opening up to the outside world in 1978. About 40 years ago before 1978, state-owned enterprises and collectively-owned enterprises operated under the state plans and there could be more overlapping enterprises than competition among them. It is fair to say that China did not have the suitable soil to promote competition law until the idea of the socialist market economy was officially put forward to by the Central Government and especially by the Chinese leader, Mr. Deng Xiaoping. The idea of the socialist market economy was formally adopted by Fourteenth National Congress of Communist Party of China in October 1992.[1]

¶1-011 Long Journey of Anti-monopoly Law Legislation

China has started to draft the anti-monopoly law for about 20 years. In August 1987, the State Council established a drafting group to prepare for a comprehensive competition law, i.e., the law deals with both anti-unfair competition and anti-monopoly behaviour. In the next year, the Interim Rules of Anti-monopoly and Anti-unfair Competition (draft) was finished. At that time, an investigation by the national authorities revealed that monopoly was not a typical problem and the serious problem was using unfair methods when engaging in commercial activities. By receiving this feedback, the drafting group was instructed to prepare for two separate laws, i.e., the anti-unfair competition law and the anti-monopoly law.[2] In 1993, the Anti-unfair Competition Law was adopted. In 1994, the Anti-monopoly Law was for the first time being listed in the legislation plan of the Standing Committee of the National People's Congress (NPCSC) but was not formally adopted.

During the 1990s, the NPCSC promulgated other laws, which may involve in issues of antitrust law. For example, the 1993 Anti-unfair Competition Law and the 1997 Price Law were, to some extent, dealing with tying sales, predatory prices and price fixing. Though China did not have a formal and comprehensive anti-monopoly law before 2008, the concept of promoting fair competition was gradually established through the implementation and enforcement of other relevant laws.[3]

In December 2003, the antitrust law was listed in the Tenth NPCSC's legislation plan and was considered as an important legislative project. In 2004, the anti-monopoly law was listed in the legislation plan of the State Council. In February 2005, the anti-monopoly law was again listed in the

[1] Xiaoye Wang & Jessica Su, *Competition Law in China*, Wolters Kluwer, 2012, p19.

[2] 21 Years Journey of the Anti-monopoly Law, http://www.competitionlaw.cn/show.aspx?id=3984&cid=13.

[3] As have been properly observed that "the consciousness of the Chinese people of the importance of protecting fair competition began to form in the 1990s, which was long before the adoption of the AML." Yong Huang and Zhe Zhang, *Study on Frontier Issues and the Future Road of Regulation over Monopoly Agreements in China*, in Michael Faure & Xinzhu Zhang, ed., *Competition Policy and Regulation: Recent Developments in China, the US and Europe*, Edward Elgar, 2011, p45.

legislation plan. In December 2005, the Ministry of Commerce announced that the examination of and the amendment to the drafted anti-monopoly law were quite substantial and it was ready to be submitted. Again in March 2006, the anti-monopoly law was proposed.[4]

As pointed out by some writers, the cause of this long-march legislation was because many ministries or commissions intended to play a leading role in enforcing the anti-monopoly law and none of them would like to give away their roleplaying.[5]

Given the reasons as above, problems relating to monopolistic activities could not be properly resolved for a long period of time.

In Wuhan, the Dongxin Airline Company decided to promote its business by offering the special programmes: (1) "buy tickets of Dongxin and get free travel to Hong Kong and Macau"; (2) "for RMB999, you will get return flight and visit Hong Kong and Macau for 5 days". It was discovered that the quoted prices were RMB700-800 lower than the market prices. Facing the price competition, eight of the biggest airline companies jointly decided not to reduce their prices. Chunqiu Airline later started a "Super Low Price Ticket" campaign. The Aviation Authority issued a notice that prices of airline tickets should not be given at more than 45% discount. To some extent, the price reduction would benefit consumers. However, the Aviation Authority intended to protect the other big airline companies. One scholar criticised sharply and pointed out an ironical situation, saying if eight of the biggest airline companies increased their prices jointly, this will be called monopoly price; if the price is decreased, this will be called predatory price; if the prices are not changed, this will be called concerted conduct.[6]

On 8 August 2006, the Regulations on Merger and Acquisition of Domestic Enterprises by Foreign Investors were issued. Chapter 5 of the Regulations dealt with merger application and examination. The Regulations helped to control the merger activities that might have anti-competitive impact to some extent.

Eventually the Anti-monopoly Law of the People's Republic of China (hereinafter "the AML") was adopted and promulgated by 29th Session of the Tenth NPCSC on 30 August 2007 and was effective from 1 August 2008.[7]

[4] For detailed information, see Xiaoye Wang & Jessica Su, *Competition Law in China*, Wolters Kluwer, 2012, p25.

[5] Wang Shichuan, *Why It Is So Difficult to Put Forward To Reform Plan of Income Distribution?* http://xian.qq.com/a/20100322/000031.htm.

[6] Xue Zhaofeng, *Who Should Be Sued For Price Change?* http://www.enet.com.cn/article/2006/0705/A20060705125164.shtml.

[7] This book adopts English versions of various Chinese laws and regulations from the "pkulaw" database available at http://www.pkulaw.cn/. The author wants to acknowledge the valuable contributions from the pkulaw database.

1. Non-competition Objectives of the AML

It is evident that main objectives of the AML are aligned with the general policies underlying modern antitrust law, but one objective as set out in Article 1 is "to promote the healthy development of the socialist market economy",[35] which has been regarded as a non-competition related objective and as having the overriding effect. The foreign media, scholars and experts like David J. Gerber and Atleen Kaur consider Article 1 as preventing unfettered market competition, and promoting China's objective of maintaining a healthy socialist economy.[36] According to them, it will not be possible to maintain the socialist market economy and at the same time promote market competition through the AML.[37]

Another related concern is the regulation of state-owned enterprises (SOEs). As a transitional socialist economy, the SOEs in China were important players in both the economic market and the everyday life of individual citizens.[38] Because of this, it has been doubted whether the government would seriously apply the AML to SOEs.[39] Article 7 of the AML provides

[35] Article 1 of the AML.

[36] For more than two decades, China has been pursuing what is called a "socialist market economy." This concept is rooted in an ideological framework that generally minimises the intrinsic value of competition. According to the author, competition is valued solely for its consequences, specifically its effectiveness in promoting economic development. For many people, "competition" also has negative associations because prior to 1979 it had long been considered antithetical to the goals of Chinese communism. "Competition" as a value is thus not only burdened with some negative associations, but even its positive valuations tend to be solely instrumental. As a consequence, this rhetorical scheme does not easily value a law that seeks to protect the process of competition other than for purely instrumental reasons. To the extent that this purely instrumental view of the value of competition law predominates, competition has no independent status, and it can thus easily be subordinated to other policy initiatives that may be considered more important for economic development at a particular time. For further information, see David J. Gerber, Economics, Law & Institutions: The Shaping of Chinese Competition Law, *26 Wash. U. J. L. & Pol'y 271*, 291 (2008). See also Atleen Kaur, "Competition Law in the Lands of Tigers and Dragons, A Brief Update on India and China", 87-SEP Mich. B. J.34, 36 (2008).

[37] Atleen Kaur, "Competition Law in the Lands of Tigers and Dragons, A Brief Update on India and China", *87-SEP Mich. B. J.34*, 36 (2008).

[38] June Teufel Dreyer, "China's Political System: Modernization and Tradition", 2nd, Boston: Allyn and Bacon, 1996, pp146-47.

[39] Jare A. Berry, "Anti-monopoly Law in China: A Socialist Market Economy Wrestles With Its Antitrust Regime", *2 Int'l L. & Mgmt. Rev. 129*, 145. Under a policy of seizing the larger SOEs and letting go of the small ones that was introduced in 1997, although the government transformed many SOEs into shareholding enterprises by issuing minority shares to investors, the central government continues to exercise effective control over their operations; hence, they are referred to as state-influenced enterprises. A Western economist described the privatization of the SOEs as more hype than reality. See June Teufel Dreyer, *China's Political System: Modernization and Tradition*, 7th, New York: Pearson Longman, 2000, p175. Thus, SOEs are still principal position in China's economic system. Accurately speaking, the state-owned economy, i.e. the socialist economy with ownership by the people as a whole, is the leading force in the national economy. Article 7, Constitution of the People's Republic of China, Beijing: China Legal Publishing House (Zhongguo Fazhi Chubanshe), 2001.

that the State shall protect SOEs that are critical to China's national economy and security.[40] This provision is suspected for effectively bolstering fair competition.[41] Thus, the underlying suspension is that the socialist market economy cannot really promote a free market economy.

Further, China was accused of allowing administrative monopoly.[42] Administrative monopolies refer to monopolistic activities initiated by government agencies at various levels by abusing their administrative power. The government also sometimes legalises monopolies.[43] Administrative monopolies may include industrial (or sector) monopolies and regional monopolies.[44] Both Eleanor M. Fox and R. Hewitt Pate consider that the administrative monopolies prevent competition and encourage restraints on the market economy,[45] and such monopolies will hinder competition.[46] Although Article 8 of the AML provides that administrative monopolies are prohibited,[47] the Law does not subject administrative monopolies to the jurisdiction of the enforcement authorities. There is no specific sanction to punish those who create administrative monopolies.[48] The actual purpose of Article 8 is, therefore, difficult to understand.[49]

[40] Article 7 of the AML.

[41] Atleen Kaur, "Competition Law in the Lands of Tigers and Dragons, A Brief Update on India and China", *87 SEP Mich. B. J.34*, 36 (2008).

