

**MASTER THESIS**

# The Conflict between Intellectual Property Law and Competition Law in China

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An Analysis of Article 55 of the New Chinese Anti- Monopoly Law and its Effect on Intellectual Property Rights

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## ABSTRACT

The introduction of the first Anti- Monopoly Law (AML) in the People's Republic of China in 2008 constitutes a massive change towards the liberalisation of the market of the 'communist giant' China. Article 55 AML deals with the correlation of intellectual property rights and competition law which is a complex issue because monopolies are created by intellectual property rights whereas competition laws try to break up monopolies and prohibit harmful monopolistic conduct in order to maintain an effective competition on the market. With the formulation of Article 55 AML China has emphasized that exercises by intellectual property right holders can be exempted from the application of the AML as long as the intellectual property rights are not abused. This provision contains many uncertainties and carries ambiguity. This dissertation evaluates the understanding of Article 55 AML and analyses the different possibilities of interpreting it. Moreover, it depicts the concerns and risks companies might face when engaging in economic activities within China. Furthermore, this paper examines the draft of the first guidelines on that particular issue and compares the Chinese system to both the European Union and the United States of America that have a long history of competition laws. The approach of both jurisdictions might set an example to the Chinese enforcement agencies and the use of exemption provisions as well as the 'rule of reason' might act as possible 'signposts' for the implementation of clarifying regulations.

**TABLE OF ACRONYMS**

AMC	Anti-Monopoly Commission (China)
AMEA	Anti- Monopoly Enforcement Agency (China)
AML	Anti- Monopoly Law (China)
CCP	Communist Party of China
ECMR	European Community Merger Regulations
IP	Intellectual Property
IPR	Intellectual Property Rights
MNC	Multinational Corporation
MOFCOM	Ministry of Commerce
MOU	Memorandum of Understanding (United States – China)
NDRC	National Development and Reform Commission
OECD	Organisation for Economic Co-operation and Development
SAIC	State Administration for Industry and Commerce (China)
SOE	State-owned Enterprise (China)
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade- Related Aspects of Intellectual Property Law
TTBE	Technology Transfer Block Exemption Regulation (European Union)
VABE	Vertical Agreements Block Exemption Regulation (European Union)
WIPO	World Intellectual Property Organization
WTO	World Trade Organisation

## INTRODUCTION

In 2008 the People's Republic of China published its first Anti- Monopoly Law (AML) and the law went into force on August 1, 2008.<sup>1</sup> The AML was the result of debates and discussions of the National People's Congress of the People's Republic of China that had been going on for more than a decade.<sup>2</sup> The AML is understood to be a 'milestone of the country's efforts in promoting a fair competition market and cracking down on monopoly activities'<sup>3</sup> and it is declared to be the 'Economic Constitution'<sup>4</sup> of China by many specialists.

This paper will concentrate on the correlation of competition law (antitrust law) and intellectual property law since this relationship has been part of continuing debates and discussions over the last years.<sup>5</sup> Intellectual property law protects an individual by granting him exclusive rights to inventions, creations and the like; i.e. preventing other people from using the intellectual property in commerce without having obtained a license.<sup>6</sup> Contrary to that anti- monopoly law or competition law tries to stop monopolistic actions to achieve a market order with a fair competition taking place.<sup>7</sup>

Despite the differences intellectual property law and anti- monopoly law also have important mutual goals such as enhancing consumer welfare and stimulating innovation.<sup>8</sup> Intellectual property laws are important for innovation to take place because without a reward or better recoup of their investments, people would lose

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<sup>1</sup> Anti- Monopoly Law (announced by the Standing Committee of the National People's Congress 30 Aug 2007; effective 4 Aug 2008) further referred to as 'Anti- Monopoly Law PRC' available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=182375](http://www.wipo.int/wipolex/en/text.jsp?file_id=182375), accessed on 7 June 2013.

<sup>2</sup> DK Round & P Lin 'Introduction: Embracing Competition in the World's Second Giant Economy: China's 2008 Anti-Monopoly Law' (2012) *RevIndOrgan-Springer* 41 at 1-2.

<sup>3</sup> N Peng 'China's First Anti- monopoly Law Takes Effect' *Xinhua News Agency* (1 August 2008) at [http://news.xinhuanet.com/english/2008-08/01/content\\_8901182.htm](http://news.xinhuanet.com/english/2008-08/01/content_8901182.htm)., accessed on 10 June 2013; also X Wang 'Highlights of China's New Anti- Monopoly Law' (2008) 75 *Antitrust Journal No. 1* at 134.

<sup>4</sup> P Jones 'Licensing in China: The New Anti Monopoly Law, The Abuse of IP Rights and Trade Tensions (2008) *XLIII (2) Les Nouvelles: J. Licensing Soc'y Int'l* 106 at 2 (see footnote 9 as well) saying that the AML is recognised widely – by both Chinese officials and scholars – as an 'Economic Institution' [经济宪法 (Jingji Xianfa)].

<sup>5</sup> A Schaub 'Competition Policy Objectives' in CD Ehlermann & LL. Laudati *European Competition Law Annual 1997: Objectives of Competition Policy* (1998) 119; see also W Kerber 'Should competition law promote efficiency? Some reflections of an economist on the normative foundations of competition law' in J Drexel & L Idot & J Monéger *Economic Theory and Competition Law* (2009) 94; and also K Czapracka *Intellectual Property and the Limits of Antitrust – A Comparative Study of US and EU Approaches* (2009).

<sup>6</sup> DI Bainbridge *Intellectual Property* 9ed (2012) 3,10,25.

<sup>7</sup> R Whish *Competition Law* 6ed (2009) 2-18.

<sup>8</sup> I.e. this can be seen in the European Commission's Guidelines on the application of Article 81 of the EC Treaty to Technology Transfer Agreements *OJ [2004] C 101/2*.

interest to research, develop and produce new products and the developing progress would come to a standstill.<sup>9</sup> An economy without a working intellectual property law would fear more piracy taking place and the initial inventors will start reducing their investments in research and development which will finally lead to a decrease in economic development and eventually harm consumers.<sup>10</sup> Thus, an effective intellectual property legislation will motivate undertakings to develop and will lead to the production of qualitatively improved goods which will contribute to the consumer welfare that is essential for an effective economy. Competition law is essential in an economy in order to stop dominant firms from abusing their power and act as a price setter so that consumers can get the best quality products at the lowest price possible.<sup>11</sup>

Since both laws aim to protect the consumer in the end it is possible for them to coexist.<sup>12</sup> Hence, intellectual property laws do not work against antitrust laws as long as the intellectual property right holder does not abuse his position (monopoly) by illegal means. For that reason the two conflicting laws have to be balanced correctly.<sup>13</sup>

With a population of 1.34 billion China is one of the largest nations, in terms of population, in the world<sup>14</sup> and with a gross domestic product (GDP) of 7298.10 billion US dollars one of the fastest growing economies<sup>15</sup>. These statistics show that it is crucial for an economy such as China to have its antitrust laws as well as its intellectual property laws set in place. The main questions in this paper will be the relationship of the new Chinese Anti- Monopoly Law and the intellectual property laws. In Article 55 of the Chinese Anti- Monopoly Law it is stated that:

*'This law is not applicable to conducts by undertakings to implement their intellectual property rights in according with relevant IP laws and administrative regulations; however, this law is applicable to the*

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<sup>9</sup> DI Bainbridge, David I *Intellectual Property* 9ed (2012) 18.

<sup>10</sup> JF Rill & MC Schechter 'International Anti- trust and Intellectual Property Harmonization of the Interface' (2003) *34 Law & Pol'Y Int'l Bus* 783.

<sup>11</sup> R Whish *Competition Law* 6ed (2009) 6.

<sup>12</sup> Y Tian 'The Impact of the New Chinese Anti- Monopoly Law on IP Commercialization in China & General Strategies for Technology- Driven Companies and Future Regulators' (2007) *Duke Law & Technology Review* 4 \*3.

<sup>13</sup> Y Tian 'The Impact of the New Chinese Anti- Monopoly Law on IP Commercialization in China & General Strategies for Technology- Driven Companies and Future Regulators' (2007) *Duke Law & Technology Review* 4 \*3.

<sup>14</sup> Trading Economics 'China Population' <http://www.tradingeconomics.com/china/population> (showing the population at the end of 2012), accessed on 10 June 2013.

<sup>15</sup> Trading Economics 'China GDP' <http://www.tradingeconomics.com/china/gdp> (GDP in 2011), accessed on 10 June 2013.

*conduct by undertakings to eliminate or restrict market competition by abusing intellectual property rights.*<sup>16</sup>

This dissertation shows that China recognizes the rights of intellectual property holders and takes into account in their competition law. However, this section of the Chinese AML was kept short which causes a lack of clarity and raises concerns for the entities working within China. This research will focus on the complex issue of the relationship between intellectual property rights and competition law and try to find a way to understand the regulations stipulated in the Chinese Anti- Monopoly Law of 2007.

Chapter 1 will focus on the interface of intellectual property rights and competition law and will give a detailed analysis of the objectives of both laws before discussing the differences and similarities the two areas of law have.

Chapter 2 will provide an outline of both the history and the current system of the intellectual property regulations in the People's Republic of China as well as the process and structure of the enacted Anti- Monopoly Law.

In Chapter 3 Article 55 AML will be discussed in detail by analysing its content and the possible impact it might have on the entities doing business within China. Moreover, this research will contain a discussion about the content of future guidelines that are discussed by the State Council at the moment and the possible effect the guidelines will have on understanding the AML, especially Article 55 AML.<sup>17</sup>

Chapter 4 analyses both the provisions in the laws of the European Union and the United States. China's structure of the AML can be compared to the structure of the European Union competition rules that are set out in the Treaty for the Functioning of the European Union.<sup>18</sup> Thus, the analysis of the European provision might provide a certain prediction of how the relationship between competition law and intellectual property law will be dealt with in China. In addition, the United States have a well developed competition system and use a

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<sup>16</sup> Article 55 Anti- Monopoly Law PRC.

<sup>17</sup> W Zhang '知识产权领域反垄断将出执法指南' (translated: 'The Guide to the Field of Intellectual Property Law and Antitrust Enforcement') *SIPO State Intellectual Property Office* (16 August 2012) available at [http://www.sipo.gov.cn/mtjj/2012/201208/t20120816\\_739355.html](http://www.sipo.gov.cn/mtjj/2012/201208/t20120816_739355.html), accessed on 21 May 2013.

<sup>18</sup> Y Tian 'The Impact of the New Chinese Anti- Monopoly Law on IP Commercialization in China & General Strategies for Technology- Driven Companies and Future Regulators' (2007) *Duke Law & Technology Review* 4 \*18.

different approach to the interface of antitrust and intellectual property. Since it is not clear at the moment which approach China will pursue the analysis of the provision in the United States could also act as a signpost for the anti- monopoly enforcement in the People's Republic of China.

The aim of this dissertation is to provide a better understanding of the competition provisions and the correlation with the intellectual property laws in the People's Republic of China and to give suggestions to investors and companies operating in China to avoid being sued by the anti- monopoly enforcement agencies.

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## CHAPTER 1 – THE CONFLICT OF INTELLECTUAL PROPERTY LAW AND COMPETITION LAW

In order to understand the conflict of competition law and intellectual property law this dissertation will first define the terms of competition and intellectual property before discussing the law thereof and outlining the goals of each in order to compare and contrast them.

### I. The Goals of Intellectual Property Law

#### 1. Definition of Intellectual Property

First, one needs to understand what intellectual property means. The term ‘intellectual property’ can also be described as ‘intangible property’ and is a form of property that cannot be captured with bare hands in contrast to an object that can be held and the possession of it usually indicates the ownership. Intellectual property is a creation of the mind and includes ‘*inventions, literary and artistic works, and symbols, names, images, and designs used in commerce*’<sup>19</sup> In other words, the subject matter of intellectual property is the result of new ideas produced by human beings.<sup>20</sup> Intellectual property includes but is not limited to patents for inventions, registered and unregistered designs, copyright, rights in performances, trade marks, passing off, law of breach of confidence and malicious falsehood.<sup>21</sup> According to the World Intellectual Property Organization (WIPO) intellectual property rights can be organized in two categories, namely industrial property and copyright and related rights where the former consists of patents, geographical indications, industrial designs and trade marks and the latter includes literary and artistic works.<sup>22</sup>

According to some academics intellectual property rights can be put into three categories; first, there is industrial property including patents and trade secrets, where the invention or information is captured to stop others from using it; secondly, there are intellectual property rights that can protect appearance and form and copyright gives the aimed protection of expression; thirdly there are intellectual

<sup>19</sup> WIPO ‘What is Intellectual Property?’ <http://www.wipo.int/about-ip/en/>, accessed on 6 May 2013.

<sup>20</sup> C Colston & J Galloway *Modern Intellectual Property Law* 3ed (2010) 2.

<sup>21</sup> DI Bainbridge *Intellectual Property* 9ed (2012) 3.

<sup>22</sup> As it can from the Berne and Paris Conventions: Berne Convention for the Protection of Literary and Artistic Works (9 September 1886, last revised at Paris 24 July 1971, amended 1979) *S. Treaty Doc. No. 99-27* and Paris Convention for the Protection of Industrial Property (20 March 1883, last revised 14 July 1967, amended 28 September 1979) *21 U.S.T. 1583; 828 U.N.T.S. 303*; also WIPO ‘What is Intellectual Property?’ *op cit*.

property rights that protect the reputation or the image of the owner such as trade marks and the tort of passing off.<sup>23</sup>

A good way of understanding intellectual property is by contrasting it with other forms of property such as the *'right in rem'*<sup>24</sup>. Taking a book as an example it can be both the object of intellectual property rights and property rights *'in rem'*. If someone destroys the book the property right of the owner is harmed whereas the intellectual property right (copyright) stays unharmed; this can be explained by defining intellectual property law as the protection of the idea<sup>25</sup> regulating the creation and use of the intangible property.<sup>26</sup>

However, it needs to be kept in mind that intellectual property rights are subject to certain limitations. These include limitations in duration<sup>27</sup> or subject matter such as the fact that a normal everyday idea cannot be protected because this would limit the society's liberty.<sup>28</sup> Also, most intellectual property laws contain some exceptions to infringement, where for example unauthorised use of a copyright protected good is not infringement as long as it is *'fair use'*, meaning that using the good for personal use and not for commercial use is allowed.<sup>29</sup>

## 2. The Objectives of Intellectual Property Law

Furthermore, the objectives of intellectual property law need to be analysed. First of all one can look at the benefits the owner of an intellectual property right gets. The law for intellectual property rights aims at protecting information and ideas of the producer or creator that are economically valuable.<sup>30</sup> When the inventor or author of an intellectual property right receives protection he/ she will become the monopolist of that certain property and can prevent others from using it, copying it or selling it without having obtained a permission in form of a license or the like.<sup>31</sup> Hence,

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<sup>23</sup> C Colston & J Galloway *Modern Intellectual Property Law* 3ed (2010) 2.

<sup>24</sup> Including both immobile property and tangible property.

<sup>25</sup> In copyright: idea encompassed in a material form.

<sup>26</sup> W Alberts *'What is Intellectual Property?'* (November 2007) *De Rebus Archived Issues*.

<sup>27</sup> Duration of IPRs: Patents are only protected for a certain period of years; copyright is usually protected for the life of the author plus some years and therefore also limited; trade marks can be protected perpetually as long as the license is always renewed.

<sup>28</sup> J Hughes *'The Philosophy of Intellectual Property'* (1988-89) 77 *Geo.L.J.*287 at 291,295.

<sup>29</sup> J Hughes *'The Philosophy of Intellectual Property'* (1988-89) 77 *Geo.L.J.*287 at 295.

<sup>30</sup> W Cornish & D Llewelyn & TF Aplin *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 7ed (2010) 6.

