Research on Merger Control in China and EU

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INTRODUCTION

Prosperity comes from competition.[1] It is broadly accepted that competition is a crucial driving force for the successful operation of economy, the efficient allocation of resources, the rapid progress of technology evolution, and the improvement of general social welfare. Therefore, protection of effective competition is the main objective of competition policy and law.[2]

In market, commercial entities and natural persons (also called “undertakings”) are the subjects who take part in competition. The undertakings pursue the maximum profits in market through internal evolution and external merger (also called “concentration”), trying to improve their competition capability and achieve the advanced and dominant position in sectors by economy of scale. Compared with internal evolution, concentration is more efficient. Undertakings acquire monopoly power, enter into a new market, create an internal capital market, take advantage of tax law, diversify their investments,[3] or achieve other goals[4] by concentrations. But on the other hand, concentration may also bring anticompetitive effects either. Horizontal concentration directly lessens the quantity of competition rivals, largely enhances the dominant position of undertakings and market convergence, finally, results in monopoly. Vertical concentration excludes the competition rivals of target undertakings by establishing exclusive system of material supply and production sale. Conglomerate expels the potential competitors by financing the target undertakings which having the dominant position in relevant market, and makes deterrence possible to the third enterprise if there is conspiracy between the undertakings of conglomerate. Concentration has both pro-competitive effects and anticompetitive effects. Therefore, countries adopt merger control regulation to eliminate the anticompetitive effects and to protect the pro-competitive effects of concentrations.

After entry into WTO in 2001, China has a growing M&A market. But before the adoption of the Antimonopoly Law of the People’s Republic of China (the AML), there is no consummate law to control concentration of undertakings. According to the investigation by the National Administration for Industry and Commerce of the PRC, multinational companies have obviously acquired the market dominant position, even the absolute monopoly position in the fields of software, sensitive material, mobile phone, camera, tyre, and soft package in China. And concentration is the most convenient way to acquire such dominant position.[5] For example, Kodak had acquired the dominant position in the sector of sensitive materials in 1998 by means of concentration, with the market shares of 50%. In 2003, Kodak acquired 20% shares of Lucky (which was the only Chinese company left before 2003) with 100 million dollars of cash and assets, it made Kodak more dominant in sensitive materials market.[6] Concentrations within China were not efficiently restricted by law. In such circumstances, the AML was adopted finally in 2007 to control concentrations. The AML intervenes in such concentrations with potential anticompetitive effects when they are initiated by relevant parties.

In the AML, there are 15 articles which specially control concentration[7]. These articles take into account of the specific situation in China and incorporate many advanced experiences of developed countries and regions.[8] This thesis aims to give a presentation of concentration control by the AML, including the typology of concentration, authorities for concentration control, substantive requirements, procedural rules, legal remedies; and to discuss the similarities and differences between the AML and

the EC merger control regulation 139/2004 (the EMCR); and tries to give some detailed suggestions to the implementation of the concentration control rules in the AML.

CHAPTER ONE TYPOLOGY OF CONCENTRATION

A. Three Types

Article 20 of the AML provides that,

Concentration of undertakings shall refer to the following circumstances:

1. merger of undertakings;

2. acquisition of control of other undertakings by an undertaking through acquisition of shares or assets;

3. acquisition of control of other undertakings by contracts etc. or decisive influence by an undertaking over other undertakings.

And compared with the EMCR, Article 20 in the AML is very similar to Article 3.1 in the EMCR which provides,

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

From the provisions above, we can conclude that concentrations can be categorized into three types which are merger, acquisition by shares or assets and control by contracts or other instruments.

. Merger

General speaking, merger has both broad and narrow concepts. Broad concept of merger equals to concentration, “merger” in the topic of this thesis is in sense of broad concept. “Merger” titled this paragraph is in sense of narrow concept. Such merger is the most classical type of concentration provided by Article 20.1 of the AML and Article 3.1(a), which refers to the circumstance that more than 2 (including) independent undertakings merge into one undertaking. There are still 2 subtypes of merger------absorbed merger and creative merger. Absorbed merger is that one undertaking remains intact, ant the other undertakings constitute a part or parts of the intact undertaking. Creative merger is that undertakings merge into a new undertaking, and the former undertakings become vanished.

. Acquisition by Shares or Assets

Acquisition by shares or assets provided by Article 20.2 of the AML and Article 3.1(b) of the EMCR is also called acquisition in short, that is, one undertaking acquires the control right of other undertaking(s) by acquiring their shares or assets. Acquisition of assets is that one undertaking acquires all or main part of assets of other undertaking(s) by purchasing or assuming debts or by other means. Acquisition by shares is that one undertaking acquires control of other undertaking(s) by holding or acquiring certain amount of shares or stocks. The amount of shares or stocks necessary for control depends on the decentralization of shares or stocks or on the impact of the acquiring undertaking’s decision on the target undertaking(s).

. Control by Contract or Other Instruments

Control by contract or other instruments is provided by Article 20.3 of the AML and Article 3.1(b) of the EMCR, which includes joint venture contract, affiliated company contract or contract aiming to control

appointment of employees and so on. Article 3.4 of the EMCR provides that a joint venture constitutes a concentration within the meaning of Article 3.1(b) of the EMCR. And Article 3.2 of the EMCR stipulates that Control shall be constituted by rights, contracts or any other means which confer the possibility of exercising decisive influence on an undertaking. Therefore, Article 20.2 and 20.3 in the AML has the same meaning with Article 3.1(b), 3.2 and 3.4 of the EMCR.

As a conclusion, the AML and the EMCR have the same typology on concentration, even the wording in both law has large extent similarity.

B. Exceptions

In order to improve the efficiency of concentration review, some countries or regions provide exceptional concentrations which are not prohibited by antimonopoly law.

. Concentration within Corporate Group

Article 22 of the AML provides explicitly exceptional concentrations within corporate group. If parent undertaking owns more than 50% voting shares or assets of each of daughter undertakings, the concentration between parent and daughter undertaking(s) or among daughter undertakings is exempted from notification for review procedure. The EMCR does not have such clear provision, but according to Article 8 of Commission Notice on the Concept of Concentration under Council Regulation (EEC) No.4064/89 on the Control of Concentrations between Undertakings, an internal restructuring of corporate group is not a concentration.

Concentration within corporate group only involves rearrangement of existed market power, and does not generate new market power concentration, because the resources such as capital, employee, technology or distribution etc. have already been operated and managed unitarily.[9] Hence, on this exception, the AML has similar provision to EC law.

But, Article3.5 of the EMCR provides the following exceptions which are absent from the AML.

