecommunication services an open market and more competitive operators are required. Therefore, the nature of a monopolised market is no longer suitable. In many countries, especially in the EU, a full liberalisation of the telecommunications sector has been completed.[22]

2.3 Interconnections in the Telecommunications Sector

'Interconnection' was mentioned in the Interconnection Directive.[23] Interconnections policies have two development stages based on the degrees of telecommunication liberalisation in the EU. The Open Network Provision Directive[24] was introduced as early as 1990 and amended in 1997 to open efficient access to public telecommunications networks and services. And regulation of unbundled access to the local loop was adopted in 2000 to meet the new situation of full liberalisation.[25]

With the process of determining the Significant Market Power (SMP) reformed in 2002, the interconnection regime has transferred from regulatory obligations to competition rules-based sector-specific regulations. Once a market is deemed to be effectively

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21 Ibid., at 41.

22 L. Garzaniti and M. O'Regan, note 4, at 4.

23 See Article 2(1) of Commission Directive 97/33/EC of June 30, 1997 on Interconnection in Telecommunications with regard to Ensuring Universal Service and Interoperability through Application of the Principles of Open Network Provision, O.J. 1997 L199/32 (Interconnection Directive). Interconnection Directive was amended by Directive 98/61/EC of September 24, 1998 amending Directive 97/33 with regard to Operator Number Portability and Carrier Pre-Selection, O.J. 1998 L268/37.

24 Commission Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunication services through the implementation of open network provision, O.J. 1990 L192/1 (ONP Directive).

25 Regulation 2887/2000/EC of December 18, 2000 on Unbundled Access to the Local Loop, O.J. 2000 L336/4 (LLU Regulation).

competitive national regulatory authorities (NRAs) shall not impose or maintain any specific regulatory obligations.[26] Network access and interconnection agreement should be on a commercial basis without the intervention of the NRAs.[27]

A three-step procedure is adopted to regulate undertakings with the SMP. First, the the relevant market is defined. The Commission makes a list of recommendations for the relevant product and services market in accordance with the principles of competition law.[28] The NRAs can also identify other markets under national circumstances, pursuant to the principles of competition law and Framework Directive.[29] Second, the effectively competitive characteristics of the market in question and the SMP in the market will be assessed. Article 16(4) of Framework Directive empowers the NRAs to impose appropriate specific regulatory obligations, and maintain or amend such existing obligations in undertakings with the SMP. As mentioned above, only in an ineffectively competitive market an undertaking with the SMP can be determined. Whether a market is effectively competitive should be determined by both the NRAs and the national competition authorities together. An undertaking, either individually or jointly with others, enjoying a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and, ultimately, consumers, shall be deemed to have the SMP.[30] The SMP in Framework Directive is equated with the dominant position concept in EU competition law.[31] Third, after an undertaking or joint undertakings with the

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[26] Article 16(3) of Directive 2002/21/EC of the European Parliament and of the council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services, O.J. 2002 L 08/33 (Framework Directive).

[27] Article 3(1) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities, O.J. 2002 L 108/7 (Access Directive).

[28] See Framework Directive, note 26, Article 15(1) and Annex I. The specific standards of definition and identification of markets were elaborated in later regulations in 2003 and 2007. Commission Recommendation 2003/311/EC of February 11, 2003 on the Relevant Product and Service Markets within the Electronic communications Sector Susceptible to *ex ante* Regulation in Accordance with Directive 2002/21/EC on a common Regulatory Framework for Electronic Communications Networks and Services, O.J. 2003 L114/45, was replaced by Commission Recommendation 2007/879/EC of December 17, 2007 on Relevant Product and Service Markets within the Electronic Communications Sector Susceptible to *ex ante* Regulation in Accordance with Directive 2002/21/EC on a common Regulatory Framework for Electronic Communications Networks and Services, O.J. 2007 L344/65.

[29] See Commission Guidelines of July 11, 2002 on market Analysis and the Assessment of Significant Market Power under the Community Regulatory Framework for electronic communications Networks and Services O.J. 2002 C165/6 (SMP Guidelines).

[30] See Framework Directive, note 26, Article 14(2).

[31] The concept of dominant position in EU competition law was defined in *United Brands* as 'a position of economics strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of tis competitors, customers and ultimately of its consumers.' Case 27/76, *United Brands v the Commission*, [1978] 1 C.M.L.R. 429, para.65. Article 14(2) of Framework Directive also states that

SMP have been identified, the NRAs should impose appropriate regulatory obligations, - e.g. transparency, non-discrimination, accounting separation, compulsory access, price controls and cost accounting - on the SMP operators, based on the distinguished wholesale market or retail market.[32] NRAs wishing to impose extra obligations shall submit requests to the Commission for authorisation.[33] These obligations should not be imposed on operators without the SMP.

2.4 Regulations in Telecommunications Sector and Competition Law

After 1998 full liberalisation was adopted in the telecommunications market and the later so-called '1998 regulatory framework'[34] was created to improve effective competition in the market. The Commission reviewed the 1998 regulatory framework in 1999 and aimed to promote more effective competition in telecommunications sector.[35] Competition Law tended to replace many of the sector regulations as soon as competition was established in the telecommunications market.

Competition rules-based sector-specific regulations were adopted in the telecommunication market where there was no effective competition, for example, in a market with one or more undertakings with significant market power, or a market without sufficient effect under Community competition law. However, the Commission can define markets and other basic principles in accordance with the principles of competition law. The Commission was required to draw up guidelines for the NARs in assessing whether competition is effective in a given market and in assessing significant market power to

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an undertaking with the SMP enjoys a position equivalent to dominance, as well as the statement in Annex II that '[t]wo or more undertakings can be found to be in a joint dominant position within the meaning of Article 14….'. See note 26.

32 Access Directive, note 27, Articles 9-13.

33 Ibid., Article 8.

34 1998 Regulatory Framework included a series of telecommunication services directives, the ONP directives and harmonisation directives on licensing and data protection. Commission directive 97/13/EC of April 10, 1997 on a Common Framework for General Authorisations and Individual Licences in the Field of Telecommunication services, O.J. 1997 L117/15 (Licensing Directive) and Commission Directive 97/66/EC of December 15, 1997 Concerning the Processing of Personal Data and the Protection of Privacy in the Telecommunications Sector, O.J. 1998 L24/1 (Telecommunications Data Protection Directive).

35 See the Result of Public Consultation on the 1999 Communications Review and Orientations for the New Regulatory Framework, COM(2000) 239 Final. Communication from the Commission of November 10, 1999, 'Towards a New Framework for Electronic Communications Infrastructure and Associated Services – The 1999 Communications Review', COM(1999) 539 (1999 Review Communication). The Telecommunications Data Protection Directive was an exception.

operation of functions under competition law rules.[36] Member States should ensure consultation and cooperation between the NARs and between those authorities and national authorities entrusted by competition law.[37] The NARs shall define relevant markets appropriate to national circumstances, in accordance with the principles of competition law.[38]

Competition rules, as an important part of sector-specific regulations, has wide application in every aspect of regulation of the telecommunications sector, from the Commission's Directives and Regulation, to Member States' telecommunications regulations, from economic regulations[39] to social regulations,[40] from the operation of national regulatory authorities to the obligations of undertakings with significant market power.

2.5 Article 106 TFEU in Telecommunications Sector

Since 1987 Green Paper, Article 106 TFEU was applied to telecommunications sectors and their operators. A series of liberalisation Directives were adopted by operation of Article 106(3) TFEU.[41] In terms of application of Article 106, several Member States challenged the 1988 Terminal Equipment Directive and 1990 Services Directive, although the Commission's opinion was finally upheld by the Court of Justice of the European Union (CJEU).[42] France argued that the Commission had exceeded its competence under Article 106(3) to withdraw special or exclusive rights to telecommunications terminal equipment. The Commission denied this, explaining that the telecommunications bodies owed their dominant position to Article 102 TFEU because they 'hold individually or jointly a

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36 See Framework Directive, note 26, para. 27.

37 See Framework Directive, note 26, Article 3(4).

38 See Framework Directive, note 26, Article 15(3).

39 Economic regulations include e.g. regulations on market access or interconnection and aim at 'the maximisation of economic efficiency by creating the conditions for competition to emerge and to continue to exist and in absence of competitive markets, by regulating companies with market power.' See L.aurent Garzaniti and M. O'Regan, note 4, para. 1-016.

40 Ibid. Social regulations, for example universal service obligations or other provisions on services of general economic interest, are based on 'a desire to avoid an undesirable distribution of wealth or opportunity and to ensure wide access to 'essential' services.'

41 'Article 106(3) Treaty on the Functioning of the European Union empowers the Commission to adopt general measures to ensure that member sstates comply, regarding public undertakings and undertakings to which they grant special or exclusive rights, with their Treaty obligations, in particular the competition rules.' See L.aurent Garzaniti and M. O'Regan, note 4, para. 1-005.

42 Some Member States challenged these directives in Case C-202/88, *France v EC Commission* [1991] E.C.R. I-1223; Jointed Cases C-271/90, C281/90 and C-289/90, *Spain, Belgium, Italy v EC Commission* [1992] E.C.R. I-5833.

monopoly on their national telecommunications network'.[43] Granting exclusive or special rights could restrict users to renting such equipment and destroy competition in the terminal equipment market. As a result the Commission should have rights to regulate under Article 106(3), while exclusive or special rights are contrary to Article 106(1). The CJEU supported the Commission's obligation to withdraw exclusive rights, but rejected the claim to special rights.[44] In cases relating to telecommunication services the CJEU followed the judgement in the *Terminals Equipments Directive* against similar arguments by Spain, Belgium and Italy.

Member States or NARs may grant some conditions or exclusive or special rights to incumbent operators with significant market power to restrict competition with new entrants or other existing operators. Article 106(1) TFEU can apply when those rights place incumbent operators in a position of infringing Articles 101 and 102 TFEU. In the case of GSM radiotelephony services,[45] Ominitel, a private mobile undertaking in Italy, was required to pay a substantial licence fee to provide GSM mobile services, while Telecom Italia Mobile (TIM), a public undertaking, owned special rights to operate a GSM mobile network and enjoyed a monopoly on the market, while Telecom Italia, the parent undertaking of TIM, also enjoyed a monopoly in telecommunications networks and voice telephony services. The Commission first identified Telecom Italia's exclusive rights granted in fixed telecommunications network, voice telephony markets and a special right to the GSM radiotelephony network. The relevant market in this case was confirmed as the market for cellular digital mobile radiotelephony services. Later the dominant position of Telecom Italia and its subsidiary TIM, and the abuse of its dominant position were justified.[46] Finally, the Commission considered the application of Article 106(2) TFEU on the operation of services of general economic interest and decided that the performance in law or in fact of a service of general economic interest did not have any effect on initial

43 See Case C-202/88, *France v EC Commission*, note 42, the preamble, para. 13.

44 The CJEU found that 'neither the provisions of the directive nor the preamble thereto specify the type of rights (special rights) which are actually involved and in what respect the existence of such rights is contrary to the various provisions of the Treaty.' See Case C-202/88, *France v EC Commission*, note 42, para. 45.

45 Commission Decision 95/489/EC, Conditions Imposed on the Second Operator of GSM Radiotelephony Services in Italy, O.J. 1995 L280/49.

46 Ibid., paras. 14-17. Telecom Italia and its subsidiary are the only undertakings permitted by law to offer telecommunications networks to the public, voice telephony and analogue radiotelephony in Italy, three markets in which they enjoy a dominant position. Telecom Italia further extended its dominant position in wire telephony or analogue mobile telephony to the market in GSM radiotelephony by increasing the costs of its rival and limited production, market or technical development.

payment.[47] As a result the Commission concluded that Telecom Italia's conduct in imposing a competitive disadvantage in the form of the initial payment on the GSM network constituted an infringement of Article 106(1) TFEU in conjunction with Article 102 TFEU.

Article 106 read in conjunction with provisions of free movement may also be applied where a State measure constitutes a restriction on free movement and grants an undertaking with exclusive or special rights. In *VTM*,[48] VTM was a private undertaking granted by the Flemish Community exclusive right to broadcast television advertising to the Flemish public. The exclusive rights excluded any operator from another Member State from establishing itself on the market of broadcasting television advertising in Flanders. The Commission identified infringement of Article 49 TFEU on free movement of establishment and refused to accept the argument that VTM's monopolisation of advertising was justified by overriding reasons of public interest. The Commission, upheld by the General Court, concluded that Flemish legislation granting a monopoly in broadcasting television advertising infringed Article 106 TFEU in conjunction with Article 49 TFEU.

3 Developments in the Telecommunications Sector in China

With China's economic reforms and Open Up policy in 1978, competition appeared in some industries. The telecommunications sector received a strong incentive for development because of the need for communications services. However, improvement was limited at the beginning owing to its past minor status in the planned economy period.[49] Nevertheless, in the following 30 years, huge changes took place in this sector.

The revolution in the telecommunications sector can be divided into four stages: (1) the monopoly stage, from 1978 to 1994; (2) competition introduction stage, from 1994 to 1998; (3) separation and restructuring stage, from 1998 to 2008; and (4) the deepening structural reform stage, since 2008.

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47 Ibid., paras.26-27.

48 Commission Decision 97/606/EC of June 26, 1997 Pursuant to Article 90(3) of the EC Treaty on the Exclusive Right to Broadcast Television Advertising in Flanders, O.J. 1997 L244/18; and Case T-266/97, *Vlaamse Televisie Maatschappij NV v E.C. Commission* [2000] 4 C.M.L.R. 1171.

49 Under the planned economy, the telecommunications industry only served the government, army and other administrative departments. See B. Holznagel, J. Xu and T. Hart (Editors), *Regulating Telecommunications in the EU and China: What Lessons to be Learned?* (2009) LIT Verlag, at 15.

3.1 Stage One: Monopoly Stage (1978-1994)

Before 1978 telecommunications in China was seriously backward compared with the rest of the world. At that time the post and telecom had small-scale networks, low level technology, bad communication quality, and low efficiency.[50] The penetration rate of telephony was only 0.43. In local telephony equipment the rate of manual telephone switch systems was 30%; long distance telephony and the telegram were mainly transferred by manned services.[51]

At the seventeenth State post and telecom working conference in 1979, the telecommunications department transferred its focus to services of social economy. Price regulation was relaxed. In 1980 a notice on charging users of installation fees for fixed-line telephones for local telephony construction was published by the Ministry of Post and Telecom (MPT) and the State Bureau of Commodity Price (SBCP).[52] However, telecommunications was still a monopolised industry since the MPT was not only the sole business operator in telecommunication market, but also carried out management with mixed functions of administration and enterprise. Administrative measures were the main way of regulating telecommunications. There was no competition existing in the telecommunications sector during the period 1978 to 1994.

3.2 Stage Two: Competition Introduction Stage (1994-1998)

The development of the telecommunications sector in the period 1994 to 1998 was on the basis of national economic system reform at the same stage. The policy of socialist market economy, replacing the previous planned economy, was stated in the 1993 Constitution Revision, and the Modern Enterprise System was introduced.[53]

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50 See http://www.stats.gov.cn/tjfx/ztfx/qzxzgcl60zn/t20090924_402589934.htm (last visited March 1, 2012).

51 See J. Song, Y. Zhu, J. Xu and J. Li, *Competitive Analysis Method and Practice in Telecommunications Sector [竞争分析方法与实践]*, (2009) People's Post and Telecom Press, at 80.

52 Joint Notice on Charging Ministry of Charging Installation Fees from New Users of Local Telephony by Ministry of Post and Telecom and the State Bureau of Commodity Price[邮电部、国家物价总局关于对市内电话新装用户收取初装费的联合通知] was published in 1980.

53 The background of this period was analysed in Chapter Two of this thesis.

3.2.1 Operators in the Telecommunications Sector

The most significant change in the telecommunications sector was the establishment of China Unicom in 1994.[54] As a competitor with the existing monopolistic MPT, China Unicom was set up to provide communications network services to the public. With the market entrance of China Unicom, efficiency of services provided was improved and the expense of receiving services also decreased. However, in the area of traditional fixed-line telecom services, China Unicom's main task was to provide supplementary services for the MPT.[55] Furthermore, until 1998, China Unicom's assets were only 1/260 of those of China Telecom and its sales were only 1/112 of China Telecom's.[56] China Unicom held a minor position in the competition with China Telecom. The telecommunications market was still lacking in efficient competition.

3.2.2 Separation of the Regulatory and Operational Functions

In 1994 there was an important reform on the telecommunications administrative authority. The MPT transferred its operational function in telecom network to the Directorate General of Telecommunications (DGT), under the requirement of the State Council for separation of the regulatory and operational functions.[57] In 1995 the DGT registered as an legal entity in the name of China Directorate General of Posts and Telecommunications (DGPT).[58] The DGPT became a relatively independent State-owned enterprise since its regulatory functions were transferred to other sections of the MPT, while the MPT changed to a relatively simple administration in the telecommunications sector. We may say 'relatively independent' because the real separation of the regulatory and operational functions was

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54 China Unicom was set up in July 1994. There was another enterprise, Jitong Communication Co. Limited, established in January 1994, several months before China Unicom appeared. Jitong was in a weak position because it was built to operate data communication for governments and SoEs.

55 The business scope of China Unicom in fixed-line telecom services was limited to 'transforming and completing the specific telecommunication network owned by Ministry of Railway and Ministry of Electric Power; providing long-distance telephone services to the society with its surplus ability, on the basis of ensuring the specific telecommunication services requirements from railway and electricity; may providing local-telephone service for the districts uncovered by public local-telephone telecommunication network or supplied by insufficient public-local-telephone services'. See the State Council's Reply on Approval of Setting Up China United Telecommunications Limited Corporation [国务院关于同意组建中国联合通信有限公司的批复], which was promulgated by the State Council on December 14, 1993.

56 J. Song, Y. Zhu, J. Xu and J. Li, note 51, at 82. China Telecom is the enterprise that the MPT transferred and established in the separation of regulatory and operational functions in 1995. This change will be mentioned later in this part.

57 See http://tech.sina.com.cn/other/2004-07-26/1443393065.shtml (last visited March 1, 2012).

58 Ibid.

not completed. In some areas, especially at the local level, the communications network was still regulated by both the local DGPT and the Department of Finance (DOF) and the Planning Department (PD) of the MPT.[59]

3.2.3 Overall Developments

There was still no specific regulation of the telecommunications sector apart from administrative measures. In economic terms the business transactions on telecommunications demonstrated great improvement. The values of business transitions on postal and telecommunication services rose by more than 30 percent above those of the previous year, reaching 241.3 billion Yuan in 1998.[60] The public fixed-line network became the second largest communications network in the world. A program-controlled telephone exchange was installed in all the cities above the county level, with the coverage rate reaching 99.8%.[61] A digital, integrated, broadband and personal communication network was gradually built. And in 1997 the policy of separation of post and telecom regulations was adopted by the MPT. In 1998 the DGPT became an independent telecommunication business operator and was renamed 'China Telecom'.

3.3 Stage Three: Separation and Restructuring Stage (1998-2008)

During the period 1998 to 2008 there were several significant developments in the structure regulation system of the telecommunications sector, including institutional reform, competition structure and legislation.

3.3.1 Institutions Reform and Separation of Regulatory and Operational Functions

In 1998 large-scale government institutional reform was carried out by the State Council. This reform required to reorganise government institutions' structure, to transfer government functions to achieve separation of the regulatory and operational functions. Government's functions should be focused on macro-economic control, social regulation

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59 B. Holznagel, J. Xu and T. Hart, note 49, at 15.

60 See the Development Statistics Reports on Communications industry in 1996, 1997 and 1998 from National Informatisation Evaluation Centre. See http://www.niec.org.cn/gjxxh/tjsjit11.htm; http://www.niec.org.cn/gjxxh/tjsjit12.doc; and http://www.niec.org.cn/gjxxh/tjsjit10.htm (last visited March 1, 2012).

61 See http://www.niec.org.cn/gjxxh/tjsjit10.htm (last visited March 1, 2012).

and public services, and the decisions on production and business operation should be handed over to enterprises.[62]

Embodied in the telecommunications sector, the MPT was abolished, while a new Ministry of Information and Industry (MII) was established to integrate planning of the State communications backbone network, broadcasting and television network and specific communications networks for military and other departments, to formulate industrial plans, policies and regulations, to distribute resources rationally and ensure information security.[63] The obligations of the MII restricted its power of administrative regulation. A complete separation of the regulatory and operational functions was introduced in the telecommunications sector. Business operators in the telecommunications market could no longer be regulated or interfered with directly by the telecommunications authorities. This reorganisation encouraged further development of a competitive market.

3.3.2 Basic Telecom Services Operators and Competition in the Telecommunications Market

The competitive structure of the telecommunications market consisted of six State-owned enterprises (SoEs): China Telecom, China Unicom, China Mobile, China Netcom, China Satcom and China Railcom.[64] These six operators provided basic telecom services.

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62 Decision of the First Session of the Ninth National People's Congress on the Plan for Restructuring the State Council [第九届全国人民代表大会第一次会议关于国务院机构改革方案的决定] was adopted on March 10, 1998. See http://www.law-lib.com/law/law_view.asp?id=96550 (last visited March 1, 2012).