<sup>31</sup> W Cornish & D Llewelyn & TF Aplin *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 7ed (2010) 7.

intellectual property rights are of a negative nature.<sup>32</sup> The owner of the right has the exclusive right to exploit it and prevent others from exploiting it by all means. This is true for all different kinds of intellectual property. Trade marks and trade secrets can exist in perpetuity and can be regarded as ‘qualified monopolies’ subject to limitations such as treaty and legislative limitations for trade marks and contractual limitations concerning trade secrets. Patents constitute a ‘qualified monopoly’ for a limited period and limited to the institution of compulsory licensing.<sup>33</sup> Compulsory licensing is the situation where a government can order the intellectual property right holder to issue a license to a certain company subject to reasonable remuneration to be paid by the licensee for the purpose of improving social welfare by satisfying domestic demands.<sup>34</sup> The holder of a plant breeder’s right also obtains a ‘qualified monopoly’ which means that ‘reverse engineering’ is legal.<sup>35</sup> Copyright and related rights constitute a ‘relative monopoly’ because other creators are not prohibited to come up with the same or similar idea independently.<sup>36</sup>

For the purpose of understanding the different objectives underlying intellectual property law one has to distinguish between the different forms of such. Concerning copyright and related rights the ultimate goal is the enhancement of creativity by for example giving the author of a book or the painter of a painting a reward for his/ her creative efforts.<sup>37</sup> Regarding industrial property a distinction needs to be made between patents, industrial designs and trade secrets and those property forms that protect distinctive signs such as trade marks and passing off. Patents, industrial designs and trade secrets are mainly protected for the reason of innovation, creating technology and design and incentivise the producer by giving him/ her a financial reward; the World Trade Organisation (WTO) states that ‘*the social purpose is to provide protection for the results of investment in the development of new technology*’<sup>38</sup>. Moreover, the WTO argues that an effective

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<sup>32</sup> DI Bainbridge *Intellectual Property* 9ed (2012) 11.

<sup>33</sup> I.e. Chapter VI Patent Law of the People’s Republic of China (announced by the Standing Committee of the National People’s Congress 12 March 1984, effective 1 April 1985, amended 1992, 2000, 2008) further referred to as ‘Patent Law PRC’ available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=178664](http://www.wipo.int/wipolex/en/text.jsp?file_id=178664), accessed on 17 May 2013.

<sup>34</sup> I.e. when the company does not use the patent properly; J Kuanpoth ‘Intellectual Property and Access to Essential Medicines: Options for Developing Countries’ (2004) *Journal of Generic Medicines: The Business Journal for Generic Medicines Sector Vol 2 No 1* at 56-57.

<sup>35</sup> C Colston & J Galloway *Modern Intellectual Property Law* 3ed (2010) 35.

<sup>36</sup> C Colston & J Galloway *Modern Intellectual Property Law* 3ed (2010) 35.

<sup>37</sup> WTO ‘What are Intellectual Property Rights?’

[http://www.wto.org/english/tratop\\_e/trips\\_e/intell\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intell_e.htm), accessed on 8 May 2013.

<sup>38</sup> WTO ‘What are Intellectual Property Rights?’ *op cit*.

intellectual property regime should also focus on the transfer of technology by means of foreign direct investments, licensing and the formation of joint ventures.<sup>39</sup> The intellectual property law concerning the use of distinctive signs aims at stimulating and securing fair competition on the market and i.e. trade marks are used for the purpose of distinguishing one good from another and to assist consumers when buying a good because a certain quality and reputation is linked to the mark itself.<sup>40</sup>

Taking all forms of intellectual property into account it can be said that the producer's or creator's rights can be justified publicly and privately. A public justification is given by the fact that once the recoupment of investment is ensured the companies will employ more people which results in a better social well-being of the society; moreover, once the protection is assured the producer or creator will release his/ her invention or creation to the public and this will lead to spreading of information and ultimately to the increase of knowledge in the society.<sup>41</sup> From a private point of view it can be argued that intellectual property rights arise naturally as the outcome of hard work.<sup>42</sup>

Summarizing one can say that intellectual property law strives to protect the producers or creators of an intellectual commodity and grants them the right to control the use of the good to be rewarded for the money and time they spent on achieving a certain outcome; keeping in mind that the intellectual creation is protected and not the good itself.<sup>43</sup> Without the protection of intellectual property rights the producers or creators would not have incentives and likely would cause a stop to research and development and the production or creation of intellectual goods which would eventually lead to the stagnation of development in the countries.<sup>44</sup> With no legal protection, the producers or creators would stop or at least reduce their work once they fear piracy taking place and this will result in less research and development and ultimately harm the consumers who cannot purchase the best

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<sup>39</sup> WTO 'What are Intellectual Property Rights?' *op cit*.

<sup>40</sup> A Griffith 'A Law-and-Economics Perspective on trade marks' in L Bently & J Davis & JC Ginsburg *Trade Marks and Brands* (2008) 245; also DI Bainbridge *Intellectual Property* 9ed (2012) 689.

<sup>41</sup> DI Bainbridge *Intellectual Property* 9ed (2012) 18.

<sup>42</sup> C Colston & J Galloway *Modern Intellectual Property Law* 3ed (2010) 45.

<sup>43</sup> WIPO *Intellectual Property Handbook: Policy, Law and Use* (2008) 3 available at [http://www.wipo.int/export/sites/www/freepublications/en/intproperty/489/wipo\\_pub\\_489.pdf](http://www.wipo.int/export/sites/www/freepublications/en/intproperty/489/wipo_pub_489.pdf), accessed on 8 May 2013

<sup>44</sup> DI Bainbridge *Intellectual Property* 9ed (2012)18.

quality and technology anymore but have to remain with the old or less innovative products.<sup>45</sup>

## II. The Goals of Competition Law

### 1. Definition of Competition

Competition can be defined as ‘*the activity or condition of striving to gain or win something by defeating or establishing superiority over others*’.<sup>46</sup> An adequate definition of competition is essential for economic thinking and competition policy.<sup>47</sup> Placing it in an economic context competition can be seen as the process of two competitors on the market aiming to have as many consumers as possible in order to increase market shares and earn more profit.<sup>48</sup> However, the freedom to compete is premised on a market place that works effectively, meaning that the different market operators cannot be obliged to compete but nevertheless competition is encouraged.<sup>49</sup> The freedom to compete is limited where actual harm to others is caused by processes such as exploiting customers or unjustified exclusion of other competitors in the market.<sup>50</sup> Perfect competition can generally be defined as the stage at which every operator on the market is a price taker and only normal profits are earned.<sup>51</sup> In perfect competition it can be said that once the profits of one competitor increase a new operator will enter the market and push the price levels down again.<sup>52</sup>

Practically, it is difficult to predict when and if this will occur given the many variables that influence the behaviour of participants in the market. However, competition law is a tool used to intervene in the market to steer the dynamics of the market as closely as possible in the direction of perfect competition.

Competition can exist in horizontal ways between two operators in the same product market as well as vertical among companies in the distribution chain.<sup>53</sup> As

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<sup>45</sup> JF Rill & MC Schechter ‘International Anti- trust and Intellectual Property Harmonization of the Interface’ (2003) *34 Law & Pol’y Int’l Bus* 783.

<sup>46</sup> Oxford Dictionaries ‘Competition’ available at <http://oxforddictionaries.com/definition/english/competition>, accessed on 22 March 2013.

<sup>47</sup> RH Bork *The Antitrust Paradox: a Policy at War with Itself* (1978) 61.

<sup>48</sup> MM Dabbah *International and Comparative Competition Law* (2010) 20.

<sup>49</sup> D Zimmer ‘The basic goal of competition law: to protect the opposite side of the market’ in D Zimmer *The Goals of Competition Law* (2012) 495; see too MM Dabbah *International and Comparative Competition Law* (2010) 20- 21.

<sup>50</sup> MM Dabbah *International and Comparative Competition Law* (2010) 21.

<sup>51</sup> The Economist ‘Competition’ <http://www.economist.com/economics-a-to-z/c#node-21529807>, accessed on 7 June 2013.

<sup>52</sup> The Economist ‘Competition’ *op cit*.

<sup>53</sup> ME Stucke ‘What is competition’ in D Zimmer *The Goals of Competition Law* (2012) 30.

one can see it is hard to find a single definition for competition. Fuchs, a Professor of Law and Judge in Germany, argues that there is no need for an exact definition of competition law for every kind of economic behaviour and that identifying particular harmful behavioural patterns of the market operators is enough to establish rules for intervention.<sup>54</sup>

## 2. The Objectives of Competition Law

Defining the exact goals is a difficult exercise. Experts have debated the precise goals of competition law for many years.<sup>55</sup> The overall aim of competition law is to establish economic efficiency in the best possible way and hence promote competition.<sup>56</sup> It has been agreed upon that this can be achieved by ensuring an efficient allocation of resources which will lead to the enhanced consumer welfare.<sup>57</sup> The Organisation for Economic Co-operation and Development (OECD) has defined consumer welfare as being ‘the individual benefits derived from the consumption of goods and services’ and is assessed economically by looking at the consumer surplus.<sup>58</sup>

In order to identify all possible goals of competition law effectively many authorities, political institutions and other organisations have divided the objectives of competition into three categories, namely economic, social and political goals.<sup>59</sup>

From an economic perspective competition law mainly revolves around the issues of maximisation of consumer welfare and economic efficiency; some discussions exist whether consumer welfare should be enhanced or total welfare.<sup>60</sup> Most countries however have implemented competition laws that focus on consumer

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<sup>54</sup> A Fuchs ‘Characteristic aspects of competition and their consequences for the objectives of competition law – comment on Stucke’ in D Zimmer *The Goals of Competition Law* (2012) 54.

<sup>55</sup> A Schaub ‘Competition Policy Objectives’ in CD Ehlermann & LL. Laudati *European Competition Law Annual 1997: Objectives of Competition Policy* (1998) 119.

<sup>56</sup> ME Stucke ‘What is competition’ in D Zimmer *The Goals of Competition Law* (2012) 28; see also D Neven ‘Competition Policy Objectives’ in CD Ehlermann & LL Laudati *European Competition Law Annual 1997: Objectives of Competition Policy* (1998) 112.

<sup>57</sup> W Kerber ‘Should competition law promote efficiency? Some reflections of an economist on the normative foundations of competition law’ in J Drexler & L Idot & J Monéger *Economic Theory and Competition Law* (2009) 94- 95; see too A Schaub ‘Competition Policy Objectives’ in CD Ehlermann & LL Laudati *European Competition Law Annual 1997: Objectives of Competition Policy* (1998) 119.

<sup>58</sup> RS Khemani & DM Shapiro (commissioned by S Zecchini) ‘Glossary of Industrial Organisation Economics and Competition Law’ (1993) *OECD* at 28-29, available at <http://www.oecd.org/regreform/sectors/2376087.pdf>, accessed on 7 June 2012.

<sup>59</sup> MM Dabbah *International and Comparative Competition Law* (2010) 39.

<sup>60</sup> W Kerber ‘Should competition law promote efficiency? Some reflections of an economist on the normative foundations of competition law’ in J Drexler & L Idot & J Monéger *Economic Theory and Competition Law* (2009) 95.

welfare.<sup>61</sup> There are two schools of thought that have influenced the understanding of competition and the law thereof in the United States and abroad.

First is the Harvard School that uses a ‘structuralist’ approach to competition law by putting most emphasis on the structure of the market and arguing that the more concentrated the relevant market is the more likely it is that competitors will engage in anti-competitive conduct and dictatorial intervention is crucial; one of the main statements of the Harvard School was that competition law has to protect competitors not competition.<sup>62</sup>

Secondly, the Chicago School of Thought evolved in the 1960s pursuing the opinion that the main aim of competition law is to maximise efficiency and thus protect competition itself and not focus on protecting individuals.<sup>63</sup> Bork, a leading economist and Chicago scholar, argues that the maximisation of consumer welfare is the single goal of competition law and that adequate consumer welfare is reached once it cannot be increased anymore by judicial- decision making.<sup>64</sup> Bork is of the opinion that the courts need to differentiate between conduct increasing wealth through efficiency, and harmful conduct decreasing the latter.<sup>65</sup> However, other economists argue that the development of the market economy, the promotion of trade and the facilitation of economic liberalisation are also economic aims of competition law, especially in developing economies.<sup>66</sup>

Many countries also take social goals such as protecting the consumer from undue exercise of market power, protecting smaller sized firms, distributing wealth and public interest considerations into account.<sup>67</sup> This social approach to competition law can be explained by the fear of private powers and can be justified on grounds of market democracy and economic equity.<sup>68</sup>

The question then arises as to whether any political goals exist in competition analysis. Many lawyers as well as many economists are of the opinion that competition law should be fully separated from politics because on one hand political

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<sup>61</sup> MM Dabbah *International and Comparative Competition Law* (2010) 40.

<sup>62</sup> MM Dabbah *International and Comparative Competition Law* (2010) 252.

<sup>63</sup> MM Dabbah *International and Comparative Competition Law* (2010) 254.

<sup>64</sup> RH Bork *The Antitrust Paradox: a Policy at War with Itself* (1978) 51.

<sup>65</sup> RH. Bork ‘Legislative Intent and the Policy of the Sherman Act’ (1966) 9 *J.L. & Econ* 7.

<sup>66</sup> EM Fox & LA Sullivan ‘Antitrust – Retrospective and Prospective: Where are We Coming From? Where are We Going?’ (1987) 62 *N.Y.U.L.Rev.* 936.

<sup>67</sup> G Amato *Antitrust and the Bounds of Power* (1997) 1-2.

<sup>68</sup> MM Dabbah *International and Comparative Competition Law* (2010) 42.

involvement will lead to a certain degree of uncertainty and controversy and on the other hand it will diminish the importance of economists in the field of competition law; however there is often a political aspect when looking at the decision of the competition authorities.<sup>69</sup> One example to illustrate a political goal is the aim of establishing individual liberty on the market and by that, providing the consumers with a choice of goods by lowering the barriers to enter the market even though they might be inefficient sometimes.<sup>70</sup>

As one can see defining the goals of competition law in a self-contained way is hardly possible. Based on history and experience countries differ in their objectives of competition law and lay emphasis on different aspects. However, everyone is agreeing that consumer or total welfare is the main aim when pursuing a competition policy.

### III. The Differences and Similarities

In order to understand what the conflict between intellectual property rights and competition law is one has to analyse the differences and similarities they share. The major difference can be found when looking at the result of an intellectual property right being granted in contrast to the goal of competition law trying to achieve an efficient allocation of resources.<sup>71</sup> Intellectual property law protects an individual by granting him exclusive rights to inventions, creations and the like<sup>72</sup>; i.e. preventing other people/ companies from using the intellectual property in commerce without having obtained a license.<sup>73</sup> Contrary to that anti- monopoly law or competition law tries to stop monopolistic actions to achieve a market order with a fair competition taking place.<sup>74</sup> Thus, there exists a huge divergence between intellectual property law and competition law as the former establishes monopolies, whereas the latter aims at breaking up monopolies to ensure a better functioning market.

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<sup>69</sup> MM Dabbah *International and Comparative Competition Law* (2010) 42- 43.

<sup>70</sup> Example from the United States in HM Blake & WK Jones 'In Defense of Antitrust' (1965) 65 *Columbia Law Review* 377 at 383-384.

<sup>71</sup> W Kerber 'Should competition law promote efficiency? Some reflections of an economist on the normative foundations of competition law' in J Drexl & L Idot & J Monéger *Economic Theory and Competition Law* (2009) 94-95; see too A Schaub 'Competition Policy Objectives' in CD Ehlermann & LL Laudati *European Competition Law Annual 1997: Objectives of Competition Policy* (1998) 119.

<sup>72</sup> K Czapracka *Intellectual Property and the Limits of Antitrust – A Comparative Study of US and EU Approaches* (2009) 36.

<sup>73</sup> DI Bainbridge *Intellectual Property* 9ed (2012) 3,10,25.

<sup>74</sup> R Whish *Competition Law* 6ed (2009) 2-18.

Despite the differences intellectual property law and anti- monopoly law also have – as it can be seen from the previous analysis – important mutual goals such as enhancing consumer welfare and stimulating innovation.<sup>75</sup> Innovation is a very important process for the society of a nation and it is unanimously agreed upon that incentives need to be given to an inventor or creator to enhance innovation.<sup>76</sup> Intellectual property laws are important for innovation to take place because without a reward or better recoup of their investments, people would lose interest to research, develop and produce new products and the developing progress would eventually come to a standstill.<sup>77</sup> However, intellectual property protection could also stifle development and innovation because of high costs of transaction and also, the spread of intellectual property rights obtained by different companies shows difficulties in the access to such rights.<sup>78</sup> Weakly formulated intellectual property laws will lead to companies blocking the entry to the market by other firms.<sup>79</sup> There have been continuous debates about the positive and negative effects of intellectual property laws on growth and development.<sup>80</sup> A major difference is the impact of intellectual property legislation in developing countries as opposed to in industrialised countries.<sup>81</sup> In countries with a working economy intellectual property rights are generally held to promote innovation whereas in less developed countries with no capacity to innovate intellectual property rights can often stifle the economic development because of all the social and economic costs occurring.<sup>82</sup> Nevertheless, an economy without a working intellectual property law would fear more piracy taking place and the initial inventors will start reducing their investments in research and development which will finally lead to a decrease in economic development and

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<sup>75</sup> I.e. this can be seen in the European Commission's Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements *OJ [2004] C 101/02* at 2.

