China-EU Law Series 2

Niels Philipsen
Stefan E. Weishaar
Guangdong Xu *Editors*

Market Integration: The EU Experience and Implications for Regulatory Reform in China

China-EU School of Law 中欧法学院
At the China University of Political Science and Law 中国政法大学

Springer

China-EU Law Series

Volume 2

More information about this series at http://www.springer.com/series/11933

Niels Philipsen • Stefan E. Weishaar •
Guangdong Xu
Editors

Market Integration: The EU Experience and Implications for Regulatory Reform in China

Springer

Editors
Niels Philipsen
Faculty of Law
Maastricht University
Maastricht, The Netherlands

Stefan E. Weishaar
Faculty of Law
University of Groningen
Groningen, The Netherlands

Guangdong Xu
Centre for Law and Economics
China University of Political Science and Law
Beijing, China

ISSN 2198-2708 ISSN 2198-2716 (electronic)
China-EU Law Series
ISBN 978-3-662-48272-8 ISBN 978-3-662-48273-5 (eBook)
DOI 10.1007/978-3-662-48273-5

Library of Congress Control Number: 2015953626

Springer Heidelberg New York Dordrecht London

Printed on acid-free paper

Springer-Verlag GmbH Berlin Heidelberg is part of Springer Science+Business Media (www.springer.com)

List of Abbreviations

ABS	Alternative business structure
AIC	Administration of Industry and Commerce
ALL	Administrative License Law
AML	Anti-Monopoly Law
API	American Petroleum Institute
APL	Administrative Procedure Law
ASME	American Society of Mechanical Engineers
BOC	Bank of China
BSI	British Standards Institution
CCBE	Council of Bars and Law Societies of Europe
CCR	Command and Control Regulation
CER	Corporate environmental responsibility
CFI	Court of First Instance
CFP	Corporate financial performance
CGO	Central government owned
CNY	Renminbi
COE	Collectively owned enterprise
CPC	Communist Party of China
CSOE	Central State Owned Enterprises
CSP	Corporate social performance
CSR	Corporate social responsibility
CSRC	China Securities Regulatory Commission
DECC	Department of Energy and Climate Change
DNV	Det Norske Veritas
DRC	Development and Reform Commission
DSJI	The Dow Jones Sustainability Indices
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EIA	Environmental Impact Assessment

EU	European Union
EUR	Euro
FIE	Foreign invested enterprise
GATI	Germany Trade & Invest
GDP	Gross domestic product
GMO	Genetically modified organism
GPL	Government Procurement Law
IGC	Intergovernmental Conference
IMF	International Monetary Fund
ISO	International organization for Standardization
ISPC	Institution-Structure-Conduct-Performance
LGO	Local government owned
MDP	Multi-disciplinary partnership
MEW	Margolis, Elfenbein and Walsh (authors)
MNC	Multinational corporation
MOFCOM	Ministry of Commerce
MoU	Memorandum of Understanding
NCS	National Competition Strategy
NDRC	National Development and Reform Commission
NGO	Non-governmental organization
NPC	National's People Congress
NPL	Non-performing loans
NSB	National Standards Body
NSGP	Nord Stream Gas Pipeline
OECD	Organization for Economic Co-operation and Development
PB	Private Background
PBOC	People's Bank of China
PPP	People, Profit, Planet
PR	Public relations
PRC	People's Republic of China
RMB	Renminbi
ROE	Return on equity
RP	Revenue Producing
SAIC	State Administration of Industry and Commerce
SASAC	State-owned Assets Supervision and Administration Commission
SETC	State Economic and Trade Commission
SGEI	Services of General Economic Interest
SIC	Schwarz information criterion
SME	Small and medium enterprise
SOE	State-owned enterprise
TEC	Treaty of Amsterdam
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TVE	Township and village enterprises

U.K.	United Kingdom
UN	United Nations
U.S.	United States
USD	United States Dollar
USDA	United States Department of Agriculture
VAT	Value added tax
WTO	World Trade Organization
WWF	World Wildlife Fund

Contents

Contributors

Michael Faure Maastricht University Faculty of Law, Maastricht, The Netherlands

Erasmus School of Law, Rotterdam, The Netherlands

Binwei Gui Center for Law and Economics at the China University of Political Science and Law, Beijing, China

Jiye Hu Center for Law and Economics at the China University of Political Science and Law, Beijing, China

Wenjing Li Center for Law and Economics at the China University of Political Science and Law, Beijing, China

Mengxing Lu Maastricht University Faculty of Law, Maastricht, The Netherlands

Jingyuan Ma Central University of Finance and Economics, Beijing, China

Mel Marquis European University Institute, Florence, Italy

Niels Philipsen Faculty of Law, Maastricht University, Maastricht, The Netherlands