. Provisional Control by Holding Institution

According to Article 3.5(a) of the EMCR, if holding institutions have acquired securities of an undertaking on a temporary basis during their normal activities, such acquisition shall not be deemed as concentration. If:

1. The holding institutions are credit institutions, other financial institutions or insurance companies;

2. They aim to resell them;

3. They shall not exercise voting rights of those securities to determine the competitive behavior of that undertaking; or they can exercise such voting rights only to dispose all or part of that undertaking, its assets or securities;

4. Such disposal shall take place within one year from the date of acquisition. And the period may be extended by the Commission if the requesting institution can show reasonably the impossibility of that disposal.

. Control by Office-Holder in Liquidation or Like Proceeding

Article 3.5(b) of the EMCR provides that such control shall not be concentration if the control is acquired by an office-holder in liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings according to national law.

. Control by Financial Institutions

Article 3.5© of the EMCR declares that if a financial holding company controls an undertaking by acquisition of assets or securities or by contract or other means, and the financial holding company

exercises the voting rights to the appointment of members of the management and supervisory bodies of the undertaking, only to maintain the full value of the investments and not to determine directly or indirectly the competitive conduct of that undertaking, such control shall not be considered as concentration.

Such controls listed by , and have no direct or indirect impact on the market competition, they are all carried out for investment value or public interest, thus, various countries provide in law that these controls are deemed to be exceptions to concentration. Chinese relevant authorities may take such examples during drafting the implementing regulation of the AML, so as to protect those interests of institutions and to improve the efficiency of concentration control procedure.

CHAPTER TWO AUTHORITIES FOR CONCENTRATION CONTROL

The authorities are the institutional guarantees for the enforcement and execution of concentration control which attracted the most attention in legislation. Generally, some countries established an independent authority for antimonopoly affairs, such as Japan, Russia and Germany; while some countries authorized two or more agencies to deal with same affairs, such as America. Global experiences manifest that the setting of authority for concentration control should adapt to the institutional system and specific circumstances in that country.[10] In China, there are two authorities in charge of concentration control due to historical reasons.

A. Antimonopoly Commission

Article 9 of the AML provides the Antimonopoly Commission is responsible for the general organization, coordination and guidance for antimonopoly affairs. Strictly speaking, Antimonopoly Commission is not an enforcement agency, because it has on administrative power on concentration control or other antimonopoly affairs. Its responsibilities cover the scope of 1. studying and drafting the relevant competition policies; 2. organizing investigation, evaluation overall market competition, and issue evaluation reports; 3. formulating and issuing antimonopoly guidelines; 4. coordinating antimonopoly administrative enforcement tasks; and 5. Performing any other duties stipulated by the State Council.

B. Enforcement Agency for Concentration Control

Article 21 of the AML provides that the qualified concentration undertakings should make notification to the antimonopoly enforcement agency of the State Council. It indicates that the enforcement authority for merger control is only at central level, under the organization, coordination and guidance of antimonopoly commission, unlike the enforcement authorities for other antimonopoly affairs (monopoly agreement, abuse of dominant market position and abuse of administrative power to restrict or eliminate competition) which may have enforcement agencies at both central level and regional level. And the Provisions on Notification Threshold for Concentration of Undertakings made by the State Council (the PNTCU) gives the detailed indication that the qualified concentration undertakings should make notification to the competent commercial department of the State Council. That is to say, the current enforcement authority for concentration control is the Ministry of Commerce. The Ministry of Commerce has the power of reviewing the qualified concentration notifications, making decisions on concentrations, initiating antimonopoly inspections, and giving conclusions in administrative reconsideration. Thus, it is a quasi-judicial institution which has a very powerful position in the field of concentration control.

C. The Independency of Enforcement Authority for Concentration Control

The independency of enforcement authority is the crucial factor in control of concentration. As the famous German economist Walter Eucken said, "the independency of antimonopoly authority is at least as important as that of Supreme Court."[11] The most important reason lies in the relationship between the

enforcement authority for concentration control which applies competition policy and other governmental institutions which carry out other economic policy. Competition policy is not the only policy which a country exercises in economy field. The other economic policies still take necessary role in blooming national economy, such as industry policy, social security policy employment policy, environment policy etc. In order to promote competition efficiency in resources allocation, countries of market economy usually give the prior position to competition policy rather than other policies.[12] Article 173 in the Consolidated Version of the Treaty on the Functioning of the European Union[13] prescribes that the Union and the member states shall ensure the conditions necessary for the competitiveness of the Union's industry exist, and the Union can not introduce any measure which could lead to distortion of competition. Therefore, these countries generally take measures to guarantee the independency of enforcement authority for concentration control (or for antimonopoly). The Directorate General for Competition of European Commission is responsible for the enforcement of concentration control which is totally independent from member states and other Union institutions. Federal Trade Commission (the FTC) of America is independent from government to a large extent, the commissioners shall be appointed by President and be approved by Senate, and not be impacted by the governmental renewal, the only way to influence the FTC is the appointment of commission chairman by president.[14] EU and America put strong independency of enforcement authorities to ensure the objective, fair and reasonable control of concentration. If the enforcement authority is not independent from other governmental institutions, it will be inevitably interfered by the relevant or higher ranked institution, especially by the institution in charge of enforcement of industry policy.

This problem does exist in China, Ministry of Commerce is a department of State Council, and ranks paralleling with other enforcement authorities of antimonopoly agencies. Such a complex institutional structure would not guarantee the independency of Ministry of Commerce which solely takes the responsibility of concentration control. Besides, such a scattered structure would not be favorable to international communication and cooperation on antimonopoly affaires, including exchanges of information, and bilateral or multilateral agreement negotiations.[15] Hence, it is necessary for State Council to reform the existed institutional structure with aiming to guarantee the independency of the enforcement authority in future.