<sup>76</sup> C Colston & J Galloway *Modern Intellectual Property Law* 3ed (2010) 21.

<sup>77</sup> DI Bainbridge *Intellectual Property* 9ed (2012) 18.

<sup>78</sup> I Hargreaves 'Digital Opportunity – A Review of Intellectual Property and Growth' (2011) *Independent Report* at 1.3 available at <http://www.ipo.gov.uk/ipreview-finalreport.pdf>, accessed on 10 June 2013.

<sup>79</sup> I Hargreaves 'Digital Opportunity – A Review of Intellectual Property and Growth' (2011) *Independent Report op cit* at 1.3.

<sup>80</sup> See KE Maskus 'Intellectual Property Rights and Development' (2000) 32 *Case W Res J Intl L* 471; also C Fink 'Enforcing Intellectual Property Rights – An Economic Perspective' (2008) *Study commissioned by the ICTSD*.

<sup>81</sup> KE Maskus 'Intellectual Property Rights and Development' (2000) 32 *Case W Res J Intl L* 471 at 476.

<sup>82</sup> CM Correa 'Intellectual Property and Competition Law – Exploring Some Issues of Relevance to Developing Countries' (2007) *ICTSD Issue Paper No 21*; see also KE Maskus 'Intellectual Property Rights and Development' (2000) 32 *Case W Res J Intl L* 471 at 478-495.

eventually harm consumers.<sup>83</sup> Many developing countries have started strengthening their intellectual property laws in order to be more attractive to foreign direct investments.<sup>84</sup>

In contrast to that, competition law is essential in an economy in order to stop dominant firms from abusing their power and acting as price setters so that consumers can get the best quality products at the lowest price possible.<sup>85</sup> Competition is seen as the major motivation for undertakings to be innovative.<sup>86</sup> Competition law aims at ensuring that a fair competition on the market takes place which stimulates the different companies in the same or comparable sector to improve or invent new products that will lift their reputation on the market and eventually will result in more sales.<sup>87</sup> Being innovative is a costly exercise for the entities competing on the market and with no intellectual property protection these costs would deter companies from engaging in research and development, especially concerning products that are easy to copy.<sup>88</sup>

Since both laws aim to protect the consumer in the end it is possible for them to coexist.<sup>89</sup> However, this coexistence of the two laws can only be working effectively as long as an intellectual property right holder does not abuse its monopolistic position.<sup>90</sup> This occurs very often when an intellectual property right holder has a certain market power because of an invented product and uses the market power to a greater factor than legally justified by conduct such as driving other competitors out of the market or exploiting the consumers by charging usurious prices.<sup>91</sup> Thus, a monopolist can control the market by regulating prices, quantity,

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<sup>83</sup> JF Rill & MC Schechter 'International Anti- trust and Intellectual Property Harmonization of the Interface' (2003) *34 Law & Pol'Y Int'l Bus* 783.

<sup>84</sup> KE Maskus 'Intellectual Property Rights and Development' (2000) *32 Case W Res J Intl L* 471 at 481, 495.

<sup>85</sup> R Whish *Competition Law* 6ed (2009) 6.

<sup>86</sup> P Aghion *et al* 'Competition, Imitation and Growth with Step-by-Step Innovation' (2001) *The Review of Economic Studies Vol 68 No 3* 467-492.

<sup>87</sup> MM Dabbah *International and Comparative Competition Law* (2010) 20.

<sup>88</sup> I Hargreaves 'Digital Opportunity – A Review of Intellectual Property and Growth' (2011) *Independent Report op cit* at 1.6-1.7.

<sup>89</sup> Y Tian 'The Impact of the New Chinese Anti- Monopoly Law on IP Commercialization in China & General Strategies for Technology- Driven Companies and Future Regulators' (2007) *Duke Law & Technology Review* 4 \*3.

<sup>90</sup> FM Abbott 'Intellectual Property, International Protection' (2010) *Max Planck Encyclopedia of Public International Law* at 58 available at [http://www.frederickabbott.com/frederickabbott/Portals/0/Documents/Intellectual%20Property%20International%20Protection%20\(published\).pdf](http://www.frederickabbott.com/frederickabbott/Portals/0/Documents/Intellectual%20Property%20International%20Protection%20(published).pdf), accessed on 10 June 2013.

<sup>91</sup> C Colston & J Galloway *Modern Intellectual Property Law* 3ed (2010) 21.

supply and distribution.<sup>92</sup> It can be said that too comprehensive intellectual property legislation will have a negative impact on competition and will prevent innovation taking place.<sup>93</sup> In contrast to that too strict competition policy or legislation can result in a restriction of intellectual property right protection and will also lead to less innovation and following that will decrease trade in relation to intellectual property goods.<sup>94</sup>

In 2003 the US Federal Trade Commission issued a report that focussed especially on the balance of competition and patent law and policy. In this report it was stated that innovation is a great benefit to consumers and that this can be achieved by a good balance between the two areas of law because both intellectual property and competition policy enhance or stimulate innovation<sup>95</sup>; however, if patent law would allow too 'obvious' patents being registered it could diminish competition in the fields where these 'obvious' patents were used and vice versa, if the competition laws are overly broad the precompetitive use of a patent could be restricted.<sup>96</sup>

Hence, intellectual property laws do not work against antitrust laws as long as the intellectual property right holder does not abuse his position (monopoly) by illegal means. The majority of the academics argue that these two laws do not stand in conflict to each other and hence, have to be balanced correctly to increase wealth by the promotion of increased innovation and development.<sup>97</sup>

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<sup>92</sup> C Colston & J Galloway *Modern Intellectual Property Law* 3ed (2010) 35.

<sup>93</sup> K Czapracka *Intellectual Property and the Limits of Antitrust – A Comparative Study of US and EU Approaches* (2009) 37.

<sup>94</sup> Y Tian 'The Impact of the New Chinese Anti- Monopoly Law on IP Commercialization in China & General Strategies for Technology- Driven Companies and Future Regulators' (2007) *Duke Law & Technology Review* 4 \*3; JF Rill & MC Schechter 'International Anti- trust and Intellectual Property Harmonization of the Interface' (2003) *34 Law & Pol'Y Int'l Bus* 783.

<sup>95</sup> Federal Trade Commission 'The Proper Balance of Competition and Patent Law and Policy' (October 2003) *FTC Report Executive Summary* at 1.

<sup>96</sup> Federal Trade Commission 'The Proper Balance of Competition and Patent Law and Policy' (October 2003) *FTC Report Executive Summary* at 1.

<sup>97</sup> This argument was first brought forward by W Bowman *Patent and Antitrust Law: A Legal and Economic Appraisal* (1973) as quoted in K Czapracka *Intellectual Property and the Limits of Antitrust – A Comparative Study of US and EU Approaches* (2009) 37 footnote 3; see also Y Tian 'The Impacts of the Chinese Anti- Monopoly Law on IP Commercialization in China & General Strategies for Technology- Driven Companies and Future Regulators' (2010) *Duke Law & Technology Review* 4 \*3.

## CHAPTER 2 – THE HISTORY OF INTELLECTUAL PROPERTY LAW AND COMPETITION LAW IN THE PEOPLE’S REPUBLIC OF CHINA

This chapter will provide an outline of the Chinese Intellectual Property Law and the Chinese Anti- Monopoly Law for the purpose of understanding how the Chinese systems developed in order to be able to analyse the impact the competition law has on the protection of intellectual property rights and vice versa.

### I. The History of Chinese Intellectual Property Law

Compared to other jurisdictions in the world the law of intellectual property arrived very late in the People’s Republic of China and is still evolving.

#### 1. The Start of Intellectual Property

The late development can be explained by looking at China’s history and analysing which theories mainly formed the common thinking in China. The neglect of intellectual property protection leads back to the theories and principles that evolved from the doctrine of Confucianism.<sup>98</sup> Traditionally knowledge was seen as a common good and developing or creating a product was recognized as an achievement of a whole family or even the community as a whole and should be shared amongst them.<sup>99</sup> Contrary to other cultures the Chinese actually see copying or stealing as ‘the highest form of flattery and respect’<sup>100</sup> and part of the learning process for the younger generations.<sup>101</sup>

It took centuries to move from no protection to a basic protection of intellectual property as private property rights and some regulations were created during the Qing Dynasty in the late nineteenth century after having been forced by some Western Powers; first a concept of trademark was introduced, then patent and copyright protection.<sup>102</sup> The Qing Dynasty aimed to change from manual work to industrial work by assisting to establish new companies with trained workers; in order to achieve that change the government needed to give incentives to the people

<sup>98</sup> MA Groombridge ‘The Political Economy of Intellectual Property Rights Protection in the People’s Republic of China’ in C Long *Intellectual Property Rights in Emerging Markets* (2000) 13.

<sup>99</sup> J Nie *The Enforcement of Intellectual Property Rights in China* (2007) 178.

<sup>100</sup> JB Bochinski ‘The Evolution of Book Piracy and Copyright Law in East Asia: An Examination of Recent Developments and Remedies Involving China and Taiwan’ (1994) *Intellectual Property Law: An International Analytical Review Journal Gordon & Breach, Inc., Vol. 2, No. 2* at 76 as quoted in MA Groombridge ‘The Political Economy of Intellectual Property Rights Protection in the People’s Republic of China’ in C Long *Intellectual Property Rights in Emerging Markets* (2000) 14.

<sup>101</sup> J Nie *The Enforcement of Intellectual Property Rights in China* (2007) 178.

<sup>102</sup> J Nie *The Enforcement of Intellectual Property Rights in China* (2007) 179.

and so from 1882 a 10-year protection of industrial techniques was granted by Emperor Guangxu.<sup>103</sup> The first actual laws concerning technology were the ‘Reward Regulations on the Development of Technology’ which was released in 1898.<sup>104</sup> Although everything was set in place, this regulation never took effect and the hypothetical owners of intellectual property rights were proud to share their inventions and creations with other people for free.<sup>105</sup> After being put under pressure by the Western powers the Qing Dynasty finally changed its laws and established the first trademark law (‘Interim Trademark Registration Regulation of 1904’) and the first copyright law (‘Great Qing Copyright Law of 1910’) of China.<sup>106</sup> Although the regulations were finally put into place they were never enforced.<sup>107</sup>

## 2. The Era of Mao Zedong

Neither during the republican era after the fall of the Qing Dynasty nor during the chaos after the unification from 1926 to 1949 emphasis was laid on the development of intellectual property rights but a trend towards a protection was visible.<sup>108</sup> In October 1949 the People’s Republic of China was founded by the Communist Party after the civil war with the Guomindang (Nationalist Party) and all the existing laws were abolished.<sup>109</sup> The theories of Marxism and later Maoism did not help the growth of strong intellectual property rights because they were against the protection of private property and instead strongly supported collective property.<sup>110</sup> However, the Communist Party of China (CCP) did formulate a patent regulation ‘Provisional Regulations on the Protection of Invention Rights and Patent Rights’ in 1950 by which the patentee was given a ‘certificate of invention’ and some monetary reward, whereas the exploiting rights were granted to the state exclusively; if on the other hand the patentee applied for a ‘certificate of patent’, the patentee obtained the right

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<sup>103</sup> M Liu *Economic analysis of intellectual property rights law* (1996) 169.

<sup>104</sup> M Liu *Economic analysis of intellectual property rights law* (1996) 169.

<sup>105</sup> D Yang ‘The development of intellectual property in China’ (2003) *World Patent Information* 25 133.

<sup>106</sup> R Ran ‘Well- Known Trademark Protection in China: Before and After the TRIPS Amendments to China’s Trademark Law (2001-2002) 19 *UCLA Pac. Basin L.J.* 232; J Nie *The Enforcement of Intellectual Property Rights in China* (2007) 179.

<sup>107</sup> C Long *Intellectual Property Rights in Emerging Markets* (2000) 15.

<sup>108</sup> C Long *Intellectual Property Rights in Emerging Markets* (2000) 15.

<sup>109</sup><sup>109</sup> Q Kong *WTO, Internationalization and the Intellectual Property Rights Regime in China* (2005) 16.

<sup>110</sup> C Long *Intellectual Property Rights in Emerging Markets* (2000) 16.

to exploit it himself/ herself.<sup>111</sup> Up until 1958 only four patents were issued which demonstrates that the system was not very efficient.<sup>112</sup>

Due to the strengthening communist movement in China the regulations were changed in 1963 and Article 23 of the new Regulations on Awards for Inventions gave all rights to the state ('nobody or no unit shall have the monopoly of the invention').<sup>113</sup> The CCP also enacted laws regulating trademarks and copyright in the 1950s but these regulations ended during the period of the Cultural Revolution from 1966- 1976.<sup>114</sup>

### 3. After the Cultural Revolution

In 1976 the Chinese Government under the leadership of Deng Xiaoping introduced a new policy called 'Four Modernizations' that ultimately wanted China to attain the level of the world powers by improving the technology, the science, the agriculture and the industry.<sup>115</sup> Intellectual property rights were a huge obstacle for the orthodox socialist regime since intellectual property rights eventually lead to monopolies which are against the theories of socialism; however, the CCP saw the importance for a policy and for the world trade.<sup>116</sup> Intellectual property protection was considered to incentivise creation and innovation, improve the functioning of the market, attract foreign investment and stimulate foreign trade.<sup>117</sup> The Regulations in Awards for Technical Improvements and the Regulations on Awards for Invention were introduced in 1978 but primarily focussed on the promotion of technology instead of protection of individuals.<sup>118</sup> Due to the fast development of China's economy during the 1980s and 90s the importance of intellectual property protection grew.<sup>119</sup> Following that China laid intellectual property rights down in the Fifth Constitution of China and developed the Trademark Law in 1982, the Patent Law in

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<sup>111</sup> Articles 4 to 7 of the Provisional Regulations for the Protection of Rights of Invention and Rights of Patents (1950) in J Nie *The Enforcement of Intellectual Property Rights in China* (2007) 179, as no published document of the regulations can be found.

<sup>112</sup> C Long Intellectual Property Rights in Emerging Markets (2000) 17-18.

<sup>113</sup> Article 23 of the Regulations of Awards for Inventions (1963) in J Nie *The Enforcement of Intellectual Property Rights in China* (2007) 180, as no published document of the regulations can be found.

<sup>114</sup> J Nie *The Enforcement of Intellectual Property Rights in China* (2007) 180.

<sup>115</sup> J Nie *The Enforcement of Intellectual Property Rights in China* (2007) 181.

<sup>116</sup> J Nie *The Enforcement of Intellectual Property Rights in China* (2007) 180.

<sup>117</sup> Huang *The Explanation on Draft of Patent Law of the People's Republic of China* (1981) 14 as quoted in J Nie *The Enforcement of Intellectual Property Rights in China* (2007) 181 footnote 27.

<sup>118</sup> Q Kong WTO, *Internationalization and the Intellectual Property Rights Regime in China* (2005) 6.

<sup>119</sup> P Torremans & H Shan & J Erauw *Intellectual Property Rights and TRIPS Compliance in China* (2007) 1.

1984, the Copyright Law in 1990 and in 1991 it enacted the Regulations on Protection of Computer Software. Also the People's Republic of China joined several important intellectual property treaties such as the WIPO in 1980, the Paris Convention in 1984, the Berne Convention in 1989 and the Patent Cooperation Treaty in 1994.<sup>120</sup> At that time however, the copyright, patent and trademark laws lacked certain requirements such as scope and applicability to everyone as well as certain remedies for stealing trade secrets.<sup>121</sup>

For example the major problem of the Patent Law was its very narrow scope and the fact that protection was not equally given to nationals and foreigners- this was only changed due to a Memorandum of Understanding (MOU) between the United States and China.<sup>122</sup> The MOU was signed by both countries in 1992 and resulted from discussions between China and the United States concerning the protection of intellectual property rights in China, that are valid in the United States.<sup>123</sup>

#### **4. Agreement on Trade- Related Aspects of Intellectual Property Law (TRIPS)**

China became a member of the World Trade Organization in 2001<sup>124</sup> and by that time had to comply with all the conventions; it was not given a transition period like other developing countries.<sup>125</sup> Therefore, from 2001 onwards the Chinese intellectual property laws had to be compliant with the minimum standards laid down in TRIPS<sup>126</sup>. Prior to entering the WTO China amended the intellectual property laws many times, announced administrative regulations and tried to focus on guidelines for the implementation of the new legislation.<sup>127</sup> By 2001 the laws were fully TRIPS

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<sup>120</sup> \* This list is not exclusive.