[42] For discussion, e.g. see Sali K. Mehra, Meng Yanbei, Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law, *49 Va. J. Int'l L. 379*, 399-402, 411-423 (2009); Bruce M. Owen, Su Sun, Wentong Zheng, China's Competition Policy Reforms: The Anti-monopoly Law and Beyond, 75 Antitrust L. J. 231, 254-259 (2008), etc..

[43] Youngjin Jung, Qian Hao, "The New Economic Constitution in China: A Third Way for Competition Regime?" *24 NW.J. Int'l L. & Bus.107*, 113 (2003).

[44] Industrial monopoly in some cases refers that industrial conglomerates operating as monopolies or near monopolies (such as China Telecom) have been authorised to fix prices, allocate contracts, and in other ways restrict competition among domestic and foreign suppliers. "Regional monopoly" refers to protectionism by provincial or local authorities to block efficient distribution of goods and services inside of China. Carl W. Hittinger, John D. Huh, "The People's Republic of China Enacts its First Comprehensive Antitrust Law: Trying to Predict the Unpredictable", *4 N.Y.U.J.L. & Bus. 245*, 254 (2007).

[45] Eleanor M. Fox, "An Anti-Monopoly Law For China-Scaling The Walls of Government Restraints", *75 Antitrust Law Journal 173*, 173 (2008).

[46] R. Hewitt Pate, "What I heard in the Great Hall of the People-Realistic Expectations of Chinese Antitrust", 75 Antitrust Law Journal 195, 195-211(2008), at 196.

[47] Article 8 of the AML.

[48] Although Article 51 of the AML simply expresses that where an administrative development or an organisation authorised by laws or regulations to perform the function of administering public affairs abuses its administrative power to eliminate or restrict competition, the department at a higher level shall instruct it to rectify; the leading person directly in charge and the other persons directly responsible shall be given administrative sanctions in accordance with law, no procedures are provided for parties that are substantively damaged by the abuse of administrative to secure relief. See Article 50 of AML.

[49] Thomas R. Howell, Alan Wm. Wolff, Rachel Howe, Diane Oh, "China's New Anti-Monopoly Law: A Perspective from the United States", *18 Pac. Rim L. & Pol'y J.53*, 84 (2009).

century, intellectual property was viewed with deep skepticism.[95] Between 1930 and roughly the mid-1970s, antitrust concerns were ignored by the courts. In a recent article, it has been observed that during this anti-patent era, the US policy-makers and regulators remained largely suspicious of the power of big businesses.[96] The courts generally viewed patents as automatic sources of monopoly power and measures were taken to weaken patent rights[97] — a perspective not entirely dissimilar to that of Chinese officials. The anti-patent stance of the US competition agencies culminated in the promulgation of the Justice Department's so-called "Nine No-Nos," setting forth fee arrangements and contractual restraints that could not be legally incorporated in technology licensing agreements. Some of the Nine No-Nos were similar to the provision termed as "abuse" of IP rights under the AML.[98] Whether this similarity of developments in the US and China is a coincidence or an unavoidable phenomena is difficult to say. While the US experience is a useful reference, China should regulate the relationship between antitrust and protection of the IP rights based on its own economic situation. On 7 April 2015, the SAIC issued the Rules on Prohibiting the Abuse of Intellectual Property Rights to Exclude and Restrain Competition. Detailed issues will be discussed in Chapter 5.

In the EU, the uncertainty of implementing and enforcing the competition law at its initial stage was due to its double objectives: "*On the one hand EEC competition law aimed to promote integration by guaranteeing the proper function of the free market mechanism. On the other hand, freedom of competition did not include those business practices which were capable of dividing the market along national lines, even if such behaviour enhanced competition.*"[99]

Agencies responsible for the enforcement of EC's competition law were difficult to implement the law with certainty since their competition law had multiple objectives. In addition, the legal uncertainties surrounding the implementation and enforcement of the EC competition law could be

[95] See Antitrust Modernization Commission, Report and Recommendations 36 (2007) (quoting Thomas R. Howell, Alan Wm. Wolff, Rachel Howe, Diane Oh, "China's New Anti-Monopoly Law: A Perspective from the United States", 18 Pac. Rim L.& Pol'y J.53, 78 (2009).

[96] Thomas R. Howell, Alan Wm. Wolff, Rachel Howe, Diane Oh, "China's New Anti-Monopoly Law: A Perspective from the United States", 18 Pac. Rim L.& Pol'y J.53, 79-82 (2009).

[97] This situation continued until 2006 when the US Supreme Court ruled in the *Illinois Tool Works Inc. v Independent Ink, Inc.* 547 US 28 (2006) that the presumption of market power of a patent holder should be abolished and a plaintiff alleging an antitrust violation must establish evidence to show the defendant's market power in the patented product.

[98] Ibid.

[99] Rein Wesseling, *The Modernisation of EC Antitrust Law*, Oregon: Hart Publishing, 2002, pp24-25. The leading cases in which these characteristics were reflected were ***Consten & Grunding*** case and ***Omega*** case. See *Consten & Grunding* [1964] OJ 161/2545; Omega [1970] OJ L242/22.

attributed to lacking experience of handling immediate aftermath of the introduction of the competition law.[100]

Given the complex nature of existing monopolies, it is legitimate to ask whether three bureaus in China could effectively enforce the AML. There is no satisfactory answer to the question, whether one-organ-system (the EU Commission) or two-organ-system (the Department of Justice and the Federal Trade Commission) will be more efficient. It may be too early to predict that the three-organ-system in China is or is not a workable choice.[101] On the other hand, it is reasonable for the provinces, autonomous regions and municipalities under the Central Government to take charge of enforcement of the AML (Article 10). China is a large country and it is impossible for the three organs to handle all anti-competition cases. The important thing is to ensure that the bureaus discharge their duties in a transparent and fair manner and provide effective supervision to avoid any local protectionism.

It is understandable that many foreigners expect to see an independent judiciary to be established in the near future. In fact, remarkable progress has been made in this direction by the judiciary itself. During the thirty years of economic reform and open-door policy, substantial judicial reforms have been made, which may be encapsulated in the following two points: (1) a proper relationship between the People's Congress and the judiciary, and between the courts and local governments, have been established to ensure judicial independence; and (2) a proper relationship between the lower courts and the higher courts and jurisdictions of different courts have been established to ensure the effective and efficient adjudication system.[102] The fact that there are cases of judicial corruption cannot be taken to mean that courts are no longer trustworthy. Judicial corruption, nepotism and favoritism exist also in several democratic countries yet one cannot say that the judiciary there is not independent or not trustworthy. Several exceptional cases of judicial corruption do not indicate that the judiciary is not discharging its duties.[103] Moreover, a judge will be seriously punished

[100] Ibid, at17. This phenomenon was similar with the present state of the Chinese society. Competition law is new to China, and thus there are a few experiences for operating the AML, in particular for the administrative enforcement because of the residual influence of the traditional supervision mechanism under centrally planned economic system and the limited "competition culture" in China. For detailed discussion, see David J. Gerber, Economics, "Law & Institutions: The Shaping of Chinese Competition Law", *26 Wash. U. J. L. & Pol'y 271*(2008), and also see Sali K. Mehra, Meng Yanbei, "Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law", *49 Va. J. Int'l L. 379* (2009).

[101] Please also see the discussion in Part Six of Chapter 8.

[102] Zhang Wenxian, "Basic Theory and Practical Progress of Judicial Reform of the People's Court", Law and Social Development, Vol. 3, 2009, pp11-14.

[103] According to Professor Liang Huixing, among those who convicted bribery crimes, 32% of offenders were judges. "Bad circulation of judicial corruption, the trade of power and money eliminating conscience", the source is available at http://global.dwnews.com/news/2009-03-24/4809415.html.

development of market economy and could be considered as a twin laws to promote a fair competition in China.

Through the above discussion, it is clear that the AML will not replace the AUCL even though some provisions of both laws are, to some extent, overlapping with each other.[129] They are different in terms of constituting elements and all provisions of the AUCL could still validly deal with relevant unfair conducts after 1 August 2008, the day the AML was effective.

The next critical issue is how to deal with those overlapping provisions? It is submitted that the overlapping problem may also exist in other jurisdictions. For example, although Germany's competition theory is highly developed, there is an overlapping between anti-unfair competition law and antitrust law, i.e., Article 1 of anti-unfair competition law overlaps with Articles 19 and 20 of Law of Restricting Competition.

The first overlapping is relating to the issue of predatory pricing. Article 11 of the AUCL stipulates that "a business operator shall not sell their commodities at a price below cost for the purpose of excluding his competitors." Article 17(1) of the AML stipulates that "a business operator, who has a market dominant position, shall not sell commodities at a price lower than cost without a reasonable excuse. Otherwise, such a conduct will be regarded as abusing market dominance."

The second overlapping could be seen on the issue of tie-in sale. Article 12 of the AUCL stipulates that "a business operator may not make a tie-in sale against the wish of the buyer or attach other unreasonable conditions." And Article 17(5) of the AML also stipulates that "a business operator, who has a market dominant position, shall not carry out tie-in sale or impose other unreasonable trading conditions without a reasonable excuse."