Mehdi Piri Damagh Maastricht University Faculty of Law, Maastricht, The Netherlands

Guang Shen Faculty of Law, Maastricht University, Maastricht, The Netherlands

Shouji Sun University of International Business and Economics, Beijing, China

Stefan E. Weishaar Faculty of Law, University of Groningen, Groningen, The Netherlands

Guangdong Xu Center for Law and Economics at the China University of Political Science and Law, Beijing, China

Qi Zhou University of Leeds School of Law, Leeds, UK

Tianshu Zhou Center for Law and Economics at the China University of Political Science and Law, Beijing, China

Introduction

Stefan E. Weishaar, Niels Philipsen, and Guangdong Xu

1 Market Integration and Economic Growth

China has long been admired for its ability to achieve double-digit economic growth figures. The economic growth literature describes such phenomena in terms of a 'catch up effect'.[1] The underlying argument is that the rise in the economic welfare and productivity of less developed economies will be larger than those of more advanced economies. Price convergence in this catch-up process is *inter alia* driven by advances in the economic production capacity of a country, and also by inflation and wage increases. The recent slowing of Chinese economic growth rates bears testimony to this catch-up effect. Moreover, various authors, such as Xu (2014), have pointed out that the current economic growth in China is not sustainable because it is the result not only of catching up but also of distorted factor prices (of, e.g., land and labour) and financial repression (such as regulated interest rates and managed credit allocation).[2]

[1] Barro and Sala-i-Martin (1995).

[2] Xu (2014), pp. 141–168.

S.E. Weishaar (✉)
Faculty of Law, University of Groningen, Groningen, The Netherlands
e-mail: S.E.Weishaar@rug.nl

N. Philipsen
Faculty of Law, Maastricht University, Maastricht, The Netherlands
e-mail: niels.philipsen@maastrichtuniversity.nl

G. Xu
Center for Law and Economics at the China University of Political Science and Law, Beijing, China
e-mail: guangdongx@cupl.edu.cn

N. Philipsen et al. (eds.), *Market Integration: The EU Experience and Implications for Regulatory Reform in China*, China-EU Law Series 2,
DOI 10.1007/978-3-662-48273-5_1

With an expanding economic potency of China, it is apparent that China cannot rely upon exports as the main driver of economic growth, nor should it rely on legal interventions that cause further distortions of factor prices. Demand for goods and services will also have to derive from China itself. This is particularly important at times of a less favourable global economic climate such as the global financial crisis of 2008, which has challenged China's mode of economic growth.[3] The Chinese legislator has identified sustainable domestic growth as an important long-term policy goal.[4]

A way for China to unleash its economic forces and to foster non-export-led economic growth is 'market integration' and regulatory reform. Economic theory suggests that integrating similar national or regional markets generally leads to (more) economic growth and societal prosperity.[5] Similarly, ensuring that regulation is setting the right incentives for regulated entities to follow rules can help to foster economic growth and allow for increases in social welfare.

Building upon the EU's experience with market integration, this book aims to unravel the role regulation can play in permitting market integration and in unleashing more economic prosperity in China. By taking an interdisciplinary 'Law and Economics' and comparative law (China and EU) approach, we aim to analyse several impediments to market integration and domestic economic growth.

Regulatory interventions can occur at all levels of government (central authorities, provincial authorities, local authorities) and may also take the form of self-regulation. Regulation can either positively or negatively impact market integration and competition, and will thereby influence trade flows. Examples of national rules that can (positively or negatively) impact the free flow of goods and services within China include competition law, public procurement rules and financial regulation. At the provincial level, restrictions to the freedom of establishment can obstruct the move of efficient firms and prevent them from taking advantage of low-cost production factors. At the local level, regulatory restrictions can impede competition on the merits (for example, in the local taxi market) leading to unnecessary high prices and hence to a lower level of social welfare. Such restrictions to market integration and economic prosperity can be routed in inefficiency-inducing regulation itself—either on national, provincial or local level—or are routed in undesirable administrative practices. The latter are sometimes referred to as administrative monopolies, alluding that the culprit that obstructs the creation of a competitive and integrated domestic market is associated with public administration. Various contributions to this book examine whether regulation can be improved to allow for better integrated markets in China and for more economic prosperity.

Some contributions focus more particularly on self-regulation by examining whether (and if so, how) the virtues of self-regulation can be combined with a

[3] Wen (2010).

[4] 12th Five Year Plan (2011–2015), adopted by the National People's Congress on 14 March 2011.

[5] See, e.g., Wagener and Eger (2009).

competitive environment, also in the specific case of China, in order to overcome obstacles to market integration and to provide stimuli for economic growth. Interesting examples in this respect include the case of professional regulation (such as lawyers and accountants) and environmental law.