CHAPTER THREE SUBSTANTIVE REQUIREMENTS

A. Substantive Test

"The substantive test is the 'carbon test', the of the Merger Regulation."[16] A substantive test is used to define whether a concentration should be allowed or prohibited. It is the hard core of merger control regulations in different jurisdictions. "These tests also determine the scope for competition authorities to take into account other factors possibly mitigating or worsening the finding of competitive harm."[17]

Two main substantive tests exist in typical jurisdictions, the Substantive Lessening of Competition test (the SLC test) and the Significantly Impediment of Effective Competition test (the SIEC test). The SLC test is employed by America in Section 7 of Clayton Act which provides that, any acquisition should be prohibited if "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly". The former EU merger control regulation applied the Dominance test, but this test remained unclear whether the regulation should apply to the concentration on non-collusive oligopolistic market where the merged undertaking would not be on strictly dominant position. As some scholar commented, "The dominance test needs a market abuse criterion to prohibit a merger; and there may be mergers not increasing market dominance but decreasing welfare. As the Commission could only count on the dominance test to evaluate mergers, it had been forced to adapt the concept, using it to deal with mergers

not punishable under purely market dominance considerations and converting it into a joint dominance argument for duopoly or oligopoly"[18] There was ‘a ‘gap’ in European merger control in that some of the U.S.-style unilateral effects analysis is not normally carried out in Europe“.[19] But under certain circumstances, concentrations may result in a significant impediment to effective competition, even in the absence of a likelihood of coordination between the members of the oligopoly. Thus, Article 2.3 of the EMCR expresses the SIEC test that a concentration which would significantly impede effective competition shall be declared incompatible with the common market, in particular as a result of the creation or strengthening of a dominant position. Therefore, there is a large convergence between the two typical substantive tests.[20]

Article 28 of the AML narrates another substantive different test, which prescribes that the concentration of undertakings should be prohibited if it has or may have an effect on eliminating or restricting competition (the ERC test). The ERC test does not explicitly require “substance” or “significance” of the effect on eliminating or restricting competition. The AML should fight against the concentration with the effect on substantively or significantly eliminating or restricting market competition, it is not necessary to ban all concentrations with the effect on restricting market competition; sometimes concentration with limited effects on restricting competition is favorable to economy of scale. And such an unclearly provision gives a large discretion to the enforcement agency, and may make the substantive test a menace to competition efficiency because broad interpretation of such provision would prohibit great amount of concentrations. In addition, the ERC test seems to be contrary with the target, which is provided by Article 5 of the AML, of encouraging undertakings to expand their scale of business and raise their market competitiveness by fair competition and voluntary collaboration. EU an US have matured practice experiences and law of merger control, it is necessary for the AML to exercise an international standard substantive test of merger control in order to participate in the championship of international merger and acquisition. Hence, feasible and detailed guidelines on concentration of undertaking should be drafted and enforced, to avoid the possibly arbitrary decisions, and to improve the transparency, stability and predictability of review procedure.

B. Main Factors for Consideration in Proceeding

During the procedure of review, some main substantive factors should be taken into account. The main factors provided by Article 27 of the AML include:

. The Market Shares of the Parties and Their Control over the Market

Market share analysis is the starting point of market analysis after definition of the relevant market. It is an important factor that it can give the signal of the impact on market structure of the concentration. If the concentration parties get more market shares, then they will acquire more powerful market control, and will more easily impede competition and the interests of consumers and competitive rivals. But it is also not everything, especially when the relevant market is narrowly defined. In European practice, the Commission will pay more strict analysis with the proportion of market shares increasing from 25% to 60% or even more. But that does not imply that a concentration with a market share beyond 60% will always be prohibited, in some cases, the Commission will approve the concentration either, probably with additional conditions.[21]

. The Degree of Market Concentration of the Relevant Market

Market concentration has closely connection with dominant market position. The higher degree of market concentration a merger of undertakings results in, the higher possibility of dominant market position it will produce or reinforce, and the higher of the possibility of eliminating or restricting competition it will generate. Various jurisdictions like EU, US and Japan use the Herfindahl-Hirshman Index to appraise the market concentration, and each jurisdiction sets a reasonable figure suitable to their own situations.

Compared with market share, market concentration can be used to analyze the market structure more accurately, and can reflect the impact on market competition more reasonably.[22] Thus, the guidelines of Chinese concentration control should introduce this beneficial tool.

. The Impact on Market Entry and Technological Advancement

A concentration resulting in high degree of market shares still can not impede competition by unilaterally or coordinately increasing price or reducing production, if the concentration is not the obstacle to market entry. When potential competitors exist, concentration will not produce or reinforce market power, the undertaking acquiring market power can not abuse the control power either, because its behaviors of increasing price or reducing production will be great driving force for the potential competitors. The market entry must be shown timely, likely and sufficiently. Market entry should be timely, that is, the trend of market entry is so strong in a reasonable period of time that it is adequate to stop the behaviors of increasing price and reducing production by the concentration undertakings. Market entry should be likely which indicates that new entrants can make profits taking into the account of the price effects of new increased production and the response of concentration undertakings. Market entry should be sufficient which means that entry must be of sufficient scope and magnitude to break the anticompetitive effect of the concentration, small-scale of entry is not considered sufficient.

Technological development has a decisive impulse to economic increase; advanced technology can promote general fortune and welfare. Technology has direct relationship with competition efficiency, so that various jurisdictions take into consideration the possible adverse effect on technological development of concentration of undertakings.

. The Impact on Consumers and Other Relevant Competitors

Whether a concentration has an eliminating or restricting effect on competition, it can also be reflected by the impact on consumers and other relevant competitors. If a concentration increases the supply of production, reduces price or improve the quality of production, gives consumers more benefits, and enhances the opportunity of transaction or access to the relevant market for competitors, it will be declared compatible with the market. While a concentration has an effect of significantly harming the interests of consumers and competitors by means of reducing the supply of production or increasing price, it will be declared incompatible with the market.

. The Impact on the Development of National Economy

The main tasks of concentration review are protecting a well-structured market, and improving competition efficiency, and booming the national economy. Concentrations having negative influences on national economy will be declared incompatible with the market. In addition, national industry policy of China plays a important role in speedy development of national economy. Therefore, some legislators suggested that the AML should take into consideration the impact of not only the competition policy, but also the industry policy on the national economy.[23] As mentioned above in Chapter three of this paper, the enforcement authority should ensure the priority of the competition policy when reviewing the concentration of undertakings; it is the pre-condition for applying industry policy.

. Other Factors Deemed to Be Relevant for Consideration

This is a “catch-all” clause which gives discretion of enforcement authority to take other necessary factors into consideration in concentration review.

Article 2.1 of the EMCR provides the similar factors in appraisal of concentration, including the market structure, the potential competition, the market position of the undertakings, the economic and financial power of the undertakings, the alternative available to suppliers and users, their access to supplies or markets, the barriers to entry, supply and demand trends for the relevant commodities, the development

of technical and economic progress with consumer's advantage and non-obstacle to competition. The factors are in a clear list, and are detailed interpreted by the guidelines. Compared with the EMCR, the main factors of Article 27 of the AML are not given in a clear list which also provides large discretion to enforcement agency. As commented by scholar, the open-ended "catch-all" clause "might be exploited to block pro-competitive conduct or to excuse anticompetitive behavior"[24]. This clause should be clearly and strictly interpreted by the State Council in the future guidelines, and should take only the factors involving market competition into consideration, not political or other factors.

