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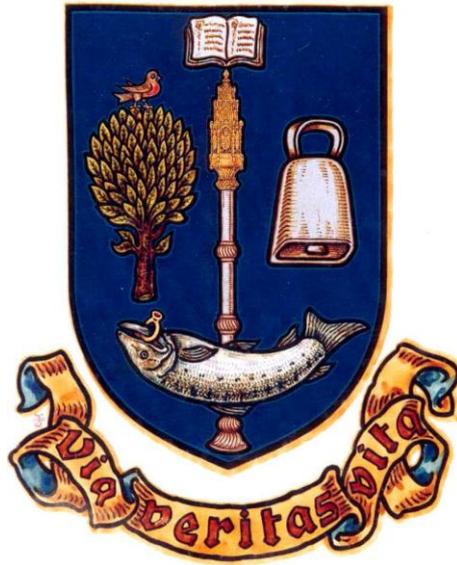
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**A CRITICAL ANALYSIS OF ASPECTS OF THE PUBLIC
ENFORCEMENT OF COMPETITION LAW IN CHINA
WITH REFERENCE TO THE EUROPEAN UNION AND
THE UNITED STATES**

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Abstract

This thesis is concerned with the problems met by the administrative enforcers of the Antimonopoly Law (the AML 2007) of the People's Republic of China (PRC) during its public enforcement. It provides solutions to some of these problems with reference to EU competition law and US antitrust law. Although the thesis cannot solve all the problems once for all, it does provide effective solutions to the three following important issues: 1. how to establish and improve transparency of Chinese merger control procedure; 2. how to allocate public enforcement power of the AML 2007 between the Central and Provincial enforcers; and, 3. how to improve the protection of right of concerned parties during the AML 2007's public enforcement.

Chinese Antimonopoly Law's public enforcement is still immature and experiencing further challenges for development. In order to establish a more effective, transparent and fair public enforcement regime, the thesis chooses EU competition law and US antitrust law to compare. Not only because they are more advanced, but also, because the AML 2007 is heavily influenced by the two regimes (especially the EU competition law regime). However, it is noteworthy that the experience from EU and US cannot solve all problems met by Chinese administrative enforcers; especially those are caused by Chinese political and economic structure which both EU and US do/did not have. Nevertheless, by solving the problems met in the above three aspects, the thesis has contributed to a more effective, transparent and fair public enforcement procedure for Chinese Antimonopoly Law.

Translations of titles, authors, and publishers from Chinese works are unofficial, and the laws in this thesis are up to date at December 2012.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, 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.

Signature _____

Printed Name _____

List of Abbreviations

ABA: American Bar Association;

ALJ: Administrative Law Judge;

AML 2007: Chinese Antimonopoly Law;

APA: US Administrative Procedure Act;

APL 1999: Chinese Administrative Procedural Law;

CAE: Central Governmental Administrative Enforcer of China;

CAN: Chinese Antimonopoly Network;

CCP: Chinese Communist Party;

CID: Civil Investigative Demand;

CIS: Competitive Impact Statement;

CJEU: Court of Justice of the European Union;

DOJ: Department of Justice;

DG Comp.: Directorate General for Competition;

ECN: European Competition Network;

ECHR: European Convention of Human Rights;

ESCAP: The United Nations Economic and Social Commission for Asia and the Pacific;

EU: European Union;

EWGA: US Executive Working Group for Antitrust;

FBI: US Agents of the Federal Bureau of Investigation;

FTC: Federal Trade Commission;

GC: General Court;

HHI: Herfindahl-Hirschman Index;

HO: Hearing Officer;

HSR Act: The Hart-Scott-Rodino Antitrust Improvements Act of 1976;

ICHN: Industry and Commerce Bureau of Henan Province;

ICJS: Industry and Commercial Administration of Jiang Su province;

MOFCOM: Ministry of Commerce of China;

NAAG: US National Association of State Attorneys General;

NCA: National Competition Authorities;

NDRC: National Development and Reform Committee of China;

OJ: Official Journal;

OPM: US Office of Personnel Management;

PAE: Provincial Governmental Administrative Enforcer of China;

PLC: Politics and Law Committee of China;

SAIC: State Administration of Industry and Commerce of China;

SAG: US State Attorneys General;

SASAC: State-owned Assets Supervision and Administration Commission of China;

SO: Statement of Objection.

Chapter 1 Introduction

1. Comparative perspectives of competition law's public enforcement

Competition law¹ has become more prevalent as the commercial legal environment has developed globally especially since World War II.² More than 112 countries have enacted their own competition law³. As Roscoe Pound said, 'Since the life of law is in its application and enforcement',⁴ competition law will fail to realise its promise unless effectively enforced. Hence the question arises as to what is the most effective way to enforce competition law. The answer to this question may vary according to jurisdiction. State's enforcement of competition law is influenced by its economic and political environment, legal tradition and resources and culture. However, there are

¹The term 'competition law' is widely used in the European Union, while in the United States 'antitrust law' is more common. China's new comprehensive competition law is called 'Antimonopoly law'. But they all have the same essential meaning: laws dealing with anti-competitive activities. In order to be precise, the thesis adopts 'antitrust law', 'competition law' and 'antimonopoly law' respectively for competition-related laws in United States, European Union and China. 'Competition law' is used as a general term where there is no need to mention the law in different legal systems.

²See, W. Wells, *Antitrust and the Formation of the Post war World*, (2002) Columbia University Press, at 1.

³See, S.Panitchpakdi, *Opening Address of the Sixth UN Conference to Review All Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, Geneva, 8-12 November 2010, available at: <http://www.unctad.info/en/6th-UN-Conferenceon-Competition-Policy/Conference/Opening-Address-by-Secretary-General-of-UNCTAD/> (last visited on 25 March 2011); See also, J.M. Jacobson (editor in chief), *Antitrust Law Developments*, volume I, 6th edition, (2007) ABA Publishing, at 1259.

⁴ R. Pound, *Jurisprudence*, 5th edition, volume 1, (1959) Lawbook Exchange Ltd, at 353.

two mainstream approaches of enforcement that may be summarised from these enforcement systems: the European Union's competition law (hereafter the EU competition law) regime and the United States' antitrust law (hereafter the US antitrust law) regime.⁵

From a procedural perspective the main distinctive characteristic of the two enforcement regimes is that the EU competition law is administrative, agency-orientated whereas the US approach is more court-orientated.⁶ Despite the differences, there are some general similarities between the two main approaches. For example, both the EU and US approach have administrative agencies and courts to enforce the law, although their functions are quite different.⁷ It is these differences and similarities that make the two regimes comparable and which forms the basis

⁵ Similar opinion can be found in Y.J. Jung & Q. Hao, 'The New Economic Constitution in China: A Third way for Competition Regime?' (2003) 24 *Northwestern journal of International law and Business*, 107-171.

⁶ *Ibid*, at 123.

⁷ The Directorate General of Competition under the European Commission, as (one of) the EU competition law's administrative enforcers, gathered in one office the authority and competence of investigation, prosecution and first-instance decision making with regard to Articles 101 and 102 TFEU's public enforcement. See, A. Jones & B. Suffrin, *EC Competition Law, Text, Cases and Materials*, 3rd Edition, (2008) Oxford University Press, at 1147; The Antitrust Division under the Department of Justice, as the administrative enforcer of the Sherman Act, only has the authority of investigation and prosecution. See, H. Hovenkamp, *Federal Antitrust Policy the Law of Competition and Its Practice*, 3rd Edition, (2005) West Group, at 593.

for the further discussion on how to solve the problems of public enforcement of China's new Antimonopoly Law ⁸(hereafter the AML 2007).

The AML 2007 was inevitably influenced by the two regimes, not merely because they are advanced or influential but also, more importantly, because China has decided to adopt the market economy.⁹ As Mark Williams wrote:

Once they have accepted the ideological case for markets, then to prevent state monopolies simply becoming private ones and to prevent market distortion caused by collusive business practices or over-concentration of production by merger in few hands, governments see the need to implement a pro-competition policy through the mechanism of law.¹⁰

Such influence is illustrated by the AML 2007's law making process and its substance. During the law-making process, Chinese legislators and officials

⁸ Chinese Antimonopoly Law was promulgated by the Standing Committee of National People's Congress on August, 30, 2007 and became effective on August, 1, 2008. The official Chinese edition of the Anti-Monopoly Law 2008 is available at:

http://www.gov.cn/ziliao/flfg/2007-08/30/content_732591.htm, last visited on 23/02/2012, 22:47. An unofficial English translation will be provided as an appendix in this thesis.

⁹See, Article 15 of the *Constitution of the People's Republic of China* (adopted on December 4, 1982):The state practises socialist market economy [‘中华人民共和国宪法’;‘zhonghuaRenminGongheguoXianfa’].

¹⁰M. Williams, ‘Adoption of the EC competition law model-Is it a Trojan horse for China?’ in W.D. Chen (edited by), *An Exploration of China's Legislation on Competition* [中国竞争法立法探要,zhongguojingzhengfalifatanyao] (2006) Social Sciences Academic Press, at 332-333.

referred to US and EU officials regularly.¹¹The substance of the AML2007, at least literally, followed the basic structure and legal settings of Articles 101 and 102 TFEU.¹²The AML 2007's public enforcement is also administrative agency-orientated.

On the other hand, the influence of the planned economy, meaning 'an economic system in which the state or workers' councils manage the economy'¹³ is also deep to the AML 2007.¹⁴For instance, administrative monopoly¹⁵is a focal point of the AML 2007 because it may foster low efficiency and poor-quality service, creates income gaps, encourages

¹¹ See, M. Williams, *Competition Policy and Law in China, Hong Kong and Taiwan*,(2005) University of Cambridge Press; see also, R.H. Pate, 'What I Heard in the Great Hall of the People: Realistic Expectations of Chinese Antitrust'(2008-2009) 75 *Antitrust Law Journal*,195-211.

¹²See, Y.J. Jung & Q. Hao, 'The New Economic Constitution in China: A Third way for Competition Regime?' *supra note 5*, at 124.

¹³See, J. Eatwell, M. Milgate, & P. Newman, *The New Palgrave: A Dictionary of Economics*,(1987) Palgrave Macmillan,at 879-880.

¹⁴ There is adequate literature on the influence of the planned economy, or the economic model of the Soviet Union upon the current Chinese economy, market structure and antimonopoly law. For further reading, see for example, N.C. Hope, D.T. Yang & M.Y. Li (edited by), *How Far Across the River?: Chinese Policy Reform at the Millennium*,(2003)Stanford University Press; J.L. Wu, 'China's Economic Reform: Past, Present and Future' (2000) 1(5)*Perspectives*, available at http://www.oycf.org/Perspectives2/5_043000/china.htm, last visited on 14/12/2012, 16:08; R.H. Pate, 'What I Heard in the Great Hall of the People: Realistic Expectations of Chinese Antitrust', *supra note 11*; Y.J. Jung & Q. Hao, 'The New Economic Constitution in China: A Third way for Competition Regime?' *supra note 5*, at 110; B. M. Owen, S. Sun & W.T. Zhang, 'Antitrust in China: The Problem of Incentive Compatibility', (2005) 1 *Journal of Competition Law and Economics*, 123-148.

¹⁵ The term 'administrative monopoly' in China refers to monopolistic activities initiated by government agencies' at various levels abusing regulatory or administrative power, including a wide variety of activities such as legalised monopolies and explicitly-prohibited *ultra vires* measures. See, Y.J. Jung & Q.Hao: The New Economic Constitution in China: A Third way for Competition Regime? *supra note 5*, at 113; see also, R.H. Pate, 'What I Heard in the Great Hall of the People: Realistic Expectations of Chinese Antitrust', *supra note 11*.

corruption and prevents the formation of a unified national market.¹⁶ However, administrative monopoly may not be regarded as a significant problem either under the EU or the US.¹⁷

The AML 2007 has been implemented for several years since 1st August 2008. The time is now right and ripe to review and evaluate the performance of the Law's public enforcers. The aim is to identify the problems met by them during the years of the AML 2007's public enforcement and to see whether and which of these problems can be addressed by the experiences from EU competition law and US antitrust law.

2. Current public enforcement of the AML 2007

2.1 The current position of administrative enforcers under the AML 2007's public enforcement

There are three parallel administrative enforcers of the AML 2007 at the central government level: the Ministry of Commerce (the MOFCOM), the

¹⁶ See, H.N. Su, 'The Adjustment of High Income in Monopoly Industries', *China Economic Times*, (June 1, 2001).

¹⁷ Under the EU or US regimes where the market economy has been well developed, competition law is traditionally perceived as dealing with only private anticompetitive conduct rather than government-based monopolies. Unlike mature market economies, transitional economies such as China's, face the task of creating, not simply maintaining competitive markets. See, B. Song, 'Competition Policy in a Transitional Economy: the Case of China', (1995) 31 *Stanford Journal of International Law*, 387-422; see also, Y.J. Jung & Q. Hao, *supra* note 5, at 127.

National Development and Reform Committee (the NDRC) and the State Administration of Industry and Commerce (the SAIC).¹⁸

2.1.1 The Ministry of Commerce

The MOFCOM is responsible for reviewing mergers under the AML 2007.¹⁹

Despite the MOFCOM's efforts in issuing a range of guidance and interim measures which are designed to clarify the legal standards and procedures of the AML 2007's enforcement,²⁰ in practice it may be the most active of the three administrative enforcers because it is responsible for the area in which action must be taken.²¹ Pursuant to Article 30 of the AML 2008, the MOFCOM

¹⁸No.11 Announcement of the State Council, (2008), available at the official website of the Central Government of PRC: http://www.gov.cn/zwqk/2008-04/24/content_953471.htm, last visited on 26/02/2012, 10:49.

¹⁹See, the functions of the Antimonopoly Bureau of the MOFCOM, available at the official website of the Antimonopoly Bureau of MOFCOM: <http://fldj.mofcom.gov.cn/aarticle/gywm/200809/20080905756026.html>, last visited on 26/02/2012, 14:18.

²⁰By the 30th December, 2012, the MOFCOM has issued 7 guidelines. They are: Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings (the Order of the MOFCOM, No. 529, 2008); the Guidelines on calculating the turnover of financial institutions for merger control purpose (the Order of the MOFCOM, No.10, 2009); the Measures for Declaration of the concentration (the Order of the MOFCOM, No.11, 2009); the Measures for Investigation of Concentration (the Order of the MOFCOM, No.12, 2009); the Interim Provisions for Implementation of Asset stripping and Business Divestiture of the Operators in Concentration (the Order of the MOFCOM, No.41, 2010); the Interim Rules on Evaluating Competitive Effects of Concentration of Business Operators (the Order of the MOFCOM, No.55, 2011); and, the Interim Measures for Investigating and Handling Failure to Legally Declare the Concentration of Business Operators (the Order of the MOFCOM, No.6, 2011).

²¹ By the 30th September 2012 the MOFCOM had issued 474 decisions on mergers under the AML 2007; 458 of them were cleared. See, the MOFCOM's notice, available at <http://fldj.mofcom.gov.cn/aarticle/xxfb/201211/20121108436852.html?291880069=705144026>, last visited on 17/12/2012, 14:59.

is obliged to publish its decisions to prohibit concentrations or to clear them with restrictive conditions. By December 2012 the MOFCOM had published 16 decisions.²² Since the number of cases dealt with by the SAIC and NDRC is limited, the cases in MOFCOM may offer the main source from which to illustrate the problems met by the central public authorities during enforcement.

The first published case handled by the MOFCOM in accordance with the AML 2007 was that of the INBEV/Anheuser-Busch merger.²³ On September 11th 2008 the MOFCOM received the application materials of concentration from INBEV. After examination of these, opinions from relevant governmental departments, beer associations, major beer producers, raw materials producers and retailers in China, in accordance with Article 28 of the AML 2007,²⁴ the MOFCOM decided to approve this concentration on the following conditions: 1. this concentration is not permitted to increase the Anheuser-Busch's current proportion of shareholding in Tsingtao Brewery Company Limited (27%); 2. if the controlling shareholders or the shareholders

²² In accordance with Article 30 of the AML the MOFCOM is only obliged to publish its decisions when the concentration is prohibited or approved with restrictive conditions.

²³ See, the Public Announcement of the MOFCOM, No.95, [2008], available at the official website of the Antimonopoly Bureau of MOFCOM:

<http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html>, last visited on 14/04/2011, 23:43

²⁴ Article 28 of the AML provides that if the concentration may eliminate or restrict competition, MOFCOM shall make a decision to prohibit their concentration. However, if the undertakings concerned can prove that the advantages of such concentration to competition obviously outweigh the disadvantages, or that the concentration is in the public interest, the MOFCOM may decide not to prohibit their concentration.

of controlling shareholders of INBEV has changed, INBEV is obliged to notify this change immediately to the MOFCOM; 3. the 28.56% shareholding ratio owned by the INBEV in Zhujiang brewery Group Co. Ltd should not be increased; 4. the new company after the concentration of INBEV/Anheuser-Busch) is not permitted to hold shares in China Resources Snow Breweries Co. Ltd nor Beijing Yanjing Brewery Co. Ltd.²⁵

The very first step taken by the MOFCOM was immature and simple (the published decision is very short, one page only). The decision is in three parts, each of which is a simple description without any further explanation: 1. the examination procedure; 2. the decision on examination; 3. restrictive conditions. Firstly, the MOFCOM's decision did not give a clear definition of the relevant market. In particular, there is no explanation of how the geographic market was defined. Given that geographic markets are very important for beer consumption since beer is sold to consumers in regional geographic markets through a special distribution system,²⁶ the lack of evidence in defining geographic market in this case would fundamentally weaken the legal grounds, if any, of the restrictive conditions imposed on this concentration. Secondly, this decision did not disclose any information on the competitive impact assessment of the case.²⁷ Instead it merely stated that

²⁵ See, the Public Announcement of the MOFCOM, No.95, [2008]

²⁶ See, X.Z. Zhang & V.Y.H. Zhang, 'Chinese merger control: patterns and implications', (2010) 6 (2) *Journal of Competition Law & Economics*, 477-496.

²⁷ Ibid, at 484.

the decision was made after examination of the application materials and consultation with the relevant government departments, producers and retailers and it did not provide any details of the process and content of the consultation. There is little information on the reasons for the MOFCOM's imposing restrictive conditions on this concentration and on how these conditions were reached. The MOFCOM did mention the parties' market share in its decision, but failed to prove the connection between the market shares and the anticompetitive effects brought by this concentration through any substantive analysis. Given the lack of information on the definition of geographic market and competitive impact assessment, the restrictive conditions imposed on the INBEV/Anheuser-Busch have insufficient grounds.²⁸ Since the MOFCOM did not explain why these restrictive conditions were imposed in its published decision, commentators suspected the restrictive conditions were based on China's industrial policies and national protectionism rather than competition law principles set by the AML 2007.²⁹

²⁸At least from its published decision there was no evidence or analysis to support the restrictive conditions.

²⁹ See for example, S.Tucker, 'INBEV ruling sparks fears for M&A in China'. *Financial Times*, Nov, 30, 2008; see also, D. Wei, 'China's Anti-monopoly Law and its Merger Enforcement: Convergence and Flexibility', (2011) 14(4) *Journal of International Economic Law*, 807-844; Q.X. Bu, 'Anheuser-Busch InBev: the legal implication under the AML 2008', (2010) 31(6) *European Competition Law Review*, 239-247; X.Z. Zhang & V.Y.H. Zhang, 'Chinese merger control: patterns and implications', *supra note 26*; C.H. Lyons, 'The Dragon in the Room: China's Anti-Monopoly Law and International Merger Review', (2009) 62 *Vanderbilt Law Review*, 1577-1621.

The second decision from the MOFCOM was even more controversial. Coca Cola/Huiyuan³⁰, as the first and only merger blocked by the MOFCOM, drew considerable attention. The MOFCOM received the application on September 18th, 2008. As it did in INBEV, the MOFCOM consulted the government departments of, trade associations, competitors in the fruit-juice market, upstream suppliers, downstream distributors, Coca Cola and Huiyuan, and economic and agricultural experts during the investigation. Again, no details of the consultation process were disclosed. After a two-phase' investigation the MOFCOM listed three negative effects of this concentration: 1. Coca Cola would be capable of transmitting its dominant position in the carbonated drinks market to the fruit juice beverage market through this concentration. Thus it would cause anticompetitive effects within the fruit-juice beverage market and harm consumer welfare; 2. after the concentration Coca Cola's market power would be significantly strengthened in the fruit juice beverage market as controlling the two well-known brands; the barriers to entry into the fruit-juice beverage market would be significantly raised after the concentration; 3. the concentration would restrain the ability to enter into competition and independent innovation of small and/or medium size fruit-juice beverage companies in

³⁰See, the Public Announcement of the MOFCOM, No.22, [2009], available at the official website of the Antimonopoly Bureau of MOFCOM: <http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html>, last visited on 25/04/2011, 23:43.

China. Hence, under Articles 28 and 29 of the AML 2007 the MOFCOM decided to prohibit the concentration between Coca Cola Company and Huiyuan Company.³¹ The prohibition was imposed for two reasons: firstly, the MOFCOM feared Coca Cola would transmit its dominant market power in the carbonated drinks market to the fruit-juice beverage market and harm competition in the fruit juice beverage market through this concentration; secondly, the MOFCOM was afraid that the benefit of small and medium fruit-juice enterprises would be jeopardised because, for example, this concentration might increase the barrier of entry into the fruit-juice market.³²

However, again the MOFCOM failed to provide sufficient evidence and persuasive reasoning to justify the above arguments. In particular, a clear examination of the definition of the relevant market, which the MOFCOM did not disclose, was essential in this case. The MOFCOM defined the whole fruit-juice beverage as the relevant market. The main reason is that different fruit juices are highly substitutable but they have low substitutability with carbonated soft drinks.³³ There is no evidence of the type of analysis used

³¹Ibid.

³²Ibid.

³³See J. Yao, MOFCOM Spokesman, *Responds to the Journalists Regarding the Antitrust Review of the Coca-Cola/Huiyuan Case*, March 24, 2009, available at <http://www.mofcom.gov.cn/aarticle/ae/ag/200903/20090306123715.html>, last visited on 29/02/2012, 14:04.

and how MOFCOM arrived at such conclusions.³⁴ In fact there are plenty of literatures providing solid economic analysis on this issue available to the MOFCOM.³⁵

Another cornerstone in the MOFCOM's reasoning is that the Coca-Cola's dominant market position in the carbonated soft drink market in China may leverage its market power in the carbonated soft drink market to the fruit juice beverage market. Again, there was no evidence disclosed on how the MOFCOM reached this conclusion. Similar to the INBEV case, mainly on the basis of Coca-Cola's market power in the carbonated soft drink market, MOFCOM established a *prima facie* case for market foreclosure.³⁶

Lack of analysis or lack of disclosure of evidence of the MOFCOM's reasoning made this prohibition arbitrary and raised the concern of the

³⁴See, X.Z. Zhang & V.Y.H. Zhang, 'Chinese merger control: patterns and implications', *supra* note 26, at 487.

³⁵ See for examples, J.P. Dube, 'Product Differentiation and Mergers in the Carbonated Soft Drink Industry', (2005) 14 *Journal of Economics & Management Strategy*, 879-904; F. Gasmi, J.J. Laffont & Q. Vuong, 'Econometric Analysis of Collusive Behavior in a Soft-drink Market', (1992) 1 *Journal of Economics & Management Strategy*, 277-311; R. Wayland: Coca-Cola versus Pepsi-Cola and the Soft Drink Industry, *Harvard Business Review*, 1992, available at <http://hbr.org/product/coca-cola-vs-pepsi-cola-and-the-soft-drink-industry/391179-PDF-ENG>, last visited on 16/03/2012, 14:41. It is noteworthy that there is a Chinese private academic institution offered a solid and detailed economic analysis on the relevant market definition in the *Coca Cola/Huiyuan*. See, Xin Hong Jun Commerce and Industrial Economic Research Studio: *Lack of Positive Analysis of China's Relevant Market Definition: Coca-Cola/Huiyuan as an example* [论我国相关市场界定实证分析的缺失——以汇源并购案为研究视角, *lunwoguoxiangguanshichangjiedingshizhengfenxidequeshi——yihuiyuanbinggouanweiyanj iushijiao*], (2011), available at <http://huiguijandan.blog.163.com/blog/static/178923061201122142052415/>, last visited on 29/02/2012, 14:50.

³⁶X.Z. Zhang & V.Y.H. Zhang, *supra* note 26, at 488.

MOFCOM's lack of legal certainty. Commentators suspected that this decision was inspired by protectionism and national sentiment rather than competition law.³⁷ Although the MOFCOM denied this claim,³⁸ it is still not clear that this decision indicated MOFCOM's protectionism of trade until more detail of analysis and definition of the relevant market had been added in the decision. Increasing the transparency of the MOFCOM's decision and decision-making process will benefit companies and investors in China because the legal certainty of merger control would be increased.

In *Mitsubishi/Lucite*³⁹ the MOFCOM approved the merger with restrictive conditions. The process of investigation was similar. It is noteworthy that, firstly, in this case the MOFCOM clearly defined MMA (a polymer necessary to make acrylic glass) as the relevant market. However, there was no analysis explaining how and why the MOFCOM defined the relevant market. Secondly, the MOFCOM classified the competition effects brought by this concentration

³⁷ See for example, C.H. Lyons, 'The Dragon in the Room: China's Anti-Monopoly Law and International Merger Review', *supra note 29*; X.Z. Zhang & V.Y.H Zhang, *supra note 26*; Q.X. Bu, 'Coca-Cola v. Huiyuan-Market-economy Driven or Protectionism?' (2010) 41(2) *International Review of Intellectual Property and Competition Law*, 202-210; F. Deng, A. Emch & G. K. Leonard, 'A Hard Landing in the Soft Drink Market-MOFCOM's Veto of the Coca Cola & Hui Yuan Deal', *Global Competition Policy*, April 2009, Release 2; J. Sun & M. Zhai, 'Thinking Over the Antimonopoly Law on China's Foreign Investors' Merger and Acquisitions: Taking Coca Cola/Huiyuan as an Example', (2009) 37(3) *Journal of Xinjiang University*, 45-51; G.P. Ying, 'Some Thoughts about the Proposed Acquisition of Huiyuan by Coca Cola from the Perspective of Antimonopoly Law', (2010) 12(6) *Journal of Southwest University of Political Science & Law*, 42-48.

³⁸ See, J. Yao, *supra note 33*.

³⁹ The Public Announcement of the MOFCOM, No.28, [2009], available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html?2560677784=705144026>, last visited on 28/04/2011, 16:19.

as horizontal and vertical effects. In relation to the horizontal effect, depending on the high market share after the concentration (64%), the MOFCOM presumed that Mitsubishi/Lucite post-merger company would have market power to exclude or restrict its rivals in the Chinese MMA market. In relation to the vertical effect the Mitsubishi/Lucite might leverage its market power in the MMA market to eliminate and restrict competition in downstream markets.⁴⁰ Again, there was no analysis to support these conclusions. The only basis of the MOFCOM ruling was market share. There may be problems with the remedies too. For example, the third condition imposed on *Mitsubishi/Lucite* was that the merged company be disallowed / forbidden to initiate any new acquisition or build additional industry for five years after this merger. This condition was designed to promote competition by protecting rivals, but may itself be anticompetitive.⁴¹

In *GM/Delphi*⁴² the MOFCOM failed to define a geographic market and a relevant product market clearly again. The MOFCOM said it assessed this concentration comprehensively but did not reveal any details of the assessment. It mentioned that GM had a 'leading position in the auto market

⁴⁰Ibid.

⁴¹X.Z. Zhang & V.Y.H. Zhang, 'Chinese merger control: patterns and implications', *supra note 26*.

⁴²The Public Announcement of the MOFCOM, No.76, [2009], available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906540211.html?1906497432=705144026>, last visited on 28/04/2011, 16:38.

in China and in the world'⁴³ but did not provide any statistic, such as the market share of GM in Chinese auto market, to support this claim although this was one of the cornerstones of the decision to impose restrictive conditions on this concentration.

In the later published merger cases⁴⁴ the problem is generally the same: the MOFCOM did not provide clear and sufficient evidence to support its conclusion on defining the relevant market and competitive impact assessment.⁴⁵

2.1.2 The National Development and Reform Committee

The NDRC, a government agency with broad responsibilities that include ensuring price stability in key areas of China's economy, is responsible for action against price-related violations of the AML 2007.⁴⁶ **In December 2012** the NDRC issued two guidelines on anti-price-related monopoly enforcement:

⁴³Ibid.

⁴⁴ By December 2012 there were 13 additional cases published by the MOFCOM. They are: *Savio/Penelope*; *GE/Shenhua*; *Seagate/Samsung*; *Henkel HK/Tian De*; *Western Digital/Viviti Technologies*; *Google / Motorola Mobility*; *Google / Motorola Mobility*; *Walmart/Yihaodian*; *ARM, Giesecke/ Devrient*. Available officially online at <http://fldj.mofcom.gov.cn/static/ztxx/ztxx.html/1?3176597381=705144026>, last visited on 03/12/2012, 21:52.

⁴⁵ Nevertheless, it is noteworthy that the economic analysis in MOFCOM's *Seagate/Samsung* decision is significantly more detailed than that of earlier decisions.

⁴⁶ See, No. 11 Announcement of the State Council, (2008), *supra note 18*.

the Provision against Price Monopoly⁴⁷ and the Provision of Procedure against Price Monopoly.⁴⁸

The NDRC has gained a little experience in dealing with anti-price-fixing agreements. In *TravelSky*,⁴⁹ China TravelSky Holding Company (hereafter, TravelSky) was a national enterprise under State-owned Assets Supervision and Administration Commission of the State Council (hereafter, the SASAC). It owned the only tickets agency and sale system in China and the market share in (year) reached 97% in the domestic civil aviation ticket computer booking market. Between March and May 2009 TravelSky decided to adopt a new formula to calculate the discount of air tickets. It was suspected of violating the AML by fixing the price of civil aviation tickets and the NDRC has initiated investigation. However, the case is still pending. The NDRC was reported to have faced great difficulty in collecting evidence.⁵⁰ In addition,

⁴⁷See, Order of NDRC, No.7 (2010), Available on the official website of the Central Government of the PRC: http://www.gov.cn/flfg/2011-01/04/content_1777969.htm, last visited on 12/05/2011, 10:11. The official English version is currently unavailable. An unofficial one can be found at:

<http://www.lawinfochina.com/NetLaw/display.aspx?db=law&sen=rLdDdW4drhdDdWEdrhd6dW4d/DdDdW4d9DdydWhd/ddDdWud9ddwdWfd9ddGdWud/ddTdWud9Dd+&Id=8440&>, last visited on 12/05/2011, 10:11.

⁴⁸See, Order of NDRC, No.8 (2010), Available at the official website of the Central Government of PRC: http://www.gov.cn/flfg/2011-01/04/content_1777998.htm, last visited on 12/05/2011, 10:31.

⁴⁹This case was handled by the NDRC in May, 2009. However, the ruling has not been published on the official journal or website of the NDRC. The process of this case can be found on <http://caac.people.com.cn/GB/114103/9315281.html>, last visited on 15/05/2011, 12:20.

⁵⁰ B.Q. Wang & W.X. Liu, 'NDRC investigated Travelsky for manipulating ticket price', *The Economic Observer*, 15th, May, 2009. Available at <http://www.eeo.com.cn/eeo/jjgcb/2009/05/18/137787.shtml>, last visited on 15/05/2011, 11:04.

TravelSky is a SOE under the direct supervision of the SASAC, which is in the same administrative hierarchy as the NDRC. Since the process of investigation has not been published, the detail of the difficulty met by the NDRC in this case cannot be identified.

It is noteworthy that the NDRC has completed its first antitrust action in the pharmaceutical sector under the AML 2007. On 14 November 2011 the NDRC published a decision to sanction the anti-competitive conduct of Shandong Weifang Shuntong Pharmaceutical Co. Ltd. (hereafter, the Shuntong) and Weifang Huaxin Medicine Trading Co.Ltd. (hereafter, the Huaxin).⁵¹The NDRC found that the two companies had entered into exclusive sales agreements with the only two manufacturers of the ingredient, thereby gaining full control of the domestic supply of promethazine hydrochloride. Shuntong and Huaxin then raised the sales price of promethazine hydrochloride. The NDRC decided to impose fines of close to RMB 7 million upon Shuntong and around RMB 150,000 on Huaxin.⁵² The announcement published by the NDRC did not identify which AML provision had been infringed. It merely held that Shuntong and Huaxin had unlawfully gained control over the supply of promethazine hydrochloride and stated that the

⁵¹ J. Liu, 'Drug firms face monopoly fines', *China Daily*, (15, November, 2011), available at http://www.chinadaily.com.cn/usa/business/2011-11/15/content_14095767.htm, last visited on 01/03/2012, 20:51.

⁵² See, N. Susan, L. Ding, J. Liu & Y.M. Sun, 'NDRC Fined Two Pharmaceutical Companies for Abusive Conducts', *China Law Insight*, King & Wood, 12 December, 2011, available at <http://www.chinalawinsight.com/2011/12/articles/corporate/antitrust-competition/ndrc-fined-two-pharmaceutical-companies-for-abusive-conducts/>, last visited on 01/03/2012, 21:10.

AML and Price Law prohibited such actions constituting ‘abuse of a monopoly position and the implementation of price monopoly conduct in order to eliminate or restrict competition, hike prices and reap excessive profits to the detriment of consumer interests.’⁵³ Several points may be concluded from this case. Firstly, the fine imposed on Shuntong far exceeds the previously highest fine for an antitrust infringement.⁵⁴ This indicates the NDRC’s tendency to increase the level of fines for antitrust violations. Secondly, at least from this case, that the two companies fined by the NDRC are domestic capital firms indicates that the nationality of the capital firms under investigation may not be a decisive factor for the NDRC.⁵⁵ Thirdly, the NDRC’s action against Shuntong and Huaxin in the pharmaceutical sector shows, at least to some extent, its determination to enforce competition law in industries dominated by sector regulation.⁵⁶

More importantly, in November 2011 the NDRC’s officials told the domestic press that they were investigating a potential abuse of dominance by China

⁵³For the original news release on the NDRC’s website (in Chinese), please refer to: http://jjs.ndrc.gov.cn/gzdt/t20111115_444599.htm, last visited on 01/03/2012, 21:17.

⁵⁴ Before this case, the highest fine imposed by the NDRC was on *Unilever*, around RMB 2 million. See, Q.F. Ding & Y. Wang, ‘Unilever’s price rise ‘a corporate decision’’, *China Daily*, 27, May, 2011.

⁵⁵ P. Cheng, A. Emch, S. Q. Fu, A. McGinty, W. Jun, H. Wheare, D. Wong, ‘Strong Medicine for Law Breakers - NDRC’s First Antitrust Action in the Pharmaceutical Sector under the Anti-Monopoly Law’, Hogan Lovells, 29 November 2011, available at <http://www.hoganlovells.com/files/Publication/a029e38d-a052-4bb5-82c4-8bc1bef386b5/Presentation/PublicationAttachment/ec637564-1b54-4cb6-ad66-7a56b4145ff2/Strong%20Medicine%20for%20Law%20Breakers.pdf>, last visited on 01/03/2012, 22:05;

⁵⁶In fact, the NDRC itself is a major sector regulator of pharmaceutical sector. The NDRC itself plays a major role in setting the prices of many essential drugs.

Telecom and China Unicom.⁵⁷ Again, without an official decision or announcement, the exact facts, process and result of investigation are not clear. However, the NDRC started tackling SOEs. The ongoing *China Telecom and China Unicom* case could be important as it will answer the question whether and to what extent the AML 2007 applies to SOEs in law and in practice.⁵⁸

2.1.3 State Administration of Industry and Commerce

The SAIC is responsible for action against non-price related violations of the AML 2007.⁵⁹ Since **December 2012** the SAIC has issued five guidelines on non-price anticompetitive agreements, non-price abuse of dominant position and administrative monopoly, respectively.⁶⁰ These guidelines are largely

⁵⁷ See, L. Pang, 'NDRC: China Unicom and China Telecom under Investigation', *the Economic Observer*, 9 November, 2011. English version is available at <http://www.eeo.com.cn/ens/2011/1109/215349.shtml>, last visited on 01/03/2012, 22:48.

⁵⁸ See, N. Petit, 'Chinese Antitrust Law – The Year of the Rabbit in Review (1) & (2)', *Chilling Competition*, (23 January, 2012), available at <http://chillingcompetition.com/2012/01/23/chinese-antitrust-law-the-year-of-the-rabbit-in-review-1/>, last visited on 01/03/2012, 22:54.

⁵⁹ See, the internal institutions' responsibility and settings of the SAIC, available at <http://www.saic.gov.cn/zzjg/zyzz/>, last visited on 02/03/2012, 16:16.

⁶⁰ See Procedural Rules for the Industry and Commerce Administration Authorities of Investigating and Treating Administrative Monopoly related Cases (Order of SAIC, 2009, No.41); Procedural Rules for the Industry and Commerce Administration Authorities of Investigating and Treating Monopolistic Agreement and Abuse of Dominant Position Cases (Order of SAIC, 2009, No.42); Rules Concerning Prohibition of Monopolistic Agreements (Order of SAIC, 2010, No.53); Rules Concerning Prohibition of Abuse Market Dominance (Order of SAIC, 2010, No.54) and Rules Concerning Administrative Monopoly (Order of SAIC, 2010, No.55). All these rules are available (in Chinese only) on the official website of the SAIC: <http://www.saic.gov.cn/fldyfbzdjz/zcfg/zcfg/index.html>, last visited on 02/03/2012, 10:25.

repetition of the content of AML 2007. Despite this, the actual casework of the SAIC was limited. The first published enforcement decision by the SAIC was *Lian Yun Gang's Concrete Association*.⁶¹ In this case the Industry and Commercial Administration of Jiang Su province (hereafter the ICJS), which is under the leadership of SAIC, received a complaint that the Concrete Association of Lian Yun Gang (hereafter, the CA) organised the premixed concrete companies in the association to reach agreements of Market Segmentation and price-fixing. The ICJS conducted preliminary investigation of the case and applied the authority of enforcing the AML 2007 to the SAIC since this jurisdiction is in the hands of the central government. The SAIC authorised the ICJS to investigate the case. At first the investigation was effective because the CA did not realise that they might have violated the AML. When the CA realised that it might have violated the AML, it did not want to continue to cooperate with the ICJS but it was too late. The crucial evidence had been collected by the ICJS.⁶² Then the ICJS organised a hearing to hear the opinions of the CA. The main claim of the CA was that the 'premixed concrete company's self-discipline terms' and 'punishment rules' were a kind of self-rescue measure to overcome overcapacity in the current sluggish economic circumstance. The ICJS denied this claim. The ICJS held

⁶¹ See, F. Yao, 'The first AML case enforced by the SAIC has been sealed: the market segmentation agreement of LianYungang's association', *Legal Daily*, 02/03/2011.

⁶² Ibid.

that this agreement violated Article 13 of the AML 2008⁶³ and imposed an injunction against the Association to cease the illegal conduct, as well as a fine of RMB 200,000 on 5 of the 16 defendants.

As the first completed public enforcement case of AML 2007 dealt with by the SAIC, there are several notable points. Firstly, the relationship between the SAIC and the ICJS indicates the allocation of the AML's public enforcement authority between the central government and the local government. After a preliminary investigation the ICJS applied for leave to enforce the AML to the SAIC. This clearly indicated that the ICJS's authority to enforce the AML comes from the SAIC of the central government. Secondly, the defendant's knowledge of antitrust violation was limited. During the investigation the CA did not realise its investigated dealing might breach the AML until the ICJS obtained the decisive evidence. Thirdly, the rights of the concerned parties in this case were not sufficiently protected. For example, the evidence was collected from the defendant when it was unaware of the violation. The concern of right against self-incrimination might be raised. Nor did the defendant have the right of access to the Commission's file or legal professional privilege. However, the ICJS did respect the defendant's right to be heard by holding an oral hearing for the CA. Lastly, the ICJS did not

⁶³Article 13 of the AML 2008 states that fixing or changing prices of commodities shall be prohibited.

explain how the penalty was calculated, nor did it explain why only 5 of the 16 business operators were fined.

2.2 Current practice of the courts under the AML 2007's public enforcement

Under the AML 2007's public enforcement regime,⁶⁴ the courts have the legal duty to conduct judicial review of the administrative enforcers' decisions taken under the AML 2007.⁶⁵ In relation to the MOFCOM's merger assessment decision the dissatisfied party must firstly apply for administrative reconsideration. If it is still dissatisfied with the result of administrative reconsideration, it then may file for administrative litigation before the court.⁶⁶ In cases of monopolistic agreement and alleged abuse of dominant market position the plaintiff may challenge the SAIC or the NDRC's decision freely either by applying for administrative reconsideration or by filing for administrative litigation in the court.⁶⁷ However, at the time of writing there has been no judicial review under the AML 2007. One may be curious about the reason why there is zero judicial review judgement. This

⁶⁴Article 50 of the AML 2007 states: "Where the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liabilities." Hence the courts are also responsible for dealing with civil cases brought by private parties related to Antimonopoly Law in relation to the private enforcement of the Law. However, this is out of the scope of this thesis. For the details of the civil private antitrust enforcement conducted by the courts, please refer to: *Report on Competition Law and Policy of China 2010*, (2010) edited by Competition law and policy Committee of China WTO Research Institution, at 188-189.

⁶⁵See, Article 53 of the AML 2007.

⁶⁶ See, para.1, *ibid*.

⁶⁷Paragraph 2 of Article 53 of the AML.

fact raises concerns about whether the courts are capable of conducting judicial review under the AML 2007.⁶⁸

3. Structural and technical problems in the public enforcement of the AML 2007

A brief examination of the current position of the public enforcement of the AML 2007 from August 2008 to December 2012 shows that there are problems with the performance of both the administrative enforcers and the courts. These problems may be roughly divided into two categories: structural problems and technical problems. This classification is based on the several causes of the problems.⁶⁹

The structural problems include: 1. lack of independent judiciary; 2. the close relationship between the administrative enforcers of the AML 2007, the

⁶⁸ See for example, *Report on Competition Law and Policy of China 2010*, [supra note 64](#); See also, D.B. Yuan, 'Why there is little case before the courts in relation to the Antimonopoly Law's enforcement: an Explanation from the Supreme Court', *Legal Daily*, 1st, September, 2008.

⁶⁹ This classification is used in the research on the sector and economic reforms of China and other transitional countries to illustrate different tasks faced by the reformers of the sector industries and economy. For instance, J.Sachs and W.T.Woo provided some targets of structural reform: enterprise (SOEs) reform, trade liberalization and price reform. J.Sachs & W.T.Woo, 'Structural factors in the economic reforms of China, Eastern Europe, and the Former Soviet Union', (1994) 9(18) *Economic Policy*, 101-145, at 103; See also, S.F. Xu & W.Y. Chen, 'The reform of electricity power sector in the PR of China', (2006) 34 *Energy Policy*, 2455-2465, at 2460. However, there are relatively less literatures in the field of Chinese antitrust laws using the classification to examine its public enforcement problems. In the *Report on Competition Law and Policy of China 2010*, the authors mentioned that Chinese AML 2007's public enforcement is facing 'dual structural and technical challenges', but there is no further explanation about the meaning of the terms. See, *Report on Competition Law and Policy of China 2010*, [supra note 64](#), at 145.

sector regulators and the SOEs. A structural problem is usually caused by the Chinese current economic and political system, and the situation of the transactional economy period. It cannot be totally solved merely by a technical improvement. For example, lack of judicial independence is a structural problem rooted in the Chinese political system.⁷⁰ Many commentators doubted that China's ill-suited judicial review system would be capable of protecting the right of defence and guarantee legal certainty in the AML 2007's enforcement.⁷¹

A technical problem in this thesis refers to which has little relevance to Chinese political structure and industrial policy; it is the specific procedural problem under the AML 2007's public enforcement. It can be solved, or at least improved under the current Chinese political structure. For example, antitrust enforcement authority's allocation between administrative enforcers at the central governmental level and the local level is unclear. This relationship can be clarified by issuing guidelines or rules.

3.1 Structural problems

⁷⁰This issue will be discussed in more detail in the following section.

⁷¹ See for examples, M. Williams, *Competition Policy and Law in China, Hong Kong and Taiwan*, *supra note 11*, at 219-220; Y.J. Jung & Q.Hao, 'The New Economic Constitution in China: A Third way for Competition Regime?' *supra note 5*, at 161; B. Song, 'Competition Policy in a Transitional Economy: the Case of China', *supra note 17*; B. M. Owen, S. Sun & W.T. Zhang, 'Antitrust in China: The Problem of Incentive Compatibility', *supra note 14*, at 137.

There are two major structural problems in enforcement of the AML 2007: lack of independent judicial review and administrative enforcers' close and the ambiguous relationship of sector regulators and SOEs.⁷²

3.1.1 Lack of independent judiciary⁷³

Although some scholars have argued that the AML 2007 may still be effectively enforced even without an independent judiciary,⁷⁴ lack of

⁷²For discussions on these two issues, see, for general examples, M. Williams, *Competition Policy and Law in China, Hong Kong and Taiwan*, *supra note 11*; H. S. Harris Jr., 'The 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*, 169-229; T. Brooks, 'China's Antimonopoly Law: History, Application and Enforcement', (2011) 16 *Appeal*, 31-48; R.H. Pate, 'What I Heard in the Great Hall of the People: Realistic Expectations of Chinese Antitrust', *supra note 11*; S.K. Mehra & Y.B. Meng, 'Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law', (2008-2009) 49(2) *Virginia Journal of International Law*, 379-429 (Although S. K. Mehra and Y.B. Meng argued that the so-called structural problems may not affect the effectiveness of the AML 2007's enforcement, they did admit that lack of judicial independence and administrative enforcers' close relationship between sector regulators and SOEs are two major structural problem faced by the AML 2007's public enforcers.); A.H.Y. Zhang, 'The enforcement of the Anti-Monopoly Law in China: An institutional design perspective', (2011) 36(3) *Antitrust Bulletin*, available at SSRN: <http://ssrn.com/abstract=1783037>, last visited on 04/03/2012, 21:46; B. Song, 'Competition Policy in a Transitional Economy: the Case of China', *supra note 17*; Y.J. Jung & Q. Hao, 'The New Economic Constitution in China: A Third Way for Competition Regime', *supra note 5*.

⁷³ Article 126 of Chinese Constitution (hereafter, the Constitution, passed and enacted on 4th, December, 1982, by the fifth National People's Congress) provides that Chinese courts shall be independent of government, non-governmental organisations and individuals. This can be seen as a basic definition of judicial independence in China in the view of legislators. At the least it refers to the ability of judges to decide disputes impartially despite real, potential, or proffers of favour. See, M. GurArie & R. Wheeler, 'Judicial Independence in the United States: Current Issues and Relevant Background Information', *Guidance for Promoting Judicial Independence and Impartiality*, revised edition, (United States, 2002), 133-147. Judiciary in this thesis is limited to the system of courts, excluding the Procuratorate (the special form of prosecutors with a broad supervisory mandate in China). For further discussion of procuratorate, please refer to G. Ginsburgs & A. Stahnke, 'The Cenesis of the People's Procuratorate in Communist China 1949-1951', (1964) 20 *The China Quarterly*, 1-83.

judicial independence has already caused problems with regard to the Law's enforcement. Courts are responsible for reviewing the first instance decisions made by the administrative enforcers.⁷⁵ However, as noted, since December 2012 there has been no judicial review case. One might attribute this fact to the courts' lack of experience of dealing with judicial review under the new AML 2007.⁷⁶ This is undeniable; however, in fact judicial review is based on the Administrative Procedural Law⁷⁷ (hereafter, the APL 1999) rather than the AML 2007. The APL 1999 has been in force for 13 years.⁷⁸ And, at least procedurally, there is no significant difference between judicial review of an antitrust case and other ordinary specific administrative Acts?⁷⁹ Judges at

⁷⁴ See, S. K. Mehra & Y.B. Meng, *Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law*, *supra note 72*.

⁷⁵ See, Article 53 of the AML 2007.

⁷⁶ See for example, *Report on Competition Law and Policy of China 2010*, *supra note 64*; Y.B. Meng, 'Research on China's judicial review system of antitrust law [我国反垄断法司法审查制度构建问题研究, zhongguofanlongduanfasifashenchazhidugoujianwentiyANJIU]', (2007) 5 *Adult Higher Education Journal*, 41-45; D.B. Yuan, 'Why there is little case before the courts in relation to the Antimonopoly Law's enforcement: an Explanation from the Supreme Court', *Legal Daily*, 1st, September, 2008; D.J. Gerber, 'Constructing competition law in China: the potential value of European and US experience', (2004) 3 *Washington University Global Studies Law Review*, 315-331.

⁷⁷ The Order of President of People's Republic of China, No.16, [1999], came into force on 1st, October, 1999. Official version is available at <http://www.zjgxxsp.gov.cn/public/LawsItem.aspx?id=2702>, last visited on 07/03/2012, 11:40.

⁷⁸ A detailed discussion of Chinese Administrative Law and Administrative Procedural Law is out of the scope of this thesis. For who is interested, please refer to: M.A. Jiang, *Administrative Law and Administrative Litigation Law* [行政法与行政诉讼法], 5th edition, (2011) Beijing University Press.

⁷⁹ According to Article 11 of the APL 1999, courts shall accept appeals towards 8 specific administrative acts: 1. an administrative sanction, such as detention, fine, rescission of a license or permit, order to suspend production or business or confiscation of property, which one refuses to accept; 2. a compulsory administrative measure, such as restricting freedom of the person or the sealing up, seizing or freezing of property, which one refuses to accept; 3.

least should not be unfamiliar with the procedure of the judicial review under the AML 2007.

There may be other reasons why the number of antitrust judicial review cases before the courts is zero. A deeper reason might be that China's lack of judicial independence has fundamentally weakened the effectiveness and credibility of the courts. Under Chinese Constitution, the judiciary is merely an organ of the government, and probably the weakest.⁸⁰ Judges are often affected by the will of governmental officials and orders from the Politics and Law Committees (hereafter, the PLC), which are responsible for supervising the work of courts according to the China Communist Party's will (hereafter the CCP).⁸¹ Besides, the courts' budget is mainly determined by the

infringement upon one's managerial decision-making powers, which is considered to have been perpetrated by an administrative organ;4. refusal by an administrative organ to issue a permit or license, which one considers oneself legally qualified to apply for, or its failure to respond to the application;5. refusal by an administrative organ to perform its statutory duty of protecting one's rights of the person and of property, as one has applied for, or its failure to respond to the application;6. cases where an administrative organ is considered to have failed to issue a pension according to law;7. cases where an administrative organ is considered to have illegally demanded the performance of duties; and 8. cases where an administrative organ is considered to have infringed upon other rights of the person and of property. Apart from the provisions set forth in the preceding paragraphs, the people's courts shall accept other administrative suits which may be brought in accordance with the provisions of relevant laws and regulations.

⁸⁰See, M.U.Killion, 'Post-WTO China and independent judicial review', (2003-2004) 26*Houston Journal of International Law*,507-559; see also, Y.W. Li, 'Court reform in China: Problems, Progress and Prospects', in J.F. Chen, Y.W. Li and J.M.Otto (edited by), *Implementation of Law in the People's Republic of China*, (2002) Martinus Nijhoff Publishers, at pp.55-83.

⁸¹ For details of the functions of the PLCs, please refer to the official websites of PLCs in central and local governments. See also, Y.W. Li, *ibid*, at 59.

government where the court located.⁸² The independence of Chinese judiciary is thus affected. This is a structural problem which deeply rooted in Chinese political structure.

3.1.2 The relationship between administrative enforcers, sector regulators and the SOEs

As noted above, since December 2012 all merger cases reported by the MOFCOM concern foreign or Hong Kong companies,⁸³ while the NDRC and the SAIC have only heard one case on Chinese private enterprises. This raises the suspicion that the targets of the AML 2007 are limited to foreign companies and domestic private companies.⁸⁴ The ability and incentive of administrative enforcers are also believed to be ‘too weak to fight against monopolistic activities of SOEs in the Chinese domestic market’.⁸⁵ The Law is called ‘a tiger without teeth’ when it concerns SOEs.⁸⁶ The combination of sector regulator and AML 2007’s enforcer may fundamentally weaken the incentive and effectiveness of the AML 2007’s enforcement because the power of enforcement is in the hand of Chinese sector regulators who may

⁸²Y.X. Wang, ‘The Cost and Efficiency of Judiciary: Financial Security and Incentive Programme of Judges in Chinese Courts [司法成本与司法效率：中国法院的财政保障与法官激励], *sifachengbenyusifaxiaolv:zhongguofayuan decaizhengbaozhangyufaguanjili*’, (2010) 6 *Jurists Review*, 132-137.

⁸³In *Henkel HK/Tian De*, the two parties’ headquarters are in Hong Kong.

⁸⁴N. Petit, ‘Chinese Antitrust Law – The Year of the Rabbit in Review’, *supra* note 58.

⁸⁵B.Q.Wang, ‘The Officials of MOFCOM Confirmed that the Merger between CUT and CNC is Suspected Illegal’, *The Economic Observer*, 30th, April, 2009.

⁸⁶X.Y. Wang, ‘Antimonopoly Law is a ‘tiger without a tooth’ [反垄断法是‘没长牙的老虎’, *fanlongduan fashimeizhangyadelaohu*], *Oriental Outlook*, 19, August, 2008.

benefit from the maintenance of SOE's monopoly. If maintaining a monopoly benefits the SOEs and thus increase the profit and performance of the MOFCOM, the NDRC or the SAIC, the incentive and effectiveness of the AML 2007's public enforcement would be seriously doubted.

3.1.3 Limited comparability between China's structural problems and EU competition law/US antitrust law's public enforcement

EU competition law and US antitrust law's public enforcement can provide limited experience with regard to the structural problems faced by Chinese AML 2007. The immediate reason is that such problems are caused by China's political and law implementation structure which were seldom faced by the EU or the US.

In relation to the first structural problem, with regard to the EU Courts, as early as the Court of Justice was established on April 18, 1951, it was based on democratic and constitutional principles and the rule of law.⁸⁷ Particularly, an independent and effective judicial review system is essential for the EU competition law.⁸⁸ Such independence is guaranteed by the EU's

⁸⁷ See, L.N. Brown & T. Kennedy, *The Court of Justice of the European Communities*, 5th edition, (2000) Sweet & Maxwell Limited, at1.

⁸⁸ See, D. Geradin & N. Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment', *TILEC Discussion Paper No. 2011-008; Tilburg Law School Research Paper No. 01/2011*, 2010, available at SSRN: <http://ssrn.com/abstract=1698342>, last visit at 09/03/2012; 13:11.

institution, personnel and budget system.⁸⁹ Judicial independence has also been a core political value in the United States since the founding of the republic.⁹⁰

As regards the second structural problem, in order to find whether it can be addressed by the experience from the EU or the US, we shall first of all find the reason(s) for the relationship. The relationship is rooted in China's political and economic structure in current transitional period⁹¹ as well as the history of planned economy from 1949 to 1978.⁹² Following the Soviet

⁸⁹ From institutional perspective, the Court of Justice was born independently from a High Authority, a Common Assembly and a Special Council of Ministers when the Treaty established the European Coal and Steel Community signed in Paris on 18, April 1951. See, A. Arnulf, *ibid*, at 3. From personnel perspective, Article 252 and 253 TFEU provided that the judges and Advocate-General of the EU Courts shall be chosen from persons whose independence is beyond doubt. The Court of Justice (and the General Court) also has independent budget from other institutions under the EU, for detail, please refer to the official website of the EU's budget, available at <http://eur-lex.europa.eu/budget/www/index-en.htm>, last visit on 09/03/2012, 21:00.

⁹⁰ In fact, there are some literatures suggesting China to import American independent judicial review system because the system is advanced. See for example, T.V. Lee, 'Exporting Judicial Review from the United States to China', (2005) 19 *Columbia Journal of Asia Law*, 152-184. For further reading about US judicial independence, please refer to S.G. Breyer, 'Judicial Independence in the United States', (1995-1996) 40 *Saint Louis University Law Journal*, 989-996; for the history and originality of the US judicial independence, please refer to J.H. Smith, 'An Independent Judiciary: The Colonial Background', (1975-1976) 124 *University of Pennsylvania Review*, 1104-1156.

⁹¹ The term 'transitional economy' or 'transitional period' in this thesis refers to 'an economy in transition from a socialist planned system modelled from Soviet Union to a market-driven economic structure.' See, B. Song, 'Competition Policy in a Transitional Economy: The Case of China', *supra note 17*, at 388.

⁹² For China's economic history from 1949 to 1978 generally, please refer to B. Naughton, *The Chinese Economy: Transitions and Growth*, (2007) Massachusetts Institute of Technology Press; see also, J.L. Wu, 'China's Economic Reform: Past, Present and Future', (2000) 1(5) *Perspectives*, at http://www.oycf.org/Perspectives2/5_043000/china.htm, last visited on 10/03/2012, 11:24; Y.J. Jung & Q. Hao, 'The New Economic Constitution in China: A Third way

Union economic model, China established the planned economy under which the state (or the Party) controlled the nation's economy and the SOEs through state plans and administrative orders. There was no private enterprise nor free market competition.⁹³ After 1978, the planned economy was abandoned and Chinese government began the transition towards market-oriented economy.⁹⁴ This is an on-going process from 1978 now and the formulation of AML 2007 may be seen as part of efforts in this transition. The sector regulators under the State Council still control the SOEs and enforce the state's plans as they did in the planned-economic period.⁹⁵ Some of these sector regulators have become antitrust law public enforcers as we

for Competition Regime?' *supra* note 5, at 110-112; B.M. Owen, S. Sun & W.T. Zhang, 'Antitrust in China: The Problem of Incentive Compatibility', *supra* note 14, at 126-128.

⁹³ See, H.H. Wu, W. Zhou & X.Y. Zhang, 'Past, present and future of China's competition policy [中国竞争政策的过去、现在和未来, zhongguojingzhengzhengcedeguoqu, xianzai he weilai]', (2008) 11 *Finance & Trade Economics*, 102-110.

⁹⁴ See, J.L. Wu, 'China's Economy: 60 Years of Progress', (2009) 20 *Caijing Magazine*, available at <http://english.caijing.com.cn/2009-09-30/110269580.html>, last visited on 10/03/2012, 17:22.

⁹⁵ For example, the SASAC is the supervisor and main shareholder of 120 SOEs which has strong market power in various relevant markets and industries. These 120 SOEs reached the following industries: nuclear, aviation, aerospace, ship, weapons, electronic technology, petroleum, electricity and grid, telecommunication, automobile, heavy machinery, electric manufacturing, steel and aluminum, Maritime transport, Air transportation, food, mining industry, construction industry, investment, tourism, consultant, engineering industry, coal and energy, metallurgy, chemical industry, salt industry, light industry, building materials, nonferrous metal, railway, information industry, agriculture, spinning, forestry, medicine and pharmacy, gold, cotton, war industry, printing, CRT, photo film, foreign trade, and video products. For details of these SOEs, please refer to the official website of SASAC, available at: <http://www.sasac.gov.cn/n1180/n1226/index.html>, last visited on 11/03/2012, 12:00. The NDRC has the authority to examine and approve projects and fix the price of thousands of products and services related nearly all industries in China via administrative orders. For example, from 2010 to 2011, the NDRC fixed the price of products and services by administrative orders from various fields and industries. The NDRC published these orders on the official website (in Chinese): <http://www.sdpc.gov.cn/zfdj/default.htm>, last visited on 11/03/2012, 17:56.

know them today (the MOFCOM, the NDRC and the SAIC). As T.Varady pointed out, ‘The single most important differentiating factor influencing competition policies in ‘Western’ and in former socialist countries respectively, is their economic heritage’,⁹⁶ For China, one most significant inheritance or rather a sequel of the planned economy is that the close relationship between the AML administrative enforcers, sector regulators and the SOEs. Nothing in the EU and US antitrust law regimes was adopted from Soviet history.⁹⁷Hence, they do not have to face the problem caused by this heritage

3.2 Technical problems and comparability with EU Competition Law and US Antitrust Law’s public enforcement

Unlike the structural problems which are unique to transitional economies, technical problems have a more comprehensive background for comparative study because they mainly concern the procedure of the AML

⁹⁶ See, T. Varady, ‘The Emergence of Competition Law in (Former) Socialist Countries’, (1999) 47(2) *American Journal of Comparative Law*, 229-275.

⁹⁷Indeed, there are some EU Member States which belong to the former Soviet Union, for example, Poland, Romania and Slovenia. However, the research on competition law regimes in Member States is beyond the scope of this thesis. In fact, these transitional countries’ competition law might be able to provide more useful reference to Chinese structural problems met during transitional period with regard to public enforcement of AML 2007. For example, Bing Song has compared competition law in Poland with China’s competition law regime and argued that ‘Poland is a prime example of a state that needs to break up large state monopolies’. See, B. Song, ‘Competition Policy in a Transitional Economy: the Case of China’, *supra note 17*, at 393; see also, B.L. McCormick & J. Unger (edited by), *China after Socialism* (1996)M.E. Sharpe Inc.

2007's public enforcement regardless of Chinese political structure.

Technical problems, have been faced, or are being faced by developed antitrust law regimes. Hence they can be effectively addressed by experience from developed antitrust law regimes such the EU and the US.

3.2.1 Lack of transparency in merger enforcement procedure

Lack of transparency⁹⁸ is a significant if not the greatest concern, as can be seen from the examination of the AML 2007's merger enforcement. The MOFCOM's lack of transparency takes two forms: firstly, the procedure of merger enforcement lacks transparency; secondly, the information released in reported decisions is insufficient.

Lack of transparency left many worried about the uncertainties of future enforcement of the AML 2007; lack of effective judicial review sharpened the worries. Especially in the merger field (due to the lack of cases before the SAIC and the NDRC), companies, lawyers and commentators suspected the MOFCOM's enforcement was influenced significantly by political considerations or other non-competition factors rather than on the basis of sound and professional competition analysis.⁹⁹ For example, in *Coca*

⁹⁸ Transparency in this thesis is only for the general public but not for the involved parties and interested third parties.

⁹⁹See, X.Z. Zhang & V.Y.H. Zhang, 'Chinese merger control: patterns and implications', *supra note 26*, at 495; see also, A. Emch & G. K. Leonard, 'A Hard Landing in the Soft Drink Market-MOFCOM's Veto of the Coca Cola & Hui Yuan Deal', *supra note 37*.

Cola/Huiyuan, observers criticised that the proposed merger was blocked due largely to China's nationalism.¹⁰⁰ But the MOFCOM claimed that the case was decided mainly on a neutral assessment of competition effects¹⁰¹. For the MOFCOM, if transparency is improved in the decision-making process and the decision, legal certainty and credibility of merger control enforcement were increased, and controversy would be reduced. Practitioners and the business community believe transparency is badly needed to provide guidance and predictability.¹⁰² And most importantly, as some scholars have argued, information disclosure or improvement of transparency is one aspect that China's administrative enforcers *can* improve in the short term.¹⁰³

3.2.2 Enforcement authority's allocation between the central and local levels: centralised or decentralised?

Another technical problem is the vagueness of the Law's public enforcement authority's allocation between the central and local government. The only

¹⁰⁰ See, A. Emch & G. K. Leonard, *ibid*; see also, C.H. Lyons, 'The Dragon in the Room: China's Anti-Monopoly Law and International Merger Review', *supra note 29*, at 1601; S. Tucker and J. Anderlini, 'China's Block on Coke Bid Raises Alarm over M&A', *Financial Times*, March 19, 2009, at 23; 'China Denies Protectionism in Coca-Cola Ruling - Rejection of \$2.4 Billion Takeover Bid for Huiyuan Prompts Questions on Foreign Investment Deal Pipeline', *The Wall Street Journal*, March 21, 2009; 'Coca-Cola in China: Squeezed Out', *The Economist*, March 18, 2009; 'Coca-Cola and China: Hard to Swallow', *The Economist*, March 19, 2009.

¹⁰¹ See, J. Yao, 'Responds to the Journalists Regarding the Antitrust Review of the Coca-Cola/Huiyuan Case', *supra note 33*.

¹⁰² See, A.H.Y. Zhang, 'Problems in Following E.U. Competition Law: A Case Study of Coca-Cola/Huiyuan', (2011) *3 Peking University Journal of Legal Studies*, available at SSRN: <http://ssrn.com/abstract=1569836>, last visited on 12/03/2012, 10:48.

¹⁰³ See for example, X.Z. Zhang & V.Y.H. Zhang, 'Chinese merger control: patterns and implications', *supra note 26*, at 495.

reported case, *Lian Yun Gang's Concrete Association*, handled by the SAIC and the ICJS indicated that the Industry and Commercial Administration of Jiang Su province could not enforce the Law directly without the SAIC's authorisation. The enforcement authority allocation is an immediate problem that would be faced by the administrative enforcers of the AML 2007. However, there is no clear rule or guidance on the authority allocation between the central and local government to address this problem. The literature and comments from scholars are limited.¹⁰⁴ This problem draws little attention in China, due to the limited caseload especially before the SAIC and the NDRC. However, with the development of the AML 2007's enforcement and the accumulation of cases, how to allocate the Law's public enforcement power between the central governmental level and the local governmental level will become more and more significant.¹⁰⁵

3.2.3 Rights of the concerned parties under the public

enforcement of the AML 2007 are insufficiently protected

¹⁰⁴ There is some literature on the institutional design of the AML 2007's administrative enforcers. In this literature, authors designed the relationship between central governmental and local enforcers and the local ones. However, these literatures generally lack analysis on the advantages and disadvantages of the designed relationship. See for general examples, G.H. Li, *The Research on Enforcement of Antimonopoly Law* [《反垄断法实施机制研究》*fanlongduanfashishijizhiyanjiu*] (2006) Chinese Founder Press; B.S. Zhang, 'A Comment of the Institutional Design of Current Administrative Enforcers of the AML 2007 [论我国反垄断执法机构的设置, *lunwoguofanlongduanfazhifajigoudeshezhi*]', (2005) 2 *Science of Law*, 113-121, at 119; X.L. Wang, 'An Approach to Antimonopoly Law Enforcement Authority and its Responsibilities [关于中国反垄断执法机构的设置与职责问题的探, *guanyuzhongguofanlongduanzhifajigou de shezhiyuzhizewentidetantao*]', (2000) 8 *Chinese Public Administration*, 60-64.