2 Importance of the Book

Despite impressive economic growth rates, it has been suggested that China's economic system is fragmented and that this fragmentation of the largest market in the world inhibits growth. Economic fragmentation in China is closely linked to the 1994 tax reforms that created the need for the provinces to raise funds to stimulate economic progress (Lu 2008; Jiang 2007). The costs of this strong rise in GDP of the local economies came in the form of regional protectionism and facilitated the creation of administrative monopolies.

Economic theory suggests that the integration of similar[6] regional markets can lead to a reinvigoration of economic growth and societal prosperity—something that may in particular be of interest during times of a world economic slowdown. The EU has a rich experience in market integration and encountered a multitude of obstacles in the creation of the European internal market, in particular related to the four freedoms (free movements of goods, services, labour and capital) and competition law as its 'natural complement' (following the *Consten Grundig* case before the European Court of Justice).

This book approaches obstacles to market integration and regulation that impedes economic growth from the perspectives of Law and Economics and comparative law. It will do so by addressing impediments in a wide area of fields, ranging from competition law, public procurement rules and financial regulation to freedom of establishment, local transportation and self-regulation, e.g. in the areas of liberal professions and the environment. Each is discussed in turn below, although of course these fields are to some extent overlapping.

[6] If regions are not similar, the economic theory of federalism suggests that further integration in the form of harmonization of laws is only efficient when (1) there are transboundary externalities, (2) this leads to economies of scale, (3) harmonization reduces transaction costs and (4) there is a genuine risk of a 'race to the bottom' (i.e., when governments actively try to attract industry at the expense of, e.g., environmental or consumer protection). After all, the starting point is a bottom-up approach, because regional (or national regulation) is better able to serve people's preferences than national (or transnational) regulation and leaves room for regulatory competition and learning effects. See Faure (2003) and various contributions to this book, including the chapter by Zhou and Philipsen.

2.1 Competition Law

The Chinese Anti-Monopoly Law entered into force on August 1st, 2008. Its creation constituted an important step in China's movement towards a more market-oriented socialist economy. It is expected that the strengthening of competition will not only lead to increased levels of welfare for the public at large but at the same time work towards a stronger legal and economic integration. This does not apply only to competition between private firms; the expectation also applies to situations where (semi-)public undertakings are competing with private undertakings. Furthermore, government intervention with competition on the merits may obstruct economic integration and give rise to inefficiencies.

In its development, the Chinese Anti-Monopoly Law was much inspired by the European (EU) competition law. One area that the Chinese legislator did not take up is government support schemes. In the EU there are so-called 'State aid' rules which prevent a 'subsidy race' between EU Member States. These State aid rules aim to prevent direct support measures (e.g., subsidies for research, land purchases, rescue and restructuring aid, etc.) that undermine competition on the merits.

One particularly important aspect regarding the establishment of a more market-oriented socialist economy in China is the role that administrative monopolies play, and to what extent they inhibit market integration. Closely related to this question is the legal relationship between the Anti-Monopoly Law and administrative law that constitutes the basis of administrative monopolies. Some scholars suggest that the Anti-Monopoly Law is not an efficient or effective tool to address such monopolies but that more efficient tools—in the fight against corruption—should be employed.[7] Law and Economics theory can be used to examine the role administrative monopolies play in cementing economic fragmentism and the pros and cons of different approaches to reduce the negative welfare effects of administrative monopolies.

2.2 Public Procurement Rules

As pointed out above, competition law is directed not only at (private and public) undertakings but also at governments granting aid to undertakings. Governments can also impact the economy in another way, namely by how they conduct their purchases of goods or services in procurement tenders. It is more particularly in this context that the European experience may offer interesting insights for China, taking into account that China is a large unitary State with many provinces. Despite all well-meant attempts, the European public procurement market remains an area that continues to resist market integration. The link between public procurement

[7] See Weishaar (2011) for a review.

and competition is a growing field of research. A detailed analysis of the European situation will not only provide much-needed novel insights into the relationship between the two fields in Europe, but it may also generate insights for the Chinese legislative reform process, and it may allow European scholars to learn from the analysis of how the issue could be addressed in the Chinese context. The last point is of particular importance since China enjoys unitary contract and public procurement laws and may therefore also provide new arguments to the discussion on market integration in Europe.

2.3 Financial Regulation

Government interference with the economy can also extend to the way it supports particular companies, e.g. by means of financial regulation in the broader sense. Financial support can extend to monetary policy, granting preferential access to loans and contracts, or shaping enforcement efforts of regulatory authorities to favour certain companies.

