

Chapter 1

Introduction

The year 2007 marked an important milestone in China's antitrust legislation. After more than 13 years of drafting, the first comprehensive competition law, the Anti-Monopoly Law ("AML"), was promulgated on 30 August 2007 and entered into force one year later on 1 August 2008. The AML introduced to China a legal framework to prevent and restrict monopolistic conducts that affect competition in the Chinese market, with provisions targeted against monopoly agreements, abuse of market dominance, anticompetitive concentrations of business operators, and abuse of administrative power to eliminate or restrict competition. Out of these four areas, this thesis will focus on the set of rules applicable to "concentrations of business operators", which is internationally commonly referred to as the "merger control" regime, and evaluate its practical application by the competent authority, the Ministry of Commerce ("MOFCOM").

The application of the AML is embedded in the general political and economic context of China. Since 1978, China's policymakers have launched far-reaching economic reforms aimed at liberalising the economy and introducing market mechanisms into the Chinese economy. These reforms have borne fruit: in less than 30 years, China's economy has grown significantly, and by 2010, China had become the world's second-largest economy. However, the legacy of the former planned economy is still evident in the country, where important parts of the economy remain subject to state control, and market power is often consolidated in the hands of a small number of state-owned entities.

The primary aim of competition laws is to address excessive market power and prevent abuses of such power. As a piece of Chinese competition legislation, the AML is no exception. It is aimed at protecting fair market competition, enhancing economic efficiency, and promoting consumer welfare. However, the language of the AML also opens a door to a possible influx of other policy goals, including, most prominently, industrial policy considerations.

As a result, the question arises as to what policy goals actually prevail in the practical application of the merger control law, i.e. whether MOFCOM adheres strictly to the aim of protection of competition and enforces the law with scrutiny

against all entities that engage in anticompetitive mergers or whether it pursues a more “selective enforcement” when non-competition-related policies are involved and state interests are at stake. This discussion has relevance not only in the context of consolidations of the Chinese state-owned industries but also in relation to acquisitions of well-known domestic companies by foreign enterprises. In particular, MOFCOM’s prohibitive decision in *Coca-Cola/Huiyuan* has provoked an international outcry that it was based more on a protectionist reasoning than on competition concerns. This thesis will, based on an in-depth analysis of the written law and all published merger decisions from the entry into force of the AML in August 2008 until December 2013, assess the competition policy orientation of MOFCOM’s enforcement practice after the first 5 years of practical application.

The thesis is structured as follows: before the merger control law under the AML will be assessed, Chap. 2 will depict the economic backgrounds of competition policy in China, and Chap. 3 will retrace the historical development of the Chinese merger control regime. Thereafter, Chap. 4 will outline the institutional framework for the enforcement of the AML, and Chap. 5 will analyse the objectives and policy standards of the Chinese merger control as embodied in the AML. Subsequently, Chap. 6 will provide an overview of all merger decisions that have been published until December 2013, and the following chapters will assess the scope of application of Chinese merger control law (Chap. 7), the merger review procedure (Chap. 8), and the substantive merger control test (Chap. 9), respectively. Last, Chap. 10 will provide a brief outlook on the judicial enforcement of the merger control law in China.

Chinese Merger Control Law

An Assessment of its Competition-Policy Orientation
after the First Years of Application

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2015, XIX, 393 p., Hardcover

ISBN: 978-3-662-43867-1