¹⁰⁵ See, G.H. Li, *ibid.*

Concerns for the rights of parties during investigation are raised by the cases dealt with by the SAIC and the NDRC. Some clues might be found in the *Lian Yun Gang's Concrete Association* case. Here officials of ICJS did not inform the investigated party that the purpose of the investigation was to collect evidence of the suspected AML 2007 violation. They conducted the investigation and collected the evidence successfully when the concerned concrete association did not realise that the ICJS was collecting evidence of AML 2007 violation; they thought it was a routine check.¹⁰⁶

Nor is there any legal basis for the right of concerned parties to have access to the administrative enforcers' file and obtaining legal privilege which exist under EU competition law's public enforcement procedure.

3.2.4 Comparability of China's technical problems and EU competition law/US antitrust law's public enforcement

Technical problems can be effectively solved or alleviated by application of experience from the EU and the US, because these two regimes have faced, or are facing similar problems. Lack of transparency under the AML 2007's public enforcement can be improved by the experience from the EU competition law and the US antitrust law. Transparency is particularly

¹⁰⁶F. Yao, 'The first AML case enforced by the SAIC has been sealed: the market segmentation agreement of LianYungang's association', *supra* note 61.

emphasized during merger enforcement in both the EU and the US.¹⁰⁷

Chinese administrative enforcers *could* increase transparency through this comparison with developed economies' experience. As a significant concern of the merger enforcement under the AML 2007, improving the procedure and the decision's transparency might provide a starting point for further reforms on the Law's public enforcement.

In relation to how to allocate enforcement jurisdiction and duty between the public enforcers of the AML 2007, both EU and the US experience can provide useful guidance. Under EU competition law, in 2002 the EU Commission decentralised its enforcement authority of Article 101(3) TFEU to the National Competition Authorities (hereafter the NCAs) and the national courts of the Member States. This 'modernisation'¹⁰⁸ provided us a good chance to evaluate the advantages and disadvantages of the centralised and

¹⁰⁷There are plenty of literatures discussing this issue in the EU and the US. See for example, K.R. Fisher, 'Transparency in Global Merger Review: A Limited Role for the WTO?' (2006) 11(327) *Stanford Journal of Law, Business, and Finance*, available at SSRN: <http://ssrn.com/abstract=1401204>, last visited on 14/03/2012, 23:10; C.Ş. Rusu, 'A few Considerations Regarding to Transparency and Legal Certainty in European Merger Control', (2007) 2 *SUBB Jurisprudencia*, 180-196; D.I. Gelfand & J. Calsyn, 'Transparency in Antitrust Merger Review: A Modest Proposal for More', (January 2005) *The Antitrust Source*, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/04_Jan05_gelfand_authcheckdam.pdf, last visited on 15/03/2012, 22:10; W.S. Grimes, 'Transparency in Federal Antitrust Enforcement', (2003) 51 *Buffalo Law Review*, 937-994; R. Pitofsky, 'Comments on Warren Grimes: Transparency in Federal Antitrust Enforcement', (2003) 51 *Buffalo Law Review*, 995-999.

¹⁰⁸ See, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, O.J. C 132/1 (1999). Although the White Paper uses the old numbering of the Treaty, all quotations of the present text are updated to the new numbering resulting from the entry into force of the Treaty of Lisbon.

decentralised enforcement mechanisms. Under US antitrust law, there are plenty of literature evaluating the United States' traditional federalism between the Congress and the states,¹⁰⁹ which can also help China to decide how to allocate the authority at central and the local levels.

In relation to the third technical problem, the EU and the US also may provide plenty of experience. In these developed antitrust law enforcement regimes, there are various rights of defence against the public enforcers' investigation. With this experience, we shall be able to argue which rights of defence can be, and should be protected, and how can they be effectively protected under the public enforcement of the AML 2007.

4. Research questions, scope and structure of the thesis

This thesis will examine the public enforcement of the AML 2007 with a comparative study of EU competition law and US antitrust law. The main reason for choosing these two developed regimes is that both are influential to the AML 2007.

¹⁰⁹ See for example, A.I. Gavil, W.E. Kovacic & J.B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems*, (2002) Thomson West, at 976-988; see also, D.L. Flexner & M.A. Racanelli, 'State and Federal Antitrust Enforcement in the United States: Collision or Harmony?' (1993-1994) 9 *Connecticut Journal of International Law*, 501-534; R.A. Posner, 'Antitrust in the New Economy', (2000-2001) 68 *Antitrust Law Journal*, 925-943; H. First, 'Delivering Remedies: The Role of the States in Antitrust Enforcement', (2000-2001) 69 *The George Washington Law Review*, 1004-1041.

This thesis adopts a comparative methodology. This has some limitations. First, the thesis chooses two regimes to compare with Chinese antimonopoly law, i.e. the EU competition law and US antitrust law. Other jurisdictions are not considered. Second, the comparative study only applies to the competition laws' public enforcement. Private enforcement and substantive issues are not dealt with here. When considering EU competition law, reference is made only to the application of Articles 101 and 102 of the TFEU by the EU Commission, and not to the role of Member States or the European Competition Network ('ECN'). A similar position is adopted in relation to the United States, in respect of which only the federal law enforced by the Department of Justice, Antitrust Division and the Federal Trade Commission is considered. Third, the EU competition law and US antitrust law enforcement only refers to their current enforcement activities. One may argue that it is necessary to compare the AML 2007 public enforcement regime (which is in its initial stage) with the EU competition law and US antitrust law public enforcement regimes at their early years to fulfil the timing condition of comparative equivalence. However, the comparative study in this thesis does not include the temporal enforcement of the EU and US at their respective initial stage because the purpose of this research is to examine whether the experience from *current* EU and US enforcement can solve the problems faced by the Chinese AML regime.

This thesis aims to suggest a series of procedural reforms to improve Chinese Antimonopoly Law's public enforcement. As discussed, the AML 2007's public enforcement has been problematic. We divided these problems into two categories, structural and technical.

The experience of EU competition law and US antitrust law may not be able to solve all the problems met by China's AML 2007. The structural problems which rooted in Chinese political structure and transitional period cannot be effectively addressed by EU and US experience. On the other hand, technical problems which are solely related to the AML 2007's enforcement procedure comparable to the EU and US experience because in the EU or the US, such problems has been solved, or are being faced by these two regimes. This thesis will focus on the technical problems faced by AML 2007's public enforcement. On examination of the AML 2007's public enforcement from 2008 to 2012 the author found three significant technical problems: 1. lack of transparency in the administrative enforcers' decisions and decision making progress; 2. the enforcement authority's allocation of the AML 2007 at central and local governmental levels is not clear; 3. the rights of the concerned parties under the AML 2007's administrative enforcement. In these three areas both the EU competition law and the US antitrust law's public enforcement regimes can help China to improve.

This thesis focuses on the technical problems in China's AML 2007's public enforcement. By '*China*', we mean the People's Republic of China, excluding Hong Kong, Tai Wan and Macao. By '*technical problems*', we mean those which have little relevance to China's general political structure, legal environment and industrial policies, namely, the problems which mainly concern the procedure of the AML 2007's public enforcement. By '*public enforcement*', we mean the way in which the Law is enforced by public authorities in order to bring anticompetitive behaviour to an end or for protection of competition.¹¹⁰ Hence antitrust lawsuits brought by individuals or private parties lies outside of the scope of the thesis. In addition, by '*enforcement*' we generally mean civil enforcement rather than criminal enforcement.¹¹¹ Civil enforcement means it follows the civil procedure, civil burden and standard of proof and sanction methods.

This thesis consists of five chapters, including an Introduction and Conclusion. This introductory chapter identifies research questions and the scope of this thesis. Chapter 1 examines the status quo of the AML 2007's public enforcement between August 2008 and December 2012, and revealed the problems raised in public enforcement. We divided these into structural and technical problems claimed that the structural problems have little

¹¹⁰ See, J. Basedow (edited by), *Private Enforcement of EC Competition Law*, (2007) Kluwer Law, at 2.

¹¹¹ However, in the discussion on the third theme, i.e. the rights of concerned undertaking or association of undertakings during the investigation, the thesis may reach criminal investigation under the Sherman Act.

comparability with the EU competition law and the US antitrust law public enforcement regimes. Hence, this thesis chooses technical problems for comparison.

Chapter 2 analyses possible ways of improving the transparency of the AML 2007's enforcement. Lack of transparency makes the Law's enforcement in future hard for practitioners to predict. Transparency in this thesis has two aspects: that of the investigation process and reporting of the case and administrative enforcers' decisions. Increasing transparency is both beneficial for the administrative enforcers and practitioners in China. For administrative enforcers of the Law, their credibility in the enforcement will be improved; for practitioners, a consistent, predictable and transparent antitrust enforcement would be established. A comparative study of EU competition law and the US antitrust law's public enforcement will be conducted.

Chapter 3 focuses on the issue of antitrust enforcement authority's allocation between the central administrative enforcers at central and at local government levels. This chapter demonstrates the necessity and importance of addressing this question and how to allocate the AML 2007's enforcement authority between central and local government. As a reference, it examines the decentralisation process under EU competition law and the federalism, the relationship between the federal government and state under the US

antitrust law. We then discuss the advantages and disadvantages of the centralised and decentralised mechanisms under the EU and the US respectively, in order to see which would be more appropriate for China's antitrust public enforcement authority allocation.

Chapter 4 discusses the rights of concerned parties under the AML 2007. As revealed by the cases mentioned above, the concerned parties' rights during the investigation are not sufficiently protected. In this regard EU competition law and the US antitrust law regimes may provide plenty of experience on how to protect the rights of the concerned parties. This chapter demonstrates which rights need to be protected during the investigation under the EU competition law and US antitrust law, and how they are protected. It then examines whether these rights can be effectively protected under the AML 2007 investigation.

Chapter 5 concludes this part of the thesis. Adopting findings in Chapters 2, 3 and 4, this chapter makes a series of suggestions on the procedure of the AML 2007's public enforcement. Comparison of EU competition law and the US antitrust law the suggestions of reforms are focused on the three technical problems stated above.

As a developing antitrust regime without an adequate legal infrastructure and often facing obstacles from industrial policies during the enforcement,¹¹² the AML 2007 has a long way to go. However, at least some technical problems can be solved with the experience of developed antitrust law enforcement regimes such as those of the EU and the US. The three technical problems addressed in this thesis may not be able to cover all the technical problems met by China's public enforcers;¹¹³ however, they provide a clue for further research on China's AML 2007 or future competition law procedure and public enforcement.

¹¹²Y.J. Jung &Q.Hao, 'The New Economic Constitution in China: A Third way for Competition Regime?' *supra note 5*, at 169.

¹¹³ For example, lack of professionalism and human resources is also a significant technical problem faced by the AML 2007's administrative enforcers. See for example, N. Petit, 'Chinese Antitrust Law – The Year of the Rabbit in Review', *supra note 58*.

Chapter 2 Improving Transparency in China's Antimonopoly Law's Public Enforcement Procedure

1. Introduction

As identified in the introduction of this thesis, lack of transparency is a significant concern in the AML 2007's merger enforcement procedure.¹ This chapter aims to examine this problem in more detail and propose ways in which to improve transparency in AML 2007 merger enforcement.

The United Nations Economic and Social Commission for Asia and the Pacific (the ESCAP) provides a complete and detailed definition of transparency: firstly, decisions taken and their enforcement are conducted in a manner that follows rules and regulations; secondly, information is freely available and directly accessible to those who will be affected by such decisions and their enforcement; and thirdly, enough information is provided and that it is provided in easily understandable forms and media.² Accordingly, in antitrust law, a transparent enforcement procedure requires, firstly that decisions and/or judgments made by administrative enforcers and courts must be based on antitrust law and regulations; secondly, the enforcement of the law must follow the procedural rules;

¹ See, '3.2.1 Lack of transparency in merger enforcement procedure', in Chapter 1 of this thesis.

² See, United Nations Economic and Social Commission for Asia and the Pacific, *What is Good Governance* (2007), available at <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp>, last visited on 16/10/2012, 14:26. The OECD, in a more succinct way, defined 'transparency' as a 'capacity of regulated entities to identify, understand and express views on their obligations under the rule of law'. See, R.D. Smith, 'Regulatory Transparency in OECD Countries: Overview, Trends and Challenges', (2004), 63(1), *Australian Journal of Public Administration*, 66-73, at 66.

thirdly, information related on enforcement³ should be freely available and directly accessible to the parties concerned and third parties whose interests stand to be affected by enforcement; finally, enough information on enforcement of the law should be provided in easily understandable forms and media to the public. This definition includes openness of the decision-making and enforcement processes as well as access to and distribution of information.⁴

The scope of transparency will be discussed here and is determined by the research question of this chapter, i.e. how to improve transparency in AML 2007 merger enforcement. As briefly examined in Chapter 1, there are two main problems: firstly, the procedure of merger enforcement lacks of transparency; secondly, the published decisions of the Ministry of Commerce (MOFCOM) have generally been very brief and notable for lack of information.

⁵ The transparency to be discussed here concerns only that related to merger enforcement procedure. In order to fulfil the requirement of comparative equivalence, transparency examined under EU competition and US antitrust law will also be limited in their respective merger enforcement procedures. Secondly, the problems raised only concern the procedure of China's merger enforcement. Thus the transparency discussed in this chapter relates only to procedural issues. Indeed, there is serious concern at the

³ Antitrust law enforcement may have different content in r different jurisdictions. In the EU enforcement under EU competition law may include (but is not limited to): the process of investigation, the process of decision- making and the process of judicial review. In US antitrust laws, such enforcement may include (but is not limited to): the process of investigation, the consent decree related procedure, the litigation, the FTC's adjudicative process and the appeal process and/or the judicial review process. China's AML 2007's public enforcement process is similar to that of the EU: it may include (but is not limited to): the investigation process, the decision making process and the judicial review process.

⁴ See, F. Weiss, 'Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison', (2006-2007) 30 *Fordham International Law Journal*, 1545-1586, at 1553.

⁵ See, *supra* note 1.

MOFCOM's published decisions and remedies on substantive issues.⁶ However, this is a topic of the substantive test of merger assessment, not of the AML 2007's enforcement procedure.⁷ Finally, transparency discussed in this chapter mainly means the disclosure of information to the public at large. The disclosure of information to concerned parties and any interested third parties will be excluded.⁸

Transparency is regarded as an important part for an open, fair, accountable and democratic government.⁹ As Justice Brandeis states: 'Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.'¹⁰ Transparency may contribute to good governance in the following ways: by 1. improving pre-decision process and results; 2. fostering agency accountability after a decision is reached; 3. enhancing knowledge of and promoting compliance with the law; 4. fostering fairness of and public confidence in the institutions of government; and, 5. avoiding unfair arbitrage in the stock market.¹¹ In antitrust law, transparency is

⁶ For example, in *Coca-Coca/Huiyuan*, the MOFCOM revealed little economic analysis in its decision. See, A.H.Y. Zhang, 'Problems in Following E.U. Competition Law: A Case Study of Coca-Cola/Huiyuan', (2011) 3 *Peking University Journal of Legal Studies*, available at SSRN: <http://ssrn.com/abstract=1569836>, last visited on 12/03/2012, 10:48.

⁷ Normally, the topic of transparency related to merger control may also relate to the substantive issues. For example, it is argued that the EU merger control regime's adoption of a 'more economic approach' on substantive test may improve the transparency in the EU Commission's decisions. However, as mentioned above, this chapter will only discuss transparency related to procedural issues, merger control procedure is just selected as an example, the substantive issues of the merger control is thus irrelevant to the discussions in this chapter.

⁸ For the examination of the disclosure of information to the concerned parties, please refer to Chapter 4 of this thesis.

⁹ See, W.S. Grimes, 'Transparency in Federal Antitrust Enforcement', (2003) 51 (4) *Buffalo Law Review*, 937-993, at 939; see also, K.C. Davis, *Discretionary Justice, A Preliminary Inquiry*, (1969) Louisiana State University Press.

¹⁰ L.D. Brandeis, *Other People's Money*, (1933) Washington, National Home Library Foundation, at 62.

¹¹ See, W.S. Grimes, 'Transparency in Federal Antitrust Enforcement', *supra* note 9, at 942-944; for a detailed discussion of the value of transparency and openness in

especially needed where investigation and decision-making is conducted by a single administrative agency and lack of system of law reporting. As law enforcement decisions become common-law markers that guide future decisions, the need for disclosure grows.¹² Transparency is important to merger enforcement under the AML 2007 where administrative enforcers have the authority to conduct investigation and make decisions and judicial review is scarce.¹³ In fact, as will be examined later, lack of transparency is a significant concern, if not the greatest that can be seen from examination of merger enforcement under the AML 2007.¹⁴

In order to provide solutions to lack of transparency of the merger enforcement procedure under the AML 2007, this chapter will firstly examine experience in the EU and US merger enforcement regimes.

2. Transparency and concerns in EU merger control enforcement

2.1 Transparency in EU merger control enforcement

EU merger control discussed in this section only refers to the mergers in an EU dimension.¹⁵ Concentrations at the Member States' level will not be

administrative law, please refer to B. Bugarcic, 'Openness and Transparency in Public Administration: Challenges for Public Law', (2004) 22(3) *Wisconsin International Law Journal*, 483-521; A. Frost, 'Restoring Faith in Government: Transparency Reform in the United States and the European Union', (2003) 9(1) *European Public Law*, 87-104; F. Weiss, 'Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison', *supra note 4*.

¹² W.S. Grimes, *ibid*, at 944.

¹³ For discussion of judicial review under the AML 2007, please refer to '3.1.1 Lack of independent judiciary' of Chapter 1.

¹⁴ '3.2.1 Lack of transparency in merger enforcement procedure' of Chapter 1 of the thesis.

¹⁵ For the definition of "European dimension", see Article 1 of Council Regulation (EU) No. 139/2004 on the control of concentrations between undertakings, adopted on 20 January 2004

considered. Merger control in the EU is supervised by the European Commission (hereafter, the Commission). The Commission was invested with a tri-partite 'investigator, prosecutor and judge' role in reviewing concentrations with a European dimension.¹⁶ Since China's merger control system has similar institutional design to that in the EU,¹⁷ experience of the Commission may provide valuable guidance.

2.1.1 The importance of transparency to EU merger control procedure

For the purpose of merger control, the concept of transparency refers to the ability of the public to see and understand the workings of the merger review process; in other words, transparency refers to the fair and responsive explanations of the antitrust enforcers' action and inaction.¹⁸ In relation to EU merger control, transparency first of all contributes to achieving consistency, predictability and fairness in applying merger norms, thereby enhancing credibility and effectiveness of merger enforcement; secondly, transparency requires the Commission to ensure that their decisions are based on accurate facts and sound economic principles; thirdly, transparency would help the concentrating parties and practitioners under EU merger control regime better to understand the likely outcome of their prospective case and the time and costs review may entail; finally, transparency may

(the EUMR), available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:en:PDF>, last visited on 21/10/2012, 17:32.

¹⁶ C.Ş. Rusu, 'A few Considerations Regarding to Transparency and Legal Certainty in European Merger Control', (2007) 2 *SUBB Jurisprudencia*, 180-196, at 190.

¹⁷ Similar to the Commission under the EU merger control system, the MOFCOM in China concentrates the functions of investigation, prosecution, decision-making and policy-making when dealing with merger assessment under the AML 2007.

¹⁸ See, R. Pitofsky, 'Comments on Warren Grimes: Transparency in Federal Antitrust Enforcement', (2003) 51 *Buffalo Law Review* 995-999; at 995.

promote discussion and understanding as well as enhancing the possibility of harmonisation of legal policies among different national competition authorities of Member States.¹⁹

2.1.2 Transparency in the EU merger control procedure

In 2004 the EU adopted the so called 'Merger Review Package'²⁰ to strengthen the objectivity and soundness of the Commission's decisions in merger cases and to increase the transparency of the merger control system.²¹ It is not the task of this section to evaluate all advantages and disadvantages of the 2004 Merger Review Package;²² nevertheless the author will focus on the content of procedural transparency in these regulations and guidelines.

From notification to Phase I decision

¹⁹ See, C.Ş. Rusu, 'A few Considerations Regarding to Transparency and Legal Certainty in European Merger Control', *supra note 16*; at 181.

²⁰ This Merger Review Package includes a revised merger regulation, a cross-border merger directive to implement the merger regulation (Commission Regulation No 802/2004 of 7 April 2004), guidelines on the assessment of horizontal mergers, a set of best practice guidelines for merger investigations and a number of measures of changes with regard to institution and DG Competition's staffing and resources.

²¹ See, M. Monti, 'Merger Control in the European Union: A Radical Reform', *Speech at the European Commission/IBA Conference on EU Merger Control, Brussels, 7 November 2002*, available at http://europa.eu/rapid/press-release_SPEECH-02-545_en.htm?locale=en, last visited on 24/10/2012, 22:36.

²² For a detailed evaluation of the 2004 Merger Review Package, please refer to A. Christiansen, 'The Reform of EU Merger Control - Fundamental Reversal or Mere Refinement?' (April 25, 2006), available at SSRN: <http://ssrn.com/abstract=898845>, last visited on 21/10/2012, 13:45; N. Levy, 'EU Merger Control: From Birth to Adolescence', (2003) 26(2) *World Competition*, 195-218; B.R. Lyons, 'Reform of European Merger Policy', (2004) 12(2) *Review of International Economics*, 246-261;

Before the parties notified the concentration, the parties may contact the Commission voluntarily²³ to discuss jurisdictional and other legal issues including a brief description of the background of the transaction, the relevant market or sector involved and the likely competitive impact of the transaction.²⁴ The pre-notification discussions are held in strict confidence,²⁵ therefore, the pre-notification discussion would not be disclosed to the public.

All the notifications are published in the Commission's Official Journal and are accessible on its website in the form of a summary.²⁶ This summary indicates the names of the interested parties (including the notifying parties and the groups to which they belong or the undertakings that control them), their countries of origin, the nature of the concentration and the economic sectors affected.²⁷ The Commission shall take account of the protection of business secrets of the undertakings.²⁸ The disclosure of notifications may be benefit merger control enforcement in at least three ways. Firstly, the potential notifying parties who propose a concentration and their attorneys may learn the requirement of the Commission from the disclosed summary and thus improve their preparation for notification. This is important for the potential notifying parties because where the information is deemed by the Commission to be incomplete, the notification will not be considered to have

²³ See, para. 8 of the DG Competition Best Practices on the Conduct of EC merger proceedings (hereafter, the Best Practice), adopted on January 20, 2004, available at <http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf>, last visited on 26 October, 2012, 16:18.

²⁴ See, M. Furse, *The Law of Merger Control in the EC and the UK*, (2007) Hart Publishing, at 99.

²⁵ Para. 8 of the Best Practice.

²⁶ See, E.N. Varona, A.F. Galarza, J.F. Crespo & J.B. Alonso, *Merger Control in the EU: Law, Economics and Practice*, second edition, (2005) Oxford University Press, at 370.

²⁷ See, Article 4(3) EUMR.

²⁸ Article 4(3) EUMR.

taken place until the complete documentation is received.²⁹ Notification is also considered invalid where information provided is incorrect or misleading.³⁰ The Commission warns that failure to comply with this obligation may significantly delay the investigation and may lead to a declaration of incompleteness.³¹ Secondly, such disclosure may provide statistics by which to evaluate the Commission's enforcement activities. For example, the percentage of the number of notifications filed before the Commission and the number of phase I decisions made by the Commission may provide important guiding information on the Commission's attitude to concentration to the practitioners in the relevant market.

After the process of investigation and internal consultation, there are three possible phase I decisions: 1. the Commission may declare lacks jurisdiction; 2. the Commission may authorise the operation because of its insignificant doubts about its compatibility with the common market; 3. an initiation of phase II proceeding where the concentration does fall within the Commission's jurisdiction and may significantly impede effective competition in the common market.³² The last decision may be modified by Article 6(2), which allows the Commission to declare the concentration compatible with the common market when the parties provide satisfactory commitments. In accordance with Article 8(1) and Article 20 ECHR, transactions that are cleared summarily under Article 6(1) (b) EUMR are the subject of a Commission statement that identifies the parties, the nature of the transaction, the relevant product and geographic markets, the degree of

²⁹ See, Article 5(2) of Commission Regulation (EC) No 802/2004 of 7 April 2004, implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (hereafter, the Implementation Regulation), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:133:0001:0039:EN:PDF>, last visited on 28/10/2012, 16:02.

³⁰ Ibid, Article 5(4).

³¹ Para. 20 of Best Practice.

³² Article 6 (1), *supra* note 29.

overlap of the participating firms, and other salient facts that led the Commission to conclude that no challenge was necessary.³³ In addition, the commitment decisions based on Article 6(2) are also required to be published.³⁴

However, there is no legal obligation on the Commission to publish the decisions of declaration of lack jurisdiction and the initiation of second phase proceeding.³⁵ The Commission has developed a practice whereby it announces in the Official Journal decisions authorising a concentration during the first phase and publishes a short note of its decisions in a press release.³⁶ In addition, anybody interested in reading the decision may request the non-confidential version from the Commission itself or read the decision on-line.³⁷ In the meantime, undertaking's business secret should be kept from disclosure. The Commission will ask the parties to indicate those parts of the decision that they consider should not be published because of business secrets after the first-phase decision is adopted. The parties must justify such request.³⁸

Phase II proceeding

If the notified transaction falls within the scope of the EUMR and gives rise to serious doubts about its compatibility with the common market, the

³³ See for example, Case COMP/M.2048, *Alcatel/Thomson Multimedia JV* (Oct. 26, 2000) (citing a Commission statement that explains its decision not to challenge the joint venture at issue), available at http://ec.europa.eu/competition/mergers/cases/index/m40.html#m_2048, last visited on 30/10/2012, 10:17.

³⁴ See, Article 8(2) and Article 20 EUMR.

³⁵ Instead, such decisions have only to be notified to the parties to the concentration and to the Member States. See, Article 6(5) EUMR.

³⁶ E.N. Varona, A.F. Galarza, J.F. Crespo & J.B. Alonso, *Merger Control in the EU: Law, Economics and Practice*, *supra* note 26, at 376.

³⁷ *Ibid.*

³⁸ *Ibid.*, at 373.

transaction will be subject to a more detailed examination in the second phase proceeding. The Commission has 90 working days to conduct its investigation.³⁹ After the investigation, if the Commission continues to hold that the merger is likely significantly to impede effective competition in the common market or in a substantial part of it, it is required to issue a Statement of Objection(hereafter, the SO) to set out the objections to the notified operation.⁴⁰

After the formal hearing and consultation with the Advisory Committee⁴¹ the Commission adopts a decision on the concentration which is required to be published.⁴² The publication states the names of the parties and the main content of the decision; it also considers the legitimate interest of undertakings in the protection of their business secrets.⁴³ For such transactions involved in a second- phase investigation, the Commission's decisions are much more detailed.⁴⁴ For example, many published decisions are more than one-hundred-pages long with detailed analysis on relevant market, impact on consumers, market shares, the market after the concentration, the competitive impact on potential market and proposed remedies and so on.⁴⁵ The Commission publishes a non-confidential version of the decision free of business secrets in the Official Journal, L series.⁴⁶

³⁹ Article 10(3) EUMR.

⁴⁰ Article 18(3), *ibid.*

⁴¹ Article 19 EUMR.

⁴² See, Article 20 EUMR.

⁴³ Article 20(2), *ibid.*

⁴⁴ W.S. Grimes, 'Transparency in Federal Antitrust Enforcement', *supra note 5*, at 958.

⁴⁵ See for example, Case No IV/M.877, *Boeing/McDonnell Douglas* (30 July, 1997), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997D0816:EN:HTML>, last visited on 30/10/2012, 11:53; Case No COMP/M.2220, *General Electric/Honeywell* (3 July, 2001), available at http://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf, last visited on 30/10/2012, 11:57; Case No COMP/M.5421, *Panasonic/Sanyo* (29 September, 2009), available at

Several points may be summarised from the above observations. Firstly, transparency in the EU merger control is respected at every stage of the procedure from notification regardless of whether the Commission determines to prohibit the merger, to allow it to proceed with conditions, or to clear it unconditionally: 1. all notifications are disclosed in the form of brief summary; 2. phase I decisions are disclosed by the Commission in practice in the Official Journal and on the website; 3. the Commission is obliged to publish its phase II decisions in detail. Secondly, the undertaking's business secrets are kept from disclosure at the same time. Before every stage of disclosure in the procedure, the Commission will ask the notifying and third parties to submit a non-confidential version and justify their opinion.

2.2 Institutional concerns of transparency of EU merger control procedure

Although the Commission managed to achieve in the past a more or less fair degree of transparency,⁴⁷ the procedure is still criticised for concerns of transparency brought by institutional design.⁴⁸ It has been argued that a

http://ec.europa.eu/competition/mergers/cases/decisions/m5421_20090929_20212_en.pdf, last visited on 30/10/2012, 12:00.

⁴⁶ E.N. Varona, A.F. Galarza, J.F. Crespo & J.B. Alonso, *Merger Control in the EU: Law, Economics and Practice*, *supra* note 26, at 392.

⁴⁷ C.S. Rusu, *European Merger Control: The Challenges Raised by Twenty Years of Enforcement Experience*, (2010) Kluwer Law International, at 52. In addition, as stated by T.O. Barnett, the Deputy Assistant Attorney General of the Antitrust Division of the DOJ, 'regarding the goal of increased transparency, the European Commission and others have been ahead of the U.S. when it comes to explaining the reasons behind decisions not to bring challenges.' See, T.O. Barnett, 'Antitrust Enforcement Priorities: A Year in Review' (November 19, 2004) Department of Justice, available at <http://www.justice.gov/atr/public/speeches/206455.htm>, last visited on 30/10/2012, 16:30.

⁴⁸ In the EU merger control system institutional design refers to a system in which investigation, prosecution and decision-making are entrusted to the same institution: the

substantial lack of transparency in a merger control system may stem from the very institutional design that a particular system is built upon.⁴⁹ Having the solid status where no separation of functions existed under the EU merger control regime, the Commission's functions have been criticised as lacking transparency and prone to political influence.⁵⁰ In addition, for a long time it has been commonly noted that the Commission's decisions on mergers have, for many reasons, not been fully subjected to substantive judicial review.⁵¹ This institutional design has consequently been thought to constitute 'the main weakness'⁵² of EU merger control in that it inherently incorporates a substantial lack of transparency.⁵³ Since sufficient criticism and proposals for reform have been made on this topic,⁵⁴ this section is not intended to discuss

Commission; parties can appeal the Commission's decision before an independent judge. See, Article 21(2) EUMR.

⁴⁹ See, P.D. Camesasca, *European Merger Control: Getting the Efficiencies Right*, (2000) Intersentia Publishers, at 246.

⁵⁰ *Ibid*, at 190.

⁵¹ F. Todorov & A. Valcke, 'Judicial review of merger control decisions in the European Union', (2006) 51(2) *Antitrust Bulletin*, 339-381, at 339. A detailed discussion on the effectiveness of judicial review under the EU merger control system lies out of the scope of this section. For more detailed research on this issue, please refer to M. Clough, 'The Role of Judicial Review in Merger Control', (2003-2004) 24 *Northwestern Journal of International Law & Business*, 729-754; R. Brandeburger & T. Janssens, 'European Merger Control: Do the Checks and Balances Need to Be Re-set?' (2001) *Fordham Corporate Law Institute*, 177-225; J. Schwarze, 'Judicial review of European administrative procedure', (2004) 68 *Law and Contemporary Problems*, 85-105.

⁵² D.G. Goyder, *EC Competition Law*, third edition, (1998) Oxford University Press, at 596.

⁵³ P.D. Camesasca, *European Merger Control: Getting the Efficiencies Right*, [supra note 49](#), at 245.

⁵⁴ For example, E. Bannerman, *The Future of EU Competition Policy*, (2002) Centre for European Reform, at 29-31; D.J. Neven, R. Nuttall & P. Seabright, *Merger in Daylight: The Economics and Politics of European Merger Control*, (1993) Centre for Economic Policy Research, at 231-236; P.D. Camesasca, *ibid*, at 245-257; C.S. Rusu, *European Merger Control: The Challenges Raised by Twenty Years of Enforcement Experience*, [supra note 47](#), at 48-60; H.C.H. Hofmann, 'Good Governance in European Merger Control: Due Process and Checks and Balances under Review', (2003) 24(3) *European Competition Law Review*, 114-131; N. Levy, 'EU Merger Control: From Birth to Adolescence', [supra note 22](#), at 195-218. A. Christiansen, 'The Reform of EU Merger Control - Fundamental Reversal or Mere Refinement?' [supra note 22](#);

appropriate institutional design but to only examine the connection between lack of procedural transparency and the institutional design of the EU merger control system; and any additional efforts that have been made to improve transparency of the EU merger control system.

The institutional design of the EU merger control system raises two main problems of procedural transparency: 1. the decisions are not taken by competent judges but by political Commission members under an administrative agency; 2. being a political body, the Commission is prone to be surrounded by political lobbyists seeking to influence opinions expressed by the Merger Task Force members on a concentration's being cleared or blocked.⁵⁵ The first problem leads to the system's lacking judicial disclosure, for example, cross examination between the Commission and the notifying parties. Although the EU merger control system publishes notifications, phase I and phase II decisions, the decision-making process, the Commission's reasoning and its internal files are generally unavailable to the public.⁵⁶ As regards the second problem, the EU merger control system seems to fit the description of a system in which the inevitable political element operates mostly behind closed doors.⁵⁷ If the competition and political stages are not kept separated and outside each other's reach, any decision clearing (or

⁵⁵ See, I. Schmidt, 'Jurisdictional Problems of Merger Control, an international comparison', in C.D. Mueller, A. Haid & J. Weigand (edited by), *Competition, Efficiency and Welfare*, (1999) Kluwer Academic Publishers, at 193.

⁵⁶ As argued by E.H. Pijnacker Hordijk, 'For an outsider, who has to rely on the published version of the Commission's decision in a given case, it is often very difficult if not impossible to access the substantive soundness of the reasoning of the Commission and the appropriateness of the remedies, if any'. See E.H. Pijnacker Hordijk, 'Towards the tenth anniversary of the EC merger regulation; an interim report', (1999) 47 S.E.W. at 120.

⁵⁷ See, C.S. Rusu, *European Merger Control: The Challenges Raised by Twenty Years of Enforcement Experience*, [supra note 47](#), at 50.

block) a concentration transaction may be susceptible of being based on political grounds.⁵⁸

In order to provide more transparency and soundness in the Commission's decision-making process and the decision itself, the Commission, under the current institutional design,⁵⁹ has provided some procedural solutions in addition to disclosure requirements in the merger control procedure mentioned above. Firstly, the role of Hearing Officer (hereafter the HO) has been enhanced. The HO is to supervise and safeguard the procedural rights of the parties to due process.⁶⁰ Although its role is still limited to providing internal checks and balances in the EU merger control system,⁶¹ the publication of the HO's independent report on whether procedural rights have been respected during the process may improve the transparency of the merger control procedure.⁶² The public may at least have a chance to observe and evaluate merger enforcement. Secondly, a Consumer Liaison function has been created in the DG Comp to encourage and facilitate the involvement of consumer associations which are often poorly resourced bodies since consumers rarely express their views to the Commission about the likely impact of specific mergers.⁶³ Thirdly, the Commission has issued a

⁵⁸ Ibid, at 50.

⁵⁹ The Commission has strongly resisted adopting a judicial-based system and any radical institutional changes in EU merger control. It argues that due to its legal culture heritage and the legal hurdles that need to be overcome for a radical institutional change to take place, the Commission is not ready to adopt a model where the investigation, prosecution and decision-making steps are separated and entrusted to different independent bodies. See, C.S. Rusu, *ibid*, at 60.

⁶⁰ C.S. Rusu, *European Merger Control: The Challenges Raised by Twenty Years of Enforcement Experience*, *supra* note 47, at 56.

⁶¹ See, N. Levy, 'EU Merger Control: From Birth to Adolescence', *supra* note 22.

⁶² For a more detailed discussion on the role of HO in the EU competition law enforcement procedure, please refer to chapter 4 of this thesis (2.3.1 Right to a fair hearing under EU competition law).

⁶³ See, M. Monti, 'Merger Control in the European Union: A Radical Reform', *Speech at the European Commission/IBA Conference on EU Merger Control*, Brussels, 7 November 2002,

series of notices and guidelines to explain the Commission's activities in merger assessment.⁶⁴ As argued by P.D. Camesasca:

Rather than changing the core of an in the meantime well-established and appreciate body of law, the real investment should be one in enhancing transparency. Offering technical guidance as on how to apply merger control by issuing Merger Guidelines has served US agencies well in carrying out their appointed task...⁶⁵

Under the current institutional design increasing the transparency of the merger assessment process may be the most feasible and effective, if not the only way, to overcome the two problems stated above. A more transparent procedure may require the Commission to disclose its process of decision-making, for example, the internal files, to certain extent.⁶⁶ Thus cross examination in a quasi-judicial procedure is possible.⁶⁷ In addition, the more

available at http://europa.eu/rapid/press-release_SPEECH-02-545_en.htm?locale=en, last visited on 24/10/2012, 22:36.

⁶⁴ See for example, the Best Practice; the Guidelines on the assessment of horizontal mergers(Official Journal C 31 of 05.02.2004) and the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF>, last visited on 10/12/2012, 15:08.

⁶⁵ See, P.D. Camesasca, *European Merger Control: Getting the Efficiencies Right*, *supra note 49*, at 257.

⁶⁶ In fact, some commentators have argued, in the context of Article 101 and 102 TFEU's enforcement, that the decision- maker should make its internal files available and conduct cross-examination during the formal oral hearing with the parties concerned. See for example, N. Zingales, 'The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to Be Heard?' (2010) 7(1) *Competition Law Review*, 129-156, at 148; ECLF Working Group on Transparency and Process, 'Transparency and Process: Do We Need a New Mandate for the Hearing Officer?' (2010) 6(2) *European Competition Journal*, 475-489, at 488.

⁶⁷ See, P.D. Camesasca, *European Merger Control: Getting the Efficiencies Right*, *supra note 49*, at 246. (Provided that the Commission's quasi-judicial character is evident at the stage when submissions are made and the parties are heard, and is reflected by the procedural safeguards accorded to the undertakings, the Commission being only allowed to take a

transparent the procedure is, the less likely political capture and influence. All in all, the goal of enhancing transparency is to ensure that the Commission's activities are better known, understood and accepted by governments, undertakings, professional practitioners and the public.⁶⁸

3. Transparency and Concerns in US merger control enforcement

3.1 An overview of the procedure of US merger control enforcement

The Antitrust Division and the Federal Trade Commission (hereafter the FTC) share the authority of enforcing US merger control policies on behalf of the Federal government under Section 7 of the Clayton Act.⁶⁹ Since October 1978, most significant mergers and acquisitions must be reported to the Division and the FTC before they occur.⁷⁰ The Hart-Scott-Rodino Antitrust Improvements Act of 1976(hereafter, the HSR Act)⁷¹ requires enterprises exceeding certain thresholds to notify the Antitrust Division and the FTC of the proposed transaction, submit documents and other information to agencies concerned in the transaction, and refrain from closing the transaction until a specific waiting period has expired.⁷² The Antitrust

decision on objections about which the undertakings have had an opportunity to make their views known); See also, L.O. Blanco, *European Community Competition Procedure*, (1996) University of Oxford Press, at chapters 7-11.

⁶⁸ See, K. Van Miert, 'Competition Policy and the Commission's Information Strategy', (1994) 1(1) *EC Competition Policy Newsletter*, 1.

⁶⁹ See, J.M. Jacobson (editor in chief), *Antitrust Law Developments*, volume I, 6th edition, (2007) ABA Publishing, at 333.

⁷⁰ See, R.L. Johnson & D.D. Smith, 'Antitrust Division Merger Procedures and Policy, 1968-1984', (1987) 32 *Antitrust Bulletin*, 967-988, at 969.

⁷¹ Pub. L. No. 94-435, 90 Stat. 1390 (codified as amended at 15 U.S.C. § 18a (1994)).

⁷² See, Chapter 3 of the Antitrust Division Manual.

Division and the FTC have a clearance procedure to allocate the case to one of them.

If the information received from the HSR file is insufficient to determine that a proposed merger will not harm competition, the Antitrust Division or the FTC will generally will open a preliminary investigation. The preliminary investigation will be mainly focused on fact-finding and economic analysis and is limited in 30 days. After conducting the preliminary investigation, the Antitrust Division or the FTC may decide whether the investigation should be continue or closed. The agency may issue a Request for Additional information which is known as Second Request when it deems necessary.⁷³ The waiting period extends up to twenty days after the parties substantially comply with the request.⁷⁴ During those 20 days the staffs attempt to complete their investigation so that the Antitrust Division or the FTC can make a decision. The statistics of the numbers of notifications, preliminary investigations and the second request are available to the public on the Antitrust Division and the FTC's official website.⁷⁵

At the decision- making stage the investigation may have three results: 1. it may be dropped unconditionally before litigation; 2. may result in a settlement, reached either before or after litigation is commenced; or 3. may result in litigation.⁷⁶

⁷³ 15 U.S.C. § 18a (b) (l) (B).

⁷⁴ The waiting period is 15 days in the case of cash tender offers and 10 days in the case of cash tender offers. Ibid.

⁷⁵ See, <http://www.justice.gov/atr/public/merger-enforcement.html>; <http://www.ftc.gov/bc/anncompreports.shtm>; last visited on 27/11/2012, 14:01.

⁷⁶ See, W.S. Grimes, 'Transparency in Federal Antitrust Enforcement', *supra note 9*, at 959. However, The FTC, unlike the Antitrust Division, is an independent regulatory agency with authority to conduct formal administrative, adjudicative and rulemaking proceedings and to issue cease and desist orders, violations of which can result in substantial civil penalties. See, W.J. Kolasky, Jr. & J.W. Lowe, 'Merger Review Process at the Federal Trade Commission:

3.2 Arguments related to the transparency of US merger control procedure

3.2.1 Concerns of transparency under the US merger control procedure

Because of the relative openness of judicial or administrative litigation and the likelihood that a tribunal decision will be accompanied by an explanatory opinion, transparency has not been a major issue for cases resolved by a court or administrative tribunal.⁷⁷

The Antitrust Division

If the Antitrust Division and the concerned parties reached a settlement via a consent decree, some transparency is provided. In relation to the consent decree between the Antitrust Division and the merging parties the Tunney Act⁷⁸ requires that a proposed settlement should be published in the Federal Register, together with a Competitive Impact Statement (the CIS)⁷⁹ that describes the underlying proceeding and other information, including a description and evaluation of alternatives to the consent proposal actually considered by the United States.⁸⁰ The Tunney Act also requires publication of a list of documents upon which the Antitrust Division relied and disclosure by the defendant of all relevant contacts between the defendant and officers

Administrative Efficiency and the Rule of Law', (1997) 49 *Administrative Law Review*, 889-914, at 895.

⁷⁷ See, S. Calkins, 'In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture', (1998) 72(1) *St. John's Law Review*, 1-42; at 15-21.

⁷⁸ 15 U.S.C. § 16 (2000).

⁷⁹ For a more detailed description about the content of a CIS please refer to Chapter 4 of this thesis, at '3.1 Introductory remarks and an overview of US antitrust laws' enforcement procedures'.

⁸⁰ 15 U.S.C. § 16(b).

or employees of the United States (other than contacts between the Antitrust Division and counsel of record).⁸¹ The proposed decree is then required to be disclosed for public comment for a sixty-day period. At the end of the period the comments and the Antitrust Division's reply to the comments must also be published in the Federal Register.⁸² In addition, summaries of this material must also be published in newspapers of general circulation for seven days over a two- week period.⁸³

However, the Tunney Act only requires the disclosure of the analysis that is addressed in the consent decree by the Antitrust Division. The Antitrust Division fails to provide meaningful analysis of the alternative remedies that were considered.⁸⁴ A competitive impact analysis provided by the Antitrust Division is incomplete if it addresses only competition issues for which the Antitrust Division was able to negotiate relief in the consent order. As argued by W.S. Grimes, if the Antitrust Division were free to ignore genuine competition issues not addressed in the order, even the most egregious sweetheart settlement could be packaged in a manner that reduced public scrutiny of critical issues.⁸⁵ In addition, the disclosure of the competitive problems which are not addressed in the consent decree may equally contribute to reasoned decision-making, consistency, predictability, and fairness of the procedure. Incomplete disclosure will decrease the value of such information to the practitioners in the market.

Another more serious concern is that there appears to be little or no disclosure when: 1. the Antitrust Division drops a merger investigation; 2. the parties to a proposed acquisition abandon or restructure the transaction,

⁸¹ 15 U.S.C. §§ 16(b), (g).

⁸² 15 U.S.C. § 16(d).

⁸³ 15 U.S.C. § 16(c).

⁸⁴ W.S. Grimes, 'Transparency in Federal Antitrust Enforcement', *supra* note 9, at 963.

⁸⁵ *Ibid.*

often in the face of expressed opposition from the Antitrust Division; and, 3. when the Antitrust Division resolves competition issues through a fix-it-first settlement⁸⁶ that requires the merging parties to restructure before proceeding with the merger. For example, in *Bell Atlantic/NYNEX*, the Antitrust Division investigated the proposed acquisition of NYNEX by Bell Atlantic in 1997-98.⁸⁷ The Antitrust Division, after investigating this acquisition for almost a year, issued a two sentence statement announcing that the investigation had been dropped because the merger did not violate antitrust laws.⁸⁸

According to statistics⁸⁹ provided by the Antitrust Division, in the fiscal year of 2011 the Antitrust Division initiated 72 merger investigations based on the HSR Act; at least 31 of them are regarded as having involved substantial antitrust issues for which an explanation of the agency decision could have provided significant guidance.⁹⁰ Of the 31 cases the Antitrust Division challenged 20. In 13 of these challenges the Antitrust Division filed a

⁸⁶ In accordance with the 'fix-it-first' solution, in some cases the parties may agree to a resolution that eliminates the potential competitive problem before the merger is effected. See, Antitrust Division Manual, Chapter 3.

⁸⁷ NYNEX controlled local telephone service in New York and New England while Bell Atlantic operated in Atlantic states from New Jersey southward to Virginia. Although not actual competitors in providing local service, the two firms were viewed as potential competitors. For a more detailed examination on this case, please refer to S.R. Brenner, 'Potential Competition and Local Telephone Service: The Bell Atlantic-NYNEX Merger' in J.E. Kwoka & L.J. White (edited by), *The Antitrust Revolution*, fourth edition (2003) Oxford University Press, at 73-100.

⁸⁸ Department of Justice Press Release, Apr. 24, 1997 ('The Division has decided that it will not challenge the transaction, having concluded that the merger does not violate the antitrust laws.'). available at <http://www.justice.gov/opa/pr/1997/April97/173at.htm>, last visited on 27/11/2012, 22:04.

⁸⁹ The statistics are available at the official website of the Department of Justice: <http://www.justice.gov/atr/public/index.html>, last visited on 27/11/2012, 17:03.

⁹⁰ In the fiscal year of 2011 the Antitrust Division initiated a second request in 31 cases, a demand for additional documentation that is typically issued when the investigating agency believes that further information is required to address serious competitive issues that may be raised by a planned acquisition.

complaint in the US District Court. The other 7 cases were settled by consent decree.⁹¹ This means there were 11 cases (35.5% of the total second request cases) which might have raised significant competitive concerns dropped by the Antitrust Division or the merging parties without any meaningful disclosure. In addition, 7 cases were resolved by the parties' either abandoning or restructuring their proposed transaction or changing their conduct to avoid competitive problems (22.6% of the total second request cases). Thus in relation to the Antitrust Division, in the fiscal year of 2011, there were 58.1% cases among which might have raised significant competitive concerns, which lacked disclosure. The situation is not better in the fiscal years from 2002-2011. From 2002-2011 there was a total of 220 second request investigations conducted by the Antitrust Division. 133 of them were challenged by the Antitrust Division and 56 cases were dropped or restructured by the merging parties. Thus the average percentage of cases which might have raised significant competitive concerns but lacked disclosure is 65.0%.⁹²

The Federal Trade Commission

When cases are settled by the consent decree between the FTC and the concerned parties, the decrees, once initially approved by the FTC, will be placed on the public record for thirty days to allow for comments.⁹³ The FTC will also publish an explanation of the proposed consent decree.⁹⁴ However, the FTC is not required to disclose its replies to the comments, nor is there any requirement of publication of the proposed consent agreement in

⁹¹ See, Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, available at <http://www.ftc.gov/bc/anncompreports.shtml>, last visited on 27/11/2012, 17:08.

⁹² This calculation method is provided by W.S. Grimes. See, W.S. Grimes, 'Transparency in Federal Antitrust Enforcement', *supra* note 9, at 965-972.

⁹³ 16 C.F.R. §§ 2.31-2.34 (2003).

⁹⁴ 16 C.F.R. § 2.34(c).

newspapers. It seems that these rules governing consent orders issued by the FTC are less rigorous than the Tunney Act procedures. Similarly, even if the disclosure of the consent decree is sufficient, the FTC would still be suspected, as is the Antitrust Division, of a tendency to disclose only those issues addressed in the settlement, leaving the public uninformed as to its thinking on other genuine competition issues raised by the investigation. However, this problem may be alleviated when the Commissioners of the FTC have different opinions on a merger. Any one of the five Commissioners can respond by filing a dissenting statement that will bring the matter to the attention of the public.⁹⁵

Similar to the Antitrust Division, the FTC offers little or inadequate disclosure when the FTC drops a merger investigation that was subject to a second request; or, when the parties to a proposed acquisition abandon the transaction in the face of agency opposition. When investigations are dropped because the parties abandon the proposed merger in the face of FTC opposition, there is typically no meaningful disclosure. However, when the agency has decided to drop an investigation because it determines that there would be no Section 7 violation, the FTC has increasingly offered some disclosure⁹⁶ although still not adequate.

In accordance with the methods evaluated the Antitrust Division, the FTC in the fiscal year of 2011 initiated 24 second request investigations of

⁹⁵ For example, in the Royal Caribbean Cruises, Ltd/P&O Princess Cruises plc & Carnival Corporation/P&O Princess Cruises,(hereafter, the Cruises mergers) when the FTC dropped the cruise mergers investigation in October of 2002, the Commission issued a statement (signed by three commissioners) along with a dissenting statement (signed by two commissioners). See, Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd/P&O Princess Cruises plc & Carnival Corporation/P&O Princess Cruises plc., F.T.C. File No. 021 0041 (Oct. 4, 2002), available at <http://www.ftc.gov/opa/2002/10/cruiselines.shtm>, last visited on 28/11/2012, 13:36. This case will be discussed in more detail later in this section.

⁹⁶ See, W.S. Grimes, 'Transparency in Federal Antitrust Enforcement', *supra* note 9, at 966.

mergers which might have had significant competitive impact. It challenged 17 transactions of them, leading to 9 consent orders, 3 administrative complaints before district court and 5 transactions that were abandoned or restructured after the parties learned of the FTC's concerns.⁹⁷ Therefore, there were 7 cases that had been dropped by the FTC and 5 cases that were abandoned or restructured by the merging parties. i.e., there are 12 cases lack of disclosure, which accounts for 50% of the total number of the cases containing second request. The average percentage from 2002 to 2011 is 46.5%. The statistics show that transparency of the FTC is slightly better than in the Antitrust Division in terms of the number of disclosed cases which may have significant competitive impact.

In practice the FTC also tends to provide more information to the public than the Antitrust Division. A notable case is the *Cruises mergers*. When the FTC closed its investigation of two proposed acquisitions involving the three largest firms in the ocean cruise industry in October 2002, it took the unusual step of issuing a statement explaining its decision which offers unique and welcome insights into the bases for an important merger enforcement decision,⁹⁸ although the FTC pointed out that its decision not to pursue either of the proposed cruise line acquisitions was based on specific and complex circumstances of this particular industry and should not be read as indicating that large mergers in highly concentrated industries would be permitted in another case.⁹⁹ The FTC's statement explained the proposed transactions,

⁹⁷ The statistics are provided by the FTC's Annual Reports to Congress Pursuant to the HSR Act of 1976, available at <http://www.ftc.gov/bc/anncompreports.shtm>, last visited on 28/11/2012, 14:11.

⁹⁸ See, W.S. Grimes & J.E. Kwoka, 'A Study in Merger Enforcement Transparency: The FTC's Ocean Cruise Decision and the Presumption Governing High Concentration Mergers', *Antitrust Source*, May 2003, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/metstudy.authcheckdam.pdf, last visited on 18/10/2012, 12:29.

⁹⁹ See, FTC Cruise Lines Statement, *supra* note 95.

analysed the relevant market and an alternative market definition considered and rejected by the FTC, and assessed some of the possible anticompetitive consequences that might occur in that market.¹⁰⁰ One reason for disclosing this dropped investigation may be that the authorities of the EU and UK were conducting a parallel investigation on the same merger and issued detailed reports explaining the facts of this case and grounds of their decisions although both agencies decided not to challenge this merger.¹⁰¹ However, the disclosure was still inadequate in some aspects. In particular, the FTC failed to explain why the presumption that concentration enhancing mergers in an already concentrated market is likely to create anticompetitive effects, which has venerable roots in economic theory and in antitrust enforcement,¹⁰² did not apply in this case.¹⁰³ Nor did the FTC explain on the three possible effects that the acquisition would bring: 1. the unilateral effects; 2. the coordinative effects; 3. the possible strategic behaviour.¹⁰⁴ Nevertheless, at least some of these issues were addressed in the statement of the dissenting Commissioners.¹⁰⁵

¹⁰⁰ *ibid.*

¹⁰¹ See respectively, the European Commission, Case No. COMP/M.2706 (Carnival Corporation/P&O Princess) C(2002)2851 (July 24, 2002), available at http://ec.europa.eu/competition/mergers/cases/decisions/m2706_en.pdf, (57 pages), last visited on 29/11/2012, 23:02; Competition Commission (UK), P&O Princess plc and Royal Caribbean Cruises Ltd: A Report on the Proposed Mergers (June 19, 2002), available at <http://www.competition-commission.org.uk>, (115 pages not including the extensive appendices), last visited on 29/11/2012, 23:04.

¹⁰² See for example, E.H. Chamberlain, *The Theory of Monopolistic Competition*, sixth edition, (1948) Harvard University Press; F.M. Scherer & D.R. Ross, *Industrial Market Structure and Economic Performance*, third edition, (1989) Houghton Mifflin.

¹⁰³ See, W.S. Grimes & J.E. Kwoka, 'A Study in Merger Enforcement Transparency: The FTC's Ocean Cruise Decision and the Presumption Governing High Concentration Mergers', *supra* note 98.

¹⁰⁴ *ibid.*

¹⁰⁵ For example, the dissenting Commissioners' statement addressed possible strategic behaviour by the post-merger firm that could disadvantage rivals or raise entry barriers. In particular it indicated that a clear market leader might force key travel agents to accept

From the above observations, it may be concluded that there are two significant concerns with regard to US merger enforcement procedure. Firstly, the disclosure provided in the cases resolved by consent decrees between the Antitrust Division/ the FTC and the concerned parties is incomplete. Secondly, in relation to the merger cases which may have significant competitive impact on the market (the cases containing second request) investigated substantially but cleared or dropped by the merging parties, there is little disclosure. The number of such cases is significant in both the Antitrust Division and the FTC. Nevertheless, especially the FTC has attempted to adopt a more transparent approach in mergers that raise competitive issues but are cleared without challenge or settlement.¹⁰⁶ As argued by W.S. Grimes and J.E. Kwoka: 'when an agency devotes substantial resources to investigating a proposed acquisition an explanation of the agency's decision should be provided, regardless of the final disposition.'¹⁰⁷

3.2.2 Arguments against the concerns for transparency under US merger control procedure

Although there is almost universal agreement that transparency in merger review is a commendable goal, there is disagreement about how great a burden should be placed on the agencies to explain their decisions.¹⁰⁸ The

exclusive contracts or pressure port authorities into dealing with competitors on unfavourable terms. See, Dissenting Statement of Commissioners S.F. Anthony and M.W. Thompson, *Royal Caribbean/Princess and Carnival/Princess* (Oct. 4, 2002), available at <http://www.ftc.gov/os/2002/10/cruisedissent.htm>, last visited on 29/11/2012, 23:14.

¹⁰⁶ See, Statement of the FTC, *RJ Reynolds Tobacco Holdings Inc./British American Tobacco plc* (June 22, 2004), available at <http://www.ftc.gov/os/2004/06/040622batrjrstmt.pdf>, last visited on 30/11/2012, 13:35.

¹⁰⁷ See, W.S. Grimes & J.E. Kwoka, 'A Study in Merger Enforcement Transparency: The FTC's Ocean Cruise Decision and the Presumption Governing High Concentration Mergers', *supra note 98*.

¹⁰⁸ D.I. Gelfand & J. Calsyn, 'Transparency in Antitrust Merger Review: A Modest Proposal for More', *Antitrust Source*, January 2005, available at

cost of transparency is significant and includes 1. the burden of preparing for a public disclosure; 2. confidentiality risk; 3. creation of precedent that would undermine future cases; and, 4. awkwardness or difficulty of explaining decisions that are based on administrative or 'mixed' reasons.¹⁰⁹

The burden of preparing for a public disclosure would be substantial if the Antitrust Division and the FTC began to disclose the cleared merger or dropped investigations. For example, the Antitrust Division would have to issue more than one statement a week to explain its decision to drop an investigation, abandon mergers and fix-it-first resolutions.¹¹⁰ A previous Commissioner of the FTC also mentioned that the primary reason an absolute requirement of explanations of all decisions is inappropriate is that it would be a substantial and rarely worthwhile resource commitment.¹¹¹

The second issue is the worry of disclosing confidential information of the businesses. Confidentiality protection is an obligation under US merger enforcement.¹¹² Companies do not have to worry about disclosure of confidential business information when they respond to a second request.¹¹³ Concerned parties and third parties would not be willing to cooperate with an

[http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/04_Jan05_gelfand.uthcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/04_Jan05_gelfand.authcheckdam.pdf), last visited on 13/10/2012, 22:12.

¹⁰⁹ W.S. Grimes, 'Transparency in Federal Antitrust Enforcement', *supra note 9*, at 948.

¹¹⁰ See, J.M. Nannes, 'Transparency in Federal Antitrust Enforcement Decisions: A Reaction to Professor Grimes', (2003) 51 *Buffalo Law Review*, 1017-1027, at 1020.

¹¹¹ See, R. Pitofsky, 'Comments on Warren Grimes: Transparency in Federal Antitrust Enforcement', (2003) 51 *Buffalo Law Review*, 995-999, at 996.

¹¹² The Clayton Act provides: Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress. 15 U.S.C. § 18a(h) (2000).

¹¹³ See, J.M. Nannes, 'Transparency in Federal Antitrust Enforcement Decisions: A Reaction to Professor Grimes', *supra note 110*, at 1021.

enforcement agency if they feared information submitted would be released to the public. Third parties may value confidentiality more than the merging parties. Customers, suppliers, or small competitors may fear retaliation. They may accept that their information may be disclosed if the agency decides to challenge a merger, but if they believe that their information may be disclosed even if the agency does not challenge the transaction, it may discourage them from coming forward in the first place.¹¹⁴

As regards the third point, a former Antitrust Division chief has expressed the concern that disclosure of the reasons an agency did not pursue a case might directly or indirectly reveal evidentiary difficulties which might make the agency vulnerable to counsel's planning transactions that are designed to frustrate the ability successfully to enjoin them.¹¹⁵ It seems undeniable that, if the Antitrust Division issued explanation on non-enforcement decisions, the defendants in litigated merger cases would be very likely to seek to use those statements against the agencies.

Finally, there are cases in which the agencies decided not to pursue, not because they are lawful or harmless but for other reasons such as limited resources. In fact many decisions to drop an investigation may be a 'mix': the case is not very strong; the agency is overcommitted; the case may make bad law; one commissioner thinks the efficiency defence is strong; the discovery did not produce strong evidence; etc.¹¹⁶ In these cases the agencies may not need to disclose their decision not to pursue. The disclosure of such cases would have little value for the consistency and predictability of merger

¹¹⁴ *ibid.*

¹¹⁵ See, *Authorization for the Antitrust Div. of the Dep't of Justice, Oversight Hearings Before the Subcomm. on Monopolies and Commercial Law, House comm. on the Judiciary, 99th Cong. 191-92 (1988)* (statement of Douglas H. Ginsburg, Assistant Attorney Gen., Antitrust Div.).

¹¹⁶ See, W.S. Grimes, *Transparency in Federal Antitrust Enforcement*, *supra note 9*, at 952.

enforcement for there are no significant competition factors in the decision. However, the public may want to know whether or not investigated conduct was determined to be lawful, or merely not a proper focus for enforcement at the time the agency reached its decision.¹¹⁷

4. How to improve transparency of Chinese merger control procedure

4.1 The importance of transparency to Chinese merger control procedure

As is evident from both EU and US merger enforcement regimes, transparency is an essential requirement of an effective, responsive and fair merger control procedure. It enables companies to understand better the possible risks associated with proposed transactions. It allows all practitioners and the public at large (not just those with inside knowledge of recent deals) to predict with greater certainty how the agencies will analyse a relevant market. It also forces the agencies to ensure that their decisions are based on accurate facts and sound economic principles and reasoning. The public also benefits from a better understanding of this important area of government regulation.¹¹⁸

Transparency can be fairly important to Chinese merger control procedure. Chinese merger control is in its initial stage and the MOFCOM has not developed ample case law and guidelines to give practitioners adequate legal certainty. From August 2008 to December 2012, the MOFCOM published 17 decisions on the mergers which are prohibited or cleared with conditions.

¹¹⁷ *ibid*, at 953.

¹¹⁸ See, D.I. Gelfand & J. Calsyn, 'Transparency in Antitrust Merger Review: A Modest Proposal for More, *Antitrust Source*', *supra note 108*.

Although the MOFCOM has published a list of the parties' names in the cases which were cleared, there is no information in this list except the names of the merging parties.¹¹⁹ Nor has the MOFCOM issued any horizontal or non-horizontal merger guidelines. (until the thesis is written). Secondly, the MOFCOM's decisions are often suspected of being influenced by political powers. For example, in the case of *Coca-cola/Huiyuan*, the MOFOM's prohibition decision was suspected of being influenced by the government and protectionism.¹²⁰ It is argued that the MOFCOM's short, vague decisions encourage speculation about protectionism.¹²¹

Transparency may not only provide necessary legal certainty of AML 2007's enforcement and contribute to a more effective, responsive and fair procedure, but also help the MOFCOM to clarify the rumours and speculation on the political or other non-competitive influence on the decisions. Hence transparency is in MOFCOM's own interests.¹²² In addition, it is relatively easy to establish a transparent enforcement system at this early stage where the caseload is not unacceptable. As C.Ş. Rusu states: 'the most practical method to ensure transparency in an antitrust system is to provide appropriate rules in this respect from the very inception of the institutional system, or in any case when it is still young and malleable.'¹²³

¹¹⁹ See, the official website of the MOFCOM, available at <http://fldj.mofcom.gov.cn/index.shtml>, last visited on 03/12/2012, 12:09.

¹²⁰ See for example, R. Evans, 'Transparency is in Mofcom's Interests', (2008-2010) 28 *International Financial Law Review*, 19-20; C.H. Lyons, 'The Dragon in the Room: China's Anti-Monopoly Law and International Merger Review', (2009) 62 *Vanderbilt Law Review*, 1577-1621; S. Tucker & J. Anderlini, 'Coke's Rejection is to Chinese Public's Taste', *Financial Times*, March 18, 2009, available at <http://www.ft.com/cms/s/0/9df57384-13d1-11de-9e32-0000779fd2ac.html#axzz2Dzw4RDb4>, last visited on 03/12/2012, 14:12.

¹²¹ R. Evans, *ibid*, at 20.

¹²² *Ibid*.

¹²³ C.Ş. Rusu, 'A few Considerations Regarding to Transparency and Legal Certainty in European Merger Control', *supra note 16*; at 182.

4.2 Current position of transparency of Chinese merger enforcement procedure

As identified in chapter 1 of this thesis, there are two concerns with regard to the transparency of Chinese merger enforcement procedure: 1. the procedure of merger investigation lacks transparency; 2. the content of the decision made by the MOFCOM lacks transparency, no matter for the approved cases, prohibit cases or cases cleared with remedies.¹²⁴

Similar to their EU and US counterparts, the Chinese merger investigation process may also be divided into two phases.¹²⁵ Article 25 of the AML 2007 provides that the phase I investigation may last for as long as 30 days once the merging parties notified successfully. Article 26 further stipulates:

Where the Antimonopoly 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.

However, neither phase I nor phase II investigation processes are disclosed to the public. From notification to phase I decision, there is no legal requirement for the MOFCOM to inform the public when merging parties notified a case before it. Nor is the MOFCOM obliged to disclose the information on the cases which have been cleared or terminated during phase I investigation. The MOFCOM will not disclose the information on cases being brought to a phase II investigation either, which are deemed to be important

¹²⁴ See, '3.2.1 Lack of transparency in merger enforcement procedure' of chapter 1 of this thesis.