Capital is the lifeblood of any market-oriented economy. Regulation addressing how banks, in particular central banks, are to conduct their business is decisively influencing money supply in the economy. Furthermore, the (mis)allocation of financial resources in an economy is influenced by the practices of commercial banks and other credit-issuing institutions, which is in turn influenced by central banks' monetary supply, the economy's credit policy and culture, and other regulatory arrangements. For example, in China, as a result of financial repression, which distorts interest rates and favours State-owned banks, scarce financial resources have been systematically and continually allocated to less profitable but more politically preferable entities, especially State-owned enterprises (SOEs), whereas private firms, which have become the driving force of China's economic growth, are forced to rely on informal and even underground credit channels to finance their survival.

Another way in which government entities can impact how companies are doing economically is through the actual application of rules, i.e. enforcement of law. Preferential or dissimilar treatment of companies leads to a distortion of the level playing field and is likely to lead to a reduction of social welfare.

2.4 Freedom of Establishment

As described above, the European internal market is based on the free movement of goods, services, labour and capital, as well as on competition law as its 'natural complement'. Closely associated with the freedom to provide services is the

freedom of establishment (see Articles 49–55 TFEU). This freedom allows companies to move from one EU Member State to another without obstruction.[8]

The internal market in the EU thus does not only allow goods and services to freely move across borders, but also factors of production such as workers, service providers or capital. This is important because, from an economic perspective, the benefits from trade in goods and services can also be achieved by trade in factors of production. Both lead to similar benefits of trade and hence to more market integration and economic prosperity.

In the EU, the freedom of establishment encompasses the right to take up and pursue activities as a self-employed person and to set up and manage undertakings without being discriminated on the basis of, e.g., nationality. Nationality does of course not play a role in a unitary country such as China, but discrimination against companies from other provinces or even from other cities—in whichever form or with whatever motivation—would impede market integration and thus be likely to undermine economic prosperity.

2.5 Self-Regulation

The literature on self-regulation has indicated that self-regulation may, from an economic perspective, have several advantages over public regulation. These advantages are more particularly related to lower costs (especially the costs of complying with new regulation), more flexibility and—most importantly—superior information of self-regulatory bodies (e.g., professional associations) when compared to the government. Thus, self-regulation, provided it is accompanied with an appropriate institutional infrastructure, can fit into a competitive environment. However, economists equally warn that there is always a risk that self-regulation may be abused by, e.g., professional bodies to engage in behaviour that in fact restricts competition (e.g., limiting the entry into the profession, restrictions on the execution of the profession, etc.). The crucial question therefore has been how the benefits of self-regulation can be kept whereby the potential disadvantages can be avoided. Some solutions, like organizing a competition between self-regulatory bodies, have in that respect been suggested. The role of self-regulation of the professions in a competitive environment is even more challenging in the context of China's adoption of the Anti-Monopoly Law and its simultaneous developments in professional regulation. So far, within the Chinese context professional regulation has been strongly state driven and has thus not yet created a competitive environment for professional services. However, steps towards self-regulation of the professions are also taken in China now, such as the Licensing Act of 2003 and

[8] Although we should point out that sometimes the goals of market integration and economic efficiency, both of which are goals of EU competition law, conflict. See on this Bishop and Walker (2010), pp. 4–8.

the recent amendments to the Lawyer's Act.[9] Hence, the question arises how these steps towards self-regulation can fit into the equally interesting tendency towards an effective competition law and policy.

Self-regulation encompasses regulatory power that derives from the authority given to self-regulatory bodies. There is, however, also the possibility that companies choose to self-impose rules of conduct upon themselves. In recent years, there has been an increase in not legally binding rules in the EU, particularly related to production standards and the environment. While in the EU and the US a lot has been written about voluntary self-restraints of companies, it is yet unclear to what extent such practices are present in China and if they are similarly effective.

3 History and Origins of This Book

This is the third book that originates from a long-standing cooperation between various Chinese and European institutions. The editors have worked together for a long time through collaboration between the Research Centre for Law and Economics (RCLE) of the China University of Political Science and Law (CUPL), to which Guangdong Xu is connected; the Maastricht European Institute for Transnational Legal Research (METRO), where Niels Philipsen is Vice Director; and the Department of Law and Economics at the University of Groningen, to which Stefan Weishaar is affiliated. Both Niels Philipsen and Stefan Weishaar are teaching courses also at the China–EU School of Law (CESL) at CUPL.

It is within the framework of this collaboration that a first joint seminar entitled 'Using Economics to Improve Regulation' was organized in May 2012 in Beijing. The papers that were presented at this seminar were later compiled into a book under the title 'Economics and Regulation in China', which was published by Routledge (Faure and Xu 2014). A follow-up seminar entitled 'Law and Finance: The Role of Law and Regulations in Sustaining Financial Markets' was organized in May 2013. This gave rise to another publication, 'The Role of Law and Regulation in Sustaining Financial Markets', with Routledge (Philipsen and Xu 2015). Both of these books also included contributions by invited experts from the United States, Europe and China.

