

## Law Antimonopoly of China – a Model of European Inspiration

**Cornelia LEFTER**

Bucharest Academy of Economic Studies  
cornelialefter@ase.ro

**Oana OPREA (TEODORESCU)**

Bucharest Academy of Economic Studies  
Oana.Teodorescu@bc1-leasing.ro

**Abstract.** *Globalization of present world economy has not only an economic component but also an important juridical aspect. Many countries are concerned to review or to supplement their internal legislation in order to make it compatible with legal rules that already exist in other countries or geographical zones that, usually, have an important role within their economic exchanges. China represents such an example, a country that, in the last decades, has intensified its commercial exchanges with EU member states. This trend was encouraged by the adoption of the Law Anti-Monopoly in China.*

**Keywords:** globalization; cooperation; competition; concerted practices; economic concentrations.

**JEL Code:** K21.

**REL Codes:** 5D, 17F.

Globalization of present world economy has not only an economic component but also an important juridical aspect. The globalization process impacts both the world economic flow and the implementation of unitary regulations or at least of a harmonized regulatory framework that can sustain the more and more complex economic relationships between the enterprises from different countries. Therefore, more and more countries are concerned to review or to amend their internal legislation in order to make it compatible with legal rules that already exist in other countries or geographical zones that, usually, have an important role within their economic exchanges.

China represents such an example, a country that, in the last decades, has intensified its commercial exchanges with EU member states, as traditional partners within China exchanges.

Moreover, after China became in 2001 a member of the World Trade Organization, its opening to foreign investments increased significantly<sup>(1)</sup>.

In this context, China Anti-Monopoly Law finds its reason of being<sup>(2)</sup>. As we will see, this law has been conceived and based on almost identical principles to the Community right provisions on competition. The law provides, within the Chinese market, action and control mechanisms similar to those regulated by the European treaties, such as: interdiction of the concerted practices<sup>(3)</sup>, interdiction of dominant position abuse<sup>(4)</sup>, mergers and concentrations control (Foster, 2007, p. 161). This similarity emerges, as shown herein<sup>(5)</sup>, in the successful economic cooperation between the European Union and China.

## 1. The bilateral economic cooperation EU-China

The continuous development within the last decades of the commercial exchanges between EU and China permitted the adoption, on the 2003 Summit, of a joint declaration which identified the competition policies as a major interest zone for the two parties. Then, starting 2003, a series of inter-institutional exchanges<sup>(6)</sup> took place between EU and China, mainly aimed at sharing to Chinese partners the expertise and success of European authorities in competition field. The consultations and EU recommendations to China consisted in: setting up clear objectives in China for the competition law and its application regime, establishment of strong and independent state institutions for the control of competition practices and to secure its procedural equity and transparency in approaching competition aspects. In the same line, in 2004 a Dialogue of Competition Policies was opened between Europe and China ([www.europa.eu](http://www.europa.eu)), as a permanent forum of consultation and transparency. Until LAM adoption in 2007, this dialogue pursuit mainly issues related to antitrust,

meaning cross border mergers, public utilities liberalization and state intrusion in market processes, multilateral competition. Official visits, high level idea exchange and consultations between EU representatives (the Director of International Relationships Division of the European Commission or the European Commissary for Competition) and Chinese officials have constituted a real push and support for the adoption of the Anti-monopoly Law in China<sup>(3)</sup>.

Received with encouragement by European officials, the new Chinese law is based on certain key concepts of the European competition law. The goals of this law, as mentioned by article 1, are: to prevent monopolist commercial behaviors, to protect a fair competition on the market and to strengthen its economic efficiency in order to safeguard consumer's interests and the public interest. Thus, article 3 of the law defines as monopolist behaviors incompatible to a normal competition climate, the following: agreements of monopoly type between market operators, abuses of dominant position; economic cluster which eliminate or affect competition, or might eliminate or affect competition on the relevant market). Also, article 4 of the law provides that all economic activities in China may be performed only within the state control and in accordance with the principles of socialist market policies: macro-control and a unified, opened and competitive market system. Therefore, the anti-monopoly practices are controlled by three State agencies: the Trade Ministry (for the mergers control), the National Commission for Development and Reform (for the price related monopolist policies) and the State Administration for Industry and Trade (for agreement between undertakings and dominant position abuse which are not related to price settlement on the market).