¹²⁵ Article 25 and 26 of the AML 2007.

and may have significant competitive impact in the market. From notification to the end of phase I investigation, there are three possible situations: 1. if a merger is cleared after the phase I investigation, the only disclosure would be the name of the merging parties; 2. if the case proceeds to phase II investigation, there is no information disclosed at this stage; 3. if the phase I investigation is dropped by the MOFCOM, there would be no information disclosed to the public. As to decisions made after phase II investigation process, it will be discussed below.

In relation to the second problem, as mentioned above, if a merger is cleared by the MOFCOM, only the names of merging parties will be disclosed in a list. When the MOFCOM's decision blocks a merger or clears it with remedies, it generally contains insufficient information to justify the decision and the remedies.¹²⁶ With the development of case law, the MOFCOM seems to have gradually adopted established concepts of merger remedies and analytical framework from more developed jurisdictions but at the same time the decisions lack clear reasoning and analytical standards.¹²⁷

4.3 Improving transparency of Chinese merger enforcement procedure

4.3.1 Comparison of the transparency of merger enforcement procedure in the EU and US

¹²⁶ For a detailed case study on the MOFCOM's cases, please refer to Chapter 1 of this thesis: '2.1 The current position of administrative enforcers under the AML 2007's public enforcement'.

¹²⁷ See, Q. Hao, 'Merger Remedies in China: Developments and Issues', (2010) 6(2) *Competition Law International*, 13-21; at 13.

The EU seems to have established greater transparency than the US. The Commission discloses nearly every step of the investigation to the public. Firstly, the Commission publishes all notifications in the Official Journal and the website of the Commission in the form of a summary. Secondly, the decisions made after the phase I investigation conducted by the Commission are also disclosed to the public. Thirdly, any merger accessed to the phase II investigation, no matter whether cleared or not, will be disclosed to the public by the Commission.¹²⁸ The Commission's website systematically lists all notified transactions, disclosing the lines of business in which participating firms are active, and reports the Commission's dispositions of each of the notified transactions.¹²⁹ The US merger enforcement regime only publishes the statistics of its investigative procedure to provide some transparency to the public. The statistics include: the number of notifications received by the Antitrust Division and the FTC; the total number of investigations conducted by the agencies; the total number of mergers challenged by the agencies; the number of second request investigation conducted by the agencies; the number of cases settled by consent decrees; the number of cases dropped by the merging parties; the number of cases settled by fix-it-first resolution; and, the number of cases filed before federal court.¹³⁰ Such statistics under the EU merger regime are also available.¹³¹ In addition, the HSR Annual Reports to Congress discloses some (but not all of) cases challenged by the Antitrust Division and the FTC. The disclosed information includes the merging parties' name, the competition related

¹²⁸ See, '2.1.2 Transparency in the EU merger control enforcement procedure' of this chapter.

¹²⁹ W.S. Grimes, 'Transparency in Federal Antitrust Enforcement', *supra* note 9, at 958.

¹³⁰ These statistics are available in the Ten Year Workload Statistics Report of the Antitrust Division and the HSR Annual Reports to Congress, available at <http://www.justice.gov/atr/public/merger-enforcement.html>, last visited on 04/12/2012, 11:32.

¹³¹ The statistics of EU merger investigation are available at <http://ec.europa.eu/competition/mergers/statistics.pdf>, last visited on 04/12/2012, 14:34.

concerns held by the agencies and the possible remedies provided by the agencies.

In relation to disclosure of the decisions, it seems the EU merger regime provides more transparency than does the US. Firstly, the Commission regularly publishes a summary statement on the cleared mergers while US agencies do not routinely disclose the cleared cases. The summary statement at least includes the following information: the parties; the nature of the transaction; the relevant product and geographic markets; the degree of overlap of the participating firms and other salient facts that led the Commission to conclude that no challenge was necessary.¹³² As is the case with U.S. merger enforcement, there is no regular disclosure of cases which are not challenged by the Antitrust Division or the FTC after the investigation. As mentioned above,¹³³ the FTC occasionally discloses some information about its clearance decision. A notable example is the *Cruises mergers* case. The EU Commission cleared the same merger and issued a fifty-seven page statement containing extensive discussion and references to economic analyses and other materials submitted by the parties and clear explanation and reasoning of the clearance decision.¹³⁴ This information could be useful in fostering a clear understanding of the law and in providing a platform for overview of the EU Commission's decisions.¹³⁵ Although the FTC has made substantial efforts to disclose the relevant information of this case, the

¹³² For an example of clearance summary statement issued by the Commission, see Case No COMP/M.6381 Google/Motorola Mobile (13/02/2012), available at http://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf, last visited on 04/12/2012, 14:52.

¹³³ See, '3.2.1 Concerns of transparency under the US merger control procedure' of this chapter.

¹³⁴ See, Case COMP/M.2706, *Carnival Corp. /P&O Princess*, (July 24, 2002), available at http://ec.europa.eu/competition/mergers/cases/decisions/m2706_en.pdf, last visited on 04/12/2012, 15:12.

¹³⁵ W.S. Grimes, 'Transparency in Federal Antitrust Enforcement', *supra note 9*, at 959.

deficiencies were still significant especially in relation to its economic analysis.¹³⁶

The Commission's decision prohibiting a merger or clearing it with commitment usually contains comprehensive and detailed analysis on the possible competition impact of the merger and the possible remedies that may address the impacts.¹³⁷ Under the US merger regime, if a merger case is settled by a consent decree, the Antitrust Division and the FTC are required to provide the public a statement containing analysis on the competitive impact of the proposed merger. However, it is argued that the enforcement agencies often disclose the analysis only of competitive issues that are addressed in the consent decree but fail to provide meaningful analysis of alternative remedies that were considered.¹³⁸ If a merger is prohibited, this decision will be made by the federal court and subject to judicial disclosure requirements.¹³⁹

It may be concluded that the EU merger regime paid more attention to the transparency of its enforcement procedure. However, the EU and US regimes have the following similarities. Firstly, both provide statistics on their enforcement activities during the investigation process. From these statistics, the public can at least evaluate the effectiveness of the merger policy's enforcement. The potential merging parties will also learn the possibility of being successfully cleared by the agencies. The agencies themselves will also

¹³⁶ See, '3.2.1 Concerns of transparency under the US merger control procedure' of this chapter.

¹³⁷ See, *supra* note 45.

¹³⁸ See, '3.2.1 Concerns of transparency under the US merger control procedure' of this chapter.

¹³⁹ The Antitrust Division has no authority to make a decision to block a merger. If it regards the merger as a high risk to the market and thus be blocked, it has to file the case and challenge the merging parties before federal court. The FTC may prohibit the merger by a preliminary injunction, which is obtained before the Federal court, based on an administrative complaint filed before the court.

have to pay attention to the consistency of their enforcement. Legal certainty and predictability will be generated even if only the statistics in the investigation process are disclosed. Secondly, both the EU and US disclose the prohibition decisions and decisions with remedies, although in different ways and to different extent. On the other hand, the main difference between the EU and US merger enforcement regimes is that the EU Commission provides a consistent and sufficient disclosure of its clearance decision in the form of a summary statement published in the Official Journal and the official website; while the US Antitrust Division and the FTC have not developed a consistent practice for disclosing merger cases which are cleared or dropped. The different attitude towards the cleared mergers in the two regimes may partly be due to their different caseload and administrative burdens. From fiscal years 2002 to 2011 there were in total 2995 mergers notified to the EU Commission, that is, 299.5 merger cases a year on average.¹⁴⁰ In the same period there was a total of 14,331 merger transactions reported under the HSR Act to the Antitrust Division and the FTC. Every year the two US merger control agencies deal with 1433.1 cases.¹⁴¹

4.3.2 What can be learned to improve the transparency of Chinese merger enforcement procedure

Improving transparency during the merger investigative process

The first problem in Chinese merger control's transparency is that there is little disclosure of information during the MOFCOM's investigative process. As noted above, both EU and US merger enforcement regimes shows that at least the statistics of investigative procedure are disclosed, providing a basis

¹⁴⁰ See, EU Merger Statistics, available at <http://ec.europa.eu/competition/mergers/statistics.pdf>, last visited on 11/12/2012, 21:31.

¹⁴¹ See, *supra* note 130 and 131.

for the public evaluation of the effectiveness of the merger policy's enforcement and also for practitioners in the market to obtain necessary legal certainty and predictability. To this end the MOFCOM might consider disclosing these statistics as the first step towards a transparent procedure. The disclosure might be made in its annual report. The statistics should at least include: 1. the number of notifications received; 2. the number of phase I investigations conducted; 3. the number of cases proceeds to the second phase investigation; 4. the number of cases cleared after the phase I investigation. If these statistics were disclosed, the public would be able to see the MOFCOM's merger enforcement activities. Potential merging parties and lawyers would also be able to predict the possibility of clearance. However, disclosure of these statistics is not enough. Firstly, disclosure is not prompt if annual reports are issued at the end of a year. Secondly, neither the public nor practitioners can see the investigative process merely from statistics. Without disclosure of the basic contain of investigated cases, they will not know which cases are more likely to be cleared and which are more likely to be challenged.

In order to provide transparency to Chinese merger investigation procedure at this early stage, the MOFCOM should offer: 1. prompt and regular disclosure of every merger case notified before the MOFCOM in a summarily way in the official journal¹⁴² and/or website;¹⁴³ 2. a prompt and regular publication of explanations of the decisions to clear or drop a merger after phase I investigation; 3. a prompt and regular disclosure of the information of cases' referral to the second phase investigation.

¹⁴² It shall be noted that the MOFCOM currently do not have an official journal to publish its decisions, notices and guidelines. The current practice of the MOFCOM is that it mainly publishes such information on its official website.

¹⁴³ Based on the experience from the EU, such statement should contain: 1. the name of the merging parties; 2. the names of the interested parties; 3. the nature of the concentration; 4. the economic sectors affected.

Improving transparency in the MOFCOM's decisions

The other problem is that the content of the decision made by the MOFCOM lacks necessary information. In relation to cleared mergers, the MOFCOM discloses the names of the parties (in Chinese) in a list on its official website. Although this is progress because the MOFCOM refused to disclose any information about its clearance decision before 16 November, 2012,¹⁴⁴ this name list can provide little meaningful information to the public and the potential merging parties about why and how these cases were cleared. No explanation of the clearance is provided, nor does any information about the merging party either.

The EU provides an example in disclosing such cleared mergers.¹⁴⁵ If the merger case is cleared after the second phase investigation, the Commission will publish a more detailed decision to explain why this merger should not be challenged. For example, in *KLM/Martinair*,¹⁴⁶ after the second phase investigation, the Commission issued a ninety-eight page decision to explain why it considered that this concentration would not significantly impede effective competition in the common market or in a substantial part of it and thus should be approved. Although the US does not disclose cleared mergers regularly, it sometimes explains clearance decisions especially when the

¹⁴⁴ See, the MOFCOM's notice on 16 November 2012, available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/201211/20121108437868.html?2551843205=705144026>, last visited on 05/12/2012, 15:12.

¹⁴⁵ If the merger case is cleared after phase I investigation, as examined in the EU section of this chapter, the Commission will publish a short statement containing the following information: 1. the name of the merging parties; 2. the nature of the transaction; 3. the relevant product and geographic markets; 4. the degree of overlap of the participating firms; and, 5. other salient facts that led the Commission to conclude that no challenge was necessary. For example, Case No. COMP/M.6381, *Google/Motorola Mobility*, *supra* note 132.

¹⁴⁶ Case No COMP/M.5141, *KLM/Martinair*, (December 17, 2008), available at http://ec.europa.eu/competition/mergers/cases/decisions/m5141_20081217_20682_en.pdf, last visited on 05/12/2012, 17:15.

investigation contains a second request. As do both the EU and US the MOFCOM should not only disclose the names of the parties to cleared mergers, but also provide meaningful information about cleared mergers especially where a second phase investigation is involved. If the level of disclosure under the EU merger regime is too high for China, at least the MOFCOM should be able to offer routine disclosure of the cleared cases involving second phase investigation,¹⁴⁷ details to include the nature of the transaction, a brief statement of the transaction's competitive impact, and the main reason for offering clearance.

Decisions made by the MOFCOM which prohibits a merger or clear it with conditions; the MOFCOM is obliged to publish timely.¹⁴⁸ However, as examined above, the decisions generally lack information about the definition of relevant market and competitive impact assessment. The MOFCOM cleared the merger between Panasonic and Sanyo with conditions on 30 October 2009.¹⁴⁹ This case was also cleared with conditions by the EU Commission on 29 September 2009¹⁵⁰ and the FTC on 24 November 2009¹⁵¹ respectively. *Panasonic/Sanyo* may provide an example to compare for the purpose of illustrating the deficiencies in the MOFCOM's decision with regard to information disclosure. It should be noted that the purpose of this comparison is not to discuss whether the MOFCOM had made the right decision or whether the remedies provided were appropriate; rather, it is to

¹⁴⁷ In fact, due to lack of disclosure of cleared cases under the Chinese merger enforcement regime, the author does not know if there is any merger been cleared after the MOFCOM's second phase investigation.

¹⁴⁸ Article 30 of the AML 2007.

¹⁴⁹ The Public Announcement of the MOFCOM, No.82, [2009], available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200910/20091006593175.html?2711934872=705144026>, last visited on 05/12/2012, 23:41.

¹⁵⁰ Case No COMP/M.5421, *Panasonic/Sanyo*, *supra* note 45.

¹⁵¹ FTC Order Sets Conditions for Panasonic's Acquisition of Sanyo, released on 24 November, 2009, available at <http://www.ftc.gov/opa/2009/11/sanyo.shtm>, last visited on 05/12/2012, 23:47.

see what information should be published (but failed to be disclosed) to justify the MOFCOM's decision and to provide necessary legal certainty and predictability to practitioners in China.

The EU Commission's decision in *Panasonic/Sanyo* is seventy-eight-pages' long. It can be divided into four parts. The first includes basic information of the case: the date of the notification received, the merging parties, the proposed operation between the merging parties and whether the Commission has jurisdiction.

The second part is the competitive assessment, which constitutes the main content of the decision. When examining the transaction's competitive impact, the Commission first of all defined "battery" and gave a detailed classification of different batteries. This classification provided a basic structure for the Commission's reasoning. There are seven main types of battery related to this transaction;¹⁵² the Commission analysed the relevant product and geographic markets, and the competitive impact in each of them. When defining the relevant product market, the Commission considered the following elements: 1. supply substitutability between the different sub-chemistries; 2. demand substitutability between the different sub-chemistries. When examining the relevant geographic market, the Commission firstly disclosed the parties' opinion and then give its own opinion based on its market investigation. The elements considered by the Commission when defining a geographic market include: 1. the place of the product produced; 2. customers' requirements in different regions; 3. whether the producer has a global pricing strategy; 4. the regions of customers' source; and, 5. the price difference between the different regions.

¹⁵² The classification is based on whether it is rechargeable, different chemistries and shape of the batteries. The seven main types are: Alkaline primary batteries, Zinc carbon primary batteries, Lithium primary batteries, NiCd rechargeable batteries, NiMH rechargeable batteries, Li-ion rechargeable batteries, and, Lithium rechargeable batteries.

When assessing the competitive impact of the transaction the Commission provided the following information based on its investigation: 1. market shares of the concerned parties; 2. whether Panasonic and Sanyo are close competitors in the relevant market; 3. other close competitors in the relevant markets; 4. the situation of the relevant market, e.g. whether the market is growing or not; and, 5. market entry barriers. The Commission also analysed the competitive impact of this transaction on other consumer electronic goods produced by Panasonic and Sanyo.¹⁵³ In light of the above examinations, the Commission reached the conclusions on whether the proposed transaction would have significant competitive impact on each types of battery relevant market and what possible competitive impact might be brought.

Thirdly, the Commission published the commitments proposed by the merging parties and its assessment of the commitments on whether they are able to remedy the serious doubt identified. When assessing the proposed remedies the Commission indicated that it firstly considers the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which these serious doubts arise; secondly, the most effective way to maintain effective competition is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties.¹⁵⁴ The final part is the conclusive decision of the Commission on whether to oppose notified operation based on all the above observations.

The FTC and the merging parties reached a consent decree. The FTC disclosed a series of information about its complaint and decision on its

¹⁵³ The consumer electronic goods include: digital still cameras, voice recorders, DVD player-recorders, home audio systems, flat-panel televisions, digital projectors, microwave ovens, air conditioners and camcorders.

¹⁵⁴ See, paras.213-214 of *Panasonic/Sanyo*, *supra* note 45.

website, including the FTC's complaint, the decision and order, and the analysis of the consent decree to aid public comment.

In the complaint the FTC firstly disclosed the name and addresses of the merging parties and stated its jurisdiction on this case. Then the FTC defined the relevant product market and geographic market without any explanations in this complaint. Next the FTC provided a brief but clear examination of the relevant markets' structure and entry conditions. It is noteworthy that the FTC used the Herfindahl-Hirschman Index (the HHI) to evaluate the concentration rate of the relevant market and concluded that the market concentration level far exceeded the thresholds set out in the Horizontal Merger Guidelines¹⁵⁵ and thus raised a presumption that the proposed acquisition would create or enhance market power. Finally the FTC concluded that competition might be significantly lessened by this transaction in three respects: 1. by eliminating actual, direct, and substantial competition between Respondents in the worldwide portable NiMH battery market; 2. by increasing the likelihood that Respondents would unilaterally exercise market power in the worldwide portable NiMH battery market; and, 3. by increasing the likelihood that US consumers would be forced to pay higher prices for portable NiMH batteries.¹⁵⁶ The FTC's complaint is a brief statement of its attitude to the case. It can tell the public the basic information of the merging parties, the relevant market and the FTC's opinions on the merger.

The FTC's decision and order contained detailed information on the remedies. It at first defined a series of terms mentioned in this decision.

¹⁵⁵ The latest version is available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>, last visited on 11/12/2012.

¹⁵⁶ See, The FTC's complaint, Docket No. C-4274, available at <http://www.ftc.gov/os/caselist/0910050/091124panasanyocmpt.pdf>, last visited on 07/12/2012, 16:03.

The FTC then regulated in detail the rights and obligations of the respondents, the divestiture party, the acquirer, the interim monitor and the trustees. It should be noted that this order contained no competitive impact analysis.

Analysis of this transaction's competitive impact lay mainly in the 'analysis of the agreement containing consent orders to aid public comment' (hereafter the analysis). The analysis was in three parts: 1. introduction of the transaction; 2. the relevant market and the competitive impact of the transaction; 3. the consent agreement. In the first part the analysis disclosed basic information about the transaction and the parties. The second part explained the relevant product market, the relevant product market and the competitive impact. The FTC defined the relevant product market as portable NiMH batteries and provided two reasons: 1. customers cannot switch to another type of rechargeable battery because the products were designed specifically to accommodate portable NiMH batteries; 2. even among customers who use NiMH batteries but are not locked into purchasing them, there is a strong preference for portable NiMH batteries for performance and cost reasons.¹⁵⁷ The FTC defined the geographic market as worldwide, providing that manufacturing of portable NiMH batteries is concentrated in Asia, and orders are shipped to customers throughout the world.¹⁵⁸ When analysing the competitive impact of the transaction the FTC cited three points: firstly, Panasonic and Sanyo are close competitors in the market of portable NiMH batteries; secondly, the merger would allow Panasonic to exercise market power unilaterally; and thirdly, the new competitors in the portable NiMH batteries are unlikely to bring sufficient competition to deter or counteract the anticompetitive effects of the

¹⁵⁷ See, Analysis of Agreement Containing Consent Orders to Aid Public Comment In the Matter of Panasonic Corporation and Sanyo Electric Co., Ltd, available at <http://www.ftc.gov/os/caselist/0910050/091124panasanyoanal.pdf>, last visited on 08/12/2012, 23:19.

¹⁵⁸ *ibid.*

proposed acquisition. The final part is the consent agreement which required Sanyo to divest its assets relating to the manufacture and sale of portable NiMH batteries to FDK Corporation.

The information disclosed by the FTC is much less than that by the EU Commission. It only provided a basic analysis of the relevant markets and competitive impact of this transaction. Although it did not explain the reasons based on which the decision was made, it gave a detailed explanation on the remedies.¹⁵⁹ Although varying in length and level of detail, the decisions in *Panasonic/Sanyo* made by the EU Commission and the FTC have the following similarities. Firstly, they defined the relevant product market in their decisions with explanations. Secondly, both agencies evaluated the competitive impact of this transaction from the following aspects: market shares of the merging parties; whether Panasonic and Sanyo are close competitors in the relevant market; the other major competitors in the relevant market; whether the relevant market was growing or not; and whether there were new competitors in the relevant market. Thirdly, both the EU Commission and the FTC disclosed detailed information on the remedies. The information included: 1. the original remedies provided by Panasonic and Sanyo; 2. the agencies' assessment of the remedies proposed by the merging parties; 3. a series of definitions of the terms used in the remedies;¹⁶⁰ 4. the reasons why the remedies could effectively address the competitive impact of this transaction; and, 5. detailed rights and obligations of the Divestment Business (the 'Respondents' in the context of the FTC's decision), the Purchaser (the 'Acquirer' in the context of the FTC's decision),

¹⁵⁹ As mentioned above, the FTC spent 26 page so explaining the proposed consent order. It defined 37 terms used in this order, set time-limits to the divestiture and provided detailed guidance on how to divest, the interim monitor, the trustee, the obligation of keeping confidentiality and the duty of notifying the FTC.

¹⁶⁰ For example, Affiliated Undertakings, Trustee, Divestment Businesses and Monitoring Trustee and so on.

the Divestiture Trustee and the Monitoring Trustee(the Interim Monitor in the context of the FTC's decision).

The MOFCOM's decision on *Panasonic/Sanyo* is three pages long and can also be divided into three parts. Part one provided summary information about the notification procedure, the content of the MOFCOM's investigation and how the MOFCOM conducted the investigation. There are two notable points in this part. Firstly, the MOFCOM indicated that the content of the investigation included: 1. the market shares of Panasonic and Sanyo in the relevant markets; 2. the degree of market concentration in the relevant market; 3. the influence of the concentration of business operators on market access and technological progress; 4. the influence of the concentration of business operators on the consumers and other business operators; and, 5. the influence of the concentration of business operators on the national economic development.¹⁶¹ However, the decision failed to cover every element in its competitive impact part. Secondly, the MOFCOM indicated that it investigated the opinions of the government, business and industrial associations and 39 competitors. The MOFCOM did to consult the consumers who might be directly affected by this merger and it failed to disclose any details and content of all these investigations.

In the second part the MOFCOM analysed the competitive impact of this transaction. It firstly classified the relevant product markets, without any explanation, as to: 1. rechargeable lithium coin batteries; 2. Ni-MH batteries for civil use; and, 3. automotive Ni-MH batteries. It then defined the relevant geographic market as worldwide, again without any explanation nor evidence. The MOFCOM briefly analysed the competitive impact of this transaction on each relevant product market. There are five elements used by the MOFCOM:

¹⁶¹ See, The Public Announcement of the MOFCOM, No.82, [2009], *supra* note 149; see also, Article 27 of the AML 2007.

1. market share; 2. the number of effective competitors after the transaction; 3. buyers' power; 4. market entry; and, 5. the degree of market concentration. All explanations were brief (in one or two sentences) and lacked statistics and reasoning.¹⁶² Moreover, the MOFCOM did not provide any analysis on other competitors except e Panasonic and Sanyo.¹⁶³

The last part was on the remedies. Again, the MOFCOM did not explain why these remedies would be effective to address the competitive concerns brought by the transaction in the decision. It can be seen that unlike the decisions of the EU and US, the MOFCOM's decision in *Panasonic/Sanyo* the MOFCOM failed to explain how the relevant markets were defined, which is the basis of the reasoning. The EU Commission provided a detailed classification of the different types of battery and gave a comprehensive description on each of the markets. The FTC although did not provide a detailed classification of batteries. It explained why the FTC regarded the portable NiMH batteries as the relevant product market.¹⁶⁴ The MOFCOM should in the first place provide sufficient evidence and reasoning to explain its definition of relevant product and geographic market. If the MOFCOM is incapable of providing a comprehensive classification of relevant products,¹⁶⁵ it at least should give basic but clear reasons to support its definition of the

¹⁶² It seems that the only statistics the MOFCOM relied on were on the market share. For example, the MOFCOM did not give any quantitative analysis on the degree of market concentration, although it claimed all three relevant markets were highly concentrated. Another example is that in the decision the MOFCOM indicated that the buyer power in the market of rechargeable lithium coin batteries cannot eliminate the negative effect brought by this merger. However, there is no further explanation of how the MOFCOM reached this conclusion.

¹⁶³ In this decision the MOFCOM's competitive concerns on the three relevant markets were partly based on the lack of effective competition between the merged company and other competitors in the relevant market. However, the MOFCOM provided no information on any competitors other than Panasonic and Sanyo.

¹⁶⁴ See, The FTC's complaint, *supra* note 156.

¹⁶⁵ Such incapability may be due to lack of experience, personnel and professionalism of the MOFCOM.

relevant market. For example, in *Panasonic/Sanyo*, the MOFCOM might have provided analysis on the supply substitutability and demand substitutability of the rechargeable lithium coin batteries when it defined it as the relevant product market. Secondly, when assessing the competitive impact the MOFCOM should provide more information to justify its conclusion. As clear from both the EU and US experience, the MOFCOM needs to disclose information and analyses on the following aspects instead of just relying on the merging parties' market share: 1. the market shares and ability of other major competitors; 2. whether the merging parties are close competitors and the reasons; 3. whether the market is growing and the evidence; 4. whether the relevant market is highly concentrated and the reasons;¹⁶⁶ and, 5. whether new competitors will enter the market and the reasons. Thirdly, it is insufficient for the MOFCOM to only publishing the remedies; it needs to explain why these remedies can effectively eliminate the anticompetitive effects brought by the transaction. Following both EU and US practice the MOFCOM might improve transparency in this regard in the following ways: 1. it should disclose the original remedies proposed by the merging parties; 2. it should provide assessment of and opinion on the original proposed remedies; 3. it should define the terms used in the remedies clearly, for example, the Divestment Business and the Purchaser; 4. it needs to explain why the remedies provided can effectively eliminate the harm to competition brought by the proposed merger; and, 5. although the MOFCOM has regulated the rights and obligations of Panasonic and Sanyo in a fairly detailed way, it failed to mention the rights and obligations of the Purchaser, the Divestiture Trustee and the Monitoring Trustee.

¹⁶⁶ When evaluating the degree of the market concentration the MOFCOM may use the HHI and the market shares of other competitors as evidence to support its conclusion instead of bringing the conclusion directly without any supportive statements.

Mergers which are prohibited or cleared with remedies by the MOFCOM are deemed important to competition and thus have significant guiding value to the public and the practitioners in the market. If the disclosure of such decisions is insufficient, the public and merging parties would be unaware of the MOFCOM's analytical framework and thus face the risk of legal uncertainty and unpredictability of the merger enforcement. On the other hand, the credibility of the MOFCOM's enforcement activity may also be affected.¹⁶⁷ If the MOFCOM can improve the quality of such decisions in the ways identified above, transparency might be significantly increased. This improvement would be both beneficial to practitioners in the market and the MOFCOM itself.

Further concerns at lack of transparency in Chinese merger enforcement procedure

The experience of the EU and US also illustrates some concerns of transparency under both regimes. In relation to the EU merger regime, the main concern is that the Commission's tripartite role under merger enforcement brings significant concerns at the transparency of EU merger enforcement.¹⁶⁸ Such concern is raised equally in China. Similar to the Commission, the MOFCOM also has exclusive authority of investigation, prosecution and decision-making. Ineffective judicial review in China worsens the situation.¹⁶⁹ In order to reduce political influence on the decisions the MOFCOM might consider increasing internal balance under current structure by establishing a hearing department to supervise the procedure of merger

¹⁶⁷ As stated by R. Evans: 'Short, vague decisions encourage speculation about protectionism.' See, R. Evans, 'Transparency is in Mofcom's Interests', *supra* note 120, at 20.

¹⁶⁸ See, '2.2 Institutional concerns of transparency of EU merger control procedure' of this chapter.

¹⁶⁹ For discussion on the ineffectiveness of judicial review under the AML 2007, please refer to '3.1.1 Lack of independent judiciary' of Chapter 1 of the thesis.

enforcement independently.¹⁷⁰ In addition, it is advisable for the MOFCOM to issue a series of notices and guidelines to explain its enforcement and general analytical framework in its merger assessment.¹⁷¹

The main concern of transparency faced by the US agencies is its cost.¹⁷² The first two sources of cost may also be faced by the MOFCOM, i.e. the administrative burden and the protection of confidentiality. In relation to the administrative burden of transparency, it is not significant under the Chinese merger enforcement regime. As examined above, the Commission annually dealt with an average of 299.5 notifications from 2002 to 2011, the two agencies under US merger enforcement regime received 1433.1 notifications (on average) annually in the same period. In China, from 1 August, 2008 to 30 September, 2012, the MOFCOM dealt with 474 merger cases in these four years and that is average of 118.5 cases a year.¹⁷³ This number amounts to 40% of the EU caseload and only 8% of the US. The cost of transparency in the Chinese current merger enforcement regime is insignificant due to the

¹⁷⁰ A detailed discussion of the role of the Hearing Department under the AML 2007's enforcement will be provided in Chapter 4 of this thesis.

¹⁷¹ This experience is also proved effective under the US merger enforcement regime. Although the Antitrust Division and the FTC fail to disclose as much information of the decisions as the EU Commission does, the two agencies have issued written guidelines that remain a good statement of the analytical framework used to review mergers. See, J.M. Nannes, 'Transparency in Federal Antitrust Enforcement Decisions: A Reaction to Professor Grimes', *supra note 110*, at 1018.

¹⁷² See, '3.2.2 Arguments against the concerns for transparency under US merger control procedure' of this chapter. The four points against transparency in US merger enforcement are: 1. the administrative burden; 2. the protection of confidentiality; 3. evidentiary difficulties which might make the Antitrust Division vulnerable to counsel's planning transactions that are designed to frustrate their successfully enjoining them; 4. there are cases where the agencies decided not to pursue not because they are lawful or harmless but for other reasons such as lack of resources. The third reason will not be met by the MOFCOM because of different institutional design and enforcement mechanisms. The fourth concern is caused by administrative overload and scarce resources. Thus in essence it is the concern of the cost of transparency.

¹⁷³ The statistics are available at the official website of the MOFCOM's Antimonopoly Bureau: <http://fldj.mofcom.gov.cn/>, last visited on 09/12/2012, 23:55.

relatively low caseload. In relation to the concern for the protection of confidentiality, it is undeniable that an increase in transparency in Chinese merger would threaten business confidentiality. For example, if more information were disclosed to the public in the MOFCOM's decision, the merging parties and the relevant third parties would not be willing to cooperate with the MOFCOM for fear that the information submitted would be released. However, this concern can be allayed by the approach provided by the EU: the Commission only provides the public a non-confidential version of the decision. As examined above, before every stage of disclosure in the procedure the Commission will ask the notifying parties and third parties to submit a non-confidential version and justify their opinion.¹⁷⁴ Thus the MOFCOM might avoid the risk of disclosing confidential information by adopting an approach similar to that of the EU.

¹⁷⁴ See, '2.1.2 Transparency in the EU merger control enforcement procedure' of this chapter.

Chapter 3 Allocation of Public Enforcement Powers in China's Antimonopoly Law between the Central and Provincial Administrative Enforcers

1. Introduction

This chapter seeks to answer the question of how to allocate the public enforcement power of the AML 2007 between the central governmental administrative enforcers (hereafter the CAEs) and provincial governmental administrative enforcers (hereafter the PAEs).¹ The CAEs include MOFCOM, SAIC and the NDRC, while the PAEs are the branches of MOFCOM, SAIC and the NDRC at the provincial level.³ Article 10 of the AML 2007 stipulates that:

¹ The 'provincial governments' discussed in this chapter include the governments of Provinces, Autonomous Regions and Municipalities directly under the Central Government. They occupy the same position in the political hierarchy under China's political system. See, Chinese Regional Administrative System, available (in Chinese) at *Xin Hua Net*, http://news.xinhuanet.com/ziliao/2003-08/22/content_1039416_5.htm, last visited on 28/03/2012, 16:36 ; For a detailed and comprehensive examination of the Chinese political structure and system, please refer to: N. Wei & A.M. Wu, '*Modern Chinese Government and Administration*[当代中国政府与行政, *dangdai zhongguozhengfu yu xingzheng*]' (2008) Renmin University of China Press.

² Because the implementation of the prohibition of the anticompetitive agreement and abuse of dominant position is separated from merger assessment under EU competition law and the US antitrust law regimes, discussion of the enforcement powers allocation between CAEs and the PAEs in this chapter will be in line with this separation. The AML 2007 enforcement power's allocation among the CAEs and the PAEs refers to the implementation of the prohibition of the anticompetitive agreement and abuse of dominant position. Merger assessment will be discussed separately.

³ In China, the branches of the CAEs at the provincial level are under direct leadership of the MOFCOM the SAIC and the NDRC respectively. The branches of the CAEs are at the same time subject to the provincial government. See, Article 66 of Organic Law of the Local People's Congress and Local People's Governments of the People's Republic of China, passed by the 5th NPC, the second Conference on 1st July, 1979, latest amended on 27th October, 2004. See

The MOFOM, the SAIC and the NDRC *may, when needed*, authorise their branches at provincial governmental level to enforce the Law.

This article ensures that the public enforcement authorities of the AML 2007 can be devolved from the CAEs to the PAEs. However, this broad statement is insufficient to determine how to allocate the enforcement powers between the CAEs and the PAEs; it merely raises a question: there is no further explanation of the words 'when needed'.

Article 10 leaves huge discretion to MOFCOM, SAIC and the NDRC in determining whether PAEs will have powers of enforcement under the AML 2007. The absence of clear guidelines, cases and procedure to address this problem not only increases the Law's uncertainty, inconsistency and unpredictability during enforcement but also causes inefficient case allocation between CAEs and PAEs.

The concerns of uncertainty, inconsistency and unpredictability are immediate for practitioners in China.⁴ They may have doubts about whether the AML 2007 can be enforced consistently by both CAEs and PAEs. For instance, if an undertaking's anticompetitive conduct has been addressed by the SAIC, it could not predict whether the same conduct would be

also, more specifically for the SAIC, Article 8 of the Interim Provisions of Industrial and Commercial Administration, issued by the Order of the SAIC, No.45, on 19 December, 1995, amended by the Order of the SAIC, No. 63, on 17, December, 1996. There are also branches of the CAEs at the city and county levels which are below the provincial level. However, since it is unclear whether the branches on the city and county levels have authority to enforce the AML 2007, this chapter will only focus on the relationship between the CAEs and their branches at the provincial level. For details of the Chinese administrative system and hierarchy please refer to N. Wei & A.M. Wu, *ibid*.

⁴ As Thomas Jones (a partner in Allen & Overy) states '(foreign) investors seek consistency and guidance in the AML 2007's implementation. In addition, national security review policies must be specific and authorities should establish detailed implementation plans in the near future.' See, Z.X. Huo, 'A Tiger without Teeth, The Antitrust Law of the People's Republic of China', (2008) 10 *Asian-Pacific Law & Policy Journal*, 32-60, at 57.

investigated and addressed again by the PAEs, because there is no explanation as to the conditions in which the SAIC will not give the provincial government the power of enforcing AML 2007. Or, in the field of merger, a business may be uncertain whether the merger will be re-examined by a PAE after it reached consent with MOFCOM.⁵ The concern of inefficient case allocation is also significant. With multiple antitrust enforcers under the regime, an inevitable question to be faced is how to allocate cases in the most efficient way between the multiple enforcers. The Commission regards the efficient way as the case is allocated to a single 'well placed authority' according to the link between the geographical market in question and the territory of the competition authority involved.⁶ Since the AML 2007 enables both CAEs and PAEs to enforce it, the question of how to determine the most efficient or well-placed authority in individual case should be answered.

To this end, the aim of this chapter is to provide a discussion of the AML 2007's allocation of public enforcement powers between CAEs and PAEs. In particular it seeks answers to the following three questions: 1. whether the AML 2007 should be directly applicable by the PAEs; 2. under what conditions PAEs may enforce the AML 2007, i.e. how to define the word 'when needed' in Article 10 of the AML 2007; 3. how to guarantee a consistent, predictable and harmonious public enforcement of the AML 2007 between the CAEs and the PAEs.

In order to answer these questions we shall examine the experience of the public enforcement of EU competition law and US antitrust law. The EU

⁵ In fact this concern is real in practice in the US. See, *California v. American Stores Co.*, 495 U.S. 271 (1990). In this case the State Attorney General of California filed a suit under Section 7 of the Clayton Act, Section 1 of the Sherman Act and California's state competition Act, upon the approved merger between America Stores and Luck Stores Inc., by the FTC.

⁶ See, *The Commission Notice on Cooperation within the Network of Competition Authorities*, [2004], OJ C101/43, para.5-15.

competition law's modernisation process from a centralised to the decentralised enforcement mechanism might provide a chance to evaluate both the centralised and the decentralised mechanisms between the Commission and the NCAs and national courts. Such an evaluation could provide useful experience for discussing the relationship between the CAEs and the PAEs under the AML 2007. In addition, the European Competition Network (hereafter, the ECN) may provide an approach for China through which effective case allocation and cooperation between the CAEs and the PAEs can be established. On the other hand, US antitrust law, with its long tradition of federalism,⁷ may provide plenty of experience on the questions such as where the boundary lies between the enforcement of the federal antitrust Acts and the states' antitrust Acts, how to enforce the federal antitrust law consistently and harmoniously through the offices of the FTC, the DOJ and the State Attorneys General.⁸

This chapter is divided into three parts. First of all we shall examine the decentralisation⁹ and multi-level governance¹⁰ of Articles 101 and 102

⁷ For discussion of the history of the United States' antitrust federalism see T.M. Wilson (edited by), *Antitrust Federalism: the Role of State Law*, (1988) American Bar Association; for a more general introduction to federalism, please refer to: L.N. Gerston, *American federalism: a concise introduction*, (2007) M.E. Sharpe Inc; see also, A. Stepan, 'Federalism and Democracy: Beyond the U.S. Model', (1999) 10(4) *Journal of Democracy*, 19-34.

⁸ The states proclaimed their roles as the 'de facto third national antitrust enforcement agency.' See, D.L. Flexner & M.A. Racanelli, 'State and Federal Antitrust Enforcement in the United States: Collision or Harmony?' (1993-1994) 9 *Connecticut Journal of International Law*, 501-534.

⁹ The term 'decentralisation' in this chapter refers to the devolution of powers concerning the enforcement of Article 101 TFEU to the national competition authorities and the national courts.

¹⁰ The term 'multi-level governance' in this chapter strictly refers to the relationship between the Commission and the national competition authorities and the national courts in Member States under the public enforcement of Article 101, Article 102 TFEU and Council Regulation No.139/2004(Official Journal L 24, 29.01.2004, p.1-22). For a more comprehensive and detailed explanation of EU's multi-level governance, please refer to L. Hooghe and G. Marks, *Multi-Level Governance and European Integration*, (2001) Rowman & Littlefield Publishers;

TFEU's enforcement. This examination will exclude competition law in the different Member States. The aim is to find what can be learned from the experience of EU competition law's decentralisation and its case allocation, cooperation and coordination mechanisms. The second part will examine the state and federal antitrust enforcement in the United States. Again, this examination will exclude states' competition Acts but will focus on the public enforcement of federal antitrust Acts. The aim is to find what can be learned by AML 2007's public enforcers from the relationship between the federal and state government under the public enforcement of federal antitrust Acts. The last part of this chapter will discuss whether the experience found in the EU and US in the above two parts is applicable and effective to address the question posed at the beginning: how to allocate public enforcement authorities between CAEs and PAEs under Chinese AML 2007.

2. Decentralisation and multi-level governance under EU competition law's public Enforcement

2.1 From centralisation to decentralisation

2.1.1 An overview

On December 16th 2002 the Council abandoned the 40 year old Regulation 17/62¹¹ and adopted Regulation 1/2003 (hereafter, Reg. 1/2003),¹² which establishes a new European competition enforcement regime based on the

see also, N. Nugent (edited by), *At the Heart of the Union: Studies of the European Commission*, 2nd edition, (2000) Macmillian Press Ltd.

¹¹ EEC Council: Regulation 17/62, Official Journal 013, 21/02/1962 P.0204–0211.

¹² Council Regulation (EC) No 1/2003 of 16 December 2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l001/10012003010_4en_00010025.pdf, last visited on 29/03/2012, 15:36.

joint enforcement of the EU competition rules by the Commission and national authorities.¹³ In order for this new enforcement regime to function efficiently the Commission decided to complement Reg. 1/2003 with a package of six accompanying notices and a Commission implementing regulation, the so-called 'Modernisation Package.'¹⁴ Two significant reforms were applied by the modernisation: the abolition of the pre-notification system established by Regulation 17/62¹⁵ and the decentralisation of Article 101(3) TFEU (Article 85(3))'s direct enforcement authority to NCAs and national courts which had previously been centralised in the hands of the Commission under Regulation 17/62.¹⁶

As a result of broad interpretation of Article 101(1) TFEU a large number of agreements between undertakings have in the past been deemed to fall within the prohibition of Article 101(1) TFEU and have therefore been

¹³ P. Lowe, 'Current Issues of E.U. Competition Law: The New Competition Enforcement Regime', (2004) 24 *Northwestern Journal of International Law & Business*, 567-584.

¹⁴ The six notices are: Commission Regulation on proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, 2003 O.J. (C 243) 3; Commission Notice on cooperation within the Network of Competition Authorities, 2003 O.J. (C 243) 11; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2003 O.J. (C 243) 20; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 2003 O.J. (C 243) 30; Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases, 2003 O.J. (C 243) 42; Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 2003 O.J. (C 243) 45; Notice - Communication from the Commission Guidelines on the application of Article 81(3) of the Treaty, 2003 O.J. (C 243) 62.

¹⁵ In accordance with Article 4 of Regulation 17 agreements, decisions and concerted practices of the kind described in Article 85 (1) of the Treaty (i.e. Article 101(1) TFEU) which come into existence after the entry into force of this Regulation and in respect of which the parties seek application of Article 85 (3) (i.e. Article 101(3) TFEU) must be notified to the Commission. Until they have been notified no decision on application of Article 85 (3) may be taken.

¹⁶ See, para.12 of the White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, European Commission, COM (99) 101 Final (Apr. 1999); O.J. C 132/1 (1999) (hereinafter White Paper).

automatically ruled null and void.¹⁷ In seeking exemption the agreements were subject to block exemption regulation¹⁸, or they had to be notified to the Commission under Article 101(3) TFEU.¹⁹ The Commission's resources were absorbed by examination of notifications and requests for exemption instead of being devoted to the investigation of complaints and the launching and pursuit of *ex officio* procedures.²⁰ The White Paper also claimed that the notification system and the Commission's monopoly of exemption under Article 101(3) TFEU resulted in undertakings' systematically notifying their restrictive practices to the Commission which, with limited administrative resources, was very soon faced with the impossibility of dealing by formal decision with the thousands of cases submitted.²¹ Thus there were two aims of the modernisation: firstly, to maintain and, where possible, improve the effectiveness of the enforcement of the EU competition rules in an enlarged European Union;²² secondly, to enable the Commission to focus on the most serious anticompetitive infringements.²³

The concerns that the reform would possibly bring or have brought and whether the modernisation can achieve the proposed goals have been widely

¹⁷ See, J.S. Venit, 'Brave New World: The Modernisation and Decentralisation of Enforcement under Articles 81 and 82 of the EC Treaty', (2003) 40 *Common Market Law Review*, 545-580.

¹⁸ On 2 March, 1965, in order to relieve the Commission from the large number of notifications pursuant to Regulation 17/62, the Council approved Regulation No. 19/65(OJ 36, 6.3.1965, p. 533-535) enabling the Commission to declare by way of regulation that Article 101(1) TFEU does not apply to certain categories of agreements. Agreements which met the criteria of established by the Commission's block exemption are automatically exempted from Article 101(1) TFEU without a notification's being required.

¹⁹ See, Article 4 of the Regulation 17/62.

²⁰ See, C. D. Ehlermann, 'The Modernisation of EC Antitrust Policy, a Legal and Cultural Revolution', (2000) 37(3) *Common Market Law Review*, 537-590.

²¹ Para. 24, The White Paper.

²² See, P. Lowe, 'Current Issues of E.U. Competition Law: The New Competition Enforcement Regime', *supra* note 13, at 568.

²³ See, para 13, the White Paper; see also, the Third Recital of Reg. 1/2003.

discussed.²⁴ This section does not seek to repeat the discussion. Rather it will only focus on the advantages and disadvantages of the centralised and decentralised enforcement mechanisms under EU competition law.

2.1.2 The reasons for and concerns of the EU's centralised enforcement mechanism

A centralised enforcement mechanism of EU competition law in this chapter specifically refers to the system established by Regulation 17/62 under which the Commission monopolised the authority of issuing individual exemption under Article 101(3) TFEU. There are two cornerstones of the centralised mechanism: the notification system and the Commission's exclusive authority to enforce exemption under Article 101(3) TFEU. The White Paper claimed that the centralised mechanism which existed for 40 years proved necessary and effective for the establishment of a culture of competition' in Europe.²⁵ In this section we shall examine the reasons for and concerns at the centralised mechanism from the economic and legal perspectives, in order to see whether the White Paper's claim is justified and what can be learned from this centralised mechanism by China's AML 2007.

²⁴ Some commentators and officials are confident about the modernisation reform. See for example, P. Lowe, 'Current Issues of E.U. Competition Law: The New Competition Enforcement Regime', *supra* note 13; M. Monti, 'The Modernisation of EC Antitrust Policy', *Opening Speech at the Annual EU Competition Law and Policy Workshops* (2000); J.S. Venit, 'Brave New World: The Modernisation and Decentralisation of Enforcement under Articles 81 and 82 of the EC Treaty', *supra* note 17. However, other commentators pointed out various concerns that may be brought by the modernisation. For example, A. Riley argued that the decentralisation in the modernisation process would strengthen the Commission's position in the EU and have a *de facto* centralised effect. See, A. Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part One: Regulation 1 and the Notification Burden', (2003) 24(11) *European Competition Law Review*, 604-615; A. Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part Two: Between the Idea and the Reality: Decentralisation under Regulation 1', (2003) 24(12) *European Competition Law Review*, 657-672.

²⁵ See, para. 4 of the White Paper.

The reasons for applying the centralised mechanism

The main reasons for applying the centralised mechanism in the EU were firstly to prevent trade protectionism between Member States; secondly to guarantee the consistent implementation of Articles 101 and 102 TFEU in Member States.²⁶ The notification system and the Commission's exclusive authority to grant exemption under Article 101(3) TFEU provided the Commission with a large amount of information and allowed it to develop a coherent implementation strategy for Article 101(3) TFEU. It also provided undertakings with legal certainty. This was particularly important in the period immediately following the adoption of EU competition law as the precise contours of the rules were not completely clear.²⁷ The reasons can be

²⁶ See, C.D. Ehlermann, 'The Contribution of EC Competition Policy to the Single Market' (1992) 29(2) *Common Market Law Review*, 257-282; see also, G. Tesauro, 'Some Reflections on the Commission's White Paper on the Modernisation of EC Antitrust Policy', in C. D. Ehlermann and I. Atanasiu (edited by), *European Competition Law Annual 2000*, (2001) Hart Publishing; at 259-270.

²⁷ D. Geradin, 'Competition between Rules and Rules of Competition: A legal and economic analysis of the proposed modernisation of the enforcement of EC competition law', (2002) 9 *Columbia Journal of European Law*, 1-28.

explained from an economic point of view:²⁸ the prevention of externalities, transaction cost savings and, perhaps, prevention of a race to the bottom.²⁹

Externalities can be typically illustrated by differing environmental law in different nations. It also occurs in competition law.³⁰ A typical example is that under the EU merger regime the costs of market power to foreign customers will be given less weight than the rents of market power to domestic interests. An excessively national focus in the control of such mergers may thus lead to distorted judgments.³¹ Such externalities may be inspired by a Member State's national interests. Unlike the Commission, national enforcement bodies will systematically focus on the local effects of a given transaction, instead of looking at the broader, EU-wide picture.³² Hence transactions with externalities should be supervised by supranational antitrust authorities to prevent a bias in favour of national interests. To this

²⁸ The foundation of the following economic views is the concept of regulatory competition, which can be traced to Tiebout's 1956 article arguing that a decentralised governmental system, with horizontally arrayed jurisdictions competing to attract residents on the basis of differing tax and benefit structures, produces efficient outcomes. Laws and regulations are regarded as 'goods' or 'services' in the market, i.e. goods and services produced by public authorities for which people are willing to pay taxes. Governments are suppliers of legal structures and products and therefore these actors could and should be disciplined by market forces and competition rules. So competition pressure would force governments to produce their regulatory products at competitive 'prices'. See, C. M. Tiebout, 'A Pure Theory of Local Expenditures', (1956) 64(5) *Journal of Political Economy*, 416-424; see also, F.H. Easterbrook, 'Antitrust and the Economics of Federalism' (1983) 26(1) *Journal of Law and Economics*, 23-50.

²⁹ See, D. Geradin, 'Competition between Rules and Rules of Competition', *supra note 27*, at 12; R. Van den Bergh, 'Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy', (1996) 16 *International Review of Law and Economics*, 363-383; E.M. Fox, 'Antitrust Law on a Global Scale: Races Up, Down, and Sideways', in D.C. Esty & D. Geradin (edited by), *Regulatory Competition and Economic Integration-Comparative Perspectives*, (2001) Oxford University Press, at 348-363;

³⁰ R. Van den Bergh, *ibid.*

³¹ See, D.J. Neven, R. Nuttall & P. Seabright, *Merger in Daylight: The Economics and Politics of European Merger Control*, (1993) Centre for Economic Policy Research, at 196.

³² See, P.C. Mavroidis & D.J. Neven, 'The White Paper: A Whiter Shade of Pale of Interest and Interests', *European Competition Law Annual 2000*, 207-222, at 214.

end centralised supervision will mitigate judgments biased in favour of national interests³³ and prevent trade protectionism between nations.

Transaction cost savings is another result brought by consistent enforcement of EU law.³⁴ In technically complicated or analysis-intensive regulatory fields such as the EU competition law enforcement regime, economies of scale can be realised by entrusting regulatory duties to a centralised authority³⁵. In practice economies of scale may bring transaction cost savings which may benefit practitioners in the market by the increase in legal certainty. Firstly, as the White Paper recalls, the notification system set out by Regulation 17/62 sought to establish the conditions for providing business with adequate legal certainty.³⁶ All the undertakings seeking exemption under Article 101(3) TFEU must bring the agreement before the Commission, the only body which is able to apply exemption. In fact most of the undertakings were not seeking exemption, but to obtain legal certainty for their agreements before they implemented them.³⁷ The abolition of this *ex ante* safeguard for undertakings would decrease legal certainty.³⁸ Secondly, the Commission's exclusive role in applying Article 101(3) TFEU

³³ See, R. Van den Bergh, 'Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy', *supra* note 29, at 372, 373.

³⁴ *Ibid*, at 374.

³⁵ See, D. Geradin, 'Competition between Rules and Rules of Competition: A legal and economic analysis of the proposed modernisation of the enforcement of EC competition law', *supra* note 27, at 6.

³⁶ See, White Paper, paras. 16-17.

³⁷ See, M. Siragusa, 'A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules', (1999) 23(4) *Fordham International Law Journal*, 1089-1127, at 1096.

³⁸ However, on the contrary, some commentators argue that the abolishment of notification system will increase legal certainty because it would be no longer possible to use the nullity sanction of Article 101(2) TFEU as a tactical weapon for competition law litigation. See for example, S. Bishop, 'Modernisation of the Rules Implementing Article 81 and 82', *European Competition Law Annual 2000*, at 57-69. This argument will be discussed in more detail in the next section.

(rather than being applied by the Commission plus 27 Member States' NCAs and national courts) may maintain the consistency and predictability of enforcement and reduce the search costs for firms and consumers. Although EU competition law is the same in the literal sense, Member States may have different interpretations and procedures to enforce it.³⁹ For example, inconsistency generates information costs as firms and their advisers have to keep track of a variety of guidelines to enforcing EU competition law.⁴⁰ These transaction cost savings may be very important for firms that are active in interstate commerce.⁴¹ The centralised enforcement mechanism can provide a more stable and predictable jurisprudence⁴² and thus save on transaction costs.

The third positive effect under the centralised mechanism is *prevention of the race to the bottom*.⁴³ To avoid perceived competitive harm, states may

³⁹ This raises the issue of whether national procedural rules should be harmonized on an EU-wide basis. On this issue see S. Kon, 'The Commission's White Paper on Modernization: The Need for Procedural Harmonization', in B.E. Hawk (edited by): *Annual Proceedings of the Fordham Corporate Law Institute on International Antitrust Law and Policy*, (2000) Juris Publishing, Inc., at 233.

⁴⁰ See, D. Geradin, 'Competition between Rules and Rules of Competition: A legal and economic analysis of the proposed modernisation of the enforcement of EC competition law', *supra note 27*, at 23.

⁴¹ See, R. Van den Bergh, 'Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy', *supra note 29*, at 374.

⁴² See, S.R. Ackerman, *Rethinking the Progressive Agenda*, (1992) Free Press; see also, M. Siragusa, 'A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules', *supra note 37*. However, under the EU competition law regime, whether the centralised mechanism can provide more legal certainty or predictability than the decentralised mechanism is still uncertain. See, G. Amato & C.D. Ehlermann (edited by), *EC Competition Law-A Critical Assessment*, (2007) Hart Publishing, at 645-646. This issue will be discussed in the following section.

⁴³ The 'race to the bottom' theory, which was initially developed in the context of US federalism, builds on the logic of a prisoner's dilemma. For general reference, see, W.L. Caryt, 'Federalism and Corporate Law: Reflections Upon Delaware', (1974) 83(4) *Yale Law Journal*, 663-705; R. L. Revesz, 'Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation', (1992) 67 *New York University Law Review*, 1210-1255, at 1217-1218.

engage in strategic behaviour and adopt lower standards than they would have chosen in the absence of economic competition.⁴⁴ However, this behaviour may not fit the EU competition law regime if all EU Member States applying the same Article 101 and 102 TFEU, which is the situation discussed here. With the same substantive law Member States are not able to introduce controversial standards or regulations which are more attractive to practitioners in the market.⁴⁵ However, races to the bottom can take place at the enforcement level: weak enforcement of Article 101 and 102 TFEU in some Member States could, at least in theory, incline enforcement agencies in other Member States to relax their own enforcement. This concern does not arise where the Commission is the sole enforcer of Article 101 and 102 TFEU. For example, since agreements caught by Article 101(1) TFEU can only be exempted by the Commission, Member States would have no authority to enforce the exemption and thus there is no chance for 'race to the bottom'. However, when the Commission proposed harmonisation of enforcement of Article 101 and 102 TFEU in a decentralised mechanism, it referred to the need to prevent inequality of competitive conditions across Member States⁴⁶

Concerns of the EU centralised mechanism

The main concern of the EU centralised mechanism is quite practical. As claimed in the White Paper and Reg.1/2003 this centralised mechanism created an immense administrative overload.⁴⁷ The Commission received hundreds of notifications every year but it only granted a formal decision on a

⁴⁴ Ibid.

⁴⁵ However, it should be noted that in the absence of centralised decision-making and clarity in the application of the law, there can be substantial scope for differing interpretations as to the obligations imposed by the substantive provisions.

⁴⁶ See, The White Paper, para. 101. This issue will be discussed in the later section.

⁴⁷ See, para. 24, Ibid; see also, the Third Recital of Regulation 1/2003.

very small percentage of the notifications that it received.⁴⁸ Especially in an enlarged EU⁴⁹ the Commission's limited resources proved increasingly inadequate to the task. Although the Commission adopted a number of measures to reduce notifications and to process notifications more quickly, the effect was limited.⁵⁰ With the help of the measures aiming to reduce notifications such as block exemption and informal comfort letters⁵¹ formal exemption decisions remained extremely rare. In the years preceding 2000, the average number of such decisions did not exceed five per year.⁵² The Commission also left many cases unsettled.⁵³ DG Comp was never able to eliminate the backlog that built up since the first wave of notifications.⁵⁴ The immediate result of the Commission's lack of response or delay was that a large number of agreements, decisions or concerted practices, regardless of their legality, remained pending and waiting for exemption from the Commission.

⁴⁸ For example, in 2002, the Commission closed 363 cases, only 33 cases of which were dealt with by formal decisions (about 9%). The statistics are available in the *XXXIInd Report on Competition Policy 2002*, SEC (2003) 467 FINAL.

⁴⁹ The number of the Member States of the EU has grown from 6 Founding Members in 1951 to 27 Member States in 2007.

⁵⁰ See, The White Paper, paras. 26-33; see also, I. Forrester, 'Modernization of EC Competition Law', (1999) 23(4) *Fordham International Law Journal*, 1028-1088.

⁵¹ The comfort letters, are signed by a director of DG Comp, inform undertakings that, according to the information in the Commission's possession, the notified agreement either did not meet the conditions for application of Article 101(1) TFEU (negative clearance letter) or qualified for exemption (exemption letter) under Article 101(3) TFEU. See, para. 34, *ibid*.

⁵² See, C.D. Ehlermann, 'The Modernisation of EC Antitrust Policy, a Legal and Cultural Revolution', *supra note 20*, at 544. I. Forrester also concluded that from the adoption of Regulation 17/62 in 1962 to 1999, the total number of formal decisions based on notification is just 222. See, I. Forrester, 'Modernization of EC Competition Law', *supra note 50*, at 1032.

⁵³ In accordance with the *Commission's Annual Report on Competition Policy 1998-2002*, during the period the number of pending cases reached an average of 959.4 each year, while the number of closed cases was only 460.8 each year averagely. Available at http://ec.europa.eu/competition/publications/annual_report/index.html, last visited on 06/04/2012, 16:38.

⁵⁴ See, C. D. Ehlermann, 'Modernization of EC Competition Law', *supra note 51*, at 544.

The other consequence of the centralised mechanism is that the undertakings concerned could bring proceedings on the national level to a halt by lodging a notification with the Commission.⁵⁵ When undertakings initiated national proceedings defendants were still able to notify their restrictive practices to the Commission in order to thwart the actions of the body to which the matter had been referred.⁵⁶ As soon as the Commission initiated procedures the competition authorities automatically lost their jurisdiction. The national courts of Member States could continue their proceedings but often stayed them until the Commission made a decision.⁵⁷ The Commission's role under the centralised mechanism proved a bottleneck rather than a promoter of the implementation of EU competition law at the national level.

2.1.3 The reasons for and concerns regarding the EU's decentralised enforcement mechanism

The "EU decentralised mechanism" means the enforcement system established by Reg.1/2003 and the six affiliated guidelines under which the *ex ante* notification system is abolished and exemption under Article 101(3) TFEU can be directly applicable by the NCAs and national courts of the Member States. Without the notification system undertakings no longer need *ex ante* to log the agreements before the Commission. Nor does the Commission's monopoly of granting exemption under Article 101(3) TFEU persist. Undertakings may seek exemption before NCAs or national courts in 27 Member States. Decentralisation may be able to overcome the concerns of

⁵⁵ See, M. Todino, 'Modernisation from the perspective of national competition authorities: impact of the reform on decentralised application of EC competition law', (2000) 21(8) *European Competition Law Review*, 348-358.

⁵⁶ See, The White Paper, para. 39

⁵⁷ Ibid.

the previous centralised mechanism; however, it may also reduce consistency and legal certainty of EU competition law enforcement.

The reasons for applying the decentralised mechanism

The application of the decentralised mechanism is to overcome the concerns brought by the centralised mechanism. The first concern is the Commission's inability to deal with the caseload created by the centralised mechanism. The second is that the notification system blocked EU competition law enforcement before NCAs and courts in Member States. According to the official statistics of the Commission the administrative overload is significantly reduced: the number of new antitrust cases received by the Commission was 509 in 1998; the number had dropped to 262 in 2003; the number of cases pending also dropped from 1204 in 1998 to 760 in 2003.⁵⁸ Hence, the decentralisation of the application of the EU competition law and the abolition of the notification system will certainly enable the Commission to focus on detecting and punishing the most serious infringements.⁵⁹

Some commentators argue that the decentralised mechanism may increase legal certainty for companies.⁶⁰ The abolition of the *ex ante* notification system and the Commission's exemption monopoly make it impossible for undertakings to use the nullity sanction of Article 101(2) TFEU as a tactical weapon to suspend competition law litigation in national courts.⁶¹ Under the new decentralised system the NCAs and national courts obtained authority to enforce Article 101 TFEU towards agreements so that firms are no longer held

⁵⁸ See, *XXXIIIrd Report on Competition Policy 2003*, (Brussels, Luxembourg, 2004), at 62; available at http://ec.europa.eu/competition/publications/annual_report/2003/en.pdf, last visited on 08/04/2012, 16:49.

⁵⁹ See, G. Amato & C.D. Ehlermann (edited by), *EC Competition Law-A Critical Assessment*, *supra* note 42, at 644.

⁶⁰ See, S.R. Ackerman, *Rethinking the Progressive Agenda*, *supra* note 43.

⁶¹ See, S. Bishop, *Modernisation of the Rules Implementing Article 81 and 82*, *supra* note 39.

hostage to the split between Article 101(1) and Article 101(3) TFEU.⁶² The other reason for the centralised system's resulting in reduced legal certainty concerns the Commission's inability to deal with administrative workload. Agreements with no or little effect on competition which would almost certainly be eligible for exemption under Article 101(3) TFEU were illegal and thus automatically null or void, unless and until they were notified and declared legal by the Commission, which was unable to do so in a reasonable period of time.⁶³ The effect was to 'alter the content of agreements, upset the bargain struck by agreements and undermine the incentives to enter arrangements in the first place.'⁶⁴

Apart from the above, the economic view again provides general grounds in favour of decentralisation.⁶⁵ Firstly, a decentralised mechanism may increase *regulatory competition*; secondly, decentralisation may prevent or improve *informational asymmetries*; thirdly, decentralisation may provide a chance for *experimentation*.

As mentioned above,⁶⁶ if we regard the Commission and NCAs as the suppliers of EU competition law, the practitioners in the market are consumers. According to competition theory, if there are more competitors in the market, governments are forced to produce their regulatory products at 'competitive prices' (e.g. since benefits of governmental intervention exceed the costs) on pain of losing their customers, the practitioners in the

⁶² See, G. Amato & C.D. Ehlermann (edited by), *EC Competition Law-A Critical Assessment*, [supra note 42](#), at 646.

⁶³ See, The White Paper, para.40.

⁶⁴ See, B.E. Hawk, 'System Failure: Vertical Restraints and EC Competition Law', (1995) 32 *Common Market Law Review*, 973-989, at 983.

⁶⁵ See, D. Geradin, 'Competition between Rules and Rules of Competition', [supra note 27](#), at 12; R. Van den Bergh, 'Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy', [supra note 29](#); E.M. Fox, 'Antitrust Law on a Global Scale: Races Up, Down, and Sideways', [supra note 29](#), at 348-363.

⁶⁶ *Ibid.*

market.⁶⁷ Given this, centralised systems of standard setting should be seen as regulatory cartels or monopoly (such as the Commission's monopoly of exemption) that, like any other form of collusion between competitors, would raise prices to the public and reduce economic efficiency.⁶⁸ At least in theory the decentralisation of EU competition law's full enforcement authority from the single Commission to 27 Member States' NCAs and courts is progress. However, in reality, the narrow set of assumptions of regulatory competition is rarely met.⁶⁹ There is neither a sufficiently large number of legislators to choose between nor perfect mobility.⁷⁰ Regulatory competition seems unlikely to happen under the EU's decentralised system. Firstly, in relation to EU merger control, the principle of the one stop shop excluded the NCAs when dealing with mergers with an EU dimension;⁷¹ while in relation to agreements or abuses of a dominant position, EU competition law would be applied if the agreement or abuse had effect between Member States.⁷² Secondly, because of the broad interpretation of 'effect between Member States' by the Court of Justice,⁷³ EU competition law can in many situations

⁶⁷ F.H. Easterbrook, 'Antitrust and the Economics of Federalism', *supra* note 28.

⁶⁸ See, D. Geradin, 'Competition between Rules and Rules of Competition: A legal and economic analysis of the proposed modernisation of the enforcement of EC competition law', *supra* note 27, at 4.

⁶⁹ See, R. P. Inman & D. L. Rubinfeld, 'Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism', (1997) 75(6) *Taxes Law Review*, 1203-1300, at 1219.

⁷⁰ See, R. Van den Bergh, 'Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy', *supra* note 29, at 365.

⁷¹ See, Article 1 of Council Regulation (EC) No 139/2004 of 20 January 2004, (Official Journal L 24, 29.01.2004, p. 1-22).

⁷² See, Article 3 of Reg.1/2003.

⁷³ The Court of Justice has consistently held that in order for an agreement to affect trade between

Member States: '... [it must, in order to come within the field of application of Article 85(Article 101TFEU), on the basis of all the objective elements of law and of fact, be such as to give rise to a reasonable expectation that it might directly or indirectly, actually or potentially, influence the flow of trade between Member States that is likely to hamper the realization of a single market between those States.' See, *Socidtd Technique Miniere v. Maschinenbau Ulm GmbH*,

be applied to agreements or abuses of dominance prior to Member States' competition law. Thirdly, decentralisation has in fact strengthened the application of EU competition law in different Member States to replace national competition law.⁷⁴ For fear that EU competition law might be enforced inconsistently the Commission provided some procedural mechanisms which might strengthen the application of EU competition law and give power to the Commission to intervene in the enforcement by the NCAs and national courts. For example, the Commission may not only require copies of draft decisions before they are adopted: it will also be able under Art.11 (6) of Reg. 1/2003 to take over cases from NCAs or national courts.