The conference that lies at the basis of the underlying book was held in May 2014 and was co-financed by the China–EU School of Law. The audience not only consisted of invited international experts and senior staff from various Chinese universities but also included CUPL students.[10] The contributions to this seminar are included in this volume, which examines how regulation can be improved to

[9] See also Philipsen (2010).

[10] In addition to the people who contributed to this book, also Prof. Hildegard Schneider (Maastricht University, Dean of the Law Faculty), Prof. Zhang Qing (CUPL) and Prof. Cao Fuguo (CUFE) presented at the seminar in Beijing.

allow for better market integration and/or economic growth in China, and if experiences in Europe may be providing useful insights (of what to do or what not to do).

4 Methodology

4.1 Multidisciplinary and Interdisciplinary Approach

In addition to Law and Economics, which will be relied upon in the current book as the main tool for studying law and regulation, other disciplines such as legal analysis, financial economics, political science and sociology will also be applied. Given that law and (economic) regulation are embedded in highly sophisticated institutional environments in which political, economic and social factors influence, complement and strengthen one another, a mono-disciplinary approach may fail to provide relevant answers. Therefore, a multidisciplinary and interdisciplinary approach is desirable.

4.2 Comparative Law

This book not only discusses general theory of market integration but also—and perhaps more importantly—compares the regulatory philosophies and practices of the EU and China. This comparative approach will provide opportunities for mutual learning and understanding. The formation, operation and evolution of economic regulation in the EU may be used as a useful reference source for policymakers in China as they design and implement their own regulatory framework. Conversely, the lessons that the Chinese have learned from market integration and regulatory reform may enrich the understanding of their counterparts in the EU regarding the connection among law, regulation and economic growth.

4.3 Positive Analysis

Many of the studies in this volume can be classified as positive analyses, in the sense that these studies attempt to explain legal rules and outcomes as they are rather than to evaluate them on the basis of subjective criteria or to provide some institutional proposals to improve them. With no intention of underestimating the importance of normative analysis, this book prefers factual issues that are

related to positive analysis to the value judgments that are associated with normative analysis, which inevitably generates controversy owing to its subjectivity. Furthermore, convincing positive analyses may contribute in clarifying existing normative issues and hence makes it more likely that a consensus will be reached. Nevertheless, some contributions will go beyond a mere positive analysis, by providing (carefully defined) policy recommendations, e.g. indicating how particular legal rules may be better able to stimulate market integration or enhance domestic demand and welfare.

5 Structure of the Book

This book is divided into four parts. Part I addresses competition law and public procurement. The chapter by Ma Jingyuan describes the role of market integration as a policy goal of competition in both the EU and China. The chapter by Mel Marquis also addresses competition law and examines state action in EU competition law and draws comparisons to Chinese competition law. Subsequently, Stefan Weishaar examines the role of public procurement in the market integration process in Europe and draws inferences for China.

Financial regulation is the subject of Part II. Hu Jiye and Sun Shouji address the implications of the European debt crisis for China. The chapter by Gui Binwei and Xu Guangdong addresses the impact of financial regulation on the profitability of SOEs. Finally, Li Wenjing and Zhou Tianshu examine the public and private enforcement of securities law in China.

Part III deals with freedom of establishment, professional regulation and self-regulation. Freedom of establishment is addressed *inter alia* by Shen Guang and Niels Philipsen. The authors take a private interest approach to assess the rules governing the freedom of establishment between provinces in China. Professional regulation is addressed by Niels Philipsen and Zhou Qi. In their chapter, Philipsen and Zhou examine alternative business structures of legal services, also from the perspective of the freedom of establishment (market integration).

Self-regulation can also take the form of self-imposed codes of conduct that are not legally binding. Lu Mengxing and Michael Faure consider these in the context of corporate environmental responsibility. In the last chapter of Part III, Mehdi Piri Damagh and Michael Faure consider the trade-off between self-regulation and public regulation by considering the specific case of regulation of cross-border pipelines.

Part IV (consisting of only one chapter) contains a set of comparative and concluding remarks by the editors.

6 Contributors

The contributors to this book are from various universities in China and in Europe. Many of the Chinese scholars, including Gui Binwei, Hu Jiye, Li Wenjing, Xu Guangdong and Zhou Tianshu, are connected to the RCLE of CUPL. Ma Jingyuan is associated with the Central University of Finance and Economics (CUFE) in Beijing. Sun Shouji is associated with the University of International Business and Economics (UIBE) in Beijing.

Several Chinese scholars are currently residing abroad. Zhou Qi is associated with the University of Leeds (UK), and Lu Mengxing and Shen Guang (both former students at CUPL) are now pursuing a PhD degree at Maastricht University (Netherlands).