<sup>121</sup> Q Kong *WTO, Internationalization and the Intellectual Property Rights Regime in China* (2005)7-8.

<sup>122</sup> Q Kong *WTO, Internationalization and the Intellectual Property Rights Regime in China* (2005) 7.

<sup>123</sup> Q Dexi 'A Survey of Intellectual Property Issues in China-U.S. Trade Negotiations under the Special 301 Provisions' (1993) *Pacific Rim Law & Policy Journal Vol 2 No 2* at 260-261.

<sup>124</sup> Protocol WT/L/432- Accession of the People's Republic of China.

<sup>125</sup> NR Lardy *Integrating China Into the Global Economy* (2002) 63.

<sup>126</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, arts 9-40, 33 I.L.M. further referred to as 'TRIPS'.

<sup>127</sup> P Torremans & H Shan & J Erauw *Intellectual Property Rights and TRIPS Compliance in China* (2007) 12.

compliant but the enforcement system was and still is lacking efficiency and intellectual property holders fear piracy.<sup>128</sup>

## II. The History of Chinese Competition Law

The conception of anti- monopoly law in China evolved very late and permitting competition on the market was not important. This can be explained by the Marxist-Leninist- Maoist doctrines that saw the idea of a market economy as wrong in nature concerning morals and traditions.<sup>129</sup> When the People's Republic of China started to reform its country after the Cultural Revolution new laws and regulations had to be established in order to become more suitable for international trade. For the last thirty years the growth of the People's Republic has been tremendous and the Chinese economy is transforming from a socialist planning economy to a market-oriented economy.<sup>130</sup>

### 1. The Way to a Competition Law

For the purpose of improving international acceptance a drafting group was formed in 1987 that was ordered to look at the competition issue in China and try to draft a useable anti- monopoly law for the Republic.<sup>131</sup> For unknown reasons the drafting group was only able to produce a rough draft of a possible competition law in 1993.<sup>132</sup> No further progress on the legislative process could be noticed until 1994 when the State Council founded another group which was aimed at developing a competition law and only twelve years later a draft of the Anti- Monopoly Law was given to the Standing Committee of the National People's Congress for revision (24 June 2006).<sup>133</sup> The Chinese legislative authority took a whole different approach to the forming of a competition law than other developed or developing countries which can be explained by the socialist theories and the totalitarian government of the Communist Party that hindered competition laws to evolve.<sup>134</sup> The People's Courts

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<sup>128</sup> Q Kong *WTO, Internationalization and the Intellectual Property Rights Regime in China* (2005) 4.

<sup>129</sup> L Ross 'China's Antimonopoly Law' (2007-2008) 22 *Antitrust* 66 at 66.

<sup>130</sup> Z Liu & Y Qiao 'Abuse of Market Dominance Under China's 2007 Anti- monopoly Law: A Preliminary Assessment (2012) 41 *Review of Industrial Organization* 78.

<sup>131</sup> H Myers *Official Report of Proceeding Hong Kong Legislative Council* (17 February 1987) as quoted in Z Xian-Chu 'An Anti- Monopoly Legal Regime in the Making in China as a Socialist Market Economy' (2009) 43 *Int'l Law*. 1469 at 1470 .

<sup>132</sup> Z Xian-Chu 'An Anti- Monopoly Legal Regime in the Making in China as a Socialist Market Economy' (2009) 43 *Int'l Law*. 1469 at 1470.

<sup>133</sup> H Yuanyuan 'China okays Draft on Anti- Monopoly Law' *China Daily* (8 June 2006) available at [http://www.chinadaily.com.cn/china/2006-06/08/content\\_611238.htm](http://www.chinadaily.com.cn/china/2006-06/08/content_611238.htm), accessed on 15 May 2013.

<sup>134</sup> LW Pye 'An Overview of 50 Years of the People's Republic of China: Some Progress but Big Problems Remain' (1999) 159 *China Quarterly* 569 at 569.

lacked a lot of experience and were too dependent on the government and only had a minor role in forming a competition law for the emerging market economy.<sup>135</sup> However, this slow process does not mean that China had no laws concerning competition at all- in 1993 it promulgated the Anti- Unfair Competition Law, in 1993 the Law on Protection of Consumer Rights and Interests, in 1994 the Advertising Law, in 1997 the Price Law, in 1999 the Bidding Law, in 2002 the Government Procurement Law, in 2003 the Law on Ports and in 2004 the Foreign Trade Law; all these regulations contained rules concerning monopolies and similar conducts.<sup>136</sup> All these different laws were too superficial and lacked coherency; they could rarely be enforced and China finally needed a comprehensive competition system.<sup>137</sup> It is very interesting to notice that China was very eager to seek advice from other jurisdictions when drafting the new law and held many international conferences and tried to involve international experts.<sup>138</sup>

## 2. The current Chinese Anti- Monopoly Law of 2007

The Chinese Anti- Monopoly Law was enacted on 30 August 2007 and took effect in 1 August 2008. The Chinese AML has been recognized worldwide as an ‘Economic Constitution’<sup>139</sup> and has also been described as a ‘milestone of the country’s efforts in promoting a fair competition market and cracking down on monopoly activities’<sup>140</sup>.

The new AML consists of eight chapters and fifty- seven articles; Chapter I – General Provisions, Chapter II – Monopoly Agreements, Chapter III – Abuse of Dominant Market Position, Chapter IV – Concentration of Business Operators, Chapter V – Abuse of Administrative Power to Eliminate or Restrict Competition, Chapter VI – Investigation into Suspicious Monopolistic Conduct, Chapter VII – Legal Liabilities and Chapter VIII – Supplementary Provisions.

<sup>135</sup> Z Xian-Chu ‘An Anti- Monopoly Legal Regime in the Making in China as a Socialist Market Economy’ (2009) *43 Int’l Law*. 1469 at 1470.

<sup>136</sup> Z Xian-Chu ‘An Anti- Monopoly Legal Regime in the Making in China as a Socialist Market Economy’ (2009) *43 Int’l Law*. 1469 at 1470- 1471.

<sup>137</sup> Z Xian-Chu ‘An Anti- Monopoly Legal Regime in the Making in China as a Socialist Market Economy’ (2009) *43 Int’l Law*. 1469 at 1471.

<sup>138</sup> M Williams *Competition Policy and Law in China, Hong Kong and Taiwan* (2005) 175.

<sup>139</sup> P Jones ‘Licensing in China: The New Anti Monopoly Law, The Abuse of IP Rights and Trade Tensions (2008) *XLIII (2) Les Nouvelles: J. Licensing Soc’y Int’l* 106 at 2 (see footnote 9 as well) saying that the AML is recognised widely – by both Chinese officials and scholars – as an ‘Economic Institution’ [经济宪法 (Jingji Xianfa)].

<sup>140</sup> N Peng ‘China’s First Anti- monopoly Law Takes Effect’ *Xinhua News Agency* (1 August 2008) *op cit*; see also also X Wang ‘Highlights of China’s New Anti- Monopoly Law’ (2008) *75 Antitrust Journal No. 1* at 134.

### 3. Goal of the Chinese Anti- Monopoly Law

The purpose of this new competition law is laid out in Article 1 of the AML that states:

*'This Law is enacted for the purpose of preventing and curbing monopolistic conducts, protecting fair market competition, enhancing economic efficiency, maintaining the consumer interests and the public interests, and promoting the healthy development of socialist market economy.'*<sup>141</sup>

Except from the last goal concerning the socialist market economy all these goals are internationally recognized competition goals.<sup>142</sup> In comparison the South African Competition Act has a clause for the purpose stating that efficiency, adaptability and development of the economy shall be promoted, consumers as well as small- or medium- sized companies shall be protected and the public interest shall be respected.<sup>143</sup>

### 4. Applicability

Article 2 of the AML stipulates that the law is applicable to *'monopolistic conducts in economic activity within the territory of the People's Republic of China'* and to behaviour outside the territory if it has an *'eliminating or restricting'* effect on China's domestic competition and market. The law does not exclude the international or foreign companies and is therefore also applicable to them if they act in a way that would harm the Chinese market.

In Article 55 of the AML an exception to the application is made by excluding the legal *'conduct of business operators to exercise their intellectual property rights'*. However, it will be applicable once the intellectual property rights are abused.

### 5. Enforcement Divisions

Article 9 and 10 of the AML orders the State Council to establish two agencies being the Anti- Monopoly Commission (AMC) and the Anti- Monopoly Enforcement Agency (AMEA). The AMC is responsible for *'organizing, coordinating and*

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<sup>141</sup> Article 1 Anti-Monopoly Law PRC.

<sup>142</sup> P Jones 'Recent Developments – China's New Anti-Monopoly Law: An Economic Constitution for the New Market Economy?' (2007) 3 *China Law Reporter Issue 5 4* at <http://www.jonesco-law.ca/89/files/pdfs/PCP%20-%20New%20AML%20-%20CLR.2007.09.pdf>, accessed on 10 June 2013.

<sup>143</sup> S2(a)-(f) Competition Act 89 of 1998, South Africa.

*guiding*<sup>144</sup> the competition on the market and will consist of various government officials who are not necessarily competition experts<sup>145</sup>, whereas the AMEA is responsible for the enforcement of the anti-monopoly legislation.<sup>146</sup> Article 10 of the AML gives the AMEA the right to assign its power to the governments of the municipalities, the autonomous regions and the provinces.

Since the AML does not say how the AMEA will be structured and which agency will enforce the law, one can assume that all three agencies that already existed prior to the AML will continue to work on competition issues and the enforcement thereof.<sup>147</sup> Before the AML was enacted the State Administration for Industry and Commerce (SAIC) was ordered to enforce the previous laws concerning monopolistic conduct, whereas the Ministry of Commerce (MOFCOM) was addressed to control the mergers of multinational corporations (MNCs) and the National Development and Reform Commission (NDRC) was ordered to enforce the prohibitions on price fixing.<sup>148</sup>

## 6. The Subject Matter

The AML contains prohibitions to ensure that the competition on the market will not be harmed. They can be split up into three different sections:

Chapter II deals with monopolistic agreements including different types of horizontal agreements between two competing businesses (i.e. fixing prices, jointly boycotting transactions etc)<sup>149</sup> and vertical agreements between an entity and its trading partner (fixing the price for resale to a third party, restricting minimum prices for resale etc).<sup>150</sup>

Chapter III sets out the rules for the ‘abuse of dominant position’ and specifies the factors of determining the dominance of an entity.<sup>151</sup> The prohibitions

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<sup>144</sup> Article 9 Anti-Monopoly Law PRC.

<sup>145</sup> F Deng & GK Leonard ‘Incentives and China’s New Antimonopoly Law’ (2007-2008) 22 *Antitrust* 73 at 73.

<sup>146</sup> Article 10 Anti-Monopoly Law PRC.

<sup>147</sup> F Deng & GK. Leonard ‘Incentives and China’s New Antimonopoly Law’ (2007-2008) 22 *Antitrust* 73 at 73.

<sup>148</sup> F Deng & GK. Leonard ‘Incentives and China’s New Antimonopoly Law’ (2007-2008) 22 *Antitrust* 73 at 73.

<sup>149</sup> Article 13 Anti-Monopoly Law PRC.

<sup>150</sup> Article 14 Anti-Monopoly Law PRC.

<sup>151</sup> Article 17-19 Anti-Monopoly Law PRC.

include but are not limited to practices such as exclusive dealing, price discrimination and refusal to deal.<sup>152</sup>

Chapter IV of the AML deals with the regulations concerning the concentration of the market including mergers and several forms of acquisition.<sup>153</sup> It also stipulates in Article 21 AML that the threshold for notifying the merger will be specified by the State Council every year.

From this structure one can see that the structure of the Chinese AML is very similar to the structure found in the competition law of the European Union.<sup>154</sup> Article 101 of the Treaty on the Functioning of the European Union (TFEU)<sup>155</sup> stipulates the rules regarding monopoly agreements, Article 102 deals with the abuse of dominance and the concentration practices are dealt with in the European Community Merger Regulations (ECMR)<sup>156</sup>.

## 7. Summary

In summary it can be said that the People's Republic of China has finally – after many discussions – established competition legislation that takes account of most of the practises that are internationally seen to be harmful to competition and thus, harmful to an effective market. However, since China is an autocratically run economy the question arises as to whether the implementation of the AML is a step forward to liberalise the economy or whether China only wants to gain greater acceptance in the world, especially by the developed nations that have competition laws in place. The following analysis will try to show whether China has only put the legislation in place or whether it has also taken steps to interpret and enforce the anti-monopoly regulations.

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<sup>152</sup> Article 17 Anti- Monopoly Law PRC.

<sup>153</sup> Article 20 Anti- Monopoly Law PRC.

<sup>154</sup> Y Tian 'The Impact of the New Chinese Anti- Monopoly Law on IP Commercialization in China & General Strategies for Technology- Driven Companies and Future Regulators' (2007) *Duke Law & Technology Review* 4 \*18.

<sup>155</sup> Treaty on the Functioning of the European Union (TFEU) Consolidated Version of the Treaty on the Functioning of the European Union 2008 *O.J. C 115/47* further referred to as 'TFEU'.

<sup>156</sup> Council Regulation 139/2005/EC on the Control of Concentrations between Undertakings (EC Merger Regulation 'ECMR') 2009 *O.J. L 24/1*.

### CHAPTER 3 – ANALYSIS OF ARTICLE 55 OF THE CHINESE ANTI-MONOPOLY LAW

The AML is the first legislation in the People's Republic of China dealing with competition and constitutes the first legislation that connects intellectual property rights and anti-monopoly law in China.<sup>157</sup> As discussed in the previous chapter the new Chinese AML contains one clause dealing with intellectual property rights and the relationship to anti-monopoly law. Given that the law does not say anything about the application to foreign companies it can be assumed that the law is applicable to both national and international or foreign enterprises inside and outside of the Chinese territory as long as it restricts or eliminates competition on the Chinese market in any possible way.<sup>158</sup> Intellectual property rights are dealt with in Article 55 AML. The meaning of Article 55 AML as well as the problems resulting from it will be discussed in further detail in the following paragraphs.

#### I. Understanding and Applying Article 55 AML

Whereas the other prohibitions<sup>159</sup> contained in the anti-monopoly legislation are dealt with in chapter two to chapter four, Article 55 AML is part of the supplementary provisions set out in chapter eight. This clause specifically deals with the exception of intellectual property right holders to the application of Article 55 AML in the following manner:

*'This law is not applicable to conducts by undertakings to implement their intellectual property rights in accordance with relevant IP laws and administrative regulations; however, this law is applicable to the conduct by undertakings to eliminate or restrict market competition by abusing intellectual property rights.'*<sup>160</sup>

This clause points out that intellectual property rights can act as an exception to the rules set out in the foregoing articles by not applying the anti-monopoly rules to persons or companies that are exercising their intellectual property rights in a legitimate way. Article 55 AML contains two important aspects which need to be

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<sup>157</sup> Translated from Chinese from: X Wang 'On the Enforcement of China's Antimonopoly Law in the Field of Intellectual Property' (2009) *Journal of Shanghai Jiaotong University (Philosophy and Social Science)* 6 at Heading I.

<sup>158</sup> Article 2 Anti-Monopoly Law PRC.

<sup>159</sup> Chapter II deals with monopolistic conduct; Chapter III deals with the abuse of a dominant position; Chapter IV is concerned with the concentration of the market due to mergers and acquisitions.

<sup>160</sup> Article 55 Anti-Monopoly Law PRC.

discussed in further detail. First, by looking at the phrasing of the clause it appears evident that the legislation concerning intellectual property rights is of equal status to the AML.<sup>161</sup> This means, in effect, that neither law can claim superiority over the other, which leads back to the relationship of intellectual property law and competition laws discussed in Chapter 1 of this thesis and further emphasises that a balance between the two areas of law has to be established.<sup>162</sup> Thus, the AML is not used to interpret intellectual property laws in any way and vice versa.<sup>163</sup>

The fact that the Chinese legislator appears to have intended to allow for the two laws to stand separate to one another is further illustrated by Article 13(4) and Article 15(1) AML. The former deals with the prohibition of ‘restricting the purchase of new technology’ and the latter makes an exception for the purpose of improvement and innovation.<sup>164</sup> The second aspect regarding Article 55 AML which has to be emphasized is that Article 55 AML actually is applicable once an intellectual property right holder abuses its rights granted by the intellectual property legislation<sup>165</sup>; here the question arises how an abuse of intellectual property rights according to Article 55 AML can be defined.<sup>166</sup>

Furthermore, the specifications that Article 55 AML sets will be analysed. For a person to be exempted from the application of the AML certain requirements need to be fulfilled. First, the person asking for an exemption needs to be ‘legally authorized’ to exercise intellectual property rights which means that taking patents as an example he/ she is the inventor of a certain good or he/ she has acquired the rights

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<sup>161</sup> D Zhang & G Gao & B Guo ‘The IPR Impact of China’s Anti- Monopoly Law: What more to expect?’ (October 2007) *China Intellectual Property Issue 20* available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=402>, accessed on 23 May 2013; also: P Jones ‘Licensing in China: The New Anti Monopoly Law, The Abuse of IP Rights and Trade Tensions (2008) *XLIII (2) Les Nouvelles: J. Licensing Soc’y Int’l 106* at 3.