How should we deal with this overlapping situation? Maybe the simple way is to argue that both the AUCL and the AML were promulgated by the Standing Committee of the NPC and according to the Legislation Law of the PRC. The provisions of the AML shall be prevail over the provisions of the AUCL.[130] However, this kind of argument could be easily defeated by the following reasons. Firstly, both predatory pricing and tie-in sale are considered as unfair competition conducts under either the AUCL or the AML. While the AUCL is targeting these two conducts broadly, the AML

[129] Article 11.1 states that "a business operator shall not sell their commodities at a price below cost for the purpose of excluding his competitors" and Article 12 states that "a business operator may not make a tie-in sale against the wish of the buyer or attach other unreasonable conditions". While Article 11.1 is dealing with below-cost sale, which is overlapping with Article 17.1(2) of the AML, Article 12 is dealing with tying arrangement, which is overlapping with Article 17.1(5) of the AML.

[130] The Legislation Law, Article 83.

is only targeting business operators who have acquired market dominant position abuse their dominance. Secondly, the legal requirements under the different laws are substantially different. Under Article 12 of the AUCL, the tie-in sale is absolutely prohibited while under Article 17(5) of the AML, the accused is allowed to offer justifications. That is why many shop-owners have been sued under Article 12 for engaging in tie-in sales because the condition to establish a case is quite simple. Thirdly, the legal liabilities under different laws will be substantially different. Perhaps this is the most important difference. A smart lawyer must be prepared for advising his/her clients on a proper law.

Therefore, it is fair to say that the promulgation of the AML does not invalidate the AUCL and both laws could be relied on to deal with different illegal conducts.

¶1-050 Part Five: Differences between Economists and Law Persons

When the term "economist" is widely understood, the term "law person" may not be easily appreciated. From a broad sense, the "law person" could possibly refer to people who are engaging in legal study, teaching and research. It is understandable that economists and law persons may view the competition law differently. While the economists may focus on the ability of a firm to keep prices above competitive levels for the foreseeable future, the law persons may focus on the degree of independence and thus equally include concerns about limitation of the market participants' economic freedom.[131] The application of the relevant competition rules requires the law persons to define the boundaries of the relevant market where market power is exercised.[132] Defining the relevant market is the first step and, in many respects, the most important question is how we perform the legal analysis. In fact, the economists' profession has been criticised for having not offered much practical help to the competition lawyers' community in establishing reliable economic criteria allowing a delineation of relevant markets for legal purposes.[133] Therefore, it may be up to law persons to finish this job.

In the US, there used to be a tension between the lawyers and economists as to how FTC resources should be deployed properly. The lawyers were in favor of a reactive approach, which would lead to shorter, easier cases and more frequent litigation. The economists, on the other hand, were generally in favor of the longer and more complex structural cases.[134]

[131] Roger J. Van den Bergh and Peter D. Camesasca, *European Competition law and Economics: A Comparative Perspective*, Thomson Sweet & Maxwell, 2006, p106.

[132] Ibid.

[133] Ibid.

[134] Tim Frazer, *Monopoly, Competition and the Law: The Regulation of Business Activity in Britain, European and America*, Harvester Wheatsheaf, 1988, pp187-188.

straightforward, i.e., if the presumption of Article 19 is established, claimant has no obligation to go back to discuss the factors or elements listed by Article 18. On the other hand, the defendant has to bear the burden to rebut the presumption and this obligation cannot be subrogated.

But interestingly, the Supreme People's Court in *Qihoo 360 Technology Co. Ltd. v Tencent Holdings Limited*[18] stepped into the shoe of QQ and discussed why QQ did not have DMP despite the fact that QQ acquired higher market shares. Firstly, the SPC "creatively" interpreted the relationship between Articles 18 and 19 and pointed out that the determination of the DMP should be based on the comprehensive evaluation of various elements. Secondly, in this case, because the competition within Internet environment had a high degree of dynamic state and the boundary of product market was not clear, the determination of DMP should not directly rely on high market shares but should pay more attention to market entry, market conduct of the operator, the impact on competition and so on. Thirdly, the SPC discussed seven aspects (i.e. the actual market shares of QQ, competition within Internet communication area, the ability of QQ controlling price and amount of product and other trade conditions, QQ's financial and technological conditions, degree of reliance of other operators on QQ, the difficult degree of entering into the market by other operators and QQ's behaviour of demanding its users to choose product between QQ and Qihoo) before reaching the conclusion that QQ did not have DMP.

In fact, all these jobs should be done by QQ and the SPC could only take its position of whether to support QQ's arguments or not. Therefore, regardless how splendid the reasoning was given in the judgment, it may confuse the role played by SPC in the case.

¶2-023 Relevant Geographic Market

On the other hand, relevant geographic market is a scope of geographic areas where consumers can acquire products or services that have a relatively strong substitution relationship. The Guidelines point out that a relevant geographic market shall mean a geographic area where consumers obtain products that are interchangeable or substitutable. These areas compete with each other in a relatively intense manner; therefore, in the process of enforcement of anti-monopoly law, such areas can be regarded as the geographic scope within which operations compete with each other.[19]

According to *Brown Shoe* case, the criteria to be used in determining the appropriate geographic market are essentially similar to those used

[18] The Chinese version of the judgment is available at http://www.pkulaw.cn/fulltext_form.aspx?Db=pfnl&Gid=120856221&keyword=%e5%a5%87%e8%99%8e&EncodingName=&Search_Mode=accurate.

[19] The Guidelines of the Anti-monopoly committee of the State Council on Defining Relevant Markets, 3rd paragraph of Article 3.

to determine the relevant product market. This is consistent with the approaches adopted by Guidelines, i.e. the substitution analysis including both demand-side substation and supply-side substitution.[20]

The *United States v Grinnell Corp* (*Grinnell* Case)[21] is another case that further discusses the issue of relevant market, especially the geographical market. One thing different from the case of *United States v Aluminum Co. of America*[22] is that, in this case, the Court was trying to strike a balance in determining the issue of monopoly. According to the Court in *Grinnell* case, the offense of monopoly under Section 2 of the *Sherman Act* should meet two elements: (a) the possession of monopoly power in the relevant market; and (b) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[23] Because monopoly could also be achieved through efficiency, inventiveness and response to demand,[24] the law should only deal with two aspects of monopolistic conducts, i.e. willful acquisition of monopoly position and illegal maintenance of monopoly power. The *Grinnell* case further indicates that, on the one hand, high share of a market did not itself constitute monopoly; on the other hand, a monopoly would not be recognised if there was no certain share of a market. By abandoning the simple approach in *Aluminum Co.* case (holding monopolizing only based on market share), the *Grinnell* case took a step further by holding that "the percentage is so high as to justify the finding of monopoly. And, as the facts already related indicate, this monopoly was achieved in large part by unlawful and exclusionary practices".[25]

Grinnell case focused more on identification of geographic market. The major method of doing so is to investigate the scope of sales and service provided. Generally speaking, the scope of sales and service provided equals to the relevant product market. Elements affecting the geographic market are mainly cost of transportation, sales model and nature of products. The location of the operator has no direct relationship with the geographic market. This is especially true today following the development of high technology and one could operate his/her businesses at home, which have the impact nationwide, or even worldwide.

Through the relevant cases, one can see a general pattern, i.e. in cases the products are sold in the whole nation or the cost of transportation is not high, courts are more inclined to decide that the geographic market is the

[20] Ibid, Articles 4, 5 and 6.

[21] 384 US 563 (1966).

[22] 377 US 271 (1964). This case will be discussed in Chapter 4 of this book.

[23] 384 US 563, 570-571 (1966).

[24] Tim Frazer, Monopoly, Competition and the Law: The Regulation of Business Activity in Britain, European and America, Harvester Wheatsheaf, 1988, p9.

[25] Ibid, at 576.

activity and its plan to integrate the Kinney stores into its operations. The competition affected thereby would be in the line handled by these stores which was the full line of shoes manufactured by Brown. On the other hand, Justice Harlan held the view that due to the flexibility of manufacture, the product market with respect to the merger between Brown Shoe's manufacturing facilities and Kinney's retail outlets might more accurately be defined as the completed wearing-apparel shoe market, combining in one of the three components which the District Court treated as separate lines of commerce.[34] He further pointed out that such an analysis, taking into account the interchangeability of production, would seem a more realistic gauge of the possible anticipative effects in the shoe manufacturing industry of a merger between a shoe manufacture and a retailer.[35]

It is important to note that the determination of relevant product market is crucial but not easy. Whether it is necessary to further determine the submarket may have different consequences to different shoes producers. For example, if one enterprise only produce one type of shoes, it is reasonable to determine submarket. However, in the *Brown Shoe* case, the consequence would be the same even without a further determination of submarket. In this circumstance, it may be more accurate to follow Justice Harlan's suggestion.

This case is still a unique one because Justice Warren determined geographic market based on vertical merger (the merger between manufacturer and retailers) and horizontal merger (the merger between manufacturers or between retailers). In the situation of vertical merger, the geographic market was the whole nation while in the situation of horizontal merger, the geographic market was every city with a population exceeding 10,000 and its immediate contiguous surrounding territory in which both Brown and Kinney sold shoes at retail through stores they either owned or controlled.

This division has a pragmatic significance. In the situation of vertical merger, the probable effect of the merger must be examined within the entire nation. First, in 1955, the date of this merger, Brown Shoe was the fourth largest manufacturer in the shoe industry with sales of approximately 25 million pairs of shoes and assets of over US$72 million while Kinney had sales of about 8 million pairs of shoes and assets of about US$18 million. Thus, in this industry, no merger between a manufacturer and an independent retailer could involve a larger potential market foreclosure. Moreover, it was apparent both from past behaviour of Brown and from the testimony of Brown Shoe's president, that Brown Shoe would use its ownership of Kinney to force Brown's shoes into Kinney stores.[36] Secondly,

[34] Ibid, at 367.