C. Exemption

Article 28 of the AML also provides that if an undertaking is able to prove that the pro-competitive effect far outweighs the anticompetitive effect of the concentration, or that the concentration is favorable for the public interest, the concentration may be declared compatible with the market.

. More Pro-Competitive Effects than Anticompetitive Effects

Article 28 of the AML does not prescribe what specific measures can prove that pro-competitive effects of a concentration can outweigh anticompetitive effects, the EMCR neither. But its Guidelines on Horizontal Mergers give more expressive discussion about the efficiency defense. "Since the reform of the EC Merger Regulation (ECMR) in 2004, the Commission promised to give more weight to efficiency considerations in merger cases. Although the Commission's policy with respect to efficiencies is still not very clear, the Horizontal Merger Guidelines state that efficiencies should be verifiable, merger-specific, and to the benefit of consumers before they may be considered to mitigate the anticompetitive effects of a merger."[25] And the Guidelines also explain the failing firm defense in detail.

1. Efficiency defense

Undertakings may concentrate to improve their competition capability in the market, and to keep the undertakings developing, and as a result, the concentration raises the general welfare. It is possible that some concentrations generate more pro-competitive efficiency than anticompetitive effects. A concentration can facilitate allocation efficiency if it leads to cost savings and efficiencies through more rational use of economic, organizational, and financial assets of the newly merged company.[26] But according to the requirements of EU Guidelines on Horizontal Mergers, the notifying parties should prove that the efficiency is merger-specific, verifiable and beneficial to consumers.

The efficiency should benefit consumers. "a merger that reduces competition, even if it brings efficiency gains, will be harmful to consumer welfare."[27] Consumers will not suffer losses as a result of concentration. Cost reduction, which only results in reducing production, is not considered to be efficiency benefiting consumers. Consumers may also benefit from innovation or increased supply of commodities. Efficiency should be timely, the later the efficiency shows, the less weight the enforcement agency will consider it. Efficiency should benefit the consumers at a sufficient degree, a concentration which leads to dominant market position will not likely be declared compatible with the market.

Efficiency should be merger-specific. The efficiency is the result of specific concentration, and there are no other less anticompetitive alternatives. Efficiency should be also verifiable. It should be quantitative, identifiable, and not a marginal one. So that the enforcement agency may confirm that the efficiency of concentration can substantially counteract the anticompetitive effects of a concentration.

2. Failing firm defense

The Guidelines on Horizontal Mergers of the EMCR identifies three criteria of the failing firm defense, and European Court of Justice has developed the three criteria into four which are:

"a) The acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking;

b) There is no less anticompetitive alternative purchaser;

c) The assets to be acquired would inevitably exit the market if not taken over by another undertaking; and

d) The deterioration of the competitive structure through the merger is at least no worse than in the absence of the merger."[28]

The notifying undertakings should provide all the relevant information in due time to prove the deterioration of the competitive structure is not caused by their concentration.

The already existed EU guidelines and practices supply a good example for China's drafting efficiency defense and failing firm defense rules of concentration control.

. Public Interest

Article 28 of the AML also provides that public interest may be a defense against concentration prohibition if the undertakings of concentration can prove it. The EMCR also has similar provision, Article 21.4 of the EMCR expresses that member states may take appropriate measures to protect legitimate interests other than the factors clearly defined by the EMCR and EC law, such legitimate interests include public security, plurality of the media and prudential rules. It should be recognized by the Commission if member states want to cite other legitimate interests. Both the AML and the EMCR do not clearly define the concept of public interest. But the best enforcement of concentration control should be soundly based on economy theory and objective evidence. It is necessary to avoid ambiguous enforcement of concentration control rules. Perhaps, it is impossible that concentration control does not involve other policies than competition policy, such as industry policy, and it is an ideal world that the assessment of concentration is grounded on clear law and policy,[29] but at least, the factors of public interest should be more transparent when they are taken into consideration by the enforcement agency.

CHAPTER FOUR PROCEDURAL RULES

"Speed often enables parties to deal more effectively with the enforcement agencies; delay often kills transactions."[30] The AML tries to make an efficient procedure system of concentration control.

A. Mandatory Prior Notification of Concentration

The concentration notifications can be classified into three models, mandatory prior notification model, mandatory post notification model and voluntary notification model.

Compared with the second model, mandatory prior notification model is favorable to both the undertakings and the enforcement agency. The undertakings of concentration can avoid the unpredictability of the law. The concentration will be implemented step by step under the law and the supervision of the enforcement authority. And this model can reduce the administrative costs of the enforcement agency.

The second model is beneficial to the economy growth. Undertakings can sufficiently make use of the market opportunity to develop their business. The biggest drawback of this model is lack of legal certainty. The undertaking after the completion of concentration will endure a risk of prohibition of the concentration or dissolution of the undertaking. Because of the completion of concentration, it has already disposed the relevant assets and fired employees, and caused enormous harm to the society and significant impediment to the competition. And it will cost a great deal expenditures to dissolve the merged assets and employees of the undertaking after the completion of concentration.

The third model will make the enforcement authority lose supervision to some disqualified concentration which will substantively lessen the competition. If the enforcement authority finds the

disqualified concentration, it will have the same drawback of the second model.

Most jurisdictions take the first model including China and EU. Article 21 of the AML provides that the qualified concentration party shall make a notification to the enforcement agency in advance; the concentration shall not be implemented if the notification has not been made. And Article 4.1 of the EMCR states that concentrations with a Community dimension shall be notified to the Commission prior to their implementation of the concentrations.

B. Criterion of Notification

The criterion of notification is a “threshold” which draws a borderline for concentration control. It is the most important objective factor determined by the subjective substantive test. The criterion should be appropriate. It can not be very low. Because that will cause lower efficiency to concentration due to frequent notification and much waiting time; and that will also increase the cost and burdensome to the enforcement agency. It can not be very high, neither. Because that is not good for prevention and prohibition of monopoly resulted from concentration. One scientific and reasonable threshold can ensure better pro-competitive effects of concentration.

Article 3 of the PNTCU legislated by the State Council stipulates that a concentration should be notified to the enforcement agency, if the aggregate worldwide turnover of all undertakings concerned is more than RMB 10 billion, and at least two of them each has a turn over of more than RMB400 million in China, or if the aggregate turnover in China of all undertakings concerned is more than RMB 2 billion, and at least two of them each has a turn over of more than RMB400 million in China.

The threshold of the PNTCU is made directly and solely to turnover. Usually, some jurisdictions make reference to assets, turnover or market shares. The criterion should be simple, clear and computable.[31] The assets criterion is clear, but the assets can not stand for the market power of the undertakings. Some undertakings have large scale of assets, but have less market power due to the bad quality of assets and management. And the assets cover the tangible and intangible assets, and it is difficult to calculate the exact value of intangible assets. The market shares criterion can directly reflects the market position, but it is difficult to calculate at the time of notification. While the turnover criterion can reflect the business achievements of the undertakings, therefore can stand for the economic force and market power, and can be easily calculated.