<sup>162</sup> P Jones ‘Licensing in China: The New Anti Monopoly Law, The Abuse of IP Rights and Trade Tensions (2008) *XLIII (2) Les Nouvelles: J. Licensing Soc’y Int’l 106* at 3.

<sup>163</sup> P Jones ‘Licensing in China: The New Anti Monopoly Law, The Abuse of IP Rights and Trade Tensions (2008) *XLIII (2) Les Nouvelles: J. Licensing Soc’y Int’l 106* at 3.

<sup>164</sup> Article 13(4) ‘Any of the following agreements among undertakings competing with each other are prohibited: [...] (iv) limiting the purchase of new technology or new facilities, or the development of new products or new technology’ and

Article 15(1) ‘Agreements among undertakings with one of the following objectives shall be exempted from the application of article 13, 14 if: (i) agreements made to improve technology, to research and develop new products’ Anti- Monopoly Law PRC.

<sup>165</sup> In line with Article 40(1) TRIPS.

<sup>166</sup> P Jones ‘Licensing in China: The New Anti Monopoly Law, The Abuse of IP Rights and Trade Tensions (2008) *XLIII (2) Les Nouvelles: J. Licensing Soc’y Int’l 106* at 3.

by assignment or license from the inventor<sup>167</sup>; also, in order to exercise rights under a patent the patent must not have expired yet given that once a patent has lapsed the former owner thereof cannot rely on the rights anymore.<sup>168</sup> Moreover, business operators cannot rely on the exception laid out in Article 55 AML if they have not applied<sup>169</sup> or registered<sup>170</sup> for an intellectual property right (patents or trade marks) or in the example of copyright have not fulfilled the requirements for copyright protection<sup>171</sup>. Secondly, and most importantly, the patent right holder's conduct needs to be within the ambit of the intellectual property right laws.<sup>172</sup> If for example a patentee acts outside his/ her rights granted by the Patent Law or uses its power to distort the market no protection will be given anymore under the intellectual property legislation and the AML will be applied to that conduct to prevent further distortion on the market.<sup>173</sup>

Article 55 AML does not define when a certain intellectual property right will be abused in the meaning of this clause and no examples have been provided in the legislation. The complex uncertainties of Article 55 AML will be discussed in the following paragraphs.

## II. Ambiguity and Uncertainties in the Law

The major problem with the new competition law, in particular the clause relating to intellectual property right holders, is that the text of Article 55 AML does not give any further information as to what situations it shall be applied. Questions such as 'When is an intellectual property right holder abusing his/ her monopolistic position?' or 'When is the conduct of a monopolist too harmful to competition on the market so that for the purpose of maintaining an efficient market economy the anti-monopoly law has to be applied?' arise. The problem can be further illustrated by

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<sup>167</sup> For further information about the legal authorization look at the Patent Law PRC, especially Articles 6 to 10.

<sup>168</sup> Article 42 Patent Law PRC; N Lizhi 'On the Relation of Exercising of Patent Rights and Antimonopoly Law' (2007) *Canadian Social Science Vol 3 No 51-4* at 2.

<sup>169</sup> Article 11 Patent Law PRC.

<sup>170</sup> Article 3 and 4 Trade Mark Law of the People's Republic of China (announced by the Standing Committee of the National People's Congress 23 August 1982, effective 1 March 1983, amended 1993, 2001) available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=131395](http://www.wipo.int/wipolex/en/text.jsp?file_id=131395), accessed on 20 May 2013.

<sup>171</sup> Article 3 Copyright Law of the People's Republic of China (announced by the Standing Committee of the National People's Congress 7 September 1990, effective 1 June 1991, amended 2001, 2010) available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=186569](http://www.wipo.int/wipolex/en/text.jsp?file_id=186569), accessed on 25 May 2013.

<sup>172</sup> N Lizhi 'On the Relation of Exercising of Patent Rights and Antimonopoly Law' (2007) *Canadian Social Science Vol 3 No 51-4* at 2.

<sup>173</sup> N Lizhi 'On the Relation of Exercising of Patent Rights and Antimonopoly Law' (2007) *Canadian Social Science Vol 3 No 51-4* at 2.

taking a patent as an example of an intellectual property right and trying to analyse the rights and duties of patentees in order to find the scope of a monopoly granted to one undertaking by a patent. Article 11 of the Patent Law states that:

*'after the patent right is granted for an invention or a utility model, unless otherwise provided for in this Law, no unit or individual may exploit the patent without permission of the patentee, i.e., it or he may not, for production or business purposes, manufacture, use, offer to sell, sell, or import the patented products, use the patented method, or use, offer to sell, sell or import the products that are developed directly through the use of the patented method'.<sup>174</sup>*

This clause shows that a patentee can exploit its granted rights fully and prevent other companies who might be possible competitors from using his/ her creation. A patent right holder has the exclusive rights over a certain technology and can, for example, set prices or set up sales conditions which objectively could be seen as anti-competitive and would not be allowed under Article 17(1) AML.<sup>175</sup> However, patent law gives the right holders the ability to recoup their investment costs by excluding others from, for example, using the same technology. The economic profits they gain from the market due to this protection are intended to incentivise to further research and development and will eventually result in goods of equal or better quality at a lower price.<sup>176</sup> Therefore, the price setting in the example can be seen as legitimate under the AML because it directly links to the patented product itself and is one of the rights obtained via patent protection.

However, concerning patent rights it is questionable when such a monopolistic behaviour amounts to conduct that is distorting the market and in the long term harmful to the unified goals of intellectual property law and competition law of promoting innovation and enhancing consumer welfare.<sup>177</sup> As previously discussed, a good balance has to be established between the existing intellectual property rights and the antimonopoly law.<sup>178</sup> The conduct of a patentee can bring about certain limitations on the market which could be disadvantageous to the competition taking place but still be tolerated because of the objectives of patent law

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<sup>174</sup> Article 11 Patent Law PRC.

<sup>175</sup> A Emch & Q Hao 'Viewpoint: The New Chinese Anti-Monopoly Law – An Overview' (2007) *eCCP eSapience Center for Competition Policy* at 13.

<sup>176</sup> L Ross 'China's New Antimonopoly Law' (2007-2008) 22 *Antitrust* 66 at 1-2; WIPO 'Economic Development and Patents' available at <http://www.wipo.int/patent-law/en/developments/economic.html>, accessed on 26 May 2013.

<sup>177</sup> Y Tian 'The Impact of the New Chinese Anti- Monopoly Law on IP Commercialization in China & General Strategies for Technology- Driven Companies and Future Regulators' (2007) *Duke Law & Technology Review* 4 \*3.

<sup>178</sup> Look at Chapter 1 Section III.

and the actual benefits such a protection has.<sup>179</sup> One example illustrating this scenario is the negotiation of a patentee with his/ her prospective licensee about the ambit of the license regarding the area of use, the type of rights and the duration of the license; such acts – in the eyes of competition – are not harmful and are possible exceptions to the application of the AML.<sup>180</sup> A counter-example is the exercise of product-tying when a company links its patented product to a product with no patent protection; here, Article 17(5) AML is most likely to be applied because that conduct might distort the competition on the market and lead to unfair advantages of one competitor to the other.<sup>181</sup> One example to illustrate tying is the *Microsoft Case* in which Microsoft tied its Windows Media Player to the Windows operating system and the European Court of First Instance affirmed the Commission's decision by ruling that this conduct lead to a foreclosure of the market.<sup>182</sup>

In defining the term 'abuse' in Article 55 AML regard might be drawn to international frameworks. Since the People's Republic of China joined the WTO in 2001, it now has to comply with all the agreements binding the members of the WTO.<sup>183</sup> As discussed in Chapter 2 of this thesis China's intellectual property laws have to comply with TRIPS, the agreement relating to the intellectual property rights in the member states. In Article 40(2) TRIPS it is stipulated that:

*'Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.'*<sup>184</sup>

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<sup>179</sup> N Lizhi 'On the Relation of Exercising of Patent Rights and Antimonopoly Law' (2007) *Canadian Social Science Vol 3 No 51-4* at 2.

<sup>180</sup> N Lizhi 'On the Relation of Exercising of Patent Rights and Antimonopoly Law' (2007) *Canadian Social Science Vol 3 No 51-4* at 2.

<sup>181</sup> A Emch & Q Hao 'Viewpoint: The New Chinese Anti-Monopoly Law – An Overview' (2007) *eCCP eSapience Center for Competition Policy* at 13.

<sup>182</sup> *Microsoft Corporation v Commission* (2007) ECR II-000, (2007) 5 CMLR 846 and *Microsoft Case* – Commission Decision relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation of 24 May 2004, 2007/53, OJ 2007 L32/23.

<sup>183</sup> Protocol WT/L/432- Accession of the People's Republic of China; NR Lardy *Integrating China Into the Global Economy* (2002) 63.

<sup>184</sup> Article 40(2) TRIPS.

This Article could be used to assist interpreting the meaning of intellectual property abuse in Article 55 AML.<sup>185</sup> At the WTO Council in October 2007 China was questioned by the European Union as to how ‘abuse intellectual property rights’ should be defined and whether the Chinese understanding goes beyond the scope set out in Article 40(2) TRIPS.<sup>186</sup> In TRIPS, abusive conduct is understood to include exclusive grantbacks which means that a licensee has to assign all the rights to the grantor if a patented technology is improved in any way or a new technology invented while using the patented technology.<sup>187</sup> Also, TRIPS sees the prevention of challenging the validity of an intellectual property right as abusive which means that for example the grantor of a patent cannot stipulate a clause in the contract forbidding the licensee to challenge the patent’s validity.<sup>188</sup> Last, Article 40(2) TRIPS states ‘coercive package licensing’ as an abuse which is understood to be the situation when a patent can only be used once other patents are licensed as well but the grantor forces the licensee to also obtain licenses for patents the licensee does not necessarily need which puts a huge burden on the licensee because he/ she has to pay royalties for a license of a patent that will not be used.<sup>189</sup> Since the AML does not contain information regarding these conditions it remains highly ambiguous as to what conduct constitutes an abuse of intellectual property rights.

Moreover, consideration should be given to other Chinese domestic legislation. It can be used to assist with the interpretation of Article 55 AML and the meaning of ‘abuse of intellectual property rights’. First, the Foreign Trade Law can help to interpret the competition law because Article 30 and Article 32 mirror the stipulations of TRIPS and also declare exclusive grantbacks, the prohibition of challenging the validity and coercive package licensing as abuse and prohibit the illegal creation of monopolies.<sup>190</sup> Secondly, regards may be drawn to the Contract Law of the People’s Republic of China. Article 329 of the Contract Law stipulates

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<sup>185</sup> A Ng & D Liang & P Waters ‘The Intersect between Intellectual Property Law and Competition Law – Implications for China’ (2008) *King&Wood Mallesons IP Bulletin Special Issue* at IV B available at <http://www.kingandwood.com/article.aspx?id=IPBulletin081127-01>, accessed on 21 May 2013.

<sup>186</sup> WTO Council for Trade-Related Aspects of Intellectual Property Rights ‘Transitional Review Mechanism of China – Communication from the European Communities’ (11 October 2007) *IP/C/W/503* at s23.

<sup>187</sup> US Legal ‘Grantback Clauses Law & Legal Definition’ available at <http://definitions.uslegal.com/g/grantback-clauses%20/>, accessed on 21 May 2013.

<sup>188</sup> Article 40(2) TRIPS.

<sup>189</sup> JB Kobak *Intellectual Property Misuse – Licensing and Litigation* (2000) at 43-44.

<sup>190</sup> Foreign Trade Law of the People’s Republic of China China (announced by the Standing Committee of the National People’s Congress 12 May 1994, effective 1 July 1994, amended 2004).

that a contract dealing with technology ('technology contract') is void if it creates an illegal monopoly, hinders the development of technology or harms the rights to a technology of a third person.<sup>191</sup> Article 343 of the Contract Law deals with technology transfer contracts allowing the transferor and transferee to set up rules concerning the exploitation of a patent to the limit that competition and development of technology will not be restricted.<sup>192</sup> These two articles could be used for defining the abuse in the meaning of Article 55 AML as they declare contracts void that lead to illegal monopolies and as a result of that cause a restriction of competition on the technology market.<sup>193</sup> Article 10 of the Interpretation of the Supreme People's Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contract further clarifies Article 329 of the Contract Law by listing six conditions as to when an illegal monopoly impedes the technological progress: first, a contract must not restrict another's technological improvement and therefore conditions such as exclusive grantbacks or sole-ownership of jointly developed technology are prohibited; secondly, the other party must not be restricted to obtain technology from other sources in order to compete; thirdly, the transferor must not hinder the transferees exploitation of the market; fourthly, the technology recipient cannot be contractually forced to also obtain raw materials and other equipment from the transferor; fifthly, the transferee cannot restrict the sources of obtaining raw materials and equipment; last, the transferee cannot prohibit the recipient to challenge the validity of the intellectual property rights in any way.<sup>194</sup> Sales involving ties or unreasonable conditions for a buyer are prohibited by Article 12 of the Law Against Unfair Competition when they are contrary to the will of the buyer; this article could also act as an indicator as to when a conduct is abusive.<sup>195</sup> All these different international and domestic laws can assist with interpreting Article 55 AML and give some ideas by what conduct intellectual property rights are abused by the

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<sup>191</sup> Article 329 Contract Law of the People's Republic of China further referred to as 'Contract Law PRC' (announced by the Standing Committee of the National People's Congress 15 March 1999, effective 1 October 1999) available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=182632](http://www.wipo.int/wipolex/en/text.jsp?file_id=182632), accessed on 26 May 2013.

<sup>192</sup> Article 343 Contract Law PRC.

<sup>193</sup> D Zhang & G Gao & B Guo 'The IPR Impact of China's Anti- Monopoly Law: What more to expect?' (October 2007) *China Intellectual Property Issue 20 op cit.*

<sup>194</sup> Translated from: Article 10 of the Interpretation of the Supreme People's Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contract (announced by the Supreme's People Court 30 November 2004, effective 1 January 2005) available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=182599](http://www.wipo.int/wipolex/en/text.jsp?file_id=182599), accessed on 26 May 2013.

<sup>195</sup> Law of the People's Republic of China Against Unfair Competition (announced by the Standing Committee of the National People's Congress 2 September 1993, effective 1 December 1993) available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=125970](http://www.wipo.int/wipolex/en/text.jsp?file_id=125970), accessed on 26 May 2013.

holder. However, none of these laws define at what point the competition will be seen as eliminated or restricted.<sup>196</sup>

Another ambiguity of Article 55 AML is that it does not provide any information concerning the size of the firm. It is questionable whether a company has to have a dominant position on the relevant market in order for the AML to apply to that undertaking or whether it is applicable to any undertaking regardless of the size and market position.<sup>197</sup> This ambiguity raises a lot of concern because no firm can be sure if the rules of Article 55 AML will be applied to them or not. The AML deals with the definition of dominance in Article 18 AML and names market shares and the ability to control as possible ways to determine dominance on the market. Article 19 AML sets out the market power thresholds that should be applied.<sup>198</sup> However, in a court action enterprises are encouraged to bring forward the ‘non- dominant firm defence’ and argue that the conduct, even though it might be anti- competitive, will not lead to a distortion of competition or result in a harmful effect on the market because the market share of the firm is relatively small.