63 Ibid.

64 The original China Telecom (DGPT) was resolved into China Mobile, China Telecom, China Satcom and China Paging by the characteristics of services in December 1999, January 2000 and June 2000. China Unicom was also reorganised and merged the China Paging in May 1999. China Netcom and China Railcom were built in December 1999 and December 2000. China Netcom, China Railcom and Jitong were issued Telecommunications Operation Licences later on. In 2002, the existing China Telecom was subdivided into the south part and the north part. The south part which mainly owned the fixed line telecommunication services in 21 provinces in the south of China, was still named China Telecom, and the north part, which mainly owned fixed line telecommunication services in 10 provinces in the north of China was consolidated with the previous China Netcom and Jitong and named China Netcom. In conclusion, until 2002, there were six telecommunications enterprises: China Telecom, China Unicom, China Mobile, China Netcom, China Satcom and China Railcom.

Table 6-1: List of Licensed Basic Telecom Services Areas for Operators in Telecom Market[65]

Operators	**Licensed basic telecom services areas**
China Mobile	Telecommunication services, including mobile data services.
China Satcom	Mobile satellite communication, speech, date and multimedia communication based on satellite transformation technology, technology services and import and export services relating to satellite communication, domestic VSAT communication, communication in telecom, broadcasting and other areas, and other services allowed or approved by the State.
China Railcom	Services including international or domestic communication on speech, data, graphics, multimedia, domestic communication and equipment services.
China Netcom	Fixed telephony, Broadband and data communication.
China Unicom	International and domestic long-distance communication, local telephony services in approved areas, mobile telecom, radio paging and satellite communication services, data communication, internet and other services the State allowed or entrusted.
China Telecom	Kinds of domestic and international fixed-line telecommunication networks and equipment including local radio loop, speech, data, graphics and multimedia communication and information services based on telecom network, and related services of system integration and technique development.

Regarding to the licensed basic telecom services listed above, some areas overlapped and some were divided. For example, China Mobile and China Unicom were the only two operators approved to enter the market in providing mobile services; in the aspect of local fixed telephony services, only China Telecom, China Netcom, China Railcom and China Unicom were licensed to operate. According to the resolution principle on China Telecom in 2002, it is clear that operators' organisation was based on a geographic market division requirement.[66]

The reform of separation and reorganisation broke the duopoly of China Telecom and China Unicom. Competition was further introduced to the basic telecom services and equipment market. Users had more choice in their telecom services. However, efficient competition had not been secured. On the one hand, all operators were State-owned and other enterprises, apart from the existing six operators, were not allowed to enter the basic telecommunication services market. On the other hand, although there were several operators in the telecom market, an operator's providing services were strictly regulated by

[65] The operation areas listed in this table are limited to basic telecommunication equipment and services.
[66] See note 64.

the 'basic telecommunication services operation licence'.[67] A segregated operation mode was adopted and in fact the licences were generally granted to these State-owned operators through the measure of assignment by the MII and communications authorities at the levels of provinces, autonomous regions and municipalities, directly under the Central Government, or as a result of tradition in Telecommunications Regulation.[68] None of them received such a licence by a tendering process. In other words competition in the telecommunication market was not only regulated by market and competition rules but also intervention by administrative measures.

3.3.3 Telecommunications Regulation and Other Regulations

The Telecommunications Regulation was formulated and published in 2000. This was the first comprehensive regulation of the telecommunications sector. The purpose of Telecommunications Regulation is 'to regulate the telecommunications market order, to protect the lawful rights and interests of telecommunications users and service providers and to ensure the safety of telecommunications network and information so as to promote the healthy development of telecommunications.'[69]

The Telecommunications Regulation includes provisions on telecom market access, universal services, construction of telecom and terminal equipment and telecommunication security. The regulations on telecom market access and universal services especially have a close relationship with competition rules.

Article 7 provides that telecom services operation applies to license systems, and no organisation or individual can provide telecom services without obtaining their telecommunication services operation licence. The telecommunication market does not have free market access. Article 8 divides services into basic telecommunication and value-added telecommunication services. Distinct standards apply to each service. The

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67 The 'basic telecom services operation licence' will be further discussed in the following paragraphs.

68 See Article 3 of Telecommunications Regulation: '[t]he Ministry of Industry and Information Technology of the People's Republic of China and the communication administrative bureaus of the provinces, autonomous regions and municipalities directly under the Central Government shall be the administrative departments for the examination and approval of the business permits.' Telecommunications Regulation of the People's Republic of China [中华人民共和国电信条例] (Telecommunications Regulation) was adopted at the 31st regular meeting of the State Council on September 20, 2000 and was published by the State Council on September 25, 2000. This regulation will be further discussed in para. 3.3.3 of this chapter.

69 Ibid., Article 1.

operator of basic telecommunication services is required to share at least 51% equity or stock with a State-owned asset, while there is no specific requirement on private or State-owned nature or stock controlling right for business operators in value-added services. Interconnection and intercommunication of telecommunication networks are encouraged.

Chapter Three of the Telecommunications Regulation lists obligations of operators and Article 44 states in particular that universal services must be fulfilled.[70] However, there is no further provision on the definition, content, determination and compensation measures of universal services. These unclear provisions on telecommunication universal services may bring problems in application, for example, on deciding the necessity of universal services in telecommunications or whether the universal services obligation has been achieved by a telecommunication operator. The market access principle and universal services application will be further analysed in the following paragraphs.[71]

Provisions on Non-public owned investment and foreign investment are specifically stated in two regulations: Several Opinions of the State Council on Encouraging, Supporting and Guiding the Development of Individual and Private Economy and Other Non-Public Sectors of the Economy[72] and Provisions on the Administration of Foreign-Funded Telecommunications Enterprises.[73] The former regulation allowed entry of the monopolised industries and fields, including telecommunications. Non-public capital was encouraged to enter monopolised services industries and fields by equity participation, while in other services, for example, value-added telecommunication services, other ways such as sole proprietorship, joint venture, cooperation and project financing were allowed.

The latter provisions regulated the operation and conduct of foreign investment in the telecommunications market. Similar to the domestic non-public economy in China, foreign investment was also allowed to enter both the basic and value-added telecommunication services market. However, there is a stricter provision on value-added services: the percentage of the equity or stock of foreign capital in an enterprise should be no more than

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70 Ibid., Article 44.

71 See para.5 of this chapter.

72 Several Opinions of the State Council on Encouraging, Supporting and Guiding the Development of Individual and Private Economy and Other Non-Public Sectors of the Economy [国务院关于鼓励支持和引导个体私营等非公有制经济发展的若干意见] (2005 Opinions on Non-Public Sectors) was promulgated by State Council on 19 February, 2005. A related but developed regulation, Several Opinions of the State Council on Encouraging and Guiding the Healthy Development of Private Investment, was adopted in 2010.

73 Provisions on the Administration of Foreign-Funded Telecommunications Enterprises [外商投资电信企业管理规定] was promulgated by State Council on 1 January, 2002 and was amended on 10 September, 2008.

50%. In other words, foreign investment can participate in the value-added services market, but cannot control a value-added services enterprise.

3.3.4 Overall Development

In 30 years of development the telecommunications sector had seen significant changes in telecommunication infrastructure, the functions of telecommunication authorities and the competition between operators. The scales of fixed-line telephony networks and mobile communications network leapt to first place in the world.[74] However, there were still restrictions for non-public owned and foreign investment and business operators to enter into telecommunication market.

3.4 Current Stage: (2008 – March, 2012)

3.4.1 Institutional Reform

In 2008 institutional reform the MII was abolished and the MIIT was founded.[75] The MIIT was expanded to a combination of industrialisation and informatisation. Compared with those of the previous MII, the obligations of the new MIIT were to draft and organise industries' development plans, industrial policies and standards, guiding and improving informatisation construction, improve technical equipment development and innovation and maintain State information security. The main task of this institutional reform was to explore ways in which to establish 'super ministries' with integrated functions, rationally allocating the functions of macro-regulation department, strengthening and integrating the departments of social management and public services to improve the people's livelihood, on the basis of transformation of government functions and clarifying the responsibilities of different ministries. The focus of this reform moved from sole separation of the regulatory and operational functions to equitably distribute functions of the State Council's departments, to reorganise the administrative management systems on each industry,

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74 See http://www.stats.gov.cn/tjfx/ztfx/qzxzgcl60zn/t20090924_402589934.htm (last visited March 1, 2012).

75 See Decision of the First Session of the Eleventh National People's Congress on the Plan for Restructuring the State Council [第十一届全国人民代表大会第一次会议关于国务院机构改革方案的决定], which was adopted on March 15, 2008, available at: http://www.law-lib.com/law/law_view.asp?id=252440 (last visited March 1, 2012).

including telecommunications industry, and to develop social management and public services functions these departments.[76]

3.4.2 Restructuring Basic Telecom Services Operators in the Telecommunications Sector

A new round of operator restructuring took place after the Announcement on Deepening Telecommunications System Reform, published on May 24, 2008.[77] The principles of this reform were to rationalise distribution of existing telecom network resources, establish full-service operation, and to constitute healthy market competition, taking the opportunity to develop the third generation of mobile telephony (3G).

Under the Announcement on Deepening Telecommunications System Reform, three main operators in the basic telecom services market were reorganised on the basis of the previous six operators.[78] And later these three new operators obtained 3G licences.[79]

Table 6-2: Structure of the Basic Telecommunication Operators before and after the Reform in 2008

Operators and Their Basic Telecom Services after Restructuring in 2008	Operators and Their Basic Telecom Services after Restructuring in 1998
China Mobile	China Mobile
	China Railcom
China Telecom	China Satcom (Basic telecom services)
	China Telecom
	China Unicom (CDMA Services)
China Unicom	China Unicom (GSM Services)
	China Netcom

This reorganisation recognised the limitations of segregated operation, based on ten years development in the telecom market. First, basic telecom services operators had only been allowed to develop and compete in their licensed spheres. Competition in the telecom market was inefficient. Second, an unbalanced structure had appeared in the telecom market, especially between fixed-line telecom and mobile services. With the development

[76] Ibid,.

[77] Announcement on Deepening Telecommunications System Reform [关于深化电信体制改革的通告] was published by the MIIT, National Development and Reform Commission (NDRC) and Ministry of Finance on May 24, 2008.

[78] See http://news.xinhuanet.com/tech/2008-05/24/content_8242658.htm (last visited March 1, 2012)

[79] Ibid.

of technology, mobile technology had demonstrated great innovation and improvement, while fixed-line telephony had reached a plateau. Users of mobile services accounted for 65.3 percent of the whole of telephony services in 2008, and there was a gap of 300 million between the users of mobile and fixed-line telephony.[80] The operators who had licensed for mobile services had gradually occupied most of the telecom market. The structure of licensed services and competition was unfair and unbalanced since operators apart from China Mobile and China Unicom could not enter into the fast-growing mobile services market.

There was a relatively fair competition structure on the telecommunication market between the three new basic telecom service operators. Each has national-wide network resources, operates full telecom services and has competitive market power. However, similar to the situation before 2008, operators in the basic telecom market are still SoEs, and there is no free market access for other private operators.

3.4.3 Other Developments

The long-awaited Telecommunication Law has not been officially formulated for more than 30 years. The rapid development of telecommunication technology and information challenges competition, operation and regulation in the current telecom market. For example, technical development and innovations in mobile technology brought more convenient, functional and cheaper services to users, compared with development in fixed-line telephony. The mobile phone became the most common means of communications; broadband services virtually replaced the earlier Dial-up internet; the introduction of internet protocol telephony services broke the monopoly of fixed-line telecom services on long-distance telephony services; and the developing 3G and other wireless broadband techniques are becoming important means of high-speed data transmission. Moreover, some structural conception reforms, for instance, fixed-mobile convergence and three networking convergence, have also been encouraged by technical development in telecommunication sector.

[80] See 2008 Statistics Report on Telecommunications Sector, available at: http://www.miit.gov.cn/n11293472/n11295057/n11298508/11979497.html (last visited March 1, 2012).

3.5 Current Legislation in Telecommunications Sector

Article 7(1) of the AML implicitly allows the exclusivity or dominant position of the State-owned economy in some industries; telecommunications is one of the seven specific industries.[81] Article 2 of 2005 Opinions on Non-Public Sectors[82] states that non-public investment shall be allowed to enter the natural monopoly business in the specified industries and fields by equity participation, and other means, and may also enter other businesses by means such as sole proprietorship, joint venture, cooperation and project financing. Several Opinions of the State Council on Encouraging and Guiding the Healthy Development of Private Investment[83] (2010 Opinions on Private Investment) further encourages the participation of private investment in telecommunications construction. Article 9 states that private investment is encouraged to enter the basic telecommunications operation market in the form of non-controlling shareholding, while private capital is also supported in the value-added telecommunications business. By Telecommunications Regulation the operators of basic telecommunication services shall be constituted with State-owned equity interest or a share no less than 51%, while there is no such requirement on the operators of value-added telecommunication services.[84] As a result the basic telecommunication services market is rated as an inherently monopolised market, while the value-added telecommunication services market is treated as a relatively competitive market.

Telecommunication means the transmission and reception of signals by any electromagnetic means.[85] In Telecommunications Regulation, it is defined as the use of wired or wireless electromagnetic systems, or photoelectric systems, to transmit, emit or receive speech, text, data, graphics or any other form of information.[86]

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81 See para.2.3.2.3 of Chapter Two of this thesis.
82 Note 73.
83 Several Opinions of the State Council on Encouraging and Guiding the Healthy Development of Private Investment [国务院关于鼓励和引导民间投资健康发展的若干意见] was promulgated by the State Council on 7 May, 2010.
84 See Articles 10 and 13 of Telecommunications Regulation.
85 See p313 of Annex on Telecommunications in General Agreement on Trade in Services (GATS).
86 See Article 2 of Telecommunications Regulation.

3.6 The Characteristics of Telecommunications in Current China

Unlike the EU, telecommunication services in China are divided into basic telecommunication services and value-added services. According to the Telecommunications Regulation, basic telecommunication services are defined as services of providing public network infrastructure, public data transmission and basic voice telephony services, while value-added services are services providing telecommunications and information services with a public network infrastructure.[87]

The current categories of telecommunication services are listed below:

[87] See Article 8 of Telecommunications Regulation. The contents of basic telecommunication services and value-added services have changed three times. Also see Table 6-3 below.

Table 6-3: Telecommunication services Categories Readjusted in 2003[88]

<table>
<tr><td></td><td>Category 1</td><td colspan="2">Category 2</td></tr>
<tr><td rowspan="6">Basic Telecommunication services</td><td>Fixed Communications Services</td><td colspan="2">Trunk Communications Services</td></tr>
<tr><td>Cellular Mobile Communications Services</td><td colspan="2">Wireless Paging Services</td></tr>
<tr><td>Satellite Communications Services Category 1</td><td colspan="2">Satellite Communications Services Category 2</td></tr>
<tr><td>Data Communications Services Category 1</td><td colspan="2">Data Communications Services Category 2</td></tr>
<tr><td></td><td colspan="2">Internet Access Services</td></tr>
<tr><td></td><td colspan="2">Domestic Communications Infrastructure Services</td></tr>
<tr><td></td><td></td><td colspan="2">Network hosting Services</td></tr>
<tr><td rowspan="6">Value-Added Telecommunication services</td><td>Online data processing and transaction processing services</td><td rowspan="3">Storage and forwarding services</td><td>Voice mail</td></tr>
<tr><td>Domestic multi-party communications services</td><td>X.400 email services</td></tr>
<tr><td>Domestic IP-VPN</td><td>Fax storage and forwarding services</td></tr>
<tr><td>Internet Data Centre Services (IDC)</td><td colspan="2">Call centre services</td></tr>
<tr><td></td><td colspan="2">Internet access services</td></tr>
<tr><td></td><td colspan="2">Information services</td></tr>
</table>

Telecommunication services are listed in order of importance of application of network infrastructure, range of users and economic interest affected by service scales. The first category of basic telecommunication services generally requires a national network infrastructure, applying to the majority of citizens. The second category of basic telecommunication services is less affected by these two factors. In regard to the network infrastructure, value-added services are not as important as basic telecommunication services. Thus the classification of value-added services is according to services characters but not by the requirement for network infrastructure. The second category of value-added services is more flexible than the first in the market. As a result competitive regulation and situations are also increasingly popular in the four categories.

3.6.1 Value-added Telecommunication services Market

There are more than 22,000 enterprises providing value-added telecommunication services, and the percentage of non-SoEs in the market was more than 95% by 2007.[89] Enterprises

[88] See Notice on Readjustment of Telecommunication services Categories [关于重新调整《电信服务分类》的通告] which was published by the MII on April 1, 2003..

operating value-added services incorporate three methods: basic telecommunication services enterprises providing value-added services, cooperative operation between basic telecommunications enterprises and value-added services enterprises, and value-added services enterprises operating with network access provided by basic telecommunications enterprises, internet services provides and Internet data centre services. The growth rates of value-added services income between value-added services in basic telecommunication services enterprises and value-added services enterprises were 11.8% and 28.8% in 2010.[90]

Generally, new operators are free to enter and withdraw from the value-added services market, although enterprises providing value-added telecommunication services still require approval through 'operating licence of value-added telecommunication services' by the supervisory department for the information industry under the State Council or telecommunications administration authorities at the provincial, autonomous region or municipality level.[91] As a result the value-added telecommunication services market, which is competitive with many operators providing various services on a relatively equal and free market should be applied under the regulations of the AML.

3.6.2 Basic Telecommunication services Market

The situation in the basic telecommunication services market is much more complicated than in the value-added services market. On the one hand, analogue trunk communication services, wireless paging services, VSAT communication services, fixed network domestic data transmission services, wireless data transmission service, customer premise network service and network hosting services, which are classified within the second category of basic telecommunication services, shall be regulated by the same way as value-added telecommunication services regulated.[92]

On the other hand, other basic telecommunication services are provided by three SoEs which are designated and organised by administrative measures. The three enterprises, China Telecom, China Mobile and China Unicom, are competing in full-service telecommunication market. However, new operators cannot enter into the market without a

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89 See http://news.xinhuanet.com/newscenter/2007-12/07/content_7216192.htm (last visited March 1, 2012).
90 See http://info.chyxx.com/ITtx/201105/445043LVZX.html (last visited March 1, 2012).
91 See Article 9 of Telecommunications Regulation.
92 See Notice on Readjustment of Telecommunication services Categories.

new round reorganisation of State-owned telecommunications enterprises or a modification on 'processing licence of basic telecommunication services'.

3.6.2.1 Reasons for the Currently Strict Basic Telecommunication Services Market Access Policies

There are reasons for adopting a strict market access policy in the basic telecommunication services market. First, maintaining large-scale enterprises to operate basic telecommunication services may satisfy the requirements for universal services provided to consumers nationwide. The telecommunication sector is still an industry with great network needs. Full universal services have not been completed, especially in the remote countryside and areas with sparse population, although a programme of telecommunication services accessing every village has operated since 2004.

Second, the strong market power of SoEs will maintain the dominant position of the State-owned economy in the telecommunications market. Innovation and development in basic telecommunication services with a background of nature monopoly characteristics requires a certain level of economics of scale. Restricting foreign-founded telecommunication enterprises from entering the basic services market and maintaining strong market power may protect the development of domestic enterprises, while foreign telecommunication enterprises have better economic strength, more advanced technology, greater experience in management and service provision.

Third, reorganisation of the three full-service telecommunications enterprises not only encourages competition in the market and stimulates the improvement of innovation and development in technology, but eliminates duplicated construction and waste of resources.[93] This reorganisation planned to set up three competitors on full-service telecommunications market, unlike the designated and divisional business areas for the six main telecommunications enterprises without efficient competition before the reorganisation in 2008. Moreover, low-level duplicated construction also existed before this reorganisation. Six main enterprises, China Telecom, China Mobile, China Unicom, China Netcom, China Railcom and China Satcom, which had provided basic telecommunication services, had their own basic services networks, with a huge

[93] This is the guiding principle of reorganisation of telecommunications enterprises in Announcement on Deepening Telecommunications System Reform in 2008, note 77. See para. 3.4.2 of this chapter.

investment. It was reported that at the end of 2004 there were five existing provincial fiber optical cable trunk network ran by China Telecom, China Mobile, China Unicom, China Netcom and China Railcom, costing more than 100 billion Yuan. [94] The length of fiber optical cable line had reached 3.6 million kilometres in 2004 while the utilization rate was merely 10%.[95]

Fourth, maintaining the dominant position of the State-owned economy in the basic telecommunication services market may help the State and telecommunications administrative organs to supervise, control and improve development of the telecommunication industry. The three networks integration,[96] for instance - the hot topic of conversation on the structural development of telecommunications networks in recent years - is propelled by the State Council and related industry administrative departments.[97] Moreover, administrative organs which have traditionally regulated the telecommunications industry and retain the right of governmental regulation do not want to relinquish their control over the large prize of the telecommunications market, although regulatory and operational functions have been separate for a long time.

Finally, economic and national security is also a consideration in the dominant position of the State-owned economy in the telecommunications market. Telecommunications is one of the seven industries considered the lifeline of the national economy and national security. The State Council's concerns on the special positions of these industries still remain.