## 2. Interdiction of agreements of concerted practices

European Commission regards these practices as ones of the most serious violations of the competition right. The practice shows, at least, at a statistic level, that the majority fields in which such concerted practices occur are: setting up prices on a relevant market, geographical allocation of clients among certain companies, or setting up and limitation of production volumes. Based on these grounds, article 101 TFEU<sup>(7)</sup>, ex-article 81 TCE<sup>(8)</sup> defines these concerted practices and the limits within which they are acting<sup>(9)</sup>.

At European level, the Commission and the competition authorities of the Member States benefit of a series of competences to prevent such anti-competition behaviors, including: fiscal facilities or fiscal reductions for the companies offering information about such anti-competition practices; inspection and control competences; the competence to consistently request

documents and information from the active companies by activity sectors. For instance, in November 2008, the Commission sanctioned<sup>(4)</sup> the enterprises Asahi, Pilkington, Saint-Gobain, S Oliver, in the autovehicles glasses field, imposing the payment of about EUR 1.3 billion as sanction on the participants to such an understanding put into practice with the violation of Art. 101 TCE. The involved parties were found guilty of an illegal sharing of the market and of exchanges of sensitive commercial information about the product deliveries on the relevant market.

As for LAM, these concerted practices or understandings are known as monopoly agreements and are divided as follows:

- *horizontal monopoly agreements*, which, in general, are the equivalent of the concerted practices at European Union level. They relate to agreements between companies aimed at setting up product prices, at limiting production volume and products supply, at sharing the dominant market among them and at restricting research-development activities on the relevant market or even at boycotting certain suppliers, competitors or even clients.
- *vertical monopoly agreements*, regarding the understandings between a company and its commercial partners aimed at setting up reselling prices or to restrict the minimum reselling prices to third parties.

Similar to the European regulations, the articles 53 and 54 of LAM provides a system of facilities and fiscal reductions, or even for the exemption from sanctions application on the companies involved in such a monopoly agreement, but which offered conclusive information and report these prohibited agreements to the competent state authorities. As for their powers, the competent authorities to apply anti-monopoly practices have the following assignments: inspections on the company's premises; requests of information and documents from the involved companies; requests of bank account statements of the companies and requests of information regarding their relations with banking authorities; sealing and retaining the proofs found out; request of relevant documents belonging to the companies, interested parties or even to other relevant entities, or individuals.

### 3. Interdiction of dominant position abuse

According to the European competition law, a company is in a dominant position if its economic power is allowing it to act independently from its competitors and eventually, to its clients (Foster, 2007, p. 161). The dominant position abuse is defined by article 102 TFEU (ex-article 82 TCE)<sup>(10)</sup>.

One of the best known cases in this field is that of the European Commission against Microsoft (<http://ec.europa.eu/competition/antitrust/cases/microsoft>). On this case, the European Commission intervened based on the complaint of Sun Microsystems and after an assessment decided in March 2004 that Microsoft abused of its dominant position on the market of PC operation systems. Consequentially, Microsoft was forced to pay a fine of EUR 497 million for abusing its dominant position on the market of PC operation systems and to disclose the information allowing its competitors to operate and become compatible with Windows.

LAM defines the abuse of dominant position as a market position of a company which can: either control the prices or quantity of products, or any other conditions of the transactions on the relevant market; or to block and affect the access of other companies to the relevant market.

The abusive and thus prohibited practices include: product sales at excessive and unjustified prices; product purchases at unjustified low prices; unjustified refuse to enter commercial relations with certain companies; product sales at dumping prices, also without justification.

In this case, the anti-monopoly authorities have, like EU rules, the discretionary power to establish if the companies have or not a dominant position and if these companies are submitted to a special responsibility (such as that of not abusing their dominant position, so that not to affect or restrict effective competition).