The criterion is a unitary threshold for all the sectors. It is difficult to provide different criteria according to the features of different sectors. And the complex criteria will cause troubles for notification by the relevant undertakings. According to the specific situation, each jurisdiction makes an appropriate number of turnover as the notification threshold. Based on calculation by experts, the amount of turnover set in the PNTCU makes that only 3.28% of all undertakings have the possibility to make notifications.[32] It is scientific and reasonable for Chinese enforcement agency to control concentrations.

Article 1 of the EMCR also has an analogous statement that a concentration with a Community dimension should be notified to the Commission, if:

1.2 A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

1.3 A concentration that does not meet the thresholds laid down in paragraph 2 has a Community

dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

© in each of at least three Member States included for the purpose of point (b) the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

From the complex expression, we can see that there are both affirmative aspects and negative aspects in the clauses which clearly define whether a concentration is Community dimension or not. Contrary to legal certainty, Article 5 of the PNTCU provides an ambiguous clause that if a concentration does not reach the threshold of notification, but evidences indicate that the concentration has or may have effect of eliminating or restricting competition, the enforcement agency shall conduct investigations in accordance with the law. Just as mentioned above, this article attaches a big discretion to the authority which will undermine the legal certainty, and then the already completed concentration will endure the risks of prohibition, dissolution, assets disposal, business transfer, fines or other legal liabilities according to Article 48 of the AML.

C. Mechanism of Consultation Prior to Notification

The mechanism of consultation prior to notification is not advisory activity in common sense. It refers to the special informal procedure with close connection to the prior notification system. Before the normal notification to the enforcement agency, the parties of intended concentration may ask the enforcement agency for their opinions, so as to identify the potential problems of their concentration plan, jurisdiction problem or other problems. It is particularly favorable to the concentration with complex problems of jurisdiction and competition.[33] Generally, there are two contents of the mechanism, one is the consultation activity of the parties and the reply of the enforcement agency, the other is measures of rearrangement by the parties according to the reply by the enforcement agency. On one hand, the parties can avoid the risks of being punished by the enforcement agency due to illegal concentration plan; on the other hand, the mechanism makes the formal notification more complete and accurate, brings convenience and efficiency of the formal review procedure, and lowers the administrative cost to concentration control. Therefore, it is popular to all the parties and the enforcement agency.[34]

Paragraph 11 in the preamble of the Implementing Regulation of the EMCR (EC 802/2004) provides that the Commission should give the parties of the proposed concentration an opportunity to discuss the intended concentration informally and in strict confidence before notification, if they so request. Through this mechanism, the undertakings can understand promptly and accurately the implication of regulations, and can prepare accurately and efficiently the necessary materials and documents for the formal notification.

The AML does not provide such effective mechanism. It is necessary for China to introduce such system into the guidelines for concentration control. The mechanism will highly improve the efficiency and lower the administrative costs of the enforcement agency, particularly when the enforcement agency has less experience in concentration control. But it should be noticed that the authorities should assume the duty of confidentiality, they are not allowed to disclose the confidential business secrets and information

acquired in the prior consultation. And the concentration plan by the undertakings and the opinions or replies by the enforcement agency in the consultation are not legally binding.

D. Single Review Process

Both the AML and the EMCR take a single process to concentration control, which is divided into two phrases, the first phrase of initial review and the second phrase of in-depth investigation.

. First Phrase of Initial Review

Article 25 of the AML states that, the enforcement agency should carry out initial review within 30 working days from the receipt of a notification, and should make a decision on whether an in-depth investigation should be implemented. If the enforcement agency has decided not to carry out in-depth investigation or has not made a decision within the time limit, the undertakings may implement the concentration.

Article 10.1 of the EMCR the Commission should decide within 25 working days whether the notified concentration is compatible with the common market, or whether a in-depth investigation is needed. The time limit should be increased to 35 working days if the undertakings offer commitments. If the Commission has decided that the concentration is compatible with the common market, or has not made a decision within the time limit (Article 10.6), the undertakings may implement the concentration.

Most of the notifications were declared compatible with the market after the first phrase of initial review.[35] According to the statistics of the European Commission, the Commission received 347 notifications of concentration in 2008, 307 of them were declared compatible with the common market after the initial review. And 175 of 203 notifications were permitted till October in 2009 after the initial review.[36]

. Second Phrase of In-Depth Investigation

Article 26 of the AML provides that, if the enforcement agency has decided to carry out in-depth investigation, it should be fulfilled within 90 working days from the date of the decision, and a final decision should be made on whether the concentration should be prohibited. The enforcement agency may extend the investigation period to not more than 150 working days, if 1. the undertaking(s) agrees; 2. the information is inaccurate and require verification; or 3. matter changed after the submission of notification. The undertakings should not implement the concentration during the investigation period. If the enforcement agency failed to make a decision within the time limits, the undertakings may implement the concentration.

Article 10.3 of the EMCR provides that, the Commission should fulfill the in-depth investigation within 90 working days. The time limit can be increased to 105 working days if the undertakings offer a commitment after 55 (inclusive) working days from the initiation of proceedings, and can be extended to 110 working days if the undertakings request such extension (but only once) not later than 15working days from the initiation of proceedings or there is an agreement between the Commission and the undertakings at any time after the initiation of proceedings. If the Commission has decided that the concentration is compatible with the common market, or has not made a decision within the time limit (Article 10.6), the undertakings may implement the concentration.

There are some differences between the single review processes of the AML and the EMCR. First, the ECMR has more efficiency than the AML. The time limit of the first phrase in the AML is 30 working days which can not extended by any reason, while that in the EMCR is 25 working days which can be extended to 35 working days. Both time limits of the second phrase are 90 working days, but the time limit of the second phrase in the AML can be extended to 150 working days, and that in the EMCR can be extended at most to 110 working days. Second, the reasons for extension are different. According to Article 10.1 of the EMCR, the time limit starts on the working day of the receipt of the complete

information. According to Article 10.4 of the EMCR, all time limits suspend if the Commission has to request information due to the responsibility of the undertakings. And the matter change clause is not a clear one which leaves discretional space to the enforcement agency. Therefore, the EMCR is more explicit than the AML in the single review process.