3.6.2.2 Opinions on Further Development of the Basic Telecommunication services Market

The market structure of the basic telecommunication services market has already seen great improvements. Basic telecommunication services were initially provided by a government institution with operational functions. Later, the regulatory and operational

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94 See http://news.xinhuanet.com/fortune/2005-08/04/content_3307239.htm (last visited March 1, 2012).

95 Ibid.

96 'Three networks integration' means services integration among data communications network (for example, internet), traditional telecommunications network (for example, telephony network) and broadcasting and television network (for example, cable television).

97 The Notice of the List of the First Group of Pilot Districts (or Cities) on Three Networks Integration [国务院办公厅关于印发第一批三网融合试点地区(城市)名单的通知] was issued by the General Office of State Council on 30 June, 2010.

functions were separated and the market was operated by several independent telecommunications enterprises, although the market of each enterprise was divided into services types and regions under administrative measures. Nowadays the basic telecommunication services market has three full telecommunication services providing enterprise competition in the whole market. Meanwhile, private investment is encouraged and supported to enter the basic telecommunication services market, as well as foreign investment, although no less than 51% State-owned equity interest or shareholding is still required. [98] The basic telecommunication service market is gradually opening to competition.

The basic telecommunication services market is no longer controlled by a single monopolised enterprise, but is an oligopoly market maintained by administrative power. With the development of technology, new services and competition rules are introduced in the market. Obligations of interconnection and intercommunication enable other enterprises without basic infrastructure opportunities to operate services by sharing a basic infrastructure. The monopolised characteristics of the basic telecommunications market are broken. The equity interest or shareholding of non-State-owned capital is allowed to reach as high as 39%. Once the special rights granted by administrative measures to the existing SoEs are withdrawn, more operators will emerge in this market.

Considering the market power of China Telecom, China Mobile and China Unicom, some enterprises may exercise stronger market power than others, especially in such sectors as telecommunications, where basic infrastructure is vital to operation. However, the operators only limited to SoEs should not be supported by regulation or laws. Article 12(2) of the Telecommunications Regulation requires a mean of bidding to issue an 'operating licence for basic telecommunication services'. But the fact is that the current three licences on basic telecommunication services are all issued by designation of administrative power. As a result the operating licences for basic telecommunication services should be issued by competing and bidding between enterprises satisfying other requirements, except for the rate requirement on State-owned equity interest or shareholding.

[98] See Article 10 of Telecommunications Regulation; Article 9 of Several Opinions of the State Council on Encouraging and Guiding the Healthy Development of Private Investment; and Articles 4-9 of Provisions on the Administration of Foreign-funded Telecommunications Enterprises.

In consideration of universal services, these services in China are more like a politically compulsory services obligation in the current stage. Government authorities formulate a unified regional planning and distribution policy and are responsible for the completion of tasks. Three main basic telecommunication service operators, China Telecom, China Mobile and China Unicom, share the designated universal service obligations by the telecommunication administrative authority through their economic indicators, for example, income and interest, financing, construction, operating and maintaining these services by themselves.[99] The current content of 'universal services' in telecommunications, focuses on rural areas,[100] including telephony access in administrative villages, telephony access in natural villages, internet access in towns and information access in the country.[101] However, with the development of a competitive market in telecommunication sectors, the obligations of providing universal services should adopt a more broad, flexible and economical method. Detailed suggestions will be discussed in the following section.[102]

Administrative measures are not a good choice of solution to this problem, in regards to duplicated constructions, especially when the basic telecommunication services market is further opened to competition, and more operators enter and provide services. There is a feasible way of improving interconnection and intercommunication between existing holders and dominant operators of telecommunication infrastructure and service providers or private network operators. The main explanation for duplicated constructions is generally that new operators in the basic services market cannot get access to existing telecommunications infrastructure, or cannot get access at a reasonable price. Once there is a free and fair method by which new operators may provide the same services with the similar basic infrastructure at much lower cost, duplicated construction is hardly likely to be their choice.

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99 See Opinions on the Implementation of Natural Villages Access to Telephony Project during 'the Eleventh-Five Years' Period [关于"十一五"期间自然村通电话工程的实施意见] was published by the MII on 17, May 2007, available at: http://www.gov.cn/zwgk/2007-05/28/content_628077.htm (last visited March 1, 2012); as well as the natural villages' access to telephony project planning for 'the twelfth-five years' period by the MIIT on 26 April, 2011, available at: http://www.gov.cn/gzdt/2011-04/26/content_1852434.htm (last visited March 1, 2012).

100 There are five stages of universal services in telecommunications in China. The first stage is providing telecommunication services access in main cities; the second stage is expanding the telecommunication services and providing in all the cities and main towns; at the moment, we are in the third stage; the fourth stage is basically ensuring telephony access for each family and internet access in each village; The final stage is providing further level's information services to individuals. See B. Holznagel, J. Xu and T. Hart, note 49, at 185. Also see http://zwgk.miit.gov.cn/n11293472/n11293877/n11302021/index.html (last visited March 1, 2012).

101 See the natural villages' access to telephony project planning for 'the twelfth-five years' period, note 99.

102 See para.5 of this chapter.

In conclusion, market and competition rules will be a better and more feasible way to regulate the basic telecommunication services market than the existing administrative measures on maintaining the dominance position of State-owned economy in the market. The basic telecommunication services market should also be a competitive market, not only in the business activities of existing operators, but also on the matter of market access, interconnections and intercommunication, and universal service.

In the following sections, three aspects of telecommunications market, market access regulations, trade restrictions and universal service, will be discussed in relating to the provisions of abuse of administrative power to eliminate or restrict competition under the AML.

4. Market Access Regulation in the Telecommunications Sector under the AML

4.1 Whether Market Access Regulations violate Article 37 of the AML

As stated above, the market of telecommunication services is divided into two categories, basic and value-added telecommunication services and the State-implemented licence systems for the operators of telecommunication services market are different in both markets. Within the distinguishing characteristics of these two markets, market access rules should also be distinguished in regulation.

4.1.1 Market Access Regulations

In the basic telecommunication services market, operators who want to be authorised must fulfil six conditions required by Article 10 of the Telecommunications Regulations.[103] The most significant is Article 10(1) which requires State-owned equity interest or shares in a basic telecommunication services operator to be less than 51%. Similar regulations are stated in two other administrative provisions. Article 9 of 2010 Opinions on Private Investment encourages private investment in the basic telecommunications operation market in the form of non-controlling shareholding. Article 6 of Provisions on the Administration of Foreign-Funded Telecommunications Enterprises also requires that the investment rate of the foreign investor(s) in a foreign-funded telecommunications

[103] See Appendix III of this thesis.

enterprise providing basic telecommunication services (except radio paging services) shall not exceed 49%.

In a value-added services market there is no specific requirement on the constitution of shares for an operator. The State supports private capital in the value-added telecommunications business, although the investment rate of the foreign investor(s) in a foreign-funded telecommunications enterprise providing value-added services shall not exceed 50%.[104]

A series of related administrative regulations are also published at State, provincial or county level under principles of telecommunication investment or restrictions on telecommunications operation provided by the State Council.[105]

Limited operators can participate in both the basic telecommunication services market and value-added services markets, although private and foreign investment is allowed or encouraged in both markets. Only SoEs can provide basic telecommunication services in the market. Private or State-owned enterprises are allowed to provide value-added services, while foreign investment is limited to 50% of stock in an operative enterprise. However, as stated before, there are more than 22,000 enterprises providing value-added telecommunication services, and the percentage of non-SoEs in the market was more than 95% in 2007.[106] No strict market access policy applies to the market of value-added telecommunication services in the context of the AML, although foreign-funded undertakings cannot have a controlling market share. In summary, strict market access regulations apply to basic telecommunication services, while loosening and competitive market access regulations apply to value-added services.

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104 Also see Article 9 of 2010 Provisions on Private Investment and Article 6 of Provisions on the Administration of Foreign-Funded Telecommunications Enterprises.

105 For example, Circular of the Ministry of Information Industry on Intensifying the Administration of Foreign Investment in Value-added Telecommunication services, a series of Guiding Opinions on the Development of Value-added Telecommunication services by Communications Administration in provinces of Henan, Heilongjiang, Shanxi and Guangdong; a series of Notices on Accelerating of Infrastructure Construction in Telecommunications by the General Offices of provinces of Liaoning, Shanxi and Henan and Dalian City,

106 Note 89.

4.1.2 Article 37 of the Anti-Monopoly Law

Article 37 of the AML provides that '[a]ny administrative organ may not abuse its administrative power to set down such provisions in respect of eliminating or restricting competition.' Should the above provisions on basic telecommunications market access regulations fall within Article 37 of the AML? There are several conditions which need to be fulfilled.

First, as discussed in Chapter Four of this thesis, in determining the application of Article 37 on an administrative provision, no specific undertaking is required, and the threat of competition's being damaged is enough to satisfy the requirement of ''eliminating or restricting competition'.[107] In basic telecommunication services, China Mobile, China Telecom and China Unicom are the only three operators in the market, and have a 100% market share in common. Other non-State-owned undertakings are not allowed to be granted the 'licence of operating basic telecommunication services' and to compete with the existing three operators. The restrictions on market access not only result in the threat of competition's being damaged, but actually effect restriction and elimination of competition in the basic telecommunication services market.

Second, in 2009 China Mobile had a 72.4% market share in the mobile market, while China Union had 20.2% and China Telecom 7.4%.[108] In 2010, according to the annual reports of the three undertakings, China Mobile had a dominant advantage no matter the amount of users on the basic telecommunication services market or the undertaking's profit.

[107] See para.2.2 of Chapter Four of this thesis.
[108] See http://it.people.com.cn/GB/1068/42905/10636131.html (last visited March 1, 2012)

Table 6-4: Comparison of Market Power between China Mobile, China Unicom and China Telecom[109]

2010	China Mobile	China Unicom	China Telecom
Number of Users (million)	584		
Users in Mobile Market (million)		167.426	90.52
Users in Fixed-line telephony market (million)		47.224	188.56
Users in Broadband Market (million)		96.635	53.46
Operating Revenue (million CNY)	485,231		
Net Profit (million CNY)	119,640	3670	1587.7

The market shares among China Mobile, China Unicom and China Telecom in 2010 were 69%, 20% and 11%.[110] It seems that there are three competitive operators. The basic telecommunication services market is still a competition market, while any operator with less than the 51% State-owned equity interest or shares cannot enter this market. This competition situation is created by statute. As a result the three operators, China Mobile, China Unicom and China Telecom, give tacit consent to a monopoly of market division by operation of statute. Administrative authorities' market access restriction in the basic telecommunication services market may infringe Article 37 when the three undertakings, by operating their business activities, cannot avoid exclusion of new competitors.

On the other hand, according to Article 19 of the AML,[111] China Mobile may have more than a 50% market share and be assumed to be operators with a dominant market position in the relative market of basic telecommunication services market.[112] Once it refuses a new operator entry to the basic telecommunication services market or share in its telecommunications infrastructure, China Mobile may abuse its dominant position and infringe Article 17 of the AML. China Mobile's refusal to deal fairly is because administrative provisions set down or issued by administrative organs, in accordance with

[109] All statistics are based on the annual reports 2010 of each undertaking. See 2010 Annual Report of China Mobile: http://www.chinamobileltd.com/images/pdf/2011/ar/2010_a_c_full.pdf; 2010 Annual Report of China Telecom: http://www.chinatelecom-h.com/gb/ir/reports.php?cat=2010; 2010 Annual Report of China Unicom: http://www.stockest.cn/nianbao/600050/2010_600050_n.htm (last visited March 1, 2012).

[110] See http://www.techweb.com.cn/mobile/2011-04-16/1019013.shtml (last visited March 1, 2012).

[111] Article 19 of the AML: Where a business operator is under any of the following circumstances, it may be assumed to have a dominant market position: (1) the relevant market share of a business operator accounts for ½ or above in the relevant market; … .

[112] The relative market is the basic telecommunication services market. This is because the restrictions on market access are based on the basic telecommunication services market. And in some specific markets, for example, the fixed-line telephony market, China Mobile may not have half of the market share.

Article 5 of Provisions for Administrative Departments of Industry and Commerce to Prevent Acts of Abuse of Administrative Power to Eliminate or Restrict Competition. Consequently, China Mobile may abuse its dominant position to restrict competition at the level of market power and anti-competitive conduct.

Third and most importantly, it must be determined whether these administrative provisions fall within Article 37 of the AML. Administrative organs in the AML include governments and their departments at both central and local level excluding the State Council. Article 37 focuses on abstract administrative conduct including administrative provisions in the light of a group of uncertain undertakings and in the form of proclamation, announcement, notice, opinion, meeting summery and other forms of administrative regulation.[113] Telecommunication Regulation, 2010 Opinions on Private Investment and Provisions on Administration of Foreign-Funded Telecommunications Enterprises apply to a group of uncertain enterprises in the telecommunications sector and are abstract administrative conduct. However, these three regulations were formulated and published by the State Council which is not an 'administrative organ' in the context of the AML, although 2010 Provisions on Private Investment is 'Opinions', a kind of administrative document listed in Article(4) of the supplemental provisions on abuse of administrative power. As a result, none of these three administrative provisions will fall within Article 37, under the current explanation of Article 37 of the AML.

As discussed in Chapter Four of this thesis on the content of administrative organs and administrative regulations on the abuse of administrative power in the AML, the State Council is still a kind of organ undertaking administrative obligation in national wide and should fall within the provisions of abuse of administrative power under the AML;[114] administration laws formulated by the State Council, as well as other administrative regulations published by Departments or Commissions of the State Council and local governments, should also fall within Article 37 of the AML. In the context of suggestions in this thesis, the above administrative provisions may fall within Article 37 of the AML.

A question we must answer is whether there is any exemption to these administrative provisions, if as suggested restrictions to market access of basic telecommunication services market maybe violate or are capable of violating Article 37 of the AML.

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113 See para. 2.2 of Chapter Four of this thesis.
114 Ibid.

4.2 Whether Article 7 of the Anti-Monopoly Law Provides an Exemption for Abuse of Administrative Power in the Telecommunications Sector

The exclusivity of State-owned operators or the dominant position of the State-owned economy in basic telecommunication services are legal circumstances imposed by administrative regulations, in accordance with the provisions of Telecommunications Regulation, 2010 Opinions on Private Investment and Provisions on the Administration of Foreign-Funded Telecommunications Enterprises. Therefore a new non-State-owned undertaking making an attempt at being an operator in this market will violate the provisions of the above administrative regulations, and not be granted the licence to operate basic telecommunication services. The three operators' conduct in refusing to trade or excluding the services provided by new operators is lawful. Article 7(1) of the AML confers exclusivity or controlling position of SoEs, implicitly accepts provisions which grant dominant position to SoEs on market access in the basic telecommunication services market and protects lawful business operations conducted by the business operators therein.

Consequently, there is a result of disharmony between Articles 7 and 37. Article 7 provides that the regulations on strict market access in the basic telecommunication services market are legal provisions and should be are accepted, while those provisions are subject to the application of Article 37. Meanwhile, Article 7, as a provision in the principle section of the AML, should apply to all provisions in the AML. As a result, the exemption created by Article 7 to the regulation of market access in the basic telecommunication services market should also apply to Article 37.

4.3 Evaluation of the Exemption Effect of Article 7 on Article 37 of the Anti-Monopoly Law on Basic Telecommunications Access Market

The exemption created by Article 7 of the AML maintains the dominant position of the State-owned economy in the basic telecommunication services market, creates barriers to new operators' market access and prevents further competition in the market by administrative power. As discussed the exercise of administrative power is not a good way of dealing with the structure of basic telecommunications operators and improve development in the basic telecommunications market at the current stage, although the regulations and control of administrative measures have been extremely effective in the

processes of separating the regulatory and operational functions, and structural adjustment in the telecommunications sector in the early stages. It is time to regulate the whole telecommunications market, transferring from administrative measures to market rules and competitive measures.

The exemption created by Article 7 may restrict further improvement of the telecommunications industry. At the moment there is no independent regulatory institution in the telecommunications sector. Administrative organs, especially the MIIT and subsidiary communications administrations at provincial and county levels, chiefly play the role of telecommunications regulatory institutions. While all three operators in the basic telecommunication services market are State-owned undertakings, competition and development are easy to control or influence by the decisions of those administrative regulation institutions. The reorganisation of State-owned operators was arranged by the MIIT, the NDRC and Ministry of Finance, and some senior managers in each telecommunications enterprise were exchanged by the order of administrative organs.[115] Those direct or indirect interventions by administrative power will also affect effective competition between existing State-owned operators.

Finally, a basic competition structure has been created between China Mobile, China Unicom and China Telecom in the basic telecommunication services market, while a competition market is almost complete in value-added services. Market competition order has gradually played an important role in the telecommunications market. Administrative power should restrict its effect and play a limited gradual role in the market. Administrative power should reduce its influence on creating strict policies on market access in telecommunication services market.

Repeal of the administrative provisions on strict market access would not require privatisation of existing SoEs, nor would directly restrict their dominant position in the

[115] In 2008 telecommunications reorganisation, the president of the former China Unicom became the deputy general manager of the new China Telecom; other two former senior managers in the former China Unicom also became deputy general managers of the new China Telecom; four former senior managers from the former China Unicom, China Netcom and China Railcom became the deputy general managers of the new China Mobile. The remaining former senior managers in previous China Netcom and China Unicom were retained and became the senior managers of the new China Unicom. There appointments were announced by the Joint Group of the Organisation Department of the Central Committee of the Communist Party of China (CCCPC) and State-owned Assets Supervision and Administration Commission of the State Council (SASAC). The Joint Group actually played a role of temporary administrative organ, although the CCCPC is not an administrative organ. See http://tech.sina.com.cn/t/2008-07-01/11382295754.shtml (last visited March 1, 2012).

telecommunications market. It would only require that administrative power be not abused to eliminate or restrict normal competition in the market, and that the AML should apply to abstract administrative conduct in the form of administrative regulations or other administrative documents. Administrative supervision and intervention would still exist, since the Telecommunications Regulation has not been replaced by Telecommunications Law and since there is no independent telecommunication supervision institution and the MIIT and its Communication Development Division plays a role of industry regulator. Their influence should be restricted on the basis of competition rules.

4.4 Summary

Administrative provisions on strict market access which only allow SoEs to operate basic telecommunication services shall constitute a violation of Article 37 of the AML. Meanwhile, Article 7 of the AML accepts the dominant position of the State-owned economy in the basic telecommunication services market, and creates an exemption to Article 37. However, the exemption created by Article 7 hinders competition in the telecommunications market under the AML. As a result administrative provisions on strict market access in the basic telecommunication services market shall be regulated by Article 37 of the AML, and the exemption created by Article 7 should be repealed.

5. Interconnection of Telecommunications Infrastructure under the AML

5.1 Definitions and Related Provisions

Interconnection is another important issue in market access policies in the telecommunications sector. The concept of 'interconnection' was defined in Article 5(1) of Provisions on Public Telecom Networks Interconnection[116] as 'the establishment of an effective communications connection between telecommunication networks to enable the subscribers of one telecommunications operator to communicate with the subscribers of

[116] Provisions on the Management of Interconnection between Public Telecommunication Networks [公用电信网间互联管理规定] (Provisions on Public Telecom Networks Interconnection) was formulated and published by the MII on May 10, 2001.

another telecommunications operator or to access the various telecommunication services of another telecommunications operator.'[117]

A series of regulations were issued by administrative organs to apply interconnection policy to the telecommunications market, and to improve development and competition between telecommunication services operators. The most important is Telecommunications Regulation Articles 17 to 22. It establishes the structure of telecommunications interconnection regulation, provides definitions, principles for interconnection and its operators and helps to reach an agreement between operators by themselves or under the coordination or conclusions of telecommunications regulatory authorities. There are other regulations. For example, the Provisional Regulation on Interconnection between Special Networks and Public Networks (1996 Provisional Regulation)[118] only applies to interconnection between private and public telephony networks.[119] Provisions on Interconnection regulates the interconnection between operators in basic telecommunication services on public telecommunications networks. Measures on the Settlement of Disputes over Interconnection between Telecommunication Networks[120] applies to disputes over interconnection between telecommunication networks arising between the basic telecommunications business operators inside the territory of the People's Republic of China as well as between these operators and entities of the private telecommunications network. Methods of Interconnection Settlement and Relay Cost Allocation between Public Telecommunications Networks[121] concerns the standards and operation of interconnection settlement and cost allocation between public telecommunications networks. The Circular of the General Office of the State Council on Distributing the Opinions of the Ministry of Information Industry and Other Departments on Further Strengthening the Supervision Over the Telecommunications Market[122]

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117 Although this provision only applies to interconnection between basic telecommunication services, this concept should apply to the whole sphere of telecommunications markets.

118 Provisional Regulation on Interconnection between Special Networks and Public Networks [专用网与公用网联网的暂行规定] (1996 Provisional Regulation) was issued by the previous MPT on July 24, 1996.

119 As early as 1996, telecommunications was mostly focused on telephony. Since there has no recent regulation, this provisional regulation still takes effect, although it seems out of date now.