A further problem occurring with the application of Article 55 AML is the uncertainty of the administrative liability of undertakings that breach Article 55 AML by abusing their intellectual property rights. The legal liabilities of undertakings infringing the rules of the AML are laid down in Article 47 to Article 54 AML including monetary penalties and orders to stop certain conduct. However, it needs to be noted that the legal liabilities are placed before Article 55 AML and therefore it is questionable if they will also be applied to the abuse of intellectual property rights when there is no dominant position at question.<sup>199</sup>

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<sup>196</sup> D Zhang & G Gao & B Guo ‘The IPR Impact of China’s Anti- Monopoly Law: What more to expect?’ (October 2007) *China Intellectual Property Issue 20 op cit.*

<sup>197</sup> K Nicholson & Z Liu ‘Avoid Competition Problems in China’ (1 July 2008) *Managing Intellectual Property – The Global IP Resource* available at <http://www.managingip.com/Article/1968516/Avoid-competition-problems-in-China.html>, accessed on 27 May 2013; also EH Lim & SP Atluri ‘A New Era of Intellectual Property Rights Licensing’ (March- April 2009) *The China Business Review Vol 36 No 2* at 27.

<sup>198</sup> Article 19 ‘Undertakings in any of the following situations can be assumed to have a dominant market position: (i) the relevant market share of one undertaking accounts for 1/2 or above; (ii) the joint relevant market share of two undertakings accounts for 2/3 or above; (iii) the joint relevant market share of three undertakings accounts for 3/4 or above. In the case that the circumstance of the undertakings fall under the conditions (ii) or (iii) and any of the undertakings has a market share of less than 10%, that undertaking shall not be considered to have dominant market position. Undertakings that are assumed to have a dominant market position shall not be considered to have a dominant market position if they can provide opposite evidence.’ Anti- Monopoly Law PRC.

<sup>199</sup> D Zhang & G Gao & B Guo ‘The IPR Impact of China’s Anti- Monopoly Law: What more to expect?’ (October 2007) *China Intellectual Property Issue 20 op cit.*

### III. Concerns

As it can be seen from the previous discussion it is very unclear what kind of conduct amounts to an ‘abuse of intellectual property rights’ in the meaning of Article 55 AML. Some experts see Article 55 AML as highly ‘controversial’.<sup>200</sup> This is a very risky situation, especially for foreign firms. Their behaviour on the market including exercises such as refusing licenses, obtaining a monopoly through a patent or limiting competition by ways of good branding, could – in the eyes of a Chinese judge – amount to abusing behaviour and hence, could result in the application of the AML.<sup>201</sup> Trials are very burdensome because they cost a lot of money and usually take up a lot of time. In order to prevent a trial the firms need to know what conduct is legal or illegal so they can plan their exercises carefully to avoid law suits.

The enforcement of the AML remains very unclear and concerns arise. It still remains unclear, for example, which authority is responsible for the enforcement. Article 10 AML only stipulates that the State Council has the duty to ensure that the enforcement is consistent with the regulations stipulated in the AML.<sup>202</sup> The multinational corporations (MNCs) doing business in the People’s Republic of China also fear the uncertainty how the AML will be interpreted and enforced. Foreign companies or MNCs are afraid that the law might be enforced more strictly on them, than on competing Chinese companies.<sup>203</sup> The antimonopoly enforcers, namely MOFCOM, NDRC and SAIC<sup>204</sup>, could be influenced by political opinions or ‘ideological beliefs’.<sup>205</sup> Especially in the People’s Republic of China it can be suspected that the enforcement of the competition law is and will be influenced substantially by political opinions and the socialist ideology because of the ‘stronger nationalistic sensibility’ and the importance of national security; this could for example result in state owned enterprises (SOEs) being exempted on grounds of Article 55 AML although they are substantially restricting competition whereas

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<sup>200</sup> EH Lim & SP Atluri ‘A New Era of Intellectual Property Rights Licensing’ (March- April 2009) *The China Business Review Vol 36 No 2* at 27.

<sup>201</sup> L Ross ‘China’s New Antimonopoly Law’ (2007-2008) 22 *Antitrust* 66 at 70.

<sup>202</sup> L Ross ‘China’s New Antimonopoly Law’ (2007-2008) 22 *Antitrust* 66 at 70.

<sup>203</sup> F Deng & G Leonard ‘Incentives and China’s New Antimonopoly Law’ (2007-2008) 22 *Antitrust* 73 at 75.

<sup>204</sup> Look at Chapter 2 Section II *Enforcement Divisions*.

<sup>205</sup> F Deng & G Leonard ‘Incentives and China’s New Antimonopoly Law’ (2007-2008) 22 *Antitrust* 73 at 75.

MNCs could be held liable for the same conduct and be tried in the courts.<sup>206</sup> SOEs are corporations that are established by the local or national government to get involved in commercial activities.<sup>207</sup> Another possible scenario could be that MNCs are pressured to establish business relations to SOEs by the way of compulsory licensing or the like.<sup>208</sup> This is a major concern to the MNCs because they will have to disclose their technology to the SOEs which could lead to unwanted dissemination of the information and to the weakening of the rights granted under intellectual property legislation.

Another possible scenario is that intellectual property right holders in China are at risk of being accused of abusing their monopolistic position on the market even though in some other countries their conduct would be seen as legitimate and in conformity with the existing intellectual property legislation.<sup>209</sup> This will result in the forfeiture of the rights granted by the intellectual property legislation and will often have negative monetary outcomes for the affected company.<sup>210</sup> This fact was further emphasized by Wu Zhenguo, the deputy director at the MOFCOM office responsible for antimonopoly concerns, who stated that business exercises of firms could be seen as abuses in the meaning of the AML but do not amount to abuses in Europe or the United States.<sup>211</sup>

However, there are certain factors that speak against the ‘misuse of the AML’ and could diminish the fears of the foreign companies.<sup>212</sup> Article 7 AML deals with the so-called SOEs and it can be assumed such enterprises are excluded from the application of the AML which shows that foreign companies do not have to fear potential inequalities concerning the enforcement because the SOEs are already excluded from the AML; but it remains unclear which kind of SOEs are excluded

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<sup>206</sup> F Deng & G Leonard ‘Incentives and China’s New Antimonopoly Law’ (2007-2008) 22 *Antitrust* 73 at 76.

<sup>207</sup> OECD ‘State Owned Enterprises in China: Reviewing the Evidence’ (2009) *Occasional Paper* at 2.1 available at <http://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/42095493.pdf>, accessed on 8 June 2013.

<sup>208</sup> F Deng & G Leonard ‘Incentives and China’s New Antimonopoly Law’ (2007-2008) 22 *Antitrust* 73 at 76.

<sup>209</sup> EH Lim, SP Atluri ‘A New Era of Intellectual Property Rights Licensing’ (March- April 2009) *The China Business Review Vol 36 No 2* at 27.

<sup>210</sup> EH Lim, SP Atluri ‘A New Era of Intellectual Property Rights Licensing’ (March- April 2009) *The China Business Review Vol 36 No 2* at 27.

<sup>211</sup> EH Lim, SP Atluri ‘A New Era of Intellectual Property Rights Licensing’ (March- April 2009) *The China Business Review Vol 36 No 2* at 27.

<sup>212</sup> F Deng & G Leonard ‘Incentives and China’s New Antimonopoly Law’ (2007-2008) 22 *Antitrust* 73 at 76.

and if for example the industries combining SOEs as well as non- SOEs are subject to the AML.<sup>213</sup> Furthermore, another aspect which could decrease the fear is the fact that many enforcers could be more stimulated by their careers and aim at the correct enforcement to improve their reputation.<sup>214</sup>

However, since the AML does not give more information to the above discussed problems, its application remains unclear to everyone and the fear of misuse, inequalities and different interpretation remains. All the uncertainties could actually result in less investment and research and innovation in China.<sup>215</sup>

#### **IV. Article 15 AML**

Article 15 AML provides an exemption to the application of Article 13 and Article 14 AML that prohibit monopolistic agreements that can harm the competition in the internal market of the People's Republic of China. On the basis of Article 15 AML monopolistic agreements can be exempted from the application of the AML if research and development is enhanced by the agreement and technology will be improved.<sup>216</sup> A very important aspect is that the exemption provision of Article 15 AML is not applicable to dominant firms but only to the monopolistic agreements situations that are located before Article 15 AML. This exemption provision could especially work for agreements on technology licensing and could therefore benefit intellectual property right holders but it remains unclear as to when such an exemption situation exists because the article is very simplified.<sup>217</sup> It is suggested that enterprises use Article 15(i) AML as a defence in a court action.

#### **V. Guidelines, Regulations or Judicial Interpretations**

The People's Republic of China mainly adopted the civil law system meaning that the legislation enacted by the state is the main source of law. However, the codified laws cannot be understood to be the exclusive source of law applied by the judicature when deciding legal problems because it is impossible to think of all the questions

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<sup>213</sup> F Deng & G Leonard 'Incentives and China's New Antimonopoly Law' (2007-2008) 22 *Antitrust* 73 at 76.

<sup>214</sup> F Deng & G Leonard 'Incentives and China's New Antimonopoly Law' (2007-2008) 22 *Antitrust* 73 at 76.

<sup>215</sup> A Emch & Q Hao 'Viewpoint: The New Chinese Anti-Monopoly Law – An Overview' (2007) *eCCP eSapience Center for Competition Policy* at 12.

<sup>216</sup> Article 15(i) Anti- Monopoly Law PRC.

<sup>217</sup> Y Tian 'The Impact of the New Chinese Anti- Monopoly Law on IP Commercialization in China & General Strategies for Technology- Driven Companies and Future Regulators' (2007) *Duke Law & Technology Review* 4 \*43.

that may arise at the time the law is drafted.<sup>218</sup> Moreover, the ambiguity and inaccuracy of language can lead to many different interpretations.<sup>219</sup> The People's Republic of China has been known for drafting the laws broadly in order to shape it further with regulations, administrative rules or judicial interpretations.<sup>220</sup> Therefore, the law itself cannot possibly be the sole source. Guidelines, regulations or judicial interpretations are needed to assist in applying the codified law.<sup>221</sup>

Looking at the AML, regulations or guidelines could bring some light into the ambiguities and uncertainties of legislation, especially to the controversy of Article 55 AML. The AML is effective since 2008 and it needs to be analysed whether regulations have been published that assist in understanding the more complicated clauses of the legislation and decrease the fear of the intellectual property right holders. In May 2012 the Supreme People's Court of China announced the 'Regulations on Several Issues Concerning Application of Law in the Trial of Civil Cases Arising from Monopolistic Conducts', which constitutes the first interpretation by the judicial body since the AML took effect in 2008.<sup>222</sup> Unfortunately, the judicial interpretation does not say anything about the complexities of Article 55 AML and mainly deals with the problems of the burden of proof, the eligible plaintiff, the jurisdiction and the scope of remedies.<sup>223</sup> Some other guidelines and regulations have been issued by the NDRC, SAIC and the State Council but none have touched the interpretation of Article 55 AML yet.<sup>224</sup>

Currently, the SAIC, an organisation directly under the State Council, is busy drafting guidelines for the application of Article 55 AML and the intersection of intellectual property rights and the AML. Discussions concerning the fifth draft of these guidelines were dealt with by the State Council on 14 August 2012.<sup>225</sup>

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<sup>218</sup> AHY Chen *An Introduction to the Legal System of the People's Republic of China* (1998) 95.

<sup>219</sup> AHY Chen *An Introduction to the Legal System of the People's Republic of China* (1998) 95.

<sup>220</sup> K Nicholson & Z Liu 'Avoid Competition Problems in China' (1 July 2008) *Managing Intellectual Property – The Global IP Resource* available at <http://www.managingip.com/Article/1968516/Avoid-competition-problems-in-China.html>, accessed on 27 May 2013.

<sup>221</sup> AHY Chen *An Introduction to the Legal System of the People's Republic of China* (1998) 95.

<sup>222</sup> DA Livdahl & H Li & J Sheng 'China: China's Supreme Court Issues Its First Judicial Interpretations On Anti-Monopoly Law Suits' (2012) Paul Hastings LLP available at <http://www.mondaq.com/x/181928/Antitrust+Competition/Chinas+Supreme+Court+Issues+Its+First+Judicial+Interpretations+On+AntiMonopoly+Law+Suits>, accessed on 21 May 2013.

<sup>223</sup> DA Livdahl & H Li & J Sheng 'China: China's Supreme Court Issues Its First Judicial Interpretations On Anti-Monopoly Law Suits' (2012) Paul Hastings LLP *op cit*.

<sup>224</sup> Q Wu 'Eu-China Comeption Dialogue: A New Step in the Internationalisation of EU Competition Law?' (2012) *European Law Journal Vol 18 No 3* at 467-468.

<sup>225</sup> W Zhang '知识产权领域反垄断将出执法指南' *SIPO* (16 August 2012) *op cit*.

Unfortunately, all the drafts, including the latest of 2012, are not published yet. However, there is a report by the legal reporter Wei Zhang dealing with the core issues concerning intellectual property law and antitrust that will be further clarified by the guidelines that are supposed to take effect sometime this year.<sup>226</sup> The draft contains four main aspects namely regulations regarding the refusal to license<sup>227</sup>, regulations about the conditions that can be placed upon business partners<sup>228</sup>, regulations concerning conspiracy agreements between operators<sup>229</sup> and general guidelines to situations restricting the competition on the market<sup>230 231</sup>.

### 1. Prohibition of Discriminatory Refusal to License

Unconditional unilateral refusal to license that is not discriminatory will usually not be regarded as abuse in the meaning of Article 55 AML because the anti-monopoly law does not force market operators to engage with others; however, the report stipulates some conditions that will amount to an abuse of intellectual property rights: first, the refusal to license will be seen as discriminatory and unfair when the operator holds a dominant position on the market (compare to Article 17(3) AML); secondly, the refusal is discriminatory if the licensee is depending on obtaining a license in order to be able to participate in the market competition (essential facility); thirdly, the refusal is prohibited when the supposed licensee cannot compete effectively because of the refusal and fourthly, the conduct is prohibited when it leads to an adverse impact on innovation competition and the legitimate interests of the consumers cannot be met anymore.<sup>232</sup>

### 2. Prohibition of Additional Conditions Contrary to the Will of the Other

Moreover, the guidelines will stipulate that a market operator cannot place conditions onto the licensee if they are contrary to his/ her will: first, exclusive grantback clauses are prohibited; secondly, the grantor cannot forbid the licensee to challenge

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<sup>226</sup> W Zhang ‘知识产权领域反垄断将出执法指南’ *SIPO* (16 August 2012) *op cit*.

<sup>227</sup> Translated from 禁止歧视性地拒绝许可(jinzhì qìshìxìng dì jùjué xùkě) = Prohibition of discriminatory refusal to license).

<sup>228</sup> Translated from 禁止违背他人意愿附加条件(jinzhì wéibèi tārén yìyuàn fùjiā tiáojiàn) = Prohibition of additional conditions contrary to the will of the other.

<sup>229</sup> Translated from 禁止经营者间协议串谋(jinzhì jīngyíngzhě jiān xiéyì chuānmóu) = Prohibition of conspiratorial agreements between operators.

<sup>230</sup> Translated from 重点审查是否限制竞争(zhòngdiǎn shēnchá shìfǒu xiànzhì jìngzhēng) = The emphasis is put on the examination whether competition is restricted.

<sup>231</sup> W Zhang ‘知识产权领域反垄断将出执法指南’ *SIPO* (16 August 2012) *op cit*.