#### 4. Control of company's mergers and takeovers

In the field of company's mergers and takeovers control, EU has a system of previous notifications and there is actually a jurisdiction divided between the Commission and the Member State authorities entitled to apply competition policies.

The mergers of a certain level, with major impact on European and even world economy, fall within the exclusive jurisdiction of European Commission. Such a transaction has to be notified to the Commission, which has about 35 days to clarify its terms and conditions and to make certain recommendations. Only after this period and if the respective mergers prove they do not affect real competition, the Commission starts the actual case analysis. To this end, the Commission has 125 working days to decide about the banning of the transaction or its permission, considering its compliance with competition practices. Usually, the clarification of transaction terms is done during the first phase and the Commission shall not authorize a merger if, its justified

conclusion is that the respective merger has a negative effect on the competition balance ([http://ec.europa.eu/competition/mergers/overview\\_en.html](http://ec.europa.eu/competition/mergers/overview_en.html)).

If the merger has a major significant impact over the intra-community competition, the assessment and decision authority belongs to the Member States' authorities. They can make market analyses and surveys and can impose the terms of a merger, in order to ensure an effective competition, or can even forbid the whole process *per se*.

LAM provides for a pre-notification system of mergers falling within certain value thresholds. In a similar way to EU provisions, the thresholds are set up depending on the respective companies' income. The Decree regarding the Declaration of Thresholds for Economic Clusters was published on August 3rd, 2008, while the China State Council has been empowered to adopt application norms in specific fields such as banks, insurances, goods etc.

Worth mentioning is also that the economic clusters of foreign investing companies in China will be pre-notified in China once they reach the thresholds set up by the above mentioned legislation. The Ministry of Commerce of China can impose specific conditions in this sense, as it happened in the previously mentioned case *Anheuser Busch/InBev*<sup>(11)</sup>.

The standards and thresholds which make such a pre-notification necessary are calculated according to the annual income of the companies involved in the clustering, the same as in EU. In addition to the Community provisions, the Chinese Ministry of Commerce can intervene in the concentrations which do not meet the pre-notification thresholds established if it has justifications to consider the respective concentration might affect competition on the relevant market. The conclusion is that, like in EU, where the previous notifications are actually a competition test, the same is happening in China, but the Ministry of Commerce can justify a transaction not necessarily by the thresholds reached, but due to other reasons, such as the public interest. The Ministry of Commerce has in this way a discretionary power whose application should, on our opinion, make the object of new regulations, also aimed at eliminating abuses on the relevant markets.

Even if, unlike European competition policies, the Chinese ones are in an incipient stage, there is, as mentioned before herein, a significant convergence between the two policy types, both at concept and application level.

Moreover, the fact that the principles and methods of their application are so similar, and sometimes identical, shows once more a successful export of commercial policies of EU, which makes nothing else but strengthens its role of major player on the world economic market.