120 Measures on the Settlement of Disputes over Interconnection between Telecommunication Networks [电信网间互联争议处理办法] was issued by the previous MII on November 29, 2001.

121 Methods of Interconnection Settlement and Relay Cost Allocation between Public Telecommunications Networks [公用电信网间互联结算及中继费用分摊办法] (2003 Methods of Interconnection Settlement) was issued by the previous MII and took effect on December 1, 2003.

122 Circular of the General Office of the State Council on Distributing the Opinions of the Ministry of Information Industry and Other Departments on Further Strengthening the Supervision Over the Telecommunications Market [国务院办公厅转发信息产业部等部门关于进一步加强电信市场监管工作意见的通知] was issued by the General Office of the State Council on August 14, 2003.

encourages the effect of administrative power on supervising and regulating the telecommunications market.

5.2 Current Process and Policies on Interconnection

The current process in interconnection can generally be divided into four steps, according to the provisions of the above Regulations. The first is to determine the leading telecommunications operators (LTO) and to formulate the LTO's interconnection rules. The LTO is determined by the State Council's Department in charge of the information industry which is the MIIT at present. Besides stipulating the conditions of and controlling vital telecommunications infrastructure and materially influencing on the entry of other telecommunication services operators into the telecommunications market, the MIIT requires control of more than a 50% share in the fixed local telephone market under Article 5 of Provisions on Public Telecom Networks Interconnection, different from 'a relatively large share of the telecommunications market' in Telecommunications Regulation. The LTO has an obligation to allow interconnection requests from other telecommunication services operators and special networks operators. Meanwhile, before any specific interconnection procedure, interconnection rules are formulated by the LTO and submitted to the MIIT for its examination and consent, on the basis of non-discrimination and transparency principles.[123]

The LTO standard adopts some similar conditions for a business operator with a dominant position under the AML, for example market share requirement in the relevant market, the possession of essential facilities and the degree of difficulty faced by other operators to enter the relevant market. However, the LTO standard still has some problems. On the one hand, a single index of 50% market share is enough to decide a LTO. The position of an operator in a market is generally determined by a series of elements, for example, financial and technical conditions and capacity of the controlling market. A fixed 50% market share is arbitrary. The standard of the LTO in considering market share should take more flexible elements into account, although at present there are only three operators in the basic telecommunication services market, different from other general markets. On the other hand, the market sphere solely depending on fixed local telephony services has a strong discriminatory effect on operators. With the development of telecommunication

[123] See Article 18 of Telecommunications Regulation.

technology, the mobile network becomes one of the most important aspects of the telecommunications sector. An operator with strong market power in a mobile network can control competition in the specific market. Furthermore, a strict limitation on fixed telephony services will further increase the imbalance between fixed telephony and mobile markets, since the number of users in the mobile market is already three times greater than that of users in the fixed telephony market. Moreover, the basic telecommunications market in China is a comprehensive market including fixed-lines telephony, mobile, internet and other markets. Operators with strong market power in specific markets, for example, China Telecom in the fixed-lines telephony market and China Mobile in the mobile market.[124] As a result, it is important to identify LTOs in distinguished related markets but not depending on a single index of 50% market share.

Interconnection rules formulated by designated LTOs are binding on their rivals and trading party. The interconnection rules include provisions such as the procedure and time limit for network interconnection, the number of interconnection points for interconnection between networks, the addresses of exchanges used for interconnection between networks, and the list of and charges for non-bundled network elements.[125] Owing to a LTO's owning infrastructure in the market and holding an advanced position in interconnection process, the formulation of interconnection rules is open and transparent to other non-leading telecommunications operators to manage interconnection issues and for administrative supervision organisations in charge. The process of negotiation between the LTO and the non-LTO can be simplified and shortened under non-discrimination and transparency principles. However, Telecommunications Regulation requires examination and consent from the MIIT for an effective interconnection rule. An interconnection agreement is a negotiation on technical matters between operators which varies according to the specific background or development of the technology or market. The MIIT should not impose strict allowance on an interconnection agreement which would bring further administrative obstacles to the interconnection process. Thus a measure of reporting for the record rather than examination and consent should be adopted.

The second step is the securing of interconnection agreements between operators. An interconnection agreement may be reached between the LTO and non-LTOs or between

[124] See Table 6-4: Comparison of Market Power between China Mobile, China Unicom and China Telecom in para.4.1.2 of this Chapter.

[125] See Article 18 of Telecommunications Regulation and Article 7 of Provisions on Public Telecom Networks Interconnection.

non-LTOs, or between operators in public telecommunications networks or between operators in public and special telecommunications networks. Both parties to an interconnection agreement in public telecommunications network must follow Articles 6 to 15 of Provisions on Public Telecom Networks Interconnection**,** besides specific obligations for the LTOs. Yet the provisions on interconnection agreement between operators in public and special telecommunications networks were issued in the 1996 Provisional Regulation and are out of date now, based on the fast development of the telecommunications technology and industry. The entire process of implementation, coordination, supervision and examination is the responsibility of the telecommunications authorities in central government or in the provinces, autonomous regions and municipalities, directly under central government control.[126]

The third step is mediation after unsuccessful negotiation between operators. In the case of an interconnection agreement's failing to be achieved, either party to the interconnection may apply to the MIIT or its provincial subordinate organs for mediation within 60 days from the day a party made the interconnection request. The authority receiving the application shall mediate to reach an agreement in accordance with the principles of technical feasibility, economic sense, fairness, impartiality and mutual complementation.[127]

The final step is a mandatory interconnection agreement completed by telecommunication authorities, under the decision based on the conclusions reached by the experts invited by authorities in their discussions and the interconnection plan they put forward.[128]

There are two regulations on settlement and apportionment of interconnection fees applying to public telecommunications networks operators. No specific regulation has been formulated on interconnection fees between operators in public and special telecommunication networks, but in reality it would operate to a similar standard to public telecommunications network operators. According to provisions in Provisions on Public Telecom Networks Interconnection and Methods of Interconnection Settlement and Relay Cost Allocation between Public Telecommunications Networks, interconnection transmission lines, conduits, others of installing, increasing the capacity of and/or

126 See Article 2 of 1996 Provisional Regulation.
127 See Articles 17 and 20 of Telecommunications Regulation.
128 Ibid., Article 20.

upgrading the equipment and ancillary facilities, or leasing fees shall be charged by operators though the measures of specified rates, average shares or negotiation.[129]

The issue in question is fee rates for inter-network settlement. Article 22(2) of Provisions on Public Telecom Networks Interconnection states that '[t]he fee rates for inter-network settlement shall be determined on a cost basis. Before a telecommunications operator's interconnection costs have been determined the inter-network settlement rates shall provisionally be determined on the basis of charges.' However, there is no realistic and feasible measure provided to determine the interconnection cost. At present, the inter-network settlement rates are generally based on charges, not costs.[130] However, the charges are too low to represent the operational cost of the LTO, although charging measures were changed from government pricing to upper-limit pricing management in 2009.[131] For example, while the average cost of an inter-network communication in a local China Telecom network is 0.16 CNY/min, the interconnection fee of a local network is 0.06 CNY/min, which is only 37.5% of the cost.[132] Moreover, the calculation process is unknown to the public. The sloping policy on interconnection fees intended to promote the development of new operators. However, these fixed and low fees determined by administrative policies rather than market rules is unfair for the market and damage fair market competition in telecommunications sector, while they also encourage new competitors to enter the market. The LTOs have to face a loss from the interconnection, not mention the benefits. The fee rates for interconnection are not only a cisincentive to LTOs' motivation on infrastructure construction and interconnection, but also create further competition problems on pricing or quality of telecommunication services.

In conclusion, administrative authorities have an extremely important effect on the whole process of interconnection, from determination of a LTO, inter-network costs and

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129 See Articles 16-20 of in Provisions on Public Telecom Networks Interconnection and Articles 26-28 of 2003 Methods of Interconnection Settlement.

130 For example, Article 28 of 2003 Methods of Interconnection Settlement explains that the leasing charges for circuit interconnection are based on the charging standards of digital circuits.

131 See Notice on Management Measures Adjustment of services charges on Fixed-line local telephony and others [关于调整固定本地电话等业务资费管理方式的通知], which was issued by the MIIT and the National Development and Reform Commission (NDRC) on November 18, 2009, available at: http://www.ndrc.gov.cn/zcfb/zcfbtz/2009tz/t20091124_315085.htm (last visited March 1, 2012); and the interview with relevant heads of the MIIT and the NDRC on management measures adjustment of services charges on fixed-line local telephony and others, available at: http://www.miit.gov.cn/n11293472/n11293832/n11294042/n11481465/13057055.html (last visited March 1, 2012).

132 C. Wang, *Legal Regulation on Telecommunications Competition: Analysis on Hot Legal Issues in Telecommunications Competition [电信竞争的法律规制-电信竞争中的热点法律问题透析]*, (2008) BUPT Press, 2008, at 61.

settlement, examination and consent of interconnection agreements and negotiation between operators, to mediation or application of a mandatory agreement. Some are necessary, but some abuse the influence of administrative power, especially on the determination of the LTO and inter-network costs. Interconnection policy in the telecommunications market is a kind of 'government leading system'. Telecommunications operators, particularly the LTO, have limited self-determination rights on interconnection issues. Unlike the competition rules-based sector-specific regulations in the EU, competition rules have little effect on the interconnection process.

5.3 Suggestions on Interconnection under Competition Rules

As discussed above, access and interconnection in telecommunications market should observe the principles of competition law in the EU. Where a relevant market is recognised as an effectively competitive market, EU competition law will be considered. Where a relevant market is recognised as ineffectively competitive, sector-specific regulations will be adopted under competition rules, and the NRAs will exert their influence on the market.

In China telecommunication administrative authorities and their administrative regulations or instruments are still the main measures to regulate interconnection in the telecommunications market. However, there is a close relation between interconnection and competition rules. One of the objectives of telecommunication reform is to constitute a competitive telecommunication market to protect the interests of telecommunication subscribers. Interconnection itself is a measure to improve fair competition in the market. Administrative measures may not represent the full requirements of the market and operators. The process of interconnection needs competition rules to ensure accordance with guidance or intervention of administrative power, undeviating from the basic market rules. Given the ineffective competition in China's telecommunications market, the full application of competition rules is not practical at the moment. Compared to the EU, a competition rules-based sector-specific regulation regime would be more feasible, and intervention from telecommunications administrative authorities should be reduced gradually.

Four practical suggestions may be advanced. First, the determination of the LTO should adopt measures similar to those adopted in the determination of a dominant position under

the AML. As with the EU, the characteristics of LTO in telecommunications market and dominant position in the AML are essentially coincidental. The current test contains some similar conditions in a dominant position, for example, the ability of controlling vital telecommunications infrastructure, a relatively large market share holding in the telecommunication market and materially influence on the entry of other business operators into this market. However, on the issues of market share and relevant market, the test should adopt a flexible standard, as in Articles 12(2) and 19 of the AML, rather than a fixed standard of a control of 50% share in the fixed-line telephony services market.

Second, a cost-based fee rate for inter-network settlement should be determined as soon as possible. It has been ten years since this principle was formulated in Article 22(2) of Provisions on Public Telecom Networks Interconnection. However, this principle is still substituted by provisional determination on the basis of charges.

Third, the exercise of administrative power in the interconnection process should be reduced. Telecommunications administrative authorities have been granted great power in the whole process of interconnection by a series of administrative regulations and instruments, but without any restrictive regulation. Uncontrolled administrative power may be abused to create barriers to fair competition in the market, which may fall within provisions of abuse of administrative power in the AML or the AUCL. Future Telecommunications Law should draw up clear spheres of conduct and limites to competence where telecommunication administrative authorities exercise power in the interconnection process. Any decision of telecommunications administrative authorities should be taken in consideration of principles in the AML. To avoid abuse of administrative power to eliminate or restrict competition, future Telecommunication Law should also be formulated on the basis of competition rules and enshrined in principle provisions.

Finally, administrative regulations and instruments are always promulgated earlier than the related laws, while the former is drafted and published by administrative organs and has a more easily and flexible formulation and modification procedures than the latter one. Furthermore, the legislative practice and custom in China is to formulate law after collecting enough evidence of experience and practice from administrative operation.[133]

[133] N. Wang, 'The Reference Value of Germany Administrative Law', (2005) 5 *People and Power* p36.

Administrative regulations or policies become the reference for legislation. Telecommunications Law, as a typical instance, has not been issued since the telecommunication reforms were carried out for nearly 25 years ago, and a great number of administrative regulations and instruments have been operated in practice. Conflict and negotiation between interest groups are another reason for delayed legislation. On the model of administrative decision in advance of legislation, administrative power, which is free to operate without restriction within a rigorous legal framework, may cause uncertainty and inconsistency in operation. Telecommunications Law should be formulated and become a reference for telecommunications administrative authorities' measures, along with the AML.

5.4 Internet Interconnection Settlement and Article 36 of the AML

The 'government leading system' in interconnection is difficult to change in the short term and Telecommunications Law is still difficult to be enacted. Furthermore, whether future Telecommunications Law can solve the problem of a 'government leading system' is unknown. In the absence of other effective laws, the provisions regulating abuse of administrative power to eliminate or restrict competition under the AML, especially Article 36, can play an important role in the irrational operation of administrative power in interconnection in telecommunications market.

Since competition in the basic telecommunication services market has more restrictions than in the value-added services market, the effect of administrative power is more obvious, especially in interconnection issue, in the former market.

The LTOs in China sometimes refuse interconnection or present interconnection with extra barriers or discriminatory conditions, although the Telecommunications Regulation requires that the LTOs cannot refuse interconnection requests from other telecommunication services operators or special networks operators. Internet interconnection settlement is a typical example. This issue will be discussed in accordance with some provisions on internet interconnection settlement against abuse of administrative power to eliminate or restrict competition in the AML to telecommunication interconnection.

In August 2010, an internal document by China Telecom caused controversy in the internet interconnection market. It required that its subsidiary companies in each province clean up the 'flowing through interconnection'[134] on high bandwidth and private line access by all other internet operators and interconnection organisations, besides the core, backbone and normal interconnection points.[135]

There are three ways in which domestic internet operators can gain internet interconnection. The first way is to interconnect through network access points (NAPs) of which there are at present only three nationally, in Beijing, Shanghai and Guangzhou. Their settlement prices are regulated by 2007 Settlement measures.[136] Another way is by direct interconnection between backbone networks China Mobile, for example, requires direct internet interconnection from China Telecom. Their settlement prices are negotiated between the parties to interconnection agreements. The third way is through a third part, which is the 'flowing through interconnection' which mentioned above.

The background is that China Telecom has strong market power in the basic internet services market, owning 60% of broadband access users, 65% of content resources, major international outgoing bandwidth and 83% of total traffic of networks interconnection.[137] As a main internet operator with the obligation of providing interconnection to other internet operators or internet services, China Telecom applied distinguished high standards for users with internet dedicated line access above 45M. The settlement standard for internet operators in a minor position is around 1000 CNY/M/Month, the maximum price stipulated in the 2007 Settlement Measures.[138] The first category of users which are the internet operators in minor positions mentioned above, include three basic services operators, China Unicom, China Railcom and China Mobile, and two national undertakings, China Education and Research Network (CERN) and Great Wall Broadband Network, have to pay an interconnection settlement costs of up to more than 1 million CNY/G/Month. The remaining users belong to the second category and their interconnection settlement costs are generally from 250,000 – 420,000 CNY/G/Month,

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134 'Flowing through interconnection' means that internet operators in a minor position buy bandwidth from other undertakings, for example internet service providers (ISP) which can get bandwidth at a lower price from China Telecom to reduce the cost of bandwidth interconnection. This internal document has not been published to the public.

135 See http://news.xinhuanet.com/fortune/2010-10/05/c_12631127.htm (last visited March 1, 2012).

136 Measures for the Settlement between the Internet Exchange Centre Networks [互联网交换中心网间结算办法] (2007 Settlement Measures) which took effect by the MII on September 1, 2007.

137 See http://news.xinhuanet.com/fortune/2010-10/05/c_12631127.htm (last visited March 1, 2012).

138 Ibid. Also see Appendix of 2007 Settlement Measures.

even as low as 10,000 CNY/G/Month in some areas.[139] China Telecom also stipulated that second category users could not transfer interconnection to first category users.[140]

Do provisions governing abuse of administrative power to restrict or eliminate competition, especially Article 36 of the AML, apply to the issue of China Telecom's conduct on Internet interconnection settlement? If so, how do they work?

5.4.1 The Leading Telecommunications Operator

China Telecom is recognised as a LTO in the telecommunication services market. With the development of internet technology, broadband rather than dial-up access is widely used in the internet services market.[141] Broadband was suggested as 'an Internet connection that allows support for data, voice, and video information at high speeds, typically given by land-based high-speed connectivity such as DSL or cable services'.[142] However, there is no uniform standard of broadband. The OECD is required to have download data transfer rates no less than 256 kbit/s,[143] while in America, the standard of actual download speeds of at least 4 Mbps and actual upload speeds of at least 1 Mbps has been suggested.[144] In China broadband is generally required to exceed the rate of 2 Mbit/s on users' network

139 See Ibid.

140 See Ibid.

141 See the report of The MIIT September 2010 Operation Situation in Communication Industry, available at: http://www.miit.gov.cn/n11293472/n11293832/n11294132/n12858447/13451771.html (last visited March 1, 2012). Internet users of basic telecommunications operators are further exponents of Broadband. From January to September 2010, internet broadband access users of basic telecommunications operators had increased by 17,157,000 households and reached 121,135,000 households, while users of dial-up internet had reduced 1,225,000 households and fallen to 6,319,000 households. Users of dial-up internet were only 0.05% of the users of broadband internet. Until the end of 2010, the amount of internet broadband access users had reached 98.3% of the whole of internet access users, 126,340,000 households. See The MIIT 2010 Annual Statistic Public Report on National Telecommunications Industry, available at: http://www.miit.gov.cn/n11293472/n11293832/n11294132/n12858447/13578942.html (last visited March 1, 2012).

142 M. Ergen, *Mobile Broadband Including WiMAX and LTE*, (2009) Springer, at 3.

143 OECD Broadband Statistics to December 2006, see http://www.oecd.org/document/7/0,3343,en_2649_34223_38446855_1_1_1_1,00.html and OECD Broadband Subscriber Criteria (2010), see: http://www.oecd.org/document/46/0,3343,en_2649_34225_39575598_1_1_1_1,00.html (last visited March 1, 2012).

144 Sixth Broadband Development Report, which was adopted on July 16, 2010 by Federal Communications Commission. See p4. Available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db0720/FCC-10-129A1.pdf (last visited March 1, 2012).

connection.[145] In this case China Telecom focused on the restrictions of interconnection on high bandwidth and private line access which were both included in the area of broadband.

The fixed-line broadband market should be distinguished from the mobile broadband market. In terms of termination, the former is generally based on computers, while the latter focuses on mobile phones. In terms of services, the stability of network and the quantity of data flow in mobile broadband is much worse than in fixed-line broadband. The charge for mobile broadband is much higher than for fixed-line broadband. The capacity of mobile broadband has not reached 1/10 of the fixed-line broadband, while its cost of unit discharge is 10 times that of fixed-line broadband.[146] They have great differences in network application. Although with the development of technology, mobile broadband will be integrated with fixed-line broadband, at the current stage mobile broadband does not compete with fixed-line broadband at the same level, nor does it have characteristics interchangeable with fixed-line broadband in the broadband market. Thus first of all the relative market is the domestic fixed-line broadband services market.[147]

Second, can China Telecom be recognised as a LTO as well as having a dominant position in this relative market? China Telecom and China Unicom constitute a duopoly in the fixed-line broadband market, since these two operators control 95% of internet international outgoing broadband, 90% of internet broadband access users and 99% of internet content resources.[148] Other operators, for example China Railcom and Great Wall Broadband share a very limited fixed-line broadband market. However, concerning market share in the fixed-line broadband market, China Telecom still has a strong market power exceeding 50%, which should fall within the definition of a dominant market position, according to Article 19(1) of the AML.[149]

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145 S. Xiong, 'How to converge the Narrowband Service in Broadband Access Network [如何在宽带接入网中融合现有窄带业务]', (2000) 16(4) *Telecommunications Science* at 15.

146 J. Zhou, 'To the Direction of Mobile Broadband [迈向移动宽带之路]', (2009) 3(3) *Information and communications Technologies* at 89.

147 Domestic broadband services market exclude districts of Hong Kong, Macao and Taiwan.

148 H. Gao, 'The Suggestions on the Fifth Plan of Telecommunication Breakup and Reorganisation [第五次电信分拆与重组方案建议]', (2011) 5 *China Internet Weekly* p30.