Informational asymmetries may provide a stronger argument in favour of decentralisation. The basic assumption is that firms will often fail to reveal the full range of information needed by regulators to make decisions.⁷⁵ Thus there is an 'asymmetry of information' between regulators who need this information and regulated firms, which, deliberately or not, fail to provide it or provide it only partially. Decentralisation may help to mitigate this problem as decentralised agencies may be in a better position to collect information from local companies.⁷⁶ Local authorities might be ideally placed to gather information, such as the market shares or existence of contacts between competitors, as they generally have good knowledge of local markets and of the local business culture. For example, the

Case 56/65, 1966 E.C.R. 235, 249 [1961-66 Transfer Binder] Common Mkt. Rep. (CCH) 7685, at 7697.

⁷⁴ See, A. Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part Two', *supra* note 24. A. Riley concluded that at the core of the decentralised mechanism is a refusal of the Commission to accept a real partnership with the NCAs (because of the Commission's supervisory role under the system), which would involve real sharing of the caseload and the development of the law, and thus the proposed modernisation is a process of centralisation rather than a decentralisation.

⁷⁵ See, M. Armstrong, S. Cowan & J. Vickers, *Regulatory Reform - Economic Analysis and British Experience*, (1994) Massachusetts Institute of Technology Press, at 11-12.

⁷⁶ See, The White Paper, para.46.

Bundeskartellamt of Germany may have a better understanding of the German market than the Commission in Brussels.

Decentralisation allows for a useful degree of *experimentation* because different regulatory regimes may enforce different (or the same) antitrust laws in different approaches and thus some novel questions may be solved by experiment in different regulatory regimes. It has been proved as a significant benefit brought by decentralisation under US federal system.⁷⁷ However, this benefit may be less significant in the EU where competition laws in Member States are identical with or similar to EU competition law.⁷⁸ This similarity reduces the possibility of experimentation with the content of substantive law because all Member States' competition law follow EU competition law. In addition, in relation to EU competition law's implementation, convergence and consistency are emphasised. Firstly, Article 3 of Reg.1/2003 requires that Articles 101 and 102 TFEU should be applied by NCAs to all agreements that could fall within their scope (applied in practice to agreements which fulfil the test of having an effect on interstate trade); secondly, Reg. 1/2003 sets up a system of supervision and control by requiring that all decisions by NCAs be vetted by DG Competition, which can displace the national authorities and substitute its own proceedings.⁷⁹

⁷⁷ As Justice Brandeis pointed, 'It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.' See, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).

⁷⁸ See, R. Van den Bergh, 'Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy', *supra note 29*, at 374; I. Forrester, 'Modernization of EC Competition Law', *supra note 50*, at 1031. However, A. Riley expressed an opposite view. He argued that 'many domestic competition regulations were very different from EC law'. See, A. Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part Two', *supra note 24*, at 69.

⁷⁹ See, Article 11(6) of Reg.1/2003.

The concern of decentralisation

The main concern of decentralisation is that it may reduce the consistency and legal certainty of Article 101 and 102 TFEU's enforcement.⁸⁰ There exists inconsistency between the Commission and the Member States because the NCAs and national courts have complete enforcement authority of Article 101 and 102 TFEU. In addition, inconsistency between Member States is also likely to happen.⁸¹

With regard to inconsistency between the Commission and the Member States, the White Paper identified two potential conflicts: where an NCA or national court takes a favourable view of an agreement that is prohibited by the Commission; and where the Commission takes a favourable view of an agreement but a national court or NCA prohibits it.⁸² Inconsistency between Member States may also appear because NCAs are not currently bound by the

⁸⁰ This concern is much discussed in the literature. For examples, D.J. Gerber & P. Cassinis, 'The Modernisation of European Community Competition Law: Achieving Consistency in Enforcement-Part I', (2006) 27(1) *European Competition Law Review*, 10-18; D.J. Gerber & P. Cassinis, 'The Modernisation of European Community Competition Law: Achieving Consistency in Enforcement-Part II', (2006) 27(2) *European Competition Law Review*, 51-57; B.E. Hawk & N. Denaeijer, 'The Development of Article 81 and 82: Legal Certainty', *European Competition Law Annual 2000*, at 129-144; C.D. Ehlermann, 'The Modernisation of EC Antitrust Policy, a Legal and Cultural Revolution', *supra note 20*; J.S. Venit, 'Brave New World: The Modernisation and Decentralisation of Enforcement under Articles 81 and 82 of the EC Treaty', *supra note 17*; S. Kon, 'The Commission's White Paper on Modernization: The Need for Procedural Harmonization', *supra note 39*; P.C. Mavroidis & D.J. Neven, 'The White Paper: A Whiter Shade of Pale of Interest and Interests', *supra note 32*; M. Siragusa, 'The Modernisation of EC Competition Law: Risks of Inconsistency and Forum Shopping', *European Competition Law Annual 2000*, at 443-456; U. Immenga, 'Coherence: A Sacrifice of Decentralisation?' *European Competition Law Annual 2000*, at 353-359; J.H.J. Bourgeois, 'Decentralized Enforcement of EC Competition Rules by National Competition Authorities: Some Remarks on Consistency, Coherence and Forum Shopping' *European Competition Law Annual 2000*, at 323-333.

⁸¹ See, M. Siragusa, 'A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules', *supra note 37*, at 1100, 1101.

⁸² See, the White Paper, para.101.

legal determinations of other NCAs. Accordingly, inconsistency may arise where NCAs in different Member States investigate the same (type of) agreement or practice and apply different legal interpretations of Article 101 TFEU.⁸³ NCAs are part of the state machinery of the Member States and are likely to be influenced to some degree by the policies and interests of their states.⁸⁴ The legislators and the NCA in Member State A are not expected or competent to solve the competition problem of Member State B, as has been discussed in the issue of *externalities*. In addition, it is only since 1990 that all Member States have had national systems of competition law.⁸⁵ The NCAs in Member States have different levels of resources, professionalism, experience and enforcement level.⁸⁶ Hence Articles 101 and 102 TFEU will be enforced inconsistently in different Member States.

A qualify degree of consistency in EU competition law's application is critical to the success of the new decentralised system.⁸⁷ Inconsistent requirements on e.g. vertical restrictions could force an undertaking to build or maintain different distribution schemes only to comply with national

⁸³ See, M. Siragusa, 'A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules', *supra note 37*, at 1101.

⁸⁴ See, A. Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part Two: Between the Idea and the Reality: Decentralisation under Regulation 1', *supra note 24*, at 660.

⁸⁵ See, A. Dreher, 'The Harmonisation of National Competition Laws in the European Community', paper delivered at *Florence Conference at EUI, Implementation of Antitrust Rules in a Federal Context* (1996), 2.

⁸⁶ For example, the NCAs in Germany, the UK, France and Italy may be better established and have more experience than the NCAs in Eastern European countries. For examination of the NCAs' capability of enforcing EU competition law, refer to A. Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part Two: Between the Idea and the Reality: Decentralisation under Regulation 1', *supra note 24*; see also, P. Nicolaidis, 'Development of a System for Decentralised Enforcement of EC Competition Policy', (2002) 37 *Intereconomics*, 41-51.

⁸⁷ See, D.J. Gerber & P. Cassinis, 'The Modernisation of European Community Competition Law: Achieving Consistency in Enforcement-Part I', *supra note 80*, at 10.

competition law requirements.⁸⁸ Legal certainty would also be reduced if EU competition law could not be enforced consistently and harmoniously in the 27 Member States. In order to guarantee consistency the Commission provides a series of convergent regulations and a cooperation and coordination mechanism between the Commission, NCAs and national courts, which will be discussed in the next section.

The Commission's argument that decentralised enforcement will result in a better application of competition rules is doubtful. Although the notification system has been abolished and the Commission is relieved from the heavy caseload brought by the centralised mechanism, it is unclear whether the NCAs and national courts will require more resources to enforce the law than the Commission. One may argue that the NCAs and national courts are more competent to enforce competition rules than the single Commission because of their knowledge of local markets and businesses. Fewer resources would thus be needed to achieve a given level of enforcement. In addition, the resources of 27 Member States altogether would be more than the scarce resources in the Commission. On the other hand, one may also argue that there is less knowledge and experience of EU competition rules in the NCAs and national courts than in the Commission. Shifting enforcement of such rules to the national level would thus require more resources than the centralised mechanism requires. In addition, the cost of keeping the consistency of the law's enforcement at the Commission's level and among the 27 Member States should also be counted.

2.2 European Competition Network: case allocation and consistency

⁸⁸See, D. Geradin, 'Competition between Rules and Rules of Competition: A legal and economic analysis of the proposed modernisation of the enforcement of EC competition law', *supra note 27*, at 23.

2.2.1 An overview

The European Competition Network (hereafter the ECN) is a part of the Modernisation Programme designed to promote consistency of policy and to regulate relations between the competition authorities of Europe in the era of decentralisation⁸⁹ Reg. 1/2003 indicates that 'the Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation.'⁹⁰ The principles of this network are provided in the Commission Notice on cooperation within the Network of Competition Authorities.⁹¹ In order to guarantee the consistency of EU competition law enforcement in the Commission and 27 Member States the ECN mainly deals with three areas: case allocation within the network, cooperation within the network and convergence mechanisms.

Case allocation

An effective case allocation mechanism is essential in a network under which the authorities have parallel enforcement powers. The Network Notice states that a case is 'well placed' if it is allocated to a single authority which stands closest to the centre of gravity of the violation in question and is therefore able to collect strategic information and bring the violation

⁸⁹ See, F. Cengiz, 'The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement', *Max Weber Programme Working Paper No. 2009/05*, April 01, 2009, available at SSRN: <http://ssrn.com/abstract=1462223>, or <http://dx.doi.org/10.2139/ssrn.1462223>, last visited on 15/04/2012, 17:35.

⁹⁰ See, Recital 15 of Reg. 1/2003.

⁹¹ Commission Notice on cooperation within the Network of Competition Authorities(hereafter the Network Notice) (*OJ C 101/43, 27 April 2004*).This Notice replaces the Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 101 and 102 TFEU, 15 October 1997.

effectively to an end.⁹² Thus there are three conditions: 1. the actions of the parties have substantial effects for the territory in which the authority is based; 2. the authority can effectively bring to an end the entire infringement; 3. the authority can effectively gather the evidence required to prove the infringement.⁹³ Thus the Network Notice provides a practical mechanism to allocate cases. Firstly, a single NCA is usually well placed to deal with violations if the agreements or practices substantially affect competition mainly within its territory, or where, although more than one NCA can be regarded as well placed, the action of a single NCA is sufficient to bring the entire infringement to an end. Secondly, parallel action by two or three NCAs may be appropriate where a violation has substantial effects on competition mainly in their respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately. Thirdly, the Commission is particularly well placed in three circumstances: 1. where the violation has effects on competition in more than three Member States; 2. where the case is closely linked to other EU provisions which may be exclusively or more effectively applied by the Commission; 3. where the EU interest requires the adoption of a Commission decision to develop EU competition policy when a new competition issue arises or to ensure effective enforcement.⁹⁴

Cooperation mechanism

⁹² See, para.8 and 16 of the Network Notice.

⁹³ M. Kekelelis, 'The European Competition Network (ECN): It Does Actually Work Well', (2009) 1 *EIPAScope*, 35-39.

⁹⁴ See, paras. 10-15 of the Network Notice.

Mutual resource interdependencies play the key role in the formation of networks⁹⁵ and it requires close and active cooperation within the network. This cooperation may be divided into three parts: cooperation between the Commission and the competition authorities of the Member States; cooperation between the Commission and national courts; cooperation between the Member States.

Article 11(1) of Reg.1/2003 requires the Commission and the competition authorities of the Member States to apply EU competition rules in close cooperation. Such obligation includes firstly that any NCA acting under Articles 101 or 102 TFEU must inform the Commission before or just after commencing its first formal investigative measure;⁹⁶ secondly, the Commission has also accepted an equivalent obligation to inform NCAs in the form of transmitting copies of most important documents to the NCAs;⁹⁷ thirdly, NCAs must inform the Commission before taking a positive decision in enforcement of Article 101 and 102 TFEU and communicate their summary decisions to the Commission on which the Commission may express written or oral observations.⁹⁸ The competition authorities may consult the Commission on any case involving application of EU competition law. Finally, in cases where the Commission needs information or evidence from the territory of a particular NCA in the course of their investigations, they may approach and ask the NCA in question to collect evidence in its territory and to communicate such evidence to the requesting authority.⁹⁹

⁹⁵ See, W.W. Powell: Neither Market nor Hierarchy: Market Types of Organisation, in G. Thompson, J. Frances, and R. Levačić (edited by): *Markets, Hierarchies and Networks: The Coordination of Social Life*, (1994) Sage Publications Ltd., at 272.

⁹⁶ See, Article 11(3) of Reg.1/2003.

⁹⁷ See, Article 11(2), *ibid.*

⁹⁸ Article 11(4), *ibid.*

⁹⁹ Article 12, Article 22(1), *ibid.*

In relation to the cooperation between the Commission and the national courts, it is noteworthy that the national courts' position is very different from that of NCA's in the network because of their independence from the executive branch.¹⁰⁰ National courts, under the EU competition law's public enforcement, are subject only to the European Court of Justice rather than the Commission.¹⁰¹ However, national courts have the right to seek the Commission's assistance: firstly, it may ask for documents in the Commission's possession; secondly, it may ask for information on procedure.¹⁰² The Commission must respond to such a request within one month.¹⁰³ In addition there is an information exchange between the Commission and the national courts.¹⁰⁴ Finally, the Commission may be present as *amicus curiae* in national proceedings when a national court enforces Article 101 and 102 TFEU.¹⁰⁵

As regards cooperation and coordination between Member States, Reg.1/2003 provides that the competition authorities of Member States shall apply EU competition rules in close cooperation. Firstly, the competition authorities of the Member States may, when acting under Article 101 and 102 TFEU, inform other Member States.¹⁰⁶ Secondly, where two or more Member States have received a complaint or are acting on their own initiative under Article 101 or 102 TFEU against the same violation, that one authority is dealing with the case shall be sufficient grounds for the others to suspend the

¹⁰⁰ See, K. Lenaerts & D. Gerard, 'Decentralisation of EC Competition Law Enforcement: Judges in the Frontline', (2004) 27 *World Competition*, 313-349; see also, D. Broomhall & J. Goyder, 'European Union in Modernisation in Europe 2005', in *Global Competition Review Special Report* (London, 2005), at 7.

¹⁰¹ G. Amato & C.D. Ehlermann (edited by), *EC Competition Law-A Critical Assessment*, *supra note 42*, at 669.

¹⁰² See, Article 15(1) of Reg.1/2003.

¹⁰³ Para.22, the Network Notice.

¹⁰⁴ See, Article 15(1) of Reg.1/2003.

¹⁰⁵ Article 15(3), *ibid.*

¹⁰⁶ Article 11(3), *ibid.*

proceeding or to reject the complaint.¹⁰⁷ Thirdly, a NCA may ask another NCA for assistance in order to collect information on its behalf.¹⁰⁸ Finally, the Advisory Committee which is composed of representatives of the competition authorities of the Member States¹⁰⁹ provides a forum in which to discuss competition matters between the Member States and deliver opinion. Besides, the Commission shall consult an Advisory Committee on restrictive practices and dominant position prior to the taking of any decision¹¹⁰ and take the utmost account of the opinion delivered by the Advisory Committee.¹¹¹

The superior role of the Commission

The Commission's superior role under the ECN leads some commentators to characterise the ECN as a 'centralised interactive model'.¹¹² The Commission's special role is explained by its responsibility for the development of EU competition policy and the necessity to establish coherence within the network of competition.¹¹³ Firstly, the national authorities have the duty to inform the Commission before or just after commencing its first formal investigative measure, and, before they taking a positive decision in enforcement of Articles 101 and 102 TFEU. Secondly, the Commission has the power to relieve the national authorities of their competencies by initiating proceedings for the adoption of a decision even if

¹⁰⁷ Article 13(1), *ibid.*

¹⁰⁸ Para.29, the Network Notice.

¹⁰⁹ Article 14(2) of Reg.1/2003.

¹¹⁰ Article 14(1), *ibid.*

¹¹¹ Article 14(5), *ibid.*

¹¹² See, D.J. Gerber, 'The Evolution of a European Competition Law Network', in C.D. Ehlermann and I. Atanasiu (edited by), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, (2005) Hart Publishing, 43-64, at 53.

¹¹³ See, U. Böge, 'The Commission's Position within the Network, the Perspective of the NCAs', in *European Competition Law Annual 2002*, *ibid.*, at 247-254; On the Commission's central role, see, Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369.

a national authority is already acting on the case.¹¹⁴ Thirdly, the national authorities cannot take decisions which would run counter to those adopted by the Commission when ruling on agreements, decisions and practices under Articles 101 and 102 TFEU.¹¹⁵ Fourthly, the Commission may intervene as *amicus curiae* in national judicial review proceedings.¹¹⁶

2.2.2 A brief evaluation of the initial experience of the ECN

Initial experience of management of the ECN has been largely positive.¹¹⁷ The worries raised at the time of inception of the ECN have not been realised. For example, it was feared that the Commission's power of relieving the NCAs of their authority of investigation would diminish legal certainty, consistency and effective enforcement within the ECN.¹¹⁸ However, the ECN's practice shows that the Commission has not yet used its power of relieving NCAs of their authority to investigate. The statistics also show that Member States are generally very active in enforcing Articles 101 and 102 TFEU. The total number of official proceedings opened by NCAs collectively far exceeds those

¹¹⁴ Article 11(6) of Reg.1/2003.

¹¹⁵ See, para. 43 of the Network Notice.

¹¹⁶ G. Amato & C.D. Ehlermann (edited by), *EC Competition Law-A Critical Assessment*, *supra note 42*, at 663.

¹¹⁷ See, F. Cengiz, 'The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement', *supra note 89*, at 19; M. Kekelekis, 'The European Competition Network (ECN): It Does Actually Work Well', *supra note 93*.

¹¹⁸ See for example, R. Wesseling argues that NCAs are unlikely to want to apply EC competition law and seek co-operation with the Commission if they feel they will subsequently lose jurisdiction to the Commission. See, R. Wesseling, *The Modernisation of EC Antitrust Law*, (2000) Hart Publishing, at 197; Böge argues that the precondition for effective enforcement is trustful cooperation based on equal rights, and this power would jeopardise this precondition. See, U. Böge, 'The Bundeskartellamt and the Competition Authority of the German Lander', in *European Competition Law Annual 2002*, at 111-118.

of the Commission.¹¹⁹ As a result it can be argued that the communication channels between the NCAs and the Commission have been working effectively and, contrary to original predictions, the Commission's superior role in this network has not prevented the emergence of mutual trust and cooperation between the Commission and the NCAs. Nor has there been any instance of conflict between the network members on case allocation during the last four years.¹²⁰

However, there are several concerns about this network. Firstly, the statistics show there is a gap between the number of formal investigations opened and final positive decisions taken by the NCAs.¹²¹ There are two possible explanations: 1. generally, the NCAs may be under a heavy burden of enforcement which has been decentralised from the Commission; 2. the practices targeted by NCA investigation are actually benign and do not constitute breaches of Articles 101 and 102 TFEU so that most cases are closed without taking any action.¹²² Both these explanations can be worrisome. The first may cast serious doubt on the effectiveness of decentralisation. The caseload relieved from the Commission is imposed again on the NCAs, and neither the Commission nor the NCAs enjoy the resources required for effective enforcement of Articles 101 and 102 TFEU. The second may suggest that the network members lack an understanding sufficient to proper enforcement of EU competition law. If this is the case, additional funds, time and resources would need to be allocated to correct

¹¹⁹ For example, in 2008, the NCAs investigated 149 cases in total, while the Commission only investigated 10. The data are available on the ECN's official website:

<http://ec.europa.eu/comm/competition/ecn/statistics.html>, last visited on 22/04/2012, 10:32.

¹²⁰ See, F. Cengiz, 'The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement', *supra* note 89.

¹²¹ For example, in 2004, the NCAs opened 200 investigations but only 16% of them closed with a final positive decision, *ibid*, last visited on 22/04/2012, 11:42.

¹²² F. Cengiz, 'The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement', *supra* note 89.

mistakes, and thus the effectiveness of the whole network would be affected. Secondly, the information exchange mechanism may raise concerns of confidentiality protection. Article 12(1) of Reg.1/2003 provides that for the purpose of applying Articles 101 and 102 TFEU the Commission and the NCAs shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. Theoretically the Network is very much an intergovernmental system that will transmit large amounts of highly confidential information.¹²³ Thirdly, instances of cooperation in which the NCAs jointly investigated the same violation or provided each other with evidence in practice have been extremely rare.¹²⁴ Finally, the FIDE Report 2008 shows that the Commission and the NCAs prefer informal channels of communication such as email and telephone.¹²⁵ Moreover, the written responses of the Commission to the envisaged NCA decisions and any other communication between the members are not open to the parties under investigation.¹²⁶ Lack of transparency raises the concern of accountability as it is difficult to observe the roles of Member States in investigation and their contributions to the final decision.

¹²³ See, S. Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?' (2005) 18(3) *Governance: An International Journal of Policy, Administration, and Institutions*, 431–452, at 442.

¹²⁴ Until 2009 only the Danish, Spanish and UK authorities had collected information on behalf of and communicated information to other NCAs. See, H. Franz Koeck & M.M. Karollus (edited by): *The Modernisation of European Competition Law: Initial Experiences with Regulation 1/2003* (hereafter, the FIDE Report 2008), volume 2, (2008) FIDE XXIII Congress Linz, Congress Publications, at 50, 303.

¹²⁵ *Ibid.*

¹²⁶ See, E.G. Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003', *ibid.*, at 446.

3. The relationship between federal and state antitrust enforcers under US federal antitrust law's public enforcement

3.1 An overview of the federal and state's antitrust enforcers under U.S. antitrust law

Before 1890 when the Sherman Act¹²⁷ (the first federal antitrust statute) was enacted, restraints of trade were largely regulated by state law.¹²⁸ The legislative history of the federal antitrust law indicates that Congress intended to leave state antitrust enforcement more or less intact but to provide an additional federal forum to deal with restraints of trade which exceeded the jurisdiction of the courts of any particular state¹²⁹. The result is that antitrust enforcement has theoretically existed at two levels, federal and state.¹³⁰ Similar to the multi-governance system under the EU competition law regime, US antitrust law public enforcement also includes

¹²⁷ Ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1–7, enacted on July 2, 1890.

¹²⁸ See, A.M. Eaton, 'On Contracts in Restraint of Trade', (1890) 4(3) *Harvard Law Review*, 128-137; F.D. Jones, 'Historical Development of the Law of Business Competition', (1926) 35(8) *Yale Law Journal*, 905-938; W.L. Letwin, 'Congress and the Sherman Antitrust Law: 1887-1890', (1956) 23(2) *University of Chicago Law Review*, 221-258; R.H. Limbaugh, 'Historic Origins of Anti-Trust Legislation', (1953) 18(3) *Missouri Law Review*, 215-248.

¹²⁹ See, *R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 600, 112 Cal. Rptr. 585, 589 (1974); see also generally, J.J. Flynn, *Federalism and State antitrust regulation*, (1964) University of Michigan Law School; S. Rubin, 'Rethinking State Antitrust Enforcement', (1974) 26(4) *Florida Law Review*, 653-757.

¹³⁰ See, H. Hovenkamp, 'State Antitrust in the Federal Scheme', (1983) 58(3) *Indiana Law Journal*, 375-432, at 376.

two levels which are based on the federal model of the United States, the federal and state levels.¹³¹

At the federal level enforcement is largely in the hands of the Antitrust Division of the DOJ and the FTC. The Antitrust Division has exclusive federal authority to enforce the Sherman Act and shares with the FTC and other agencies the federal authority to enforce the Clayton Act.¹³² In addition, the Antitrust Division has exclusive criminal authority under Sections 1, 2 and 3 of the Sherman Act, section 4 of the Robinson-Patman Act and section 14 of the Clayton Act.¹³³ The FTC has broad enforcement power under the FTC Act and Clayton Act.¹³⁴ The Antitrust Division and the FTC shares concurrent jurisdiction to investigate many types of conduct. To be sure that only one of the two agencies investigates a particular matter they have developed a clearance procedure¹³⁵ which governs assignment of investigation to one agency or the other.¹³⁶

¹³¹ This section mainly focuses on the State Attorneys General's enforcement of federal antitrust laws rather than their own state antitrust statutes. State courts' judicial activities are also excluded. For an extensive examination of the state antitrust statutes' enforcement please refer to ABA Section of Antitrust Law: *State Antitrust Practice and Statutes*, 3rd edition, (2004) ABA Publishing; see also, H. Hovenkamp, *ibid*. In addition, discussion of the relationship between the federal and state antitrust enforcers in this section is limited to the civil action. Criminal action and procedure is excluded in this section.

¹³² See, J.M. Jacobson (editor in chief): *Antitrust Law Developments*, volume I, 6th edition, (2007) ABA Publishing, at 691.

¹³³ See, E.T. Sullivan & H. Hovencamp, *Antitrust Law, Policy and Procedure: Cases, Materials, Problems*, 5th edition, (2004) Matthew Bender & Company Inc., at 65.

¹³⁴ See, A.I. Gavil, W.E. Kovacic & J.B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems*, (2002) Thomson West, at 929.

¹³⁵ The clearance procedure is based on a series of formal and informal interagency agreements dating back as far as 1938. A detailed examination of the procedure is not the purpose of this section. For a detailed description and discussion of the clearance procedure, refer to Chapter VII of *Antitrust Division Manual*, 4th edition, available at <http://www.justice.gov/atr/public/divisionmanual/chapter7.pdf>, last visited on 29/04/2012, 21:03; see also: D.L. Roll, 'Dual Enforcement of the Antitrust Laws by the Department of Justice and the FTC: The Liaison Procedure', (1976) 31 *The Business Lawyer*, 2075-2086;

Some states had been legislating and enforcing antitrust provisions even before the Sherman Act was enacted.¹³⁷ In the years immediately following the passage of the Sherman Act, more antitrust suits were filed by the states, under their own statutes, than by federal enforcers.¹³⁸ However, federal enforcement soon began to grow and peaked in the 1960s.¹³⁹ And as federal enforcement grew, state antitrust enforcement was virtually non-existent from the 1960s to the 1980s.¹⁴⁰ At the beginning of the 1980s the states declared their determination, collectively or individually, aggressively to enforce both federal and state antitrust laws.¹⁴¹ Explanations of the revival of the state enforcement¹⁴² include firstly that in 1976 Congress passed the Crime Control Act which provided the 'seed money' for states to fund their own antitrust enforcement.¹⁴³ Secondly, in the same year the Hart-Scott-Rodino Antitrust Improvements Act (hereafter the HSR Act) was passed which enables states to bring civil actions on behalf of natural persons residing in the state, as *parens patriae*, in any district court in the United

W.E. Kovacic, 'Downsizing Antitrust: is it time to end dual federal enforcement', (1996) 41(3) *Antitrust Bulletin*, 505-540.

¹³⁶ See, J.M. Jacobson (editor in chief): *Antitrust Law Developments*, *supra* note 132, at 693.

¹³⁷ See, J.J. Flynn, *Federalism and State antitrust regulation*, *supra* note 129, at 90-91; see also, M. D. Forkosch, *Antitrust and the Consumer (enforcement)*, (1956) Dennis Publishing, at 416-427.

¹³⁸ For a detailed examination of the antitrust history of the state enforcement of the early era: 'Conceptual Reach of State Antitrust Law, 1880-1918', (1987) 135(3) *The University of Pennsylvania Law Review*, 495-593.

¹³⁹ D.L. Flexner & M.A. Racanelli, 'State and Federal Antitrust Enforcement in the United States: Collision or Harmony?' *supra* note 8, at 506.

¹⁴⁰ See, R.H. Lande, 'When Should States Challenge Mergers: A Proposed Federal/State Balance', (1990) 35(4) *New York Law School Law Review*, 1047-1094.

¹⁴¹ The statistics also show the effort of the state enforcement. For example, in 1988 and 1989 the states sued more merger cases under Section 7 than the Antitrust Division. See, R.H. Lande, *ibid*, at 1054.

¹⁴² See, D.L. Flexner & M.A. Racanelli, 'State and Federal Antitrust Enforcement in the United States: Collision or Harmony?' *supra* note 8, at 507-508.

¹⁴³ 42, U.S.C. § 3739 (1988).

States and claim treble damages.¹⁴⁴ Thirdly, in the 1980s the states believed that the federal enforcers had abandoned their primary role in antitrust enforcement and were challenging fewer and fewer antitrust violations.¹⁴⁵ Fourthly, the states found themselves increasingly in disagreement with the federal government in the 1980s.¹⁴⁶ In short the states have become a 'de facto third national antitrust enforcement agency',¹⁴⁷ which have the authority to enforce both federal and state antitrust law.

It is also noteworthy that under the US antitrust public enforcement regime, jurisdiction to adjudicate alleged violations of the federal antitrust laws is vested in the federal district courts¹⁴⁸ and been interpreted as exclusive.¹⁴⁹ The Antitrust Division, the FTC and the State Attorneys General (hereafter, the SAG) have the authority of investigation and prosecution.

At the federal level both the Antitrust Division and the FTC may bring proceedings before a federal district court after investigation.¹⁵⁰ Or, more commonly, if the Antitrust Division found antitrust concerns after investigation, before filing a complaint in a federal district court it will

¹⁴⁴ 15, U.S.C. § 15 (1988).

¹⁴⁵ See, T.G. Krattenmaker & R. Pitofsky, 'Antitrust Merger Policy and the Reagan Administration', (1988) 33(2) *Antitrust Bulletin*, 211-232.

¹⁴⁶ Specifically, the states were dissatisfied with the lax enforcement to mergers by the Antitrust Division and the FTC, as exemplified in the DOJ's 1982 and 1984 Merger Guidance. See, M.F. Brockmeyer, 'Report on the NAAG Multi-State Task Force', (1989-1990) 58(2) *Antitrust Law Journal*, 215-220; at 216.

¹⁴⁷ M. Crane, J.R. Loftis III, A.H. Silberman & S.H. Walbolt, '60 Minutes with Robert M. Langer, Assistant Attorney General - State of Connecticut, and Chair, NAAG Multistate Antitrust Task Force', (1991-1992) 60(1) *Antitrust Law Journal*, 197-216.

¹⁴⁸ 15 U.S.C. § 4.

¹⁴⁹ See, e.g. *General Inv. Co. v. Lake Shore & Mich. Rwy. Co.*, 260 U.S.261(1922).

¹⁵⁰ For example, the Antitrust Division may sue for damages suffered by the United States as a purchaser of goods. Like private plaintiffs, the United States can recover treble damages, represented by the Antitrust Division. See, 15, U.S.C. § 15a. The FTC also has the authority to represent itself, either by commencing or defending an action in court. See, Section 13(b) of the FTC Act, 15 U.S.C. Sec. 53(b).

propose a consent decree on the respondent to settle the concern. The Antitrust Division must submit each proposed consent decree for approval by the court in which the complaint has been filed.¹⁵¹ In addition, a violation of the decree is punishable by the court if the Antitrust Division can prove the violation according to the civil procedural standard. On the other hand, under Section 5(b) of the FTC Act, the FTC may challenge putative unfair or deceptive act(s) or practice(s) (or violations of other consumer protection statutes) through administrative adjudication.

At the state level the SAGs have two main ways of enforcing federal antitrust law. Firstly, they may bring a civil action on behalf of natural persons residing in the state, as *parens patriae*, in any federal district court in the United States.¹⁵² A *parens patriae* suit in the antitrust context was brought by the SAG in *Georgia v. Pennsylvania Railroad Co.*¹⁵³ The State of Georgia alleged that the defendants violated the antitrust laws by conspiring to fix railroad rates, thus injuring commercial activity in the State. The Supreme Court upheld Georgia's *parens patriae* authority, acknowledging that:

Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.¹⁵⁴

¹⁵¹ J.M. Jacobson (editor in chief), *Antitrust Law Developments*, *supra* note 132, at 705.

¹⁵² See, 15, U.S.C. § 15c (a) 1 & 2(1988). See also, *Georgia v. Pennsylvania Railroad Co.* 324 U.S. 439 (1945).

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.* at 451.

Georgia established the States' authority to sue as *parens patriae* for injunctive relief under Section 16 of the Clayton Act,¹⁵⁵ based on injury to state consumers or commerce.¹⁵⁶ Congress enacted the HSR Act in 1976 and conferred on the states *parens patriae* authority to seek treble damages on behalf of natural persons injured by federal antitrust violations under Section 4C of the Clayton Act.¹⁵⁷

Secondly, since states are considered 'persons' under the Clayton Act,¹⁵⁸ they may sue for damages under Section 4 if they are direct purchasers of goods affected by an antitrust violation.¹⁵⁹ If the state is an indirect purchaser, it is limited to the remedy of injunctive relief.¹⁶⁰

Under state sovereignty under the US Constitution,¹⁶¹ states have considerable freedom in enforcing federal and state antitrust laws.¹⁶² States

¹⁵⁵ Section 16, 15 U.S.C. § 26, provides in the pertinent part that: Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws., when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue .

¹⁵⁶ See, e.g., *California v. Frito-Lay, Inc.*, 333 F. Supp. 977, 979 (C.D. Cal. 1971); *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982, 984 (D. Haw. 1969).

¹⁵⁷ See, 15 U.S.C. § 15c (l), which provides that in pertinent part that: Any attorney general of a State may bring a civil action in the name of such State as *parens patriae* on behalf of natural persons residing in such State in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections I to 7 of this title.

¹⁵⁸ See, *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396(1906).

¹⁵⁹ 15, U.S.C. § 15 (1993).

¹⁶⁰ 15, U.S.C. § 26 (1993); see also, *Cargill v. Monfort*, 479 U.S. 104, 122(1986).

¹⁶¹ See Tenth Amendment to the United States Constitution. For a comprehensive discussion of the general power and role of states under U.S. federalism, please refer to K.R. Thomas: *Federalism, State Sovereignty and the Constitution: Basis and Limits of Congressional Power*, *CRS Report for Congress*, September 5, 2003, available at <http://www.fas.org/sgp/crs/misc/RL30315.pdf>, last visited on 02/05/2012, 21:19.

enforcement differs from federal enforcement in certain respects. For example, states have generally adopted a more aggressive attitude towards merger control and vertical restraint cases than federal antitrust enforcers.¹⁶³ Moreover, states retain the power to reopen and challenge a federally approved merger case.¹⁶⁴ The American Bar Association concluded that the states do not agree to be bound or constrained by the decision of the federal enforcement agencies.¹⁶⁵

3.2 Whether states should be empowered to enforce federal antitrust law

The relationship between the SAGs and federal agencies raises the following question which could also be faced by Chinese AML 2007's administrative enforcers at the central governmental level and at the local level: whether the state should be empowered to enforce federal antitrust laws.

3.2.1 Concerns of state enforcement of federal antitrust laws

Conflict between the State and Federal Antitrust Enforcement

¹⁶² However, U.S. Constitution imposed some limitations on the states' sovereignty, for example, the limitation of the Commerce Clause. The Supreme Court also indicated that federal law prevails over state law due to the operation of the *Supremacy Clause*, and that federal law can neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes. See, *Cooper v. Aaron*, 358 U.S.1 (1958).

¹⁶³ See, D.L. Flexner & M.A. Racanelli, 'State and Federal Antitrust Enforcement in the United States: Collision or Harmony?' *supra note 8*, at 513-519.

¹⁶⁴ See for example, *California v. American Stores Co.* 495 U.S. 271 (1990).

¹⁶⁵ See, ABA Section of Antitrust Law, *State Antitrust Practice and Statutes*, *supra note 131*.

Conflict between the state and federal antitrust enforcement of federal antitrust laws was especially significant during the 1980s.¹⁶⁶ The states, through coordinated multistate litigation, became increasingly active in antitrust litigation in areas where the federal authorities chose not to pursue.¹⁶⁷ During the Reagan Administration, because of a relatively lax enforcement of federal antitrust law especially on vertical restraints and mergers,¹⁶⁸ states became the chief enforcers of federal antitrust law in these two areas.¹⁶⁹ Contrary to the federal antitrust enforcers' attitude towards vertical restraints, some states held that 'vertical pricing restraints actually led to higher retail prices in the real-world marketplace.'¹⁷⁰ Some states also rejected federal acceptance of a merger's impact on total welfare, including that of shareholders; instead they generally insisted on a single focus on consumer welfare.¹⁷¹ As increasingly mergers and price-fixing litigation took place in a number of states, the SAGs began organising collective, multistate investigations and litigation. The National Association

¹⁶⁶ See 3.1 an overview of federal and state antitrust enforcers under U.S. antitrust law' is offered in this section.

¹⁶⁷ See, J. Ratner, 'Conflicting Federal and State Enforcement of Federal Antitrust Law: Statutory Crisis or Celebration of Diversity?' *Multistate Litigation Seminar Paper*, February 2, 2001, available at http://www.law.columbia.edu/center_program/ag/resources/Library?exclusive=filemgr.download&file_id=94724&rtcontentdisposition=filename%3DRatner,%20J-%20Conflicting%20Federal%20and%20State%20Enforcement%20of%20Federal%20Antitrust%20Law.pdf, last visited on 15/05/2012, 14:33. Reagan Administration adopted the Chicago School's view that 'virtually all vertical restraints, pricing or otherwise, are either neutral or beneficial to consumers'; see, J.W. Burns, 'Embracing both Faces of Antitrust Federalism: Parker and ARC America Corp.,' (2000) 68(1) *Antitrust Law Journal*, 29-44, at 32.

¹⁶⁸ See, J.W. Burns, *ibid.*

¹⁶⁹ See, J. Ratner, 'Conflicting Federal and State Enforcement of Federal Antitrust Law: Statutory Crisis or Celebration of Diversity?' *supra note 167*.

¹⁷⁰ See, J.W. Burns, 'Embracing both Faces of Antitrust Federalism: Parker and ARC America Corp.,' *supra note 167*, at 33.

¹⁷¹ See, J.I. Klein, K.J. O'Connor, R. Pitofsky, E. M. Fox, J.L. McDavid, and R. Schmalensee, 'Roundtable Conference with Enforcement Officials', (1997) 65 *Antitrust Law Journal*, 929-971; at 951.

of State Attorneys General (hereafter the NAAG) created a Task Force to coordinate multistate antitrust investigations. Thus states expanded the antitrust enforcement from a local¹⁷² or state level to the interstate level.

In the 1990s cooperation between federal and state enforcers became active and the divergence between the federal and SAG approach to enforcement diminished. One scholar noted that the heads of antitrust authorities at the DOJ and the FTC 'have sent a clear message to their staffs that cooperation with the states is now the rule.'¹⁷³ Nevertheless, multistate antitrust enforcement actions (during the 1990s) illustrate a continuing difference in view as to what types of activity are properly actionable under the federal antitrust laws.¹⁷⁴ For example, in *Kodak 1992*¹⁷⁵ the states filed

¹⁷² In this chapter, the author uses the phrase 'local' under U.S. antitrust public enforcement regime to mean intrastate or statewide as opposed to purely national effects.

¹⁷³ See, J. Ratner, 'Conflicting Federal and State Enforcement of Federal Antitrust Law: Statutory Crisis or Celebration of Diversity?' *supra* note 167. The antitrust cases during the period also illustrated the cooperation between the SAGs, the DOJ and the FTC. For example, In *Browning-Ferris Industries/Attwoods*, Florida, Maryland and the DOJ investigated a proposed merger of Browning-Ferris and Attwoods in 1994, two of the nation's largest waste disposal companies; see, *United States v. Browning-Ferris Indus., Inc.*, 1995-2 Trade Cas. (CCH) 71,186 (D.D.C.1995); in *Chevron/Texaco*, 12 States and the FTC investigated the proposed merger of Chevron and Texaco in 2000 and 2001; see, *California v. Chevron Corp.*, Case No. 01-07746 (C.D. Cal. Sept. 7, 2001); In re *Chevron Corp.*, Docket No. C-4023, 2001 FTC LEXIS 135 (FTC 2001); in *Exxon/Mobil*: New York and nine other northeastern States, along with Texas, California and the Pacific northwest States, filed suit in conjunction with an FTC administrative complaint, challenging the merger of Exxon and Mobil in 1999, two of the world's largest integrated petroleum products companies; see, *New Jersey v. Exxon Corp.*, 99 CV 03183 (RMU) (D.D.C. Nov. 30, 1999); In re *Exxon Corp.*, No. C-3907, 2001 FTC LEXIS 16 (FTC 2001); in *Health Care*, the FTC and the State of Missouri pursued a preliminary injunction against a hospital merger in southeast Missouri in 1999; see, *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999); in *Legal Publishing*: seven States and the DOJ brought a joint action in the District of the District of Columbia in 1997, challenging the proposed merger of Thomson and West Publishing, two of the nation's leading publishers of legal research; see, *United States v. Thomson Corp.*, 1997-1 Trade Cas. (CCH) 71,754 (D.D.C. 1997).

¹⁷⁴ See, S.P. Mahinka & K.M. Sanzo, 'Multistate Antitrust and Consumer Protection Investigations: Practical Concerns', (1994) 63(1) *Antitrust Law Journal*, 213-238.

¹⁷⁵ *Eastman Kodak Co. v. Image Technical Service, Inc.*, 112 S. Ct. 2072 (1992).

two *amici* briefs in opposition to positions taken by the DOJ. In fact most of the antitrust cases undertaken by the states have not been supported by federal agencies.¹⁷⁶ More recently *Microsoft*¹⁷⁷ brought the conflict between federal antitrust enforcers and SAGs in enforcement into sharp focus.¹⁷⁸

Arguments brought by *Microsoft* case

Microsoft illustrated the tension and divergence between federal and state enforcement. The *Microsoft* litigation began in May 1998 when the Justice Department and a score of states filed separate complaints alleging that *Microsoft* had illegally monopolised the Internet browser market.¹⁷⁹ The District Court of Columbia found various violations of federal antitrust law and thus ordered a splitting up of the company.¹⁸⁰ The Court of Appeals for the District of Columbia Circuit affirmed in part, reversed in part, and remanded for reassignment to a different trial judge.¹⁸¹ The DOJ and nine states agreed to a new consent order, which the new district judge modified. However, the rest of the states refused this consent order and filed a new suit with different remedies based on the same facts of *Microsoft*'s conduct. *Microsoft* dismissed the new remedies proposed by the rest of the states and

¹⁷⁶ See for example, *State of New York by Vacco v. Reebok Intern. Ltd.*, 96 F.3d 44 (2d Cir. 1996); *State of Texas ex rel. Atty. Gen. Morales v. Zeneca, Inc.*, 1997 WL 570975 (N.D.Tex. 1997); *State of Missouri, et al. v. American Cyanamid Co.*, Dkt. No. 97-4024-CV-C-SOW (W.D. Mo. Jan. 30, 1997).

¹⁷⁷ *United States v. Microsoft Corp.*, 253 F.3d 34, 47 (D.C. Cir. 2001).

¹⁷⁸ This debate brought by *Microsoft* case will be examined in the following part.

¹⁷⁹ See, J.L. Himes, 'Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in Remedies Phase of the *Microsoft* Case', (2002) 11 *George Mason Law Review*, 37-109; S. Calkins, 'Perspectives on State and Federal Antitrust Enforcement', (2003) 53 *Duke Law Journal*, 673-735; for more details of the *Microsoft* case, please refer to K. Auletta, *World War 3.0: Microsoft and Its Enemies*, (2001) Random House.

¹⁸⁰ *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 35-56 (D.D.C. 2000); *United States v. Microsoft Corp.*, 97 F. Supp.2d 59, 64 (D.D.C. 2000).

¹⁸¹ *United States v. Microsoft Corp.*, 253 F.3d 34, 118-19 (D.C. Cir. 2001) (per curiam).

argued that first of all the litigating states could not demonstrate a "state-specific" injury different from the nationwide injury arising from Microsoft's antitrust violations; in addition, the litigating states were usurping the enforcement role of the DOJ on behalf of the United States; and finally the proposed consent decree in the United States' action would, upon its entry, have a *res judicata* effect, thus precluding any remedy in the litigating states' case.¹⁸² However, The Court of Appeals for the District of Columbia Circuit denied Microsoft's dismissal motion¹⁸³ and upheld the litigating states' standing to sue in deciding the liability phase of the case.¹⁸⁴ Thus *Microsoft* raised the possibility that significantly different remedies could emerge to redress the same adjudicated Microsoft liability for monopoly maintenance.¹⁸⁵

Justice Posner reached a somewhat stern conclusion: nothing in the theory of federalism lends support to authorising SAGs to bring *parens patriae* suits under federal antitrust law¹⁸⁶ and thus the states' *parens patriae* authority should be denied. There are three main supportive opinions for this conclusion.¹⁸⁷ Firstly, states can do no more than free ride on federal

¹⁸² See, J.L. Himes, 'Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in Remedies Phase of the *Microsoft* Case', *supra* note 179, at 38.

¹⁸³ Civil Action No. 98-1233, 209 F. Supp. 2d 132 (D.D.C. 2002) (filed June 12, 2002).

¹⁸⁴ *Ibid*, at 141-145.

¹⁸⁵ See, Stipulation, *United States v. Microsoft Corp.*, Civil Action No. 98-1232 (CKK) (D.D.C. Jan. 11, 2003) (filed Nov. 6, 2001).

¹⁸⁶ See, R.A. Posner, 'Federalism and the Enforcement of Antitrust Laws by State Attorneys General', (2004) 2 *Georgetown Journal of Law & Public Policy*, 5-15.

¹⁸⁷ Apart from the three concerns listed in this section, the concern of the diversity of the state enforcement is particularly significant in the merger area. See for example, J. Rose, 'State Antitrust Enforcement, Mergers, and Politics', (1994) 41 *Wayne Law Review*, 71-134; at 115-26 (lamenting differences in federal and state antitrust standards in merger regulations); D. A. Zimmerman, 'Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers', (1999) 48 *Emory Law Journal*, 337-366. However, merger has been excluded in this chapter. Nevertheless, the concern of diversity brought by state enforcement on agreements and abuse of dominant positions will be discussed in the following section.

antitrust litigation.¹⁸⁸ In the Microsoft case, if the DOJ brings an antitrust suit, the SAGs may be able to take a free ride on the Department's investment in the litigation, by bringing parallel suits that are then consolidated with the DOJ's suit.¹⁸⁹ Secondly, state enforcement might be easily influenced by a state's interest groups,¹⁹⁰ particularly when a state is too subjective¹⁹¹ to protect the interests of the competitors in its territory using the government antitrust enforcement to put at disadvantage a competitor out of its territory. As Justice Posner argued, 'the federal government, having a larger and more diverse constituency, is less subject to takeover by a faction.'¹⁹² In fact some in the United States were concerned that the EU was trying to aid European businesses in some international mergers by opposing mergers of US firms that compete in Europe.¹⁹³ This concern also exists with regard to the EU decentralised competition law regime, which is interpreted as protectionism, or in the economic term, 'externalities'.¹⁹⁴ One way overcome externalities is to establish a centralised supervision which has a focus beyond Member

¹⁸⁸ See, R.A. Posner, 'Antitrust in the New Economy', (2001) 68 *Antitrust Law Journal*, 925-943, at 940.

¹⁸⁹ *United States v. Microsoft Corp.*, 253 F.3d 34, 47 (D.C. Cir. 2001); quoted from R.A. Posner, 'Federalism and the Enforcement of Antitrust Laws by State Attorneys General', *supra note 186*, at 9.

¹⁹⁰ See, R.A. Posner, *ibid*; see also, R.A. Posner, 'Antitrust in the New Economy', *supra note 188*.

¹⁹¹ See, *supra note 188*.

¹⁹² *Ibid*, at 941.

¹⁹³ See for example, W.E. Kovacic, 'Transnational Turbulence: The Boeing McDonnell Douglas Merger and International Competition Policy', (2001) 68(3) *Antitrust Law Journal*, 805-874; at 839-852.

¹⁹⁴ For an examination of externalities, please refer to '2.1.2 the reasons for and concerns of EU's centralised enforcement mechanism' of this chapter. In fact U.S. commentators also use the term 'federalism externality' under U.S. antitrust law enforcement regime, which means one state acting on complaint from an in-state business, might sue an out-of-state business, thereby helping local business by imposing an unnecessary cost on the out-of-state concern. See, H. First, 'Delivering Remedies: The Role of the States in Antitrust Enforcement', (2000-2001) 69 *George Washington Law Review*, 1004-1041; at 1030-1031.

States' interest,¹⁹⁵ in this case the states' interest. Thirdly, States do not have the resources to enforce federal antitrust laws. As Justice Posner argued, they cannot afford large staff and so they cannot reap the benefits of specialisation. Nor can they afford to hire top-quality lawyers. These resource-related handicaps are particularly serious in a highly technical, expert-witness intensive, specialised field of law such as federal antitrust law.¹⁹⁶

Some commentators argue that Posner's concerns and conclusions lack supportive evidence.¹⁹⁷ Firstly, the claim that states can do 'no more' than free ride on federal antitrust litigation is not borne out by the facts.¹⁹⁸ It is undeniable that the SAGs may come after and makes some use of the efforts of the federal antitrust enforcement agencies. In fact this type of follow-on litigation has a long history.¹⁹⁹ However, such litigation brought by states is not a free ride because they can raise substantial issues relating to substantive antitrust liability²⁰⁰ or relating to damages.²⁰¹ In *Microsoft*

¹⁹⁵ See, R. Van den Bergh, 'Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy', *supra note 29*, at 372, 373.

¹⁹⁶ See, R.A. Posner, 'Federalism and the Enforcement of Antitrust Laws by State Attorneys General', *supra note 186*, at 9. It is noteworthy that the concern at some Member States' possible lack of resources and incapability with regard to the enforcement of Article 101 and 102 TFEU also exists under EU competition law's decentralised approach. See for example, A. Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part Two: Between the Idea and the Reality: Decentralisation under Regulation 1', *supra note 24*, at 658.

¹⁹⁷ See for example, H. First, 'Delivering Remedies: The Role of the States in Antitrust Enforcement', *supra note 194*; J.L. Himes, 'Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in Remedies Phase of the *Microsoft* Case', *supra note 179*; S. Calkins, 'Perspectives on State and Federal Antitrust Enforcement', *supra note 179*.

¹⁹⁸ See, H. First, *ibid*, at 1028.

¹⁹⁹ The first case brought by a governmental entity for antitrust damages is *Addyston Pipe* in 1906. See, *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 395 (1906).

²⁰⁰ For example, Cf. *7-UP Bottling Co. v. Archer Daniels Midland Co.*, 191 F.3d 1090 (9th Cir. 1999)

(insufficient evidence of participation in price-fixing agreement to which ADM had previously pleaded guilty.)

Justice Posner specifically expressed the concern of free ride when a state/states act(s) cooperatively with the DOJ or the FTC. However, cooperation between state and federal agencies is so frequent that sometimes such cooperation is deemed necessary.²⁰² And for most of the time, cooperation is harmonious and effective.²⁰³ Hence one may ask, if states were simply free riding on the federal litigation effort, why this cooperation is a relatively recent development and why would the federal government permits it?²⁰⁴ It is true that state enforcement of federal law would complicate the result; however, the complication comes from the fact that the states have jurisdiction under federal law and are capable of exercising it instead of simple 'free riding'.²⁰⁵

The second concern is known as federal externality or state protectionism. As mentioned in the EU section this claim is certainly theoretically possible. However, there is little supportive evidence under US antitrust enforcement regime.²⁰⁶ This is at least partly because of the existence of the Multistate Antitrust Task Force of the National Association of State Attorneys General (hereafter, the Task Force). The Task Force is composed of antitrust contacts from all states and territories that are members of NAAG.²⁰⁷ It was to

²⁰¹ See, H. First, 'The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law', (2001) 68 *Antitrust Law Journal*, 711-804; at 714-716.

²⁰² There are some examples from case law; see, [the footnote 173](#). For more comprehensive and detailed information, please refer to ABA Section of Antitrust Law: *State Antitrust Practice and Statutes*, [supra note 131](#).

²⁰³ ABA Section of Antitrust Law: *State Antitrust Practice and Statutes*, *ibid*, at 827-829.

²⁰⁴ H. First, 'Delivering Remedies: The Role of the States in Antitrust Enforcement', [supra note 194](#); at 1029.

²⁰⁵ *Ibid*, at 1029.

²⁰⁶ *Ibid*, at 1031.

²⁰⁷ See, the official website of the NAAG, available at http://www.naag.org/who_are_naags_members_and_how_is_it_organized.php, last visited on 10/05/2-12, 21:54.

improve, enhance and coordinate state antitrust enforcement.²⁰⁸ The concern that states might use enforcement as a protective device cannot arise in the case of one single state since litigation against anticompetitive behaviour that has multistate effects will likely be brought on a multistate basis. It thus seems highly unlikely that all states in a multistate group will be subject to such a trade-off analysis. This means that such cases will have to appeal to most of the states on their merits, not because of competitor influence.²⁰⁹ As argued in the EU section, externalities can be avoided by establishing an enforcement agency which goes beyond one state's interest. The Task Force may be viewed as an enforcement agency.

As regards the third concern about the states' ability to enforce federal antitrust law, again the claim of the states' relative lack of resources for antitrust enforcement holds good. However, both the FTC and the DOJ may also face this problem.²¹⁰ Interestingly, statistics show that state enforcers might not be so incapable. For example, the SAG of New York from March 1999 to February 2001 on its own initiative opened 9 antitrust cases on restraints of trade and monopolisation respectively. SAG completed all the 9 cases in time.²¹¹ Moreover, cooperation between states and federal agencies may reduce this concern. The Task Force's most important function is to coordinate multi-state investigation and litigation. In this regard the Task Force functions as an antitrust enforcement unit.²¹² If the Task Force

²⁰⁸ See, M.F. Brockmeyer, 'Report on the NAAG Multi-State Task Force', *supra* note 146, at 216.

²⁰⁹ See, H. First, 'Delivering Remedies: The Role of the States in Antitrust Enforcement', *supra* note 194, at 1031.

²¹⁰ See, S. Calkins, 'Perspectives on State and Federal Antitrust Enforcement', *supra* note 179, at 721-722.

²¹¹ See, H. First, 'Delivering Remedies: The Role of the States in Antitrust Enforcement', *supra* note 194, at 1017. Indeed, the New York SAG cannot represent all States and District of Columbia in the U.S., the capability and resources vary in different States.

²¹² See, M.F. Brockmeyer, 'Report on the NAAG Multi-State Task Force', *supra* note 146, at 216.

decides to pursue an investigation, one or two states will typically take the lead and other interested states will share the responsibility and allocation of resources.²¹³ In addition, the fact of active state enforcement through the NAAG and the Task Force especially after the 1980s also indicates that the concern over the states' inability to enforce federal antitrust law may be exaggerated.²¹⁴

Other critics of state enforcement of federal antitrust laws

The first and major concern other than Posner's argument is that the divergent federal and state requirements place undue burdens on businesses. Because of the SAGs' ignorance of the federal approach on matters like vertical restraints and mergers and pursue federal antitrust cases based on theories rejected by the federal agencies,²¹⁵ businesses have to bear uncertainty, delay, and unpredictability with regard to business planning.²¹⁶ Such inconsistency brings additional costs to businesses and thus decreases the efficiency of the federal antitrust law's enforcement.²¹⁷

Some critics have argued that collective multistate activity creates an alternative multistate regulation of antitrust law.²¹⁸ Therefore such

²¹³ Ibid.

²¹⁴ See, *ibid*, at 217-218; see also, ABA Section of Antitrust Law, *State Antitrust Practice and Statutes*, *supra* note 131.

²¹⁵ See, J.W. Burns, 'Embracing both Faces of Antitrust Federalism: Parker and ARC America Corp.', *supra* note 167, at 39-40.

²¹⁶ See, J. Rose, 'State Antitrust Enforcement, Mergers, and Politics', *supra* note 187, at 117.

²¹⁷ See, J. Rose, *ibid*, at 117-118; see also, D. P. Majoras, Antitrust and Federalism, Remarks Before the New York State Bar Association, (Jan. 23, 2003), published by the *Department of Justice*, at 3-6; available at <http://www.justice.gov/atr/public/speeches/200683.htm>, last visited on 10/05/2012, 16:49.

²¹⁸ As former Alabama Attorney General Bill Pryor stated, multistate antitrust lawsuits 'have shifted from a role of protecting consumer welfare in commercial transactions to an emerging role of regulation and taxation through litigation.' See, W.H. Pryor Jr., 'A Comparison of

multistate enforcement violates the intention of the HSR Act and Congress. Firstly, the HSR Act recognised that the federal government 'has been particularly effective in cases involving large purchasers', whereas the federal government has not been active in pressing violations 'of relatively small size.'²¹⁹ Secondly, granted the above fact, through this Act Congress encouraged states to supplement federal antitrust efforts by tackling anticompetitive practices in areas in which the federal government had neither the resources nor the expertise to investigate,²²⁰ especially on mergers or price-fixing with local concerns.²²¹ Thirdly, the HSR Act clearly set forth that 'the goal of this Act is to promote the cooperation in antitrust enforcement between the States and the federal government'.²²² Thus critics held that the multistate antitrust enforcement which is divergent from federal agencies had gone beyond the scope of state authority and ran contrary to this spirit of cooperation and mutual assistance.

3.2.2 The states' comparative advantages when enforcing federal antitrust law

State enforcement has its unique advantages that make it irreplaceable within the US antitrust enforcement regime. These are the most compelling comparative advantages: 1. familiarity with local markets; 2. familiarity with

Abuses and Reforms of Class Actions and Multi government Lawsuits', (2000) 74 *Tulane Law Review*, 1885-1900; at 1898.

²¹⁹ See, The Hart-Scott-Rodino Antitrust Improvements Act of 1976, at 3 (reprinted at 1976 U.S.C.C.A.N. 2572) (1977).

²²⁰ *Ibid.*

²²¹ In fact, Congress placed several constraints on parens patriae suits, including the Section 15c(c) limitations on the power of states to settle and the Section 15c(b)(1-2) obligation of states to provide notice to constituents of their right to exclusion election, thereby indicating Congressional intent to limit the scope of state antitrust enforcement. See, 15 U.S.C. §15c(c) (2000); 15 U.S.C. §15c(b)(1-2) (2000).

²²² See, *supra* note 219.

and representation of state and local institutions; and, 3. ability to provide monetary relief to injured individuals.²²³

State Attorneys General have a clear advantage in understanding local markets.²²⁴ Similar to the 'information asymmetry' claim in favour of decentralisation under EU competition law,²²⁵ a SAG may have a better understanding of the local market than enforcers from Washington D.C. For example, the SAG of California may be considered to be in a better position than the FTC to investigate and sue for injunction relief in a merger involving a local shop because the SAG is more likely to be familiar with the history and current market dynamics of that area. In fact the Antitrust Division of the DOJ has also recognised that it may be sensible for states to take the lead in challenging conspiracies in localised markets.²²⁶

Secondly, SAGs are more likely than federal enforcers to know and be known and be trusted by state and local government officials.²²⁷ When the state or local governments act as purchasers,²²⁸ they are notoriously

²²³ See, S. Calkins, 'Perspectives on State and Federal Antitrust Enforcement', *supra note 179*, at 679. There are certainly other advantages but the listed three are most compelling. For example, L. Constantine argued that state enforcement can maximise citizen participation. See, L. Constantine, 'Antitrust Federalism', (1990) 29 *Washburn Law Journal*, 163-184; at 182-183.

²²⁴ See, R.B. Bell, 'Counterpoint: States Should Stay out of National Mergers', (1989) *Antitrust*, at 37.

²²⁵ See, '2.1.2 The reasons for and concerns of EU's centralised enforcement mechanism' of this chapter.

²²⁶ See, Protocol for Increased State Prosecution of Criminal Antitrust Offenses, 70 *Antitrust & Trade Reg. Rep. (BNA)* 362, 362 (1996) (announcing that the Division may transfer to state attorneys general the criminal prosecutorial responsibility "for offenses including, but not limited to, bid rigging and/or price fixing in localized markets").

²²⁷ See, S. Calkins, 'Perspectives on State and Federal Antitrust Enforcement', *supra note 179*, at 681.

²²⁸ For example, schools can be overcharged for milk, roofs, carpets and fuel; local governments can be overcharged for fuel, waste disposal, flooring and ambulance services;

susceptible to anticompetitive manipulation.²²⁹ States have worked effectively with purchasing authorities to deter and prosecute such illegality, returning money to the taxpayers and the victims of conspiracy.²³⁰ In such circumstances, 'no Washington-based voice is likely to be listened to as carefully as the voice of the State Attorney General'.²³¹

Thirdly, the SAGs can compensate injured individuals. There are two ways. Firstly, states may represent the taxpayers by recovering overcharges exacted from state purchasing operations;²³² in addition, SAGs are the only governmental officials specifically authorised by federal statute to recover monetary relief in treble damages for natural persons injured by Sherman Act violations.²³³ The federal agencies, on the other hand, almost always choose between two remedies: a criminal penalty which is within the DOJ's exclusive authority, and a prospective-only injunction of limited duration.²³⁴ In

and state agencies can be overcharged for road building, infant formula, travel, and health care services, and so on.

²²⁹ For discussion of the issue of governmental purchasers and related antitrust problems, please refer to R.D. Blair & D.L. Kaserman, *Antitrust Economic*, (1985) Oxford University Press, at 144; R.H. Bork, *The Antitrust Paradox*, (1978) Free Press, at 347; J.S. Wiley, Jr., 'A Capture Theory of Antitrust Federalism', (1986) 99(4) *Harvard Law Review*, 713-789, at 728.

²³⁰ For example, in the *Florida Milk* (the first school milk cases), an action filed in February 1988 by the Attorney General of the State of Florida triggered many other state investigations and complaints, and more than \$32 million recovered by Florida against milk companies accused of price fixing in schools. See, Cf. *Florida v. Southland Corporation, et, al.*, Case No. 8S-O273-Civ-Scott (SD. Fla., Miami Div). See also, R.F. Lanzillotti, 'The Great School Milk Conspiracies of the 1980s', (1996) 11(4) *Review of Industrial Organization*, 413-458; at 423.

²³¹ See, M. Crane, J.R. Loftis III, A.H. Silberman & S.H. Walbolt, '60 Minutes with Robert M. Langer, Assistant Attorney General-State of Connecticut, and Chair, NAAG Multistate Antitrust Task Force', *supra note 147*.

²³² See, K.J. O'Connor, 'Federalist Lessons for International Antitrust Convergence', (2002) 70 *Antitrust Law Journal*, 413-441; at 442.

²³³ 15 U.S.C. § 15c (2000). *Parens patriae* authority was established by Title III of the Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1383, 1394

(1976) (codified at 15 U.S.C. § 15c (2000)).

²³⁴ See, E. Gellhorn & W.E. Kovacic, *Antitrust Law and Economics in a Nutshell*, 4th edition, (1994) West Publishing Co., at 450-452.

practice consumers have been the beneficiaries of the SAGs' efforts. For example, in *Compact Discs*,²³⁵ about 3.5 million people received almost \$13 each as their share of a settlement.²³⁶ In another case, *Bristol Myers-Squibb*,²³⁷ although the FTC had issued an injunction against a pharmaceutical firm that allegedly abused the patent system to block competition,²³⁸ states expected to recover over \$150 million to their consumers.²³⁹ The DOJ has no such power, while the FTC lacks the experience and resources to distribute the recoveries efficiently to consumers in various states.²⁴⁰

3.3 Consistent enforcement of federal antitrust laws between federal agencies and the State Attorneys

General²⁴¹

²³⁵ See, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. 2:01-CV-125-P-H, 2003 U.S. Dist. LEXIS 12663 (D. Me. July 9, 2003).

²³⁶ See, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 2003-1 Trade Cas.(CCH) ¶ 74,060, at 96,591 (D. Me. 2003).

²³⁷ See, *Bristol-Myers Squibb Co.*, FTC File Nos. 0010221 (Taxol), 0110046 (BuSpar), 0210181 (Cisplatin) (Mar. 7, 2003).

²³⁸ See, Press Release, FTC, FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government

Processes to Stifle Generic Drug Competition (Mar. 7, 2003), available at <http://www.ftc.gov/opa/2003/03/bms.htm>, last visited on 12/05/2012, 21:00.

²³⁹ See, Press Release, Florida Attorney General, States Reach Tentative Agreement with Bristol Myers-Squibb in Antitrust Drug Cases (Jan. 7, 2003), available at <http://myfloridalegal.com/newsrel.nsf/newsreleases/9E2439956993A54285256CA70075AB79>, last visited on 12/05/2012, 21:09.

²⁴⁰ The FTC has itself recognised and admitted that it has used this authority 'cautiously' and 'sparingly', employing it in only a handful of cases. See, *Cf.* FTC, Policy Statement on Monetary Equitable Remedies in Competition Cases, (July 25, 2003), available at <http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>, last visited on 12/05/2012, 21:17.

²⁴¹ Undoubtedly, federal courts and Supreme Court are also playing significant roles in keeping consistency of federal antitrust law's public enforcement. However, this section is focused on the relationship between the federal agencies and state attorneys general. For

3.3.1 Case allocation between state and federal enforcers: a general principle

As the third *de facto* federal antitrust law enforcer²⁴² the SAGs have the freedom to choose to sue as *parens patriae* or direct/indirect purchaser under federal antitrust law or the antitrust statutes of their states. Hence, unlike in the EU where Articles 101 and 102 TFEU must be applied to 'trade between Member States',²⁴³ the SAGs are not obliged to apply federal antitrust law to interstate commerce.²⁴⁴ The concept of 'case allocation' and 'well placed' between the Commission and the Member States under the EU competition law regime²⁴⁵ might not exist under its US counterpart, because theoretically all the federal antitrust cases are placed in the federal district courts.