Just as a scholar says, "As a practical matter, most transactions never undergo any significant antitrust review, and among those that do, most are resolved through consent decrees.“[37] According to the statistics of the European Commission, the Commission received 347 notifications of concentration in 2008, 321 of them were declared compatible with the common market, none was prohibited. And 178 of 203 notifications were permitted till October in 2009, none was prohibited.[38] According to the publicized information, the Ministry of Commerce of the PRC received 58 notifications, 46 of them came to end, 45 cases were approved, only 1 case was prohibited.[39]

E. Commitment

In order to improve the best pro-competitive effects of concentrations, various jurisdictions approve concentrations with attached conditions. Articles 6.2 and 8.2 of the EMCR provide that the Commission may attach conditions and obligations to its decision with intention to ensure that the undertakings concerned comply with the commitments. And Article 29 of the AML also states that the enforcement agency may permit a concentration with conditions to alleviate the negative impact of the concentration on competition.

Normally, the enforcement agency approves a concentration with conditions only after the submission of the commitment by the undertakings concerned and a prudent consideration on that commitment. The agency will not attach conditions voluntarily to an approval of a concentration without commitment by the relevant undertakings. After the submission of the commitment, the enforcement agency should make an appraisal on the quality of the commitment. A qualified commitment should eternally restore effective competition, be proportionate to the anticompetitive effects, and can eliminate the harm caused by the concentration. The commitment should avoid generating more anticompetitive effects to the market. And it should be carried out timely and efficiently, usually without special supervision by the enforcement agency.[40] Commitments may classified into commitments to transfer a market position, commitments to exit from a joint-venture, commitments to grant access, and other commitments[41]; or may be divided into structural commitments and behavioral commitments according to research requirement. According to Article 13 of the Provisional Regulation (Draft) of Review on Concentration of Undertakings (the PRRCU)[42]drafted by the Ministry of Commerce of the PRC , the commitment should be operable, and can remove the restricting or eliminating effects on competition. The commitment can be modified, but if the relevent undertakings did not provide a commitment or provide a disqualified final commitment, the enforcement agency would issue a prohibition to the relevant concentration.

If the enforcement agency considers the commitment is qualified, it will attach restrictive conditions with a view to eliminate the adverse impacts on competition of the concentration. The restrictive conditions cover structural restrictions, behavioral restrictions.[43] According to Article 11 of the PRRCU (draft), the restrictive conditions include structural conditions, such as divestment of business or assets; behavioral conditions, e.g. key technology licensing or access to infrastructure (network or platform); or both. The structural restriction is more acceptable to the enforcement agency because it makes direct pro-competitive effects to the market, while the behavioral restriction does not have such direct effects.

Among the restrictive conditions, divestment is the most important way to rescue a concentration. It is simple, easy to manage and has a definite consequence.[44] According to the practice in EU, the objective of divestment is to restore effective competition. The divestment covers all the necessary intangible or tangible assets, business and personnel. The relevant undertakings should provide sufficient information of business, personnel or organization to the potential purchasers. And the potential

purchasers and the divestment plan should be permitted by the Commission. The divestment business should be independent from the business of the relevant undertakings. And the relevant undertakings should preserve the economic viability, marketability and competitiveness of the divestment business, and minimize any risk of loss of competitive capability. They should not impose a significant adverse impact on the value, management or competitiveness of the divestment business or cause fundamental change to it; make available sufficient resources for its development, and take all reasonable steps to encourage all key personnel to remain with the divestment business. The relevant undertakings may not acquire control of the divestment within 10 years, unless it is proved unnecessary due to market structure change. The Commission and the parties would appoint an independent trustee to monitor the enforcement of the divestment commitment. [45] The Commission may conduct the divestment plan according to the “Crone-jewel”, if the relevant undertakings do not carry out the commitment of divestment with attached conditions.

Commitments in other forms are also very important. In US, "recently, the FTC has demonstrated greater flexibility in remedies, sometimes permitting simple licenses of intellectual property assets to remedy horizontal merger concerns (particularly where entry into the relevant market would be difficult in the absence of the license)."[46] There is an urgent need for Chinese enforcement agency to issue regulations or guidelines to make these commitments detailed and clearly.

CHAPTER FIVE LEGAL REMEDIES

The decisions on concentration always have important impacts on the parties, the competitors and other interested parties, therefore, various jurisdictions give legal resorts to them for remedies.

A. Administrative Reconsideration

Compared to the EMCR, the AML announces the means of administrative reconsideration for the relevant parties to claim their right, while the EMCR does not provide the corresponding measure. Article 53 of the AML provides that the relevant parties, who disagree with the decision of the enforcement agency made on concentration in the single process, may apply for administrative reconsideration; the relevant parties who disagree with the administrative reconsideration decision may file an administrative lawsuit. The AML provides a special rule for legal remedy on concentration. If relevant party wants to sue an administrative decision by the enforcement agency, he or she must file for administrative reconsideration at first. While relevant party of the decision on other antimonopoly affairs (such as monopoly agreement or abuse dominant market position) can file for administrative lawsuit or reconsideration at his or her choice. The main reason for the AML providing such rule is that the work of concentration control is very professional compared with other antimonopoly affairs. During the procedure of concentration control, the agency must do a great deal of work, such as appraisal of turnover, market definition, assessment of market competition, consideration of defenses, and evaluation of commitment and so on and so forth. The agency will give professional interpretation using economic theory or taking other complex factor, such public interest, into consideration. The administrative efficiency is vital to the concentration parties and other relevant parties. The agency has enough experiences, resources and personnel to deal these professional affairs, thus, this rule can reduce the time cost of the relevant parties. Besides, this rule gives a chance for the enforcement party to rectify its mistakes by itself.

According Article 9 in the Administrative Reconsideration Law of the PRC (the ARL), the relevant parties shall file for administrative in cases their legitimate interest was infringed by the decision of the enforcement agency within 60 days from the time they knew or should know the decision. But they must prove that their interest has been injured by the agency. The relevant parties cover the concentration parties, the competitors and other interested parties, such as consumers.

And according to the Measures of the Ministry of Commerce for the Administrative

Reconsideration[47], the qualified agency for receipt of the application is the Legal Affairs Institution of Ministry of Commerce. After the institution receives the application, it shall examine it within 5 working days, and shall decide whether to accept it or not.

As a general rule, the method of written reconsideration shall be adopted. If the case is very complicated or it is unable to find the truth through written reconsideration, the opinions of the parties concerned may be heard, onsite investigations may be conducted, and special institutions may be invited to test and authenticate the relevant items (Article 22 of the ARL). In the course of the administrative reconsideration, the enforcement agency (the respondent) shall not gather proofs from the applicant and other relevant organizations or individuals on its (their) own initiative, nor may they consider any fact or information found after having made the decision as the factual basis for the decision. The institution shall reconsider the decision made by the respondent on merits, applicable law, procedure, competence of the agency, and propriety of the decision (Article 28 of the ARL), and then give an opinion.