149 Article 19(1) of the AML: '[w]here a business operator is under any of the following circumstances, it may be assumed to be have a dominant market position: (1) the relevant market share of a business operator accounts for ½ or above in the relevant market; …'

Table 6-5: China Telecom and China Unicom in Broadband Market[150]

	China Telecom	China Unicom
Internet International Outgoing Bandwidth	62%	33%
Broadband Access Users	51%	39%
Internet Content Resources	65%	34%

Furthermore, there is not adequate competition between China Telecom and China Unicom. The fixed-line broadband market of China Telecom is mostly focused on 21 provinces in south China while China Unicom's market is generally located in 10 provinces in north China. The geographical boundary on the fixed-line broadband market is based on their inherited fixed-line broadband markets from the former China Telecom and China Netcom, before the 2008 telecommunications revolution.[151] Moreover, internet operators and undertakings greatly rely on the infrastructure and services of China Telecom, since 83% of total traffic of network interconnection has to go through China Telecom's network. China Telecom have materially influence the entry of other internet service operators into the market if it refuses to trade with them. For instance, the outgoing bandwidth of China Railcom[152] had been cut down to 41 Gbps, which was 20% of the whole bandwidth for China Railcom, in China Telecom's cleaning up the 'flowing through interconnection' policy in 2010.[153] As a result, China Telecom is not only a LTO in Telecommunications Regulation, but has a dominant position in the fixed-line broadband market under the AML.

150 Ibid. However, there are different statistics on broadband access users. According to the Xinhua Net news, see http://news.xinhuanet.com/fortune/2010-10/05/c_12631127.htm, China Telecommunications owned 60% of broadband access users; according to statistics in The MIIT 2010 Annual Statistic Public Report on National Telecommunications Industry, 2010 Annual Reports of China Telecom and China Unicom, the amounts of broadband access users nation wide, China Telecom and China Unicom in 2010 were 126,340,000, 63,480,000 and 47,224,000 households. The rates of broadband access users of China Telecom and China Unicom were 50.25% and 37.38%. Nevertheless, the amount of broadband access users in China Telecom still exceeded 50%, no matter which set of statistics.

151 In the 2002 telecommunications revolution, the former China Telecom was divided into a new China Telecom, which mainly owned fixed line services in 21 provinces in south China, and a new China Netcom which was consolidated with the original China Netcom and Jitong, and mainly owned fixed line services in 10 provinces in north China. See FN 93. Later, during the 2008 telecommunications revolution, a new China Telecom and a new China Unicom were created with a full telecommunication services model. The new China Unicom merged with China Netcom and owned their fixed line services in 10 provinces in north China, including fixed broadband services. See Table 3. Although the new China Unicom also merged China Netcom's fixed telecommunications network services in 21 provinces in south China, the amount of users in these 21 provinces was only 3,470,000 households, hardly competing with China Telecom. See http://ccnews.people.com.cn/GB/87326/8537961.html (last visited March 1, 2012).

152 China Railcom was merged by China Mobile in 2008 and became a whole-owned subsidiary undertaking of China Mobile.

153 See http://news.xinhuanet.com/fortune/2010-10/05/c_12631127.htm (last visited March 1, 2012).

Third, China Telecom adopts a unidirectional settlement measure. In both interconnection through internet exchange centres and direct interconnection with China Telecom other fixed-line broadband undertakings in minor positions are not only charged by their content from China Telecom's network of accessed by their users, but also have to pay for their own content accessed by China Telecom users through their interconnection.[154] This further strengths the dominant position of China Telecom. On the other hand, China Telecom adopted discriminatory settlement prices on different internet operators and undertakings. A much higher interconnection settlement price is required from several main internet operators who are existing competitors for China Telecom in the internet services market. This conduct will increase the interconnection costs of China Telecom's competitors, further restrict the bandwidth and internet services development of its competitors, and finally maintain its dominant position in the internet services market. Additionally, the huge gap in settlement prices between the first category operators and the second category undertakings shows indirectly that the prices China Telecom charged its rivals are much higher than the true cost, although measures to identify the cost are still not confirmed. Moreover, settlement prices are generally unilaterally decided by China Telecom, although interconnection negotiation between the parties to the interconnection is required by Telecommunications Regulation and 2007 Settlement Measures,[155] because of China Telecom's market power.[156]

Finally, China Telecom refused 'Flowing through interconnection'. In other words, second category undertakings are not allowed to transfer their obtained transfer interconnection to the first category operators, and the latter cannot obtain interconnection more cheaply. China Telecom therefore not only maintained the huge gap on discriminatory interconnection settlement prices, but also protected its own monopoly position in the market.

As a result China Telecom's applying discriminatory pricing to counterparties, setting and increasing transactions' barriers by maintaining settlement prices at levels much higher than cost, and refusing interconnection transfer, constitute an abuse of its dominant position under the AML.

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154 Except the interconnection with China Unicom and China Education and Research Network through internet exchange centres. See Article 4 of 2007 Settlement Measures.

155 See Article 20 of Telecommunications Regulation and Article 3 of 2007 Settlement Measures.

156 See http://tc.people.com.cn/GB/183175/183215/12996716.html (last visited March 1, 2012).

5.4.2 Administrative Power

Administrative power has a great effect on the issue of interconnection settlement. Several administrative instruments have been passed, in 2001, 2004, 2005 2006 and 2007 by the MII.[157] The unidirectional settlement measure had been adopted since the earliest 2001 Settlement Measures. Any interconnection organisations receiving interconnection from China Telecom or China Unicom should pay settlement fees to China Telecom or China Netcom.[158] Furthermore, settlement should be charged according to standards determined in the Appendixes of these Settlement Measures, and based on the data communication rate between networks from 2001 to 2006. [159] In other words, the settlement charges were fixed by government prices and standards. Although the settlement charge was replaced by a government guiding price through upper limit standard in 2007 Settlement Measures, China Telecom is still free to charge different prices to internet operators or undertakings. Moreover, the government guiding price on an upper limit standard of settlement charge cannot represent the cost of interconnection. There is no rule on determining settlement prices provided by the government. In consideration of the huge gap in China Telecom's interconnection settlement price between different categories of operators and undertakings, and China Telecom's applying virtually the maximum charge to its competitors, the government upper limit standard cannot be considered a fair charge based on the cost of interconnection.[160] All these provisions in 2007 Settlement Measures grant a unidirectional

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157 2001 Interim Provisions on the Interconnection Services between Internet Backbone Networks [互联网骨干网间互联管理暂行规定] (2001 Interim Provisions) took effect by the MII on September 29, 2001 and was replaced by 2004 Measures for the Settlement of the Interconnection between Internet Backbone Networks [互联网骨干网间互联结算办法] (2004 Settlement Measures) which took effect by the MII on May 1, 2004 and was invalidated on July 1, 2005. 2005 Measures for the Settlement between the Internet Exchange Centre networks [互联网交换中心网间结算办法] (2005 Settlement Measures) replaced the previous 2004 Settlement Measures and took effect by the MII on July 1, 2005. 2006 Measures for the Settlement between the Internet Exchange Centre networks [互联网交换中心网间结算办法] (2006 Settlement Measures) replaced the previous 2005 Settlement Measures and took effect by the MII on November 1, 2006. 2007 Settlement Measures replaced the previous 2006 Settlement Measures and took effect by the MII on September 1, 2007. There is another administrative document on internet interconnection. Interim Provisions on the Management of the Interconnection between Internet Backbone Networks [互联网骨干网间互联管理暂行规定] was issued by the MII on October 8, 2001.

158 See Article 3 of 2001 Interim Provisions, 2004 Settlement Measures, 2005 Settlement Measures, 2006 Settlement Measures and Article 4 of 2007 Settlement Measures. Nowadays, the two basic internet operators are China Telecom and China Unicom. China Netcom was merged by China Unicom in 2008 Telecommunications Reform.

159 See Article 3 of 2001 Interim Provisions and Settlement Measure from 2004 to 2006.

160 According to Appendix of 2007 Settlement Measures, settlement price (CNY/Month) = 1000 (CNY/Mbps Month) * settlement rate (Mbps). Since 1G is equal to 1024M, the maximum settlement price (CNY/G/Month) should be 1000 (CNY/Mbps Month) * 1024 (Mbps), that is around 1 million CNY/G/Month. The interconnection settlement prices for first category internet operators are almost equal to the government upper limit settlement price.

settlement measure and free decision rights on the internet interconnection settlement price under the range of the government upper limit price.

5.4.3 Whether an administrative power falls within Chapter Five of the AML

With the rights on the unidirectional settlement measure and interconnection settlement pricing granted the MII by Telecommunications Regulation and 2007 Settlement Measures, China Telecom created barriers to other internet services operators in the market to increase the cost to competitors, reduce competition in the basic internet services market, and maintain its dominant position. Finally, the charge for internet users will be maintained at a high level and consumers' interests will be harmed. Compared to the previous settlement price - for example the settlement price up to 2.2 million CNY for the first category operators in 2006 [161] - although the settlement price has been considerably reduced by the new settlement measure standard provided by the MII in 2007 Settlement Measures, the effect of restricting or eliminating competition in the internet market cannot be ignored. In conclusion, China Telecom abused its dominant position to set discriminatory interconnection settlement prices for competitors, by reason of rights granted from the MII.

Another argument involving 'compulsory force' of administrative power needs to be clarified. Administrative measures in this case are a form of empowerment without compulsory force on the abusive dominant position conduct of China Telecom. According to the rules in the AML, an administrative measure will be considered illegal under Article 36 of the AML, only if business operators are forced by an administrative organ or organisation empowered by law or administrative regulation to administer public affairs to engage in conduct of abusing dominant market position or setting a monopoly agreement. In such circumstances the administrative measures of granting unidirectional settlement method and the freedom to negotiate interconnection settlement prices in this case, do not have the characteristics of compulsory force on China Telecom's interconnection conduct. The relevant administrative measures at issue will not fall under Article 36 of the AML, although these administrative measures have the effect of restricting or eliminating competition, and China Telecom did abuse its dominant position in the basic internet services market and infringed Article 17 of the AML.

[161] See http://www.kejixun.com/2010/1005/36122.html (last visited March 1, 2012).

As suggested in previous Chapters, compulsory force should not be a necessary condition of constituting an abuse administrative power to restrict or eliminate competition.[162] Although China Telecom was not forced to adopt the conduct of abusing its dominant position, it was empowered to set a standard much higher than the true cost, which actually encouraged China Telecom to adopt high and discriminatory interconnection settlement prices for its competitors. There is no information published to show that what effect the telecommunication administrative authority had in the process of mediating or forcibly effecting interconnection. However, the result is that internet interconnection operators, for example China Unicom, China Railcom, Great Wall Broadband and local broadcasting and television operators are all dissatisfied with the interconnection settlement price, but have to reach an agreement with China Telecom or find a third way to get cheaper access to the interconnection transferred from the second category undertakings.[163] Nor has the huge gap in settlement prices between the first and second categories operators and undertakings also have not been regulated by telecommunication administrative authorities. This situation shows that telecommunications administrative authorities, especially the MIIT,[164] either did not work effectively, or stood on the side of China Telecom. The conduct of the MIIT may have a similar effect of supporting the discriminatory and unfair interconnection settlement prices operated by China Telecom against its competitors in a disguised form. The abuse of administrative power by the MIIT should be regulated by Chapter Five of the AML, although without 'compulsory force'.

5.4.4 Exemptions

Since exercise of administrative power is considered as an abuse when it restricts or eliminates competition, are there any exemptions applying to this abuse? As suggested in Chapter Four of this thesis, the AML should learn from EU competition law and create an exemption for an administrative measure which may improve public interest and is the only way to achieve this administrative target.[165] China Telecom in this case, is recognised as a LTO in the basic internet services market and is required to assume the obligation of universal services. Universal services, as a part of Service of General Economic Interest (SGEI), constitute an exemption in Article 106(2). Universal services are also suggested to

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162 See para.4.2 of Chapter Four of this thesis.
163 See http://news.xinhuanet.com/fortune/2010-10/05/c_12631127.htm (last visited March 1, 2012).
164 It was the MII. See Article 20 of Telecommunications Regulation and Article 5 of 2007 Settlement Measures.
165 See para.5 of Chapter Four of this thesis.

be a kind of exemption for abuse of administrative power, with the effect of restricting or eliminating competition. The position of universal services in the communications sector and the effect of universal services of China Telecom in the case of internet interconnection will be further discussed in the next section.

5.5 Summary

Telecommunications interconnection is operated with the guidance and coordination of telecommunications administrative authorities and negotiation between telecommunication services operators. It is beneficial to the balance and improvement of market competition and development of the telecommunications industry. However, interconnection in telecommunication sector has some unreasonable matters under the AML.

LTOs may abuse their dominant position in the telecommunication services market and place other services operators, particularly their competitors, in disadvantaged positions in a relevant market: for example by China Telecom's interconnection settlement measures and prices issues on the fixed-line broadband market. In some circumstances, telecommunications administrative authorities may abuse administrative power to formulate regulations or policies which have the effect of restricting or eliminating market competition: for example the MIIT's measures on unidirectional settlement measures, the over valued settlement standard, and the basis on cost in the case of China Telecom's fixed-line broadband interconnection. These measures harm competition between broadband services operators and consumer benefits. As a result the LTOs' conduct maybe constitute an infringement under the AML and telecommunications administrative authorities should be regulated by the AML to fall within the provisions on abuse of administrative power to restrict or eliminate competition.

6. Telecommunication universal services and Exemptions under the AML

In this section the exemptions applied to provisions governing abuse of administrative power in the telecommunications sector in Chapter Five of the AML will be discussed, besides the exemptions created by Article 7 of the AML in the general provisions chapter. There are two further questions to be answered: What kind of situation in the

telecommunications sector can qualify as an exemption within Chapter Five of the AML? What is the legal procedure satisfying the conditions of the exemptions?

6.1 Universal Services in Telecommunications Sector

Article 44 of Telecommunications Regulation requires that '[t]elecom business operators should fulfil their obligations of providing universal service in accordance with State regulations.' However, there is no clear definition of 'universal services' in the telecommunications sector in China. In the EU, universal service is defined as 'a defined minimum set of services of specified quality which is available to all users independent of their geographical location and, in the light of specific national conditions, at an affordable price' in the telecommunications sector.[166] The characteristics of availability, accessibility and affordability are broadly accepted by the International Telecommunication Union (ITU) and other international organisations.[167]

Considering the development of technology, market, economic conditions and users demand, the content of universal services is always changing, not only in developing countries but also in developed countries. In the 2002 Universal Service Directive, neither mobile nor broadband was treated as part of universal services. In Switzerland in 2008, France and Finland in 2009, for example, broadband access was continuously treated as a kind of universal service in telecommunications.[168] In the UK, although broadband Internet has not been part of universal services, a target of 2 Mbis broadband access by 2012 was formulated by the Ministry of Communications.[169]

In terms of the scope of universal services, developing countries have to face more complex elements of geography, technology, economy and society, and generally tend to achieve it in stages.[170] As a developing country, China divides the targets of

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166 See Article 2 (2) (f) of Universal Service Directive.

167 See International Telecommunication Union, Chapter Four of 'World Telecommunication Development Report: Universal Access' March 1998. 'Rethinking Universal Service for a Next Generation Network Environment', DSTI/ICCP/TISP(2005)5/FINAL, available at: http://www.oecd.org/dataoecd/59/48/36503873.pdf (last visited March 1, 2012).

168 See http://www.dailymail.co.uk/news/article-1192359/Internet-access-fundamental-human-right-rules-French-court.html and http://www.lvm.fi/web/en/pressreleases/-/view/920100 (last visited March 1, 2012).

169 See http://news.bbc.co.uk/1/hi/technology/7858498.stm (last visited March 1, 2012).

170 C. Milne suggested that the scope of universal service had five stages which were based on the different types of goals on technology, geography, economy, sociality and libertarian. See C. Milne, *Universal Service for Users: Recent Research Results – An International Perspective*, Paper for the 25th annual

telecommunications' universal service into five stages, according to a report by Su Jinsheng, previous chief of the telecommunications administration Bureau of the MIIT and the former MII (Table 6-6).

Table 6-6: The Five Stages and Goals of Telecommunications' Universal Service in China[171]

	Goals
Stage 1	Telecommunications service access to major cities;
Stage 2	Telecommunications service access to cities and major counties and towns;
Stage 3	Until 2010, mid-term goal: provide general access services: telephony access to each village and Internet access[172] to counties or towns;
Stage 4	Until 2020, long-term goal: basically maintain general telephony access and quality to households, telephony access to each household and Internet access to each village;
Stage 5	Further individual information service coverage, and higher standard information service provided.

Unlike developed countries in the EU where the household is the unit to evaluate the standard of universal service, the main task of implementing universal services in China is still telephony access to natural villages and Internet access to administrative villages.[173] In other words, the scope of universal service is the goal between stage 3 and stage 4. As a result implementation of universal service obligation in rural areas is extremely important. In the next paragraph, rural universal service in telecommunications sector will be discussed and whether the rural universal service qualifies as an exemption for abuse of the administrative power to eliminate or restrict competition will be further examined.

Telecommunications Policy Research Conference, September 1997. This opinion was adopted by the ITU in 'World Telecommunication Development Report: Universal Access' in 1998, available at: www.itu.int/ITU-D/ict/publications/wtdr_98/index.html (last visited March 1, 2012).

171 J. Xu and B. Holznagel, *Comparative Study of the Telecommunications Law in the EU and China [中欧电信法比较研究]*, (2008) Law Press, at 185, Table 4-1;
also see http://news.xinhuanet.com/newscenter/2005-08/25/content_3404409.htm (last visited March 1, 2012).

172 There is no standard on Internet access stated. But it should be broadband access, because broadband access is the main approach to Internet connection in China. Until 2010, Internet dial-up users reduced by 1.64 million households to 5.9 million households, while broadband users increased by 22.36 million households and reached 126.34 million household, according to the 2010 Statistics Report on Telecommunications Sector, available at:
http://www.miit.gov.cn/n11293472/n11293832/n11294132/n12858447/13578942.html (last visited March 1, 2012). In 2009, the percentage of users in broadband access raised to 90.1% of the whole Internet access users from 45.5% in 2004. See 'The 25th Statistic Report of Internet Development in China [第二十五次中国互联网络发展状况统计报告]', available at:
http://www1.cnnic.cn/uploadfiles/pdf/2010/1/18/141029.pdf (last visited March 1, 2012).

173 See the goal of the Rural Access project in the twelfth five years plan from 2011, available at: http://www.gov.cn/zwgk/2011-02/14/content_1803223.htm (last visited March 1, 2012).

6.2 The Rural Access project and Universal Services

The Rural Access project (RA project) is a part of telecommunications' universal service, which mainly focuses on rural areas in China. The aim is to expand the coverage of telecommunication services to poor, suburban or sparsely populated areas by providing universal telecommunications' services to every administrative and natural village.[174] The RA project, in its current stage, merely improves the most basic telecommunication universal services, for example, telephone services and internet services. But the content of the RA project will change depending on development and needs in the countryside.

6.2.1 The Content of the Rural Access Project

The measures for carrying out telecommunication universal services vary in accordance with the revolution in the telecommunications industry. Before the telecommunications revolution in 1998, China Telecom was a monopoly organisation with government and enterprise functions. It was also the only provider of telecommunication universal services under government's compulsory measures. The funding for universal services generally came from governmental fiscal subsidy, telephone installation fees, social subsidies from other additional charges, and crossing subsidies from long distance telephone services.[175]

Since 1998, China Telecom was resolved and other five telecommunications undertakings, China Unicom, China Mobile, China Netcom, China Satcom and China Railcom started to provide basic telecommunication services in the relatively competitive market. China Telecommunications was still responsible for providing universal services while, at the same time, it had to face a reduction of market share, decline of commercial profit and competition from other telecommunications undertakings. On the one hand, China Telecommunications became a relatively independent public undertaking due to the separation of government functions from enterprise management. Universal service, as a public interest service, was not as important as it had been in an independent undertaking. On the other hand, the tariff in the telecommunications sector dropped, especially in those areas where China Telecommunications had previously obtained crossing subsidies, for example, installation fees for fixed telephones mobile access fees, long distance telephone

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174 Administrative village is the smallest self-governance organisational unit in the Chinese countryside. Until 2005, there were a total number of 680,000 administrative villages in China. See: http://english.peopledaily.com.cn/200505/30/eng20050530_187563.html (last visited March 1, 2012)

175 See J. Xu and B. Holznagel, note 171, at 192.

services, rent for electronic circuits and internet fees.[176] Given on such influences, the development of telecommunications' universal service was slow in country areas, where universal service investment means much more than profit in the commercial sense.

New approaches to universal services were adopted in rural areas and the obligation to provide universal services was acknowledged by telecom business operators in through Telecommunications Regulation in 2000. In the 'RA Project Implementation Plan'[177] the MII appointed six basic telecommunication services operators to share this obligation by dividing up the universal services by area and assigning a part to each undertaking. Since the telecommunications revolution in 2010, China Mobile, China Telecom and China Unicom have shared telecommunications universal services obligation. The RA project has been implemented for seven years, and the content of universal services in the RA project grows by stages.

[176] See W. Dong and Q. Zhang, *Report on China's Economic Development and Institutional Reform: China: 30 years of Reform and Opening-up(1978-2008)) [中国经济发展和体制改革报告：中国改革开放 30 年（1978-2008）]* (2008) Social Science Academic Press, at 530.