However, as a general principle Congress intended a limited, localised scope of state enforcement of federal antitrust law.²⁴⁶ Section 15F (a) of HSR Act states:

more information on the functions of federal courts and Supreme Court in relation to antitrust law enforcement, please refer to M.A. Duggan: *Antitrust and the U.S. Supreme Court, 1829-1980* 2nd edition, Federal Legal Pubns, (United States, 1981); R.H. Bork: *The Antitrust Paradox*, [supra note 229](#);

²⁴² M. Crane, J.R. Loftis III, A.H. Silberman & S.H. Walbolt, '60 Minutes with Robert M. Langer, Assistant Attorney General-State of Connecticut, and Chair, NAAG Multistate Antitrust Task Force', [supra note 147](#).

²⁴³ See, Article 3 of Reg.1/2003.

²⁴⁴ In fact, state antitrust laws can extend to transactions involving interstate commerce. For example, *Coca-Cola Co. v. Harmar Bottling Co.*, 2006-2 Trade Cas.(CCH) ¶ 75, 464 (Tex., Oct. 20, 2006); *R.E. Spriggs Co. v. Adolph Coors Co.*, 112 Cal. Rptr. 585, 587-594 & n.4(Ct. App. 1974); *Oliver v. All-States Freight*, 156 N.E.2d 190, 195-196(Ohio Ct. App. 1957).

²⁴⁵ See, '2.2 European Competition Network: case allocation and consistency' of this chapter

²⁴⁶ Generally refer to '3.2.1 Concerns of state enforcement on federal antitrust laws' in this chapter.

Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State Attorney General would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State Attorney General.²⁴⁷

That the federal antitrust enforcer is required to notify SAGs of additional *parens patriae* claims when it files suit suggests that federal antitrust enforcement might not be able to cover the entire range of antitrust violations. Congress anticipated that because some areas of local concern would be left out of federal investigations states should be empowered to bring additional antitrust suits. As one commentator said, 'it would make little sense for Washington-based enforcers trying to craft divestitures to remedy a grocery store merger, or debating about the viability of stores on different sides of some small town, not to consult with or involve a state enforcer who is more likely to be familiar with the history and current market dynamics of that area.'²⁴⁸ In this way the SAGs would ensure consumer and business protection in situations currently left unprotected due to gaps in federal enforcement²⁴⁹

3.3.2 Coordination and cooperation between state and federal enforcers

²⁴⁷ 15 U.S.C. §15f(a)(2000).

²⁴⁸ See, S. Calkins, 'Perspectives on State and Federal Antitrust Enforcement', *supra* note 179, at 680.

²⁴⁹ See, J. Ratner, 'Conflicting Federal and State Enforcement of Federal Antitrust Law: Statutory Crisis or Celebration of Diversity?' *supra* note 167.

As mentioned above especially in the 1990s cooperation between states and federal antitrust enforcers was active.²⁵⁰ Both the SAGs and federal agencies developed mechanisms to coordinate federal antitrust law enforcement between states and federal agencies.

First of all the NAAG, founded in 1907, is the key organisational vehicle for cooperation among the states. It 'facilitates interaction among Attorneys General as peers, thereby enhancing the performance of Attorneys General and their staffs to respond effectively to emerging state and federal legal issues'.²⁵¹ The NAAG represents all states, including the United States territories and the District of Columbia. Its central office has helped coordinate the states' efforts in investigation, litigation, lobbying and training.²⁵² The NAAG also provides a continuing legal education program for state lawyers, organises seminars, conferences, summits and publishes written reports, monographs and newsletters on substantial issues of antitrust laws. The Association also serves as liaison agency to the federal government in federal antitrust law enforcement.²⁵³ In the NAAG the coordination between the states is entirely voluntary. There is no hierarchical control of these joint efforts. Each state, and the federal government when it is involved, is sovereign.²⁵⁴ When conducting an antitrust investigation involving more than one state normally one state will take the lead. The NAAG's general principle is that the state (or states) most

²⁵⁰ See, 'Conflict between the State and Federal Antitrust Enforcement' in the section of '3.2.1 Concerns of state enforcement on federal antitrust laws'.

²⁵¹ See, the official website of the NAAG, *supra* note 207;

²⁵² For a description of NAAG's administrative structure, see R. Abrams & L. Constantine, 'Dual Antitrust Enforcement in the 1990s', in H. First, E.M. Fox & R. Pitofsky (edited by): *Revitalizing Antitrust in its Second Century: Essays on Legal, Economic, and Political Policy*, (1991) Greenwood Publishing Group, at 484-515.

²⁵³ See, the official website of the NAAG, *supra* note 207.

²⁵⁴ See, H. First, 'Delivering Remedies: The Role of the States in Antitrust Enforcement', *supra* note 194, at 1014.

committed to organising and managing an investigation or litigation will become the lead (or co-lead) state, but there is no formal way to compel this result or to choose a lead. When a federal enforcement agency is involved, that agency leads the investigation, again by virtue of superior resources and interest rather than any legal requirement.²⁵⁵ In addition, the NAAG created the Task Force in 1983 to coordinate the investigation by different SAGs and encourage cooperation during such investigation.²⁵⁶ As the activities of the Task Force grew, more states wished to participate actively. Over the years membership grew to the point that now the Task Force became, in essence, a committee of the whole.²⁵⁷

Secondly, the Executive Working Group for Antitrust (hereafter, the EWGA), formed in October 1989, created an opportunity for the DOJ, FTC, the NAAG, and individual SAG to gather and discuss antitrust policy and enforcement. The EWGA includes the FTC Chairman, the Assistant Attorney General in charge of the DOJ Antitrust Division, and representatives of the states' Attorneys General. They meet to discuss issues of common interest. Extending those discussions to the staff level, and scheduling more frequent meetings, might further facilitate coordination. Staff-level meetings would enable state and federal personnel to assess candidly what is (or is not) working as well as it could.²⁵⁸ Thanks to the EWGA overlapping federal and

²⁵⁵ See, H. First, *ibid*; at 1015; see also, M.F. Brockmeyer, 'Report on the NAAG Multi-State Task Force', *supra note 146*, at 216.

²⁵⁶ See, M.F. Brockmeyer, *ibid*.

²⁵⁷ See, M.F. Brockmeyer, 'Report on the NAAG Multi-State Task Force', *supra note 146*, at 216; see also, M. Crane, J.R. Loftis III, A.H. Silberman & S.H. Walbolt, '60 Minutes with Robert M. Langer, Assistant Attorney General - State of Connecticut, and Chair, NAAG Multistate Antitrust Task Force', *supra note 147*, at 200.

²⁵⁸ See, P.J. Harbour, 'Cooperative Federalism in the Enforcement of Antitrust and Consumer Protection Laws', in *Federal Trade Commission 90th Anniversary Symposium*, on September 23, 2004, available at <http://www.ftc.gov/speeches/harbour/040923coopfed.pdf>, last visited on 19/05/2012, 11:54.

state enforcement can be coordinated and the duplication of effort can also be prevented.²⁵⁹

Thirdly, both the federal and state antitrust authorities have issued a series of guidelines to coordinate their civil investigation and prosecution.²⁶⁰ For example, the NAAG has redrafted its Horizontal Merger and Vertical Restraints Guidelines to make them more consistent with the Federal Guidelines. In addition, federal and state antitrust authorities developed the 1998 Protocol for Coordination in Merger Investigations between the Federal Enforcement Agencies and State Attorneys General,²⁶¹ which has greatly increased cooperation between states and the federal government during merger investigations.

As the result of the effort of coordination and cooperation made by both federal and state antitrust enforcers there were numerous examples of multistate federal cooperation in antitrust investigation and prosecution especially during the 1990s.²⁶²

²⁵⁹ See, J.S. Rill & C.S. Chambers, 'Federalism in Antitrust Enforcement: The United States Experience with a Dual Enforcement Regime', in C.D. Ehlermann & L. Laudati (edited by), *Robert Schuman Centre Annual on European Competition Law 1996*, (1997) Kluwer Law International.

²⁶⁰ There are other guidelines to coordinate federal and state criminal enforcement which are beyond the scope of this chapter. For example, in March, 1996 the DOJ has issued the Protocol for Increased State Prosecution of Criminal Antitrust Offenses. See, Department of Justice Press Release, available at <http://www.justice.gov/atr/public/guidelines/0618.htm>, last visited on 20/05/2012, 15:39.

²⁶¹ See, 4 Trade Reg. Rep.(CHH), ¶¶ 13, 211-13, (Oct. 26, 1995); see also, Antitrust Division, FTC Announce Program to Assist States with Merger Enforcement, 62 Antitrust & Trade Reg. Rep. (BNA), 331, 338-339 (Mar. 12, 1992).

²⁶² For such examples, please refer to [footnote 173](#). See also, J. Ratner, 'Conflicting Federal and State Enforcement of Federal Antitrust Law: Statutory Crisis or Celebration of Diversity?' [supra note 167](#); J.S. Rill & C.S. Chambers, 'Federalism in Antitrust Enforcement: The United States Experience with a Dual Enforcement Regime', [supra note 259](#).

4. The Relationship between the Central and Provincial Administrative Enforcers under China's Antimonopoly Law

4.1 Factors to be considered under the AML 2007 regarding public enforcement

The examination above makes clear that both EU competition law and US antitrust law enforcement regimes are two-level. The EU has the Commission's and national enforcers' levels; the US antitrust regime has the federal and states levels. Similarly, Chinese AML 2007's public enforcement is at the central and the provincial governmental levels.²⁶³ As mentioned in the introduction to this chapter, this section seeks to answer the following three questions: 1. whether the AML 2007 should be directly applicable by the PAEs; 2. How to allocate antitrust cases between the CAEs and the PAEs; 3. How to guarantee a consistent, predictable and harmonious public enforcement of the AML 2007 between the CAEs and the PAEs. There are three facts that need to be considered when discussing the three questions : 1. the PAEs are able to enforce the AML 2007 but need pre-authorisation from the CAEs; 2. PAEs generally lack resources and ability to enforce the AML 2007; and 3. protectionism is a serious problem in China.

According to Article 10 of the AML 2007, PAEs are able to enforce the law on authorisation devolved by the CAEs. In *Concrete Association* the provincial enforcer of Jiang Su province investigated the case after it obtained

²⁶³ In accordance with Article 10, the MOFOM, the SAIC and the NDRC may, when needed, authorise their branches at provincial governmental level to enforce the Law.

authorisation from the SAIC.²⁶⁴ This shows that the enforcement authority of the AML 2007 is not exclusive to MOFCOM, the NDRC and the SAIC, and the provincial agencies need authorisation from central government to enforce the law. The following sections will discuss whether the AML 2007's enforcement authority should be devolved to the PAEs; if it should, then the question is how to ensure consistency between the CAEs and the PAEs.

China has 31 provincial governments.²⁶⁵ They generally lack capacity and resources to enforce the AML 2007. Firstly, many PAEs do not have a specific institution to enforce the law. None of provincial branches of the MOFCOM has a specific department to assess mergers among the 31 provincial governments. There are only 7 provincial branches of the NDRC clearly provided in its internal regulations that they are responsible for enforcing the law against price monopoly.²⁶⁶ However, there is no specific agency to take charge of regulating price-related monopoly. There are more provincial branches of the SAIC which are specifically responsible for governing non-price related monopoly. Of the 31 PAEs 24 provincial governments report that they have established specific agencies to fight against non-price related monopolies. However, most of them failed to provide further explanation on how to enforce the AML 2007.²⁶⁷ Moreover, in practice the PAEs issued no guideline in relation to the enforcement of the AML 2007. The number of

²⁶⁴ See, Y. Fan, The first AML case enforced by the SAIC has been sealed: the market segmentation agreement of Lian Yungang's association, *Legal Daily*, 02/03/2011.

²⁶⁵ In fact China has 22 provinces (Taiwan is excluded), 5 autonomous region and 4 municipalities directly under the Central Government. They are in the same administrative hierarchy (the provincial level) under Chinese administrative structure. Thus, there are 32 provincial governments. See, H.Z. Dong, *The Handbook of the Administrative Division of People's Republic of China 2012*, [2012 中华人民共和国行政区划简册, 2012zhonghuarenmingongheguo xingzhengquhua jiance] (2012) Sinomaps Press.

²⁶⁶ The seven provincial branches are: Beijing, Tianjin, Neimenggu(inner Mongolia), Henan, Gansu, Shanghai and Xinjiang.

²⁶⁷ For detail, please refer to the official websites of the provincial governments.

cases is also very limited.²⁶⁸ These facts suggest that the PAEs generally lack institutional capacity and resources to enforce the AML 2007.

Protectionism between provinces is significant. It can be illustrated directly from economic analysis. Data show that the tariff between domestic provinces amounted to 46% in 1997. And these data, from 1986-1996 are on average, 35%.²⁶⁹ In 1997 consumers residing in a province purchased goods produced in their own province 21 times more than from other provinces, while this number is 11 times in 1987.²⁷⁰ In practice, under the name of assistance to the local economy, local(provincial) governments used their heightened administrative powers (in terms of trade, investment, budget, and price fixing) to implement a multiform protection of workers and enterprises under their authority.²⁷¹ Other provincial barriers include: approved import bans, discriminatory product and health certification standards, tariffs and dumping charges, confiscations of profits earned on marketing interprovincial goods, as well as subsidies to local commercial units for buying locally produced products aimed at curtailing competition

²⁶⁸ Until December, 2012, the author cannot find a single guideline issued by the 31 PAEs in relation to the AML 2007's enforcement. The published cases are also limited. However, there are some examples. Henan Province claimed that in 2011 it dealt with 35 cases related to non-price anticompetitive conducts; however, nothing further is reported. Jiangxi Province reported 7 cases but they were based on Anti-unfair Competition Law which was enacted in 1993 rather than the AML 2007.

²⁶⁹ See, S. Poncet, 'A Fragmented China: Measure and Determinants of Chinese Domestic Market Disintegration', (2005) 13(3) *Review of International Economics*, 409-430; see also, B.S. Zhang, 'A Comment of the Institutional Design of Current Administrative Enforcers of the AML 2007 [论我国反垄断执法机构的设置, lun woguofanlongduanfazhifajigou de shezhi]', (2005) 2 *Science of Law*, 113-121.

²⁷⁰ See, S. Poncet, *ibid.*

²⁷¹ See, X.B. Zhao & L. Zhang, 'Decentralization Reforms and Regionalism in China: a Review', (1999) 22 *International Regional Science Review*, 251-81; see also, Wong, Christine, 'Economic Growth under Decentralisation: Old Wine in New Bottles? Another Look at Fiscal Incentives in China', *Paper presented at the Workshop on National Integration*, organised by the World Bank and China's Development Research Centre, State Council (2003).

with home-province products and sustaining employment and the survival of uncompetitive local enterprises.²⁷² A questionnaire survey also shows that undertakings in 31 provinces generally feel that the provincial protectionism is a significant problem in China's domestic market.²⁷³

4.2 Whether a centralised or a decentralised enforcement mechanism is appropriate for the AML 2007

Although Article 10 of the AML 2007 empowers the provincial governments to enforce the law, the question of 'whether these provincial governments should be empowered to enforce the AML 2007' still remains.

4.2.1 Whether a centralised enforcement mechanism is appropriate under the AML 2007?

Possible advantages of a centralised mechanism²⁷⁴ under the AML 2007

As examined in the EU section, the centralised enforcement mechanism under Regulation 17 brought the following two advantages: firstly, consistent and predictable implementation of Articles 101 and 102 TFEU in Member States could be guaranteed; secondly, it could prevent trade protectionism

²⁷² See, A. Kumar, *China, Internal Market Development and Regulation: A World Bank Country Study*, (1994) World Bank Publications; see also, S.T. Li, Y.Z. Liu & B. Chen, 'Research on Measures—Objects and Degrees of Local Protection in Chinese Domestic Market, an Analysis Based on Sample Survey', *paper presented at the conference on Chinese Economy*, University of Clermont-Ferrand, France, 23–24 October 2003.

²⁷³ See, S.T. Li, Y.Z. Liu & B. Chen, *ibid.*

²⁷⁴ The so-called centralised mechanism in this section means that under which the law cannot be directly enforced by local enforcers, such as the PAEs.

between Member States.²⁷⁵ Although during the examination of US antitrust law the author did not find much discussion on the advantages of a centralised enforcement system, critics of state enforcement of federal antitrust laws reveal that, if federal antitrust law were to be enforced directly by different states, it would cause problems of inconsistency and protectionism between states.²⁷⁶ Hence, based on both the EU and US experience, it could be concluded that a centralised enforcement mechanism might bring two major advantages: 1. keeping consistent and predictable enforcement of the antitrust law; 2. preventing trade protectionism between Member States (or states).

If China were to adopt a centralised enforcement mechanism for the AML 2007 the two advantages might be gained. If only the CAEs can enforce the Law directly, one immediate effect is that the AML 2007 would be uniformly enforced in China's provinces. As the core enforcer(s), CAEs need not worry about contradictory decisions from PAEs and can guarantee consistency of interpretation of the Law, the standard of enforcement as the result of similar violations. CAEs may establish principles of enforcement, precedent and case law and binding/nonbinding guidelines. Such consistency is important to undertakings not only because it can save transaction costs but, more importantly, because it can provide considerable predictability which is crucial especially during such an early stage of the AML 2007's

²⁷⁵ See, 'The reasons for applying the centralised mechanism' in '2.1.2 The reasons for and concerns of EU's centralised enforcement mechanism' of this chapter.

²⁷⁶ See, generally, '3.2.1 Concerns of state enforcement on federal antitrust laws'. Justice Posner argued that state enforcement of federal antitrust law would be 'too subject' to protect the competitors in its territory using the government antitrust enforcement to disadvantage a competitor out of its territory. See, R.A. Posner, 'Antitrust in the New Economy', *supra note 188*, at 940; H. First also argued that one state, acting on complaint from an in-state business, might sue an out-of-state business, thereby helping local business by imposing an unnecessary cost on the out-of-state concern. See, H. First, 'Delivering Remedies: The Role of the States in Antitrust Enforcement', *supra note 194*, at 1030-1031.

enforcement.²⁷⁷ Experience from EU competition law also indicates that at the early stage a centralised enforcement mechanism is more effective than the decentralised mechanism due to the need to establish consistent EU competition law enforcement and predictability for undertakings in the market.²⁷⁸ China is also in its early years of enforcement of the AML 2007 and competition policy was not widely known in many provinces of China before. In addition, as identified above, the PAEs generally lack resources, experience and capacity to enforce the Law. The benefit of consistent and predictable enforcement of the AML 2007 brought by the centralised mechanism could be crucial to consumers, undertakings as well as enforcers of the Law.

The second advantage of a centralised mechanism is that it can prevent, or at least relieve, inter-province protectionism. This will also be crucial for China's AML enforcement. As identified above, China faces significant local protectionism between provinces. If PAEs are empowered to enforce the AML 2007, Justice Posner's concern under the US antitrust law regime could be realised in China. For instance, Chinese PAEs in different provinces may protect competitors in their own territory using the government antitrust enforcement to disadvantage a competitor out of its territory,²⁷⁹ which runs contrary to the goal of the AML 2007 which aims to establish an integrated

²⁷⁷ Similar opinion can be seen in A.H.Y. Zhang, 'Problems in Following E.U. Competition Law: A Case Study of Coca-Cola/Huiyuan', (2011) 3 *Peking University Journal of Legal Studies*, available at SSRN: <http://ssrn.com/abstract=1569836>, last visited on 27/05/2012, 16:48.

²⁷⁸ The *White Paper* states that the centralised authorisation system was necessary and proved very effective for the establishment of 'a culture of competition' in Europe. It enabled the Commission to establish the uniform application of Article 101 TFEU throughout the EU when competition policy was not widely known in many parts of the Community in the early years. See, § 4 of the *White Paper*.

²⁷⁹ Chinese commentators also expressed this concern. See for example, B.S. Zhang, 'A Comment of the Institutional Design of Current Administrative Enforcers of the AML 2007'; *supra* note 269, at 117.

domestic market.²⁸⁰ This is a realistic risk in China. Take the tobacco industry for example.²⁸¹ Economic analysis shows that the tobacco industry in China faces serious provincial protectionism.²⁸² The barrier is established by provincial governments in the form of an administrative monopoly²⁸³ because the tax on tobacco leaf is mainly for local government revenue.²⁸⁴ Hence it is likely that the PAEs would have used the AML 2007 to protect the undertakings within their territories if they were empowered to enforce the law.

To prevent such situation, a centralised and national level enforcer(s) would be needed to overcome local protectionism. As illustrated both by EU and US experience, a centralised, super-provincial-interest supervision will mitigate judgments biased in favour of provincial interests and prevent trade

²⁸⁰ See, Article 4 of the AML 2007.

²⁸¹ For a more comprehensive analysis on the monopoly and local protectionism of China's tobacco industry, please refer to J.F. Zhu, *Research on the Development of China's Tobacco Industry*[中国烟草工业发展研究, *zhongguoyancaogongye fazhanyanjiu*], PhD Thesis, (2008) Jilin Agricultural University, China P.R.; M. Tao, *Chinese Tobacco Industry under Monopolistic Control*[专卖管制下的中国烟草业 *zhuanmaiguanzhixia de zhongguoyancaoye*], PhD Thesis, (2005) Fudan University, China P.R.

²⁸² See, C.E. Bai, Y.J. Du, Z.G. Tao & S.Y. Tong, 'Local Protectionism and Regional Specialization:

Evidence from China's Industries', (2004) 63 *Journal of International Economics*, 397-417, at 408; see also, Z.L. Huang & J.Y. Wang, 'Local Protectionism and Market Fragmentation: An Experience Study in China [地方保护与市场分割:来自中国的经验数据, *difangbaohu yu shichangfenge:laizi zhongguo de jingyanshuj*]', (2006) 2 *China Industrial Economics*, 60-67.

²⁸³ In essence, in China, local protectionism is a kind of administrative monopoly. See, Y. Guo & A.G. Hu, 'The Administrative Monopoly in China's Economic Transition', (2004) 37 *Communist and Post-Communist Studies*, 265-280.

²⁸⁴ See, T.W. Hu, Z. Mao, M. Ong, E. Tong, M. Tao, H. Jiang, K. Hammond, K.R. Smith, J.de Beyer & A. Yurekli, 'China at the Crossroads: the Economics of Tobacco and Health', (2006) 15 *Tobacco Control*, 37-41, at 38.

protectionism between provinces,²⁸⁵ which is one of the goals of the AML 2007.

Concerns of the centralised mechanism under the AML 2007

A centralised enforcement mechanism would also bring some concerns. Such concerns faced by EU competition law enforcer(s) include:²⁸⁶ 1. the Commission faced an immense administrative overload created by the centralised mechanism; 2. the undertakings concerned could bring proceedings at the national level to a halt by lodging a notification with the Commission.²⁸⁷ However, it is doubtful that the concerns faced by EU centralised mechanism would apply equally to China.

Firstly, the CAEs of China have not faced an immense administrative caseload. On the contrary, **by December 2012**, the CAEs, especially the NDRC and the SAIC, did not deal with many cases in the 4 years' enforcement. Take the NDRC for example; it did not complete a single case from August 2008 to April 2010.²⁸⁸ From August 2010 to April 2012,²⁸⁹ the NDRC has investigated 5

²⁸⁵ See respectively, 'The reasons for applying the centralised mechanism' in '2.1.2 The reasons for and concerns of EU's centralised enforcement mechanism' of this chapter; 'Arguments brought by Microsoft case' in 3.2.1 'Concerns of state enforcement on federal antitrust laws' of this chapter.

²⁸⁶ In the US there is little discussion of the concerns at centralised mechanism for a centralised enforcement mechanism never existed under U.S. antitrust law enforcement.

²⁸⁷ See, 'The concerns of the EU centralised mechanism' in '2.1.2 The reasons for and concerns of EU's centralised enforcement mechanism' of this chapter. However, examination of the US antitrust enforcement regime did not show much information on the discussion of concerns over a centralised enforcement mechanism.

²⁸⁸ See, *Report on Competition Law and Policy of China 2010*, edited by Competition law and policy Committee of China WTO Research Institution, (2010) Law Press, at 135.

²⁸⁹ Unfortunately the author cannot find any official record or publication from the NDRC on AML 2007 cases from April 2010 to August 2010.

cases and completed 4 of them.²⁹⁰ Compared with the workload faced by the EU Commission in its centralisation period,²⁹¹ the NDRC's burden is quite light.

The second concern faced by the EU is based on the notification system on exemption. This concern could be raised when an undertaking is facing investigation by a NCA, and it may use the Commission's superior power to thwart the NCA's investigation. Hence if the PAEs in China are entirely excluded from the AML 2007's enforcement, this concern will not arise because the undertaking could deny the PAE directly. Or, if the PAEs may enforce the AML 2007 on the authorisation by the CAEs and there is a centralised notification system for exemption (Article 15 of the AML 2007), an undertaking could similarly thwart the PAE's investigation by notifying its conduct before the CAEs. In this case the CAEs must react timely to the notification to prevent such a block.²⁹² Nevertheless, this concern is not currently relevant since China still does not have such notification system for exemption.

4.2.2 Whether a decentralised enforcement mechanism is appropriate under the AML 2007

²⁹⁰ See, A. Fels, X.Y. Wang & J. Su (edited by), *China Competition Bulletin*, available at <http://www.anzsog.edu.au/research/publications/the-china-competition-bulletin>, last visited on 28/05/2012, 11:23.

²⁹¹ According to data from the Annual Report of the Commission, from 1998 to 2002 the number of pending cases before the Commission reached an average of 959.4 each year. See, *Report on Competition Policy 1998-2002*, available at http://ec.europa.eu/competition/publications/annual_report/index.html, last visited on 28/05/2012, 11:34.

²⁹² This concern has been discussed under EU competition law regime. For example, M. Siragusa suggested that 'the Commission must decide on notified agreements within certain time limits.' See, M. Siragusa, 'A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules', *supra note 37*; at 1103.

Possible advantages of a decentralised mechanism under the AML 2007

The so-called decentralised enforcement mechanism under China's AML 2007 means that under which the AML 2007 is directly enforceable by the PAEs without any authorisation from the CAEs.

From the examination of EU practice, EU competition law's decentralised enforcement mechanism may have the following advantages: 1. it may create competition of rules; 2. local agencies are in a better position to collect information from local companies; 3. decentralisation allows for a useful degree of experimentation.²⁹³ As examined in the US section of this chapter, the advantages of state enforcement include: 1. they may have a better understanding of the local market than enforcers at the federal level; 2. they are more likely than federal enforcers to know and be known and be trusted by state and local government officials; 3. they can compensate injured individuals while the federal enforcers cannot.²⁹⁴ The first advantage of the state enforcement under US antitrust law, namely the familiarity with local markets, is similar to the claim of *informational asymmetries* under EU competition law's regime.²⁹⁵ The last two advantages of US antitrust law²⁹⁶ do not exist under China's antimonopoly law regime. As to the second advantage, i.e. familiarity with and representation of state and local institutions, a PAE is not independent in China as it belongs to the provincial

²⁹³ See, 'The reasons for applying the decentralised mechanism' in '2.1.3 The reasons for and concerns regarding the EU's decentralised enforcement mechanism' of this chapter.

²⁹⁴ See, '3.2.2 The states' comparative advantages when enforcing federal antitrust law' of this chapter.

²⁹⁵ See, 'The reasons for applying the decentralised mechanism' of '2.1.3 The reasons for and concerns of EU's decentralised enforcement mechanism' in this chapter.

²⁹⁶ Namely, the familiarity with and representation of state and local institutions; and, the ability to send money to injured individuals. See, '3.2.2 The states' comparative advantages when enforcing federal antitrust laws' of this chapter.

government.²⁹⁷ Hence, theoretically, when the provincial government claims to be the victim of an antitrust violation, the PAE of this province could not make a decision on this violation because it is at the same time the plaintiff in this case. As to the third advantage, there is no legal ground in China for the PAEs, as *parens patriae*, to compensate their residents and individual consumers. Thus there are three main comparative advantages of a decentralised enforcement mechanism summarised both from EU competition and US antitrust law regimes that might be applied in China: 1. competition of rules; 2. local agencies' better position to collect information from local companies; 3. experimentation.

Competition of rules could be very limited during the AML 2007's enforcement even if a decentralised enforcement mechanism were introduced. Firstly, as mentioned above, Chinese provinces currently do not have their own antitrust statutes. The AML 2007 was enacted to be applied to all 22 provinces, 5 autonomous regions and 4 municipalities directly under the Central Government²⁹⁸. As the first comprehensive and unified antitrust statute of China²⁹⁹ the AML 2007 is followed as an example of legislation by the provincial governments subsequently if the province intends to make its

²⁹⁷ The provincial administrative enforcers in China are branches of the Central Administrative Enforcers in local governments. They are under dual leadership control: the leadership of the local government and the leadership of the CAEs. For general relationship between Chinese central and local government, please refer to J.G. Zhang, *Introduction to the Relationship among Governments in Contemporary China* [当代中国政府间关系导论, *dangdai zhengfuguanxi daolun*], (2009) Social Sciences Academic Press; L.Q. Xue, *Authorisation System: Longitudinal Intergovernmental Relations during the Reform and Open Era* [授权体制: 改革开放时期政府间纵向关系研究, *shouquantizhi: gaigekaifangshiqi zhengfujian zongxiangguanxianyanjiu*], (2010) Tianjin People's Press; H.Y. Wei, *Study on Local Government Modes under the Framework of Constitutional Politics in China* [宪政架构下的地方政府模式研究, *xianzhengjiagouxia de difangzhengfumoshiyanjiu*], (2004) China Social Sciences Press.

²⁹⁸ See, Article 2 of the AML 2007.

²⁹⁹ See, H.W. Hittinger & J.D. Huh, 'The People's Republic of China Enacts its First Comprehensive Antitrust Law: Trying to Predict the Unpredictable', (2008) 4 *New York University Journal of Law and Business*, 245-283.

own provincial antitrust statute. Moreover, although the AML 2007 did not stipulate the relationship between the Law and provincial antitrust statutes, the Law of the People's Republic of China on Legislation (hereafter the Legislation Law 2000)³⁰⁰ provides that the legislators at the provincial level are able to 'formulate local regulations in accordance with the specific conditions and actual needs of their respective administrative areas'.³⁰¹ However, such local regulations are 'not allowed to be in contradiction with Chinese Constitution, laws and administrative regulations'.³⁰² In other words the AML 2007 will be applied in all provinces, autonomous regions and municipalities prior to provincial and local antitrust statutes, if they have any. Nor should any provincial and local antitrust statutes conflict with the AML 2007. However, different PAEs may have different procedures to enforce the same AML 2007 and thus regulatory competition may happen to some extent.

The second advantage may be a stronger reason for decentralisation. As illustrated both by EU and US experience a local authority will be better placed than the central authority to deal with local antitrust violation. The Commission in Brussels may not be able to detect a price-fixing agreement between local shops in a UK town; the state Attorney General of California may have a better understanding of the local market than the enforcers from Washington D.C. Similarly, the provincial government in Xinjiang autonomous region (which is 2410 km from Beijing) may be considered a better antitrust enforcer than officials in Beijing when dealing with local antitrust concerns. Although PAEs may lack capacity and experience to enforce the AML 2007, the PAEs do have this comparative advantage that the CAEs do not have.

³⁰⁰ The Law of the People's Republic of China on Legislation was adopted by the 3rd Session of the Ninth National People's Congress on March 15, 2000, and effective from July 1, 2000.

³⁰¹ See, Article 63 of the Legislation Law 2000.

³⁰² *Ibid.*

Thirdly, the advantage of experimentation would also be limited if China were to adopt a decentralised enforcement mechanism for the AML 2007. Firstly, as mentioned above, the obligation to enforce the same AML 2007 in a similar and convergent way would greatly weaken the effect of experimentation. Secondly, the lack of capacity of the PAEs would also limit experimentation. Hence it might be too early to consider the benefit of experimentation in China.

Concerns regarding the decentralised mechanism under the AML 2007

The main concern with the decentralisation of EU competition is that it may reduce the consistency and legal certainty of Articles 101 and 102 TFEU.³⁰³ Examination of the US antitrust law regime also illustrates a similar concern of inconsistency.³⁰⁴ There are three additional concerns regarding the US state enforcement of federal antitrust laws. Firstly, state enforcers can do no more than free ride on federal antitrust litigation; secondly, state enforcement might be easily influenced by the state's interest groups; and, thirdly, state enforcers do not have the resources to enforce federal antitrust law.³⁰⁵

If the PAEs may directly enforce the AML 2007, enforcers of the Law may face inconsistency of two kinds: firstly, that between PAEs and CAEs; secondly, between PAEs. The inconsistency between the PAEs and the CAEs could appear because, although PAEs cannot make contradictory antitrust statutes, there is no specific law or regulation stipulating that the PAEs

³⁰³ See, 'the concern of decentralisation' in '2.1.3 The reasons for and concerns regarding the EU's decentralised enforcement mechanism' of this chapter.

³⁰⁴ See, 'Other critics of state enforcement of federal antitrust laws' in '3.2.1 Concerns of state enforcement of federal antitrust laws' in this chapter.

³⁰⁵ See, 'Arguments brought by Microsoft case' in '3.2.1 Concerns of state enforcement on federal antitrust laws' of this chapter.

cannot take different decisions from those of CAEs in relation to antitrust enforcement. PAEs may either take a more restrictive, less rigorous or lax enforcement approach than the CAEs. There are two possible sources of inconsistency in PAE practice. Firstly, a PAE is not currently bound by the legal determinations of another PAE. Inconsistency may arise where PAEs in different provinces investigate the same (type of) agreement or practice and apply different legal interpretations of the AML 2007. Secondly, different PAEs may have different levels of resources, professionalism, experience, and enforcement levels. For example, the government of Shanghai may have more resources, expertise and experience than the government of Xinjiang autonomous region.³⁰⁶ If PAEs are empowered to enforce the AML 2007 directly, different PAEs would enforce the AML 2007 inconsistently. A consistent enforcement of the AML 2007 is vital especially at this early stage. It is necessary for legal certainty and predictability for both undertakings and consumers; it can help to build a stable enforcement system for the AML 2007; it may also contribute to the establishment of an integrated domestic market in China.

³⁰⁶ Because there is no report on the AML 2007's enforcement by Shanghai or Xinjiang provincial government, there is no direct evidence to prove that Shanghai PAE is more capable than Xinjiang PAE with regard to the AML 2007's enforcement. However, there is some evidence to prove that Xinjiang is much less developed than Shanghai in terms of economy. For example, the GDP of Xinjiang in 2009 is 427.358 billion RMB, while the GDP of Shanghai in 2009 is 1.4901 trillion RMB. See, *Statistical Bulletin of the National Economic and Social Development of Xinjiang Uygur Autonomous Region 2009*, published by Xinjiang Uygur Autonomous Region Statistical Bureau, available at <http://www.tjcn.org/tjgb/201004/11247.html>, last visited on 29/05/2012, 16:38; *Statistical Bulletin of the National Economic and Social Development of Shanghai 2009*, published by Shanghai Statistical Bureau, available at <http://www.tjcn.org/plus/view.php?aid=6002>, last visited on 29/05/2012, 16:41. The permanent resident population of Xinjiang in 2010 is about 21.8 million; the permanent resident population of Shanghai in 2010 is about 23.0 million. See, *the Sixth National Population Census Data Bulletin 2010 (No.2)*, published by National Bureau of Statistics of China, available at http://www.stats.gov.cn/tjfx/jdfx/t20110429_402722512.htm, last visited on 29/05/2012, 16:52.

All the concerns of decentralisation encountered under US antitrust regime may also arise in China. Firstly, it is very likely that the PAEs can do no more than free ride on CAEs' enforcement.³⁰⁷ Posner's argument concerning the US antitrust law regime may not reflect the fact,³⁰⁸ however, that in China the free ride can be a real concern. Without sufficient competence and resources, if the PAEs were granted direct enforcement authority at such an early stage, it is very likely that they would only come after and make use of the efforts of the CAEs and raise no substantial issues relating to the Law's enforcement. The second concern raised regarding the US antitrust regime would be even more significant in China. As mentioned above, China's provincial policy of protectionism is a serious.³⁰⁹ Even before the enactment of the AML 2007 provincial governments used various tools to protect local businesses and discriminate against competitors in other provinces.³¹⁰ The AML 2007 could be another tool. Provincial government A may protect the local shoe making factory A from its competitor (shoe making factory B) in province B by enforcing the AML 2007 more rigorously in respect of the branch of factory B in province A. The temptation would be particularly strong if the provincial enforcer of the AML 2007 is not independent of the provincial government, which is the case in China. Thirdly, lack of competence of the PAEs in China has been discussed above³¹¹ .

³⁰⁷ In fact this is a view held by Posner concerning the U.S. antitrust enforcement regime. See, R.A. Posner, 'Antitrust in the New Economy', *supra* note 188; at 940.

³⁰⁸ See, H. First, 'Delivering Remedies: The Role of the States in Antitrust Enforcement', *supra* note 194; at 1028.

³⁰⁹ See, '4.1 Factors to be considered under Chinese AML 2007's public enforcement' in this chapter.

³¹⁰ A. Kumar, *China, Internal Market Development and Regulation: A World Bank Country Study*, *supra* note 272.

³¹¹ See, '4.1 Factors to be considered under Chinese AML 2007's public enforcement' in this chapter.

4.3 Some proposals for the AML 2007's centralised enforcement mechanism

4.3.1 A centralised enforcement mechanism is more appropriate for China at this time

Discussion of advantages and concerns of centralised and decentralised enforcement mechanism in Chinese circumstances now completed, we may conclude that a centralised enforcement mechanism is more appropriate than a decentralised mechanism at this time.

Firstly, the advantages brought by the centralised mechanism are more significant than the advantages brought by the decentralised mechanism. Maintaining consistent and predictable enforcement of antitrust law and preventing trade protectionism between provinces in China may be the primary task for AML 2007 enforcers. The advantages brought by decentralisation would be diminished in current Chinese circumstances. Regulatory competition is not likely to occur even if decentralisation is introduced because all PAEs enforce the same AML 2007 or their local antitrust statutes modelled on the AML 2007 with similar enforcement procedures and standards. Experimentation would also be insignificant for the same reason and the lack of experience of the PAEs. PAEs do have an advantage because they are more familiar with local markets. However, this advantage will be weakened if the PAEs do not have enough resources, experience and expertise to enforce the Law directly.

Secondly, the concerns arising in respect of decentralisation are more significant than those under a centralised mechanism. As mentioned

above,³¹² it is too early to consider the concerns of centralisation: the current administrative workload of CAEs is acceptable; and the notification system does not exist under China's AML 2007 enforcement regime. However, the possible concerns can be immediate and serious. Firstly, at such an early stage, public enforcement of the AML 2007 should remain consistent and stable to establish both general principles as well as detailed procedural rules for subsequent enforcement and legal certainty and predictability for practitioners and consumers in the domestic market. The main concern is inconsistency. Secondly, the three concerns regarding state (direct) enforcement of federal antitrust laws under US antitrust law may be particularly significant in China³¹³ due to the two features of China's antitrust enforcement: PAEs generally lack resources, experience and competence to enforce the AML 2007; and, provincial or local protectionism.

4.3.2 A specific design of a centralised enforcement mechanism for China's AML 2007

There are two possible centralised mechanisms for China to choose between: 1. in which all enforcement powers are in the hands of the central government and PAEs are excluded from AML 2007 enforcement; 2. in which PAEs can enforce the AML 2007 on the authorisation from the CAEs. The author prefers the second option for two reasons. Firstly, if the first option were to be adopted, CAEs might face immense and unacceptable administrative workload after years of development and decentralisation could be the only choice at that stage. At that time, however, PAEs would

³¹² See, 'Concerns of the centralised mechanism under the AML 2007' in '4.2.1 Whether a centralised enforcement mechanism is appropriate under the AML 2007?' of this chapter.

³¹³ Although these three concerns are not persuasive under U.S. antitrust law regime, see, H. First, 'Delivering Remedies: The Role of the States in Antitrust Enforcement', *supra* note 194; S. Calkins, 'Perspectives on State and Federal Antitrust Enforcement', *supra* note 179.

still have no experience to enforce the AML 2007 because they were excluded previously. Secondly, the advantage of PAEs that they are more familiar with local markets and local antitrust violation than are CAEs is undeniable. PAEs should make use of this advantage to improve the effectiveness of the Law's public enforcement.

Under the centralised authorisation, PAEs cannot enforce the AML 2007 without the authorisation from CAEs. Firstly, PAEs' enforcement actions are supervised by CAEs. Such supervision may include: 1. the obligation of the PAEs to obtain authorisation before its first formal antitrust investigation; 2. the obligation to inform CAEs before taking a decision in enforcement of Articles 13, 14, 15 and 17 of the AML 2007; 3. the obligation of the PAEs to respect and follow precedents made by the CAEs to maintain consistent enforcement of the AML 2007; 4. if the CAEs think that a PAE is not enforcing the AML 2007 properly, they may issue a guidance letter to help it enforce the Law. Secondly, during the PAE's enforcement, a CAE may withdraw authorisation and therefore relieve the PAE(s) from enforcing the Law. A CAE may consider withdrawal when the PAE's enforcement action and/or decision would run counter to previous decisions and procedural rules set up by the CAEs. However, the CAEs should initiate such proceeding cautiously and after consulting with that PAE and giving reasons.

4.3.3 Establishing a notification system for exemption under Article 15 of the AML 2007

Another question is whether undertakings should notify agreements, decisions or concerted practices before the AML 2007 administrative enforcers for exemption. Establishing a notification system in China would at least bring three benefits. Firstly, anticompetitive agreements, decisions or

concerted practice may be examined by the administrative enforcers before they are enforced; secondly, undertakings or association of undertakings would be relieved of self-examination of their possibly anticompetitive conduct; thirdly, this notification process might spread the sense of antitrust and make the AML 2007 become known by the undertakings or association of undertakings and lawyers within China.³¹⁴ More importantly, the main reason for the EU's abandoning its notification system was the heavy administrative burden,³¹⁵ which does not exist currently in China.³¹⁶ Finally, the AML 2007 has a very short history compared with that of the EU and US; secondly, the public enforcement of antitrust law is immature; thirdly, Chinese undertakings generally lack knowledge of the AML 2007 and it would be hard or even unrealistic to require them to conduct self-examination of their anticompetitive agreements, decisions or concerted practices.³¹⁷ China should establish the *ex ante* notification system which is similar to the previous EU notification system under Regulation 17 under which undertakings seeking exemption should notify the CAE of agreements, decisions or concerted practices before they come into force.

4.4 Case allocation between the CAEs and PAEs: a basic principle

³¹⁴ In fact this is what had happened in the EU at its early years. The abolished notification system under EU competition law had spread Article 101 and 102 TFEU and made them become known by the undertakings or association of undertakings and lawyers within the EU and establishment of 'a culture of competition' in Europe. See, para. 4 of the White Paper; see also, W.P.J. Wils, *Principles of European Antitrust Enforcement*, (2005) Hart Publishing, at 6.

³¹⁵ See, para. 4 of the White Paper; see also, the Third Recital of Regulation 1/2003, *supra* note 13.

³¹⁶ See, 'Concerns of the centralised mechanism under the AML 2007' in '4.2.1 Whether a centralised enforcement mechanism is appropriate under the AML 2007?' of this chapter.

³¹⁷ See, G.Y. Xu & C. Wang, 'Modernisation of EU Competition Law and the Establishment of Chinese Antimonopoly Law's Enforcement mechanism, [欧共体竞争法实施机制的现代化, 兼论我国反垄断法实施机制的确立, ougongti jingzhengfa shishijizhi de xiandaihua, jianlun woguofanlongduanfashishijizhi de quelij]', *supra* note 274, at 149.

Article 10 of the AML 2007 grants PAEs power to enforce the law. Case allocation between the CAEs and PAEs needs to be decided. Under EU competition law NCAs and national courts in Member States are obliged to enforce Articles 101 and 102 TFEU when the suspected violation has 'effect between Member States',³¹⁸ which is interpreted broadly by the Court of Justice.³¹⁹ EU competition law provides a general principle of case allocation which states a case is 'well placed' if it is allocated to a single authority which stands closest to the centre of gravity of the violation in question and therefore has the ability to collect strategic information and bring the violation effectively to an end.³²⁰ Moreover, the ECN also provides a practical approach to allocation of cases between the Commission and national enforcers of Member States.³²¹ The general principle under the US regime of allocating antitrust cases between federal enforcers and state Attorneys General, although not voluntarily applied, is that state enforcement of federal antitrust law should be focused on local matters, while federal antitrust enforcers should deal with antitrust violations which have an effect between states or on the national level.³²²

In sum both EU and US practice adopts a general principle for case allocation between the two-tier enforcers: where local enforcers are better placed to deal with local antitrust matters and US federal enforcers or the EU Commission focus on concerns at US federal or the EU level. In fact this measure of antitrust case allocation finds a parallel in China's patent law.

³¹⁸ See, Article 3 of Reg.1/2003.

³¹⁹ See, [footnote 73](#).

³²⁰ See, para.8 and 16 of the Network Notice.

³²¹ See, '2.2.1 An overview' of this chapter.

³²² See, '3.3.1 Case allocation between state and federal enforcers: a general principle' in this chapter.

Article 3 of Patent Law of the People's Republic of China (hereafter, Patent Law 2000)³²³ states:

The Patent Administrative Organ under the State Council is responsible for the patent work nationwide...The authorities for patent work under the governments of provinces, autonomous regions and municipalities directly under the Central Government are responsible for the patent administration work of their own administrative areas.

This principle can also be applied under China's two-tier antitrust enforcement. To this end the general words 'when needed' in Article 10 of the AML 2007 can be interpreted as: 1. the MOFOM, the SAIC and the NDRC should authorise their provincial administrative enforcer which stands closest to the centre of gravity of the violation in question to enforce the Law when the suspected violation only has an effect within its territory; 2. if a violation of the Law has a nationwide effect, CAEs should take the case and/or cooperate with PAEs; 3. If the violation in question is between two or several provinces but does not have a national effect, the PAEs in these provinces should be authorised to enforce the Law in a cooperative and coordinative manner.³²⁴

However, there is no official explanation of the words 'nationwide effect' under Chinese antitrust or anti-unfair competition law regime. Similar words can be found in Civil Procedural Law of People's Republic of China

³²³ Adopted at the 4th Session of the Standing Committee of the Sixth National People's Congress on March 12, 1984; amended twice in 1992 and 2000 respectively.

³²⁴ The cooperation and coordination will be discussed in the following section.

³²⁵(hereafter, Civil Procedural Law 2007). Article 21(1) of the Civil Procedural Law 2007 states:

The Supreme People's Court shall have jurisdiction as the court of first instance over the cases that have nationwide effect.

Although there is no explanation or definition of 'nationwide effect', in the Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China³²⁶(hereafter, the Opinions on Civil Procedural Law), there appear some factors that need to be considered when the Higher Courts³²⁷ determine the province-wide impact and their jurisdiction: the complexity of the case, the related amount of the case and the impact in the territory.³²⁸ These factors may also be considered in defining a 'nationwide effect' in antitrust cases. Additionally, China might consider a more formulaic but more feasible policy adopted by the EU competition law regime: when the violation in question involves three or more provinces and this violation has a nationwide effect it shall be dealt with by CAEs.³²⁹

³²⁵ Adopted on April 9, 1991 at the Fourth Session of the Seventh National People's Congress.

³²⁶ Discussed and adopted at the 528th meeting of the Judicial Committee of the Supreme People's Court, and promulgated by Judicial Interpretation No.22 [1992] of the Supreme People's Court on July 14, 1992.

³²⁷ China's hierarchy of courts can be divided into four levels: Basic People's Courts (or the Grass-root Courts) deal with cases in a city or county; the Intermediate People's Courts are set up within provinces, autonomous regions and municipalities directly under the central government. Intermediate Courts sit in the central city of a province or autonomous regions; The Higher People's Courts are established at the provincial level and deal with cases with province-wide impact; the Supreme People's Court is the highest court in China and deals with cases with nationwide impact. For detailed structure and jurisdiction of Chinese courts, see, Organic Law of the Peoples Courts of the People's Republic of China, adopted on July 1, 1979 at the Second Session of the Fifth National People's Congress.

³²⁸ See, Article 1(3) of the Opinions on Civil Procedural Law.

³²⁹ See, Para. 14 of the Network Notice.

When determining which PAE (or PAEs) is better placed to deal with a local matter we may refer to the three conditions under EU competition law as well: 1. the actions of the parties have substantial effects for the territory in which the authority is based; 2. the authority can effectively bring to an end the entire infringement; 3. the authority can effectively gather the evidence required to prove the infringement.³³⁰

4.5 Cooperation and coordination under the enforcement of the AML 2007 between CAEs and PAEs

Both the EU and US encourage cooperation and coordination between antitrust enforcers. Under the decentralised enforcement mechanism of EU competition law, Article 11(1) of Reg.1/2003 imposes a legal duty of cooperation on the Commission and national enforcers in Member States.³³¹ The national enforcers in Member States are also obliged to cooperate with and inform each other.³³² In addition, the ECN was created to enhance cooperation and coordination between the Commission and national enforcers of Member States and its initial experience is generally positive.³³³

³³⁰ See, M. Kekelelis, 'The European Competition Network (ECN): It Does Actually Work Well', *supra* note 93.

³³¹ Article 11 and Article 12 of Reg.1/2003 stipulates five kinds of obligation: firstly, any NCA acting under Articles 101 or 102 TFEU must inform the Commission before or just after commencing its first formal investigative measure; secondly, the Commission has also accepted an equivalent obligation to inform NCAs in the form of transmitting copies of most important documents to the NCAs; thirdly, the NCAs are under an obligation to inform the Commission before taking a positive decision in enforcement of Articles 101 and 102 TFEU and communicate their summary decisions to the Commission on which the Commission may express written or oral observations; fourthly, the competition authorities may consult the Commission on any case involving application of EU competition law; finally, in cases where the Commission needs information or evidence from the territory of a particular NCA in the course of their investigations they may approach and ask the NCA to collect evidence in its territory and to communicate such evidence to the requesting authority.

³³² See, Article 11(3) and Article 13(1) of Reg. 1/2003; para.29 of the Network Notice.

³³³ See, '2.2 European Competition Network: case allocation and consistency' in this chapter.

State enforcers under the US antitrust law regime have more freedom than the national enforcers in EU Member States because the cooperation between state and federal enforcers is voluntary.³³⁴ However, there has also been developed a series of networks to enhance cooperation and coordination, for example the NAAG and its Task Force.³³⁵

EU and US experience show that cooperation and coordination mechanisms between antitrust enforcers may bring at least two benefits: firstly, they may reduce the possibility of inconsistent enforcement of EU competition or US federal antitrust law; secondly, through such cooperation, inexperienced individual local enforcers may gather their resources and enforce the law jointly as a unit and thus the concern of local enforcers' incapability can be reduced.³³⁶ These two benefits could be very important for the AML 2007 because China may face problems of inconsistent enforcement of the Law and lack of capacity of PAEs. Even if a centralised enforcement mechanism is adopted under which the PAEs are excluded from enforcing the AML 2007, cooperation between the CAEs and PAEs is still necessary to overcome informational asymmetries when the CAEs need information on local markets from the PAEs.³³⁷

In order to establish and enhance cooperation and coordination in AML 2007 enforcement at least two things can be done: firstly, imposing a legal obligation of cooperation and coordination between CAEs and PAEs and different PAEs by adopting a regulation governing AML 2007 public

³³⁴ See, See, H. First, 'Delivering Remedies: The Role of the States in Antitrust Enforcement', *supra* note 194, at 1014.

³³⁵ See, '3.3.2 Coordination and cooperation between state and federal enforcers' in this chapter.

³³⁶ See, M.F. Brockmeyer, 'Report on the NAAG Multi-State Task Force', *supra* note 146; ABA Section of Antitrust Law, *State Antitrust Practice and Statutes*, *supra* note 131.

³³⁷ Please refer to '2.1.3 The reasons for and concerns regarding the EU's decentralised enforcement mechanism' in this chapter.

enforcement procedure; secondly, establishing a network under which all CAEs and PAEs can cooperate during investigation, exchange information and allocate the case efficiently.

The obligation of cooperation and coordination might include, but not be limited to: 1. The CAEs and PAEs 'informing each others before or just after commencing the first formal investigative measure of anticompetitive conducts; The information might also be shared with other PAEs;³³⁸ 2. PAEs might be placed under an obligation to inform CAEs before taking a decision in enforcement of Articles 13, 14, 15 and 17 of the AML 2007;³³⁹ 3. If CAEs were to initiate proceedings for adoption of a decision under Articles 13, 14, 15 and 17 of the AML 2007, it should relieve the PAEs of their competence to apply these articles. If a PAE were already acting on a case, CAEs should consult this PAE before initiating proceedings. In addition, PAEs might consult CAEs on any case involving the application of AML 2007.

The network constituted by CAEs and PAEs could be called 'The Chinese Antimonopoly Network' (hereafter the CAN). The aim of the CAN would be to enhance, improve and coordinate the CAE and PAE antitrust enforcement. It should at least have three functions: 1. to allocate antitrust cases within the network; 2. to exchange information between CAEs and PAEs efficiently; 3. to help PAEs to enforce the AML 2007 effectively. For example, if a violation in question involves two or more PAEs while having no nationwide effect, these PAEs might take action collectively as one authority in order to overcome

³³⁸ In fact, according to Article 10 of the AML, PAEs are under an obligation to inform CAEs before the first formal investigation because they need authorisation from CAEs to enforce the law. However, neither the AML 2007 nor other related regulations imposed an obligation on CAEs to inform PAEs.

³³⁹ These Articles concern the prohibition of monopolistic agreements and abuse of dominant position under the AML 2007.

their individual incapacity. One PAE should take the lead and the other PAEs should share information and resources to help the PAE which leads the case.

Chapter 4 Protection of Rights of Concerned Parties during the Administrative Procedure under the AML 2007

1. Introduction

Rights of the concerned parties in China are normally regulated under civil, criminal or administrative procedures¹. Public enforcement of the AML 2007 conducted by Chinese administrative enforcers follows the administrative procedure under which the enforcers have the authority both to investigate and to take decisions.² However, there is no uniform or specific law or regulation stipulating the procedure of neither administrative investigation nor the right of defence during investigation in China.³The only related content in the AML 2007 is Article 43, which provides that:

¹To date China has enacted three major procedural laws: Civil Procedural Law of People's Republic of China(adopted on April 9th, 1991 at the Forth Session of the Seventh National People's Congress, and revised at the 30th Session of the Standing Committee of the 10th National People's Congress in 2007); Criminal Procedural Law of People's Republic of China(adopted on July 1st, 1979 at the Second Session of the Fifth National People's Congress, and revised at the Forth Session of the Standing Committee of the 8th National People's Congress in 1996); and, Administrative Procedural Law of People's Republic of China(adopted on April 4, 1989, at the Second Session of the Seventh National People's Congress, and revised by Order No. 16 of the President of the People's Republic of China on April 4, 1989),(hereafter, the APL). The rights of defence protected by these laws are in the procedure in court. However, as will be illustrated below, there is no specific legislation on the protection of the rights of defence during the administrative investigation process in China.

²Article 44 of the AML 2007 provides that after investigating and verifying the suspected anticompetitive conduct, if the enforcer of the Law believes the conduct has constituted a violation of the Law, it shall take decisions according to law and it may publish it.

³See, L.J. Tang, 'Categorisation of China's Administrative Investigation [论行政调查的类型化, lunxingzhengdiao cha de leixinghua]', (2010) 1 *Western Law Review*, 119-124; see also, Z.H. Kang, 'The Protection of the Rights of the Investigated party during the Administrative Investigation [论行政调查中被调查人的权利保

The undertaking(s) concerned and third interested parties being investigated have the right to express their opinions to the administrative enforcer(s) of the AML 2007. The administrative enforcer(s) shall verify the facts, reasons and proofs being given by undertakings concerned and/or third interested parties being investigated.

In addition, the MOFCOM, the SAIC and the NDRC have issued their own procedural rules and regulations.⁴These did not introduce any new kind of right of the concerned parties other than that set out in the AML 2007.⁵ In fact, in the Chinese general administrative law regime protection of rights of concerned parties during administrative procedures is insufficient.⁶In

护,lunxingzhengdiaochezhongbeidiaoچارendequanlibaohu]', (2012) 1 *Hubei Social Science*, 159-162;

⁴See, the Measures for the Undertaking Concentration Examination (No. 12 Decree [2009] of the MOFCOM);the Provision of Procedure against Price Monopoly(No.7 Decree [2010] of the NDRC); Procedural Rules for the Industry and Commerce Administration Authorities of Investigating and Treating Administrative Monopoly related Cases(No.41 Decree[2009] of the SAIC); Procedural Rules for the Industry and Commerce Administration Authorities of Investigating and Treating Monopolistic Agreement and Abuse of Dominant Position Cases(No.42 Decree[2009] of the SAIC).

⁵However, the Measures for the Undertaking Concentration Examination provides a detailed procedure on oral hearing. See, Article 8 of the for the Undertaking Concentration Examination. This oral hearing procedure is also regulated in the Administrative Punishment Law of the People's Republic of China (adopted at the fourth session of the Eighth National People's Congress on March 17, 1996; hereafter, the Administrative Punishment Law), which should be followed also by the SAIC and the NDRC when they are organising oral hearing under the AML 2007.

⁶See, S.N. Ying & H. Zhuang, 'The Status Quo and Future Development of Chinese Administrative Investigation [行政调查的现状与未来发展方向,xingzhengdiaoche de xianzhuangyuweilaifazhanfangxiang]', (2008) 5 *Jiangsu Social Science*,114-116. For the analysis on the protection of rights of defence in general administrative investigative procedure under Chinese administrative laws, please refer to C.Y. Zhang, *Guarantee of Rights of Private Party in Administrative Investigation [行政调查中相对人权利保障问题研究,xingzhengdiaochezhongxiangduirenquanlibaozhangwentiyANJIU]*,(2011)Thesis of master degree of law, Zhengzhou University.

practice, in *Concrete Association*⁷, the rights of the investigated undertakings were not sufficiently protected during the investigation by the Industry and Commercial Administration of Jiang Su province (hereafter the ICJS).⁸ Thus during the administrative proceeding under the AML 2007 protection of rights of concerned parties is a significant concern that requires examination.

This chapter examines the rights of concerned parties during the administrative procedure under the AML 2007's public enforcement. Particularly, there are three questions: 1. what protection of rights of concerned parties is there during the administrative enforcement procedure of the AML 2007? 2. What is the experience of the enforcement regimes of EU competition law and US antitrust law? and, 3. What can be learned to protect concerned parties' rights under the AML 2007 from the experience of the EU and US?

The scope of rights of concerned parties discussed in this chapter is defined as follows: firstly, it includes those enjoyed by the undertaking concerned and investigated by the administrative enforcer(s).⁹ Thus the rights of the complainants and other third parties are not considered. Secondly, the rights of the concerned parties are those which arise or which should arise under the AML 2007's administrative investigative procedure. There is no express definition of the 'administrative investigative procedure of the AML 2007's public enforcement' in China.¹⁰ In this chapter it refers to the

⁷ See, F. Yao, 'The first AML case enforced by the SAIC has been sealed: the market segmentation agreement of LianYungang's association', *Legal Daily*, 02/03/2011.

⁸ For details, please refer to '3.2.3 Rights of the concerned undertaking (or association of undertakings) during antitrust investigation are insufficiently protected' in Chapter 1 of this thesis.

⁹ Similar classification can be found in M. Kekelekis, *EC Merger Control Regulation: Rights of Defence*, (2006) Kluwer Law International, at 91-92.

¹⁰ Indeed, Chinese commentators have discussed the definition of 'administrative investigative procedure' in China which is more general than the 'administrative investigative procedure under the AML 2007'. Although there has been no consensus on this definition reached so far,

proceeding from the beginning of an antitrust investigation initiated by the public enforcer(s) of the AML 2007, based on a complaint or an act of the administrative enforcer's own initiation, to the issuance of the first instance decision. Hence the rights in any subsequent judicial review proceeding shall be excluded here. Thirdly, this chapter will mainly focus on the rights of concerned parties in relation to monopolistic agreements and abuse of dominant position; the rights of concerned parties during merger assessment will be excluded.¹¹

one view is well accepted: an administrative investigative procedure is initiated by the administrative authorities, aiming to collect evidence in order to realise the administrative purpose. See for example, Y.C. Mo, *Administrative Law and Administrative Procedural Law* [行政法与行政诉讼法, *xingzhengfayuxingzhengsusongfa*], (2008) Science Press, at 187; S.N. Ying, *Administrative Law in Contemporary China* [当代中国行政法, *dangdaizhongguoxingzhengfa*], (1998) China Founder Press, at 822; S.Z. Sun & B. Cai, 'On the Connotation, Confines and Legal Regulation of Administrative Investigation [行政调查的内涵, 边界及法律规制, *xingzhengdiaochedeneihan, bianjiejifalvguizhi*]', (2011) 39(6) *Journal of Lanzhou University (Social Science)*, 125-131; J. Zhang, 'Research about the Basic Concept of Administrative Inquiry [行政调查基本概念初探, *xingzhengdiaochohajibengainianchutan*]', (2009) 10 *Law Science Magazine*, 111-113. Administrative investigative procedure of the AML 2007's public enforcement means the procedure under which the investigation initiated by the public enforcer(s) of the AML 2007 aims to collect evidence of violation of the AML 2007 in order to make a decision upon whether the undertaking or association of undertakings concerned has violated the AML 2007.

¹¹ Although the procedures between the merger assessment and the investigation of monopolistic agreements/abuse of dominant positions are quite distinctive and independent of each other, the rights of defence during merger assessment are similar to that during investigations of monopolistic agreements or abuse of dominant position. For example, the right to be heard is protected both in the procedure of merger assessment and investigation on anticompetitive agreement or concerted practices between undertakings or association of undertakings in China. Article 7 of the Measures for the Undertaking Concentration Examination provides that during the investigation process (of merger assessment), the MOFCOM may initiate hearings or hold them in response to the request of the relevant parties, making investigations, collecting evidence and listening to the opinions of the relevant parties. Article 43 of the AML confirms that the undertaking(s) concerned and being investigated shall have the right to be heard. Under EU competition law, the rights of defence during the merger assessment and investigation of anticompetitive agreements and concerted practices between undertakings or association of undertakings are generally the same. For

The institutional design created under the AML 2007 is unique: the MOFCOM, the NDRC and the SAIC share enforcement authority. The MOFCOM is mainly responsible for merger control review; the NDRC is mainly responsible for enforcement in respect of restrictive agreements and abuse of dominant positions that are price-related; and, the SAIC is mainly responsible for enforcement in respect of restrictive agreements and abuse of dominant positions that are non-price-related.¹² As revealed in the legislative history, such a tripartite system of enforcement flowed from a failure of the three bodies to disagree in relation to secession of powers which each believed should reside with them.¹³ Ambiguity can easily be generated by this parallel enforcement system, especially between the NDRC and the SAIC. A monopolistic activity can easily trigger both agencies' jurisdiction because it often contains both price and non-price matters.¹⁴ However, the MOFCOM, the NDRC and the SAIC concentrated the authority of investigation, decision making and (some of) legislation in their respective jurisdiction. In accordance with Article 53 of the AML 2007, Chinese courts are only responsible for conducting judicial review with regard to the Law's public enforcement. To this end, the rights of concerned parties during the administrative proceeding are mainly safeguarded by the administrative enforcers rather than Chinese courts. In this one respect the institutional

details, please refer to M. Kekelelis, *EC Merger Control Regulation: Rights of Defence*, *supra* note 9.

¹² See the official websites of the three agencies respectively.

¹³ See, Y. Huang, 'Pursuing the Second Best: The History Momentum, and Remaining Issues of China's Anti-Monopoly Law', (2008)75 *Antitrust Law Journal*, 117-131, at 125-126.

¹⁴ There are plenty of criticisms around this system both from foreign and domestic scholars. For example, G.H. Li, *The Research on Enforcement of Antimonopoly Law [反垄断法实施机制研究, fanlongduanfa shishijizhi yanjiu]*, (2006) Chinese Founder Press; A.H.Y. Zhang, 'The enforcement of the Anti-Monopoly Law in China: An institutional design perspective', (2011) 36(3) *The Antitrust Bulletin*, available at SSRN: <http://ssrn.com/abstract=1783037>, last visited on 19/06/2013, 00:26; B.S. Zhang, 'A Comment of the Institutional Design of Current Administrative Enforcers of the AML 2007 [论我国反垄断执法机构的设置, lun wogoufanlongduanfa zhifajigoudeshezhi]', (2005) 2 *Science of Law*, 113-121.

design of the AML 2007 is similar to that which arises under EU competition law. The EU Commission (hereafter, the Commission) also has the authority of investigation, decision making and legislation while the Court of Justice of the European Union and the General Court only have the authority of judicial review. The situation in the US is different. The two major administrative enforcers of US federal antitrust laws, the Antitrust Division of the Department of Justice, and the Federal Trade Commission (hereafter the FTC) only have the authority of investigation and preparing the consent decree. The federal court is the main decision maker, although in some circumstances the FTC may be reconstituted as an administrative court.¹⁵ Under such institutional design, as will be illustrated below by this chapter, the federal court is the main protector of the rights of concerned parties under US antitrust law.