The European scholars include Mel Marquis, associated with the European University Institute (Florence, Italy); Niels Philipsen from Maastricht University (Netherlands); and Stefan Weishaar from the University of Groningen (Netherlands). Michael Faure is associated with the Erasmus University Rotterdam and Maastricht University and is also a 'foreign distinguished professor' at CUPL. Mehdi Piri Damagh is a PhD researcher from Iran, currently associated with Maastricht University.

Acknowledgements As editors, we are grateful to the many people who made this book and the preceding seminar possible. We are especially grateful to all the contributors for their willingness to participate in this highly interesting and challenging project and for meeting the strict deadlines that we imposed upon them.

We are also grateful to the people who helped us in organizing the seminar on 'Market Integration: The EU experience and implications for regulatory reform in China'. Our thanks in this respect go to Professor Xi Tao, director of RCLE, for his continuous support and to Ms. Liang Min and Ms. Wang Yao for their efficient practical support in organizing the seminar.

Furthermore, we would like to thank the Student Fellows at METRO, as well as one of our former students, who helped us in proofreading and pre-editing many chapters. We would like to especially mention Amelie Draper, Joanna Switalska and Mariam Pathan here.

We are grateful to the China–EU School of Law at CUPL and Hamburg University for the financial support that made this research project possible. Finally, we are grateful to our publisher, Springer, for their kind, professional and efficient support in the publication of this book.

Finally, we would like to point out that in this introduction we adhered to the Chinese custom of mentioning family names of Chinese authors first. In the remainder of the book we will, however, follow the European (and our publisher's) custom.

April 2015

References

Barro R, Sala-i-Martin X (1995) Economic growth. MIT Press, New York

Bishop S, Walker M (2010) The economics of EC competition law: concepts, application and measurement, 3rd edn. Sweet & Maxwell, London

Faure M (2003) How law and economics may contribute to the harmonisation of tort law in Europe. In: Zimmerman R (ed) Grundstrukturen des Europäischen Deliktsrechts. Nomos, Baden-Baden, pp 31–82

Faure M, Xu G (eds) (2014) Economics and regulation in China. The Economics of Legal Relationships Series, Routledge

Jiang L (2007) Interpreting the AML on abuse of dominance – an interview with a member of the expert group on AML Drafting, Prof. Huang Yong. Administration of Industrial and Commerce 18, 37

Lu M (2008) The most serious weakness of the AML. Shanghai Security Daily, 14 April 2008

Philipsen NJ (2010) Regulation and competition in the legal profession: developments in the EU and China. J Competition Law Econ 6(2):203–231

Philipsen NJ, Xu G (eds) (2015) The role of law and regulation in sustaining financial markets. The Economics of Legal Relationships Series, Routledge

Wagener HJ, Eger T (2009) Europäische Integration, Wirtschaft und Recht: Geschichte und Politik. Vahlen, München, pp 240–250

Weishaar S (2011) Administrative monopolies, state aid, barriers to entry and market integration: challenges for the Chinese Anti-Monopoly Law. In: Faure M, Zhang X (eds) Competition policy and regulation: recent developments in China, the US and Europe. Edward Elgar, Cheltenham/Northampton, pp 98–129

Wen J (2010) Increasing domestic demand a long-term strategy: China's premier. Xinhua, Beijing, 22 March. http://www.china-embassy.org/eng/xw/t674551.htm

Xu G (2014) Does law matter for economic growth: a re-examination of the legal origin hypothesis. European Studies in Law and Economics No. 14. Intersentia, Antwerpen-Groningen

Part I
Competition Law and Public Procurement

Market Integration as the Goal of Competition Law: The EU Experience and Its Implications for China

Jingyuan Ma

1 Introduction

Both in China and in Europe, competition law plays a crucial role in establishing an integrated market. Chinese economists and lawyers have long acknowledged that administrative monopolies generate considerable efficiency losses and consumer welfare losses;[1] provisions on prohibiting administrative monopolies entered into force even decades before the promulgation of the Chinese Anti-Monopoly Law (hereinafter the AML). However, the enforcement of these provisions was rather ineffective.[2]

During the 13-year legislative history of the AML, it remained a debated issue whether prohibiting administrative monopolies should be included as one of its main objectives. Some commentators argued that administrative monopolies were *the* monopoly problem in China that the competition law should tackle,[3] whereas others proposed that given the specific economic and political characteristics of China during its transition from a centrally planned system to a market economy, the AML could only play a limited role in preventing governmental agencies from imposing anti-competitive restrictions.[4] Being influenced by this debate, provisions on prohibiting administrative monopolies were first included in several drafts of the AML that were released for comments after 2002; however, in the draft of December 2005, the entire chapter on "prohibiting administrative monopolies"

[1] Chan (2009), p. 267; Guo and Hu (2004), p. 277; Yu and Yu (2011).