[177] Telecommunications Universal Services in Countryside – the Village Access Implementation Plan [农村通信普遍服务—村通工程实施方案] was published by the MII on 16 January, 2004, see: http://tech.sina.com.cn/it/2009-09-15/20353440496.shtml
and http://www.cnii.com.cn/20070108/ca395867.htm (last visited March 1, 2012).

Table 6-7: Development of the Rural Access project[178]

	Operators	Goals	Effects
2004-2005	Six basic telecommunication services operators (China Telecom, China Mobile, China Unicom, China Netcom, China Satcom and China Railcom)	Telephone access available in at least 95% administrative villages.	Until 24 November, 2005, 52,304 administrative villages had telephone access. The coverage had reached 97%.
2006-2010	Six basic telecommunication services operators[179] (China Telecom, China Mobile, China Unicom, China Netcom, China Satcom and China Railcom)	Telephone access available in 100% administrative villages and mostly natural villages with 20 households above 100% towns have internet access; and setting up information services system in counties, towns and villages.	100% administrative villages and 94% natural villages have telephone access; 100% towns have Internet access; nearly half of towns have set up towns information services stations and information services system in counties, towns and villages.
2011-Now	Three basic telecommunication services operators (China Mobile, China Telecom and China Unicom)	Broadband access available in 100% administrative villages; Telephone access available in 100% natural villages; and setting up information services system.	

There are other characteristics to which there is a need to pay attention. First, undertakings with the obligation of providing telecommunication universal services are assigned or tendered by departments in charge of the information industry under the State Council, according to Telecommunications Regulation.[180] In the RA project basic telecommunication services operators are assigned by the previous MII or the current MIIT. The distribution of universal services obligation is based on the revenues and profit of each operator, as well as their existing basic telecommunications' services network areas. Next, the RA project investment relies mainly on the funds raised by operators themselves, supplemented by those raised by central and local government fiscal subsidy. For example, the amount of direct investment in the RA project reached 50 billion CNY from 2006 to

178 See http://www.cnii.com.cn/20070108/ca395867.htm; http://www.miit.gov.cn/n11293472/n11293877/n11302021/n13735231/13735477.html; http://www.miit.gov.cn/n11293472/n11293832/n11293907/n11368223/13563594.html; and http://www.gov.cn/zwgk/2011-02/14/content_1803223.htm (last visited March 1, 2012).

179 In 2008 Telecommunications sector revolution, six basic telecom services operators have been restructured into 3 basic telecom services operators: China Mobile, China Telecom and China Unicom.

180 See Article 44 (2) of Telecommunications Regulation.

2010, while the amount of operators self-raising funds was up to 48 billion CNY.[181] Each operator, China Telecom, China Mobile and China Unicom had respectively spent 24 billion CNY, 23.1 billion CNY and 3.55 billion CNY.[182] Furthermore, a multi-channel fund-raising mechanism on telecommunication universal services investment was put forward. A fund for telecommunication universal services was suggested to develop the RA project in 2011.[183]

6.2.2 Whether the Rural Access project could be an Exemption under Chapter Five of the AML

Universal service generally is an important part of the content of SGEIs in Article 106(2) TFEU in EU competition law. A question will be asked whether telecommunication universal services in China will satisfy the requirement of public interest exemption in Chapter Five of the AML? As discussed above, the restrictions on market access in the basic telecommunication services market may violate Article 37 of the AML on abuse of administrative power to eliminate or restrict competition. Another question arose: whether telecommunication universal services, especially the RA project could qualify as an exemption for those restrictions.

6.2.2.1 The Significance of the Rural Access project

The RA project in economic terms, will improve economic development in rural areas. Telecommunication approaches are simple, fast and convenient methods of communication in modern society. Residents, undertakings or other economic organisations in rural areas can receive valuable market information, find potential business in a vast country, increase their economic benefits and income, and finally, secure good living conditions.

The implementation of telecommunication universal services in rural areas will have an active effect on social development. Residents will be provided with basic communication

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[181] See http://www.miit.gov.cn/n11293472/n11293877/n11302021/n13735246/13735598.html (last visited March 1, 2012)

[182] See http://www.miit.gov.cn/n11293472/n11293877/n11302021/13739081.html; http://www.miit.gov.cn/n11293472/n11293877/n11302021/13739107.html; http://www.miit.gov.cn/n11293472/n11293877/n11302021/13739094.html; and http://tech.sina.com.cn/t/2011-04-26/02095448928.shtml (last visited March 1, 2012).

[183] See The MIIT's Opinions on Implementing 2011 Telecommunications Rural Access project, available at http://www.gov.cn/zwgk/2011-02/14/content_1803223.htm (last visited March 1, 2012).

facilities and capacities, and will meet fundamental, common life requirements. The RA project also supports the development of medical care, education. It improves redistribution of national income and narrows the gap between developed and developing regions, especially between urban and rural areas.

Concerning the telecommunications sector itself, universal service in rural areas is also a requirement of the telecommunications market. There are 674,149,546 people residing in rural areas, accounting for 50.32% of the national population.[184] Telecommunication is still in the early stages in these areas. Rural area in China will be a broad market with potential for growth in the future, although at present the telecommunication investment is higher than its profit. Market expansion will further improve the development of telecommunication manufacturing and service sectors.

6.2.2.2 The Rural Access project and Public Interest

The RA project, as a part of universal services, has the basic characteristics of universal services: availability, affordability and accessibility. It provides general telephony and Internet access to every village or town, although its goals may vary depending on the stages of development. It may be argued that the RA project is not a 'universal' service since the coverage of the RA project is only in a limited territory, rural areas, and only residents in those areas can benefit from this project. The unbalanced development of telecommunication services has led to this kind of universal service within a reasonable distance for each person reached in urban areas much earlier than in rural areas. The low income population group is not covered by the current universal service because the current target is based on location standards, but not a more detailed goal for each household or even the individual.

Regarding charges for telecommunication services, basic telecommunications operators should at least provide a tariff plan which has the same tariff structure and billing units as the current standard tariff, and the tariff should not exceed the current standard tariff.[185] In

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184 See the Main Statistics Report on the Sixth Nationwide Population Census 2010, published by National Bureau of Statistics of China on April 28, 2011. Available at: http://www.stats.gov.cn/tjgb/rkpcgb/qgrkpcgb/t20110428_402722232.htm (last visited March 1, 2012).

185 See the MIIT and National Development and Reform Commission's Notice on Adjusting the Measures of Tariff Management on Fixed Local Telephony and Other Services [工业和信息化部、国家发展改革委关于调整固定本地电话等业务资费管理方式的通知] was published on November 18, 2009. Available at:

other words, government upper limit pricing management should be adopted to control tariff plans provided by basic telecommunications service operators under a reasonable and affordable price. The public payment capacity index on telecommunications tariff rose rapidly to 0.4956 in 2010 from 0.01615 in 2000, with an increase in urban and rural residents' income and the decrease in telecommunication tariff charges.[186]

The RA project requires no discriminatory manner for all telecommunication services subscribers. A uniform telecommunications tariff standard should be adopted nationwide. Each person should have equal rights to obtain access to telecommunication services, although unlike other developed countries, the low-income population group and special facilities used by people with disabilities have not been considered in China.

Operators under an obligation to provide telecommunication universal services are assigned by departments in charge of the information industry under the State Council, the MIIT at present. These operators should implement the task consigned by the RA project in their responsibility zones and cannot consistently refuse to provide established telecommunication services to consumers.

To summarise, the RA project is a kind of telecommunication universal service for the public interest. China Mobile, China Telecom and China Unicom fulfil their legal obligation in a compulsory manner. The RA project providing universal service in rural areas might qualify as an exemption in the telecommunications sector under abuse of administrative power in the AML.

6.2.2.3 The Rural Access project and Its Obligation Operators

Can the RA project only be implemented by basic telecommunications service operators? First, it is required to by undertakings' business capacity. The rural area is a broad and open region in such a huge country as China. There are massive gaps in telecommunication services penetration between the urban and rural areas.

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http://www.miit.gov.cn/n11293472/n11293832/n12843926/n13917072/14034364.html (last visited March 1, 2012).

186 See Research Team of Entering the Information Society: China's Information Society Development Report 2010, 'China's Information Society Development Report 2010 [中国信息社会发展报告 2010]' (2010) 6 *E-Government* p31. However, this research further analyses the capacity index in mobile and broadband services, and concludes that the tariff charges of main telecommunication services are still too high, compared with the public's income, ability to pay and the goal of universal service. See p11 and p 66-67.

Table 6-8: 2004-2009 Fixed-line Telephony Penetration in Urban and Rural Area (per 100 population)[187]

	2004	2005	2006	2007	2008	2009
Urban Area	37.6	35.9	41.7	41.8	38.2	34.1
Rural Area	15.8	20.3	17.5	16.4	15.1	14.3
Gap	21.8	15.6	24.2	25.4	23.1	19.8

Table 6-9: 2004-2009 Mobile Ownership of Urban and Rural Residents (per 100 household)[188]

	2004	2005	2006	2007	2008	2009
National	66.7	87.5	101.9	117.1	130.8	145.8
Urban Area	111.4	137.0	152.9	165.2	172.0	181.0
Rural Area	34.7	50.2	62.1	77.8	96.1	115.1
Gap	76.7	86.8	90.8	87.4	75.9	65.9

Table 6-10: 2005-2010 Internet Penetration in Urban and Rural Areas[189]

	2005.12	2006.12	2007.12	2008.12	2009.12	2010.12
Urban Area	16.9%	20.2%	27.3%	35.2%	44.6%	50.0%
Rural Area	2.6%	3.1%	7.1%	11.7%	15.0%	18.5%

As the tables above show, the penetration of fixed-line telephony and the gap between urban and rural areas were almost at the same level, with minor fluctuations, from 2004 to 2009, while mobile ownership was increasing, with the gap between urban and rural areas gradually decreasing after its highest point in 2006. However, until 2010, the gap in the Internet continued to enlarge, twice that of 2005, although Internet coverage expanded. Generally the penetration of various telecommunications services and improved both in urban and rural areas since the RA project started. But the gap between urban and rural areas cannot be neglected, especially the increasing gap on the Internet. Providing telecommunication universal service is a huge task for operators. Only basic telecommunication services operators with large economic scales can implement the huge task.

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187 The statistics of Chart 1 is referred from China Digital Divide Research Group of National Information Centre, 2010 China Digital Divide Report, available at: http://yearbook.idc.com.cn/China2010/ztyj_15.htm (last visited March 1, 2012).

188 Ibid.

189 The statistics of Chart 3 is referred from China Internet Network Information Centre, 2010 Investigation Report on the Development of Internet in Rural Area of China, published in August 2011, available at: http://www.cnnic.cn/research/bgxz/ncbg/201109/P020110906360062661430.pdf (last visited March 1, 2012).

Second, investment and profit in and from universal service were asymmetric in rural areas. Telecommunication universal services, especially in rural areas, grew almost from nothing, unlike developed countries in the EU with basically universalised and well-established telecommunications networks, and high levels of household telecommunication services penetration. It requires extremely high construction and maintenance costs, and has a long investment recovery period. However, the benefit from the services provided is restricted, at least at the current stage, by use and household per capita income. Many areas, especially in western China, even operate at a loss. By 2010 the cost of the RA project had reached 50 billion CNY, and 96% of funds were raised by operators under universal service obligation. There are other related problems in implementing the RA project in some areas, for example, electricity, road access, land requisition, subsidy and compensation. Those problems need to be solved with the support and negotiation not only of the residents, but also local governments.[190]

As a result at the current stage, any individual undertaking will find it difficult to assume the obligation of universal service, especially in rural areas. If an individual undertaking was allowed to enter the basic telecommunication services market and compete with the existing service providers, it could concentrate on more profitable areas, for example urban since it is 'not bound for economic reasons to offset losses in the unprofitable areas against in the more profitable areas.'[191] Free of universal service obligation, especially that of the RA project in the rural areas, the individual undertaking may offer more advantageous tariffs than the three basic telecommunication services operators assigned to universal service, and 'cherry pick' business.

6.2.2.4 The RA project as an Exemption in Chapter Five of the AML?

A last question should be answered before the RA project can qualify as an exemption to the administrative restriction on market access in the basic telecommunication service market: whether the objective of universal service in rural areas can be equally achieved by other means which may have a less harmful effect on competition.

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[190] See http://www.miit.gov.cn/n11293472/n11293877/n11302021/n13046758/13047470.html (last visited March 1, 2012).

[191] See para. 18 of Case C-320/91, *Paul Corbeau* [1995] 4 *C.M.L.R* 621.

Universal service obligations in rural areas, in accordance with the rules of the RA project, are assigned by the MIIT to basic telecommunications service operators to distribute the proportions of each operator's revenues and profit and the regional features of each operator's existing telecommunications network in each province. Under current rules, an individual basic telecommunications service operator, with limited economic scale and fund, will find it difficult to undertake rural universal service. In commerce under capital the profit motive is prior. The company will automatically concentrate on a profitable market, when there are no bounds imposed. Although a company may have some social responsibility, this does not mean that it will give up its potential advantages in a competition market. When there is market access in a basic telecommunications service market, China Telecom, China Mobile and China Unicom find hard to carry out the universal service obligation in rural areas, and have to face cherry-picking in a profitable market, under the current measures of obligation assigned or even tendered, and the current funding approach of mostly relying on operators' fund-raising.

The RA project creates an exemption for the State Council in refusing an individual undertaking with a less than 51% State-owned equity interest or shares access to the basic telecommunications service market by Article 10(1) of Telecommunication Regulation. The State Council and Telecommunication Regulation does not violate Article 37 of the AML and constitute abuse of administrative power to eliminate or restrict competition.

7. Summary

This chapter presents a case study examining the influence of abuse of administrative power to eliminate or restrict competition regulations in the AML in telecommunications, a basic utility sector. The background and development of the telecommunications sector in the EU and China is separately reviewed. Further comparison of telecommunications in the EU and China is analysed. An understanding of the telecommunications sector secured, this chapter discussed the application of Chapter Five of the AML to three aspects of telecommunications: market access, interconnection and exemption.

Administrative restriction on basic telecommunication services market should be found to be a restriction of market access and an abuse of administrative power conduct, to eliminate or restrict competition under Article 37 of the AML. This chapter further

examines Article 7 of the AML, and considers that Article 7 creates an exemption to market access restrictions in the issue of applying Article 37. However, this exemption does not work through application of competition law rule, but is created by the requirements of industrial policy, which is decided by administrative authorities. In fact, it maybe maintain the dominant position of the State-owned economy in basic telecommunication services markets, create barriers to new operators' market access, and prevent further competition in the market by administrative power. Article 7 of the AML should be repealed.

This thesis finds that administrative power, but not competition rules, have great impact on telecommunications' interconnection and provisions of basic telecommunication services. Administrative power should be narrowed and regulated under the AML. It further discusses violations of Article 36 of the AML, taking as examples China Telecom's conduct in applying dissimilar pricing policies to counterparties, setting and increasing transactions' barriers by maintaining settlement prices at much higher than cost, and refusing interconnection transfer. Finally, it is concluded that the MIIT's regulations on these questions shall fall within the area of Chapter Five of the AML is made.

This thesis analyses universal service in the basic telecommunications service market as an exemption from abuse of administrative power to eliminate or restrict competition. On the basis of discussion of the RA project, the exemption effect of universal service in rural areas on basic service market access issues is examined. It is found that the RA project qualifies an exemption for the three enterprises, China Telecom, China Mobile and China Unicom to abuse their dominant positions to eliminate or restrict competition to apply Article 37 of the AML on market access restriction by Article 10 of Telecommunications Regulation.

Chapter Seven
Conclusion

The Chinese Anti-monopoly Law (AML) entered into force on August 1, 2008. Its development and formulation has adopted the experiences and suggestions from a number of countries and international organisations. The experiences from EU competition law played an especially essential role. There are hundreds of articles written by scholars in the areas of monopoly agreement, abuse of market dominance and merger control inside and outside of China. However, little research has been undertaken on the aspect of abuse of administrative power to eliminate or restrict competition due to the specific background and situation pertaining in China. This thesis aims to provide a critical comparison between the AML, and EU competition and free movement rules, and draws on the EU's experience as a source of criticism and guidance in relation to the application of abuse of administrative power to eliminate or restrict competition in the AML.

1. The Significance of this Study

With the adoption of Economic Reform and the Opening-up Policy in 1978, a centrally planned economy was gradually transferred into a market economy in China. Markets started to have a basic function in resource distribution and liberalisation in the investment field was expanded. After more than 30 years' development, China has formed a relatively competitive market. The argument on the formulation of the AML lasted for nearly two decades during which time there was continued development of the market economy.

The control of abuses of administrative power has an important role to play on eliminating or restricting fair competition in the market economy in China. First, administrative power is one of the most serious and universal methods to eliminate or restrict competition in China. Some scholars even suggested that abuse of administrative power should be regarded as the main regulated object of the AML in the current stage.[1] Second,

[1] X. Wang , 'Regulating Administrative Conduct of Restricting Competition in Accordance with the Law

administrative power is a kind of non-economic conduct which interferes with the economic activities in the market. Zheng Chenpeng claimed that administrative power gave rise to even more serious social harm than economic monopoly.[2] Finally, abuse of administrative power to eliminate or restrict competition may have an influence on the economy and polities between enterprises and administrative departments, regions or even individuals. As a result, the regulation of abuse of administrative power supported by the State, scholars, enterprises and ordinary people.

Abuse of administrative power to eliminate or restrict competition became one of the most controversial problems during the AML's formulation process. It has been slightly five years since the AML took effect, and only one case has been brought relating to abuse of administrative power; this was dismissed by the Court.[3] It is important that there be further research on the regulations and practice of abuse of administrative power to eliminate or restrict competition under the AML.

At the same time, EU competition law has developed for more than half century since the competition rules were set and brought into effect in the Treaty of Rome in 1958 and became a relatively completed model of competition law, especially after 'modernisation' in 2004.[4] The China's AML has similar provisions on the regulations of monopoly agreement and abuse of market dominance, since the 1999 draft followed the EU approach especially in relation to Articles 101 and 102 TFEU.[5] In Article 106 TFEU, Member States

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[依法规范行政性限制竞争行为]', (1998) 3 *Chinese Journal of Law*, p 89; W. Zhang and H. Sheng, 'The Chinese Anti-Monopoly Problem from Telecommunications Sector [从电信业看中国的反垄断法]', 1998 (2) *Revolution*, p 66; Y. Guo & A. Hu, 'The Administrative Monopoly in China's Economic Transition', (2004) 1 *Communist and Post-Communist Study* p 265; L. Yang, *Research on Chinese Administrative Monopoly Problem [中国行政垄断问题研究]* (2006) Economic Science Press at 59; Z. Zhu, Research Development and Evaluation on Revolution Problems on China's Monopoly Industries, 2007 (1) *Economics Perspective*, p 64.

2 P. Zheng, *The Legal Control Research of Administrative Monopoly [行政垄断的法律控制研究]* (2003) Peking University Press at 87.

3 See Case 2 in para. 4.3.1 of Chapter Four of this thesis.

4 Competition rules were created in Articles 65 and 66 of the Treaty of Paris of 1951 which created the European Coal and Steel Community in a regional level between France, Italy, Belgium, the Netherlands, Luxembourg and Germany. The Modernisation of EU competition law is generally regarded as the major reform in the enforcement of EU competition law when Regulation 1/2003 took into effect. See Council Regulation 1/2003 [2003] OJ L1/1.

5 See M. Williams, *Competition Policy and Law in China, Hong Kong and Taiwan*, (2005) Cambridge University Press, at 177.

are required not to enact or maintain in force any measure contrary to Articles 101 and 102 on public undertakings and those granted special or exclusive rights. EU competition law has connections with other relevant policies, especially those on free movement of goods, services and capital provisions, all share a common objective of a creating a competitive internal market. These free movement provisions deal with the public actions of Member States. 'Member States' in Article 106 and 'public actions' in the free movement provisions share some common elements with the 'administrative power' used in the AML.[6] This similar context provides a basis for comparing Article 106 TFEU, EU free movement rules and the regulations of abuse of administrative power in the AML.

Much has been published relating to State measures in EU competition law or administrative power in the AML. In the views of some scholars, the provisions on abuse of administrative power to eliminate or restrict competition in the AML do not have a close relationship with EU competition law and would fall outside it in a strict sense.[7] It has been argued that the abuse of administrative power should be treated as are trade barriers in other areas of the EU Treaty rather than in the context of competition rules. Some however have argued that EU competition law has similar rules to the AML on regulating State measures and that these provisions are the most typical provisions on regulating government conduct in the competition law category.[8] However, there is little comparative research made between the AML and EU competition law, and almost none which considers the role of Article 106 TFEU, and other relevant EU provisions, especially free movement rules, in relation to the issue of abuse of administrative power.[9]

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6 The context of 'Member States' which includes administrative organs in all levels, national and regional parliaments and judicial organs, is similar but has broader definition than the word 'administrative power' in AML. See the discussion in paras. 2.2 and 3.2.3 of Chapter Four of this thesis.

7 M. Williams, note 5, at 142. Y. Huang and Z. Deng, 'On the Character of China Anti-Monopoly Law under Controlling Administrative Monopoly [论规制行政垄断的我国《反垄断法》的特色]', (2010) 7 *Legal Science Magazine* p 52.