<sup>232</sup> W Zhang ‘知识产权领域反垄断将出执法指南’ *SIPO* (16 August 2012) *op cit*.

the validity of the intellectual property right in question and thirdly, it is seen as an abuse when limitations are put on the licensee concerning the manufacture, use, sale of competing goods or competing technologies after a license has expired as well as other unreasonable trading conditions.<sup>233</sup>

Furthermore, the guidelines will set out that ‘tying practices’ are unreasonable, especially when the intellectual property right holder has a dominant position on the market of the tying product, the two tied products belong to different trading habits, the tying has a substantial impact on the market of the tying product and the dominance of the intellectual property right holder in the tying product market extends to the tied product market and results in the restriction or exclusion of other market operators.<sup>234</sup>

### 3. Prohibition of Conspiratorial Agreements between Operators

The guidelines will further clarify as to which conduct amounts to a conspiratorial agreement between competitors and therefore constitutes an abuse of intellectual property rights which lead to the distortion of competition. First, the fixing of license fees and sales prices concerning intellectual property goods between competitors is prohibited; secondly, the limiting of licenses and the limiting of production and sales volume are seen as conspiratorial and therefore abusive; thirdly, dividing the concerned markets of the intellectual good as well as the raw material market between competitors is prohibited; fourthly, an agreement about the restriction of purchase and development of new technology is not allowed; last the guidelines will state that the joint refusal to license as well as the joint refusal to sell intellectual property goods to a particular market operator amounts to an abuse in the meaning of the anti-monopoly law.<sup>235</sup>

Furthermore, the guidelines will stipulate that a restriction of resale to a third person or fixing resale prices to a third person will also not be tolerated under the competition law in an agreement of two parties when TRIPS is applicable.<sup>236</sup>

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<sup>233</sup> W Zhang ‘知识产权领域反垄断将出执法指南’ *SIPO* (16 August 2012) *op cit.*

<sup>234</sup> W Zhang ‘知识产权领域反垄断将出执法指南’ *SIPO* (16 August 2012) *op cit.*

<sup>235</sup> W Zhang ‘知识产权领域反垄断将出执法指南’ *SIPO* (16 August 2012) *op cit.*

<sup>236</sup> W Zhang ‘知识产权领域反垄断将出执法指南’ *SIPO* (16 August 2012) *op cit.*

#### **4. The Emphasis is put on the Examination of whether Competition is restricted**

Concerning the requirement of the restriction or distortion of competition, the guidelines will set out the following rules to be applied by the anti-monopoly enforcement agencies: first of all, the behaviour of the legal entity concerning an intellectual property right has to be analysed; secondly, the nature of the relationship between the operators has to be analysed; thirdly, the intellectual property goods are used to define the relevant product market; fourthly, the market power of the operator has to be established; then, the behaviour of everyone on that specific product market has to be analysed (impact on the competition); last, the negative impact on the competition has to be weighed against the positive effects of intellectual property law and it needs to be established which effect is greater and will result in an improvement on the market in the long term – in other words, is the beneficial impact of a certain conduct from an operator greater than negative impact on competition so that a restriction of competition can be tolerated in some way?<sup>237</sup> In summary and in order to ascertain the impact on competition, the enforcement agencies have to take into account the exercise of the intellectual property rights of both the holder and the competitors, the position on the market, the degree of concentration in the relevant market, the industry practices and the industrial development, the effectiveness and scope of restriction and the exercise of intellectual property rights to promote innovation and new technologies including the rapidness of technological change.<sup>238</sup>

#### **5. Interim Summary**

The fifth draft of the guidelines dealing with the interface of intellectual property law and competition law, namely Article 55 AML, is the first legal document about this problem since the enactment of the law in August 2008 and will finally give some information and assistance concerning the interpretation and application of Article 55 AML. As is evident considering the previous discussion of Article 40(2) TRIPS it is notable that the guidelines will contain similar provisions because the proposed guidelines also see exclusive grantback licensing as well as the restriction of a licensee to challenge an intellectual property rights validity as an abuse of

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<sup>237</sup> W Zhang ‘知识产权领域反垄断将出执法指南’ *SIPO* (16 August 2012) *op cit.*

<sup>238</sup> W Zhang ‘知识产权领域反垄断将出执法指南’ *SIPO* (16 August 2012) *op cit.*

intellectual property law and declare the anti- monopoly law applicable in such situations. The guidelines clearly declare tying to be unreasonable and hence illegal and discuss the different refusals to license in detail to give a clear impression when a refusal amounts to abuse because the mere refusal itself is usually not restricting competition. In summary it can be said that the drafted guidelines deal with the major problem of understanding how intellectual property rights and competition shall be understood and balanced with each other and they are much needed. The enactment of these guidelines is long- awaited and will bring about a change in understanding and interpreting Article 55 AML.

### **6. Nature of the Future Guidelines**

The guidelines on the application of the AML will most likely be of a binding nature because they are drafted by the SAIC, a ministerial organisation directly under the State Council of the People's Republic of China.<sup>239</sup> The State Council, or also the central government, is both the highest executive organ as well as the highest administrative organ in China.<sup>240</sup> Therefore it can be presumed that the guidelines will be binding to the enforcement institutions.

### **VI. Summary**

Summarizing the whole analysis it can be said that Article 55 AML is a first step towards finding a balance between intellectual property rights and anti- monopoly law in the People's Republic of China but further interpretations in the way of regulations, guidelines, case law or judicial interpretation are necessary to understand how the law will be enforced and what the intellectual property right holders have to expect by the enforcement agencies of the AML. The international and domestic legislation dealing with the abuse of intellectual property rights can be used as a guidance but intellectual property right holders cannot rely on them to predict the outcome of a court trial.

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<sup>239</sup> SAIC 'About Us – Mission' available at <http://www.saic.gov.cn/english/aboutus/Mission/>, accessed on 8 June 2013.

<sup>240</sup> The Central People's Government of the People's Republic of China 'State Council' available at <http://english.gov.cn/links/statecouncil.htm>, accessed on 7 June 2013.

## CHAPTER 4 – COMPARISON TO THE SYSTEMS IN THE EUROPEAN UNION AND THE UNITED STATES OF AMERICA

Since the AML is still very new there are no published cases concerning the interface of competition and intellectual property in China yet. Other ways need to be found to analyse the possible outcome of competition cases in the Chinese jurisdiction. In order to be able to predict how anti- monopoly cases including intellectual property right holders will be dealt with in the future this thesis will look at other more experienced legal systems and their understanding of the relationship between competition law and intellectual property law. Both the approach of the European Union as well as the system in the United States can be taken into consideration.

### I. Reasons for the Comparison

The European Union system, in particular, can be used to predict possible outcomes because – as it was analysed earlier<sup>241</sup> – the Chinese AML have adopted a similar structure to the competition rules of the European Union as the latter served as a role model.<sup>242</sup> In 2001 the European Union and the People’s Republic of China signed a declaration that majorly dealt with the competition policies in both jurisdictions; following that a lot of discussions on that particular topic took place and the European authorities shared their experience in the competition enforcement with Chinese partners.<sup>243</sup> Moreover, a permanent European- China Competition Dialogue was established in 2004 which aims at giving some technical assistance to China’s development of a competition policy.<sup>244</sup> In 2011 China and the United States also signed a memorandum which pursues the aim of establishing a dialogue between Chinese and United States competition authorities to offer assistance.<sup>245</sup> Both

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<sup>241</sup> Chapter II 2 6 *The Subject Matter*.

<sup>242</sup> Y Tian ‘The Impact of the New Chinese Anti- Monopoly Law on IP Commercialization in China & General Strategies for Technology- Driven Companies and Future Regulators’ (2007) *Duke Law & Technology Review* 4 \*18.

<sup>243</sup> C Lefter & O Oprea ‘Law Antimonopoly of China – a Model of European Inspiration’ (2011) *Theoretical and Applied Economics Vol XVIII No 8* at 76.

<sup>244</sup> EU and China ‘Terms of Reference of the EU-China Competition Policy Dialogue’ (2004) available at [http://ec.europa.eu/competition/international/bilateral/cn2b\\_en.pdf](http://ec.europa.eu/competition/international/bilateral/cn2b_en.pdf), accessed on 9 June 2013.

<sup>245</sup> US and China ‘Memorandum of Understanding Antitrust and Antimonopoly Cooperation between US and China’ (2011) available at <http://www.ftc.gov/os/2011/07/110726mou-english.pdf>, accessed on 9 June 2013.

dialogues are not binding to China but help to improve China's competition policies and regulations.<sup>246</sup>

Both the European Union and the United States have a longer history of antitrust laws and enforcement and their dealing with the interface of both competition and intellectual property law could act as possible 'signposts' for the anti-monopoly cases in China.

Business operators can deal with each other in several ways and many different forms of agreements; some can be about intellectual property rights exclusively and others may include intellectual property rights under auxiliary conditions only.<sup>247</sup> The two main activities dealing with intellectual property rights concern the granting of licenses and the assignment. Granting a license means that another competitor can use the intellectual property (subject to the terms of the license) and assigning a right means that the new holder of the right can exploit it fully.<sup>248</sup> For the purpose of in-depth analysis this thesis will concentrate on the issues that arise in relation to competition law around the licensing of intellectual property rights, especially technology transfer agreements, in both the European Union and the United States.

## II. The System in the European Union – Block Exemptions

### 1. Competition Rules in the European Union

European Union competition law strives to ensure effective competition within the single market that comprises the European Union Member States, and aims at decreasing barriers of transnational trade by ensuring an efficient allocation of resources.<sup>249</sup> As discussed in Chapter 1 of this thesis, the objectives of intellectual property law and competition law seem completely adverse at first sight but nevertheless they share the same long term goal of enhancing development and consumer welfare.<sup>250</sup> Therefore, intellectual property rights cannot be understood to

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<sup>246</sup> Q Wu 'Eu-China Competition Dialogue: A New Step in the Internationalisation of EU Competition Law?' (2012) *European Law Journal Vol 18 No 3* at 462.

<sup>247</sup> MM Dabbah *EC and UK Competition Law – Commentary, Cases and Materials* (2004) 200.

<sup>248</sup> MM Dabbah *EC and UK Competition Law – Commentary, Cases and Materials* (2004) 200.

<sup>249</sup> Slaughter & May 'The EU Competition Rules on Intellectual Property Licensing – A Guide to the European Commission's Technology Transfer Block Exemption Regulation' (May 2012) at 1 available at <http://www.slaughterandmay.com/media/64581/the-eu-competition-rules-on-intellectual-property-licensing.pdf>, accessed on 28 May 2013.

<sup>250</sup> European Commission's Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements *OJ [2004] C 101/02*.at 2.

be anti- competitive in nature. However, certain conduct of the licensor in relation to his/ her intellectual property rights could lead to an anti- competitive effect in the relevant market and result in a distortion of the European Union's rights on competition.<sup>251</sup>

The competition law of the European Union is embedded in the Treaty for the Functioning of the European Union<sup>252</sup>, namely Article 3(b), Article 101 and Article 102 TFEU. Article 3(b) TFEU gives the sole power of establishing competition rules to ensure a working market economy to the European Union. Article 101 TFEU deals with anti- competitive agreements, that could involve intellectual property rights by ways of licensing and Article 102 TFEU that deals with the abuse of dominance. An 'undertaking' in the meaning of these two articles is understood in a broad sense as an entity of any legal form that is involved in economic activity of some form.<sup>253</sup> Because licensing is one of the most important actions when dealing with intellectual property rights Article 101 TFEU is the main legislation concerning the interface of competition law and intellectual property rights because it deals with agreements between competitors. However, when an intellectual property right holder has a dominant position on the market Article 102 TFEU claims can also be raised. Article 105 TFEU states that the enforcement authority of European Union competition rules lies with the European Commission. This concept will be further discussed in the following paragraphs.

As it can be seen the structure of the European Union competition rules is very similar to the provisions in the Chinese AML. In Chapter 2 the AML is concerned with monopolistic agreements (in the European Union 'anti- competitive agreements') whereas Chapter 3 deals with the abuse of a dominant market position.

## **2. Application of the Competition Legislation – Guidelines and Rules**

Unlike the Chinese AML, the articles in the TFEU dealing with competition do not contain any information about the relationship between competition law and intellectual property rights. An important case in the history of competition law in the European Union is the case of *Consten and Grundig*, which dealt with the

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<sup>251</sup> C Seville *EU Intellectual Property Law and Policy* (2009) 373.

<sup>252</sup> TFEU 2008 O.J. C 115/47.

<sup>253</sup> J Schrire 'Intellectual Property Licenses and EU Law' (2011) *The Computer & Internet Lawyer* Vol 28 No 7 at 24.

problem of parallel imports and the restriction thereof.<sup>254</sup> Grundig was a manufacturer of electronic goods in Germany and granted an exclusive distribution right of its products to Consten, a French distributor. The agreement of the two undertakings stipulated that Consten was the only distributor in France (Grundig could not appoint other distributors), Consten consented to obtain minimum quantities and was prohibited to sell products from Grundig's competitors or to sell Grundig products outside the French territory, in return Consten obtained the right to register Grundig's trade mark 'GINT' and by that could prevent other market operators to sell these goods. Following that, Consten sued an unauthorized seller of these products in France but the Commission and the European Court of Justice decided that the agreement between Consten and Grundig was anti-competitive in nature because the registration of the trade mark in France was for the sole purpose of preventing parallel imports and thereby restricting competition which made Article 101(1) TFEU (ex Article 81 EC Treaty) applicable.<sup>255</sup> This case gives some information as to how intellectual property rights are dealt with in the European Union. Through the following analysis of European competition law and intellectual property law this thesis will focus on the existence of guidelines and regulations that deal with this controversial area and it will be analysed if the existing regulations could help the People's Republic of China or give some guidance in structuring their guidelines accordingly.

For the analysis of the application and guidelines it will be distinguished between Article 101 and Article 102 TFEU.

#### a) Article 101 TFEU

Article 101 TFEU prohibits agreements or concerted practises that can harm trade between the Member States of the European Union and lead to an anti-competitive impact on the internal market by distorting, restricting or preventing competition. In the *Bayer Adalat*<sup>256</sup> case the European Court of Justice ruled that for an agreement or a concerted practise to exist a 'concurrence of wills' needs to be present. Moreover, the application of Article 101(1) TFEU demands an 'appreciable effect' on the

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<sup>254</sup> *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* 13 July 1966 Joined cases 56 and 58-64.

<sup>255</sup> *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* 13 July 1966 Joined cases 56 and 58-64.

<sup>256</sup> *Bundesverband der Arzneimittel-Importeure and Commission of the European Communities v Bayer AG* 6 January 2004 Joined Cases C-2/01 P and C-3/01 P at 18, 97.

market and for that reason the Commission issued a notice that excludes agreements of minor importance based on market shares, annual turnover and number of employees.<sup>257</sup>

### 1) Restrictions of Article 101(1) TFEU

Many conditions found in intellectual property license agreements such as restricting prices or consumers, tying products or prohibiting exports in the eyes of the European Commission and the European Court of Justice are seen to breach Article 101(1) TFEU.<sup>258</sup>

The restriction of prices or so-called ‘resale price maintenance’ is prohibited by Article 101(1)(a) TFEU and is seen as very anti- competitive conduct. A grantor fixes prices if the license agreement contains a clause about maintaining a specified fixed or minimum price<sup>259</sup>; recommendations or fixed maximum prices are not seen as anti- competitive. Restricting the class of customers is generally not seen as harming competition unless passive restrictions are placed upon the licensee as well meaning that customers cannot be prohibited to buy their goods outside a specific group of customers; however, the licensee can be restricted to actively promote the goods outside a specific group.<sup>260</sup> This provision can be compared to Article 13(i) AML which prohibits the fixation or change of product prices between market operators. Thus, guidelines on these situations could help to predict the outcome of price fixing cases in the People’s Republic of China.

Moreover, the European Union sees the tying of an intellectual property good to another good as potential harm to competition.<sup>261</sup> Tying of licenses occurs when the licensor requires the licensee to purchase also another license in order to acquire the desired license. Article 101 TFEU might be applicable when two competitors agree to such practises and competition is restricted by that. However, vertical agreements can be exempted under the requirements of the Vertical Agreements

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<sup>257</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) *OJ [2001] C 368/07*.

<sup>258</sup> J Schrire ‘Intellectual Property Licenses and EU Law’ (2011) *The Computer & Internet Lawyer Vol 28 No 7* at 25.

<sup>259</sup> Also including discounts, distribution margins, rebates or clauses that put sanction on the licensee if the clauses are not obeyed; J Schrire ‘Intellectual Property Licenses and EU Law’ (2011) *The Computer & Internet Lawyer Vol 28 No 7* at 26.

<sup>260</sup> J Schrire ‘Intellectual Property Licenses and EU Law’ (2011) *The Computer & Internet Lawyer Vol 28 No 7* at 26.

<sup>261</sup> See definition at Chapter 3 II *Ambiguity and Uncertainties in the Law*.

Block Exemption (VABE).<sup>262</sup> The exemptions will be discussed further in the next section. In cases concerning safety issues or technology improvement tying agreements might be seen as increasing market efficiency and hence, would not be restricted by Article 101 TFEU.<sup>263</sup> As discussed above, product tying will also be seen to be anti-competitive and thus prohibited under the AML and the proposed guidelines of the State Council in the People's Republic of China. This again shows that the Chinese legislators have a similar understanding of harmful practises that are likely to distort competition.

Export bans are generally understood as clauses that restrict the licensee to sell the goods outside its allotted territory. A distinction needs to be made between active sales (actively marketing the products outside the territory) and passive sales (customers from other territories buying products from the licensee for example via the internet) where the former generally does not raise competition concerns whereas the latter is seen as anti-competitive because customers would be harmed by the lack of purchase sources; for such conduct no exemption can be made on terms of the VABE.<sup>264</sup> An exception to that rule can be seen when looking at technology licenses and the application of the Technology Transfer Block Exemption (TTBE).<sup>265</sup> In order to fall under the exemption of TTBE an agreement between two entities with the main object of licensing technology has to exist. The TTBE will be discussed further in detail in the following paragraphs. With regard to China no further information to the understanding and impact of export bans exists so far. The new guidelines do not contain information about that practise.