To this end, when comparing with the law of the EU and the US particular attention will be paid to the procedures applying to the public enforcement of Article 101 and 102 TFEU, which are constructed similarly to procedures under the AML 2007.¹⁶ The rights of concerned parties which exist in relation to investigation under Articles 101 and 102 TFEU may provide direct and relevant experience from which to analyse and suggest improvements to the rights of the defence during the administrative investigation under the AML 2007. In US antitrust law the rights of the defence during the investigation process are largely defined and protected by the courts rather than the

¹⁵ See, J.M. Jacobson (editor in chief), *Antitrust Law Developments*, volume I, 6th edition, (2007) ABA Publishing, at 665-687.

¹⁶ The Commission, like the SAIC or the NDRC under the AML 2007, in a procedure relating to an infringement of the EU competition rules, performs both investigative and decision-making functions. See, K. Lenaerts & I. Maselis, 'Procedural Rights and Issues in the Enforcement of Articles 81 and 82 of the EC Treaty', (2000) 24(5) *Fordham International Law Journal*, 1615-1654, at 1616.

administrative enforcers such as the Antitrust Division or the FTC.¹⁷ Although the procedure of US antitrust investigation is different from that under the AML 2007, the functions of such rights under US antitrust law are similar to that under the AML 2007 and Article 101 and 102 TFEU. Legitimate comparison may be drawn between the rights of the defence under US antitrust investigation and under the EU's and China's procedures.¹⁸

This chapter is divided into three parts. Firstly, a detailed examination is offered of the rights of concerned parties under the public enforcement of Article 101 and 102 TFEU in order to find useful experience for improving the protection of rights of the defence under the public enforcement of the AML 2007. The second part will examine the rights of concerned parties protected during investigations undertaken by the DOJ and FTC under US antitrust law and to see if there is any experience in US antitrust procedure that can be used by China. The third part of this chapter will set out the rights of concerned parties which are protected under the public enforcement of the AML 2007. It will then discuss whether the experience of EU and US is applicable and effective to address the problems raised above.

2. Rights of the Defence during the Administrative Enforcement of Article 101 and 102 TFEU

2.1 Introductory remarks

¹⁷ For details of the antitrust investigation conducted by the Antitrust Division and the FTC, please refer to J.M. Jacobson (editor in chief), *Antitrust Law Developments*, *supra* note 15, at 665-687; 695-716.

¹⁸ For further analysis on functional comparative law, please refer to K.Zweigert & H.Kötz, *An Introduction to Comparative Law*, 3rd edition, (1998) Oxford University Press.

Rights of concerned parties in this section are those of the investigated parties and/or addressees of the statement of objection (hereafter, the SO) during the Commission's administrative enforcement process of Article 101 and 102 TFEU, i.e. from the beginning of fact finding to the issuance of the first instance decision which may contain a sanction. The purpose of this section is to examine the rights of the concerned parties in the administrative proceeding as a means of identifying issues and relevant experience that may be applicable to the protection of rights of defence under Chinese AML 2007.

The TFEU contains no express provisions on the protection of fundamental rights in the administrative proceeding of applying Article 101 and 102 TFEU.¹⁹ Rather these rights are guaranteed by the general principles of law recognised by the Court of Justice of the European Union (hereafter the CJEU), which devolve in part from the constitutional conditions common to Member States, and in part from international obligations accepted by Member States including, most importantly, the European Convention of Human Rights (hereafter the ECHR).²⁰ Theoretically, the Commission's enforcement of Article 101 and 102 TFEU is not subject to the precedent case law of the ECHR because the EU is not yet a party to the Convention. Rather, the fundamental rights have been developed mainly by the CJEU.²¹ Nevertheless, in the case of *Stauder*²² the CJEU referred for the first

¹⁹ See, M. Kekelekis, *EC Merger Control Regulation: Rights of Defence*, *supra* note 9; at 15.

²⁰ See, Article 6(3) TEU; see also, Case C-5/88, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, [1989] ECR 2609, para.19; Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, para. 4.

²¹ See, C. Leskinen, 'An Evaluation of the Right of Defence during Antitrust Inspections in the Light of the Case Law of the ECtHR: Would the Accession of the European Union to the ECtHR bring about a Significant Change?' (29 April, 2010) *Working Paper IE Law School*, available at http://globalcampus.ie.edu/webes/servicios/descarga_sgd_intranet/envia_doc.asp?id=9697&nombre=AccesoDatosDocumentoIE.Documento.pdf&clave=WPLS10-04, last visited on 11/06/2012, 16:27.

²² Case 29/69, *Stauder*, [1969] ECR p.419

time to fundamental rights contained in the general principle of law and confirmed that the Court had to ensure the respect of these fundamental rights.²³

The CJEU acknowledged that the provisions and case law of the ECHR have a key role as a special source of inspiration in providing human rights protection²⁴ and affirmed the particular position of the ECHR among the international instruments for the protection of fundamental rights.²⁵ In practice the CJEU could not ignore the Luxembourg Court's engaging in an in-depth analysis of its right of defence protection provision as well as of the cases from the ECHR.²⁶ In the light of above considerations, the EU Charter of Fundamental Rights (hereafter the Charter)²⁷ had been made to protect the fundamental rights within the EU. The protection of the rights of the concerned parties in the EU would follow the case law of the CJEU and the Charter.²⁸

²³ Ibid, at § 7. In later cases the CJEU developed the case law established on *Stauder* and held that 'respect(ing) for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to Member States, must be ensured within the framework of the structure and objectives of the Community.' See, Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125, at § 4; see also, the fifth Recital of Regulation 1/2003 (hereafter, the Reg.1/2003).

²⁴ See, Case 4/73, *Nold v Commission*, [1974] ECR 491, para.13.

²⁵ See, Opinion 2/94 on Accession of the Community to the ECHR, [1996] ECR p. I-1759.

²⁶ See, A. Andreangeli, *EU Competition Enforcement and Human Rights*, (2008) Edward Elgar Publishing Limited, at 8.

²⁷ Part II, Treaty establishing a Constitution for Europe, [2003] OJ C 169.

²⁸ Discussion on relationship between the protection of the rights of defence in the EU and the protection of fundamental rights under the ECHR is clearly beyond the scope of this thesis. For further analysis on this relationship, please refer to K. Lenaerts & D. Arts (edited by), *Procedural Law of the European Union*, second edition, (2006) Sweet & Maxwell; M. Kekelelis, *EC Merger Control Regulation: Rights of Defence*, [supra note 9](#); A. Andreangeli, *EU Competition Enforcement and Human Rights*, [supra note 26](#); K. Lenaerts & I. Maselis, 'Procedural Rights and Issues in the Enforcement of Articles 81 and 82 of the EC Treaty', [supra note 16](#), at 1615-1654; C. Leskinen, 'An Evaluation of the Right of Defence during Antitrust Inspections in

In order to examine the rights of the concerned parties under EU competition law, this section will first of all give an overview of this administrative proceeding. Rights of the concerned parties in this proceeding will then be examined. They may include the right to be heard, the right of access to the Commission's files; the right to legal representation; the right against self-incrimination and the protection of legal professional privilege.²⁹

2.2 The Commission's administrative proceeding in applying Articles 101 and 102 TFEU

Under the powers granted by Reg.1/2003³⁰ the Commission has the power to obtain information from undertakings and may question natural persons; the Commission may make decisions and must afford those to whom decisions are to be addressed, and those with sufficient *locus standi* the right to be heard before any such decision is made.

In the first stage the Commission investigates facts of the suspected violation based on complaints, leniency applications (and perhaps whistle-blowing) or on its own initiative. This fact-finding may proceed

the Light of the Case Law of the ECtHR: Would the Accession of the European Union to the ECtHR bring about a Significant Change?' *supra note 21*.

²⁹ These five are the main rights enjoyed by the investigated party and/or the addressee of the SO in the procedure of the Commission's administrative enforcement of Article 101 and 102 TFEU which developed by case laws of the EU Courts and summarised from secondary literatures, although they may be grouped differently. See for example, C. Kerse & N. Khan, *EC Antitrust Procedure*, fifth edition, (2005) Sweet & Maxwell; T.K. Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-dumping/anti-subsidies Proceedings*, (2004) Kluwer Law International; K. Lenaerts & D. Arts, *ibid*; M. Kekelelis, *EC Merger Control Regulation: Rights of Defence*, *supra note 9*; A. Andreangeli, *EU Competition Enforcement and Human Rights*, *supra note 26*; C. Leskinen, 'An Evaluation of the Right of Defence during Antitrust Inspections in the Light of the Case Law of the ECtHR: Would the Accession of the European Union to the ECtHR bring about a Significant Change?' *supra note 21*.

³⁰ Article 4 of the Reg.1/2003.

informally or formally.³¹ Where the investigation is conducted at a simple request from the Commission the addressees are free to decide whether or not they will reply to the questions put to them. A penalty may only be imposed when the investigated parties, having decided to reply, provide inaccurate or incomplete information.³² If the investigation is conducted by the exercise of formal powers, including by the making of relevant decisions, the investigated parties are obliged to cooperate actively with the Commission. In this case fines and/or periodic penalties may be imposed on the addressee of such decisions when they fail to provide the relevant information.³³ The Commission has two major investigatory powers: of requesting information and inspecting on the spot.³⁴ No matter whether the request for information is based on a simple written request or a formal decision, the Commission must state the legal basis and the purpose of the investigation, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for supplying incorrect or misleading information and/or failure to provide relevant information.³⁵ In relation to on-site inspections the Commission has a power to enter an undertaking's premises and to inspect and take copies of and/or seal its business records in whatever form they are maintained,³⁶ and/or ask for oral explanations on the spot.³⁷ Similarly, if an inspection is ordered upon a simply requested in writing, there is no legal obligation on the undertakings to submit to it; where the inspection is ordered by the

³¹Article 18(1) of the Reg.1/2003.

³²Article 18(2), *ibid.*

³³Article 23(1), *ibid.*

³⁴ See, C. Kerse & N. Khan, *EC Antitrust Procedure*, *supra note 29*, at 39.

³⁵Article 18(2) and Article 18(3), *ibid.*

³⁶Article 20, *ibid.* It is noteworthy that the inspection is not limited to the premises of the undertaking under investigation. Other premises may include the homes, lands and means of transport of directors, managers and other members of staff of the undertakings and associations of undertakings concerned. See, Article 21(1) of Reg.1/2003.

³⁷Article 20(2) (e), *ibid.*

Commission's decision, the investigated undertakings must cooperate actively during the inspection.³⁸ When the inspection is conducted by a simple request, the official of the Commission should prepare a written authorisation specifying the subject matter and purpose of the inspection and the possibility of penalties under Article 23 in cases where production of the required books or other business records is incomplete or where answer to questions is incorrect or misleading.³⁹ When the inspection is ordered by a formal decision Article 20(4) of Reg.1/2003 provides that the decision must: 1. specify the subject matter and purpose of the inspection; 2. appoint the date on which it is to begin; and, 3. indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice.

If the Commission considers that the evidence points to an infringement which should be the subject of a decision,⁴⁰ it must inform the undertakings in writing of the objections raised against them, namely the SO, before the final decision is taken.⁴¹ The SO generally is composed of two distinct sections, one section headed 'The Facts', containing a factual description of the contested practices and the other headed 'legal assessment', containing the Commission's provisional legal qualification of the facts.⁴² The SO is only a procedural step preparatory to the final decision.⁴³ Its purpose is to give the

³⁸ Article 23(1) (c) and Article 24(1) (e), *ibid.*

³⁹ Article 20(3), *ibid.*

⁴⁰ In accordance with Article 10 of Reg.1/2003, if the Commission after the fact-finding stage can find no grounds for action to be taken under competition rules, it will issue a declaration of inapplicability. If the Commission finds the evidence points to an infringement of Article 101 and/or 102 TFEU, it may either issue a Statement of objection or adopt interim measures. See, Article 10(1) of Regulation 773/2004(OJ L 123, 27.4.2004, p. 18) (hereafter, the Reg. 773/2004) and Article 8 of Reg.1/2003. For the purpose of examining the rights of defence this section will only focus on the proceeding which leads the issuance of Statement of Objection.

⁴¹ See, Article 10 of Reg. 773/2004.

⁴² See, K. Lenaerts & I. Maselis, *Procedural Rights and Issues in the Enforcement of Articles 81 and 82 of the EC Treaty*, *supra note 16*, at 1626.

⁴³ See, Case 60/81, *IBM v. Commission*, [1981] ECR 2639 (CJ.), at ¶¶ 20-21; see also, C. Kerse & N. Khan, *EC Antitrust Procedure*, *supra note 29*, at 210.

parties concerned all the information necessary to enable them to defend themselves before the Commission adopts a final decision.⁴⁴ The addressees of the SO have no legal obligation to reply, though in practice a formal reply is made in almost all cases.⁴⁵ The addressees' reply to the SO is first in written form and second, if necessary, oral.⁴⁶ There is a time limit fixed by the SO within which the undertaking must deliver its written defence.⁴⁷ In the time limit the undertaking has the right to be heard on the matters to which the Commission has taken objection.⁴⁸ Prior to adopting a decision finding an infringement of EU competition rules the Commission must consult the Advisory Committee on restrictive practices and dominant positions.⁴⁹ After the hearing and consultation are completed the decision has to be drafted, taking account of everything in the fact-finding stage, hearings and the opinions of the Hearing Officer⁵⁰ and Advisory Committee.

2.3 Procedural rights of parties alleged to have infringed Article 101 and/or Article 102 TFEU

2.3.1 Right to a fair hearing under EU competition law

The right to a fair hearing has long been deeply entrenched in the EU legal system as a general principle of law common to Member States.⁵¹ This is

⁴⁴ *Woodpulp Judgment*, [1993] ECR I-1307 at ¶¶ 52, 154.

⁴⁵ C. Kerse & N. Khan, *EC Antitrust Procedure*, *supra note 29*, at 240.

⁴⁶ *Ibid.*

⁴⁷ Article 10(2) of Reg. 773/2004.

⁴⁸ Article 27(1) of Reg. 1/2003.

⁴⁹ Article 14(1), *ibid.*

⁵⁰ The role of Hearing Officer will be discussed in more detail in Section '2.3.1 Right to a fair hearing under EU competition law'.

⁵¹ See generally, T.K. Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-dumping/anti-subsidies Proceedings*, *supra note 29*; H.P. Nehl, *Principles of Administrative Procedure in EC Law*, (1999) Hart Publishing; A. Andreangeli, *EU Competition Enforcement and Human Rights*, *supra note 26*.

reflected in the Charter.⁵² Article 41 of the Charter provides that every citizen has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. It includes the right of every person to be heard, before any measure which would affect him or her adversely is taken.⁵³ This principle was firstly confirmed in EU competition proceedings by the CJEU in *Transocean Marine Paint*:

...there is a general rule that a person whose interests are perceptibly affected by a decision taken by a public authority, must be given the opportunity to make his point of view known.⁵⁴

The principle was reiterated in *Hoffmann la Roche* by the Court in a more restrictive way in referring to ‘the right to be heard before a sanction or penalty’ is inflicted.⁵⁵ This approach was abandoned and the right to be heard has also been invoked by complainants and other interested parties in the infringement proceedings who have sufficient interest in the proceeding.⁵⁶

Based on the case law developed by the CJEU, Reg.1/2003 confirms that the right of the concerned parties to be heard should be guaranteed.⁵⁷ Reg.773/2004 further provides that the right to a hearing shall be exercised

⁵²Protocol No 1 attaches the Charter, to the Treaty of Lisbon (TFEU) and accords it the same status as the Treaty, OJ 2000 C 364, p 1. Also Article 6(2) TFEU asserts that the Union protects fundamental rights as enshrined in the Charter, the ECHR and the constitutions of the Member States.

⁵³ J. Flattery, ‘Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing’, (2010) 7(1) *Competition Law Review*, 53-81; at 54.

⁵⁴ Case 17/74 *Transocean Marine Paint* [1974] ECR 1063.

⁵⁵Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, para. 9.

⁵⁶Case 43/85, *ANCIDES v Commission*, [1987] ECR 3131, para. 8.

⁵⁷See, Recital 32 of Reg.1/2003; see also, Article 27 of Reg.1/2003, which provides that the undertakings concerned must be afforded the opportunity to be heard on the allegation of anticompetitive conduct raised by the Commission against them.

first and foremost in writing, whereas the oral hearing plays a supplementary role.⁵⁸ Hence there are two main ways to safeguard the concerned parties' right to a hearing: the issuance of the SO and the oral hearing.⁵⁹

Right to be heard during period of request for information and before inspection

There are two main instruments by which the Commission conducts its investigation: request for information and inspection.⁶⁰ When requesting information, no matter whether by a simple request or by decision, the Commission is required to state the legal basis and the purpose of the request specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for supplying incorrect or misleading information.⁶¹ When conducting an inspection officials shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided if the required books or other records related to the business are incomplete or where the answers to questions asked are incorrect or misleading.⁶² In the case of a dawn raid officials are also obliged to present a document or a warrant setting out the scope of their investigatory powers and the subject of the investigation on the spot.⁶³ These requirements provide essential procedural safeguards to the concerned parties' right to be heard.

⁵⁸See, Article 10(3) of Reg. 773/2004.

⁵⁹See, T.K. Giannakopoulos, 'The Right to be Orally Heard by the Commission in Antitrust, Merger, Anti-dumping/Anti-subsidies and State Aid Community Procedures', (2004) 24(4) *World Competition*, 541–569; at 569.

⁶⁰See, Article 18 and Article 20 of Reg. 1/2003.

⁶¹Article 18(2) and (3), *ibid*.

⁶²Article 20(3), *ibid*.

⁶³For a more detailed discussion about the right of the concerned parties under the Commission's dawn raids, please refer to I. Aslam & M. Ramsden, 'EC Dawn Raids: A Human Right Violation?' (2008) 5(1) *Competition Law Review*, 61-87.

After the investigation: Statement of Objection and reply

In order to safeguard the concerned undertakings' right to be heard it is the Commission's obligation to notify in a clear and exhaustive manner its allegations of anticompetitive conduct against the concerned parties.⁶⁴ In fact the starting point from which the right to a hearing becomes operative is from receipt of the SO from the Commission. In *Boehringer Mannheim*⁶⁵ the CJEU held that the SO must at least set out clearly, albeit succinctly, the essential facts on which the Commission relies.⁶⁶ In later cases the Courts held that the Commission should not only be obliged to state clearly all the facts and legal arguments supporting its allegations,⁶⁷ but would also have to explain the inference that it has drawn from the evidence collected and on which it relies against the investigated undertakings.⁶⁸ In *Corus UK*⁶⁹ it was stated that the Commission will be obliged to give a brief assessment of the proposed pecuniary sanction in terms of its severity and the duration of the infringement to allow the investigated parties to foresee the extent of the penalty that is likely to be inflicted on them and to challenge it in its submissions.⁷⁰

In addition the SO should be consistent with the grounds relied on by the Commission in its final decision since the undertaking must be fully informed so as to be able properly to prepare its defence to refute the evidence

⁶⁴T.K. Giannakopoulos, 'The Right to be Orally Heard by the Commission in Antitrust, Merger, Anti-dumping/Anti-subsidies and State Aid Community Procedures', *supra* note 59, at 569.

⁶⁵Case 45/69, *Boehringer Mannheim v Commission*, [1970] ECR 769.

⁶⁶*Ibid*, para.9.

⁶⁷See, Case T-191/98, *Atlantic Container Line AB and others v Commission*, [2003] ECR II 3275, para.113.

⁶⁸*Ibid*, at para.162.

⁶⁹Case T 48/00, *Corus UK Ltd v the Commission*, Judgment of the Court of First Instance (Second Chamber) of 8 July 2004, [2004] ECR II-2325.

⁷⁰*Ibid*, para.144 and 146. See also, more recently, T-109/02 *Bolloré*[2007] ECR II-947, para 67; Case T-340/03, *France Télécom v Commission*, [2007] ECR II-107.

against it before a final decision is taken.⁷¹ However, it should be noted that not every divergence between the findings contained in the final decision and the allegations made in the SO will give rise to annulment of the decision.⁷² The CJEU recognises that the Commission may, or rather should, modify the content of the SO as a result of new fact-finding measures or of the explanations given by the investigated parties in relation to the allegations or to the evidence.⁷³ In this case a supplementary SO will be issued. The decision may be annulled only if the divergences with the SO concern new evidence or allegations on which the investigated parties have not had an opportunity to make their views known or to reply following the original SO.⁷⁴

Oral hearing and the role of Hearing Officer

In accordance with Article 12 of Reg.773/2004 the addressees of the SO may request an oral hearing in their written submissions to the Commission. Reliance on this right has gained increasing importance as a means of clarifying and testing the arguments and evidence for and against the case made by the Commission in the SO.⁷⁵ However, before the creation of the Hearing Officer in 1982⁷⁶ the investigated parties raised concerns as to the

⁷¹See, J. Flattery, 'Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing', *supra* note 53, at 61.

⁷²See, A. Andreangeli, *EU Competition Enforcement and Human Rights*, *supra* note 26, at 37.

⁷³Cases 142 & 156/84, *BAT & Reynolds v Commission* [1986] ECR 1899, para.27.

⁷⁴See for examples, T 67/01, *JCB Service v Commission*, [2004] ECR II-49, paras. 50-51; Case T 109/02, *Bollere SA and Others v Commission*, Judgment of the General Court (Fifth Chamber) of 26 April 2007, paras.80-81.

⁷⁵See, A. Andreangeli, *EU Competition Enforcement and Human Rights*, *supra* note 26, at 47.

⁷⁶The intention to create the Hearing Officer was expressed first in the *XIth Report on Competition Policy*, 1982, Brussels, para.66. Hearing Officers now operate under terms of reference set out in a Commission Decision of 23 May 2001. (OJ L 162, 19.6.2001) (hereafter the 'Terms of Reference'). For the history of the development of Hearing Officer, please refer to M. Albers & J. Jourdan, 'The Role of Hearing Officers in EU Competition Proceedings: A Historical and Practical Perspective', (2011) 2(3) *Journal of European Competition Law & Practice*, available at

extent to which the oral hearing could actually fulfil its function. In particular they felt that the oral hearing should be conducted by an official who displayed some guarantee of independence.⁷⁷ In response to the criticism⁷⁸ the Commission appointed Hearing Officers to chair hearings,⁷⁹ vested with genuine autonomy and the right to direct access to the responsible member of the Commission to strengthen the objectivity of the procedure and any decision taken subsequently.⁸⁰

The Hearing Officer is responsible for the preparation of the oral hearing. The preparation stage might include the drawing up of a list of questions, the request for parties to submit a prior written notification containing the essential contents of their intended statements, the holding of preparatory meetings with the persons invited and the setting of time limits to provide a list of participants on their behalf.⁸¹ The date, duration and place of the hearing are determined by the Hearing Officer. Every person shall be heard in the presence of all other persons invited to attend. The Hearing Officer will

<http://jeclap.oxfordjournals.org/content/early/2011/05/15/jeclap.lpr023.full.pdf+html>, last visited on 06/07/2012, 11:03.

⁷⁷ A. Andreangeli, *EU Competition Enforcement and Human Rights*, *supra note 26*, at 47. Formally, the oral hearing procedure was to appoint the Director responsible for the Directorate dealing with the case. See, C. Kerse & N. Khan, *EC Antitrust Procedure*, *supra note 29*, at 199.

⁷⁸ See for example, House of Lords Select Committee on the European Union (8th Report, 1981-82, *Competition Practice* HL paper 91); B. Vesterdorf, 'The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?' *Antitrust* (2009) 6 *Chronicle*, available at <https://www.competitionpolicyinternational.com/the-court-of-justice-and-unlimited-jurisdiction-what-does-it-mean-in-practice>, last visited on 07/07/2012, 22:09.

⁷⁹ The Hearing Officer has other functions than chairing oral hearings. For example, the HO may take decisions on the extension of time limits for responding to a statement of objectives, on access to additional documents and on the scope of disclosure. See Decision 94/810/ECSC-EC on the terms of reference of Hearing Officers in competition procedures before the Commission [1994] OJ L330/67, arts 3-7. These functions will be discussed in the following sections.

⁸⁰ Commission of the European Union, *XII Report on Competition Policy*, 1983, Brussels, 31.

⁸¹ Article 11 of the Decision 2011/695 on the function and terms of reference of the Hearing Officer in certain competition proceedings [2011] OJ L 275/29 (hereafter, Decision 2011/695).

preside over the hearing in full independence and will ensure that the oral hearing contributes to the objectivity of the decision taken subsequently.⁸² The Hearing Officer allocates speaking time to parties, as well as time for question-and-answer sessions. Questions may be asked by all participants, notably the DG Competition (hereafter, the DG Comp.) and the parties.⁸³ The oral hearing constitutes a basis for an interim report to the competent member of the Commission, in which the Hearing Officer draws preliminary conclusions regarding the effective exercise of procedural rights.⁸⁴ However, the interim report is unavailable for private parties to the proceedings.⁸⁵ In addition, the Hearing Officer shall also provide a final report which shall be attached with the final decision and published.⁸⁶ The final report primarily examines whether the right to be heard has been respected, and whether the final decision includes only objections on which parties have been given the opportunity of making known their views.⁸⁷

Problems relating to the right to be heard in the application of Article 101 and 102 TFEU

It is undeniable that the creation of the Hearing Officer has contributed to the objectivity, transparency and efficiency of the oral hearing proceeding. However, the objectivity and transparency of the oral hearing procedure is subject to constant scrutiny and question.

⁸²See, P.V. Cleynenbreugel, 'The Hearing Officer's Extended Mandate: Whose Special Friend in the Conduct of EU Competition Proceedings?' (2012) 33(6) *European Competition Law Review*, 286-293; at 290.

⁸³For a detailed description of the oral hearing procedure, please refer to C. Kerse & N. Khan, *EC Antitrust Procedure*, [supra note 29](#).

⁸⁴Decision 2011/695, art. 14.

⁸⁵See, J.T. Lang, 'Compensation for Unjustified Administrative Procedures in Community Law', (2002) 23(10) *European Competition Law Review*, 490-494; at 492.

⁸⁶ See, M. Albers & J. Jourdan, 'The Role of Hearing Officers in EU Competition Proceedings: A Historical and Practical Perspective', [supra note 76](#).

⁸⁷Articles 15 and 16 of the Terms of Reference.

Firstly, although the Hearing Officer is declared to conduct the hearing in full independence⁸⁸, it did not go as far as to allow the Hearing Officer to be appointed outside the number of the Commission officials.⁸⁹ Commentators argue that the degree of independence that the Hearing Officer enjoys is not sufficient to comply with the concerns for the effectiveness of the guaranteed role during the proceedings.⁹⁰ Secondly, the hearing is an entirely voluntary process, both as to attendance, which cannot be compelled by the Hearing Officer, and as to the participation of its attendees, who are neither under a duty to respond to every chief accusation nor have the right to receive specific answers from the Commission.⁹¹ As a result there is no power to summon witnesses, nor are the participants in the hearing under an obligation to answer questions or to tell the truth. This causes another consequent deficiency: lack of any possibility for the undertakings to question (cross-examine witnesses) the evidence submitted against them or to hold a public hearing.⁹² It is reported by the House of Lords that the oral hearings are ‘not an adversarial process like a trial’ but ‘much more a presentation by the parties to the Commission’.⁹³ Finally, in the post-oral

⁸⁸Article 14(1) of the Reg.773/2004.

⁸⁹See House of Lords Select Committee on the European Union, *XIX Report: Strengthening the Role of Hearing Officer*, sess.1999-2000, para.31. Although in the 2001 reform of the Terms of Reference, the independence of the Hearing Officers was reinforced by removing the link to DG Competition, the HO is still an official of the Commission.

⁹⁰ M. Levitt, ‘Commission Hearings and the Role of the Hearing Officer: Suggestions for Reform’, (1998) 19(6) *European Competition Law Review*, 404-409; at 404-405. J. Flattery also argued that, ‘As a result of the fact that the same case team both investigates and draws up the draft infringement decision there is a certain perception that the whole proceedings may be subject to a degree of prosecutorial bias.’ See, J. Flattery, ‘Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing’, *supra note 53*, at 71.

⁹¹ N. Zingales, ‘The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to Be Heard?’ (2010) 7(1) *Competition Law Review*, 129-156; at 148.

⁹²J. Flattery, ‘Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing’, *supra note 53*, at 71.

⁹³See, See, House of Lords Select Committee on the European Union, *XIX Report: Strengthening the Role of Hearing Officer*, *supra note 89*.

hearing phase, lack of transparency of the interim report is also a significant concern. The interim report, which addresses all procedural issues relating to the fairness of the procedure, may also contain observations on specific issues brought to the attention of the Hearing Officer by any part during the procedure, as well as on the substance of the case. Yet no right is vested in any party to the proceedings concerning such report.⁹⁴

2.3.2 Right of access to the Commission's files

Legal basis: equality of arms

Once informed by the SO of the matters raised against them the undertakings concerned have an opportunity to submit their observations. To enable them to do so in full knowledge of the facts they are allowed access to the Commission's file.⁹⁵ The legal basis can be referred to the 'general principle of equality of arms, which presupposes that in a competition case the knowledge which the undertaking concerned has of the file used in the proceedings is the same as the Commission's.'⁹⁶ It is unacceptable, according to the Court, for the Commission alone to have documents available to it and to be able to decide whether or not to use them against the undertaking concerned.⁹⁷ The Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty,

⁹⁴N. Zingales, 'The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to Be Heard?' *supra note 91*, at 149.

⁹⁵T.K. Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-dumping/anti-subsidies Proceedings*, *supra note 29*, at 123. In *Cement* the GC said that access to the file is 'one of the procedural guarantees intended to protect the rights of the defence and to ensure, in particular, that right to be heard can be exercised effectively'. See, Cases T10-12/92 and 15/92 *Cimenteries CBR v Commission* [1992] ECR II-1571, at para.38.

⁹⁶See, Case T-30/91 *Solvay v Commission* [1995] ECR II-1175, at para.59; [1996] 5 CMLR 57; Case T-175/95 *BASF Coatings AG v Commission*, [1999] ECR II-1581, at para.46; [2000] 4 CMLR 33.

⁹⁷ See, C. Kerse & N. Khan, *EC Antitrust Procedure*, *supra note 29*, at 217.

Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (hereafter the Notice on access to the file)⁹⁸ confirms this principle in the opening sentence, one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of defence.

Accessible and non-accessible documents

The Commission's files may be divided into those which are accessible and those which are not. In *Consten&Grundig*⁹⁹ the CJEU acknowledged that the undertaking concerned must be put in a position to reply to the complaints made against them by the Commission. Nevertheless, the CJEU said that 'it is not necessary that the entire contents of the file be communicated (to the undertaking concerned).'¹⁰⁰ In early judgments the EU Courts did not refer to the making available of the entire file or the other evidence and documents which the Commission might have but on which it did not seek or rely.¹⁰¹ In *Hercules*¹⁰² and later in *Soda Ash*¹⁰³ the General Court¹⁰⁴ (hereafter, the GC) required disclosure of all relevant documents and information in the Commission's possession other than the business secrets of other undertakings, internal Commission documents and other confidential information. The GC held that 'it cannot be for the Commission alone to decide which documents are useful for the defence'.¹⁰⁵ Thus the undertakings concerned must be given the opportunity to examine documents which may be relevant for the defence. The Court's opinion has been

⁹⁸ *Official Journal* C 325, 22.12.2005, p. 7-15.

⁹⁹ Case 56 and 58/64, [1966] ECR 199, at para.5; [1966] CMLR 418.

¹⁰⁰ *Ibid.*

¹⁰¹ C. Kerse & N. Khan, *EC Antitrust Procedure*, [supra note 29](#), at 214.

¹⁰² Case T-7/89, *SA Hercules Chemicals v Commission*, [1991] ECR II-1711; [1992] 4 CMLR 84.

¹⁰³ Cases T-30, 36 and 37/91 *Solvay and ICI v Commission* [1995] ECR II-1775.

¹⁰⁴ The Court of First Instance (known as the CFI) has been renamed the European General Court since the entry into force of the Lisbon Treaty on 1 December 2009.

¹⁰⁵ *Ibid.*, at para.91.

accepted by the Commission. Reg.1/2003 and the Notice on access to the file state that the undertaking concerned should be granted access to all documents making up the Commission file, with the exception of internal documents, business secrets of other undertakings, or other confidential information.¹⁰⁶

The Commission's internal documents are treated as non-accessible.¹⁰⁷ They mainly consist of 'drafts, opinion or memos from the Commission's departments or other public authorities'.¹⁰⁸ Non-disclosure is justified by the need to ensure secrecy of the Commission's deliberation and a 'space of free thinking' for its officials.¹⁰⁹ However, the protection of internal Commission documents is not absolute. In *NHM Stahlwerke*¹¹⁰ the GC held that although the sound functioning of the EU institutions could be put at risk by disclosure of internal documents, this risk should be assessed with regard to the protection of the rights of the concerned parties.¹¹¹ The Court therefore suggested that, first of all, the Commission should identify the documents classified as internal in the file with detailed and specific reasons; secondly, internal documents which are relevant to issues upon which the Court must rule should be disclosed in their entirety to the undertakings concerned.¹¹² Nevertheless, it is noteworthy that the GC's view is not entirely consistent with that of the Commission, which argues that undertakings concerned

¹⁰⁶ See, Article 27(2) of Reg. 1/2003; para.10 of the Notice on access to the file.

¹⁰⁷ See, C-310/93 *PBPB Industries Plc v British Gypsum Ltd* [1995] ECR I-865, at para. 25.

¹⁰⁸ See, para.12 of the Notice on access to the file.

¹⁰⁹ See, M. Levitt, 'Commission Notice on Internal Rules of Procedure for Access to the File', (1997) 18(3) *European Competition Law Review*, 187-190; at 190.

¹¹⁰ Joint Cases T-134, 136-138, 141, 145, 147-148, 151, 156-157, *NHM Stahlwerke and Others v Commission*, [1996] ECR II-537.

¹¹¹ *Ibid*, at paras.73-74.

¹¹² *Ibid*, at para.76.

should be precluded from access to internal documents because of the internal Commission files' lack of evidential value.¹¹³

Based on case law of the EU Courts, the Notice on access to the file defines business secrets as information on an undertaking's business activity which could result in a serious harm to the same undertaking.¹¹⁴ It is the Commission's obligation to protect business secrets during the antitrust investigation.¹¹⁵ However, confidentiality is not a bar to disclosure.¹¹⁶ The Commission should try to find a way of communicating the substance of the secret or confidential material without breach of this obligation, or it should not use or rely on the material in the case if the material cannot be disclosed to the undertaking concerned.¹¹⁷ In practice it is the parties who have submitted information to the Commission, whether under compulsion or otherwise, to claim that the material is confidential and should not be disclosed.¹¹⁸ They are also asked to provide a non-confidential version of the documents, which would enable any parties with access to the file to determine whether the information deleted is likely to be relevant for their defence.¹¹⁹ If it is difficult to prepare a non-confidential version, the Commission should send to the undertaking concerned a sufficiently precise list of the problem documents in order to ensure the parties concerned are

¹¹³See, para.12 of the Notice on access to the file.

¹¹⁴Para.18, *ibid*; Judgment of 18.9.1996 in Case T-353/94, *Postbank NV v Commission*, [1996] ECR II-921, paragraph 87.

¹¹⁵Recital 32 of Reg.1/2003; see also, Case 53/85 *AKZO Chemie v Commission* [1986] ECR 1965, at para.28.

¹¹⁶In a number of cases the CJEU has made clear that the Commission cannot shelter behind rules of protecting business secrecy and confidentiality to the detriment of the parties' rights of defence. See for example, Case 85/76 *Hoffman-La Roche v Commission*, *supra* note 55, at para.5; Case 100-103/80, *Musique Diffusion Francaise v Commission* [1983] ECR 1823, at paras. 5-10; Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, at paras.22-25. See also, para.24 of the Notice on access to the file.

¹¹⁷C. Kerse & N. Khan, *EC Antitrust Procedure*, *supra* note 29, at 223.

¹¹⁸Article 16 of Reg.773/2004.

¹¹⁹Para.35 of the Notice on access to the file.

able to assess whether the documents are relevant to their defence.¹²⁰ If the party fails to comply with the requirements, the Commission may assume that the documents do not contain confidential information.¹²¹

The Notice on access to the file defines other confidential information as information other than business secrets which may be considered confidential insofar as its disclosure would significantly harm a person or undertaking.¹²² Information which does not qualify as a business secret may still be protected from disclosure.¹²³ The Notice gives two examples. The first is the information that would enable parties to identify complainants or other third parties who wish or need to remain anonymous,¹²⁴ which has been confirmed by the EU Courts.¹²⁵ The legitimate interests of the secrecy of the complainants or other third parties' identity must be reconciled with the need to guarantee the effective protection of the rights of defence of the undertakings concerned and with the principle of equality of arms.¹²⁶ The other example is military secrets.¹²⁷

The role of the Hearing Officer

The undertakings concerned may have a dispute with the Commission when the latter refuses the concerned undertaking's application of disclosure of the file. Or the undertakings which require the Commission to keep the

¹²⁰ See, Case T-25/95 *Cimenteries CBR v Commission*, [2000] ECR II-491, at para.147.

¹²¹ Article 16(4) of Reg.773/2004.

¹²² See, the Notice on access to the file, para.19.

¹²³ C. Kerse & N. Khan, *EC Antitrust Procedure*, [supra note 29](#), at 232.

¹²⁴ See, the Notice on access to the file, para.19.

¹²⁵ See, C-310/93 P *BPB Industries Plc v British Gypsum Ltd*, [supra note 107](#), at para.26; Case T-5/02, *Tetra Laval BV v Commission(I)*, [2002] ECR II-4831.

¹²⁶ See, para.24 of the Notice on access to the file; see also, A. Erlandsson: The Defendant's Right of Access to the Commission's File in Competition Cases, *Legal Issues of European Integration*, (1998), volume 25, issue 2, 139-186; at 157.

¹²⁷ Para.20 of the Notice on access to the file.

confidential information within the administrative proceeding may feel unhappy when the Commission still discloses it to the undertaking concerned. In these circumstances the undertaking has a right of recourse to the Commission and then to the Hearing Officer.¹²⁸ The Hearing Officer has authority to determine whether a document contains confidential or internal information and whether a document should be classified as non-accessible. His/her job is to investigate the matter and communicate a reasoned decision on any such request to the party making the request and any other parties standing to be affected by the procedure if the request is not agreed by the DG Comp.¹²⁹ The procedural issues of access to the file and disclosure of documents must be attached to the decision, sent to the parties with the decision and published in the Official Journal.¹³⁰ It is noteworthy that there is no legal recourse available immediately to challenge the Hearing Officer's decisions concerning access to file.¹³¹ In the recent *Intel* case the GC held that 'the decisions refusing to grant access to those documents... even though they may constitute an infringement of the rights of the defence, are merely preparatory measures whose negative effects will be felt only in the event of any final decision finding that there has been an infringement'.¹³²

2.3.3 Legal professional privilege under EU Competition law

Legal basis and a brief history of legal professional privilege

¹²⁸ See, Article 9 of the Terms of Reference; see also, para.42 of the Notice on access to the file.

¹²⁹ C. Kerse & N. Khan, *EC Antitrust Procedure*, *supra* note 29, at 237.

¹³⁰ Article 15 of the Terms of Reference.

¹³¹ Such possibility was explicitly ruled out in Joined Cases T-10, 11, 12 & 15/92, *Cimenteries CBR v Commission* [1992] ECR II-2667. The approach was also endorsed by Advocate General Léger in his opinion in Case C-310/93P, *BPB Industries and British Gypsum v. Commission*, *supra* note 107, para.122.

¹³² Case T-457/08 R, *Intel v Commission*, [2009] ECR II-12, para.56.

Legal professional privilege existed in Member States before recognition by the EU.¹³³ In common-law jurisdictions, legal professional privilege is derived initially from consideration of the ‘*oath and honour*’ of the lawyer.¹³⁴ Under this approach this privilege opposes compelled disclosure of a client’s secrets in violation of the gentleman’s code of honour.¹³⁵ Some scholars explain legal privilege on a utilitarian view. They argue that privilege is necessary for the maintenance of good client-lawyer relations and thus if people are able to consult lawyers without having to worry about the risks of subsequent disclosure of the information revealed and of the legal advice received, lawyers will be sought more frequently, advice received will be more accurate and the law will be better respected.¹³⁶ Therefore the welfare of society in general is increased. On the other hand, civil law countries tend to recognise legal professional privilege as a fundamental right of the client rather than an obligation of lawyers. The privilege is regarded as a necessary requirement of the proper administration of justice.¹³⁷ In the milestone case,

¹³³In fact EU law does not directly require national investigations and proceedings to protect legal privilege to the same standard as that defined by the Court of Justice for Commission investigation. National rules recognising a broader scope for legal privilege are compatible with the narrower standard in investigation conducted by the Commission. In this thesis legal professional privilege only refers to the latter, namely the privilege during the Commission’s antitrust investigation rather than the standard in Member States.

¹³⁴See, T. Christoforou, ‘Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case’, (1985) 9(1) *Fordham International Law Journal*, 1-62; at 3. However, this is not the place to review in detail the origins and rationales proposed throughout the history of the privilege at common law system. For information on the privilege within common law jurisdictions, please refer to J.H. Wigmore, *Evidence in Trials at Common Law*, (1940) Little, Brown; J. Auburn, *Legal Professional Privilege: Law & Theory*, (2000) Hart Publishing; G.C. Hazard, ‘An Historical Perspective on the Attorney-Client Privilege’, (1978) 66(5) *California Law Review*, 1061-1091; G.L. Peiris, ‘Legal Professional Privilege in Commonwealth Law’, (1982) 31(4) *International and Comparative Law Quarterly*, 609-639.

¹³⁵ See, E.G. Fournie, ‘Legal Professional Privilege in Competition Proceedings before the European Commission: Beyond the Cursory Glance’, (2004-2005) 28 *Fordham International Law Journal*, 967-1048; at 977.

¹³⁶*Ibid*, at 980.

¹³⁷See, T. Christoforou, ‘Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case’, *supra* note 134, at 4.

AM&S,¹³⁸ the CJEU stated that protection of the confidentiality of lawyer-client communications was construed as a necessary requirement of the client's right to a fair trial,¹³⁹ which is a fundamental right in accordance with Article 6 of ECHR.

Since the 1982 judgment of *AM&S* EU law has imposed restrictions on the ability of the Commission to obtain and present documents constituting communications between a lawyer and his/her client as evidence in its competition investigations.¹⁴⁰ As mentioned above, the CJEU tends to recognise legal professional privilege as a right of the undertaking concerned. In that case the CJEU stated that, first of all, protection of confidentiality of certain written communications between lawyers and client constitutes a general principle common to the law of the Member States and as such forms part of EU law; secondly, protection of confidentiality will be assured in EU competition law only when the following three conditions are met: (a) written communications between lawyer and client are made for the purposes and in the interests of the client's right of defence; (b) written communications emanate from independent lawyers, i.e. lawyers not bound to the client by a relationship of employment; and (c) written communications emanate from a lawyer who is entitled to practice his/her profession in a Member State.¹⁴¹

While *AM&S* established the basic procedure and scope of the protection of legal professional privilege, *Akzo*¹⁴² has brought this area of law into the

¹³⁸ *Australian Mining & Smelting Europe Ltd. v Commission*, Case 155/79, [1982] ECR 1575, [1982] 2 CMLR 264. (hereafter, the *AM&S*[1982] ECR)

¹³⁹ See, E.G. Fournie, 'Legal Professional Privilege in Competition Proceedings before the European Commission: Beyond the cursory Glance', *supra note 135*, at 990.

¹⁴⁰ *Ibid*, at 968.

¹⁴¹ *AM&S* [1982] ECR, at paras.21, 24, 26.

¹⁴² *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v Commission*, Joined Cases T-125/03 R & T-253/03 R, [2004] ECR, [2004] 4 CMLR 15.

spotlight again, reviving academic debate on whether the rules established in *AM&S* should be changed. In this case the President suggested in particular that the judgment in *AM&S* might be outdated and the Court considered the possibility of extending the privilege to in-house lawyers.¹⁴³

The conditions of legal professional privilege protection

As one of the rights of the defence during administrative proceedings under EU competition law, generally speaking, protection of legal privilege is the result of a compromise between two competing interests: effective investigation of anticompetitive activities in order to enforce EU competition law efficiently, and the right of the individual to have unfettered recourse to proper legal advice and assistance with a view to safeguarding his/her rights.¹⁴⁴ Accordingly the protection would not cover all communication between lawyer and client.

As mentioned above, the first condition provided by *AM&S* is that written communications between lawyer and client should be made for the purpose and in the interest of the client's right of defence.¹⁴⁵ This means, firstly, communications which are not for the purpose of protecting right of defence during the administrative proceeding of EU competition law's enforcement would not be privileged; secondly, a client may waive the privilege by disclosing the written communications if he considers it to be in his/her best

¹⁴³ See, *ibid*, paras. 122-123. For a detailed discussion on the *Akzo* case, please refer to G. Murphy, 'CFI signals possible extension of professional privilege to in-house lawyers', (2004) 25(7) *European Competition Law Review*, 447-454.

¹⁴⁴ T. Christoforou, 'Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case', *supra* note 134, at 5.

¹⁴⁵ *AM&S*[1982] ECR, ¶ 21.

interests to do so.¹⁴⁶ Once the privileged information has been disclosed by the client the basic justification for protection no longer applies.¹⁴⁷

The second condition brought more controversy. The privilege only applies to independent lawyers. It is worth noting that the Court defined “independence” negatively rather than positively: a lawyer who is not bound to the client by a relationship of employment.¹⁴⁸ By contrast, an in-house lawyer will be bound to his/her client by a relationship of employment. Much has been said about discrimination against in-house counsel in the *AM&S* by commentators.¹⁴⁹ The core question on which the debate on in-house counsel privilege revolves is the requirement of ‘independence.’¹⁵⁰ The Court held that the primary role of the lawyer and the privilege is to contribute to the proper administration of justice rather than seeking to safeguard the interests of his client.¹⁵¹ And an in-house lawyer may be bound by the employment relationship. S/he has only one client: his/her employer. The in-house lawyer is not a ‘third party’ to which communications may pass.¹⁵²

¹⁴⁶Ibid, para.28.

¹⁴⁷See, T. Christoforou, ‘Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case’, *supra note 134*, at 44.

¹⁴⁸*AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. ¶8757, at 9055.

¹⁴⁹ See for examples, G. Murphy, ‘CFI signals possible extension of professional privilege to in-house lawyers’, *supra note 143*; T. Christoforou, ‘Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case’, *supra note 134*; A.M. Hill, ‘A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community’, (1995) 27 *Case Western Reserve Journal of International Law*, 145-194.

¹⁵⁰See, E.G. Fournie, ‘Legal Professional Privilege in Competition Proceedings before the European Commission: Beyond the cursory Glance’, *supra note 135*, at 1011.

¹⁵¹See, T. Christoforou, ‘Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case’, *supra note 134*, at 15.

¹⁵²There is a series of cases (although not limited to the field of Antitrust) explaining this argument. For example, in *Bec* the Court stated that in an employment relationship employees perform the work in question for and under the direction of undertakings; for the duration of that relationship, they are incorporated into the undertakings concerned and thus form an economic unit with each of them. See, Criminal proceedings against *Jean-Claude*

In addition, s/he may have to consider practical issues such as salary and promotion in the undertaking and be sensitive to the interests and activities of his/her employer. These are considered to weaken in-house lawyers' independence and its contribution to a proper administration of justice.

The opposite may, however, be argued with equal merit. Firstly, in-house lawyers are well placed to provide legal advice given their intimate knowledge of an undertaking's activities.¹⁵³ This merit is particularly significant in the Reg.1/2003 era in which greater reliance was placed on undertakings to ensure that they comply with the law. In-house lawyers have a central role to play in this regard.¹⁵⁴ Affording in-house lawyers the same protection as independent lawyers will enhance legal compliance and predictability of EU competition law in a decentralised enforcement system. In addition, some commentators argued that in-house lawyers may, in fact, feel safer and more confident leaving one corporation and seeking employment with another if they disagree with the management.¹⁵⁵ Furthermore, in-house lawyers can always get the advice of an outside lawyer

Becu, Annie Verweire, Smeg NV and Adia Interim NV, Case C-22/98, [1999] ECR I-5665, ¶ 26. In *Euro-Lex*, the General Court rejected as inadmissible an application signed on behalf of a German company by a lawyer who was also one of its directors and stated firmly the principle that valid representation in proceedings before it require not only that the lawyer is authorised to practise before a court of a Member State, but also that the lawyer must be "a third party" who is "independent of the applicant". See, *Euro-Lex European Law Expertise GmbH v. Office for Harmonisation in the Internal Market*, Case T-79/99, [1999] ECR II-3555. In the same vein the Court of Justice has clearly established in *Lopes* that a lawyer cannot appear before the Court representing himself, even where he would be entitled to do so before Member State courts. See, *P. Lopes v. Court of Justice*, Case C-174/96, [1996] E.C.R. 1-6401, ¶11.

¹⁵³See, European Company Lawyers Association: In-house Counsel Legal Privilege Needed with Modernisation of EC Competition Law, Brussels, August 19, 2003, available at http://www.ecla.org/media/2047/modernisation_gc_2003.pdf, last visited on 29/07/2012, 12:53.

¹⁵⁴See, G. Murphy, 'CFI signals possible extension of professional privilege to in-house lawyers', *supra note 143*, at 452.

¹⁵⁵See, T. Christoforou, 'Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case', *supra note 134*, at 16.

in cases where they think they may disagree with the board of directors. Nor is there any evidence whatsoever to justify the implied accusation that in-house counsel act as stooges for management plotting to break the law.¹⁵⁶ The large number of such cases is said to confirm the high ethical standards of in-house counsel and their ability to resist pressure to violate their ethical responsibilities.¹⁵⁷

The third condition is that written communications emanate from a lawyer who is entitled to practice his/her profession in a Member State. The immediate and important result is that communications between a lawyer in a non-Member State and the client are excluded from legal professional privilege protection.¹⁵⁸ For example, any written communication between a Member State firm and an American lawyer will not be protected by legal professional privilege. It is noteworthy that the protection of the privilege is not limited to the lawyer's geographic scope and/or nationality.¹⁵⁹ An independent (lawyer from a third country who is called to the bar) solicitor or barrister entitled to practice his/her profession just as a lawyer in a Member State, no matter where s/he comes from, will fall within the protection of the principle of confidentiality.¹⁶⁰

¹⁵⁶See, European Company Lawyers Association: In-house Counsel Legal Privilege Needed with Modernisation of EC Competition Law, *supra note 143*.

¹⁵⁷A.M. Hill, 'A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community', *supra note 149*, at 188-189.

¹⁵⁸See, *AM&S*, [1982] ECR, ¶ 26. The Court referred specifically to Council Directive No. 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services. See, Council Directive No. 77/249/EEC, O.J. L 78/17 (1977); see also Council Directive No. 98/5/EC, O.J. L 77/36 (1998)

¹⁵⁹See, E.G. Fournie, 'Legal Professional Privilege in Competition Proceedings before the European Commission: Beyond the cursory Glance', *supra note 135*, at 1008.

¹⁶⁰See, *AM&S*, [1982] ECR, ¶ 25; see also, H. Kreis, 'The AM & S judgment of the European Court of Justice and its consequences within and outside the Community', (1983) 7(2) *World Competition*, 3-22. For further discussion about this issue, please refer to T.

In addition to the above three conditions, in *AM&S* the Court stated that the privilege covers ‘all written communications exchanged after the initiation of administrative procedure’; earlier communications may also be protected if they concern the subject matter of the later administrative procedure.¹⁶¹ The GC in *Hilti* expanded the scope of legal professional privilege to include ‘internal notes confined to reporting the text or content’ of communications between lawyer and client.¹⁶² As regards the question whether legal privilege also covers oral communication between a qualified lawyer and client, although the GC in *AM&S* specified that legal privilege covers written communications exchanged between lawyer and client, it did not limit the scope of privilege only to written communication. That in one case legal advice appears in writing or print in a business document while in the other only in oral conversation should not lead to different treatment in terms of protection of legal professional privilege.

Proof dilemma when granting the privilege

It is the Commission which determines whether the protection of privilege should be granted during the investigation.¹⁶³ A proof dilemma will be faced: often the only way to establish whether the privilege applies is to look into the content of the documents themselves. As the *AM&S* case itself clearly shows, privilege claims cannot be adjudicated on the exclusive basis of declarations of the party claiming privilege.¹⁶⁴ However, the investigated party doubted that permitting the inspectors to examine the documents would violate the confidential status. The inspectors should be satisfied with

Christoforou, ‘Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case’, *supra* note 134.

¹⁶¹ *AM&S*, [1982] ECR, ¶ 23.

¹⁶² *Hilti AG v. Commission*, Case T-30/89, [1990] ECR 11-163, [1990] 4 CMLR 602.

¹⁶³ See, *AM&S*, [1982] ECR, ¶ 17.

¹⁶⁴ The Commission's submissions were similar in *AM & S Europe*, 1982 E. Comm. Ct.J. Rep. at 1588, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 1613.

a description of the documents. In case of dispute the matter should be referred to an independent third party rather than the Commission.¹⁶⁵ However, the Court in *AM&S* confirmed the Commission's investigative power and rejected any suggestion that third parties should decide whether the protection of privilege should be granted. It held that is for the Commission itself and not the undertaking concerned or a third party (whether an expert or an arbitrator) to determine whether or not a given document must be produced.¹⁶⁶ In competition investigations the Commission may require production of the business documents which it considers necessary, including written communications between lawyer and client by decision.¹⁶⁷ The Court in *AM&S* has provided a practical way: put the claimed information in a sealed envelope¹⁶⁸ and allow only the reporting judge and the Advocate-General to see the documents.¹⁶⁹ Since *AM&S* the Court has become the only body competent to give a definitive judgment on the protection of the legal professional privilege in dispute between the Commission and parties investigated.¹⁷⁰

2.3.4 Right against self-incrimination under EU competition law

¹⁶⁵ *AM&S*, [1982] ECR, ¶.3-4.

¹⁶⁶ *Ibid*, ¶ 17.

¹⁶⁷ *Ibid*, ¶16, 27.

¹⁶⁸ *Ibid*, at 1616.

¹⁶⁹ See Opinion of Advocate General Slynn, *AM&S*, [1982] ECR

¹⁷⁰ See, T. Christoforou, 'Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case', *supra note 134*, at 48. Some scholars argued that the Court's role in granting the privilege in dispute should be played by the Hearing Officer. See for example, E.G. Fournie, 'Legal Professional Privilege in Competition Proceedings before the European Commission: Beyond the cursory Glance', *supra note 135*, at 1026-1028.

The right against self-incrimination can be justified on three main grounds.¹⁷¹ Firstly, the right was explained as a means of protecting autonomy from improper coercion, known as privacy.¹⁷² The right against self-incrimination is thus related to the right of each individual to a sphere of privacy and centres on the existence of an individual's right to control the provision of information about ourselves.¹⁷³ An individual's self-knowledge and inner workings of mind are generally seen as areas in which the law should not intervene. However, it is also immediately clear that such a right cannot be absolute: a balance has to be drawn between the significance of the information to the individual and the societal needs that justify the demand to reveal it.¹⁷⁴ Secondly, the right against self-incrimination is to avoid the 'cruel trilemma' faced by the defendant.¹⁷⁵ To avoid the defendant's facing that cruel choice between three detrimental outcomes the right gives the guilty suspect a way out: silence.¹⁷⁶ This argument requires that the state should act in a manner which is humane, and claims that it is intuitively inhumane to compel a person to harm himself, even when the same harm

¹⁷¹ There are other theories to explain this privilege, for example, the game theory. However, it is not the purpose of this part to cover all these explanations. For a more detailed examination about the theoretical foundations of the right against self-incrimination, please refer to A. Andreangeli, *EU Competition Enforcement and Human Rights*, *supra note 26*, at 123-129; A. MacCulloch, 'The Privilege against Self-incrimination in Competition Investigations: Theoretical Foundations and Practical Implications', (2006) 26(2) *Legal Studies*, 211-237, at 215-222.

¹⁷² See for example, R.S. Gerstein, 'Privacy and Self-Incrimination', (1970) 80(2) *Ethics*, 87-101.

¹⁷³ See, A. MacCulloch, 'The Privilege against Self-incrimination in Competition Investigations: Theoretical Foundations and Practical Implications', *supra note 171*, at 215-216.

¹⁷⁴ R.S. Gerstein, 'Privacy and Self-Incrimination', *supra note 172*, at 89.

¹⁷⁵ In the original form, the cruel trilemma was the three choices alternatives open to a guilty suspect questioned under oath: to confess and suffer the consequences; to remain silent and be in contempt; or to lie and commit perjury. See, A. MacCulloch, 'The Privilege against Self-incrimination in Competition Investigations: Theoretical Foundations and Practical Implications' *supra note 171*, at 217.

¹⁷⁶ *Ibid.*

would be justifiable when inflicted by others.¹⁷⁷ Lastly, the right against self-incrimination may also be explained as a 'functional necessity' within the criminal justice system.¹⁷⁸ The purpose of the right is to protect against wrongful conviction of the innocent and to operate as part of the presumption of innocence. The right is related to the presumption of innocence and preventing the authorities from forcing the accused to produce inculpatory evidence which would be impossible to obtain if not for his/her cooperation.¹⁷⁹

The scope of the right against self-incrimination in investigation under EU competition law: divergence between the CJEU and the Strasbourg Court

The right against self-incrimination was recognised by the CJEU to some extent as part of the general principle of EU law, although not explicitly provided by the relevant implementing legislation.¹⁸⁰ However, the scope of this right under the Commission's investigation is limited. The Court has made it clear that where the right against self-incrimination existed in the laws of the Member States it applied only in relation to criminal proceedings.¹⁸¹ Furthermore, there was no such principle common to the law of the Member States that could be relied upon by legal persons in the

¹⁷⁷R.K. Greenawalt, 'Silence as a Moral and Constitutional Right', (1981) 23(1) *William and Mary Law Review*, 15-71; at 39.

¹⁷⁸I. Dennis, 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-Incrimination', (1995) 54(2) *Cambridge Law Journal*, 342-376; at 376.

¹⁷⁹*Ibid*, at 355.

¹⁸⁰Case 27/88, *Orkem v Commission*, [1989] ECR 3355, para.28, 33-34(hereafter, *Orkem* [1989] ECR).

¹⁸¹ Although Reg.1/2003 stated clearly that the sanction under EU Competition law shall not be in criminal (Article 23(5) of Reg.1/2003), some commentators argued that it is now clear that competition investigations are considered to be 'criminal' in nature, according to the all-important jurisprudence of the ECtHR. See, *Societe Stenuit v France* (1992) 14 EHRR 509; A. MacCulloch, 'The Privilege against Self-incrimination in Competition Investigations: Theoretical Foundations and Practical Implications', *supra note 171*, at 233.

economic sphere, in particular, infringements of competition law.¹⁸² Thus the Court confirmed the power of the Commission to obtain ‘all necessary information’¹⁸³ from the undertaking concerned even through compulsion, in order to guarantee the effectiveness of the Commission’s investigation.¹⁸⁴

Nonetheless, the Court acknowledged that the Commission’s powers are not unlimited.¹⁸⁵ It did accept that in order to protect the rights of the defence during the investigation a limited right against self-incrimination existed in EU law.¹⁸⁶ The CJEU thus held that the Commission may not ‘compel an undertaking to provide it with answers which might involve an admission on its part to an infringement which it is incumbent upon the Commission to prove’.¹⁸⁷ Hence the Commission may compel the undertaking concerned to answer questions of a purely factual nature but not questions that would involve an admission of violation.¹⁸⁸ This restrictive interpretation of the right under competition investigation is maintained in later case law of the CJEU.¹⁸⁹ The CJEU’s approach has been criticised by commentators because even purely factual evidence may be damning.¹⁹⁰

¹⁸² *Ibid*, para.29.

¹⁸³ See, Article 18 of Reg.1/2003.

¹⁸⁴ *Orkem* [1989] ECR, paras.38-39.

¹⁸⁵ See, A. Andreangeli, *EU Competition Enforcement and Human Rights*, *supra* note 26, at 130.

¹⁸⁶ See, *Orkem* [1989] ECR, para.35; see also, A. Riley, ‘Saunders and the Power to Obtain Information in Community and United Kingdom competition law’, (2000) 25(3) *European Law Review*, 264-281; at 267.

¹⁸⁷ *Orkem* [1989] ECR, para.35.

¹⁸⁸ See, K.P.E. Lasok, ‘The Privilege against Self-Incrimination in Competition Cases’, (1990) 11(2) *European Competition Law Review*, 90-91; at 91.

¹⁸⁹ See for example, *Mannesmannrhen-Werke AG v Commission*, Case T-112/98 [2001] ECR 11-729, [2001] 5 CMLR 1; *LVM NV and Others v Commission*, [2002] ECR I-8375.

¹⁹⁰ A. Riley, ‘Saunders and the Power to Obtain Information in Community and United Kingdom competition law’, *supra* note 186, at 269.

3. Rights of the concerned parties during investigative procedures under US Antitrust Law

3.1 Introductory remarks and an overview of US Antitrust law enforcement procedure

This section seeks to examine the rights of concerned parties under the public enforcement of US antitrust laws, specifically § 1 and 2 of the Sherman Act, by the US Department of Justice. There is no specific procedure for the public enforcement of US antitrust laws. Enforcement is governed by general procedural rules such as the Federal Rules of Civil Procedure¹⁹¹ and the Federal Rules of Criminal Procedure.¹⁹² Hence there are no *specific* rights of the investigated or accused parties in the federal enforcement of antitrust law. Rights of concerned parties in US civil and/or criminal procedure are protected by general laws, including relevant provisions of the US Constitution. For example, the Fourth Amendment protects the individual or/and corporations from unreasonable search and seizure by means of

¹⁹¹The Federal Rules of Civil Procedure is available at <http://www.uscourts.gov/forms/civil2010.pdf>, last visited on 22/08/2012, 16:59.

¹⁹²The Federal Rules of Criminal Procedure is available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Criminal%20Procedure.pdf>, last visited on 22/08/2012, 21:00.

subpoenas¹⁹³ and the Fifth Amendment provides protection against self-incrimination.¹⁹⁴

There are three main procedures to implement US antitrust law at the federal level: 1. the Antitrust Division's civil enforcement of the Sherman Act; 2. the Antitrust Division's criminal enforcement of the Sherman Act and the Clayton Act; and, 3. the FTC's civil enforcement of Clayton Act and FTC Act.¹⁹⁵

The Antitrust Division's civil investigation usually begins with voluntary cooperation. Voluntary investigation would not involve rights of the concerned parties.¹⁹⁶ When conducting a civil investigation the Antitrust Division normally adopts a Civil Investigative Demand (hereafter the CID). Through the CID the Antitrust Division may require the recipient to produce documentary material, written interrogatory responses or/and oral testimony.¹⁹⁷ The CID must generally state the nature of the conduct constituting the alleged antitrust violation and the provision of the law applicable thereto.¹⁹⁸ During this compulsory investigation, the recipient of the CID may also claim right under the standards applicable to Grand Jury

¹⁹³The Fourth Amendment of US Constitution provides that The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. See also, *Hale v. Henkel*, 201 U.S. 43 (1906); *Wilson v. United States*, 221 U.S.361 (1911); *Norcross v. United States*, 209 Fed.13 (9th Cir.1913), *Shotkin v. Nelson*, 146 F.2d 402 (10th Cir.1944).

¹⁹⁴The Fifth Amendment of the US Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. See also, *Kastigar v. United States*,406 U.S. 441 (1972).

¹⁹⁵See, H. Hovenkamp, *Federal Antitrust Policy the Law of Competition and Its Practice*, 3rd Edition, (2005)West Group, at 593.

¹⁹⁶See, J.M. Jacobson (editor in chief), *Antitrust Law Developments*, *supra* note 15, at 695.

¹⁹⁷See, ABA Section of Antitrust Law, *Department of Justice Civil Antitrust Practice and Procedure Manual*,(2012)ABA Publishing, at 64-70.

¹⁹⁸15 U.S.C. §1312(b) (1).

subpoena.¹⁹⁹ The rights during the Antitrust Division's CID investigation include the right against unreasonable search and seizure under the Fourth Amendment; the right against self-incrimination under the Fifth Amendment; and attorney-client privilege.

As the exclusive federal agency with the power to enforce antitrust law via the criminal law, the Antitrust Division's investigation may begin either with a complaint or on its own initiative.²⁰⁰ Whatever the origin, the investigation is first assigned to an attorney or attorneys for preliminary investigation.²⁰¹ If the preliminary investigation results in a recommendation to proceed further, the investigation takes on a different character, namely the seeking and obtaining of specific evidence of violation sufficient to warrant suit.²⁰² There are two options: 1. seeking voluntary cooperation; 2. investigation by the use of compulsory powers.

The Antitrust Division's voluntary based investigation is mainly conducted by interviews or by file searches. In such circumstance antitrust attorneys and Bureau agents have no power to subpoena or compel the production of documents from a businessman's files, or to compel persons to talk to them or give them written statements.²⁰³ The legal results of voluntary submissions can differ greatly from production of records under subpoena. Firstly,

¹⁹⁹Ibid, §1312(c) (1).

²⁰⁰The Antitrust Division typically only proceeds by criminal investigation in cases involving horizontal arrangements between competitors those are per se unlawful, such as price fixing and bid-rigging. See, ABA Section of Antitrust Law, *Department of Justice Civil Antitrust Practice and Procedure Manual*, *supra* note 197, at 55.

²⁰¹See, C.L. Terrel, 'Processes in the Investigation of Complaints', (1940) 7 *Law and Contemporary Problems*, 99-103.

²⁰² See, W.H. Hamilton, *Antitrust in Action*, (1940) Da Capo Press, at 33.