[2] Owen et al. (2008), p. 235; Liu and Qiao (2012), p. 79.

[3] Wang (2004), p. 286.

[4] Owen et al. (2008), pp. 256–257.

J. Ma (✉)
Central University of Finance and Economics, Beijing, China
e-mail: jingyuan.ma@edle-phd.eu

N. Philipsen et al. (eds.), *Market Integration: The EU Experience and Implications for Regulatory Reform in China*, China-EU Law Series 2,
DOI 10.1007/978-3-662-48273-5_2

was completely deleted by the State Council. This chapter was reinserted in 2006 when the draft was submitted to the Standing Committee of the National People's Congress (NPC) for its first reading, and was kept until this law was promulgated in August 2007.[5]

Although the chapter on administrative monopolies was included in the final version of the AML, the current competition law system in China still faces some obstacles to combat administrative monopolies, therefore to foster integration within the domestic market. Foremost, among the five objectives that are listed in Article 1 of the AML,[6] the goal of breaking down trade barriers between regions was not explicitly mentioned. Although it seems to be obvious that to achieve any of these five goals, such as the objective of "safeguarding the interests of consumers and social public interest" or "promoting the healthy development of the socialist market economy", monopolistic conduct by administrative agencies should be prohibited, it remains both a theoretical and practical question how these broad competition goals are connected and, among all of these goals, whether the market integration goal should be prioritized.

This chapter draws attention to EU competition law. For over 60 years, competition law and policy in Europe has played a crucial role in the process of European integration. EU competition law has been considered as the essential legal instrument to break down trade barriers that are raised by both public and private powers. According to Barry Hawk, market integration is the "first principle" of the competition law in the European Community, and it is to be applied to eliminate restrictive practices that may impede the process of market integration.[7] Competition Commissioner Karel van Miert made clear that "*competition policy is not an end in itself, to be pursued dogmatically. Rather it is an instrument, a crucial one, to make the best of one's economic potential and to serve the common good. In doing so, in the EC, competition policy has been and remains also a major tool for integration*".[8] Starting from the Treaty of Paris in 1951, the goal of establishing an integrated common market has been clearly stated in EU treaties, and to achieve this goal, a complete competition law system has been developed to prohibit anti-competitive restrictions imposed both by public power at the Member States' level and by private enterprises.

This chapter explains how market integration has become the primary goal of EU competition law and how this goal can be achieved by developing a competition law framework. On the one hand, competition law should be implemented together with other EU laws in order to eliminate restrictions on the free movement of economic resources. On the other hand, provisions on dealing with governmental

[5] Owen et al. (2008), pp. 254–255.

[6] See Article 1 of the AML: "This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy". This translation is adopted from http://en.people.cn/90001/90776/90785/6466798.html. Accessed 6 March 2015.

[7] Hawk (1972), p. 231.

[8] Van Miert (1993), p. 135.

conduct on restricting competition should be developed and enforcement mechanisms of such provisions must be strengthened. This chapter shows that we can learn from the EU experience: if market integration is indeed a main goal of competition law in China, a more complete legal framework should be developed to deal with different types of administrative monopolies, and to secure an effective enforcement of the competition law, both public and private enforcement instruments should be enhanced.

The structure of this chapter is as follows. After this introduction, Sect. 2 will introduce administrative monopolies in China and their anti-competitive effects. Also, it will discuss the weak enforcement of competition law provisions on administrative monopolies. Section 3 will summarize how the market integration goal has been incorporated in the EU treaties and how the competition law system has developed in order to achieve this goal. Section 4 analyses the implications of EU experiences for China. The last section concludes.

2 Market Fragmentation and Administrative Monopolies in China

2.1 Administrative Monopolies

As a general definition, administrative monopolies usually refer to monopolistic behaviour that is supported by government or regulatory agencies at both central and regional levels. The governmental agencies and departments tend to protect certain sectors or industries through exercising their administrative power and thus impede competition in these sectors.

Administrative monopolies have developed due to historical reasons. Prior to the Market Reform in 1978, the Chinese economy was organized through a system of national planning.[9] State-owned enterprises (SOEs), which played a dominant role in almost all industries, were under the direct control of the central authority.[10] Learning from the former Soviet Union, before the reform, in every major industry in China, there was a "corresponding ministry" to ensure government control and management.[11] The State directly regulated production, price, supply of raw materials, entry and exit into the market, even the salary of enterprises' managers and employees.[12] SOEs had to produce according to central plans, and to deliver all outputs and revenues to the State.[13] The tight control over industries was gradually relaxed after the 1978 Market Reform. SOEs were allowed to retain part of their

[9] Shang (2009), p. 4.