8 P. Zheng, note 3, at 161-164. X. Fang, 'Legal regulation of an administratively restricted competitive conduct [对行政性限制竞争行为的法律规制]', (2005) 2 *Legal Science* p 87. J. S. Schneider, 'Administrative Monopoly and China's New Anti-Monopoly Law: Lessons from Europe's State Aid Doctrine' (2010) 2 *Washington University Law Review* p 884.

9 Jacob S. Schneider discussed the relationship between the provisions of abuse administrative power in the AML and Europe's State Aid Doctrine. See J. S. Schneider, note 8, p 869.

As a result, this thesis has focused on five questions: (1) what is the relationship between EU competition law, especially Article 106, and provisions in the AML relevant to the abuse of administrative power to eliminate or restrict competition? (2) can China, in this respect, learn from the EU, and if so, how? (3) what is the relationship between free movement of goods, services and capital rules and abuse of administrative power to eliminate or restrict competition provisions? (4) can China learn from the EU's experience on free movement rules, and, if so, how? and (5) as a case study, how do the abuse of administrative power to eliminate or restrict competition rules of the AML apply to the telecommunications sector?

2. Key Findings and Recommendations

2.1 Key Findings on the Content of Abuse of Administrative Power in the AML

Chapter Three of this thesis clarifies some different understandings on the content of 'administrative power', administrative regulations in Article 37 and the compulsory effect of the control of abuse of administrative power in the AML. In Chapters Four, Five and Six, these different understandings are compared and discussed with similar provisions in the EU, and are analysed in the context of telecommunications sector.

The first argument is on the current content of provisions controlling administrative power in the AML. Administrative power in the AML, which is inherited from the area in the AUCL, includes power held by the central and local administrative organs and organisations empowered by a law or administrative regulation to administer public affairs, excluding the State Council. On one hand, the thesis considers that unlike the EU, and based on the existing Chinese legal system, legislative or judicial power is unlikely to fall within the content of the AML. On the other hand, the definition of administrative power which excludes the State Council merely stress on the characteristics of the 'State functions', but ignores the fundamentally administrative functions as an administrative

organ.[10]

The second argument is on the content of administrative provisions in Article 37. According to Article 4 of the supplement regulation, administrative provisions, such as administrative regulations issued by the State Council and administrative rules issued by the departments or commissions of the State Council and local governments, are not included in Article 37. However, this exclusion concerns the quasi-legislative element of these administrative regulations or rules, but ignores their basically administrative characteristics. A case study on market access in telecommunications further indicates the potential or actual effect on restricting or eliminating competition of administrative regulations or rules.

The third argument is on the compulsory effect of abuse of administrative power. Compared with the EU's experience, this thesis points out that compulsory force should not be recognised as an essential characteristic of abuse of administrative power. Administrative power without compulsory effect may also restrict or eliminate competition in the market. It is incomplete for the AML to regulate merely abuse of administrative power with compulsory effect.

Recommendations: Three recommendations are made on the definition term of abuse of administrative power.

(1) The State Council is an administrative organ and should be recognised as being subject to the provisions on abuse of administrative power to restrict or eliminate competition in the AML.
(2) Administrative regulations issued by the State Council and administrative rules issued by the departments or commissions of the State Council and local governments should be the kinds of administrative provisions to which Article 37 of the AML should apply.
(3) Both abuse of administrative power with or without compulsory effect may restrict or eliminate competition and may fall within the provisions of abuse of administrative

[10] See para. 1.2.2 of Chapter Three of this thesis.

power in the AML.

2.2 Key Findings on the Dual-Structure of Abuse of Administrative Power in the AML

Chapters Four and Five of this thesis examine the relationship between abuse of administrative power, Article 106 TFEU and EU free movement rules. In terms of business operators, an administrative conduct may fall within in Article 36 of the AML when the administrative conduct forces or encourages business operators to engage in monopolistic conduct, while Articles 33 to 35 do not require that a monopolistic conduct be in place. In terms of the relationship between business operators and administrative power, similarly to Article 106 TFEU, Article 36 of the AML directly takes the operation of a business operator empowered by and benefiting from abuse of administrative power into account. However, the role of a business operator in identifying whether abuse of administrative power is found sometimes is ignored, especially in Articles 33 to 35 of the AML, which focus on the different area of administrative restrictions.

This thesis establishes that provisions of the AML and its supplementary provisions[11] on the control of abuse of administrative power to eliminate or restrict competition create a dual-structure system. The first level relates to the administrative conduct empowered or restricted by an abuse of administrative power such as to constitute monopolistic conduct as prescribed in the AML, for example, Article 36 of the AML and Articles 3(7) and 5 of the supplementary provisions. Administrative conduct in such a case would in the EU potentially lead to the application Article 106 TFEU. The second level relates to categories of administrative conduct inherited from the Anti-Unfair Competition Law (AUCL), for example, Articles 33 to 35 of the AML and Articles 3(1)-(6) of its supplementary provisions on free circulation. These provisions share some similar contexts with the free movement of goods, services, and capital rules set out in the TFEU, rather than with Article 106 TFEU.

[11] Provisions for the Industry and Commerce Administrations to Stop Acts of Abusing Administrative Power for the Purpose of Eliminating or Restricting Competition [工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定] was issued by the SAIC on December 31, 2010 and took effect on February 1, 2011.

Recommendations: Considering the significant differences between free circulation rules (Articles 33 to 35 of the AML) and Article 36 of the AML, the free circulation provisions which do not have a close relationship with monopolistic conduct of business operators should be removed from Chapter Five of the AML, the chapter of abuse of administrative power in the AML.

However, this is unlikely to happen in the short term. The AML has been in force for over five years and legislators and scholars remain concerned about the district blockage issue and still wish to see this regulated under the AML. This thesis provides a reasonably developed intellectual framework within which to deal with the relationship between abuse of administrative power in relation to business operators' monopolistic conduct and free circulation.

2.3 Key findings on Exemptions for Abuse of Administrative Power in the AML

Unlike the competition and free movement rules in the EU, the abuse of administrative power provisions in the AML do not contain any provisions which would exempt an undertaking or an administrative conduct in relation to the provision of services of economic interest or other public interest.

Not all the administrative conduct with effect of eliminating or restricting competition should be abandoned. Some administrative conduct, which may advance consumer interests and public interests, and which can not achieved by an alternative choice with less restrictive means, may fall outside of the regulation of abuse of administrative power in the AML. As discussed in Chapters Four and Five of this thesis, Article 106 TFEU and EU free movement rules have become good references for the establishment of exemptions in the provisions of abuse of administrative power.

The advancement of the public interest in particular should give rise to the possibility of exemptions. Unlike the EU provisions, 'restricting rights' is the core element for the

operation of Chapter Five of the AML. The anti-competitive conduct of a business operator is not always a necessary condition in identifying an abuse of administrative conduct. Provisions on the abuse of administrative power in the AML mainly focus on administrative power, but not on business operators. Moreover, the public interest is broadly accepted as a basis for an exemption in other provisions of the AML and in a series of Chinese laws. Discussion of exemptions in the telecommunications sector in Chapter Six of this thesis also provides support for this approach.

Recommendations: The AML should create an independent exemption article in Chapter Five, incorporating a public interest test.

2.4 Key Findings on Abuse of Administrative Power in the Telecommunications Sector

This case study in the telecommunications sector is based on research set out in the previous chapters of this thesis. This analyses the position of competition rules in the telecommunications sector, a specifically basic utility industry. It also examines the feasibility of a series of opinions and suggestions made in this thesis.

Chapter Six finds that in the current stage, administrative power still plays a leading role in the structure and development of China's telecommunications sector. Administrative powers have much greater effect than competition rules in the area of basic telecommunications services, although a relatively equal and free market for business operators is created in value-added telecommunications services.

In terms of market access and interconnection in the basic telecommunications services market, administrative conduct or administrative regulations are not regulated by the current provisions relating to the abuse of administrative power in the AML, although they do have the effect of eliminating or restricting competition.

Recommendations: The effect of administrative power in the basic telecommunications market should be restricted and regulated under the AML.

(1) Through the case study on market access in the basic telecommunications market, it has been shown that administrative restrictions in such cases should be treated as a form of abuse of administrative power and fall within Article 37 of the AML. Article 7 of the AML should be repealed.

(2) Through the case study on interconnection in the basic telecommunications market, it has been shown that the MII, the telecommunications authority, may violate Article 36 of the AML, since its control over China Telecom constitutes an abuse under the AML.

(3) However, the Rural Access project (RA project) which is aims at the provision of a universal service should benefit from an exemption from the rules on controlling abuse of administrative power in the basic telecommunications service market.

3. Contributions

This study has made significant contributions, not only to the understanding of the nature, character and relationship between provisions on the abuse of administrative power to eliminate or restrict competition in the AML, Article 106 TFEU in EU competition law and EU free movement rules, but also to suggestions for the improvement of legislation and the implementation of abuse of administrative power provisions under the AML, especially in the telecommunications sector.

The first contribution is on abuse of administrative power provisions of the AML and the relationship of these to the content of Article 106 TFEU. Few scholars have advanced comparative research in this respect, although some scholars have mentioned similarities existing between the provisions. A gap left by other scholars on the issue of abuse of administrative power in the AML is therefore filled. Meanwhile, further recommendations on the basis of experience of Article 106 TFEU propose a different perspective to complete or even restructure the provisions of abuse of administrative power in the AML.

The second contribution is in relation to the relationship between Articles 33 to 35 of the AML and EU free movement rules. This thesis has shaken off the comparison with EU competition law and has expanded a new research area. The law, and particularly the practice of the law, of Articles 33 to 35 is in its infancy, and the provisions have not been applied at the time of writing. This thesis aims to advance our on the reasonableness and feasibility of these free circulation provisions in the context of the AML. Moreover, this thesis has provided a series of suggestions, based on the EU's experience in relation to free movement of goods, services and capital, on the practice of Articles 33 to 35 in the future.

The third contribution is a focus on the dual-structure system of abuse of administrative power in the AML. With the slow development on relevant regulations and cases, there has been little research into the current provisions and practice of the control of abuse of administrative power in the AML. This thesis has created a new basis on which to analyse and compare the provisions relating to the abuse of administrative power. No prior study has been carried out on the different features of Articles 33 to 35 and Article 36 regarding the relationship between administrative power and business operators under the AML, although has been some research on the relationship between EU competition and free movement rules.

The fourth contribution is to the study of the AML and its impact on the telecommunications sectors. There are few case studies on abuse of administrative power made by scholars, especially in specific industries, although arguments have been made as to whether the AML should apply to industries 'controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries implementing exclusive operation and sales according to law'. This study is the only research that has focused on this issue so far.

To some extent, the lack of studies in the above areas illustrates the originality of this thesis. The contribution of this thesis provides a comprehensive understanding of the provisions relating to abuse of administrative power in the AML. This could form the basis

for further studies on other aspects of abuse of administrative power in the AML, for further examination of the relationship with EU competition law and competition legislation in other countries and provides suggestions on the formulation of further supplementary provisions and modifications of the current provisions of abuse of administrative power in the AML.

4. Further Perspectives

4.1 Further Study on Article 107 of EU Competition Law[12]

This thesis focuses on the lessons that may be learned from Article 106 TFEU, and EU free movements rules which are not part of EU competition law. However, other areas of EU law, especially Article 107 TFEU, may also have relevance to the provisions relating to the abuse of administrative power in the AML, and could be a reference point for further development of the AML. Article 107 is aimed at incompatible subsidies or other aids granted by Member States on inter-State competition by favouring certain undertakings or certain products. The experience in regulating these subsidy measures which are maintained by Member States, may be relevant to further examination of the provisions on controlling the abuse of administrative power in relation to regional subsidies or other administrative aid in the AML, although they have differences in that Article 107 applies to States in the EU, while the AML applies at the level of the locality. Exemptions in Article 107(3) may also provide a good example for the scope of public interest which is suggested as a standard of exemptions in the AML provisions.

4.2 Further Study on Enforcement and Legal Liabilities of the AML

Arguments still exist on the so-called troika structure[13] and the merely suggestion rights of

[12] See Article 107 TFEU.
[13] The troika structure means that three administrative organs share the enforcement functions of the AML.

enforcement organs with the AML relating to the legal liability of abuse of administrative power in Article 51.[14] The troika structure may cause poor efficiency by resulting in overlapping functions and potentially giving rise to conflicts, dislocation, omission or action beyond the authority of the three enforcement organs, although the anti-monopoly commission is in charge of organising, coordinating, and guiding anti-monopoly work.[15] An independent, consolidated and high-ranked enforcement organ with comprehensive functions, as found in the EU, may be a useful benchmark for the development of China's enforcement structure.[16] The NDRC, the authority which specifically regulates the issues of abuse of administrative power under the AML can merely put forward suggestions on handling according to law to the relevant superior authority. This would put the anti-monopoly enforcement, especially on abuse of administrative power, in a weak position to operate and regulate in practice. The research in this are is not discussed in this thesis, and merits further work.

4.3 Further Study on the Anti-Monopoly Law Cases

As mentioned above, as of the time of writing there has been no relevant conclusive case law in relation to the area under consideration in this thesis in China. However, the research on the understanding of the AML policies and provisions, the analysis on the operation of examination process and further discussion on the development of abuse of administrative power in legislation and in practice cannot be made without the analysis of

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The three enforcement organs include Ministry of Commerce of the People's Republic of China (MOFCOM), National Development and Reform Commission (NDRC) and State Administration for Industry and Commerce (SAIC).

[14] For example, A. Emch, 'Antitrust in China – The Brighter Spot', (2011) 32(3) *European Competition Law Review* p 132; D. Wei, 'China's Anti-Monopoly Law and its Merger Enforcement: Convergence and Flexibility', (2011) 14(4) *Journal of International Economic Law* p 807; N. Bush, 'Chinese Anti-Monopoly Law Enforcement: Launching into Stormy Seas', (2009) April *The Asia-Pacific Antitrust Review* p 34; Z. Cheng, 'A Taxonomy on the Costs of Antitrust Regulation: A Case on the Establishment of China's Antitrust Agency [反垄断规制的成本分类 – 以我国反垄断机构的设置为例]', (2009) 2 *Industrial Economics Research* p 14; K. X. Li and M. Du, 'Does China need Competition Law?', (2007) March *Journal of Business Law* p 182; X. Wang, 'Several Questions on China's Anti-Monopoly Enforcement Institutions [我国反垄断执法机构的几个问题]', (2007) 1 *Dongyue Tribune* p32; S. Cao, 'On the Enforcement Agency of China's Anti-Monopoly Law [论我国反垄断法执法机构]' (2005) 1 *Law Science Magazine*, p 35.

[15] X. Wang, 'Analysis and Evaluation of the Chinese Anti-Monopoly Law [《中华人民共和国反垄断法》评析]' (2008) 4 *Chinese Journal of Law*, p 68; X. Wang, note 14; and S. Cao, note 14.

[16] A. Jones and B. Sufrin, *EC Competition Law – Text, Cases, and Materials*, 4th Edition, (2011) Oxford University Press, at 1037-1038.

detailed cases. This study has chosen previous cases related to abuse of administrative power under other laws such as the AUCL and administrative conduct which may result in abuse of administrative power to eliminate or restrict competition under the AML in different ways. Further study on practical cases will be an essential and interesting task for scholars in the area of abuse administrative of power under the AML.

Appendix

Anti-Monopoly Law of the People's Republic of China[1]

(Adopted at the 29th meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China on August 30, 2007)

Table of Contents

Chapter I General Provisions

Article 1

This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy.

Article 2

This Law shall be applicable to monopolistic conducts in economic activities within the People's Republic of China.

[1] The English version is available at: http://tradeinservices.mofcom.gov.cn/en/b/2007-08-30/9043.shtml (last visited on March 1, 2012).

This Law shall apply to the conducts outside the territory of the People's Republic of China if they eliminate or have restrictive effect on competition on the domestic market of the PRC.

Article 3

For the purposes of this Law, "monopolistic conducts" are defined as the following:

(1) monopolistic agreements among business operators;

(2) abuse of dominant market positions by business operators; and

(3) concentration of business operators that eliminates or restricts competition or might be eliminating or restricting competition.

Article 4

The State constitutes and carries out competition rules which accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system.

Article 5

Business operators may, through fair competition, voluntary alliance， concentrate themselves according to law, expand the scope of business operations, and enhance competitiveness.

Article 6

Any business with a dominant position may not abuse that dominant position to eliminate, or restrict competition.

Article 7

With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries implementing exclusive operation and sales according to law, the state protects the lawful business operations conducted by the business operators therein. The state also lawfully regulates and controls

their business operations and the prices of their commodities and services so as to safeguard the interests of consumers and promote technical progresses.

The business operators as mentioned above shall lawfully operate, be honest and faithful, be strictly self-disciplined, accept social supervision, shall not damage the interests of consumers by virtue of their dominant or exclusive positions.

Article 8

No administrative organ or organization empowered by a law or administrative regulation to administer public affairs may abuse its administrative powers to eliminate or restrict competition.

Article 9

The State Council shall establish the Anti-monopoly Commission, which is in charge of organizing, coordinating, guiding anti-monopoly work, performs the following functions:

(1) studying and drafting related competition policies;

(2) organizing the investigation and assessment of overall competition situations in the market, and issuing assessment reports;

(3) constituting and issuing anti-monopoly guidelines;

(4) coordinating anti-monopoly administrative law enforcement; and

(5) other functions as assigned by the State Council.

The State Council shall stipulate composition and working rules of the Anti-monopoly Commission.

Article 10

The anti-monopoly authority designated by the State Council (hereinafter referred to as the Anti-monopoly Authority under the State Council) shall be in charge of anti-monopoly law enforcement in accordance with this Law.

The Anti-monopoly Authority under the State Council) may, when needed, authorize the corresponding authorities in the people's governments of the provinces, autonomous

regions and municipalities directly under the Central Government to take charge of anti-monopoly law enforcement in accordance with this Law.

Article 11

A trade association shall intensify industrial self-discipline, guide business operators to lawfully compete, safeguard the competition order in the market.

Article 12

For the purposes of this Law, "business operator" refers to a natural person, legal person, or any other organization that is in the engagement of commodities production or operation or service provision, and;

"Relevant market" refers to the commodity scope or territorial scope within which the business operators compete against each other during a certain period of time for specific commodities or services (hereinafter generally referred to as "commodities").

Chapter II Monopoly Agreement

Article 13

Any of the following monopoly agreements among the competing business operators shall be prohibited:

(1) fixing or changing prices of commodities;

(2) limiting the output or sales of commodities;

(3) dividing the sales market or the raw material procurement market;

(4) restricting the purchase of new technology or new facilities or the development of new technology or new products;

(5) making boycott transactions; or

(6) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.

For the purposes of this Law, "monopoly agreements" refer to agreements, decisions or other concerted actions which eliminate or restrict competition.

Article 14

Any of the following agreements among business operators and their trading parties are prohibited:

(1) fixing the price of commodities for resale to a third party;

(2) restricting the minimum price of commodities for resale to a third party; or

(3) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.

Article 15

An agreement among business operators shall be exempted from application of articles 13 and 14 if it can be proven to be in any of the following circumstances:

(1) for the purpose of improving technologies, researching and developing new products;

(2) for the purpose of upgrading product quality, reducing cost, improving efficiency, unifying product specifications or standards, or carrying out professional labor division;

(3) for the purpose of enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators;

(4) for the purpose of achieving public interests such as conserving energy, protecting the environment and relieving the victims of a disaster and so on;

(5) for the purpose of mitigating serious decrease in sales volume or obviously excessive production during economic recessions;

(6) for the purpose of safeguarding the justifiable interests in the foreign trade or foreign economic cooperation; or

(7) other circumstances as stipulated by laws and the State Council.

Where a monopoly agreement is in any of the circumstances stipulated in Items 1 through 5 and is exempt from Articles 13 and 14 of this Law, the business operators must additionally prove that the agreement can enable consumers to share the interests derived from the agreement, and will not severely restrict the competition in relevant market.

Article 16

Any trade association may not organize the business operators in its own industry to implement the monopolistic conduct as prohibited by this Chapter.

Chapter III Abuse of Market Dominance

Article 17

A business operator with a dominant market position shall not abuse its dominant market position to conduct following acts:

(1) selling commodities at unfairly high prices or buying commodities at unfairly low prices;

(2) selling products at prices below cost without any justifiable cause;

(3) refusing to trade with a trading party without any justifiable cause;

(4) requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause;

(5) tying products or imposing unreasonable trading conditions at the time of trading without any justifiable cause;

(6) applying dissimilar prices or other transaction terms to counterparties with equal standing;

(7) other conducts determined as abuse of a dominant position by the Anti-monopoly Authority under the State Council

For the purposes of this Law, "dominant market position" refers to a market position held by a business operator having the capacity to control the price, quantity or other trading conditions of commodities in relevant market, or to hinder or affect any other business operator to enter the relevant market.