[35] Ibid.

[36] Ibid, at 332.

there was a trend toward concentration in the industry, i.e., the tendency of the acquiring manufacturers to become increasingly important sources of supply for their acquired outlets.[37] In other words, where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns product the entire supply.

In the situation of horizontal merger, the geographic market was those cities with a population exceeding 10,000 and their environs in which both Brown and Kinney retailed shoes through their own outlets. Concerning the merger of two manufacturing facilities there was no substantial lessening competition. May be it was because of the small market share of Kinney (ranked 12). However, in the area of retail the situation was quite different. In 118 separate cities the combined shares of the market of Brown Shoe and Kinney in the sale of one of relevant lines of commerce exceeded 5%. In 47 cities their share exceeded 5% in all three lines. If a merger achieving the control of 5% was approved, the Court might be required to approve future merger efforts by Brown Shoe's competitors seeking similar market shares.[38] The oligopoly situation would then be furthered. In addition, as a result of this merger, Brown Shoe moved into second place nationally in terms of retail stores directly owned. Including the stores on its franchise plan, the merger placed under Brown's control almost 1600 shoe outlets, or about 7.2% of the Nation's retail "shoe stores" and 2.3% of the nation's total retail shoe outlets.[39] The Court therefore must follow the mandate of Congress that tendencies towards concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cites at a time.

There is one more important thing needs to be noted from the *Brown Shoe* case. Through the discussion of Justice Warren, one could clearly see the legislative intention of the antitrust law: the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy because there was evidence of the danger to the American economy in unchecked corporate expansions through mergers. On the other hand, there was a need to retain "local control" over industry and to protect small businesses. The *Clayton Act* did not prohibit mergers in two situations, i.e., a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market or a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market. The protection of consumers' interest may not be the major intention initially. For example, Justice Warren had

[37] Ibid.

[38] Ibid, at 343.

[39] Ibid, at 345.

(Meizhiyuan), Huiyuan and Tinghsin with market share of 21%, 20%, 15% and 16% respectively.[61] According to Euromonitor International, Huiyuan's fruit juice products took up 10.3% and was ranked number one in this market, while Coca-Cola's sub-brank "Mei Zhi Yuan/Minute Maid" took up 9.7% and was ranked number two.[62] Further, Huiyuan's market shares in the submarkets, i.e., pure fruit juice market and low concentrated fruit juice market are more substantial in this case. According to Huiyuan's own data released on 30 June 2008, it had 43.8% in pure fruit juice market and 42.4% in low concentrated fruit juice market.[63] According to a third set of data provided by Beijing Orient Agribusiness Consultant (BOABC), in 2007, the sales volume of Coca-Cola and Huiyuan were respectively 15.04% and 13.96% of the fruit juice market shares and were placed as second and third.[64]

Those data could not be the same simply because different institutions used different references and standards. However, the data can be taken for the purpose of reference. In the following part, the data of AC-Nielsen would be used to illustrate the issue of market concentration.

3. Market Concentration

The purpose of regulating merger and acquisition by antitrust law is to prevent the reduction of number of competitors in the same market. The prevention of market concentration is the main objective of an antitrust law by examining the concentration ratio. Certainly, there are many ways to calculate the ratio. The most popular one that is widely used in the US and the EU today is the Herfindahl-Hirshmann-Index (HHI).[65] Generally speaking, the HHI is calculated by summing the squares of the individual market shares of all market participants. According the Guideline, an HHI score below 1,000 is non-concentrated, between 1,000 and 1,800 is moderately concentrated, and above 1,800 is concentrated with 10,000 being a monopoly. The post-merger standards are largely the same except that incremental criteria are added.[66] Now taking the data of AC-Nielsen as one example, it is possible to calculate the HHI. According to one author, since the market shares of Uni-President, Cola-cola, Huiyuan and Tinghsin have already known (21%, 20%, 15%, and 16% respectively), the rest of

[61] Huang Xian Yu, "Huiyuan's Acquisition by Coca-Cola in PRC – Case Analysis", Journal of Economics, Business and Management, Vol. 3, No. 2, February 2015, p271.

[62] Observation on the Coca-Cola/Huiyuan Acquisition Case: Will There be an Monopoly in the Fruit Juice Market? at http://money.163.com/09/0318/18/54N7HDU7002524TH.html.

[63] Observation on the Coca-Cola/Huiyuan Acquisition Case: Will There be an Monopoly in the Fruit Juice Market? at http://money.163.com/09/0318/18/54N7HDU7002524TH.html.

[64] Ibid.

[65] Shan Hao, *The Practice4 of M&A under Anti-monopoly Law: Legal Interpretation, Case Analysis and Operational Guidance for Undertaking Concentration*, Law Press China (Beijing 2008), pp135-136.

[66] Huang Xian Yu, "Huiyuan's Acquisition by Coca-Cola in PRC – Case Analysis", Journal of Economics, Business and Management, Vol. 3, No. 2, February 2015, p273.

the market share of 28% could be assumed to be shared equally between 7 manufacturers (4%@7 = 28%) in order to see the HHI:

The estimated HHI before the merger is therefore

$21^2 + 20^2 + 15^2 + 16^2 + 7 \times 4^2 = 1210$

The market share of Coca-Cola after acquisition is

$20 + 15 = 35\%$

The estimated HHI after the merger therefore is

$21^2 + 35^2 + 16^2 + 7 \times 4^2 = 2034$

Thus, "it can be seen that before the acquisition, the juice market is a moderate concentrated market (HHI between 1,000 and 2,000) according to the definition of US and EC guidelines. After the acquisition, the juice market becomes highly concentrated and the significant change in HHI makes its presumption of market power".[67]

Yao Jian, spokesman of the MOFCOM said during the news conference that the MOFCOM had also taken into account Coca-Cola's competitive edge regarding finances, brand, management, marketing, etc. before coming to the conclusion that Coca-Cola possessed a dominant market position.[68] Even if his conclusion was right, it should be more reasonable if he could reveal the concentration ratio.

4. Coca-Cola's Influence-Leverage Effect

Yao Jian further mentioned that carbonated beverage and fruit juice beverage belonged to two separate but adjacent markets. In addition to its dominance over the carbonated beverage market, Coca-Cola would enhance its competitive edge and influence over the fruit juice beverage market after successfully acquiring Huiyuan. Exploiting its superiority in the carbonated beverage market, Coca-Cola might effectively leverage its dominance over fruit juice beverage market.[69] In other words, Coca-Cola would tie and bundle carbonated beverage with fruit juice beverage by means of promotion, or by making use of consumers' brand loyalty or preference.[70]

[67] Ibid.

[68] Yao Jian Answered Question During News Conference concerning antitrust review of the merger between Coco-Colar and Huiyuan, at http://www.gov.cn/gzdt/2009-03/24/content_1267595.htm.

[69] Ibid.

[70] Susan Nign, In Defense of the Coke Huiyuan Decision, http://www.chinalawinsight.com/2009/04/articles/international-trade/in-defense-of-the-coke-haiyuan-decision/.

¶3-010 Part One: Scope of Monopoly Agreements

¶3-011 General Introduction

What are monopoly agreements and what are the purposes of regulating monopoly agreements? The AML gives only a broad concept of monopoly agreement. According to Article 13 of the AML, monopoly agreements refer to agreements, decisions or other concerted behaviours that may eliminate or restrict competition. When agreements and decisions are understandable, the concerted behaviours are a bit difficult to understand and deserve more discussion below.

Before there is a further interpretation of this provision, it is necessary to know that in different counties or regions, people may address "monopoly agreements" differently. It is called "agreements restricting competition" in the EU; it is called "Cartel" in Germany; it is called "conspiracy or collusion" in the US; and in Japan, it is called "unfair trade restriction". Regardless which name is used, it is important to know that all those names share the same context, which will be discussed below.

Under the AML, there are three parts of provisions dealing with monopoly agreements: (1) Article 3(1) states that to reach monopoly agreements between business operators is a monopoly practice, which will be covered by the AML; (2) Chapter II specifically deals with horizontal monopoly agreements and vertical monopoly agreements, as well as exemptions; and (3) Article 46 stipulates the legal responsibilities of forming monopoly agreements, while Articles 55 and 56 generally exempt the exercise of intellectual property rights and agreements concerning agricultural sector.

Chapter II of the AML should be the focus here. Chapter II has four provisions, and the way of writing is much similar to Article 81(1) of the Treaty Establishing the European Community, which prohibits all agreements, decisions and concerted practices, and provides four exemptions (i.e. to improve the production; or to improve the distribution of goods; or to promote technical; or to promote economic progress).

Monopoly agreements can be generally proved by showing the existence of oral or written agreements. However, according to relevant laws, monopoly agreements could exist when there are concerted actions. The typical example is that gas stations in the same area increase prices simultaneously and people suspect the existence of concerted actions. In the case of *Monsanto Co. v Spray-rite Svc. Corp.*, the Court offered a useful guidance, i.e. in order to prove the existence of concerted price fixing, the plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that

the doctrines will be seriously eroded.[1] In practice, trial courts will usually consider three elements: (1) whether the market conducts of undertakings are uniform; (2) whether there is any intention of contact or information exchange among the undertakings; (3) whether the undertakings can provide a reasonable justification for the uniformity of conduct. The market structure, competitive conditions, changes in the market, industry condition and so on should be considered in finding the concerted practice.[2] This is a complicated issue and in the relevant part of this chapter, and more discussion will be arranged.