[10] Lin et al. (1998), p. 423.

[11] Owen et al. (2008), p. 240; Berry (2005), p. 133; Yang (2002), p. 170.

[12] Lin et al. (1998), p. 423.

[13] Lin et al. (1998), p. 423.

profits. Nevertheless, because the Market Reform followed a top-down, planned approach,[14] one of the most challenging tasks during the transition was the "separation of the administration from the enterprise".[15] By implementing certain economic regulatory policies, governments in all regions are often involved in activities that have anti-competitive effects.[16]

Yang defines three types of administrative monopolies in China: sectorial monopolies, regional monopolies and public utilities.[17] Sectorial monopolies refer to large enterprise groups affiliated with government ministries that may receive favourable treatment, because government departments often play a regulatory role in industries such as non-ferrous metal, electronics, shipbuilding, tobacco and freight transport. Regional monopolies refer to local governments and administrative agencies, which may establish trade barriers in order to prevent the flow of goods and services from a particular local region to other regions. Such behaviour is also called local protectionism. Public utility monopolies refer to sectors that are considered as natural monopolies, such as water, power, heat, gas, postal services, telecommunications, civil aviation and railways. Their monopolistic position is often protected.[18]

Although, in general, administrative monopolies include monopolistic conduct by both central and local governments, it is more likely that the central government tends to conduct sectorial monopolies, and local governments are involved in regional monopolies. According to Chan,[19] in the analysis of administrative monopolies, restrictive behaviour by the central government is often excluded, because many scholars perceive such behaviour as implementing a type of national industrial policy. In most cases, administrative monopolies refer to the abusive conduct by local governments, which impose territorial restrictions on the free flow of economic resources or tend to protect local enterprises. Administrative monopolies can also refer to the abusive conduct by ministries and departments subordinated to the central government, which protect certain industries or sectors by restricting market entry.[20]

The underlying motivation for local protectionism is that, starting from the 1970s, the control over SOEs has been to a large extent decentralized to local governments; at the same time, as a result of the 1994 tax reform, the fiscal power was also decentralized.[21] The profits of SOEs could contribute to the tax revenues of local regions, and the performance of these companies could also partially

[14] Yang (2002), p. 175.
[15] Guo and Hu (2004), p. 272.
[16] Guo and Hu (2004), p. 272.
[17] Yang (2002), p. 172.
[18] Yang (2002), p. 172.
[19] Chan (2009), p. 264.
[20] Guo and Hu (2004), p. 273.
[21] Qian and Weingast (1996), p. 162.

determine how likely it is that local political leaders would be promoted.[22] As a consequence, local governments were incentivised to promote economic growth in their own region,[23] and some of them were willing to set up trade barriers to block the inflow of products and services from other regions in order to support the development of SOEs in their own region.

2.2 *Anti-competitive Effects of Administrative Monopolies*

Both lawyers and economists in China have acknowledged that administrative monopolies create anti-competitive effects, and a few empirical studies have been conducted to measure the efficiency losses that are caused by administrative monopolies. Many have agreed that the most significant effect of administrative monopolies is market fragmentation.[24] The empirical study by Poncet shows that the trade flow between provinces in China decreased significantly from 1987 to 1997. In 1987, consumers purchased products that were produced in the local region 12 times more than those that were produced in other provinces. This number increased to 16 in 1992 and 27 in 1997.[25] By applying the institution-structure-conduct-performance (ISCP) framework, Yu and Yu claimed that market segmentation could be significantly reduced by implementing a successful regional development policy and a cross-region competition policy.[26] For example, between 1985 and 2006, the degree of regional administrative monopoly in eastern provinces decreased more significantly than in western provinces.[27] One reason to explain such observations, according to their study, was that the regional development policy implemented during the Market Reform reduced the level of administrative monopolies in eastern provinces.[28]

In addition to the market fragmentation problem, it was argued that administrative monopolies may impose harm on consumer welfare, because administrative monopolies may incentivise inefficient firms to provide expensive products and services for local consumers, since the efficient ones in other regions are often prohibited from entering the local market.[29] Imposing restrictions on the free movement of economic resources may also lead to allocative inefficiency.[30]

---

[22] Jung and Hao (2003), p. 115; Chen and Zhu (2014), p. 230. See also the contribution by Shen and Philipsen to this volume.

[23] Saich (2011); Ip and Law (2011), p. 358.

[24] Chan (2009), p. 267; Guo and Hu (2004), p. 277.

[25] Poncet (2003).

[26] Yu and Yu (2011).

[27] Yu and Yu (2011), p. 94.

[28] Yu and Yu (2011), p. 94.

[29] Chan (2009), p. 267; Yang (2002), p. 172.

[30] Yu and Yu (2011), p. 79; Chen and Zhu (2012), p. 203.