After having been approved by the person-in-charge of the Ministry of Commerce, or having been adopted upon collective deliberation, an administrative reconsideration decision shall be made. The decision should be made within 60 days from the acceptance of the application, with a possible extension of at most 30 days if the case is complicate. Once the written administrative reconsideration decision is served, the decision is instantly legally effective (Article 31 of the ARL). If the relevant parties request compensation, the reconsideration agency will decide to compensate the parties according to the State Compensation Law of the PRC.

Therefore, from the procedure above, we can see that the administrative reconsideration provides an efficient way for the relevant parties to remedy.

B. Judicial Review

According to Article 53 of the AML, if the relevant parties (including the concentration parties, the competitors or other interested parties) do not accept the decision of the administrative consideration, they may file for judicial review. And according to Article 14, 15 and 16 in the Administrative Procedure Law of the PRC (the APL), the intermediate court or above (high or the supreme court) has the jurisdiction of such cases. Usually, the relevant parties should challenge the administrative reconsideration decision within 15 days after the receipt of the decision, or within 15 days after the expiration for the time limits of the administrative reconsideration if the relevant parties do not receive that decision (Article 38 of the APL). The qualified court should decide whether to accept the case or not within 7 days from the receipt of the case (Article 42). The court will review the merits, applicable law, procedure, competence of the authority and the fairness of the administrative penalty of the filed decision. And if the administrative penalty is obviously unfair, the court may amend the administrative decision; in other circumstances, it only can uphold, annul the administrative decision, or order the authority to perform the statutory duty within prescribed time, and can not change the administrative decision directly (Article 54). The court should make the judgment within 3 months after the acceptance of the case. And this time limit can be extended when there is special situation after the approval of higher court (Article 57). If the relevant parties do not accept the judicial judgment of the court of first instance, they are also given a second chance to appeal the judicial judgment. The court of final appeal should make the final decision with 2 months after the receipt of the appeal. And this time limit can be extended either where there is special situation after the approval of higher court (Article 60).

The European commission decisions under the EMCR are also reviewable by the European Court of Justice (the ECJ) and the Court of First Instance (the CFI) according to Article 16 of the EMCR and Article 263 of the Consolidated Version of the Treaty on the Functioning of the European Union.[48] "Applicants have to show that there is a decision with legal consequences and that they have been directly and individually concerned."[49] These applicants cover the concentration parties, the competitors and the

interested parties, and they must show that their legitimate interests are affected directly and individually by the concentration decision. The court will review merits, competence of the authority, procedure, applicable law, and the propriety of the administrative penalty (fine or periodic penalty payment). The CFI will not make a judgment to substitute the Commission's decision. It will annul the decision if the Commission's decision is unlawful and then the Commission will make another decision to comply with the judgment. The judgment of the CFI will cost normally 2 years or even longer in concentration cases because of the complexity of concentration case and the workload of the CFI.[50] The relevant parties can appeal the case to the ECJ if they do not accept the judgment of the CFI.

There are many similarities of judicial review mechanism on the points of the qualified parties, grounds for judicial review etc. between China and European Union. They both show the respect of the margin of the discretion of the enforcement agency, and do not review the propriety of the administrative decision except for administrative penalty. It seems that Chinese judicial review is more efficient to review concentration cases than that of EU. The time limits of judicial review are much shorter than that of EU, but the unlimited extension produces ambiguity of such time limits. And EU has developed an expedited procedure to deal with those simple, urgent cases, and it proves its value in concentration cases. According relevant statistics, the maximum period is 12 months from acceptance to judgment in expedited procedure with concentration cases.[51] Compared to EU, there is no expedited procedure in the APL, while there are such procedures in the Civil Procedure Law of the PRC and the Criminal Procedure Law of the PRC. Therefore, in order to improve the efficiency of the judicial review of concentration cases, the APL should establish such procedure; and at the same time, the court should avoid abuse of the unlimited extension of the time limits.

CONCLUSION

The AML declares the articles of concentration control mechanism, and they will largely impact on the concentration of undertakings. The AML and the EMCR have a lot of similarities, because the articles of concentration control in the AML specially take examples of the legislation and practice in EU. The similarities cover the typology of concentrations, the main factors for consideration, the procedural rules, and the judicial review mechanism. "The European Commission model proved to be the most influential."[52] Taking the European example, China has obtained an international standard legislation of concentration control, and it is no doubt that China will improve the efficiency of concentration control and have common language in international communication and cooperation on concentration control affairs.

The AML also has it own characteristics. It declares a different substantive test, which stipulates that the concentration of undertakings should be prohibited if it has or may have an effect on eliminating or restricting competition (the ERC test). And it supplies a different legal resort, administrative reconsideration which is mandatory procedure prior to the judicial review, for the relevant parties to remedy their legal interests. Compared with EU rules, there are also detailed different aspects on typology of concentration, authorities of concentration control, procedural rules of concentration and so on. It will be favorable to the drafting of the guidelines or the legislation of the implementing regulations.

However, the articles of concentration control concerned in the AML are brief and abstract. "it lacks many vital details and nuances of foreign antitrust doctrines."[53] These articles provide large discretion for the authorities which may undermine the legal certainty and stability of concentration control and would bring risks to the efficiency of concentration control and the legal interests of the relevant interested parties. As commented, "China has chosen an administrative-oriented model in concentration control. This may bring higher efficiency, but may also bring the hidden trouble of governmental over-intervention."[54] EU has developed a relatively matured legal system for concentration control; while China still has a long

way to go, in making implementing regulations, drafting guidelines, and narrowing their discretion down on concentration control.