Sometimes, a monopoly agreement is so obvious simply because it has been done through relevant meetings. On 26 December 2006, the World Instant Noodle Association China Association held its First Session of 8th Summit in Beijing and decided the times and procedures of increasing prices for different quality noodles. On 21 April 2007, the World Instant Noodle Association China Association held the First Session of 9th Summit and decided that high price noodle would be increased from RMB1.5 per pack to RMB1.7 per pack and the price increase would be implemented from 1 June 2006 by the whole industry. On 5 July 2007, the World Instant Noodle Association China Association held a meeting again to discuss the prices and some members proposed to increase the price for all noodles. On 23 July 2007, the head of the association released the news about price increasing. Subsequently, the NDRC stepped in to investigate the case and ordered to stop the price increase.[3] Even though this case was happened before the promulgation of the AML, the monopoly agreements were considered illegal under the PRC Price Law.[4] The first case, which was handled after the promulgation of the AML was reported on 2 March 2010 by the *Legal Daily*. In Lianyungang, Jiangsu Province, a business association, together with other five enterprises, made "industrial self-regulatory provisions" and "rules of supervision and punishment" to divide markets and to fix prices. The Bureau of Administration for Industry and Commerce of Jiangsu Province confiscated the illegal income in the amount of RMB 136,481.21 and imposed fine in the amount of RMB 530,723.19. None of the six parties concerned had appeal the decision.[5]

[1] *Monsanto Co.*, 465 US 752, 763 (1984).

[2] Article 3 of Rules of AIC on Prohibition of Monopoly Agreements issued on 31 December 2010.

[3] http://www.tzjiuge.com/news_details.asp?articalid=651.

[4] Article 14 (1) of the Price Law of the PRC states that the operators shall not commit the manipulation of market price in collusion to the detriment of the lawful rights and interests of other operators or consumers.

[5] One Association and 5 Undertakers in Lianyungang Were Fined for Their Monopoly Agreement, at http://www.legaldaily.com.cn/bm/content/2011-03/03/content_2493926.htm?node=20734 (19 June 2015).

they are large enough, can insulate retailers from competition by eliminating nearby competitors as well as preventing entry.[43]

	Distinction		
Types	Subject	Degree of harm	Any positive effect
Horizontal Monopoly Agreement	Among competitors	High	No
Vertical Monopoly Agreement	Between operators who have buying and selling relationship	Low	Yes

It is important to examine the market position of parties who formed vertical agreements. Usually, a vertical agreement may have a problem only if one of the parties (in general the supplier) has acquired a DMP. Whether a vertical agreement violates the AML should be largely depended on market power of the parties. Only when parties to the agreement have appreciable market powers or own relatively large shares in the market, will people worry about the possibility of maintaining high monopoly price. This conclusion can be supported by the following statement made by the EU Commission in Guidelines on Vertical Restraints published on 5 October 2010: "For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power on the level of the supplier or the buyer or on both levels. Vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies."[44]

In order to determine whether a vertical agreement can survive challenges under the AML, it is necessary to consider the degree of market concentration, the degree of competition and the difficulty of market entry. It is also necessary to pay attention to the cross elasticity of the demand between the product itself and the substitutable products. Usually, if the elasticity is relative lower, or the substitutability is lower, then a vertical agreement can be considered as creating some negative effects.

[43] Konkurrensverket/Swedish Competition Authority, "The Pros and Cons of Vertical Restraints", 2008, at http://www.google.com.hk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CEMQFjAH&url=http%3A%2F%2Fkonkurrenceafgorelser.dk%2Fsites%2Fdecisions%2Ffiles%2Fdecisions%2Frap_pros_and_cons_vertical_restraints_0.pdf&ei=5ECFVfP6A6a3mwXI7ZmwDw&usg=AFQjCNGryT_VvM4XHqqtcu0qfBNaQl2RHA.

[44] The document in English is available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010SC0411.

¶3-017 Non-price Vertical Agreement v Price Restriction Vertical Agreement

The AML does not further divide vertical agreements into non-price vertical agreements and price restriction vertical agreements. In fact, the distinction is meaningful. The non-price vertical agreements[45] usually do not have negative impact. Instead, it would improve the service quality and perfect the sales procedures. In the case of *Monsanto Company v Spray-rite Service Corporation*,[46] the US Supreme Court stated clearly that the non-price vertical agreements "are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition".[47]

In comparison, the price restriction vertical agreements will be subjected to high scrutiny and can be further divided into maximum price restriction agreement and minimum price restriction agreement. Generally speaking, maximum price restriction agreements may be good to consumers while minimum price restriction agreement may have certain negative impacts. In practice, it should be analysed on a case by case approach.

In the US, the attitude of courts towards these two types of agreement is different. In the case of *Monsanto Company v Spray-rite Service Corporation*,[48] the US Supreme Court discussed the issue of vertical price restrict, which happened between Monsanto Company and its distributors. According the Court, vertical price-fixing was an agreement between a supplier and a dealer that fixes the minimum resale price of a product, which was a clear-cut antitrust violation. Nowadays, the situation has changed and the US courts have adopted the rule of reason to deal with minimum resale price agreements.

On the other hand, agreements on maximum resale prices would be evaluated under the "rule of reason" standard because in some situations these agreements could benefit consumers by preventing dealers from charging a non-competitive price. In fact, the Court had changed its position in *Albrecht v Herald Co.*,[49] where it branded maximum retail price fixing unlawful per se. In *Albrecht* case, a newspaper publisher granted exclusive territories to independent carriers on the condition that they adhere to a maximum price for resale of newspapers to the public. In its decision, the Court expressed concern that vertical maximum price fixing could allow

[45] For example, a manufacturer may impose a certain measure of uniformity and quality standardization on his distributors or retailers for the purpose of enabling him to create a brand image and to attract consumers.

[46] 465 US 752 (1984).

[47] Ibid, at 761.

[48] 465 US 752 (1984).

[49] 390 US 175 (1968).

reinsurance boycott and thus loss of income to the agents and brokers who would be unable to find available markets for their customers. General RE was alleged to have agreed to either coerce ISO to adopt demands or failing that derail the entire CGL forms-even forms having no objectionable terms.[100]

In fact, the final result was the same whether under Justice Souter's board definition or Justice Scalia's narrow definition. The allegations were sufficient and the defendants constituted boycott.

¶3-024 Market Division

Article 13.1(3) of the AML states that competing undertakings are prohibited from concluding the monopoly agreement on splitting the sales market or the purchasing market for raw and semi-finished materials. This provision again is too simple.

In fact, market division is an indirect way to fix price because it avoids competitions from other competitors, as well as price competition from other competitors. Thus, the price formed does not reflect true competition and market price. Usually, market division has three forms, i.e. division of geographic area, division of consumers and division of products.

In the case of *Palmer v BRG of Georgia, Inc.*,[101] one important issue was discussed, i.e. whether an allocation of markets or submarkets by competitors is not unlawful unless the market in which the two previously competed is divided between them?

In that case, both respondents, BRG of Georgia, Inc. (BRG) and Harcourt Brace Jovanovich Legal and Professional Publications (HBJ), entered into an agreement under which BRG was given an exclusive license to market HBJ's trade name; HBJ agreed not to compete with BRG in Georgia, and BRG agreed not to compete with HBJ outside the State; and HBJ was entitled to receive $100 per student enrolled by BRG and 40% of revenues over $350. Immediately after agreement was signed, the price for BRG's course increased from $150 to $400. Petitioners sued both respondents alleging that BRG's price was increased by reason of the agreement in violation of Section 1 of the *Sherman Act*. The District Court held that the agreement was lawful, and the Court of Appeals affirmed. Both courts held that an allocation of markets or submarkets by competitors was not unlawful unless the market in which the two previously competed was divided between them.[102] The US Supreme Court reversed and remanded the judgment.

[100] Ibid, at 810-811.

[101] 498 US 46 (1990).

[102] Ibid, at 47-48.

The Supreme Court held that the agreement was unlawful on its face. The agreement's revenue-sharing formula, coupled with the immediate price increase, indicated that the agreement was "formed for the purpose and with the effect of raising" the bar review course's prices in violation of the *Sherman Act*. Furthermore, agreements between competitors to allocate territories to minimise competition are illegal regardless of whether the parties split a market within which they both did business or merely reserved one market for one and another for the other.[103]

¶3-025 Bid-Rigging

Article 13 of the AML is silent on bid-rigging issue. Maybe Article 13.1(6) could be helpful for regulating this type of conduct. On the other hand, the bid-rigging conducts could be dealt with by other relevant laws. For example, Article 15 of the AUCL, which states "bidder shall not act in collusion for bidding, or in collusion for not raising or reducing the bidding price. Bidder shall not collude with the company that is offering to bid in order to put the other bidders out of the competition." Both the Bidding Law of the People's Republic of China[104] and the Regulations on the Implementation of the Bidding Law of the People's Republic of China (the Implementing Regulations)[105] deal with bid activities specifically.

According to Article 39 of the Implementing Regulations, it shall be deemed as bidder collusion under any of the following circumstances: (1) bidders negotiate with each other on setting bidding prices or any other substantive content of the bidding documents; (2) bidders agree on the bid winner; (3) bidders agree beforehand that some bidders abandon bidding or win the bid; (4) bidders of the same group, association, chamber of commerce or any other organisation collaborate with each other in bidding by demand of such organisations; or (5) bidders take other joint actions for the purpose of winning bids or excluding specific bidders.