²⁰³ See, R.A. Nitschke, 'Procedure in Antitrust Investigation', (1950) *University of Illinois Law Forum*, 593-628, at 596.

voluntary submission is *ipso facto* a waiver of the right of privacy.²⁰⁴ Secondly, voluntary submission is a waiver of the constitutional right against self-incrimination, and no immunity can be claimed since the immunity statute only applies where the documentary evidence has been produced under oath and in obedience to a subpoena.²⁰⁵ Thirdly, giving voluntary access to files waives the attorney-client privilege under the rule that disclosure of privileged communications without claiming the privilege is a waiver.²⁰⁶ Fourthly, a person who or corporation which voluntarily submits its records to the Government, and is not made a defendant may not be able to compel the Government to return or permit inspection of those documents.²⁰⁷ Fifthly, the Government has no obligation of secrecy with respect to documents produced voluntarily and not submitted to the Grand Jury. It should be noted that although a person may refuse to supply information or records as indicated above, if he voluntarily supplies the same, it would appear that under the 'false statement' statute he must tell the truth and supply true records.²⁰⁸

The Antitrust Division brings suit in the federal court challenging anticompetitive practices pursuant to the Sherman Act and Clayton Act,

²⁰⁴See, *Olmstead v. United States*, 277 U.S. 438, 478-479, 48 Sup. Ct. 564, 572 (1928); *Harris v. United States*, 331 U.S. 145, 198, 67 Sup. Ct. 1098, 1120 (1947).

²⁰⁵32 STAT. 904 (1903), 15 U.S.C. § 32 (1946); 34 STAT. 798 (1906), 15 U.S.C. § 33 (1946).

²⁰⁶See, *United States v. American Optical Co.*, Civil No. 10-391, S.D.N.Y, Dec. 15, 1941

²⁰⁷See, *Burdeau v. McDowell*, 256 U.S. 465, 41 Sup. Ct. 574 (1921); *United States v. Wisconsin Cheese Exchange*, Crim. No. 33198, N.D. Ill.

²⁰⁸ The statute states that whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.' 62 STAT. 749 (1948), 18 U.S.C. § 1001 (1950 Supp).

civily or criminally.²⁰⁹ There is no difference between antitrust litigation and any other litigation in the federal court, which should follow normal judicial procedure.²¹⁰ Nevertheless, it is more likely after a civil investigation, that the Antitrust Division would offer a consent decree to the parties concerned to stop the illegal practices alleged in the complaint, prevent their renewal and restore competition to the state that would have existed had the violation not occurred.²¹¹ The Division must file a Competitive Impact Statement (hereafter the CIS) in the proposed consent final judgement to explain why the proposed decree is appropriate.²¹² In addition, the Antitrust Division is required to file materials and documents that are considered determinative in formulating the proposed consent judgement.²¹³ These provisions guarantee the rights to be heard and access to the Antitrust Division's file of the recipients of the consent decree.

In relation to compelling criminal investigation the Antitrust Division mainly relies on search warrant and Grand Jury subpoena *ducestecum*. It is not the purpose of this section to discuss the procedure of enforcing the searching warrant or the Grand Jury subpoena. It is enough to illustrate that the rights of the concerned parties are mainly related to the search warrant and Grand Jury subpoena *ducestecum* investigation. The Fourth Amendment governs search warrants and it extends to both individual and corporate bodies.²¹⁴ The government must show a fair probability that the crime was

²⁰⁹ See, ABA Section of Antitrust Law, *Department of Justice Civil Antitrust Practice and Procedure Manual*, *supra* note 197, at 185.

²¹⁰ See, generally, J.M. Jacobson (editor in chief), *Antitrust Law Developments*, *supra* note 15.

²¹¹ See, U.S. Department of Justice Antitrust Division Manual, fourth edition, Chapter IV-54 (July, 2009), available at <http://www.justice.gov/atr/public/divisionmanual/chapter4.pdf>, last visited on 31/08/2012, 21:55.

²¹² See, 15 U.S.C. §16, §16 (b).

²¹³ *Ibid*, §16 (b).

²¹⁴ See, *See v. Seattle*, 387 U.S. 541, 545-546 (1967); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392(1920).

committed /perpetrated at the place specified in the warrant to the court.²¹⁵The Fourth Amendment also requires that the warrant must ‘particularly describe the place to be searched, and the persons or things to be seized.’²¹⁶ The warrant should leave no discretion to the executing officer.²¹⁷ The issuance of a search warrant is determined by different courts and thus the standard may be flexible. The Grand Jury subpoenas *ducestecum* are often more extensive than the searching warrant and require production in a short period of time.²¹⁸ During a Grand Jury subpoena investigation, several privilege issues may be involved, for example, the attorney-client privilege (or the legal professional privilege).²¹⁹ In addition, the Fifth Amendment which protects compelled self-incrimination may be involved. A sole proprietor may assert a Fifth Amendment privilege to resist producing business or personal records if the act of production involves compelled admissions that the documents exist, are authentic or are in the proprietor’s possession.²²⁰

The FTC’s antitrust enforcement may take non-adjudicative and adjudicative form. In non-adjudicative procedure the FTC applies a CID or a subpoena to compel a concerned party to produce information. The FTC then brings the case before the federal court or prepares a consent order where

²¹⁵*Illinois v Gates*, 462 U.S. 213, 238 (1983).

²¹⁶*Maryland v. Garrison*, 480 U.S. 79, 84 (1987); *Stanford v. Texas*, 379 U.S. 476, 481(1965); *Marron v. United States*, 275 U.S. 192, 196 (1927); *United States v. Baldwin*, 987 F.2d 1432, 1436 (9th Cir. 1993); *United States v. Oloyede*, 982, F. 2d 133, 138(4th Cir. 1992); *Virgin Islands v. Gereau*, 502 F. 2d 914, 930(3rd Cir. 1974).

²¹⁷See, *Stanford v. Texas*, 379 U.S. 476, 485(1965); *Marron v. United States*, 275 U.S. at 196.

²¹⁸ABA Section of Antitrust Law: *Handbook on Antitrust Grand Jury Investigations*, 3rd edition, (2002)ABA Publishing,at 38.

²¹⁹See, *United States v. Calandra*, 414 U.S. 338, 346 (1974); *In re Grand Jury Subpoena DucesTecum*, Dated Sept.15, 1993, 731 F2d 1032, 1036 (2d Cir. 1984). The attorney-client privilege issue will be discussed later in detail later in this section.

²²⁰See, *United States v. Doe*, 465 U.S. 605, 612-614(1984). The privilege against self-incrimination will be discussed later in detail later in this section.

necessary. Similar to the Antitrust Division's civil enforcement, the right against unreasonable search and seizure, the right against self-incrimination, the attorney-client privilege and the rights to be heard and access to the file may be involved. In the FTC's adjudicative enforcement, which resembles administrative proceeding under EU competition law, similar rights of the concerned parties are guaranteed, although in a different way from that under the non-adjudicative procedure.²²¹ The FTC may commence the investigation with a complaint issued to the concerned parties. The FTC may investigate the subject-matter in the complaint by compelling approaches, which bear a modest resemblance to the civil investigation conducted by the Antitrust Division.²²² The Administrative Law Judge (hereafter the ALJ), who is a part of the FTC but has independent function of adjudication,²²³ is entitled to hold hearings and issue initial decision.²²⁴

Of the three US antitrust law's enforcement procedures, only the FTC's adjudicative procedure may be classified as an 'administrative proceeding' defined in the introduction of this chapter.²²⁵ However, the rights which may be claimed during the precomplaint investigation and the FTC's adjudicative proceeding, no matter whether criminally or civilly, have similar functions, i.e. protecting legitimate rights of the investigated individual and/or corporation during the compulsory investigation or the adjudicative proceeding conducted by the Antitrust Division and/or the FTC. From this

²²¹ See, generally, Part 3 of the FTC Rules of Practice, available at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=d3accaad2f519b68cdb15079ca0c0ec1&tpl=/ecfrbrowse/Title16/16cfr3_main_02.tpl, last visited on 01/09/2012, 18:29. More detailed discussion on the FTC adjudicative proceeding will be discussed later in this section.

²²² Ibid, subpart D.

²²³ See, J.M. Jacobson (editor in chief), *Antitrust Law Developments*, *supra* note 15, at 669.

²²⁴ See, subpart E and F of Part 3 of the FTC Rules of Practice.

²²⁵ The administrative enforcement procedure is defined as 'from the beginning of fact finding investigation conducted by the administrative enforcer(s) to the issuance of the first instance decision which may contain sanction by the same administrative enforcer.' See, '1. Introduction of this chapter' and '2.1 Introductory remarks' in this chapter.

perspective the rights of defence under US antitrust laws are comparable with those under Article 101 and 102 TFEU and China's AML 2007.²²⁶

In order to fulfil the functional equivalence the scope of rights of concerned parties under US antitrust laws discussed in this section are defined firstly as the rights of concerned parties under the compulsory pre-complaint investigation by the Antitrust Division and/or the FTC's non-adjudicative procedure. Secondly, the rights of concerned parties under the FTC's adjudicative procedure will also be considered; thirdly, the rights refer to those enjoyed by the undertaking concerned and investigated by the administrative enforcer(s) rather than the rights of complainants or third parties; fourthly, the right of concerned parties during merger assessment will be excluded; lastly, the US antitrust laws in this chapter only refer to federal antitrust laws. State antitrust statutes are excluded. The main rights of parties concerned under US antitrust law include the right to be heard and access to the file; the right against self-incrimination and attorney-client privilege; the right against unreasonable search and seizure.

3.2 Procedural rights during the investigative procedures under US antitrust laws

3.2.1 Rights to be heard under US antitrust law

Civil investigation under US antitrust laws normally begins with the issuance of a CID.²²⁷ The recipient of the CID's right to be heard may be

²²⁶As K. Zweigert& H. Kötz provided, 'the only things which are comparable are those which fulfil the same function'. See, K. Zweigert& H. Kötz, *An Introduction to Comparative Law*, *supra* note 18, at 34.

²²⁷ There are three types of CID in antitrust law enforcement: the CID requesting documentary material, the CID requesting a written interrogatory response and the CID requesting oral testimony. See, Chapter 3 of Antitrust Division Manual, *supra* note 211, at 52.

protected by the following procedures. Firstly, a CID must state the nature of the conduct constituting the alleged antitrust violation and the provision of the law applicable thereto.²²⁸ If the CID is requesting documentary material, it must describe the class or classes of documentary material to be produced there under with such precision and certainty as to permit such material to be fairly identified.²²⁹ If the CID is requesting a written interrogatory response, the interrogatory should be propounded with clarity and certainty.²³⁰ As regards the CID for oral testimony, the CID must state the date, time and place where the testimony will be taken and identify an antitrust investigator who will conduct the examination.²³¹ Secondly, a CID recipient may raise objection to the CID. S/he generally has three options: 1. to negotiate a deferral or modification of compliance with the Division; 2. to refuse to respond to the CID unless or until compelled by the court; 3. to file a petition to quash or modify the CID.²³² If any of the three options is adopted, the recipient will have the opportunity to make his/her view known to the Antitrust Division or the courts by filing the petition. In fact the Antitrust Division encourages negotiation with the recipient about the content of the CID. It typically serves CIDs accompanied by a cover letter which invites the recipient to contact the Division promptly to discuss any modifications to the CID.²³³

Most likely the Antitrust Division will provide a consent decree to the party concerned after its civil investigation. The consent decree is produced by negotiation between the Antitrust Division and the concerned parties. During

²²⁸See, *ibid*, Chapter 3, 62.

²²⁹15, U.S.C. §1312(b) (2) (A).

²³⁰*Ibid*, §1312(b) (3) (A).

²³¹ See, Antitrust Division Manual, *supra note 211*, Chapter 3, 57.

²³²ABA Section of Antitrust Law, *Department of Justice Civil Antitrust Practice and Procedure Manual*, *supra note 197*, at 71.

²³³See, Antitrust Division Manual, *supra note 211*, Chapter 3, 55-56.

negotiation the Antitrust Division is required to produce a CIS²³⁴ in which the Division must describe the nature of the proceeding and explain the proposed consent decree, the remedies available and the procedures for modifying the proposed decree.²³⁵ Within ten days of the filing of the proposed consent decree a defendant must file with the court descriptions of all communications on its behalf concerning the consent decree.²³⁶ During the negotiation the parties concerned may make their view known to the Antitrust Division and/or to the court. If the Antitrust Division brings the case to litigation before the federal court, the defendant has the right to have his views heard before the court. This is beyond the scope of this discussion, defined in the introduction to this section.

As with the civil investigation conducted by the Antitrust Division, during the criminal investigation under Grand Jury subpoena the respondent and counsel have the opportunity to negotiate the scope of the subpoena. The negotiation process often enables Antitrust Division attorneys to learn about the industry and the respondent, and it allows the respondent to learn about the focus and scope of the investigation.²³⁷ In addition, the respondent may challenge a subpoena by advancing a motion to quash or modify it before court.²³⁸ The respondent bears the burden of showing the abuse of the Grand Jury process. His/her view can be heard by the Antitrust Division and the court during this process. Finally, during the final stages of a Grand Jury investigation the Antitrust Division will issue a target letter to any individual or corporation that it considers to be a putative defendant.²³⁹ At this stage the target is given the opportunity to testify before Grand Jury and the

²³⁴ 15 U.S.C. §16, §16 (b).

²³⁵ See, J.M. Jacobson (editor in chief), *Antitrust Law Developments*, [supra note 15](#), at 706.

²³⁶ See, 15 U.S.C. § 16 (g).

²³⁷ J.M. Jacobson (editor in chief), *Antitrust Law Developments*, [supra note 15](#), at 743.

²³⁸ *Ibid.*

²³⁹ *Ibid.*, at 761.

target's counsel is given the opportunity to meet the Division's attorneys conducting the investigation.²⁴⁰

The FTC's civil investigation, its non-adjudicative process, is similar to the Antitrust Division's civil enforcement; while under its adjudicative process the FTC initiates the investigation by sending a complaint to the concerned parties which states the concern of the FTC.²⁴¹ The recipient is required to answer the questions raised in the complaint within 14 days of being served.²⁴² In the FTC's adjudicative process public hearing plays a very important part. Similar to practice under EU competition law, a hearing is organised and chaired by the Administrative Law Judge (the ALJ).²⁴³ Compared with the role of the Hearing Officer under EU competition law, an ALJ plays a more important part and is the central figure.²⁴⁴ It is not only responsible for the organisation and the chairing of the hearing, but it is also responsible for making final administrative decisions.²⁴⁵ The independence of ALJs is guaranteed by the following mechanisms. First of all ALJs are selected by the US Office of Personnel Management (hereafter, the OPM) rather than the FTC itself; secondly, ALJs receive compensation from the OPM rather than the FTC;²⁴⁶ thirdly, the US Administrative Procedure Act (hereafter, the APA)²⁴⁷ requires that the ALJs' functions be conducted in an impartial manner and that if a disqualification petition is filed against an ALJ in any case, the agency must determine that issue on the record, and as part

²⁴⁰See, Antitrust Division Manual, *supra* note 211, Chapter 3, 120-122.

²⁴¹See, FTC Rules of Practice, subpart B.

²⁴²*Ibid*, § 3.12.

²⁴³See, J.S. Lubbers, 'Federal Administrative Law Judges: A Focus on our Invisible Judiciary', (1981) 33 *Administrative Law Review*, 109-131, at 110. (Providing that a hearing is organised and chaired by the Administrative Law Judge in the proceeding in which administrative determinations must be based on the records of trial-type hearings.)

²⁴⁴J.S. Lubbers, *ibid*, at 109.

²⁴⁵For details of the procedure, please refer to Part 3 of the FTC's Rule of Practice.

²⁴⁶5 U.S.C. § 5362 (1976).

²⁴⁷Pub.L. 79-404, 60 Stat. 237, enacted on June 11, 1946.

of the decision in that case;²⁴⁸ finally, the APA also stipulates that an ALJ may not be responsible to, or subject to supervision by anyone performing investigative or prosecutorial functions for an agency.²⁴⁹

3.2.2 The right of access to the file under US antitrust laws

Interested federal, state and private parties may seek to obtain access to Grand Jury information in certain circumstances regulated under Rule 6(e) (3).²⁵⁰ As regards concerned parties' right of access to the file produced by Grand Jury investigation Rule 6(e) (3) (C) states that the disclosure may be made when so directed by a court preliminarily to or in connection with a judicial proceeding; or, when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury.²⁵¹ Thus the federal courts may decide whether to disclose Grand Jury information.

Federal Criminal Rule 16(a) provides what the government must disclose during a criminal litigation.²⁵² One of its essential purposes is to give the defendant and counsel an adequate opportunity to prepare a defence. The information subject to disclosure by the Antitrust Division includes:

1. the defendant's oral statement made before the government;
2. the defendant's written or recorded statement within the government's possession, custody or control or before a Grand Jury;
3. organisational

²⁴⁸ 5 U.S.C. § 556(b) (1976).

²⁴⁹ 5 U.S.C. § 554(d) (1976).

²⁵⁰ See, ABA Section of Antitrust Law, *ibid*, at 186.

²⁵¹ See, Rule 6(e) (3) (C) of the Federal Rules of Criminal Procedure.

²⁵² See, Federal Rules of Criminal Procedure Rule 16. A criminal defendant also has the protection of *Brady v. Maryland*, 373 U.S. 83 (1963), which requires the prosecution to disclose to the defendant evidence that is favourable to the defendant and material to the issues of guilt or punishment and the Jencks Act, 18 U.S.C. § 3500. Quoted from ABA Section of Antitrust Law, *Criminal Antitrust Litigation Handbook*, 2nd edition, (2006) ABA Publishing, at 117, footnote 1.

defendant; 4. the defendant's record; 5. documents and objects including any item material to preparing the defence, the government intends to use the item in its evidence-in-chief at trial or item was obtained from or belongs to the defendant; 6. the defendant's reports of examinations and tests; and, 7 expert witnesses.²⁵³ On the other hand, Rule 16 stipulates two non-accessible documents. Firstly, internal governmental documents are not subject to disclosure. These include reports, memoranda and other internal governmental documents made by an attorney for the government or other government agent investigating or prosecuting the case.²⁵⁴ Secondly, statements made by government witnesses are not subject to disclosure except as provided by the 18 U.S.C. §3500.²⁵⁵ Since such witnesses may include the complainants and third parties, the business secret and the information of the complainants and the third parties are protected from disclosure.

Unlike a criminal defendant a defendant in a civil case has more discovery tools. For example, a civil practitioner may obtain disclosure of the opponent's legal theories, witnesses and evidence.²⁵⁶ As are the plaintiff and the defendant in civil litigation, both the Antitrust Division and the concerned parties are obliged to disclose the information that the disclosing party may use to support its claims or defences during the initial disclosure and the pre-trial disclosure process.²⁵⁷ Rule 26 (b) of the Federal Civil Procedure Rules provides that unless otherwise limited by court order, the scope of discovery is as follows: parties may obtain discovery regarding any non privileged matter that is relevant to any party's claim or defence. Thus there are two main limitations to accessible files: 1. privileged files are

²⁵³ See, Rule 16(a) (1) (A)-(G).

²⁵⁴ Rule 16 (a) (2).

²⁵⁵ Ibid.

²⁵⁶ ABA Section of Antitrust Law, *Criminal Antitrust Litigation Handbook*, [supra note 252](#), at 117.

²⁵⁷ Rule 26 (a) (1) and (3) of the Federal Rule of Civil Procedure.

treated as non-accessible; 2. by order, the court may alter the limits in these rules. Besides, there are limitations on the frequency and extent of such disclosure and electronically stored information with consideration of the cost and burden of disclosure.²⁵⁸

Under the FTC's adjudicative procedure parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defences of any respondent.²⁵⁹ The ALJ may authorise for good cause additional discovery of materials in the possession, custody, or control of those Bureaux or Offices of the FTC. However, again, privileged materials are kept from disclosure.²⁶⁰

Unlike in the EU, there is not much discussion on the right of access to the file in the US antitrust law enforcement context. Probably because of the existence of the federal court and the ALJ as the independent decision maker, the investigative power of the Antitrust Division or the FTC investigator is limited. Hence these rights can be sufficiently protected by the above-mentioned procedural instruments. The concerned parties' right to be heard and right of access to the file have not drawn as much attention as that under EU competition law.

3.2.3 Attorney-client privilege under US antitrust law

Justification of the attorney-client privilege

²⁵⁸ See, Rule 26 (b) (1) and (2), *ibid*.

²⁵⁹ See, § 3.31 (c) (1) of the FTC's Rule of Practice

²⁶⁰ For example, witness privilege and counsel-client privilege need not be disclosed. See, § 3.31 (c) (2) and (4) of the FTC's Rule of Practice.

The rule of attorney-client privilege, which is known as legal professional privilege in the EU, has been recognised by the US courts since 1888.²⁶¹ It is noteworthy that US courts later recognised the privilege between the in-house counsel and client in 1915.²⁶² In *Upjohn Co. v. United States*²⁶³ the Supreme Court held that attorney-client privilege ‘is the oldest of the privileges for confidential communications known to the common law’.²⁶⁴ Although the rules differ somewhat according to jurisdiction, all attorneys have an obligation to maintain the confidences of their clients.²⁶⁵ Justifications for attorney-client privilege are similar to those espoused by the EU and its Member States. In *Upjohn* the court said that the purpose of this privilege is to encourage the ‘communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation’,²⁶⁶ because the best administration of justice can only occur when clients can have full and frank communication with their lawyers.²⁶⁷ Another justification is based on the notions of privacy and autonomy of the client in determining who should have access to his information.²⁶⁸

²⁶¹ See, *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

²⁶² See, *United States v. Louisville & N. R.R.*, 236 U.S. 318, 336 (1915).

²⁶³ See, *Upjohn Co. v. United States*, 449 U.S. 383 (1981), (hereafter, the *Upjohn*).

²⁶⁴ See, *ibid*, at 389.

²⁶⁵ See, A.M. Hill, ‘A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community’, *supra note 149*, at 168.

²⁶⁶ *Upjohn*, 392.

²⁶⁷ See, *Trammel v. United States*, 445 U.S. 40 (1981); *Fisher v. United States*, 425 U.S. 391, 403 (1976), *Hunt v. Blackburn*, 128 U.S. 464 (1888), *United States v. Louisville & N. R.R.*, 236 U.S. 318 (1915), *Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp 483 (E.D. Pa. 1962),

²⁶⁸ See, Developments in the Law - Privileged Communications: II. Modes of Analysis: The Theories and Justifications of Privileged Communication, *Harvard Law Review*, (1985), volume 98, issue 6, 1450-1666; at 1471, 1480-1483.

However, courts have recognised that the privilege hinders the discovery of the truth and therefore should not be broadly construed.²⁶⁹ Criticism of attorney-client privilege is not uncommon, particularly of the underlying assumption that privilege increases communication.²⁷⁰ Unfortunately there is a paucity of available evidence that either supports or runs counter to the assumptions underlying the need to protect confidentiality.²⁷¹

On the above justifications both the EU and US have recognised the attorney-client privilege as one of the most fundamental protections afforded to clients. However, unlike the EU, the US extended this protection also to in-house counsel. Therefore the issue in the US is not whether in-house counsel should be allowed to exercise the attorney-client privilege, but rather who in a particular company should be included in that protection.²⁷²

The scope of the attorney-client privilege in the US

The purpose of the attorney-client privilege is to protect the relation between the attorney and the client. Thus, first of all, the communication must be made with the intention of obtaining or providing legal advice. This is especially relevant in the corporate context where general counsel, those sitting on the board of directors, are often asked to or freely provide both

²⁶⁹See, A.M. Hill, 'A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community', *supra note 149*, at 174.

²⁷⁰See, Developments in the Law - Privileged Communications: II. Modes of Analysis: The Theories and Justifications of Privileged Communication, *supra note 268*, at 1474.

²⁷¹See, F.C. Zacharias, 'Rethinking Confidentiality', (1989) 74 *Iowa Law Review*, 351-412, at 364; see also, *ibid*, at 1474; 'The Attorney-Client Privilege and the Corporate Client: Where Do We Go after Upjohn?' (1983) 81(3) *Michigan Law Review*, 665-692; at 665.

²⁷²See, A.M. Hill, 'A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community', *supra note 149*, at 167.

business and legal advice.²⁷³ Secondly, the privilege only applies to those who are deemed privileged persons. This includes the client, a prospective client, or ‘an agent of either who facilitates communication between them and agents of lawyers who facilitate representation.’²⁷⁴ If an officer discusses personal legal matters, the privilege may disappear.²⁷⁵ In addition, courts exclude from the privilege communication between clients and their attorneys that was made in furtherance of an ongoing or future criminal or fraudulent act.²⁷⁶ To invoke the crime/fraud exception, the party seeking discovery must establish a *prima facie* case of crime or fraud.²⁷⁷

Although US has extended attorney-client privilege to in-house counsel, discussion on whether and to what extent this privilege should be thus applied still continues because the role of in-house counsel would complicate the first two standards. Unlike a lawyer from an independent law firm, an in-house counsel may have only one client.²⁷⁸ The economic fate of in-house attorneys is tied directly to a single employer.²⁷⁹ Secondly, the in-house counsel is not only responsible for giving legal advice, but also for providing business advice. As mentioned, only legal advice would be protected. In essence, this presents a conflict of interest for the attorney. While attorneys owe their own fiduciary duties to the client, as members of the board they

²⁷³ See, L.C. Cohen, ‘In-House Counsel and the Attorney-Client Privilege: How Sarbanes-Oxley Misses the Point’, (2003-2004) 9 *Stanford Journal of Law, Business & Finance*, 297-322; at 304.

²⁷⁴ *Ibid*, at 305.

²⁷⁵ See, S.W. Williams, ‘Keeping Secrets In-House: Different Approaches to Client Confidentiality for General Counsel’, (1999) 1 *Journal of Legal Advocacy & Practice*, 78-95; at 83.

²⁷⁶ See for example, *Clark v. United States*, 289 U.S. 1, 15 (1933); *United States v. Zolin*, 491 U.S. 554, 562-563 (1989).

²⁷⁷ *United States v. Zolin*, *ibid*.

²⁷⁸ S.R. Weaver, ‘Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis’, (1997) 46 *Emory Law Journal*, 1023-1052; at 1026-1027.

²⁷⁹ *Ibid*, 1027.

also owe a fiduciary duty to the shareholders.²⁸⁰ Thirdly, while outside-counsel is usually presented with specific legal questions, in-house counsel has a grander picture of the issue at hand.²⁸¹ Hence they may confuse the best legal answer with the best business strategy. These differences²⁸² between independent lawyer and in-house counsel mean the latter cannot meet the standards of attorney-client privilege protection in certain circumstances.

Attorney-client privilege in antitrust cases

Attorney-client privilege applies in antitrust cases to the same extent as in other contexts.²⁸³ During compulsory investigation conducted by the Antitrust Division or the FTC communication between the concerned parties and the attorney should be protected from disclosure unless the communication falls outside the scope of the privilege. For example, the recipient of a CID may refuse to provide the communication between his/her attorney and log the privilege before the court. Meanwhile, a party seeking to withhold documents under this privilege must at a minimum, provide the essential elements necessary to sustain a claim of privilege.²⁸⁴ For example, to ensure that the essential elements are met, courts have required privilege claims to state the basis upon which it is claimed, subject matter, number of

²⁸⁰ See, L.C. Cohen, 'In-House Counsel and the Attorney-Client Privilege: How Sarbanes-Oxley Misses the Point', *supra note 273*, at 316.

²⁸¹ S.R. Weaver, 'Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis', *supra note 278*, at 1028.

²⁸² Professor Weaver also points out the conflicts that arise as a result of being an employee of the corporation and the possibilities for suit against the corporation for wrongful termination. This could be viewed as more relevant to the attorney's economic dependence on the single client and not as a separate factor, even though it may also present its own set of ethical dilemmas. See, *ibid*, at 1028.

²⁸³ See, J.M. Jacobson (editor in chief), *Antitrust Law Developments*, *supra note 15*, at 939.

²⁸⁴ *Alexander v. Fed. Bureau of Investigation*, 186 F.R.D. 102, 107 (D.D.C. 1998).

pages, author, date created, and the identity of all persons to whom the original or any copies of the document were shown or provided.²⁸⁵

3.2.4 Right against self-incrimination: the Fifth Amendment

The right against self-incrimination under US antitrust law enforcement

The right against self-incrimination is recognised as fundamental in the US.²⁸⁶ This right applies to antitrust investigation and litigation as it applies elsewhere in the US. In the context of antitrust law this right may be asserted when the concerned parties face the CID²⁸⁷ or Grand Jury subpoena.²⁸⁸ Since the procedure of asserting this privilege is similar under the CID investigation and Grand Jury subpoena investigation, to avoid repetition, we only choose the right against self-incrimination under antitrust Grand Jury subpoena investigation as an example for examination.

A witness subpoenaed to appear before a Grand Jury may assert the Fifth Amendment privilege and refuse to testify if he reasonably believes that the government in the form of the Antitrust Division could use that testimony against him in a prosecution or that the testimony could lead to other

²⁸⁵Ibid, at 106.

²⁸⁶See, *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). See also, D. Dolinko, 'Is There a Rationale for the Privilege against Self-Incrimination', (1986) 33 *UCLA Law Review*, 1063-1148. For the historical remarks and theoretical basis of the general right against self-incrimination, please refer to 'Brief historical and theoretical remarks' in '2.3.4 Right against self-incrimination' of this chapter.

²⁸⁷For example, when responding to a CID requesting oral testimony, the statute permits a refusal to answer on the basis of the privilege against self-incrimination. See, 15 U.S.C. §1312 (i) (7) (A).

²⁸⁸The Fifth Amendment provides a witness subpoenaed by the Grand Jury with a constitutional right not to testify if the testimony would tend to incriminate the witness. See, ABA Section of Antitrust Law, *Handbook on Antitrust Grand Jury Investigations*, *supra* note 218, at 145. The right against self-incrimination may also be asserted during antitrust civil litigation and prosecution. However, this judicial procedure lies beyond the scope of discussion in this section.

evidence that the government might so use.²⁸⁹ A witness may invoke the privilege whether or not s/he is a target of the investigation.²⁹⁰ The Antitrust Division may challenge assertion of the privilege by moving to compel answer, and the court will then decide whether any hazard of self-incrimination is posed.²⁹¹ To assert the right it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.²⁹² The witness may decline to answer any question that, if answered, 'would furnish a link in the chain of evidence needed to prosecute the claimant.'²⁹³ Where the possibility of self-incrimination is not apparent the court may require the witness to indicate where the danger lies.²⁹⁴

A witness must assert the privilege to claim its protection.²⁹⁵ If the witness answers a question without invoking the privilege, the privilege is waived for that question.²⁹⁶ Moreover, once a witness voluntarily reveals incriminating facts, s/he may not refuse to disclose the details related to those facts.²⁹⁷

When a witness has decided to assert the privilege against self-incrimination, his/her counsel shall inform the Antitrust Division of the client's intention. The Antitrust Division will commonly advise counsel

²⁸⁹ See, *Kastigar v. United States*, 406 U.S. 441, 445 (1972).

²⁹⁰ See, *United States v. Washington*, 431 U.S. 181, 189 (1977).

²⁹¹ See, *Hoffman v. United States*, 341 U.S. 479, 486 (1951)

²⁹² Ibid, at 486-487.

²⁹³ Ibid, at 486.

²⁹⁴ See, *McCoy v. Commissioner*, 696 F.2d 1234, 1236 (9th Cir. 1983).

²⁹⁵ See, *Garner v. United States*, 424 U.S. 648, 656 (1976); *Smith v. United States*, 337 U.S. 137, 150 (1949); *United States v. Monia*, 317 U.S. 424, 427 (1942).

²⁹⁶ See, *Rogers v. United States*, 340 U.S. 367, 371 (1951).

²⁹⁷ Ibid, at 373.

whether it will consider a grant of immunity.²⁹⁸ Immunity generally assures the recipient that if the Antitrust Division were to prosecute him or her for crimes about which testimony is given, then the Antitrust Division would have the substantial burden of affirmatively demonstrating that its evidence is not derived from the witness' testimony.²⁹⁹ Moreover, the Antitrust Division is required to seek the approval of the US Attorney General before prosecuting a witness who has previously received a grant of immunity.³⁰⁰ The decision to grant statutory immunity is made by the Antitrust Division, but only when the court enters an order directing the witness to testify. The decision then has force.³⁰¹

The scope of the right against self-incrimination

Unlike that under the CJEU which only offers a fairly limited protection against self-incrimination,³⁰² the right in US antitrust law covers both answers to questions of factual and non-factual nature. Even so, this right is not absolute.³⁰³ First of all, the right against self-incrimination can only

²⁹⁸See, ABA Section of Antitrust Law, *Criminal Antitrust Litigation Handbook*, *supra* note 252, at 160.

²⁹⁹See, *Kastigar v. United States*, at 441, 461-462.

³⁰⁰See, US Department of Justice, Attorney's Manual, (Oct, 1997), at §9-23.

³⁰¹ See, 18 U.S.C. § 6002 (2001). It is noteworthy that as long as the request for immunity is in proper form, the district judge has no discretion to deny it. See, *United States v. Leyva*, 513 F. 2d 774, 776 (5th Cir.1975).

³⁰²The CJEU only prevent the European Commission from 'compelling an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove'. The European Commission may compel the undertaking concerned to answer questions of a purely factual nature; even the answer to this factual question will incriminate the concerned party. See, 'The scope of the right against self-incrimination in investigation under EU competition law: divergence between the CJEU and the Strasbourg Court' in '2.3.4 Right against self-incrimination' of this chapter. However, the protection offered by the CJEU can reach undertakings; while the constitutional privilege in the US, as mentioned below, only applies to individuals.

³⁰³See, M.M. Baylson, 'The Fifth Amendment in Civil Antitrust Litigation: Overview of Substantive Law', (1981-1982) 50 *Antitrust Law Journal*, 837-846; at 837.

protect individuals, not corporations.³⁰⁴ If the Antitrust Division directs the subpoena to the corporation, then the corporation must find some means by which to comply because no Fifth Amendment defence is available to it.³⁰⁵ Secondly, the right does not prohibit all forms of compulsory investigation; it applies only to testimonial communication, namely direct or implicit assertions involving the obligation to tell the truth.³⁰⁶ Therefore this right does not apply to handwriting samples,³⁰⁷ voice exemplars³⁰⁸ or any other form of compulsion not involving testimony.

To sum up, only the individual witness rather than a corporation who faces testimony involving the obligation to tell the truth may invoke the right against self-incrimination.

3.2.5 Right against unreasonable search and seizure: the Fourth Amendment

A brief background and history

The fourth amendment to the United States Constitution provides that persons shall be secure from unreasonable search and seizure and that search warrants shall not issue but upon a showing of probable cause.³⁰⁹ It consists of

³⁰⁴See, ABA Section of Antitrust Law, *Criminal Antitrust Litigation Handbook*, *supra note 252*, at 146; see also, B.J. Rashid, 'New Trends in Antitrust Investigations', (1968) 37(2) *Antitrust Law Journal*, 188-197; at 190.

³⁰⁵See, *Braswell v United States*, 487 U.S. 99, 107 (1988); *Bellis v. United States*, 417 U.S. 85, 88 (1979); *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906).

³⁰⁶See, *Pennsylvania v. Muniz*, 496 U.S. 582, 597 (1990) (provided that the privilege applies to any compelled assertion of fact forcing a choice between 'truth, falsity or silence' that contains a testimonial component).

³⁰⁷See, *United States v. Mara*, 410 U.S. 19, 22 (1973).

³⁰⁸See, *United States v. Dionisio*, 410 U.S. 1 5-7(1973).

³⁰⁹U.S. Constitution, Amendment IV.

two distinct clauses: the right of privacy clause and the warrant clause.³¹⁰ The first clause guarantees the individual's right to be secure from unreasonable search and seizure. The Supreme Court has held that the reasonableness of a search under the privacy clause may be determined by whether a searching warrant is issued before search or/and seizure.³¹¹ A warrantless non-consensual search is prima facie unreasonable.³¹² The second clause requires that that warrants may only be issued upon a showing of probable cause³¹³

The origin of this constitutional right can be traced back to the common law tradition of England.³¹⁴ Although a full examination of the history and background lies outside the scope of this section,³¹⁵ a brief review of the background and history of the Fourth Amendment may at least establish the following points. Firstly, one of the foundations of the principle against unreasonable search and seizure is that '(N) o free man shall be taken or imprisoned or outlawed or exiled or in any wise destroyed, save by the lawful

³¹⁰See, Note, 'The Right of the People to be Secure: The Developing Role of the Search Warrant', (1967) 42 *New York University Law Review*, 1119-1138; at 1119-1120.

³¹¹*South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976); *United States v. Rabinowitz*, 339 U.S. 56, 65-66 (1950).

³¹² *United States v. Martinez-Fuerte*, 429 U.S. 338 (1977), at 351-352.

³¹³See, Note, 'The Right of the People to be Secure: The Developing Role of the Search Warrant', *supra* note 310, at 1119.

³¹⁴See, J.J. Stengel, 'Background of the Fourth Amendment to the Constitution of the United States- Part One', (1968-1969) 3 *University of Richmond Law Review*, 278-298; at 278.

³¹⁵For analysis of the background, history and principles of the Fourth Amendment, please refer to J.J. Stengel, *ibid*; see also, N.B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, (1937) Johns Hopkins Press; J.J. Stengel, 'Background of the Fourth Amendment to the Constitution of the United States- Part Two', (1969-1970) 4 *University of Richmond Law Review*, 60-76; A.R. Amar, 'Fourth Amendment First Principles', (1997) 107(4) *Harvard Law Review*, 757-819; W. Cuddihy & B.C. Hardy, 'A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution', (1980) 37(3) *William and Mary Quarterly*, 371-400; K.H. Fox, 'The Right to Say 'No': The Fourth Amendment and Administrative Inspections', (1979) 17 *American Business Law Journal*, 283-311.

judgment of his peers or the law of the land' declared in the Magna Carta in 1215 in England.³¹⁶ Secondly, the adoption of the Fourth Amendment was a reaction to a long history of executive abuse in England and the Colonies in the area of search and seizure.³¹⁷ Thirdly, similar to the right against self-incrimination, the Fourth Amendment originally is used in criminal investigation and arrest (but not in administrative inspection).³¹⁸ However, in 1967 the Supreme Court held in *Camara* and *See* that the Fourth Amendment should also be applied equally in administrative inspection.³¹⁹ In relation to the administrative inspection procedure, the scope of Fourth Amendment is in essence determined by the problem of balancing competing societal interest in safeguarding the public health and safety against the privacy and security of the individual.³²⁰ Through the above cases the Supreme Court established that the individual's privacy has priority over to the public's interest in investigating administrative laws' violation and enunciated the guiding principle for administrative search and seizure: except in certain carefully defined classes of case a search of private property without proper consent is 'unreasonable' unless it has been authorised by a valid search warrant.³²¹

The Fourth Amendment and US antitrust law enforcement

The Fourth Amendment in the context of antitrust enforcement mainly covers investigation involving search and seizure and so for example a search

³¹⁶ See, N.B. Lasson, at 20, *ibid*.

³¹⁷ See, J.J. Stengel, 'Background of the Fourth Amendment to the Constitution of the United States- Part One', *supra note 314*, at 298.

³¹⁸ See, K.H. Fox, 'The Right to Say 'No': The Fourth Amendment and Administrative Inspections', *supra note 315*, at 284.

³¹⁹ See, *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967).

³²⁰ See, K.H. Fox, 'The Right to Say 'No': The Fourth Amendment and Administrative Inspections', *supra note 315*, at 287.

³²¹ *See v. City of Seattle*, 387 U.S. 528-529.

warrant. The Antitrust Division uses a search warrant as the first means by which to secure documents immediately, along with the issuance of a broader Grand Jury document subpoena.³²² In accordance with the requirement of the Fourth Amendment, the Antitrust Division in practice usually uses a search warrant after it has already conducted an extensive covert investigation and has established reasonable cause to believe a crime has been committed.³²³ Indeed, the Antitrust Division has viewed search warrants as the most effective means of gathering incriminating evidence because the risk of document destruction and concealment is thereby reduced.³²⁴

In order to obtain a search warrant the Antitrust Division must state information believed to establish necessary probable cause. The court must find probable cause to believe that a crime has been committed and the evidence of that crime is at the place specified in the warrant. If the court decides to issue a search warrant, the Fourth Amendment provides that the warrant must particularly specify the place to be searched, and the persons or things to be seized.³²⁵ However, due to the complexity of antitrust violation and investigation, it is often difficult to describe with particularity the business records and documents to be seized.³²⁶ Realising this, the court will consider the nature of the activity being investigated with a practical margin of flexibility, depending on the type of property to be seized.³²⁷

³²²See, ABA Section of Antitrust Law, *Handbook on Antitrust Grand Jury Investigations*, *supra* note 218, at 30.

³²³See for example, R.D. Paul & J.M. Gidley, DOJ Unveils New Get-Tough Policy: Price Fixing Begins to Hit Bottom, *Legal Times*, (4, May 1998).

³²⁴See, ABA Section of Antitrust Law, *Handbook on Antitrust Grand Jury Investigations*, *supra* note 218, at 31.

³²⁵See, footnote 216.

³²⁶See, ABA Section of Antitrust Law, *Handbook on Antitrust Grand Jury Investigations*, *supra* note 218, at 33.

³²⁷See, *James v. United States*, 416 F.2d 467, 473(5th Cir. 1969).

Agents of the Federal Bureau of Investigation (hereafter the FBI) typically execute search warrants in antitrust investigation.³²⁸ It is noteworthy that the FBI may use force to conduct the search if necessary, and the government can prosecute attempts to prevent or obstruct that search.³²⁹ Yet neither a company nor an individual subject to a search warrant is required to give any statement to the investigator.³³⁰

A company may challenge the use of evidence obtained by a search warrant. The Fourth Amendment provides the following grounds on which to challenge the validity of a search warrant: 1. that the Antitrust Division did not establish probable cause for the issuance of the warrant; 2. that the warrant failed to describe the items to be seized or the location to be searched with sufficient particularity; or, 3. that the affiant deliberately provided false information or exhibited a reckless disregard for the truth.³³¹ The person challenging the search and/or seizure must have standing. The test is ‘whether governmental officials violated any legitimate expectation of privacy held by the individual’.³³²

4 Procedural rights of concerned parties during the public enforcement under Chinese Antimonopoly Law

4.1 Introductory remarks

³²⁸ See for example, *United States v. Andreas*, 23 F. Supp. 2d 855, 857 (N.D.Ill.1998).

³²⁹ 18 U.S.C. §§1501, 1509, 1512, 2231 (1991).

³³⁰ See, ABA Section of Antitrust Law, *Handbook on Antitrust Grand Jury Investigations*, *supra* note 218, at 36.

³³¹ See generally, J.W. Moore, *Moore's Federal Practice*, third edition, (1997) Matthew Bender.

³³² See, *Rowlings v. Kentucky*, 448 U.S. 98, 106 (1980); *United States v. Salvucci*, 448 U.S. 83, 95 (1980); *Raskas v. Illinois* 439 U.S. 128, 140 (1978).

The purpose of this section is to examine the problems of protection of procedural rights of concerned parties under the public enforcement of the AML 2007, with the aim of progressing to recommendations designed to improve the protection of rights of concerned parties available from the experience of the EU and US. There is little literature on the protection of rights of concerned parties specifically under the AML 2007's public enforcement.³³³ However, since the public enforcement of the AML 2007 follows administrative procedure,³³⁴ discussion of the protection of rights of private parties under administrative law enforcement can provide a reference for the examination of the rights of concerned parties under the AML 2007.³³⁵ Sufficient literature has discussed the types of procedural right under administrative procedure that the parties concerned should have.³³⁶

³³³ In fact, the author only find one related article analysed the rights of private parties under the AML 2007's public enforcement. See, Y. You, 'On the Protection of the Benefits of the Parties in the Enforcement of Antimonopoly Law [论反垄断执法相对人的利益保护, lunfanlongduanzhifaxiangduiren de liyibaohu]', (2012) 2 *Journal of Xiamen University (Arts & Social Sciences)*, 102-109.

³³⁴ An administrative procedure is initiated by the administrative authorities, aiming to collect evidence in order to realise the administrative purpose (see, *supra*footnote 10), and to this end the public enforcement of the AML 2007 is a kind of administrative procedure. Since the AML 2007 is enforced by the administrative enforcers, the procedure follows the administrative enforcers' procedural regulations. For example, NDRC issued the 'Provisions on the Administrative Procedures for Law Enforcement against Price Fixing', while the SAIC issued the 'Provisions on the Procedures for the Administrative Departments for Industry and Commerce to Investigate and Handle Cases of Monopolization Agreements and Abuse of Dominant Market Position'. Both provisions have stipulated that procedural provisions under the AML 2007's enforcement should be referred to China's administrative laws. See, Article 24 of the Provisions on the Administrative Procedures for Law Enforcement against Price Fixing and Article 26 of the Provisions on the Procedures for the Administrative Departments for Industry and Commerce to Investigate and Handle Cases of Monopolization Agreements and Abuse of Dominant Market Position, respectively.

³³⁵ For general examination of the rights of private parties under China's administrative laws, please refer to Y.S. Weng (edited by), *Administrative Law [行政法, xingzhengfa]*, (2009) China Legal Publishing House; J.J. Liu, *The Due Process of Administrative Investigation [行政调查正当程序研究, xingzhengdiaochezhengdangchengxuyanjiu]*, (2010) Shandong University Press; M.J. Hu, 'The Procedural Right of the Private Parties in Administrative Process [论行政

In order to answer the two questions raised in the introduction of this chapter, this section is divided into two parts: firstly, an examination of the current position on procedural rights of concerned parties under the public enforcement of the AML 2007 is provided; secondly, improving the protection of those rights under the AML 2007 with the experience from EU competition law and US antitrust law.

4.2 The protection of procedural rights of concerned parties under AML 2007

相对人的程序性权利, lunxingzhengxiangduiren de chengxuxingquanlij', (2005) 1 *Public Law Research*, 201-233; X.X. Wang, 'An Analysis upon the Protection of Right of Private Parties in Administrative Process [行政过程中相对人程序性权利研究, xingzhengguochengzhongxiangduirenychengxuxingquanliyanjiu]', (2001) 4 *China Legal Science*, 75-90; J.M. Xiao & W.H. Li, 'On the Administrative Procedural Rights [行政程序性权利研究, xingzhengchengxuxingquanliyanjiu]', (2007) 6 *Journal of Political Science and Law*, 5-12.

³³⁶For example, X.X. Wang argued that the rights of private parties under Chinese administrative procedure should include: 1. the right to an impartial decision-maker; 2. the right to be informed; 3. the right to be heard; 4. the right to equal treatment; 5. the right to reason-giving; 6. the right to disobedience; 7. the right of appeal. See, X.X. Wang, *ibid*, at 80-85. J.M. Xiao & W.H. Li divided the rights of private parties into four categories: 1. the right to initiate an administrative procedure; 2. the right to be informed; 3. the right to participate in the administrative procedure; 4. the right to disobedience. See, J.M. Xiao & W.H. Li, *ibid*, at 8-10. M.J. Hu summarised the rights as, 1. the right to participate in the administrative procedure; 2. the right to require the government to disclose the information; 3. the right of access to the government's file; 4. the right to reason-giving; 5. the right to apply for withdrawal. See, M.J. Hu, *ibid*, at 211-218; Y.T. Liu & H.W. Liu listed 12 kinds of right of private parties that can be listed under the heads mentioned above. See, Y.T. Liu & H.W. Liu, 'Research on the Right of Private Parties under Administrative Law [行政相对人权利研究, xingzhengxiangduirenquanliyanjiu]', (2005) 49(4) *Journal of Heilongjiang Administrative Cadre Institute of Politics and Law*, 29-32; at 31-32. To sum up, according to these scholars, private rights under China's administrative procedure should at least include (but not be limited to): 1. the right to an impartial decision-maker; 2. the right to be heard; 3. the right to be informed; 4. the right of access to the file; 5. the right to disobedience; 6. the right to appeal; 7. the right to apply for withdrawal; and, 8. the right to equal treatment.

4.2.1 Statutory rights of concerned parties in legislation

The AML 2007 does not provide any specific right of concerned parties under its public enforcement procedure.³³⁷ In the procedural provisions issued by the NDRC and the SAIC the situation is not further clarified. However, both procedural provisions suggest that the procedure should follow the Administrative Punishment Law of the People's Republic of China (hereafter, the Administrative Punishment Law).³³⁸The SAIC's procedural provision additionally provides that procedure should also follow the Provisions on the Procedures for Imposition of Administrative Punishments by the Administrative Authorities for Industry and Commerce (hereafter the SAIC Provision on Administrative Punishment); and the Provisions on the Procedures for Hearing before Imposition of Administrative Punishments by the Administrative Authorities for Industry and Commerce (hereafter the SAIC Provisions of Hearing).³³⁹

³³⁷The AML 2007 only generally provides that the concerned parties may express their opinion and that the enforcer should verify the fact, reason and evidence raised by the concerned parties; See, Article 43 of the AML 2007.

³³⁸See Article 24 of the Provisions on the Administrative Procedures for Law Enforcement against Price Fixing issued by the NDRC; see also, Article 26 of the Provisions on the Procedures for the Administrative Departments for Industry and Commerce to Investigate and Handle Cases of Monopolization Agreements and Abuse of Dominant Market Position issued by the SAIC. Administrative Punishment Law of the People's Republic of China was adopted at the fourth session of China's Eighth National People's Congress on March 17, 1996.

³³⁹Article 26 of the Provisions on the Procedures for the Administrative Departments for Industry and Commerce to Investigate and Handle Cases of Monopolization Agreements and Abuse of Dominant Market Position issued by the SAIC stipulates that the procedure under AML 2007's public enforcement should subject to the Administrative Punishment Law; Provisions on the Procedures for Imposition of Administrative Punishments by the Administrative Authorities for Industry and Commerce (adopted on October, 1st, 2007 by the SAIC), and, Provisions on the Procedures for Hearing before Imposition of Administrative Punishments by the Administrative Authorities for Industry and Commerce (adopted on October, 1st, 2007 by the SAIC).

The Administrative Punishment Law provides the following on rights of private parties. Firstly, the concerned parties have the right to be informed before the issuance of a decision containing sanction upon the party concerned.³⁴⁰ Secondly, Article 32 of the Administrative Punishment Law provides that concerned parties have the right to express their defend themselves before the administrative enforcer. Thirdly, the Law provides a relatively detailed procedure of hearing.³⁴¹ However, the hearing can only be held before the issuance of the decisions involving order of suspension of production or business, rescission of business permit or licence and imposition of a comparatively large amount of fine.³⁴² Fourthly, after the investigation, if the administrative enforcer decides to impose a sanction upon the investigated parties, the concerned parties must be informed in writing. The decision must contain the following information: 1. the name, title and address of the concerned parties; 2. the facts and evidence for the violation of law, regulations or rules; 3. type of and reasons for the proposed sanction; 4. the enforcement manner of the decision and time limits; 5. the procedure and time limits of applying administrative reconsideration or/and judicial review; 6. the name of the administrative agency that makes the

³⁴⁰See, Article 31 of the Administrative Punishment Law.

³⁴¹Article 42 of the Administrative Punishment Law provides that public hearings are to be organised according to the following procedure: 1. if a public hearing is requested by the parties concerned, the request shall be submitted within three days after the parties concerned are notified by the administrative organ in charge; 2. the administrative enforcer(s) shall notify the parties concerned of the time and venue of the hearing seven days before it is held; 3. with the exception of cases involving state secrets, business secrets or individual privacy, hearings shall be held in public; 4. public hearings are to be chaired by a person appointed by the administrative enforcer(s) in charge and who is not one of the investigators of the case in question, if the parties concerned deem that the person chairing the hearing has a straight connection to the case; they have the right to submit a request for withdrawal; 5. the parties concerned may personally attend the hearing or may ask one to two persons to represent them; 6. at the hearings investigators present the facts and evidence of violation of law by the parties concerned, and suggest administrative punishments; the parties concerned defend themselves and confront the investigators; 7. a transcript on the public hearing shall be made, checked by the parties concerned, and signed by them or affixed with their seals.

³⁴²Ibid.

decision and the date on which the decision is made.³⁴³ Finally, the Administrative Punishment Law as well as the AML 2007 stipulate that the investigated parties are obliged to cooperate with the administrative enforcer and may not reject or hamper the investigation.³⁴⁴

The main rights of the concerned parties under administrative procedure (and public enforcement under the AML 2007) regulated under legislation are the right to be informed and the right to be heard. The right to be informed means the parties concerned have the right to be informed about the proposed investigation and possible sanction which may have adverse effects on the parties concerned.³⁴⁵ The right to be heard means that before the administrative enforcer makes any decision on the parties concerned which may affect their interests; the concerned parties have the right to make their view known to the administrative enforcer and defend themselves.³⁴⁶ The two rights are closely linked: the right to be informed is the guarantee and a part of the right to be heard.

It is noteworthy that there is neither legal professional privilege nor right against self-incrimination in Chinese administrative law and the AML 2007.

4.2.2 Protection of rights of concerned parties in practice

³⁴³See, Article 39, *ibid.*

³⁴⁴See for example, Article 42 of the AML 2007, Article 37 of the Administrative Punishment Law.

³⁴⁵See, X.X. Wang, *ibid.*, at 81.

³⁴⁶*Ibid.*

Several antimonopoly cases tried by the NDRC and the SAIC give some clues about protection of the rights of concerned parties under the AML 2007's public enforcement.³⁴⁷

In the first case handled by the SAIC, *Lianyungang Concrete Association*,³⁴⁸ the ICJS investigated the price fixing agreement between the concrete companies in Lianyungang city in early January, 2011. The investigator had collected key evidence in pre-investigation because the concrete association 'did not recognise that their agreement might violate the law'.³⁴⁹ A hearing was then held for the Concrete Association. It is noteworthy that the hearing was held by ICJS itself. After the hearing, the ICJS imposed a fine of RMB 200,000 on the Concrete Association. In the written decision there is no clear and detailed description of the facts on which the decision is based, the reasoning behind the decision, nor how the fine is calculated.³⁵⁰

This case at least revealed the following concerning the protection of rights of the concerned parties under the AML 2007's public enforcement.³⁵¹ Firstly, the right to be informed was disregarded. The concerned parties in this case did not know the purpose nor subject matter of the investigation until key evidence had been collected by the ICJS. The concerned parties did not even realise that their agreement might violate the AML 2007 and was under

³⁴⁷For all the following case information, please refer to A.Fels, X.Y. Wang & J. Su (edited by), *China Competition Bulletin 2010-2012*, China Competition Research Centre, available at <http://www.anzsog.edu.au/research/publications/the-china-competition-bulletin>, last visited on 19/09/2012, 21:40.

³⁴⁸See, F. Yao, The first AML case enforced by the SAIC has been settled: the market segmentation agreement of LianYungang's association, *supra note 7*.

³⁴⁹Ibid.

³⁵⁰The decision merely stated that 'the members of the concrete association reached the agreement of price-fixing and market segmentation, which violated Article 16 of the AML 2007. In accordance with Article 46(3) of the AML 2007 the ICJS decided to order the concrete association to cease the illegal conduct and imposed a fine of 200,000 RMB.' See, *ibid*.

³⁵¹Since there is no official publication of the case decision by the ICJS or the SAIC, the information of this case is largely based on news reports.

investigation. Secondly, the right to be heard- was ignored. Before the hearing the ICJS did not provide the concerned parties with a clear and exhaustive statement of its allegations of anticompetitive conduct. Thirdly, although a hearing was held for the concrete association, it was organised and chaired by the ICJS itself which conducted the investigation. It is thus hard to guarantee the impartiality and effectiveness of the hearing. The ICJS rejected the arguments presented by the concrete association at the hearing.

In the case of *Fuyang Paper Industry Association*³⁵² which was dealt with at the same time as *Lianyungang Concrete Association*, the Zhejiang Price Bureau Branch of the NDRC fined the Paper Manufacturer Association of Fuyang City, 500,000 RMB for price fixing and output restriction. The author cannot find any published information on how the concerned parties were investigated in relation to this case. However, the announcement mentioned that the Paper Manufacturer Industry Association had organised five meetings at which more than 20 members discussed and agreed price increases, output restrictions and price discounts during 2010.³⁵³ The decision also provided the exact date of each meeting and the price agreed after each meeting.³⁵⁴ The concerned parties' right to be informed seemed better observed than in the *Lianyungang Concrete Association* case. However, due to lack of disclosure of more detail, the author does not know further details of the investigation nor whether other rights of the concerned parties under the investigation were respected.

³⁵² See, 'Paper Manufacturer Association of Fuyang City Fined for Price Monopoly Conduct' (NDRC, 19 January 2011) available at the official website of the NDRC (in Chinese): http://jjs.ndrc.gov.cn/gzdt/t20110119_391551.htm, last visited on 20/09/2012, 16:21.

³⁵³ *ibid.*

³⁵⁴ *ibid.*

More recently, in the case of *Henan Second-hand Car Cartel*,³⁵⁵ the Industry and Commerce Bureau of Henan Province (hereafter, ICHN) investigated and penalised a cartel in the second-hand car market in Anyang city, Henan Province. After receiving frequent customer complaints the ICHN began the investigation with the authorisation from the SAIC in January 2011. It found that three second-hand car dealers had set up the cartel in October 2007 and gradually all the eleven second-hand car dealers in Anyang became involved in the cartel. The dealers had reached an agreement collectively to manage their businesses, divide the market, fix service fees and punish participants who deviated from the cartel agreement. The ICHN held that the dealers had infringed Article 13 of the AML 2007 and imposed penalties pursuant to Article 46(1) of the Law of 1.73 million RMB.³⁵⁶ It is noteworthy that the decision gave a simple explanation of how the final penalty was calculated: the illegal gains of the cartel from 2007 were RMB 1,468,202.08; the fine for anticompetitive conduct was RMB 264,920.37. Thus the fine was the sum of the two: 1.73 million RMB. In addition, according to the report in the *China Consumer News*, the investigators of ICHN collected relevant evidence from law firms.³⁵⁷ However, it is unclear whether this 'relevant evidence' included the communications between the lawyer and the concerned parties. If yes, a question would be raised: whether the communications between a lawyer and his/her client were protected from disclosure.

³⁵⁵ See, 'Second-hand Car Cartel Investigated and Penalised in Henan Province', published by the official website of the Chinese Government, available at

http://www.gov.cn/gzdt/2012-08/03/content_2197559.htm, last visited on 20/09/2012, 20:18; see also, *Henan Daily*,

3 August 2012; *China Consumer News*, 13 August 2012.

³⁵⁶ See, A.Fels, X.Y. Wang & J. Su (edited by), *China Competition Bulletin*, *supra note* 348, (Edition 22, July/August 2012).

³⁵⁷ See, C.X. Li & J.A. Di, Henan Investigated and Punished the First Monopoly Case in the Second-hand Car Market, *China Consumer News*, 13 August 2012, available at (in Chinese): <http://www.ccn.com.cn/news/yaowen/2012/0813/431772.html>, last visited on 20/09/2012, 21:04.

The cases under AML 2007 raise the following concerns. First of all, the parties concerned were not properly informed of the procedure. Thus protection of the right to be heard is inadequate. Secondly, the hearing is not organised and chaired by a specified and independent officer. Thirdly, whether communications between a lawyer and client were protected from disclosure is unknown. The following section will discuss whether and how experience from EU competition law and US antitrust law can improve the rights of concerned parties under the AML 2007.

4.3 Improving the protection of rights of concerned parties under AML 2007

From the experience of EU competition law and US antitrust law, the following rights of concerned parties should be considered: 1. the right to be heard; 2. the right of access to the file; 3. legal professional privilege; 4. the right against self-incrimination; and, 5. the right against unreasonable search and seizure. Under China's AML 2007 and administrative law the concerned parties only have the rights to be informed and the right to be heard. Even these two rights are not fully protected in practice.

4.3.1 Improving the right to be informed and the right to be heard: statement of objection and consent decree

Comparison of the right to be heard under EU competition law and US antitrust law

Both EU competition law and US antitrust laws respect the right of parties to be heard during and after investigation. Firstly, when requesting information, no matter in what form, both EU and US enforcers are required

to provide the legal basis and the purpose of the request as well as specify what information is required in the written request. In addition, before an inspection, both the officials of EU and US are required to produce a written authorisation specifying the subject matter and purpose of the inspection.³⁵⁸ Finally, after the investigation the Commission will send a SO to inform the parties concerned of the Commission's objections after the investigation;³⁵⁹ while the Antitrust Division will offer a consent decree after its investigation under US antitrust law. Or the FTC will send a complaint to the concerned parties which states the concern under its adjudicative procedure.³⁶⁰ No matter what forms they take, the Commission's SO, the Antitrust Division's consent decree and the FTC's complaint have the following similarities: 1. the time of issuing the SO, the consent decree and the FTC complaint are similar, i.e., after the investigation; 2. the SO, the consent decree and the FTC complaint all have a basic function: of informing the concerned parties of the allegation against them proposed by the administrative enforcers; 3. the SO, the consent decree and the FTC's complaint all require administrative enforcers to provide clear and definite facts and legal arguments on which the objection based, explanation of the relationship between the evidence and allegation, and assessment of the proposed remedy to the parties concerned.

On the other hand, it should be noted that the purpose of the SO and the FTC's complaint may differ from the Antitrust Division's consent decree. The purpose of a SO/FTC's complaint is to inform the parties concerned of the objections raised against them so that the right to be heard can be protected,

³⁵⁸ The on-the-spot inspection in US antitrust law is conducted under a search warrant which states clearly the subject matter, scope and purpose of the inspection. Please refer to '3.2.4 Right against unreasonable search and seizure: the Fourth Amendment' of this chapter.

³⁵⁹ For details, please refer to '2.3.1 Right to a fair hearing under EU competition law' of this chapter.

³⁶⁰ See, FTC Rules of Practice, subpart B.

while the consent decree has an additional purpose which to provide a settlement proposed by the Antitrust Division to avoid expense and inconvenience of trial both for the Antitrust Division and the concerned parties.³⁶¹ This difference lies in the different institutional design and enforcement mechanism between EU competition law and US antitrust law (especially the Sherman Act). The former emphasises the Commission's tripartite role in the enforcement while the GC and the CJEU are only responsible for judicial review.³⁶² The latter only confers on the Antitrust Division the authority of investigation and prosecution; the Federal District Courts have the decision-making authority. However, the basic rationale and mechanism of protecting the concerned parties' right to be heard after the investigation is similar: the concerned parties shall reply to the SO or the consent decree in a way which enables them to make their view heard.

What can be learned by China: improving the right to be heard during the AML 2007's enforcement procedure

Since the right to be heard has been recognised by the AML 2007 as well as Chinese administrative law,³⁶³ there is no need to discuss whether introducing the right to be heard will be good or bad for China's AML 2007's enforcement. Rather, this subsection suggests how protection of the right to be heard could be improved upon the deficiencies found above³⁶⁴ and reference to the experience of the EU and US.

Firstly, before conducting an investigation Chinese administrative enforcers might issue a written notice to inform the parties concerned of the

³⁶¹ See, J.M. Jacobson (editor in chief), *Antitrust Law Developments*, *supra* note 15, at 703.

³⁶² See, P. Marsden, 'Checks and balances: EU Competition Law and the Rule of Law', (2009) 5 *Competition Law International*, 24-28, at 25.

³⁶³ See, '4.2 The protection of procedural rights of the concerned parties under the AML 2007' of this chapter.

³⁶⁴ See particularly, '4.2.2 Protection of rights of concerned parties in practice'.

proposed investigation to guarantee the parties' right to be informed, which could be called a 'pre-investigation notice'. The notice should at least include the subject matter of the investigation and the related laws that the concerned parties might have violated. When investigators conduct a dawn raid without warning, they should at least inform the concerned parties on the spot of the subject matter and the law they might have violated. If so, the problem in *Lianyungang Concrete Association* case could be avoided. This is especially important when enforcement of the AML 2007 is at such an early stage and it is unfamiliar to domestic undertakings in China.

Secondly, after the investigation the administrative enforcer of the AML 2007 should be obliged to send a written statement to the parties concerned when the investigation might lead to a decision having any adverse effect on the parties concerned and this should be stated clearly and exhaustively.³⁶⁵ It should at least include: 1. all the facts, law and legal arguments supporting the administrative enforcers' allegations; 2. an explanation of the relationship between the evidence collected and the anticompetitive effects alleged; and, 3. a brief assessment of the proposed pecuniary sanction; and, 4. the time limit for reply. In addition, this statement should be consistent with the grounds relied on by the administrative enforcers of the AML 2007 in the final decisions. The parties concerned would be required to reply to the objection in order to safeguard their right to be heard, using all facts and evidence known to them which are relevant to their defence against the objections raised by the administrative enforcers. Besides, in the later oral hearing procedure, the parties concerned would be able to prepare their

³⁶⁵ In fact Article 31 of Administrative Punishment Law requires administrative enforcers to inform the concerned parties of the facts, grounds and reasons before the issuance of the punishment decision. However, it did not provide any formal and detailed mechanisms on how to safeguard this right in practice. Under the enforcement of the AML 2007, at least the published cases showed that there is no legal requirement for the administrative enforcers to inform the parties concerned after the investigation and before the final decision.

defence more effectively because they have been informed about the facts and legal arguments against them. Thus through this mechanism the concerned parties' right to be heard can be improved.

It should also be noted that to add a pre-investigation notice and a statement of objection during the AML 2007's enforcement inevitably means an increase in administrative costs. More professional staff would also be required.