References

1. L. Erhard, Prosperity Through Competition, Translated by Shikang Zhu, The Commercial Press, 1983, p.11.
2. Paolo Buccirossi, Lorenzo Ciari, Tomaso Duso, Sven-Olof Fridolfsson, Giancarlo Spagnolo, Cristiana Vitale, Ex-post Review of Meger Control Decision, A Study for European Commission, p.23.
3. Keith N. Hylton, Antitrust law------Economic Theory and Common Law Evolution, Cambridge University Press, 2003, pp.312-313.
4. Friedrich Trautwein, Merger Motives and Merger Prescriptions, Strategic Management Journal, Vol. 11 1990, pp. 284-290.
5. Cai Yifei, First Investigation on Competition Restiction of Multi-national Companies, 21st Century Business Herald, 17th, May, 2004.
6. Cai Yifei, Why Kodak was Highlighted, 21st Century Business Herald, 17th, May, 2004.
7. The AML also has provisions on monopoly agreement, abuse of dominant market position and abuse of administrative power to restrict or eliminate competition.
8. Wang Xiaoye, Detailed Interpretation about Antimonopoly Law of PRC, IPR Press, 2008, p.6 in preface.
9. Liu Heping, Study on the Legal System of EU Merger Control, Peking University Press, 2006, p. 59.
10. Wu Zhenguo, M&A and Antimonopoly Review, in: Jiansan Shi (Ed.), China M&A Law Report 2009, Law Press, 2009, p. 47.
11. Dieter Wolf, experiences of German Competition Law, in: Xiaoye Wang (Ed.), Antimonopoly Law and Market Economy, Law Press, 1998, p 258.
12. Wang Xiaoye, Detailed Interpretation about Antimonopoly Law of PRC, IPR Press, 2008, p.70.
13. Consolidated version of the Treaty on the Functioning of the European Union, in: Office Journal of the European Union, C 115, vol.51, 9, May, 2008, p. 126.
14. Wei Xinjiang, Comparative Research on Antitrust Control of Merger in EU and US, Peking University Press, 2005, P.199.
15. Wang Xiaoye, The Difficult Problem about Multiple Institutions of Antimonopoly Enforcement in China, China Development Observation, vol.9, 2006, P. 58.
16. New Merger Regulation Frequently Asked Questions, EU Institution Press Release, MEMO/04/9, 20, January, 2004.
17. An Renckens, Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defense, Journal of Competition Law and Economics, 3(2), May, 2007, P164.
18. Borja Martinez, Fernández, Iraj Hashi, Marc Jegers, The Implementation of the European Commission's Merger Regulation 2004: An Empirical Analysis, Journal of Competition Law and Economics, 4(3), Oxford University Press, 26, March, 2008, pp.792-793.
19. Lorenzo Coppi, Mike Walker, Substantial Convergence or Parallel Paths? Similarities and Differences in the Economic Analysis of Horizontal Mergers in U.S. and EU Competition Law, The Antitrust Bulletin, Spring-Summer, 2004, p103.
20. Liu Heping, Comparative Research of the Substantive Tests on Merger Control between EU and U.S., Legal Science, vol.1, 2005, p.112.
21. Wang Xiaoye, Detailed Interpretation about Antimonopoly Law of PRC, IPR Press, 2008, pp.178-179.
22. Hu Jian, Interpretation on Legislation of Concentration of Undertakings in Antimonopoly Law, in: Jiansan Shi (Ed.), China M&A Law Report 2008, Law Press, 2008, p. 14.
23. Wang Xiaoye, Detailed Interpretation about Antimonopoly Law of PRC, IPR Press, 2008, p. 183.
24. Nathan Bush, Anticipating Chinese Antitrust Law, China Business Review, January—February, 2008,

p.46.
25. An Renckens, Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defense, Journal of Competition Law and Economics, 3(2), May, 2007,pp. 160-161.
26. Yusaf H. Akbar, Gabriele G. S. Suder, The New EU Merger Regulation: Implications for EU-U.S. Merger Strategies, Thunderbird International Business Review, Vol. 48(5), September—October, 2006, p. 671.
27. Idem, p.672.
28. Antonio Bavasso, Alistair Lindsay, Causation in EC Merger Control, Journal of Competition Law and Economics, 3(2), 2007, p. 187.
29. Mathew Heim, Problems and process: European merger control and how to use it, Journal of Public Affairs, vol. 4, 2003, pp. 81-82.
30. Michael S. McFalls, Chutes and Ladders: The Contemporary Merger Review Process before US Antitrust Enforcement Agencies, The Licensing Journal, September, 2008, p.21.
31. Zhao Xiaoguang, Study and Consideration on the Notification Criterion for Concentration of Undertakings, in: Jianshan Shi (Ed.), China M& Law Report 2009, Law Press, 2009, p. 8.
32. Idem, p. 10.
33. Shi Jiansan, Hu Jian, Feng Pengcheng, Yin Xiaowen, Comparative Research on Foreign Merger Control System, in: Jiansan Shi (Ed.), China M&A Law Report 2007, Law Press, 2007,p. 43.
34. Wu Zhenguo, M&A and Antimonopoly Review, in: Jiansan Shi (Ed.), China M&A Law Report 2009, Law Press, 2009, pp. 38-39.
35. Liu Heping, Study on the Legal System of EU Merger Control, Peking University Press, 2006, p. 171.
36. http://ec.europa.eu/competition/mergers/statistics.pdf.
37. Michael S. McFalls, Chutes and Ladders: The Contemporary Merger Review Process before US Antitrust Enforcement Agencies, The Licensing Journal, September, 2008, p. 24.
38. http://ec.europa.eu/competition/mergers/statistics.pdf.
39. http://fldj.mofcom.gov.cn/aarticle/zcfb/200907/20090706409831.html.
40. Wang Xiaoye, Detailed Interpretation about Antimonopoly Law of PRC, IPR Press, 2008, p.188.
41. Merger Remedies Study (public version), DG Competition of the European Commission, Oct. 2005, p30.
42. http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106011511.html.
43. Paul Craig, Gráinne de Búrca, EU Law, Oxford (Forth Edition) University Press, 2007, p.1067.
44. Wei Xinjiang, Comparative Research on Antitrust Control of Merger in EU and US, Peking University Press, 2005, P. 99.
45. http://ec.europa.eu/competition/mergers/legislation/commitments.pdf.
46. Michael S. McFalls, Chutes and Ladders: The Contemporary Merger Review Process before US Antitrust Enforcement Agencies, The Licensing Journal, September, 2008, p.13.
47. http://www.china-liaoning.gov.cn:8085/news_view.asp?newsid=51.
48. Consolidated version of the Treaty on the Functioning of the European Union, in: Office Journal of the European Union, C 115, vol.51, 9, May,2008, p. 162.
49. Paul Craig, Gráinne de Búrca, EU Law, Oxford (Forth Edition) University Press, 2007, p.1067.
50. Francisco Todorov, Anthony Valcke, Judicial review of merger control decisions in the European Union, in: The Antitrust Bulletin, vol.51, No. 2, September,2006, pp. 364-377.
51. Liu Heping, Study on the Legal System of EU Merger Control, Peking University Press, 2006, pp. 240-241.
52. Nathan Bush, Anticipating Chinese Antitrust Law, China Business Review, January—February 2008, p.46.
53. Nathan Bush, Anticipating Chinese Antitrust Law, China Business Review, January—February, 2008,

p.48.
54. Wang Zhongmei, Research on M&A Control by Chinese Antimonopoly Law, in: Jiansan Shi (Ed.), China M&A Law Report 2009, Law Press, 2008, p. 48.