---

## Notes

---

- (1) European investments on Chinese market exceed EUR 35 billion, most of them after 2001.
- (2) The Anti-monopoly Law or LAM was adopted in August 2007 and entered into force on the 1<sup>st</sup> of August 2008.
- (3) According to Competition, The Law and Leading Lawyers Worldwide, vol. I, Practical Law Company, PLC Cross Border Handbooks, Legal and Commercial Publishing Ltd., 2009, p. 39
- (4) Jurnalul Oficial C173, 25/07/2009, pp. 13-16
- (5) [www.europa.eu/competition/international/bilateral](http://www.europa.eu/competition/international/bilateral)
- (6) Between the European Commission and the Trade Ministry of China.
- (7) Treaty for the functioning of the European Union.
- (8) European Community Treaty.
- (9) Article 101 TFEU provides that:
- (1) Any agreements between companies are incompatible with the domestic market and banned, as well as any decisions of companies' association and any concerted practices which might affect the trade between the Member States and which have as object or effect the hindering, narrowing or distortion of competition within the Common Market and especially those which:
- (a) set up, directly or indirectly, buying or selling prices, or any other trading conditions;
  - (b) limit or control production, trading, technical development or investments;
  - (c) divide the markets or supplying sources;
  - (d) apply, in the relations with commercial partners, unequal conditions for equivalent services, generating in this way a competition disadvantage;
  - (e) condition the contracts signing by the partners' acceptance of additional services, which, by their nature, or according to commercial customs, have no connection to the object of the respective contracts;
- (2) Agreements or decisions banned based on the present article are rightfully null.
- (3) Nevertheless, the provisions of paragraph (1) can be declared as inapplicable in case of:
- any agreements or categories of agreements between companies;
  - any decisions or categories of decisions of companies' association;
  - any concerted practices or categories of concerted practices
- which contribute to the improvement of production or products distribution, or to the promotion of technical or economic progress, also securing the consumers an equitable part of the obtained benefit and which:
- (a) do not impose on the respective companies constraints which are not indispensable for the meeting of those objectives;
  - (b) do not offer the companies the chance to eliminate competition as regards a significant part of the respective products.
- (10) Article 102 (former article 82 TCE) provides that:
- It is incompatible with the domestic market and banned, to the extent in which it can affect the trade between the Member States, the abuse use by one or several companies of a dominating position gained on the domestic market, or on a significant part of it.
- These abusive practices may consist especially of:
- (a) imposing, directly or indirectly, buying or selling prices, or any other inequitable trading conditions;

- (b) limit or control production, trading, technical development to the consumers' disadvantage;
- (c) apply, in the relations with commercial partners, unequal conditions for equivalent services, generating in this way a competition disadvantage;
- (d) condition the contracts signing by the partners' acceptance of additional services, which, by their nature, or according to commercial customs, have no connection to the object of the respective contracts.

<sup>(11)</sup> Anheuser Busch/InBev is the first case where the Chinese Trade Minister published in 2008 a decision in the area of mergers. This case deals with the undertaking of Anheuser Busch by InBev. The Trade Minister stated that the respective undertaking would not affect the relevant market (the beer producers market in China), but imposed some disputed conditions limiting InBev to acquire interest parts in other companies on the relevant market. Thus, InBev was forbidden: to acquire interest parts in two Chinese beer producers – Resources Snow and Beijing Yanjing, to increase the ownership of Anheuser-Busch in another beer producer (Tsing-Tao Brewery) and to increase InBev ownership in another beer producer, Zhujiang Brewery. These restrictions imposed on the future transactions surprised the experts as a competition authority would not normally impose conditions for a future undertaking, but only to the effects of such a concentration on the market. In other words, a competition authority would not normally state unfavorably with respect to a future concentration, unless the respective concentration would negatively impact competition on the relevant market.

---

## References

- Anti-Monopoly Law of China, source: [www.china.org.cn/government/laws/2009-02/10/content\\_17254169.htm](http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm)
- CONCIL REGULATION (EC) No. 139/2004 of January 20<sup>th</sup>, 2004 regarding the control of economic clustering among companies
- Consolidated version of the Treaty regarding the Functioning of European Union (with further amendments made by the Lisbon Treaty)
- Craig, P., De Burca, G. (2009). *Dreptul Uniunii Europene*, Editura Hamangiu
- Foster N. (2007). *EU Law 2007*, Sixth Edition, Oxford University Press 2007, p. 161  
<http://ec.europa.eu/> (*case Microsoft and case Asahi, Pilkington, Saint-Gobain, S Oliver*)
- Online legislative library – <http://www.thefreelibrary.com/>
- Weatherill, St. (2003). *Cases and Materials on EU Law*, 7<sup>th</sup> Edition, Oxford University Press
- Web portal of European Union - <http://ec.europa.eu/>
- Web portal of European Court of Justice - <http://curia.europa.eu/>
- Web portal of European legislation - <http://eur-lex.europa.eu/>
- Web portal of the Government of PR of China: <http://www.china.org.cn/>