Article 18

The dominant market status shall be determined according to the following factors:

(1) the market share of a business operator in relevant market, and the competition situation of the relevant market;

(2) the capacity of a business operator to control the sales markets or the raw material procurement market;

(3) the financial and technical conditions of the business operator;

(4) the degree of dependence of other business operators upon of the business operator in transactions;

(5) the degree of difficulty for other business operators to enter the relevant market; and

(6) other factors related to determine a dominant market position of the said business operator.

Article 19

Where a business operator is under any of the following circumstances, it may be assumed to be have a dominant market position:

(1) the relevant market share of a business operator accounts for1/2 or above in the relevant market;

(2) the joint relevant market share of two business operators accounts for 2/3 or above; or

(3) the joint relevant market share of three business operators accounts for 3/4 or above.

A business operator with a market share of less than 1/10 shall not be presumed as having a dominant market position even if they fall within the scope of second or third item.

Where a business operator who has been presumed to have a dominant market position can otherwise prove that they do not have a dominant market, it shall not be determined as having a dominant market position.

Chapter IV Concentration of Business operators

Article 20

A concentration refers to the following circumstances:

(1) the merger of business operators;

(2) acquiring control over other business operators by virtue of acquiring their equities or assets; or

(3) acquiring control over other business operators or possibility of exercising decisive influence on other business operators by virtue of contact or any other means.

Article 21

Where a concentration reaches the threshold of declaration stipulated by the State Council, a declaration must be lodged in advance with the Anti-monopoly Authority under the State Council, or otherwise the concentration shall not be implemented.

Article 22

Where a concentration is under any of the following circumstances, it may not be declared to the Anti-monopoly Authority under the State Council:

(1) one business operator who is a party to the concentration has the power to exercise more than half the voting rights of every other business operator, whether of the equity or the assets; or

(2) one business operator who is not a party to the concentration has the power to exercise more than half the voting rights of every business operator concerned, whether of the equity or the assets.

Article 23

A business operator shall, when lodge a concentration declaration with the Anti-monopoly Authority under the State Council, submit the following documents and materials:

(1) a declaration paper;

(2) explanations on the effect of the concentration on the relevant market competition;

(3) the agreement of concentration;

(4) the financial reports and accounting reports of the proceeding accounting year of the business operator; and

(5) other documents and materials as stipulated by the Anti-monopoly Authority under the State Council.

Such items shall be embodied in the declaration paper as the name, domicile and business scopes of the business operators involved in the concentration as well as the date of the scheduled concentration and other items as stipulated by the Anti-monopoly Authority under the State Council.

Article 24

Where the documents or materials submitted by a business operator are incomplete, it shall submit the rest of the documents and materials within the time limit stipulated by the Anti-monopoly Authority under the State Council; otherwise, the declaration shall be deemed as not filed.

Article 25

The Anti-monopoly Authority under the State Council shall conduct a preliminary review of the declared concentration of business operators, make a decision whether to conduct further review and notify the business operators in written form within 30 days upon receipt of the documents and materials submitted by the business operators pursuant to Article 23 of this Law. Before such a decision made by the Anti-monopoly Authority under the State Council, the concentration may be not implemented.

Where the Anti-monopoly Authority under the State Council decides not to conduct further review or fails to make a decision at expiry of the stipulated period, the concentration may be implemented.

Article 26

Where the Anti-monopoly Authority under the State Council decides to conduct further review, they shall, within 90 days from the date of decision, complete the review, make a decision on whether to prohibit the concentration, and notify the business operators concerned of the decision in written form. A decision of prohibition shall be attached with reasons therefor. Within the review period the concentration may not be implemented.

Under any of the following circumstances, the Anti-monopoly Authority under the State Council may notify the business operators in written form that the time limit as stipulated in the preceding paragraph may be extended to no more than 60 days:

(1) the business operators concerned agree to extend the time limit;

(2) the documents or materials submitted are inaccurate and need further verification;

(3) things have significantly changed after declaration.

If the Anti-monopoly Authority under the State Council fails to make a decision at expiry of the period, the concentration may be implemented.

Article 27

In the case of the examination on the concentration of business operators, it shall consider the relevant elements as follows:

(1) the market share of the business operators involved in the relevant market and the controlling power thereof over that market,

(2) the degree of market concentration in the relevant market,

(3) the influence of the concentration of business operators on the market access and technological progress,

(4) the influence of the concentration of business operators on the consumers and other business operators,

(5) the influence of the concentration of business operators on the national economic development, and

(6) other elements that may have an effect on the market competition and shall be taken into account as regarded by the Anti-monopoly Authority under the State Council.

Article 28

Where a concentration has or may have effect of eliminating or restricting competition, the Anti-monopoly Authority under the State Council shall make a decision to prohibit the concentration.

However, if the business operators concerned can prove that the concentration will bring more positive impact than negative impact on competition, or the concentration is pursuant to public interests, the Anti-monopoly Authority under the State Council may decide not to prohibit the concentration.

Article 29

Where the concentration is not prohibited, the Anti-monopoly Authority under the State Council may decide to attach restrictive conditions for reducing the negative impact of such concentration on competition.

Article 30

Where the Anti-monopoly Authority under the State Council decides to prohibit a concentration or attaches restrictive conditions on concentration, it shall publicize such decisions to the general public in a timely manner.

Article 31

Where a foreign investor merges and acquires a domestic enterprise or participate in concentration by other means, if state security is involved, besides the examination on the concentration in accordance with this Law, the examination on national security shall also be conducted in accordance with the relevant State provisions.

Chapter V Abuse of Administrative Power to Eliminate or Restrict Competition

Article 32

Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power, restrict or restrict in a disguised form entities and individuals to operate, purchase or use the commodities provided by business operators designated by it.

Article 33

Any administrative organ or organization empowered by a law or an administrative regulation to administer public affairs may not have any of the following conducts by abusing its administrative power to block free circulation of commodities between regions:

(1) imposing discriminative charge items, discriminative charge standards or discriminative prices upon commodities from outside the locality,

(2) imposing such technical requirements and inspection standards upon commodities from outside the locality as different from those upon local commodities of the same classification, or taking such discriminative technical measures as repeated inspections or repeated certifications to commodities from outside the locality, so as to restrict them to enter local market,

(3) exerting administrative licensing specially on commodities from outside the locality so as to restrict them to enter local market,

(4) setting barriers or taking other measures so as to hamper commodities from outside the locality from entering the local market or local commodities from moving outside the local region, or

(5) other conducts for the purpose of hampering commodities from free circulation between regions.

Article 34

Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality to participate in local tendering and bidding activities by such means as imposing discriminative qualification requirements or assessment standards or releasing information in an unlawful manner.

Article 35

Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality to invest or set up branches in the locality by imposing unequal treatment thereupon compared to that upon local business operators.

Article 36

Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to force business operators to engage in the monopolistic conducts as prescribed in this Law.

Article 37

Any administrative organ may not abuse its administrative power to set down such provisions in respect of eliminating or restricting competition.

Chapter VI Investigation into the Suspicious Monopolistic Conducts

Article 38

The anti-monopoly authority shall make investigations into suspicious monopolistic conducts in accordance with law.

Any entity or individual may report suspicious monopolistic conducts to the anti-monopoly authority. The anti-monopoly authority shall keep the informer confidential.

Where an informer makes the reporting in written form and provides relevant facts and evidences, the anti-monopoly authority shall make necessary investigation.

Article 39

The anti-monopoly authority may take any of the following measures in investigating suspicious monopolistic conducts:

(1) conducting the inspection by getting into the business premises of business operators under investigation or by getting into any other relevant place,

(2) inquiring of the business operators under investigation, interested parties, or other relevant entities or individuals, and requiring them to explain the relevant conditions,

(3) consulting and duplicating the relevant documents, agreements, account books, business correspondences and electronic data, etc. of the business operators under investigation, interested parties and other relevant entities or individuals,

(4) seizing and detaining relevant evidence, and

(5) inquiring about the business operators' bank accounts under investigation.

Before the measures as prescribed in the preceding paragraph are approved, a written report shall be submitted to the chief person(s)-in-charge of the anti-monopoly authority.

Article 40

When inspecting suspicious monopolistic conducts, there shall be at least two law enforcers, and they shall show their law enforcement certificates.

When inquiring about and investigating suspicious monopolistic conducts, law enforcers shall make notes thereon, which shall bear the signatures of the persons under inquiry or investigation.

Article 41

The anti-monopoly authority and functionaries thereof shall be obliged to keep confidential the trade secrets they have access to during the course of the law enforcement.

Article 42

Business operators, interested parties and other relevant entities and individuals under investigation shall show cooperation with the anti-monopoly authority in performing its functions, and may not reject or hamper the investigation by the anti-monopoly authority.

Article 43

Business operators, interested parties under investigation have the right to voice their opinions. The anti-monopoly authority shall verify the facts, reasons and evidences provided by the business operators, interested parties under investigation.

Article 44

Where the anti-monopoly authority deems that a monopolistic conduct is constituted after investigating and verifying a suspicious monopolistic conduct, it shall make a decision on how to deal with the monopolistic conduct, and publicize it.

Article 45

As regards a suspicious monopolistic conduct that the anti-monopoly authority is investigating, if the business operators under investigation promise to eliminate the impact of the conduct by taking specific measures within the time limit prescribed by the anti-monopoly authority, the anti-monopoly authority may decide to suspend the investigation. The decision on suspending the investigation shall specify the specific measures as promised by the business operators under investigation.

Where the anti-monopoly authority decides to suspend the investigation, it shall supervise the implementation of the promise by the relevant business operators. If the business operators keep their promise, the anti-monopoly authority may decide to terminate the investigation.

However, the anti-monopoly authority shall resume the investigation, where

(1) the business operators fail to implement the promise,

(2) significant changes have taken place to the facts based on which the decision on suspending the investigation was made; or

(3) the decision on suspending the investigation was made based on incomplete or inaccurate information provided by the business operators.

Chapter VII Legal Liabilities

Article 46

Where business operators reach an monopoly agreement and perform it in violation of this Law, the anti-monopoly authority shall order them to cease doing so, and shall confiscate

the illegal gains and impose a fine of 1% up to 10% of the sales revenue in the previous year. Where the reached monopoly agreement has not been performed, a fine of less than 500,000 yuan shall be imposed.

Where any business operator voluntarily reports the conditions on reaching the monopoly agreement and provides important evidences to the anti-monopoly authority, it may be imposed a mitigated punishment or exemption from punishment as the case may be.

Where a guild help the achievement of a monopoly agreement by business operators in its own industry in violation of this Law, a fine of less than 500,000 yuan shall be imposed thereupon by the anti-monopoly authority; in case of serious circumstances, the social group registration authority may deregister the guild.

Article 47

Where any business operator abuses its dominant market status in violation of this Law, it shall be ordered to cease doing so. The anti-monopoly authority shall confiscate its illegal gains and impose thereupon a fine of 1% up to 10% of the sales revenue in the previous year.

Article 48

Where any business operator implements concentration in violation of this Law, the anti-monopoly authority shall order it to cease doing so, to dispose of shares or assets, transfer the business or take other necessary measures to restore the market situation before the concentration within a time limit, and may impose a fine of less than 500,000 yuan.

Article 49

The specific amount of the fines as prescribed in Articles 46 through 48 shall be determined in consideration of such factors as the nature, extent and duration of the violations.

Article 50

Where any loss was caused by a business operator's monopolistic conducts to other entities and individuals, the business operator shall assume the civil liabilities.

Article 51

Where any administrative organ or an organization empowered by a law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order it to make correction and impose punishments on the directly liable person(s)-in-charge and other directly liable persons. The anti-monopoly authority may put forward suggestions on handling according to law to the relevant superior authority.

Where it is otherwise provided in a law or administrative regulation for the handling the organization empowered by a law or administrative regulation to administer public affairs who abuses its administrative power to eliminate or restrict competition, such provisions shall prevail.

Article 52

As regards the inspection and investigation by the anti-monopoly authority, if business operators refuse to provide related materials and information, provide fraudulent materials or information, conceal, destroy or remove evidence, or refuse or obstruct investigation in other ways, the anti-monopoly authority shall order them to make rectification, impose a fine of less than 20,000 yuan on individuals, and a fine of less than 200,000 yuan on entities; and in case of serious circumstances, the anti-monopoly authority may impose a fine of 20,000 yuan up to 100,000 yuan on individuals, and a fine of 200,000 yuan up to one million yuan on entities; where a crime is constituted, the relevant business operators shall assume criminal liabilities.

Article 53

Where any party concerned objects to the decision made by the anti-monopoly authority in accordance with Articles 28 and 29 of this Law, it may first apply for an administrative reconsideration; if it objects to the reconsideration decision, it may lodge an administrative lawsuit in accordance with law.

Where any party concerned is dissatisfied with any decision made by the anti-monopoly authority other than the decisions prescribed in the preceding paragraph, it may lodge an application for administrative reconsideration or initiate an administrative lawsuit in accordance with law.

Article 54

Where any functionary of the anti-monopoly authority abuses his/her power, neglects his/her duty, seeks private benefits, or discloses trade secrets he/she has access to during the process of law enforcement, and a crime is constituted, he/she shall be subject to the criminal liability; where no crime is constituted, he/she shall be imposed upon a disciplinary sanction.

Chapter VIII Supplementary Provisions

Article 55

This Law does not govern the conduct of business operators to exercise their intellectual property rights under laws and relevant administrative regulations on intellectual property rights; however, business operators' conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law.

Article 56

This Law does not govern the ally or concerted actions of agricultural producers and rural economic organizations in the economic activities such as production, processing, sales, transportation and storage of agricultural products.

Article 57

This Law shall enter into force as of August 1, 2008.

Appendix

Provisions for Administrative Authorities for Industry and Commerce to Prevent Abuses of Administrative Powers to Eliminate or Restrict Competition[2]

Article 1

These Provisions are formulated in accordance with the Anti-Monopoly Law of the People's Republic of China (hereinafter referred to as the "Anti-Monopoly Law") to prevent abuse of administrative powers to exclude or restrain competition.

Article 2

Administrative agencies and organizations authorized by the laws and regulations to manage public affairs shall not abuse their administrative power by excluding or limiting competition.

Article 3

Administrative agencies and organizations authorized by the laws and regulations to manage public affairs shall not abuse their administrative power by engaging in the following acts:

(1) Setting restrictions, either overtly or in a disguised form, that entities or individuals can only operate, purchase or use the commodities provided by business operators designated by such administrative agencies and organizations authorized by the laws and regulations to manage public affairs, or restricting others' normal business activities, by means of explicit or implicit requirements, rejecting or delaying in administrative licensing, or repetitive inspection;

(2) Applying different technical requirements or inspection standards to or adopting repetitive inspection, repetitive accreditations or other discriminatory technical measures on non-local commodities, as compared with those for local commodities of the same kind, to hinder or restrict non-local commodities from entering the local market;

(3) Implementing administrative licensing requirements specifically set for non-local

[2] The Chinese version is available at: http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103268.html and the English translation is available at the database of Westlaw China. The title of this English version was Provisions for Administrative Authorities for Industry and Commerce to Prevent Abuse of Administrative Powers to Exclude or Restrain Competition.

commodities, or adopting different licensing conditions, procedures, time limits, etc., when implementing administrative licensing for non-local commodities, to hinder or restrict non-local commodities from entering the local market;

(4) Setting up impediments, or adopting other approaches, to hinder or restrict non-local commodities from entering the local market or local commodities from form being delivered to non-local market;

(5) Excluding or restricting non-local business operators from participating in local tendering and bidding activities by setting discriminatory qualification requirements or appraisal standards, or publishing information not according to law, etc.;

(6) Excluding or restricting non-local business operators from making investments in the local area or establishing branches, or hampering such operators from the normal business activities of such operators, by applying discriminatory treatment; and

(7) Compelling the business operators to reach/implement monopoly agreements that exclude or restrain competition, or compelling business operators with dominant market positions to abuse their dominant market positions.

Article 4

Administrative agencies shall not abuse their administrative powers by formulating or promulgating regulations that contain any content of excluding or restraining competition, in the form of decisions, announcements, circulars, notices, opinions, meeting minutes, etc.

The provisions of the preceding paragraph shall be applicable to organizations authorized by the laws and regulations to manage public affairs.

Article 5

Business operators shall not engage in the following acts:

(1) Reaching/implementing performing monopoly agreements or abusing dominant market positions on the pretext of administrative restrictions set by administrative agencies and organizations authorized by the laws and regulations to manage public affairs;

(2) Reaching/performing implementing monopoly agreements or abusing dominant market positions on the pretext of administrative delegation authorization by administrative

agencies and organizations authorized by the laws and regulations to manage public affairs; and

(3) Reaching/performing implementing monopoly agreements or abusing dominant market on the pretext of administrative regulations formulated or promulgated by administrative agencies and organizations authorized by the laws and regulations to manage public affairs.

Article 6

Where administrative agencies or organizations authorized by the laws and regulations to manage public affairs violates the provisions of Articles 3 or 4 of these Provisions, the State Administration for Industry and Commerce and the administrative authoritiestions for industry and commerce of all provinces, autonomous regions and municipalities directly under the Central Government may, with regard to the abuses of administrative power by excluding or restraining competition committed by the administrative agencies and organizations authorized by the laws and regulations to manage public affairs and the consequences thereof, make suggestions on penalizing penalty according to law to the superior organs according to the provisions of Article 51 of the Anti-Monopoly Law.

Article 7

Where business operators engage in monopoly in violation of the provisions of Article 5 of these Provisions, the Provisions for Administrative Authorities for Industry and Commerce on Prohibition of Monopoly Agreements and the Provisions for Administrative Authorities for Industry and Commerce on Prohibition of the Abuses of Dominant Market Position shall apply.

Article 8

Where business operators have reached and implement performed monopoly agreements, the administrative authorities for industry and commerce shall order such operators to cease the illegal acts, confiscate the illegal gains therein, and impose thereon a fine of not less than 1% and not more than 10% of the sales revenue of the preceding year; where

monopoly agreements reached have not been implemented performed yet, such operators may be imposed a fine below RMB 500, 000. Where business operators abuse their dominate market positions, the administrative authorities for industry and commerce shall order such operators to cease the illegal acts, confiscate the illegal gains therein, and impose thereon a fine of not less than 1% and not more than 10% of the sales revenue of the preceding year.

Article 9

If the laws and administrative regulations stipulate otherwise regarding the handling of abuses of administrative powers by administrative agencies or organizations authorized by the laws and regulations to manage public affairs to exclude or restrain competition, such stipulations shall prevail.

Article 10

Anti-monopoly enforcement personnel of the administrative authorities for industry and commerce shall handle the cases in strict accordance with the law and pursuant to the Provisions on the Procedures for the Administrative Authorities for Industry and Commerce to Prevent Abuses of Administrative Powers to Exclude or Restrain Competition.

Any anti-monopoly enforcement personnel of the administrative authorities for industry and commerce abusing the official power vested in him, neglecting his duties, practicing favoritism and committing irregularities engaging in malpractice for personal gain, or revealing trade secrets that he has become aware of during the course of law enforcement procedures, shall be penalized according to the relevant provisions.

Article 11

Commodities mentioned herein shall include services.

Article 12

The State Administration for Industry and Commerce shall be responsible for interpreting these Provisions.

Article 13

These Provisions shall become effective as of February 1, 2011.

Regulation on Telecommunications of the People's Republic of China

Decree of the State Council of the People's Republic of China (No. 291)

The Regulation on Telecommunications of the People's Republic of China has been adopted at the 31st regular meeting of the State Council on September 20, 2000 and is hereby published.

ZHU Rongji(Premier)

September 25, 2000

Article 10

An operator of a basic telecommunications service must fulfil the following conditions:

(1) the operator shall be a sole purpose undertaking that is legally established to engage in basic telecommunications services, and State-owned equity interest or shares in the undertaking shall not constitute less than 51%;

(2) it has a feasibility study and a technical plan for network construction;

(3) it has appropriate funds and professionals required for its business activities;

(4) it has premises and appropriate resources required for its business activates;

(5) it has the reputation or capability of providing long-term service to subscribers; and

(6) other conditions stipulated by the State.

Article 41

While providing telecommunications services, a telecommunications business operator may not carry out any of the following acts:

(1) limiting, by any means whatsoever, telecommunications subscribers to using the telecommunications services that it has designated;

(2) limiting telecommunications subscribers to using telecommunications terminal equipment it has designated or refusing telecommunications subscribers' use of self-supplied telecommunications terminal equipment for which they have obtained permission to connect to the network;

(3) violating State regulations by modifying, or modifying in disguised form, its charge rates, or by increasing, or increasing in disguised form, the items for which it charges fees, without authorization;

(4) refusing, delaying or terminating the provision of telecommunications services to a telecommunications subscriber without a legitimate reason;

(5) not performing the undertakings it publicly made to telecommunications subscribers or making false publicity that is likely to cause confusion; or

(6) making use of improper means to harass telecommunications subscribers or retaliating against telecommunications subscribers who have filed a complaint.

Article 42

During the course of telecommunications business operations, a telecommunications business operator may not carry out any of the following acts:

(1) using any method whatsoever to limit a telecommunications subscriber from selecting telecommunications services legally provided by other telecommunications business operators;

(2) unreasonably cross-subsidizing other business that it operates; or

(3) engaging in unfair competition by providing telecommunications business or services below cost, in order to squeeze out competitors.

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