According to Article 40 of the Implementing Regulations, it shall be deemed as bidder collusion under any of the following circumstances: (1) bidding documents of different bidders are prepared by the same entity or individual; (2) different bidders entrust the same entity or individual to handle bidding matters; (3) the project manager indicated in the bidding documents of different bidders is the same person; (4) bidding documents of different bidders are abnormally consistent or there are regular differences in the bidding prices; (5) bidding documents of different bidders are mingled with each other; or (6) bid bonds of different bidders are transferred from the account of the same entity or individual.

[103] Ibid, at 49-50.

[104] It was adopted by the Standing Committee of the Ninth National People's Congress at the 11th Session on 30 August 1999.

[105] It was adopted at the 183rd executive meeting of the State Council on 30 November 2011 and came into force on 1 February 2012.

agreements could be taken out of prohibition by Articles 13 and 14, but they still need to prove that relevant agreements will not affect competition, as well as consumers' benefits. Thus, by requiring plaintiff to bear additional burden of proof, it actually render Article 15 less meaningful or more burdensome.

3. How to Interpret One Key Fact?

Experts of both parties confirmed that the price of J&J's products had not been changed basically within 15 years. However, experts of appellant interpreted this fact as J&J having market power to fix the price, i.e., J&J initially charged high price from those who had strong capacity of consumption and then gradually reduced price in order to attract more consumers. On the other hand, experts of respondents interpreted this fact as reduction of price by taking into consideration elements including inflation. This may imply that J&J had to do so because of high competition in the relevant market.

The Higher Court was on Appellant's side. It held the view that even though there were rivals entered into this market continuously, the fact that J&J could keep price unchanged within 15 year showed that J&J had a strong power to fix the price. It went on saying that, based on a general experience, if in a market with adequate competition, all undertakings were acceptors of price competition and were unable to keep price unchanged within a long period of time. The fact that J&J could keep price unchanged within 15 years could also prove that staplers market was the market of lacking of competition.

4. Is Rainbow a Proper Plaintiff?

The legal status of the plaintiff (appellant) is another critical issue. The defendant (respondent) argued that the plaintiff did not have a standing in this case because the plaintiff was also the party of the vertical monopoly agreement. The defendant cited Article 1 of the AML and argued that the Law protects only the interests of consumers and society as a whole and it did not protect the interests of participants or implementers of a monopoly agreement. In other words, the proper plaintiffs should be competitors or consumers whose interests had been infringed upon.

The Higher Court held that Rainbow was a proper plaintiff in this case for the following three reasons.

(1) Since Rainbow was the party of the agreement of restricting minimum resale price (MRP), it might lose partial customers and profits if it did not give the chance to resale products below the MRP because of implementation of the agreement. In addition, Rainbow might suffer loss due to the punishment for breaching MRP. Thus, the party of a monopoly agreement could be a

participant or an implementer but at same time the victim of the agreement, who could rely on Article 50 of the AML to sue. If Rainbow was refused to sue its civil rights would not be protected.

(2) Rainbow should be allowed to sue in accordance with Article 50 of the AML because the legislative purpose was to prevent and restrain monopolistic conducts, protect fair market competition, and safeguard the interests of consumers and public interests. Since it is very difficult for other parties (including consumers) to know the concrete situation of a monopoly agreement, such agreement could not be restrained if the party who knew the inside information and held relevant evidence was not allow to sue.

(3) Article 1 of the SPC Judicial Interpretation of the AML states that "civil dispute cases arising from monopolistic conduct" should mean civil lawsuits filed with the people's courts by natural persons, legal persons, and other organisations for disputes over losses caused by monopolistic conduct or violations of the AML by contractual provisions, bylaws of industry associations, and so on. In this case, Rainbow sue J&J because there were disputes between two parties about whether the content of the resale agreement violated the AML. Rainbow therefore must be the proper plaintiff to sue.

5. What Are Legal Status of Expert Views?

Article 13 of the SPC Judicial Interpretation of the AML states:

"A party may apply to the people's court to employ a professional institution or professionals to produce market investigation or economic analysis reports on special issues of a case. With the permission of the people's court, both parties may, by consultation, determine the professional institution or professionals; and if such consultation fails, the people's court shall designate the professional institution or professionals.

The people's court may examine and assess the market investigation or economic analysis reports as mentioned in the preceding paragraph by referring to the provisions of the Civil Procedure Law and relevant judicial interpretations regarding identification conclusions."

This provision states clearly that the people's court may treat the market investigation or economic analysis reports as identification conclusion (identification opinion[113]), which is a type of evidence in accordance with Article 63.1(7) of the PRC Civil Procedure Law. However, according to

[113] The PRC Civil Procedure Law was amended on 31 August 2012 and the term "identification conclusion" (Jianding Jielun) was changed into "identification opinion" (Jianding Yijian).

selling their products below cost and will raise prices above a competitive level.

- The second period saw the publications on predatory pricing by two eminent antitrust scholars in 1975. Harvard Law School Professors Donald F. Turner and Philip Areeda observed that predatory pricing was not common and proposed a cost-based rule for determining whether a pricing strategy is predatory or not. In fact, their theory substantially changed the general attitude towards the predatory pricing in the US.

The approach of Professors Donald F. Turner and Philip Areeda was in fact adopted by the US Supreme Court in Brooke Case. In fact, this case is important for several reasons: (1) the Court noted that predatory pricing was generally implausible. Justice Kennedy, writing for the Court, noted earlier authority that concluded "predatory pricing schemes are rarely tried"; (2) the Court stated that only truly below costs sales ought to be treated as predatory; (3) the Court held that plaintiff must prove the likelihood that the alleged predator will be able to later recoup the losses associated with its predatory pricing. When facing these requirements, plaintiff is generally unable to satisfy them.

Based on the review of the US experience, it is possible to make three points here. First, the US judiciary has focused more and more on the consumer protection rationale for antitrust. Second, the US judiciary has focused on the maintenance of the competitive process rather than the protection of competitors. Third, the predatory pricing should still be regulated by antitrust law, but careful evaluation must be conducted in order to protect a fair competition and legal interest of consumers.

No case so far has been dealt with under Article 17(2) of the AML. This book suggests that courts should follow the consumer protection rationale and deal with predatory case prudently and wisely.

3. Refuse To Deal

Article 17.1(3) states that undertakings holding a dominant market position are prohibited from refusing to enter into transactions with their trading counterparts without justifiable reasons. It has been said that "refusal to deal is generally considered abusive, as it limits the customers' activity and prevents access of other competitors to the market of a certain product or service".[37]

[37] Irene Grassi and Kanzlei Derra, Refusal to Supply and Abuse of Dominant Position in European Antitrust Law: an Analysis of the Case Law of the Court of Justice, at http://www.google.com.hk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBsQFjAA&url=http%3A%2F%2Fwww.derra.eu%2Fdateien%2Fpublic%2Fpublikationen%2Fpublikation160.pdf&ei=woWSVbGnMeTVmgWdrIPgBQ&usg=AFQjCNELzA_VSZGChF3zzYfxd1Kn20SYzA.

Broadly speaking, refusal to deal shall include both refuse to supply and refuse to purchase. However, the AML will mainly target the situation of refusal to supply because an undertaking with dominant market position usually can control crucial products and the refusal to supply would affect the daily life and social stability. On the one hand, it is true that the principle of freedom of contract should be respected. On the other hand, the AML must prevent undertakings with dominant market position from abusing this principle and refusing to supply relevant products.

Two types of undertakings may be possibly accused for refuse to deal. The first type is relating to industries that have a bearing on the lifeline of the national economy or national security. For example, undertakings listed under Article 7 of the AML need to be aware of this situation. The second type is relating to IP holders who have their exclusive right of intellectual properties. This will be discussed in detail in Chapter 5.

The AML does not mention the concept of boycott which is also a kind of refusal to deal. For detailed discussion of boycott, please refer to Chapter 3 of this book.

4. Restriction to Deal

Article 17.1(4) states that without justifiable reasons, undertakings holding dominant market positions are prohibited from allowing their trading counterparts to make transactions exclusively with themselves or with the undertakings designated by them. This type of conduct is usually seen in the cases of abusing IP right. For detailed introduction, please see Chapter 3.

5. Tying Arrangement

Tying arrangement is generally an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he/she will not purchase that product from any other supplier.[38] This may happen only if an undertaking has acquired the true market power in the tying product market, which will enable him to leverage that power into a second product market and to successfully block the entry of the second market by his rivals.[39] Other harms of tying arrangements are that: (1) they may be used to evade price control in the tying product through secret transfer of the profit to the tied product; (2) they may be used as a counting device to effect price discrimination; and (3) they may be used to force a full line of products on the customer so as to

[38] *Eastman Kodak Co. v Image Tech Svcs.*, 504 US 451, 461 (1992).

[39] Ibid, at 492.

¶5-011 The Antitrust Investigations

This part will start with three cases where three foreign firms, i.e., Inter Digital Inc., Qualcomm and Microsoft, were under investigation by the authorities in China.