4.3.2 Towards a more effective and impartial public hearing

Comparison of public hearings under EU competition law and US antitrust law

Public hearings play an important part in both EU competition and US antitrust enforcement procedure.³⁶⁶ The two systems have many points in common. Firstly, the hearing is organised and chaired by specific officers or departments. Secondly, both the Hearing Officer and the ALJ have several procedural instruments to safeguard their independence.³⁶⁷ Thirdly, the purpose of the hearings under both regimes is to balance the position of the concerned parties and the administrative enforcers. Therefore the Hearing Officer in EU law requires both concerned parties and the investigator to submit a prior written notification containing the essential contents of their

³⁶⁶ To be precise, "hearings" under US antitrust law mentioned in this section means the hearing organised and chaired by the Administrative Law Judge under the FTC's adjudicative enforcement.

³⁶⁷ For example, the Hearing Officer is attached, for administrative purposes, to the member of the Commission with special responsibility for competition and thus does not directly belong to the Directorate-General responsible for the investigation and prosecution of competition law infringements. On the other hand, ALJs are selected and financially supported by the OPM rather than the FTC itself (5 U.S.C. § 5362 (1976)).

intended statements.³⁶⁸ The concerned parties are also given the opportunity to gain access to the Commission's file.³⁶⁹ A hearing under the FTC's antitrust enforcement goes further. It protects the concerned parties' right to 'due notice, cross-examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing.'³⁷⁰ These similarities may be recognised as essential features for an effective and impartial hearing at least in EU competition and US antitrust law.

On the other hand, the hearing procedures in the two jurisdictions differ in certain respects. For example, the ALJ is externally independent of the investigators of the FTC, while the Hearing Officer provides merely an internal balance which belongs to the Commission. In addition the concerned parties may question the investigators' evidence and conduct cross-examination in the hearing held by the ALJ, while under the hearing held under EU competition law there is no cross-examination.

What can be learned by China: A more effective and impartial public hearing under the AML 2007's enforcement procedure

Hearings under China's AML 2007 have the same basic function as those under EU and US systems: to give the concerned parties opportunities to defend themselves before an independent official or agency other than the administrative investigator(s).³⁷¹ To this end, practice and experience in the latter systems might suggest how the hearing procedure under the AML 2007 could be improved in its effectiveness and impartiality.

³⁶⁸ See, Article 11 of the Decision 2011/695 on the function and terms of reference of the Hearing Officer in certain competition proceedings [2011] OJ L 275/29.

³⁶⁹ For details, please refer to '2.3.2 Right of access to the Commission's files' of this chapter.

³⁷⁰ See, § 3.41(c) of the FTC Rules of Practice.

³⁷¹ See, H.K. Yang, 'A Research on Several Questions of Administrative Hearing System [关于行政听证制度若干问题的研讨, guanyuxingzhengtingzhengzhiduruoganwentideyantao]', (1998) 1 *Jiangsu Social Science*, 74-81, at 77.

It may be concluded from Article 42 of the Administrative Punishment Law that the public hearing procedure under the AML 2007 has the following problems. Firstly, the (applicable) scope of the hearing procedure is unclear. Article 42 of the Administrative Punishment Law provides that the administrative enforcer should inform the concerned parties of their right to request a public hearing only when the proposed decision involves suspending production and business operations, revoking certificates or business licences, or imposing relatively large fines or other administrative punishments. There is no further explanation of the general words ‘relatively large fine’. Such vagueness leaves the administrative enforcers of the AML 2007 excessive discretion in whether to inform the parties concerned of this right and thus may harm the right to be heard and decrease legal certainty.³⁷² Secondly, the hearing is chaired by a person appointed by the administrative enforcer. Although the concerned parties may submit a request for withdrawal if they think the person chairing the hearing has a direct connection to the case, it is the administrative enforcer(s) who decides who is to chair the hearing. There is no designated official or agency responsible for conducting the hearing. Thirdly, there is no (procedural) guarantee for an independent hearing. Article 42(4) of the Administrative Punishment Law merely states that the organiser of the hearing should be different from the investigator(s) in the case. Accordingly, given that there is no designated hearing staff(s) or department under the AML 2007, a hearing would be chaired by just another official in the same administrative agency which conducted the investigation. Fourthly, although the concerned parties may defend themselves during the

³⁷² For example, in *Lianyungang Concrete Association* the concerned parties did not submit the request for public hearing. However, the ICJS still held a public hearing for the concrete association. There is no explanation of why the ICJS held this hearing.

hearing, they have no opportunity to question the evidence held by the administrative enforcer, nor can they cross examination the investigators.³⁷³

Given the experience of the EU and US systems, China should be able to improve its hearing procedure under the AML 2007 in the following ways. Firstly, the applicable scope of a hearing procedure should be determined. Setting the limit of fines as a condition of whether to grant the parties concerned the opportunity of a hearing seems unreasonable and unfair. On the one hand, it is impossible to determine what exactly a 'large fine' means. On the other, the right to a hearing of parties who risk a relatively small fine would be jeopardised, for they may not be able to request a public hearing. All concerned parties under the AML 2007, regardless of the amount of proposed fine, should be given the right to request a public hearing due to its importance to the parties' right to be heard under the AML 2007.³⁷⁴

Secondly, administrative enforcers of the AML 2007 should establish a specific department to organise and chair the hearing. Take the NDRC for example. All the hearings under the NDRC's Antimonopoly law enforcement shall be organised and chaired by this hearing department. Under current

³⁷³ It is not the task of this thesis to evaluate China's administrative hearing system. For a more detailed examination on China's hearing system, please refer to Z.C. Peng, L. Xue & K. Kan, *Public Hearing Systems in China* [听证制度, *tingzhengzhidu*], (2004) Tsinghua University Press; J.S. Zhang, *Research on Administrative Hearing System* [行政听证制度研究, *xingzhengtingzhengzhiduyanjiu*], (2010) Zhejiang University Press; H.K. Yang, 'A Research on Several Questions of Administrative Hearing System [关于行政听证制度若干问题的研讨, *guanyuxingzhengtingzhengzhiduruoganwentideyantao*]', *supra note 371*; Q.W. Gao, 'The Status Quo and Perfection of China's Administrative Hearing System [我国行政听证制度的现状与完善, *woguo xingzhengtingzhengzhidu de xianzhuangyuwanshan*]', (2002) 2 *Theory Research*, 59-61.

³⁷⁴ For the importance of the public hearing to the AML 2007's administrative enforcement procedure, please refer to S.W. Hu, 'The Deployment of Hearing System in the Enforcement of Antimonopoly Law [反垄断法中听证制度之引入, *fanlongduanfazhongtingzhengzhiduzhiyinru*]', (2009) 28(4) *Journal of Anqing Teachers College (Social Science Edition)*, 21-25.

practice the organiser and chairman of a hearing is appointed by the administrative enforcer dealing with the case. The establishment of a specific hearing department may limit the administrative enforcer's discretion in appointing the organiser and chairman of the hearing and thus improve the objectivity, independence and predictability of the hearing.

Thirdly, this specialised department should conduct the hearing independently at least of anyone performing investigative or/and prosecutorial functions. This is an essential requirement for an impartial and effective hearing. Here are two options. Firstly, as EU experience shows, the administrative enforcer of the AML 2007 may achieve internal independence within the administrative enforcer by certain procedural guarantees. Take the NDRC for example. China's State Council or/and the NDRC might rule in law or regulation that it is the responsibility of the hearing department to guarantee the fairness of the hearing. Secondly, the hearing department might be authorised to organise and chair hearings independently of anyone performing investigative functions in the NDRC in antimonopoly cases. Thirdly, the hearing department might be made directly responsible to the Director General of the NDRC and required to prepare an interim report after each hearing exclusively for the Director General³⁷⁵ of the case. Fourthly, the hearing department should also be made responsible for issuing and publishing an independent final report to evaluate the fairness and effectiveness of the hearing. Secondly, administrative enforcers of the AML 2007 might establish an external hearing department as under the ALJs in US antitrust law. This is unrealistic, if not impossible, under the current AML 2007's administrative enforcement. China currently does not have a role the

³⁷⁵ In the case of the NDRC, the Price Division of the NDRC is responsible for enforcing the AML 2007.

function of which can be compared with that of the ALJs in the US;³⁷⁶ in addition, it is unrealistic to expect the allocation of the budget of the hearing department under the administrative enforcers of the AML 2007 to be independent of that agency. To this end, it seems that the experience of the hearing procedure under EU competition law is more feasible.

Fourthly, the concerned parties in the hearing should have the opportunity not only to defend themselves, but also to question and challenge the evidence and legal case advanced by the investigators. During the preparatory stage of the hearing, the concerned parties should be able to access the investigators' file on the basis of which the administrative enforcer made the allegation.³⁷⁷ The hearing department should also have the power to require both parties, especially the investigators, to attend the hearing. Moreover, the investigators should be obliged to answer the questions raised by the concerned parties.

However, it should be noted that the establishment of the hearing department may cause several concerns. Firstly, its creation under the NDRC, the SAIC and the MOFCOM would inevitably increase the administrative burden and cost. Secondly, an independent hearing department might provide the concerned parties a mechanism by which to slow down the proceedings, submitting to the hearing department a variety of requests that are of dubious purpose, which might be revealed to be simply

³⁷⁶ For discussion on how the ALJ system might be introduced in the Chinese administrative hearing procedure, please refer to J.Li, 'An Evaluation of the Independence of the American Administrative Law Judge [美国行政法官独立化进程评述, meiguoxingzhengfaguandulihuaajinchengpingshu]', (1996) 47(5) *Peking University Law Journal*, 74-76.

³⁷⁷ The concerned parties' right of access to the file will be discussed in detail below.

well-engineered dilatory tactics.³⁷⁸ Thirdly, if EU practice is adopted, the hearing procedure under the AML 2007 will face similar problems to those met by the EU Hearing Officer: the position of the hearing department under the administrative enforcers of the AML 2007 may not be independent enough; and lack the opportunity for the concerned parties under the AML 2007 to cross-examine witnesses and challenge the evidence submitted against them.

4.3.3 Right of access to the file under the AML 2007

Comparison of the right of access to the file under EU competition and US antitrust law

Both EU competition and US antitrust law recognise the right of access to the file as a necessary component of the concerned parties' right to be heard.³⁷⁹ However, their ways of granting this right may differ. In EU competition law the right of access to the Commission's file is granted after the issuance of the SO if requested by the parties concerned. However, the Commission regards its internal file, the business secrets and other confidential information as non-accessible files.³⁸⁰ In case of dispute between the concerned parties and the Commission, the former have a right of recourse to the Commission and then to the Hearing Office. In US antitrust law this right is safeguarded by federal criminal or civil procedural rules and the ALJ's adjudicative procedure. The main difference between the two regimes lies in the right's being protected under EU competition law by an administrative proceeding and by the investigator and the decision maker:

³⁷⁸ Similar concern is also raised in the context of EU competition law. See, N. Zingales, 'The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to Be Heard?' *supra note 91*, at 138.

³⁷⁹ See, '2.3.2 Right of access to the Commission's files' and '3.2.1 Rights to be heard and access to the file' of this chapter, respectively.

³⁸⁰ See, Article 27(2) of Reg.1/2003.

the Commission; under US antitrust law this right is safeguarded by its judicial or quasi-judicial procedural requirement and the judiciary. The files accessible under US criminal procedure are quite limited, even more limited than under EU competition law.³⁸¹ In US civil litigation and FTC adjudicative procedure, however, the limitations on the accessible files are fewer. Firstly, privileged information is generally non-accessible; secondly, the courts or ALJs may impose a limitation on the frequency and extent of such disclosure. Unlike EU competition law which defines the scope of accessible and non-accessible files clearly during its administrative enforcement procedure, US antitrust law enforcers leave considerable discretion to the federal courts and ALJs to decide the scope of accessible and non-accessible files.

What can be learned by China: introducing the right of access to the file in the AML 2007's enforcement procedure

Unlike the right to be heard, right of access to the file does not exist in Chinese Antimonopoly and Administrative law. In the period of AML 2007's enforcement the published cases shows that the concerned parties did not have the right of access to the administrative enforcers' file.³⁸² Hence the very first question to be answered is: is there any need to give the parties concerned the right of access to the file under the AML 2007 enforcement? As illustrated both by EU and US experience, the right of access to the file is a necessary part of protection of the right to be heard. If China recognises the right to be heard under its AML 2007 regime (in which case it is recognised), it should also recognise the right of access to the file because it is a necessary

³⁸¹ Please refer to 'Right of access to the file under US antitrust laws' in '3.2.1 Rights to be heard and access to the file under US antitrust laws'

³⁸² However, in China's criminal procedure counsel (rather than the defendant) have the right to consult, extract and duplicate judicial documents pertaining to the current case and the technical verification material from the procuratorates and courts. See, Article 36 of Criminal Procedural Law of People's Republic of China, adopted on January 1, 1997.

part of it. If the concerned parties under the AML 2007 are given the right of access to the administrative enforcer's file, their right to be heard can be better protected, the public hearing may be more effective and the procedure would thus be fairer and more balanced.

With regard to establishing this right under the AML 2007 regime, the experience of EU competition law may be more valuable. Enforcement of the AML 2007 follows an administrative proceeding similar to that of EU competition law. Requiring the administrative enforcers of the AML 2007 to grant the concerned parties the right of access to their files would not need any radical structural changes in the enforcement regime. If US practice were adopted, this right would be granted by Chinese courts rather than administrative enforcers. The difficulty lies in Chinese courts' exclusion under current AML 2007 from public enforcement except in conducting judicial review.³⁸³ Nor are administrative enforcers and concerned parties plaintiffs and defendants. Thus there is no legal ground on which the court might grant this right under the AML 2007. However, it should be noted that the US approach may be more transparent, objective and effective than that of the EU at least with regard to civil enforcement. Firstly, the Antitrust Division and concerned parties are in an equal position before federal courts; secondly, the scope of accessible files is not determined by the plaintiff but by federal procedural rules and the court.

Both the EU and US may provide useful experience on the question of accessibility of files. Firstly, an accessible file must be relevant to the case in respect of which objection is made, a file based on which the administrative enforcer made the allegation and decision. Files which are irrelevant to the case should not be disclosed to the concerned parties. Secondly, as in EU

³⁸³Article 53 of the AML 2007.

competition law, a file containing business secrets should not be disclosed.³⁸⁴ Keeping business secrets is also a legal obligation on the administrative enforcer under the AML 2007.³⁸⁵ Thus it has legal ground to treat business secrets as non-accessible. Similarly, the category of non-accessible ‘other confidential information’ under the AML 2007 may contain state secrets, the complainants’ information and matters within the individual’s privacy which have been regulated in the Administrative Punishment Law.³⁸⁶ Thirdly, as regards the administrative enforcers’ internal file, its non-accessibility is justified by the EU competition regime and US antitrust criminal procedure. However, the EU Courts’ view is not entirely consistent with the view of the Commission with regard to whether to disclosure of the Commission’s internal files. The General Court requires the Commission to balance the risk of disclosing internal files and protection of the right of concerned parties.³⁸⁷ It thus held that the Commission should identify the documents classified as internal in the file and justify their non-disclosure with detailed and specific reasons. Such internal files may nevertheless be disclosed to the parties concerned by the Courts’ order. The requirement under US antitrust criminal procedure may be incomparable with that under the AML 2007 because the latter includes no criminal procedure. It is still arguable whether the administrative enforcers’ internal files should be disclosed under the AML

³⁸⁴ For details, please refer to ‘Accessible and non-accessible documents’ in ‘2.3.2 Right of access to the Commission’s files’ of this chapter.

³⁸⁵ See, Article 41 of the AML 2007.

³⁸⁶ According to Article 42(3) of Administrative Punishment Law, the hearing shall be in camera if it contains state or, business secrets or matters of an individual’s privacy. Article 3 of the Law of the People’s Republic of China on Guarding State Secrets (Adopted at the Third Meeting of the Standing Committee of the Seventh National People’s Congress on September 5, 1988, and effective from May 1, 1989) stipulates that: ‘All state organs, armed forces, political parties, public organizations, enterprises, institutions and citizens shall have the obligation to guard state secrets.’ The category of ‘other confidential information’ needs more detailed and careful analysis. However, it is the task of Administrative law, not of this thesis.

³⁸⁷ Joint Cases T-134, 136-138, 141, 145, 147-148, 151, 156-157, *NHM Stahlwerke and Others v Commission*, [1996] ECR II-537, at paras. 73-74.

2007. The author held that at least the protection of the internal files cannot be absolute. The administrative enforcers of the AML 2007 should assess the risk of disclosure and the protection of the concerned parties' right to be heard and provide sufficient reason to explain why the specific internal documents are non-accessible. This requirement could be fairly important given that the AML 2007's enforcement system lacks transparency and external balance.³⁸⁸ On the other hand, it should be noted that because of this lack of transparency and external balance it is still hard to limit the administrative enforcers' discretion in determining the scope of their internal files under the AML 2007. Finally, as regards privileged files which are protected from disclosure under US antitrust law, since there is no such privilege in current Chinese civil and administrative procedure,³⁸⁹ it would be too early to treat the privileged files as non-accessible under the AML 2007's enforcement.

To sum up, in order to improve the rights of concerned parties and the impartiality of the AML 2007's enforcement procedure, the MOFCOM, NDRC and SAIC may consider giving concerned parties the right to access its file upon application. The concerned parties may gain access after they have received the statement of objection and before the issuance of the administrative enforcers' final decision. In order to maintain the efficiency of

³⁸⁸ As regards lack of transparency, see, A.H.Y. Zhang, 'Problems in Following E.U. Competition Law: A Case Study of Coca-Cola/Huiyuan', (2011) 3 *Peking University Journal of Legal Studies*, available at SSRN: <http://ssrn.com/abstract=1569836>, last visited on 13/11/2012, 10:48; see also, X.Z. Zhang & V.Y.H. Zhang, 'Chinese merger control: patterns and implications', (2010) 6(2) *Journal of Competition Law & Economics*, 477-496. The lack of external balance within the AML 2007's enforcement has two causes: 1. administrative enforcers of the AML 2007, similarly to the EU Commission, have the authority of investigation, prosecution and decision-making; 2. lack of independent and effective judicial review. Please refer to '3.1.1 Lack of independent judiciary' in Chapter 1 of this thesis.

³⁸⁹ For example, the attorney-client privilege has not been recognised yet in administrative and civil procedures, nor has the witness privilege against self-incrimination. See, '4.2 The protection of procedural rights of the concerned parties under AML 2007' of this chapter.

the enforcement, the MOFCOM, NDRC and SAIC may set a time limit on this right. After the concerned parties have submitted the request for access to the file the administrative enforcer may decide whether to grant the request. Where the parties concerned dispute the administrative enforcers' refusal of their application, the hearing department of the administrative enforcer may be entitled to determine whether the file should be disclosed or not, as does the Hearing Officer in the EU.³⁹⁰ In relation to the scope of accessible files, business secrets and other confidential information should not be disclosed; in relation to the administrative enforcer's internal files, the administrative enforcer must justify refusal of access to such files before denying the concerned parties' request.

4.3.4 Legal professional privilege: a restrictive scope

Comparison of legal professional privilege under the EU Competition and US Antitrust law

Professional privilege (or the attorney-client privilege) is recognised both by EU and US regimes. Its justifications are similar in the two regimes: communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation must remain confidential because the best administration of justice can only be secured when clients can have full and frank communication with their lawyers.³⁹¹ Another similarity lies in the regimes' restriction of the scope of this privilege. Both the EU and US grant this privilege only when the communication is made with the intention of obtaining or providing legal advice. In addition, both the EU and US grant this privilege only when the

³⁹⁰ See, 'The role of the Hearing Officer' in '2.3.2 Right of access to the Commission's files' of this chapter.

³⁹¹ See, '2.3.3 Legal professional privilege' and '3.2.2 Attorney-client privilege' of this chapter.

communication emanates from a lawyer who is entitled to practise in their respective jurisdictions.³⁹²

On the other hand, the differences in the protection of the legal professional privilege between the two regimes are equally significant. Firstly, the way in which this privilege is protected differs. Under EU competition law it is for the Commission to determine whether the protection of privilege should be granted during the investigation,³⁹³ while in US antitrust law this privilege is granted and supervised by courts.³⁹⁴ Secondly, under the EU system the privilege only applies to independent lawyers: communications between in-house lawyers in a relationship of employment with the concerned parties would not be protected, while US has extended this privilege to in-house counsel.

What can be learned by China: whether the concerned parties under the AML 2007 should be granted legal professional privilege?

Although legal professional privilege is not regulated in Chinese legislation, lawyers in China are obliged to keep secrets for their clients. Article 33 of the Law on Lawyers of the People's Republic of China (hereafter, the Lawyers' Law)³⁹⁵ states:

A lawyer shall keep confidential secrets of the State and commercial secrets of the parties concerned that he comes to

³⁹² See, 'The conditions of legal professional privilege protection' in '2.3.3 Legal professional privilege' and 'The scope of the attorney-client privilege in the US' in '3.2.2 Attorney-client privilege' of this chapter respectively.

³⁹³ See, *AM&S*, [1982] ECR, ¶ 3-4.

³⁹⁴ See, '3.2.2 Attorney-client privilege' of this chapter.

³⁹⁵ Law of the People's Republic of China on Lawyers was adopted at the 19th Session of the Standing Committee of the Eighth National People's Congress on May 15, 1996, last amended at the 30th Session of the Standing Committee of the Tenth National People's Congress on October 28th, 2007.

know during his practice activities and shall not divulge the private affairs of the parties concerned.

In addition, Article 8 of the ‘Standard of Professional Ethics and Practice Discipline of Chinese Lawyers’ (hereafter, the Professional Ethics Standard) issued by Chinese Lawyers’ Association requires lawyers to keep state secrets, business secrets and individual privacy of the client. However, Chinese lawyers’ professional confidentiality is read as an obligation rather than a privilege that can be used as a defence in the criminal and/or administrative procedure.³⁹⁶ In AML 2007 enforcement there is seldom discussion of legal professional privilege. However, in practice this issue has been met in the *Henan Second-hand Car Cartel* case.³⁹⁷ Since legal professional privilege has not been introduced in the AML 2007 and the administrative laws of China, this subsection seeks to answer the three questions: 1. is it necessary to introduce this privilege to the AML 2007’s enforcement procedure? 2. If necessary, how can this privilege be granted to the concerned parties under the AML 2007? 3. If necessary, what is the scope of this privilege under the AML 2007?

In relation to the first question, from the experience of EU competition law and US antitrust law it is necessary to give antitrust lawyers in China the legal professional privilege. Firstly, as EU and US systems show, legal professional privilege may increase the welfare of the whole of society.³⁹⁸ For example, if the communication between the undertaking concerned and the antitrust lawyer is protected by legal professional privilege, it may be expected that the undertaking concerned will be encouraged to consult the professional

³⁹⁶ See, J.X. Wang, ‘An Analysis of Lawyers’ Professional Confidentiality [律师职业秘密问题研究, *lvshizhiyemimiwentiyanyanjiu*], *supra note 347*, at 317.

³⁹⁷ See, ‘Second-hand Car Cartel Investigated and Penalised in Henan Province’, *supra note 355*.

³⁹⁸ See, Legal basis and a brief history of legal professional privilege.

lawyers more often without having to worry about the risks of subsequent disclosure of the information revealed and of the legal advice received. The AML 2007 would be respected more often because antitrust lawyers are more familiar with antitrust law than the parties concerned. This is especially important for undertakings in China given that the AML 2007 is new law and its enforcement is at such an early stage. Secondly, the privilege is regarded as a necessary requirement for the proper administration of justice by the CJEU³⁹⁹ and the US courts.⁴⁰⁰ Although Chinese legislators have not recognised this privilege as a necessary requirement, it can nevertheless improve protection of the parties concerned under the AML 2007 and make the procedure fairer and more balanced.⁴⁰¹ In fact Chinese scholars have argued that legal professional privilege is based on fundamental procedural principles such as presumption of innocence, the right against self-incrimination and individual's privacy,⁴⁰² which have been found in Chinese Criminal Procedural law.

The second question is that of how to grant professional privilege to the concerned parties in the practice of the AML 2007's enforcement. As there is no external balance as in US antitrust law procedure in China,⁴⁰³ the privilege may only be given by Chinese administrative enforcers. The proof dilemma⁴⁰⁴ met by the EU Commission would thus similarly be faced by China. Legal

³⁹⁹T. Christoforou: Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case, *supra* note 134, at 4.

⁴⁰⁰ See, *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

⁴⁰¹ In *AM&S* the CJEU stated that protection of the confidentiality of lawyer-client communications was construed as a necessary requirement of the client's right to a fair trial.

⁴⁰² See, T. Cheng, 'Deciphering the Professional Secrets of the Legal Profession [论律师的职业秘密, lunlvshidezhidemimi]', (2005) 4 *Justice of China*, 37-41, at 38.

⁴⁰³ For example, under US antitrust laws' enforcement, the concerned parties' privilege claim is booked before courts. See, *Alexander v. Fed. Bureau of Investigation*, 186 F.R.D. 102, 107 (D.D.C. 1998).

⁴⁰⁴ See, 'Proof dilemma when granting the privilege' in '2.3.3 Legal professional privilege' of this chapter.

professional privilege in China might be guided by the EU's 'sealed envelope' method.⁴⁰⁵ Firstly, it is for administrative enforcers of the AML 2007 to determine whether the protection of privilege should be granted during investigation. Secondly, it is the concerned parties' obligation to persuade investigators that the claimed document should be privileged. For example, they might state the basis upon which the privilege is claimed, subject matter, number of pages, author, date created and the identity of all persons to whom the original or any copies of the document were shown or provided. Thirdly, the administrative enforcer should not disclose the document and/or use it as evidence in the decision if the claimed document fulfils the conditions of granting legal professional privilege. Fourthly, in the case of dispute the investigator should put the claimed document in a sealed envelope and take it directly to the Director General of the administrative enforcer of the AML 2007. Only the Director General can open the envelope and decide whether the document inside should be privileged. Finally, the concerned parties may waive the privilege by disclosing the written communication if he considers it to be in his/her best interests to do so. For once the privileged information has been disclosed by the client, the basic justification for protection no longer applies.⁴⁰⁶

As regards the last question, it should be firstly noted that protection of legal professional privilege illustrates the conflicts between protection of the concerned parties' right and effective enforcement: the existence of this privilege would unavoidably harm the effectiveness of enforcement, the aim of which is to disclose facts and truth.⁴⁰⁷ Moreover, in AML 2007 enforcement

⁴⁰⁵Ibid.

⁴⁰⁶See, T. Christoforou, 'Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case', *supra* note 134, at 44.

⁴⁰⁷ See, J.X. Wang, 'An Analyse on Lawyers' Professional Confidentiality [律师职业秘密问题研究, *lvshizhiyemimiwentiyanjiu*]', *supra* note 347, at 320.

practice the NDRC and the SAIC have met difficulties in investigation.⁴⁰⁸ In addition, the NDRC and the SAIC are not active with regard to enforcing the AML 2007 and have not accumulated adequate experience.⁴⁰⁹ Affording the protection of communications between concerned parties and their lawyers from disclosure would increase the barrier to investigation as well as discourage NDRC and SAIC enforcement.⁴¹⁰ Hence the scope of the legal professional privilege under the enforcement of the AML 2007 should be strictly limited.

As EU competition law and US antitrust law provide, the following restrictions can be applied. Firstly, the privileged communication should be made for the purpose of protecting the right of concerned parties and the legal advice should be made by lawyers who are entitled to practise in China. This condition is derived directly from the purpose and essential meaning of legal professional privilege itself. Secondly, on the question whether legal professional privilege should be applied to in-house lawyers under the AML 2007 investigation, the author believes that it is too early. First of all, there is no legal professional privilege under current AML 2007 enforcement, which means even communication between an independent lawyer and the client cannot be protected from disclosure. Thus the first consideration should be establishing this privilege in the China's antimonopoly investigation procedure for independent lawyers rather than extending this privilege to in-house lawyers. In addition, as shown by EU and US experience, extending

⁴⁰⁸ For example, in *Travel/Sky*, the NDRC was reported to meet obstacles during the investigation and thus the investigation is pending. See, B.Q. Wang & W.X. Liu, NDRC investigated Travelsky for manipulating ticket price, *The Economic Observer*, 15th, May, 2009.

⁴⁰⁹ For details, please refer to '2.1 The current position of the administrative enforcers under the AML 2007's public enforcement' in Chapter 1 of this thesis.

⁴¹⁰ For example, in the Henan Second-hand Car Cartel case, if the communications between the concerned parties and the lawyers had been covered by legal professional privilege, the investigator (ICHN) would not have been able to collect the evidence of the communications between lawyers and the concerned parties.

this privilege to in-house lawyers may cause various problems. For example, it is hard to distinguish whether an in-house lawyer's opinion is business advice or a legal advice; also because in essence the in-house lawyer is an employee of the concerned company. The relationship between an in-house lawyer and his/her employer differs from that between an independent lawyer and his/her client. Besides, the privilege should be excluded when the concerned parties are conducting or planning an on-going or future crime.⁴¹¹ Finally, the privileged communication under the AML 2007 should be in the form of written and should be made after the initiation of investigation. These restrictions are provided to prevent this privilege being abused as a delaying tactic by the concerned parties.

4.3.5 Right against self-incrimination: too early to extend to the AML 2007

Comparison of the right against self-incrimination under EU Competition and US Antitrust law

The right against self-incrimination is recognised as a basic principle in EU and US law to protect individual's human right. However, the scope of this right in the two regimes differs. The CJEU reluctantly recognises this right to a limited extent: the Commission may compel the undertaking concerned to answer questions of a purely factual nature even if answer to this factual question may incriminate the concerned party.⁴¹² Only questions which may

⁴¹¹ See, See, J.X. Wang, 'An Analyse on Lawyers' Professional Confidentiality [律师职业秘密问题研究, lvshizhiyemimiwentiyANJIU]', *supra note 347*, at 325. J.X. Wang further explained the scope of 'criminal act', it include: 1. crimes of endangering national security; 2. crimes of endangering public security; 3. Other crimes that should be disclosed by the lawyers.

⁴¹² The CJEU only prevents the European Commission from 'compelling an undertaking to provide it with answers which might involve an admission on its part of an infringement which it is incumbent upon the Commission to prove'. See, 'The scope of the right against

include admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove are prevented. Under US antitrust law the right against self-incrimination, as one of the Constitutional rights, covers both answers to questions of factual and non-factual nature. However, only the individual witness (rather than any legal person such as a company) who testifies on oath may invoke the right against self-incrimination.⁴¹³

What can be learned by China: whether the right against self-incrimination should be introduced in the AML 2007's public enforcement procedure

The right against self-incrimination is regulated in Chinese Criminal Procedural Law's latest modification.⁴¹⁴ However, there is no further procedural rule or mechanism to guarantee this right during criminal procedures. Moreover, discussion of this right in China is limited to the scope of criminal procedure.⁴¹⁵ The most important question is: is it necessary to

self-incrimination in investigation under EU competition law: divergence between the CJEU and the Strasbourg Court' in '2.3.4 Right against self-incrimination' of this chapter.

⁴¹³ See, 'The scope of the right against self-incrimination under US antitrust laws' in '3.2.3 Right against self-incrimination: the Fifth Amendment' of this chapter.

⁴¹⁴ See, Article 50 of Chinese Criminal Procedural Law, last modified on March 14, 2012. However, in the same statute, Article 118 stipulates that the suspected parties are obliged to answer the investigators' questions truthfully.

⁴¹⁵ It is not the task of this thesis to give a comprehensive and detailed discussion of the right against self-incrimination in a general sense under Chinese law. For more detailed research on this topic, please refer to L. Peng, *The Privilege against Self-Incrimination [不得强迫自证其罪原则研究, budeqiangpozizhengqizuiyanjiu]*, (2009) Chinese Procuratorial Press; C.Y. Fan, 'From the Obligation of 'Answer truthfully' to the right 'against self-incrimination' [从'应当如实回答'到'不得自证其罪', cong 'yingdangrushihuida' dao 'budeqiangpozizhengqizui']', (2008) 2 *Chinese Journal of Law*, 111-121; G.J. Liu, 'Several Problems on the Establishment of the Right to Silence in China-Part One [在我国确定沉默权原则几个问题的探讨-上, zaiwoguoquedingchengmoquanyuanzejigewentizhitantao-shang]', (2000) 2 *China Legal Science*, 43-54; G.J. Liu, 'Several Problems on the Establishment of the Right to Silence in China-Part Two [在我国确定沉默权原则几个问题的探讨-下, zaiwoguoquedingchengmoquanyuanzejigewentizhitantao-xia]', (2000) 3 *China Legal Science*, 37-47; Y.H. Song & H.Y. Wu, 'The Principle of the Privilege against Self-Incrimination and its

extend the right against self-incrimination to the AML 2007?⁴¹⁶ The main justification is that the concerned parties' rights during AML 2007 enforcement would be improved. If this right were given, during the investigation the investigated parties would be able to refuse to answer question raised by the investigator if the witness thinks answer would incriminate herself/himself.

If this right were extended to AML 2007 enforcement procedure, the following concerns would be raised. Firstly, it might discourage administrative enforcers from enforcing the law actively and harm the effectiveness of enforcement of the AML 2007. Administrative enforcers' effective investigation is important to disclose anticompetitive activities. Compelling a company to provide all necessary information is a guarantee to the effectiveness of the investigation,⁴¹⁷ while the right against self-incrimination would protect the concerned parties from disclosure. As mentioned above,⁴¹⁸ given that public enforcement of monopolistic agreements and abuse of dominant position under the AML 2007 is inactive since 2008,⁴¹⁹ it would be inadvisable further reduce the effectiveness of the

Procedural Protection [任何人不受强迫自证其罪原则及其程序保障, renherenbushouqiangpozizhengqizuiyuanzejiqichengxubaozhang], (1999) 2 *China Legal Science*, 117-128; Y.G. Yang, 'An Analyse on the Principle of against Self-Incrimination [论不强迫自证其罪原则, lunbuqiangpozizhengqizuiyuanze]', (2003) 1 *China Legal Science*, 130-137.

⁴¹⁶ The AML 2007 does not impose criminal responsibilities upon the individuals or companies violating the substantial part of the Law. However, the concerned parties may face (individual and company) prosecution if they break the procedural rules provided by the AML 2007 and/or other administrative laws. See, Article 52 of the AML 2007.

⁴¹⁷ See, Case 27/88, *Orkem v Commission*, [1989] ECR 3355, at paras. 38-39.

⁴¹⁸ See, 'Legal professional privilege' in '4.3.3 Improving the protection of procedural rights of the concerned parties under AML 2007: from a comparative perspective' of this chapter.

⁴¹⁹ See, N. Petit, 'Chinese Antitrust Law – The Year of the Rabbit in Review (1) & (2)', *Chilling Competition*, (23 January, 2012), available at <http://chillingcompetition.com/2012/01/23/chinese-antitrust-law-the-year-of-the-rabbit-in-review-1/>, last visited on 04/10/2012, 16:06. For a more detailed record of monopolistic agreement and abuse of dominant position cases under the AML 2007, please refer to A. Fels, X.Y. Wang & J. Su (edited by), *China Competition Bulletin 2010-2012*, *supra* note 347.

enforcement. Secondly, it is problematic to apply this right to a legal person, who is, in most situations the subject of AML 2007 investigation. EU competition law and US antitrust law both provide that this right can only be enjoyed by natural persons. China's Criminal Procedural Law also only offers protection to natural persons rather than any legal persons.⁴²⁰ Hence there is no legal ground for extending this right to legal persons such as companies or undertakings. Thirdly, the enforcement procedure of the AML 2007 is an administrative rather than criminal. One of the reasons for which the CJEU offers limited protection of the right against self-incrimination under EU competition law is that the Commission's enforcement is not of a criminal nature.⁴²¹ Concerned parties under the AML 2007 cannot incriminate themselves because there is no criminal responsibility for anticompetitive conduct. Fourthly, even under China's criminal procedure the right against self-incrimination is too immature to have any applicable procedure and mechanism to safeguard this right, not to mention extending it to AML 2007 enforcement. It may be too early to give the concerned parties the right against self-incrimination under the AML 2007. Extension of this right to the AML 2007 enforcement should not be earlier than the establishment of certain mutual and practical procedures and mechanisms to exercise this right under China's criminal procedure.

4.3.6 Right against unreasonable search and seizure: no legal ground

The right against unreasonable search and seizure is provided by US Constitution. In US antitrust law this right is specifically raised when the investigation is conducted under search warrant. Accordingly, the Antitrust

⁴²⁰ Article 50 of the Criminal Procedural Law provides that the judge, the procurator and the investigator may not force any natural person to incriminate himself/herself.

⁴²¹ See, Article 23(5) of Reg.1/2003.

Division must demonstrate reasonableness before the court to obtain a search warrant when a crime is reasonably believed to have been committed. In addition, the search warrant must particularly describe the place to be searched, and persons or things to be seized.⁴²²

China also has a search warrant system in its criminal law.⁴²³ However, there is no legal ground for the right against unreasonable search or seizure which can be applied in criminal investigation.⁴²⁴ Since under the AML 2007 administrative enforcers cannot even invoke criminal procedure, there is no obvious reason and legal ground for establishing this right under the AML 2007.

⁴²² See, 'Fourth Amendment and US antitrust law enforcement' of '3.2.4 Right against unreasonable searches and seizures: the Fourth Amendment' in this chapter.

⁴²³ See, Article 128 of China's Criminal Procedural Law; see also, Article 206 of the Procedural Rules of Chinese Public Security Bureau when Dealing with Criminal Cases(No. 35 Order of Ministry of Public Security of the People's Republic of China, last amended on 25th October, 2007).

⁴²⁴ For discussion of search warrants in Chinese criminal law, please refer to L.P. Pan, *Research on China's Criminal Search System [刑事搜查制度研究, xingshisouchazhiduyanjiu]*, PhD Thesis, (2006)Sichuan University;L.P. Pan, 'Research on the Reform of China's Criminal Search [试论我国刑事搜查制度的改革,shilunwoguoxingshisouchazhidu de gaige]',(2005) *4Academic Forum*,111-115; F.Q. Liu, 'From Authorization to Restraint- Research on the Functions of Search Warrant [从授权到限权-搜查令功能研究, congshouquandaoxianquan-souchalinggongnengyanjiu]', (2009) 9(2) *Journal of Kunming University of Science and Technology (Social Science edition)*, 69-76.

Chapter 5 Conclusion

China's Antimonopoly Law (the AML 2007) was adopted on 1st August, 2008, after its entering into the WTO. In about four and a half years' enforcement the administrative enforcers of the AML 2007 have met various problems (in practice). This thesis has attempted to find solutions to some of these problems. This thesis has compared the public enforcement regimes of EU competition and US antitrust law. There are two reasons for choosing these two regimes for comparison. Firstly, they are two mainstream enforcement regimes;¹ secondly, the public enforcement mechanism of the AML 2007 is significantly influenced by the two regimes.²

The thesis first examined the public enforcement of the AML 2007 in the four and a half years and identifies the following problems: 1. lack of independent judiciary and effective judicial review; 2. the administrative enforcers of the AML 2007 are not independent of sector regulators and the SOEs in China; 3. lack of transparency in Chinese merger enforcement; 4. the vagueness of the Law's public enforcement authority's allocation between the central and local government; 5. rights of the concerned parties are insufficiently protected. The first two problems are classified as structural and the rest as technical problems. Structural problems (of the AML 2007's public enforcement) are rooted in the current Chinese political and economic structure such as lacking judicial independence. They are caused by the fact of Chinese transitional period from planned to market economy.³ The

¹ The EU competition law public enforcement regime is known as administrative-orientated while the US antitrust law enforcement regime is known as judicial-orientated. See, Y.J. Jung & Q. Hao, 'The New Economic Constitution in China: A Third way for Competition Regime?' (2003) 24 *Northwestern journal of International law and Business*, 107-171, at 123.

² See, '1. Comparative perspectives of competition law's public enforcement' of Chapter 1.

³ See, B. Naughton, *The Chinese Economy: Transitions and Growth*, (2007) Massachusetts Institute of Technology Press; see also, J.L. Wu, 'China's Economic Reform: Past, Present

experience of EU competition and US antitrust law may offer little contribution to their solution because neither regime went through a transitional period.

On the other hand, the technical problems met by the AML 2007's administrative enforcers are not caused by Chinese political and economic structure; they are solely related to the procedure of the AML 2007's public enforcement and they may also be faced by the public enforcement regimes of EU competition law as well as US antitrust law. For example, the case allocation between different enforcement authorities and protection of right of concerned parties are commonly concerned issues under an antitrust enforcement regime regardless of what political and economic structure it belongs to. Technical problems can be solved under the current Chinese political and economic structure. Experience of the EU and US may provide effective solutions to the technical problems of the AML 2007.

This thesis does not aim to solve all the problems within the public enforcement of the AML 2007; rather it only focuses on providing solutions to the three significant technical problems by examining public enforcement regimes under EU competition law and US antitrust law. Namely, how to improve transparency of the merger control under the AML 2007; how to allocate the enforcement authority of the AML 2007 between the administrative enforcers at the central governmental level and at the provincial governmental level; and, how to improve the rights of concerned parties under the AML 2007's public enforcement.

Chapter 2 seeks to show how transparency of merger enforcement under the AML 2007 might be secured by referring to EU and US experiences.

Transparency may contribute to an open, fair and responsive procedure. It is especially important to Chinese merger for this regime is still young and often suspected to be influenced by political factors.⁴ Examination focuses on two issues: firstly, transparency during the merger investigation process; secondly, the transparency in merger decisions. The first section of this chapter examined the two issues mentioned above under EU merger enforcement regime. During the merger investigation process, the Commission promptly discloses information on notifications, declarations of lack of jurisdiction, decisions of clearance after phase I investigation and decisions to conduct a second phase investigation. In relation to the decisions made after the second phase investigation, the Commission will offer detailed explanation in the decisions, regardless of whether the case is cleared unconditionally, cleared with remedies or blocked. On the other hand, it should be noted that the main concern of transparency under the EU merger regime lies in the Commission's tripartite role under the regime.

The second part of this chapter examined transparency under the US merger regime. Similar to the EU's, US merger assessment also contains two phases of investigation. However, the Antitrust Division and the FTC did not pay as much attention to transparency as the EU Commission does. Firstly, in relation to the merger investigation process, the Antitrust Division and the FTC only disclose the statistics of certain cases in the annual reports. The notifications based on the Hart-Scott-Rodino Antitrust Improvements Act (hereafter, the HSR Act) are not be made public for the considerations of confidentiality.⁵ Nor would there be disclosure of the procedure when an investigation is dropped by the agencies; a proposed merger is dropped by

⁴ See, R. Evans, 'Transparency is in Mofcom's Interests', (2008-2010) 28 *International Financial Law Review*, 19-20.

⁵ See, I.K. Gotts (edited by), *The Merger Review Process*, second edition, (2001) ABA Publishing, at 100.

the merging parties; or, the Antitrust Division resolves competition issues through a fix-it-first settlement. In relation to the decisions made under US merger control regime, there are three possibilities. Firstly, the case may be cleared after the Antitrust Division or the FTC's investigation because of its insignificant competitive impact, in which case there would be little disclosure of the decision. Secondly, the merger may be cleared with consent decree settlement, in which case the agencies are required to disclose the remedies and explain the competitive impact. However, it is argued that the agencies fail to provide analysis of the competitive impact which has not been addressed by the remedies.⁶ Thirdly, the merger may be filed in a Federal court if the Antitrust Division or the FTC may want to block it.⁷ Thus the decision is subject to the requirement of judicial disclosure, which lies out of the scope of Chapter 2. It can be concluded that there are two significant concerns under US merger enforcement's transparency: 1. when the investigation or the proposed merger is dropped or the merger is cleared, there is little disclosure of information on the case; 2. when the case is settled by consent decree, disclosure of information is incomplete. On the other hand, there are arguments advanced that improving US merger control regime's transparency would bring significant cost to the agencies.⁸

The third part of this chapter aims to solve the problem of how to improve the transparency of merger control procedure under the AML 2007. Firstly, it compared the transparency of EU and US merger control procedures and found the following results: 1. In relation to the investigative procedure, both regimes provide statistics on their enforcement activities during the

⁶ See for example, W.S. Grimes, 'Transparency in Federal Antitrust Enforcement', (2003) 51(4) *Buffalo Law Review*, 937-993.

⁷The FTC may also issue a preliminary injunction to block a merger which is authorised by federal court.

⁸ See, J.M. Nannes, 'Transparency in Federal Antitrust Enforcement Decisions: A Reaction to Professor Grimes', (2003) 51 *Buffalo Law Review*, 1017-1027

investigation process; 2. both the EU and US disclose the prohibition decisions and decisions with remedies, although in different ways and to different extent; 3. the EU merger control regime offers more transparency than the US Antitrust Division and the FTC did in both the investigative procedure and final decisions.⁹ Comparison of EU and US merger enforcement regimes and as the current practices of the MOFCOM's merger enforcement illustrates that the MOFCOM should provide a more transparent investigative procedure by publishing the statistics and summary information on the notifications, the cases challenged by the MOFCOM and the case proceeds to the second phase investigation. In order to address the problem of lack of information on the MOFCOM's final decision, this section compared the content of decision in *Panasonic/Sanyo* merger between EU, US and China. Comparison disclosed a series of deficiencies in the MOFCOM's decision such as lacking analysis on the relevant market and explanation on remedies. This section also examined whether the concerns of transparency met by the EU and US would apply to the Chinese merger control regime. It found that the institutional design concern of the EU merger control regime would also be met by China, while the concern of cost of transparency met by the US merger regime is insignificant due to the MOFCOM's relatively low caseload.

Chapter 3 aims to find an effective way to allocate the enforcement authority of the AML 2007 between the central government administrative enforcers (the CAEs) and the provincial government administrative enforcers (the PAEs). This chapter firstly examined decentralisation and multi-level governance under EU competition law's public enforcement. It is noteworthy that the modernisation of EU competition law provides us a chance to evaluate both centralised and decentralised enforcement mechanism under EU competition law. After providing an overview of the modernisation

⁹ See, '3.3.1 A comparative study between the transparency of merger enforcement procedure between the EU and US' of Chapter 2.

process from a centralised enforcement mechanism to a decentralised mechanism under EU competition law, the thesis analysed the advantages and concerns of the EU centralised and decentralised enforcement mechanisms, respectively. Discussion is established on economic and theoretical analysis. The advantages of the centralised enforcement approach under Regulation 17/62 include: 1. that it can prevent trade protectionism between Member States; 2. it may guarantee the consistent implementation of Articles 101 and 102 TFEU in Member States. The main concern of this approach is that the European Commission (the Commission) cannot afford the immense administrative overload.¹⁰ The reasons for applying the decentralised approach under Reg.1/2003 include: 1. that it can overcome the administrative burden caused by the centralised mechanism especially in an enlarged EU; 2. national competition authorities and national courts in Member States may be in a better position to collect information on local conduct than the Commission in Brussels. The main concern brought by the decentralised approach is that it may reduce the consistency and legal certainty of Articles' 101 and 102 TFEU enforcement. Although EU competition law's enforcement regime has abandoned the centralised approach, it is nevertheless difficult to conclude simply that the decentralised mechanism is better. This thesis further analysed the experience of the European Competition Network, which aims to guarantee the legal certainty in EU competition law's decentralisation era.

The second part of this chapter examined the relationship between Federal and State antitrust enforcers under US federal antitrust law public enforcement. Although there is no such classification as 'centralised approach' and 'decentralised approach' under the US antitrust enforcement regime, debate on whether states should be empowered to enforce federal

¹⁰See the Third Recital of Regulation 1/2003; see also, para. 24 of the White Paper.

antitrust law are also heated, especially after the *Microsoft* case.¹¹ The states' comparative advantages when enforcing federal antitrust law may be summarised as: 1. familiarity with local markets; 2. familiarity with and representation of state and local institutions; 3. ability to provide monetary relief to injured individuals. The concerns of state enforcement of federal antitrust laws are equally significant. Firstly, the conflict between federal enforcers and State Attorneys General reduces the legal certainty of enforcement and brings additional costs to businesses. Secondly, it may cause state protectionism. Thirdly, state enforcers do not have the resources to enforce federal antitrust laws. Similar to EU experience, the US also developed a series of mechanisms to encourage cooperation and coordination between federal and state antitrust enforcers to reduce legal uncertainty.

Before applying the above criteria to China's AML 2007's public enforcement regime, the thesis found two features in China that need to be considered during the discussion: 1. Chinese PAEs generally lack resources and capacity to enforce the AML 2007; and, 2. protectionism is a serious matter in China. In the light of EU and US experience the thesis then discussed whether a centralised or decentralised enforcement approach would be more suitable for Chinese AML 2007's public enforcement, given the considerations of the above two features. This chapter further analysed the case allocation mechanism, cooperation and coordination of PAEs and CAEs under the AML 2007.

Chapter 4 seeks ways in which to improve the protection of rights of concerned parties under AML 2007 public enforcement. It firstly examined the rights of concerned parties during the administrative enforcement of Articles 101 and 102 TFEU. The procedural rights of concerned parties under EU competition law include: 1. rights to be heard; 2. right of access to the

¹¹ *United States v. Microsoft Corp.*, 253 F.3d 34, 47 (D.C. Cir. 2001).

Commission's file; 3. legal professional privilege; and, 4. right against self-incrimination. Protection of the right to be heard is recognised as one of the basic principles of EU law.¹² In EU competition law this right is protected by two mechanisms: the reply to the Statement of Objection and oral hearing. The oral hearing procedure has been criticised for lack of independence of the Hearing Officer and the lack of cross examination during the hearing. The right of access to the Commission's file is based on the concept of 'equality of arms'¹³ at common law. It is noteworthy that not all Commission files are accessible. The Commission's internal files, the file which contains business secrets and other confidential information should be kept from disclosure. Legal professional privilege also stems from common law tradition.¹⁴ Notably in EU competition law, this privilege cannot be applied to in-house lawyers. As regards the right against self-incrimination, the Court of Justice (the CJEU) adopts a rather narrow interpretation and confirms that the Commission has the power to obtain 'all necessary information'¹⁵ from the parties concerned but cannot compel the parties to provide answers involving an admission of the infringement which it is incumbent upon the Commission to prove.

The next part of this chapter examined the rights of concerned parties under US antitrust law. There are three kinds of procedure under US antitrust law's public enforcement: the Antitrust Division's criminal enforcement procedure, the Antitrust Division's civil enforcement procedure and the Federal Trade Commission (the FTC)'s civil enforcement procedure. The

¹² See, Protocol No 1 attaches the Charter, to the Treaty of Lisbon (TFEU) and accords it the same status as the Treaty, OJ 2000 C 364, p 1; see also, Article 6(2) TFEU.

¹³ See, E. Toma, 'The Principle of Equality of Arms: Part of the Right to a Fair Trial', (2011) 1(3) *Law Review*, available at SSRN: <http://ssrn.com/abstract=1931999>, last visited on 22/11/2012, 17:06.

¹⁴ I.e., the 'oath and honour' of the lawyer. See, T. Christoforou, 'Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case' (1985) 9(1) *Fordham International Law Journal*, 1-62; at 3.

¹⁵ See, Article 18 of Reg.1/2003.

thesis analysed the rights of concerned parties under the three procedures and summed up five kinds of right of concerned parties: 1. the right to be heard; 2. the right of access to the file; 3. attorney-client privilege; 4. the right against self-incrimination; and, 5. the right against unreasonable search and seizure. Although the procedures of public enforcement of EU competition and US antitrust law are quite distinctive, the types of the right of concerned parties are generally the same, except the right against unreasonable search and seizure under US antitrust law. However, the scope and the way to safeguard these rights differ in the EU and US systems. Firstly, the oral hearing under the FTC's adjudicative procedure is conducted by an independent Administrative Law Judge (the ALJ); while under EU law the Hearing Officer is not as independent as the ALJ. Secondly, in US antitrust law the right of access to the file is safeguarded by its judicial or quasi-judicial procedural requirement and the judiciary; while the right of access to the file under EU competition law is protected by the Commission. Thirdly, attorney-client privilege under US antitrust law applies equally to in-house lawyers¹⁶ while under EU competition law such privilege only holds between client and independent lawyer. Finally, the scope of the right against self-incrimination under US antitrust law is wider than that under EU competition law.

This chapter then turns to China and examines the current position of protection of right of concerned parties under the AML 2007 based on legislation and cases. The concerned parties under the AML 2007 only have two rights: the right to be heard and the right to be informed. In practice even these two rights are not protected. This thesis deems it is necessary to learn from the experience from both the EU and US to give sufficient

¹⁶Although such extension of this privilege is subject to criticisms, see for example, S.R. Weaver, 'Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis', (1997) 46 *Emory Law Journal*, 1023-1052; at 1026-1027.

protection of the rights of concerned parties under the AML 2007. However, several facts related to China should be considered. For example, the AML 2007 has just been enacted and the administrative enforcers (especially the SAIC and the NDRC) have not gained sufficient experience and thus a rigid enforcement policy may be preferable. In addition, the NDRC and the SAIC have met difficulties in investigation in practice with regard to collecting evidence in a secret cartel case.¹⁷ Finally, some rights enshrined in EU and US law are not recognised in China. In the light of above facts, the thesis discussed each right of concerned parties examined above in order to determine what can be learned by the AML 2007's public enforcement regime.

Following the above discussion, it became necessary to propose some recommendations on how to allocate the enforcement authority of the AML 2007 between CAEs and PAEs as well as how to provide sufficient protection of rights of concerned parties under the AML 2007.

1. How to provide transparency of merger control enforcement under the AML 2007

Transparency during the investigative procedure

In order to provide transparency of the merger investigative procedure under the AML 2007, the author argued, the MOFCOM should publish the statistics on investigation as an initial step towards a transparent procedure. The statistics include: the number of notifications received; the number of phase I investigations conducted; and, 3. the number of cases accessed to the second phase investigation.¹⁸ However, mere disclosure of statistics is not

¹⁷ See, the *TravelSky* case, in *The Economic Observer*, 15th, May, 2009.

¹⁸ See, '3.3.2 What can be learned to improve the transparency of Chinese merger enforcement procedure' of Chapter 2.

enough. The MOFCOM should disclose promptly and regularly a summary of information on the notification and the explanation of its decisions on whether to clear a merger or investigate it in the second phase. In this way the public, the potential merging parties and other practitioners could see and evaluate the MOFCOM's enforcement and be given legal certainty and predictability of the MOFCOM's merger enforcement, and thus the merger policy would be better respected.

Transparency of the MOFCOM's decision

In relation to cleared mergers, the MOFCOM should not only disclose the name of the merging parties, but also, as in EU practice, provide more information on the nature of the transaction, a statement of the transaction's competitive impact, and the main reason for offering clearance. Such disclosure is especially important when the MOFCOM clears a merger after the second phase investigation.

Where the decision blocks a merger or clears it with conditions, although the MOFCOM is obliged to publish them timely, the decision itself lacks necessary information especially with regard to the explanation of the definition of relevant market, competitive impact and the remedies. In order to improve the situation, after comparison of *Panasonic/Sanyo*, the author made the following suggestions. Firstly, the MOFCOM should provide the definition of relevant product market and relevant geographic market. Secondly, the MOFCOM should give a sound analysis on the competitive impact of the proposed transaction. Such analysis might include: 1. the market shares and ability of other major competitors; 2. whether the merging parties are close competitors and the reasons; 3. whether the market is growing and the evidence; 4. whether the relevant market is highly concentrated and the reasons; 5. whether new competitors will enter the

market and the reasons. Thirdly, if the decision contains remedies, the MOFCOM should disclose the original remedies proposed by the merging parties and its assessment and an explanation of how the remedies will effectively eliminate the anticompetitive effects brought by the transaction.

This chapter has provided solutions to the two problems of transparency under Chinese merger control procedure: lack of transparency during the MOFCOM's investigation and lack of disclosure of information in the MOFCOM's decisions. The public and practitioners in the market would benefit from a more transparent merger control regime for the increasing of legal certainty and predictability; on the other hand, the improvement of transparency of the procedure would equally help the MOFCOM to establish its credibility when enforcing the AML 2007, especially when it is young and its decisions of which are often suspected of being influenced by the government.

2. How to allocate the enforcement authority of the AML 2007 between the administrative enforcers at central and provincial governmental levels.

A centralised enforcement approach is more appropriate for the AML 2007 at current stage

When considering the advantages and disadvantages of the centralised and the decentralised enforcement approaches summarised from the experience of EU competition law and US antitrust law for the Chinese AML 2007, the thesis concluded that a centralised enforcement mechanism may be more appropriate than the decentralised approach. Firstly, the concerns raised by the centralised enforcement approach faced by the previous EU competition

law regime under Regulation 17/62¹⁹ seem to be less significant in AML 2007's public enforcement since the administrative workload is not so high in China. Secondly, the advantages that a centralised enforcement approach brought are valuable for the enforcement of the AML 2007. For example, it may prevent provincial protectionism in China and guarantee a consistent and unified enforcement of the AML 2007 and thus provide necessary legal certainty. Thirdly, the main concern of a decentralised approach, i.e. reduction of legal certainty and consistency of enforcement, seems to be fatal especially for a new and unfledged competition law regime such as China's AML 2007. Finally, the advantages such as regulatory competition and experimentation that are brought by a decentralised approach to EU and US seem to be less significant to China because of the incapability of the PAEs to enforce the AML 2007.

A specific design of a centralised enforcement approach for China's AML 2007

Given that the above conclusion reached, this thesis provided a specific institutional design of a centralised enforcement approach for the AML 2007. Under this approach the CAEs are the main enforcers of the AML 2007. They may enforce the Law by themselves or authorise the PAEs to enforce it. The AML 2007 is not directly enforceable by the PAEs. Firstly, the PAEs' enforcement actions are supervised by the CAEs. For example, the PAEs should obtain the authorisation from the CAEs before its first formal antitrust investigation; the PAEs should inform the CAEs before taking a decision on enforcement; the PAEs should respect and follow the precedent made by the CAEs. In addition, if the CAEs think that a PAE is not enforcing the AML 2007

¹⁹Since a centralised enforcement approach never existed in US federal antitrust law, the advantages of this approach are mainly based on the examination on the public enforcement of EU competition law under Regulation 17/62.

properly, they may issue a guidance letter to the PAE to help it enforce the Law. Secondly, during PAE enforcement a CAE should have the power to withdraw the authorisation and therefore relieve the PAE(s) of its duty to enforce the Law. However, the CAEs should initiate such proceeding cautiously.

This thesis also argued that China should adopt an *ex ante* notification system is similar to the previous EU notification system under Regulation 17/62. There are four reasons. Firstly, anticompetitive agreements, decisions or concerted practice can be examined before they come into practice; secondly, undertakings or associations of undertakings would be relieved of self-examination of their possible anticompetitive conduct; thirdly, this notification process might spread the sense of antitrust and make the AML 2007 known to undertakings or associations of undertakings and lawyers in China; fourthly, the heavy administrative burden faced by EU competition law's notification system does not exist under AML 2007 enforcement.

Case allocation mechanism and cooperation of PAEs and the CAEs

This thesis further discussed the case allocation mechanism and the cooperation and coordination of CAEs and the PAEs. EU and US systems show that the general principles are: 1. that CAEs should authorise PAEs which stands closest to the centre of gravity of the violation in question to enforce the Law when the suspected violation only has an effect within its territory; 2. if a violation of the Law has a nationwide effect, the CAEs should investigate the case and/or cooperate with the PAEs; 3. If the violation in question is between two or several provinces but do not have a national effect, the PAEs in these provinces should be authorised to enforce the Law in a cooperative and coordinative manner. The thesis also suggested that a Chinese Antimonopoly Network (the CAN) should be established to encourage

cooperation and coordination of CAEs and PAEs. The CAN should have three purposes: 1. to allocate antitrust cases within the network; 2. to exchange information between CAEs and PAEs efficiently; 3. to help the PAEs to enforce the AML 2007 effectively.

To this end this chapter has provided a set of solutions to the second technical problem met by the AML 2007's public enforcement: how to allocate the enforcement authority of the AML 2007 between CAEs and PAEs.

3. How to establish the rights of concerned parties under the AML 2007's public enforcement

Chapter 4 made a series of suggestions to establish the protection of rights of concerned parties under the AML 2007 enforcement regime with reference to EU and US experience. Firstly, in order to provide the protection of the concerned parties' right to be heard, Chinese administrative enforcers should inform the parties of the concerned matters after the investigation by a statement of objection if the investigation may lead to any decision containing sanction. The concerned parties should also be obliged to reply to this statement in order to guarantee this right. In addition, the oral hearing needs to be more impartial. To this end AML 2007 enforcers might consider establishing a designated hearing department which is sufficiently independent of the investigators of the case. The parties concerned in the hearing should also have the right to question the investigators and the evidence against them instead of merely defending themselves. The investigators must answer the questions raised by the parties concerned. Thirdly, the right of access to the file should be given to the concerned parties under the AML 2007, given its importance to the protection of right to be heard. However, business secrets, the administrative enforcers' internal documents and other confidential information should be protected from

disclosure.²⁰ Fourthly, AML 2007 enforcers should permit the protection of legal professional privilege to a limited extent. Such limitations might stipulate: 1. that privileged communication be made for the purpose of protecting the right of concerned parties; 2. legal advice should be given by lawyers who are entitled to practise in China; 3. Chinese in-house lawyers might not claim this privilege; 4. privileged communication should be written and be made after the initiation of investigation. Fifthly, it is too early for the AML 2007 public enforcement regime to adopt the privilege against self-incrimination and the privilege against unreasonable search and seizure. It is recommended that these two privileges should not be applied to the AML 2007's public enforcement until they have been firmly established in Chinese Criminal Procedure Law. Chapter 4 has addressed the technical problem raised in the introduction of the thesis, i.e. how to establish the rights of concerned parties under the AML 2007's public enforcement.

As the three technical problems have been dealt with, the transparency of the merger enforcement has been established; more legal certainty and predictability will be provided to the public and potential merging parties accordingly. In addition, the relationship between central and provincial governmental enforcers has become clearer; case allocation between the CAEs and PAEs has been clearer and more consistent; cooperation and coordination of CAEs and PAEs has been encouraged in a consistent and effective way. Moreover, protection of rights of concerned parties under the AML 2007 has been secured. The thesis has contributed to a more effective, transparent and fair public enforcement procedure under the AML 2007. Chinese legislators and administrative enforcers of the AML 2007 might

²⁰As indicated in Chapter 3 the protection of the administrative enforcers' internal files is conditional. Administrative enforcers of the AML 2007 should assess the risk of disclosure and protection of the concerned parties' right to be heard and provide sufficient reason for denial of access to internal documents. See, '4.3.3 Right of access to the file under the AML 2007', Chapter 3.

consider formulating a specific procedural regulation for the AML 2007's public enforcement to address these problems based on the examinations in this thesis.

The solutions suggested in this thesis may need further analysis. For example, in relation to case allocation between the CAEs and the PAEs, the thesis did not provide a comprehensive discussion of the definition of 'nationwide effect' which is an important factor in case allocation.²¹ In relation to discussion of the rights of concerned parties under the AML 2007's , although it has been argued that it is too early to grant the right against self-incrimination to parties concerned, it has not been suggested when would be appropriate to grant this right.

Although the purpose of this thesis is to examine the technical problems raised by the AML 2007's public enforcement, it has to be accepted that for reasons of space and time this thesis has only focused on three most obvious technical problems. There are other technical problems which may also be comparable to EU competition and the US antitrust law, such as lack of professionalism. The author also believes that with the continuous development of the AML 2007 enforcement, more technical problems will emerge.

Nor does this thesis address the structural problems of the AML 2007. Therefore, in a more general sense, (public enforcement of) the AML 2007 still faces serious challenges. For example, lack of independent and effective judicial review will weaken the effectiveness of the public enforcement regime of the AML 2007 since it is the only external balance within an administrative orientated enforcement mechanism. Moreover the close relationship between AML 2007 public enforcers, sector regulators and SOEs

²¹ See, '4.4 Case allocation between CAEs and PAEs: a basic principle' in Chapter 3.

may weaken public enforcers' incentive to enforce the AML 2007.²² It seems that the structural problems may have a more significant influence on the effectiveness of the AML 2007's public enforcement. However, EU competition law and US antitrust law regimes will not have comparability with regard to such structural problems. To address them, the author considers that it would be appropriate for China to choose competition law regimes which have experienced the transitional period from planned economy to market economy, for example, the competition law regime of Poland²³ or Russia, which would be a totally different topic from that of this thesis. All these show that there is a need for more research on the public enforcement of the AML 2007, to improve it further.

²² For a more detailed discussion on this issue, please see, J.F. Li, 'Sector regulation and Chinese Antimonopoly Law's enforcement structure [产业规制视角下的中国反垄断执法架构, chanyegunzhi shijiaoxiade zhongguo fanlongduafa zhifajiegou]', (2010) 2 *Studies in Law and Business*, 32-43.

²³ For a comparative study of competition laws between China and Poland, please refer to B. Song, 'Competition Policy in a Transitional Economy: the Case of China', (1995) 31 *Stanford Journal of International Law*, 387-422.

APPENDIX: KEY SUBSTATIVE LEGISLATIONS (EXCERPTS)

THE PEOPLE'S REPUBLIC OF CHINA

Anti-Monopoly Law of the People's Republic of China

(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)

Translated by China.org.cn, available at

http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm, last visited on 7th March, 2013.

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.

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 for $1/2$ 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.

THE EUROPEAN UNION

Article 101(ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 (ex Article 82 TEC)

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

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or 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;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

THE UNITED STATES

The Sherman Antitrust Act, 15 U.S.C. §§ 1-7

Section 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Section 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of

the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

The Clayton Antitrust Act, 15 U.S.C. §§ 12-27

Section 3

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 7

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade

Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the

main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

The Federal Trade Commission Act, 15 U.S.C. §§ 41-58

Section 5

(a) Declaration of unlawfulness; power to prohibit unfair practices;
inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a (f)(3) of this title, Federal credit unions described in section 57a (f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227 (b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A) (ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4) (A) For purposes of subsection (a), the term “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

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