Inter digital Inc. (IDC) is an American company that holds many essential standard patents in the wireless telecommunication sector. It was accused for the abuse of market dominant position by (1) charging unfairly high prices; (2) requiring grant-back patents freely; and (3) tying non-essential standard patent technology with essential standard patent technology.[1] On 22 May 2014, NDRC announced to suspend the antitrust investigation against IDC after IDC promised to eliminate the anti-competitive effects and to restore the market competition order.[2] In fact, on 6 December 2011, Huawei Technologies brought a case before the Shenzhen Intermediate People Court (Shenzhen Court) claiming that IDC violated the AML by abusing its dominant market position in the licensing of SEPs for 3G wireless communications and asking for a compensation of 20 million yuan. The Shenzhen Court held that there was a case of abusing dominant market position by charging excessive fees and ordered IDC to pay 20 million yuan. But Shenzhen Court rejected Huawei's claim of tying arrangement. Therefore, both parties appealed the judgment and on 21 October 2013, the Guangdong Higher People's Court ruled to maintain the judgement.[3] Thus, it seems that the NDRC had a good reason to investigate IDC's suspected violations.

Qualcomm is the largest maker of processors and communications chips for mobile phones and its major customers are Apple Inc. and Samsung Electronics Co.[4] Qualcomm established its presence in China in 1999.[5] Recently, it was reported that Qualcomm was under investigation by the National Development and Reform Commission (NDRC).[6] Through

[1] Wei Huang and Cathy Lin, A second look at IDC investigation case in China, 8 June 2014, at http://www.lexology.com/library/detail.aspx?g=bd34e778-468d-4a6b-8428-4ebc148dec0a.

[2] Ibid.

[3] The Written Judgment of Guangdong Higher People's Court is available at http://blog.sina.com.cn/s/blog_c182d0730101hzfn.html.

[4] Ante, Spencer E & Clark, Don, "China Opens Monopoly Probe Into Chip Maker Qualcomm", Wall Street Journal, Eastern edition [New York, N.Y], 26 Nov 2013: B.1. In fact, Qualcomm has many Chinese customers such as Huawei, Zhongxing Telecommunication Equipment Corporation and Xiaomi. The Investigation of Qualcomm May Hurt Xiaomi, 4 December 2014, at http://tech.qq.com/a/20141204/058927.htm.

[5] NEIL GOUGH and CHRIS BUCKLEY, Adviser to Government in Chinese Investigation of Qualcomm Is Ousted, 13 August 2014, at http://www.nytimes.com/2014/08/14/business/international/antitrust-adviser-to-beijing-ousted-in-inquiry-over-payments.html.

[6] According to Mr. Xu Kunlin, the Director General of the Bureau of Price Supervision and Anti-monopoly under the NDRC, the suspected conducts of Qualcomm were initially reported by two US companies in 2009. Press Conference of the PRC State Council Information Office, 11 September 2014, at http://www.scio.gov.cn/xwfbh/xwbfbh/wqfbh/2014/20140911/index.htm.

the investigation, the NDRC discovered that Qualcomm held a dominant position in the CDMA/WCDMA/LTE wireless communication standard essential patents (SEPs) market and baseband chip market and Qualcomm had abused its dominant position in several ways: (1) Qualcomm charged unfairly high patent royalties on Chinese companies; (2) Qualcomm tied in sales of patent licenses that are not wireless communication standards; (3) Qualcomm imposed unfair terms on sales of baseband chips.[7] During the investigation, Qualcomm proposed a rectification plan package concerning some of its wireless SEPs: (1) adjusting its patent royalties on handsets sold for use within China to 65% of the wholesale net selling price of a handset device; (2) providing a patent list and stopping charging patent fees for expired patents when licensing patents; (3) ceasing to make the grant-back as one condition on Chinese licensees and request Chinese companies licensing their patents to Qualcomm for free; (4) stopping tie-in sales of non-wireless communication SEPs without justifiable cause; and (5) stopping imposing unfair terms in licensing agreements and non-challenge clause on Chinese licensees as a condition for baseband chip supply.[8] Finally, the NDRC imposed a fine of RMB 6.088 billion (approximately USD 975 million), which was said to be the largest fine in China's corporate history.[9]

As far as the possible violations of antitrust law is concerned, Qualcomm was accused in both South Korea and Japan, and is appealing adverse rulings in both countries.[10] The latest news was that Qualcomm would face an antitrust investigation from the EU authority over allegations of abusing its dominant market position.[11] Furthermore, Qualcomm disclosed that the Federal Trade Commission of the US was investigating its possible violation relating to patent licensing.[12]

[7] The NDRC Request Qualcomm to Rectify Its Wrongs and Imposed Fine for RMB 6 billion, at http://www.sdpc.gov.cn/xwzx/xwfb/201502/t20150210_663822.html.

[8] Ibid.

[9] Susan Ning, Kate Peng and Lingbo Wei, "Qualcomm Investigation Finally Closed: Some Changes in Business Model in Addition to an RMB 6.088 Billion Fine", 12 February 2015, at http://www.chinalawinsight.com/2015/02/articles/corporate/antitrust-competition/qualcomm-investigation-finally-closed-some-changes-in-business-model-in-addition-to-an-rmb-6-088-billion-fine-2/.

[10] Ante, Spencer E & Clark, Don, "China Opens Monopoly Probe Into Chip Maker Qualcomm", Wall Street Journal, Eastern edition [New York, N.Y], 26 Nov 2013: B.1.

[11] Sam Reynolds, Qualcomm May Face an EU Antitrust Investigation, 28 August 2014, at http://www.brightsideofnews.com/2014/08/28/qualcomm-eu-antitrust-investigation/.

[12] Andre Grenon and Lisa Shumaker, "Qualcomm sees more China trouble, faces probes in US, Europe", 5 November 2014, at http://www.reuters.com/article/2014/11/05/us-qualcomm-results-idUSKBN0IP2P020141105.

of the intellectual property right itself and sacrificing more competition than is necessary to provide appropriate incentives to innovate."[52]

The conclusion from this examination is obvious: the attitude of the US courts towards the abuse of IPRs is changeable based on the dynamic competition policies. Policies nowadays are more focusing on the IP hegemony in the world, especially in most developed countries. The US courts will therefore more emphasise on the protection of IPRs by the IP law with minimum interference by the antitrust law.

¶5-022 The EU Experiences: More Balanced Attitude

The EU took a different approach because at the time the EC was established, its main objective was to achieve the integration among the member states and to remove barriers including technological barriers of the member states. The main task was to actively develop the EU level competition law in order to regulate the IPRs. However, after the completion of the common market and many member states have established the antitrust system in line with the EU competition law, the EU started to relax its central regulation of IPRs by the EU competition law.[53] Interestingly, the EU courts treated Microsoft case with an attitude different from that of the US courts. On 24 March 2004, the EU Commission decided that Microsoft had abused its dominant position in the PC operating system market by refusing to disclose interface information and tying its separate Windows Media Player product with its Windows PC operating system. The Court of First Instance delivered its judgment on 17 September 2007 upholding the findings of abuse in the Commission's decision and the amount of the fine remaining unchanged at EUR 497 million.[54] On the contrary, in the US, Microsoft successfully settled the case with the Department of Justice and the settlement did not substantially affect Microsoft's abusive behavior. Maybe the motivation of the settlement is to protect its superpower in the world because it has been said that the Microsoft-DOJ Proposed Final Judgment failed to protect the public interest, i.e. the consumers' interest.[55]

[52] Robert Pitofsky, "Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy", 16 Berkeley Tech. L.J. 535, 546 (2001).

[53] Peng Xinqian, "The Balance of Intellectual Property Law and Antimonopoly Law in National Economic Strategy", the Journal of Shanxi Politics and Law Institute for Administrators, Vol. 24, No. 1, 2011, p21.

[54] In the US, Microsoft was found guilty for abusing its monopoly power by bundling its flagship Internet Explorer (IE) web browser software with its Microsoft Windows operating system. However, the case was finally settled and approved by the US appeals court. Microsoft thus avoided being broken into two separate units. For detailed information, please visit *United States v Microsoft Corp.*, at http://en.wikipedia.org/wiki/United_States_v._Microsoft_Corp.

[55] Consumer Federation of America, COMPETITIVE PROCESSES, ANTICOMPETITIVE PRACTICES AND CONSUMER HARM IN THE SOFTWARE INDUSTRY: AN ANALYSIS OF THE INADEQUACIES OF THE MICROSOFT-DEPARTMENT OF JUSTICE PROPOSED FINAL JUDGMENT, at http://www.justice.gov/atr/cases/ms_tuncom/major/mtc-00028565b.htm#1.

¶5-023 Relevant Legislation and Implementation in the US and the EU

In order to properly deal with the IP holder's rights under the antitrust law and to offer IP holders clear guidelines on how to avoid the violation of antitrust law, many countries have published the relevant guidelines. For example, in the US in 1995, the Department of Justice and the Federal Trade Commission jointly issued the Antitrust Guidelines for the Licensing of Intellectual Property. In the EC in 1996, the EC Commission issued Commission Regulation (EC) No 240/96 of 31 January 1996 on the Application of Article 85 (3) of the Treaty to Certain Categories of Technology Transfer Agreements. In Japan in 1989, the Fair Trade Commission issued Guidelines on Patent Know-how Licensing Agreement (reissued in 1999). In Taiwan in 2001, the Fair Trade Commission issued Fair Trade Commission Disposal Directions (Guidelines) on Technology Licensing Arrangements (updated 6 February 2012). The late-coming SAIC Rules are just a right reaction of this popular practice.

According to the Antitrust Guidelines for the Licensing of Intellectual Property, three general principles should be followed: (a) intellectual property is regarded as being essentially comparable to any other form of property; (b) there is no presumption that intellectual property creates market power in the antitrust context; and (c) intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive.[56] The 1996 EC Technology Transfer Agreements also indicate three important principles: (1) the IPR creates monopoly power and the abuse of monopoly power should be regulated by the competition law; (b) the IP owners have the absolute right to their innovative fruits but their licensing conditions or terms should be regulated by the competition law; and (c) IP licensing should be subjected to exemption list and per se violation list.

The comparison of these two legal documents is meaningful. It shows clearly that IP holders do possess the market power because of their unique intellectual properties. In other words, the more the intellectual properties are unique, the bigger the market power they will possibly achieve. China would probably adopt a rebuttable presumption of market power by IP owners at an initial stage of implementing the SAIC Rules so that they need to bear the burden of proving that they do not have substantial market power.[57]

[56] Article 2.0 of the Antitrust Guidelines for the Licensing of Intellectual Property. Despite the Guidelines, the presumption was officially removed by the US Supreme Court in 2006 in the case of *Illinois Tool Works Inc. v Independent Ink, Inc.*, 547 US 28 (2006). "Today, we reach the same conclusion, and therefore hold that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product."

[57] This point will be further elaborated in part III.

business operators; (2) a business operator acquired control over other business operators by acquiring their equities or assets; or (3) a business operator acquires control over other business operators or is able to exert a decisive influence on other business operators by contract or any other means. This indicates clearly that, to some extent, acquisition is more complicated than merger.

From civil law aspect, the fact that Andy acquires assets of Baby does not necessarily mean that Andy has obtained controlling power of the assets. This is simply because acquiring assets of another could also be achieved through methods of lease, sale or withholding. However, from the aspect of the AML, if an acquisition of assets amount to "control" of another it should be regulated in accordance with the relevant provisions of the AML.

In the EU, "control" will be divided into sole control and joint control. If one enterprise has acquired the majority voting rights of another enterprise, this would be legally regarded as a sole control. On the other hand, "joint control situations arise, where two or more undertakings have the possibility to exercise decisive influence over another undertaking".[8] How to define "decisive influence" is certainly a tough question. According to Chinese Company Law, a "controlling shareholder" shall mean a shareholder whose capital contribution occupies 50% or more in the total capital of a limited liability company or a shareholder whose stocks occupies more than 50% of the total equity stocks of a joint stock limited company or a shareholder whose capital contribution or proportion of stock is less than 50% but who enjoys a voting right according to its capital contribution or the stocks it holds is large enough to impose an big impact upon the resolution of the shareholders' meeting or the shareholders' assembly.[9] In comparison, Chinese approach is more specific in terms of definition.

Further, under the Chinese Company Law, "actual controller" shall mean any person who is not a shareholder is able to hold actual control of the acts of the company by means of investment relations, agreements or any other arrangements. One of the emerging ways to become actual controller is to use so called variable interest entity (VIE) model or contract controlling model. It was reported that Baidu, Sina and Alibaba used this method to bypass Chinese foreign investment restrictions.[10] The basic operation of VIE is that foreign investors buy into an offshore shell company initially. Then through a complicated web of contracts, the offshore shell company controls the domestic company that is holding licenses to operate

[8] Matti Huhtamäki, "What types of joint control transactions constitute reportable concentrations under Finnish merger control rules?" available at http://www.nordiccompetitionblog.com/?p=302.

[9] The Chinese Company Law, Article 216(2).

[10] Major Tian, "What's Next For the Variable Interest Entity Structure?" 5 February 2015, at http://knowledge.ckgsb.edu.cn/2015/02/05/finance-and-investment/whats-next-for-the-variable-interest-entity-structure/.

in industries otherwise under strict government control.[11] In fact, contract control of a firm is virtually an acquisition and it should be subjected to both concentration review and national security review. Because of this, in 2011, the MOFCOM issued the Provisions of the Ministry of Commerce on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors. Article 9 of which states that whether a merger or acquisition of a domestic enterprise by a foreign investor falls within the scope of merger and acquisition security review shall be determined from the substance and actual impact of the transaction. No foreign investor shall substantially evade the merger and acquisition security review in any form, including but not limited to holding shares on behalf of others, trust, multi-level reinvestment, leasing, loans, agreement-based control and overseas transactions. Further, on 19 January 2015, the MOFCOM issued for public comment a comprehensive draft of Foreign Investment Law (the Draft Law). As having been predicted, if the Draft Law is adopted, it will radically transform the handling of foreign related investment and M&A transactions in China.[12]

Normally, the term "contract", which is used under Article 20(3), should have a broad meaning. But the AML may only focus on certain contracts, which will affect control and decisive influence. To some extent, joint venture contract should also be included.[13] One needs to see the relationship between the joint venture and its parent companies from trade amount and operation areas.

¶6-012 Herfindahl-Hirschman Index

In order to determine the degree of concentration, people may use different methods in order to measure the concentration level. The first one is so called the eight-firm concentration ratio (CR8), which is the sum of the market shares of the eight largest firms; the second one is so called the four-firm concentration ratio (CR4), which will focus on the top four firms in obtaining concentration ratio.[14] However, the most popular measuring method is so called the Herfindahl-Hirschman Index (HHI). In the US, the 1968 Merger Guidelines adopted CR4 method.[15] The CR4 was replaced by

[11] Ibid.

[12] Edwarde Webre, "The Draft Foreign Investment Law", 23 February 2015, available at http://www.deacons.com.hk/news-and-insights/publications/the-draft-foreign-investment-law.html.

[13] It has been said that, based on MOFCOM's practice, both full-functional joint ventures (performing on a lasting basis all the functions of an automonmous economic entity) and non-full- functional joint ventures are covered by the AML. See Adrian Emch, Jose Regazzini and Vassily Rudomino, *Competition Law in the BRICS Countries*, Wolters Kluwer, 2012, p192.

[14] Roger J. Van den Bergh and Peter D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (2nd Edn), Sweet & Maxwell, 2006, p69.

[15] Ibid, at 357.

For one example, in 2012, the MOFCOM approved M&A deal between Google Inc. and Motorola Mobility Holdings Inc. with a condition that Google Inc. should keep Android free and available without discriminating against any particular device maker for five years, even though the condition was suspected for helping domestic competitors such as ZTE Corp. and Huawei Technologies Co., which offer smartphones that use Android.[62]

For another example, in April 2014, The MOFCOM announced that it approved the purchase of Nokia's Devices and Services business by Microsoft subject to certain conditions.

The MOFCOM imposed conditions on both Microsoft[63] and Nokia[64] as follows:[65]

(1) With regard to its standard-essential patents ("SEPs"), Microsoft was required (subject to the requirement of reciprocity by any potential licensee):

- to honor its FRAND commitments for SEPs;
- not to seek injunctions or exclusion orders based on its SEPs against smartphones made in China;
- not to require reciprocal licensing from licensees unless the licensee holds SEPs for the same industry; and
- to transfer its SEPs only to third parties that agree to abide by these conditions.

(2) For its non-essential patents, Microsoft was required:

- to continue to provide nonexclusive licenses to smartphone manufacturers within China;
- to license such patents (a) for fees not exceeding those it charged prior to the concentration or contained in current license agreements, and (b) on the same (in substance) non-price terms and conditions as prior to the concentration; and

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[62] John Letzing & Paul Mozur, China Clears Google to Buy Motorola Mobility, May 20, 2012, http://www.wsj.com/articles/SB10001424052702303360504577414280414923956.

[63] The conditions imposed on Microsoft are generally for 8 years.

[64] The conditions on Nokia are subject to a reporting duty for 5 years.

[65] The following summarised conditions are prepared by Peter J. Wang, Sébastien J. Evrard and Yizhe Zhang, Antitrust Alert: China's MOFCOM conditionally clears Microsoft/Nokia and Merck/AZ, May 2014, at http://www.jonesday.com/antitrust-alert--chinas-mofcom-conditionally-clears-microsoftnokia-and-merckaz-05-22-2014/.

- within 5 years, not to transfer these patents to any third party, and thereafter to transfer them only to third parties that agree to abide by these conditions.

(3) Nokia is required (generally subject to reciprocity):

- to continue to honor its existing FRAND commitments for SEPs;
- to confirm its support for the principle that, subject to reciprocity, injunctions should not be enforced based on SEPs to prevent implementation of a standard subject to FRAND undertakings unless the prospective licensee is unwilling to enter into or comply with a FRAND license;
- not to require licensees also to license Nokia's patents not subject to FRAND undertakings;
- to transfer its SEPs to a new owner only subject to existing FRAND undertakings and its MOFCOM commitments; and
- not to depart from its current generally offered FRAND per unit running royalty rates for its current portfolios of cellular communication SEPs.

1.2 Issues of Divesture

According to the Provisions on Restrictive Conditions, divesture shall refer to the behaviour of a divestiture obligor selling divested business to a potential buyer.[66] Certainly, the divestiture obligor shall refer to any undertaking that shall sell divested business according to the MOFCOM's decision.[67] The divested business shall refer to all factors necessary for undertakings to conduct effective competition in the relevant markets, including rights and interests of divestiture obligors such as tangible assets, intangible assets, equity, key personnel as well as customer agreements or supply agreements. Furthermore, divested business may be a subsidiary, branch or business department of undertakings participating in the concentration.[68]

People should not confuse the assets divesture under different laws. In China, assets divesture was largely used by state-owned enterprises to remove some of bad assets or business for the purpose of converting into enterprises with shareholding system.[69] In other jurisdictions, assets

[66] Article 4.1.

[67] Article 4.2.

[68] Article 4.3.

[69] Ding Maozhong, Research on Assets Divesture in the Control System of Concentration of Undertakings, Shanghai Academy of Social Science Press, 2013, p1.