## 2) Exemption in Article 101(3) TFEU and Block Exemptions

An agreement falling under Article 101(1) TFEU can be exempted on grounds of Article 101(3) TFEU if it

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<sup>262</sup> Commission Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices *OJ [2010] L/102*.

<sup>263</sup> J Schrire 'Intellectual Property Licenses and EU Law' (2011) *The Computer & Internet Lawyer Vol 28 No 7* at 27.

<sup>264</sup> J Schrire 'Intellectual Property Licenses and EU Law' (2011) *The Computer & Internet Lawyer Vol 28 No 7* at 25-26.

<sup>265</sup> Commission Regulation No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements *OJ [2004] L123*.

*'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'*<sup>266</sup>

being subject to further conditions named in the exemption article. If an agreement falls within the requirements of Article 101(3) TFEU it is automatically exempted which means that undertakings do not have to apply for an exemption to be granted. This article can be compared to Article 15 AML that also exempts certain agreements if technology can be improved and research and development will be enhanced. The Commission has announced guidelines in 2004 and 2011 which further clarify the understanding of Article 101.<sup>267</sup> In contrast to that no guidelines exist in China.

Furthermore – and more important to intellectual property rights – is the European Union system of block exemptions to certain kinds of agreements. This system has the effect of decreasing the duty of both an undertaking and the Commission to analyse the agreements because if the requirements stipulated in a block exemption regulation are met the agreement automatically falls outside the scope of Article 101(1) TFEU.<sup>268</sup> Exemptions are for the purpose of preventing an overload of cases and try to bring more transparency into the application of the European Union competition rules. Concerning intellectual property rights, the Commission's TTBE of 2004 becomes important which has the purpose of maintaining competition on the internal market and gives legal certainty to the entities active in the European Union.<sup>269</sup> Patents, software copyrights and know-how licenses and assignments are exempted from Article 101(1) TFEU if the conditions stipulated in the TTBE are met which include but are not limited to the market shares (less than twenty per cent combined concerning competitors, less than thirty per cent combined concerning non- competitors) and the prohibition of hardcore restrictions as stated in detail in Article 4 TTBE. Article 5 TTBE contains some restrictions which are generally not understood to be anti-competitive but further case-to-case

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<sup>266</sup> Article 101(3) TFEU.

<sup>267</sup> European Commission's Guidelines on the application of Article 81(3) of the Treaty *OJ [2004] C101/08* and European Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements *OJ [2011] C11/01*.

<sup>268</sup> J Schrire 'Intellectual Property Licenses and EU Law' (2011) *The Computer & Internet Lawyer Vol 28 No 7* at 27.

<sup>269</sup> Commission Regulation No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements *OJ [2004] L123* at 11.

analysis is needed.<sup>270</sup> Also, the Commission has issued guidelines that further clarify the application of the block exemption.<sup>271</sup> The guidelines are a very useful source to understand the application of Article 101(3) TFEU to technology transfer agreements and also contain some information on the application of Article 101 TFEU to agreements that do not fit into the requirements of the block exemption.<sup>272</sup>

Moreover, there is the VABE which exempts all agreements between entities of different economic levels if the market share of the supplier does not exceed thirty per cent or the buyer's share on the market where the goods are bought does not exceed thirty per cent. Intellectual property licensing agreements are caught by this exemption if the license is not the main purpose of the agreement, the intellectual property is linked to using, selling or reselling the good and the agreement does not have the aim to restrict competition by means of the vertical restraints that are stipulated in the VABE.<sup>273</sup>

The regulations issued by the Commission or the Council have binding force.<sup>274</sup> Guidelines and notices by the Commission are seen as so-called 'soft law' and influence the analysis of competition law by providing guidance.<sup>275</sup> However, they are not legally binding but help in predicting the outcome of competition enforcement.<sup>276</sup>

This approach to the interface of competition law and intellectual property law by the way of block exemptions could provide useful guidance to the Chinese anti-monopoly enforcement agencies. Exemptions are a good way to avoid an overload of work for the enforcement agencies and courts so that they can focus on the conduct of competitors that is more harmful to competition and will result in a distortion of the market. Moreover, undertakings can predict what to expect from the competition authorities and plan their businesses accordingly. Moreover, a competition system in

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<sup>270</sup> J Schrire 'Intellectual Property Licenses and EU Law' (2011) *The Computer & Internet Lawyer* Vol 28 No 7 at 29.

<sup>271</sup> European Commission's Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements *OJ [2004] C 101/02*.

<sup>272</sup> MM Dabbah *EC and UK Competition Law – Commentary, Cases and Materials* (2004) 224.

<sup>273</sup> Article 2 (Exemption), Article 3 (Market Share Thresholds) and Article 4 (Hardcore Restrictions) Commission Regulation No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices *OJ [2010] L/102*.

<sup>274</sup> Article 103 TFEU.

<sup>275</sup> A Dashwood et al *Wyatt and Dashwood's European Union Law* (2011) 708-709.

<sup>276</sup> HCH Hofmann 'Negotiated and Non-Negotiated Administrative Rule-Making – The Example of EC Competition Policy' (2006) *43 CMLRev 1* at 153.

a dynamic intellectual property market needs to be flexible and only evaluate and control the behaviour of competitors that notionally can be anti- competitive.

### **b) Article 102 TFEU**

Article 102 TFEU deals with the abuse of a dominant position and does not contain a similar exemption provision as Article 101(1) TFEU. An undertaking is seen to be dominant when it can act independently on the market and can by certain conduct distort competition; this usually occurs when an entity has a market share of more than forty per cent but can also occur between shares of twenty- five per cent to forty per cent based on individual cases.<sup>277</sup> Abusive conduct includes but is not limited to practises such as price fixing, discriminatory activities and limitations to technical development or markets. Regarding intellectual property right holders with a dominant position, abusive conduct can occur in several cases such as exclusive licensing that is restricting competition or demanding usurious royalty fees from the licensees. Moreover, the tying by a dominant firm is seen as abusive and therefore falls within Article 102 TFEU.<sup>278</sup> The European Court of Justice has established an important test for the evaluation whether the refusal to license amounts to an abuse in the meaning of Article 102 TFEU, namely the ‘exceptional circumstance’ test.<sup>279</sup> The test regards a refusal as abusive if the technology in question is essential for competition taking place on that market and the licensee intends to sell a product using that technology which the licensor does not sell. Following that a refusal to license the technology without objective justification results in the creation of a dominant position of the licensor in a secondary product market.<sup>280</sup> The ‘exceptional circumstance’ test can be compared to the rules stated in the proposed Chinese guidelines concerning prohibition of discriminatory refusals to license where a refusal is regarded as anti- competitive if other undertakings are dependent on the

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<sup>277</sup> Also including collective dominance but not in the case of a 40/30/30 market shares; J Schire ‘Intellectual Property Licenses and EU Law’ (2011) *The Computer & Internet Lawyer Vol 28 No 7* at 30.

<sup>278</sup> Illustrated in the *Microsoft Case* – Commission Decision relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation of 24 May 2004, 2007/53, OJ 2007 L32/23 and *Microsoft Corporation v Commission* (2007) ECR II-000, (2007) 5 CMLR 846.

<sup>279</sup> *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* (1995) Joined cases C-241/91 P and C-242/91 P ECR I-743 and *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*. (2004) Case 428/01 ECR I-503.

<sup>280</sup> *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*. (2004) Case 428/01 ECR I-503 at 52.

dominant undertaking and without the license cannot take part in the competition on the market anymore (essential facility).<sup>281</sup>

### c) Exhaustion of Rights Doctrine

Another principle dealing with the relationship between intellectual property rights and competition law in the European Union is the Doctrine of the Exhaustion of Rights which means that an intellectual property right holder cannot prevent export to other European Economic Area States once he/ she has placed the product on the market in a Member State.<sup>282</sup> In order to understand the meaning of the doctrine the existence of intellectual property rights and the exercise thereof need to be established.<sup>283</sup> This concept was first established in two European cases.<sup>284</sup> The undertaking in questions needs to be a holder of intellectual property rights and furthermore the intellectual property goods need to be placed on the market in one of the Member States.

## III. The Model in the United States – Rule of Reason

### 1. Antitrust Rules in the United States

In the United States the competition law or better called antitrust law takes a different approach to coping with the problems occurring between intellectual property laws and antitrust law than in the European Union. The United States follow a common law system and rely on precedent cases. However, the legislature – the Congress – has enacted statutes, called ‘acts’ in the United States, for the areas of intellectual property law and antitrust law. The antitrust laws of the United States aim at stimulating a market that is accessible to everyone by preventing exclusionary behaviour of the entities that could be harmful to the competition.<sup>285</sup>

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<sup>281</sup> W Zhang ‘知识产权领域反垄断将出执法指南’ *SIPO* (16 August 2012) *op cit*.

<sup>282</sup> This Doctrine has been confirmed by many cases of the ECJ: i.e. *Deutsche Grammophon Gesellschaft mbH v Metro- SB-Grossmaerkte GmbH & Co KG* (1971) Case 78/70 EC 487; *Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc.* (1974) Case 15/74 ECR 1147; *Sebago Inc. and Ancienne Maison Dubois & Fils SA v G-B Unic SA* (1999) Case 173/98 ECR I-04103.

<sup>283</sup> MM Dabbah *EC and UK Competition Law – Commentary, Cases and Materials* (2004) 202.

<sup>284</sup> *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* 13 July 1966 Joined cases 56 and 58-64 and *Deutsche Grammophon Gesellschaft mbH v Metro- SB-Grossmaerkte GmbH & Co KG* (1971) Case 78/70 EC 487.

<sup>285</sup> SE Foster & SR Alfonso & BJ Reingold ‘Recent Developments in Intellectual Property Antitrust Law’ (2013) *The Antitrust Review of the Americas* at 16 available at [http://www.perkinscoie.com/files/upload/12\\_08\\_Reingold\\_US\\_IP\\_&\\_Antitrust.pdf](http://www.perkinscoie.com/files/upload/12_08_Reingold_US_IP_&_Antitrust.pdf), accessed on 31 May 2013.

The most important federal statutes dealing with antitrust in the United States are the Sherman Act<sup>286</sup> and the Federal Trade Commission Act<sup>287</sup> and moreover, some states enacted competition laws as well that mirror the rules stipulated in the federal acts.<sup>288</sup> Section 1 of the Sherman Act<sup>289</sup> sets out the restriction of agreements between two or more entities that have as their outcome the restriction of competition in an unreasonable and unjustified way. This can be compared to Chapter 2 of the AML. Monopolies are dealt with in Section 2 of the Sherman Act<sup>290</sup> that prohibits deliberate creation of a monopoly, the attempt thereof and the collaboration with another person for the purpose of monopolizing a certain part of the market excluding such monopolies that grow bigger because the products are of higher quality, the company grew because of business competence or the branch is monopolized by historical reasons.<sup>291</sup> In terms of section 5 of the Federal Trade Commission Act<sup>292</sup> the Commission is authorised to prevent all ‘unfair methods of competition’ and all ‘unfair or deceptive acts’ that can be harmful to commerce. The United States intellectual property laws confer an exclusive right on the intellectual property right holder for a limited period and hence allow him/ her to prevent others from using the intellectual good. In contrast to other jurisdiction the United States antitrust enforcement is known to benefit the intellectual property right holder.<sup>293</sup>

The agencies responsible for the enforcement of antitrust are the Antitrust Division of the Department of Justice that has criminal and civil enforcement powers, the Federal Trade Commission that can enforce the rules stipulated in the Federal Trade Commission Act<sup>294</sup> and private entities that can sue for breach in the civil court.<sup>295</sup>

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<sup>286</sup> The Sherman Antitrust Act (1890) *15 U.S.C. §§1-7*.

<sup>287</sup> The Federal Trade Commission Act (1914) *15 U.S.C. §§ 41-58*.

<sup>288</sup> D Zhang & G Gao & B Guo ‘The IPR Impact of China’s Anti- Monopoly Law: What more to expect?’ (October 2007) *China Intellectual Property Issue 20 op cit*.

<sup>289</sup> §1 U.S.C..

<sup>290</sup> §2 U.S.C..

<sup>291</sup> *United States v Grinnell Corp.* (1966) 384 US 563, 570-71.

<sup>292</sup> §45 U.S.C..

<sup>293</sup> SE Foster & SR Alfonso & BJ Reingold ‘Recent Developments in Intellectual Property Antitrust Law’ (2013) *The Antitrust Review of the Americas* at 16 *op cit*.

<sup>294</sup> Commission §41 U.S.C..

<sup>295</sup> RA Jacobsen Jr & SM Meisner ‘Recent developments in antitrust and intellectual property law’ (2004) *The Antitrust Review of the Americas* at 40 available at <http://www.mwe.com/info/pubs/antitrust0504.pdf>, accessed on 31 May 2013.

## 2. Application of the Antitrust Rules

The antitrust enforcement agencies in the United States have both used the ‘per se rule’ and the ‘rule of reason’ to decide upon the behaviour of entities that could restrict competition.<sup>296</sup> Concerning the ‘per se rule’ conduct is prohibited when it is inherently unlawful with no further proof required and no economic justification can be established.<sup>297</sup> For example, the courts have found intellectual property licensing as per se illegal for certain pricing practises and for tying of a non intellectual property good with an intellectual property.<sup>298</sup> This can be compared to the rules stipulated in the draft of the proposed guidelines by the State Council in China because they will declare price fixing as well as tying as anti- competitive.<sup>299</sup> However, the courts have used the rule of reason for the majority of the cases concerning antitrust issues.<sup>300</sup> The rule of reason is a preponderance of the positive and negative aspects of a certain conduct in order to find out whether the economic activity is pro- or anti- competitive.<sup>301</sup> If the pro-competitive aspects outweigh the anti-competitive impact on the market the conduct is lawful and if the anti-competitive part prevails the conduct is found to be illegal.

The comparison of the United States approach to the future guidelines in China is very interesting. As discussed above the new provisions will set out rules as to when competition is restricted according to Article 55 AML.<sup>302</sup> In those guidelines the SAIC decided to use a similar approach to the United States system by weighing the positive and negative impact of competition against each other and deciding which effect outweighs the other in order to decide whether the entity’s conduct will be prohibited by the antitrust rules or not. Having identified this similarity the decisions in the United States might act as possible guidelines for the Chinese enforcement agencies and courts.

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<sup>296</sup> RA Jacobsen Jr & SM Meisner ‘Recent developments in antitrust and intellectual property law’ (2004) *The Antitrust Review of the Americas* at 40 *op cit*.

<sup>297</sup> i.e. *State Oil Co v Khan* (1997) 522 U.S. 3 at 10.

<sup>298</sup> i.e. for price practises: *United States v General Motors Corp* (1966) 384 U.S. 127 at 148; for tying: *Northern Pac. Ry. v United States* (1958) 356 U.S. 1 at 5-6; DF Broder *A Guide to US Antitrust Law* (2005) 3-013 to 3-025.

<sup>299</sup> Look at Chapter 3 V 2 *Additional Conditions Contrary to the Will of the Other* and 3 *Prohibition of Conspiratorial Agreements between Operators*.

<sup>300</sup> RA Jacobsen Jr & SM Meisner ‘Recent developments in antitrust and intellectual property law’ (2004) *The Antitrust Review of the Americas* at 40 *op cit*.

<sup>301</sup> i.e. *National Society of Professional Eng’rs v United States* (1978) 435 U.S. 679 at 691.

<sup>302</sup> Look at Chapter 3 V 4 *The Emphasis is put on the Examination of whether Competition is Restricted*.

### a) Guidelines

In 1995 the Department of Justice and the Federal Trade Commission issued Antitrust Guidelines for the Licensing of Intellectual Property (Antitrust Guidelines).<sup>303</sup> The guidelines provide information about the general principles of intellectual property and antitrust and the antitrust concerns such as the rules for defining the market; it also gives guidance to the enforcement agencies on the method of analysing the conduct and the rule of reason, rules for applying the general principles to the different kinds of exclusionary conduct and enforcement rules on invalid intellectual property rights.

The Antitrust Guidelines are not binding on the courts and the enforcement agencies but they contain many analytical principles that were established in the precedents and show how the existing case law is applied.<sup>304</sup> Section 2 of the Antitrust Guidelines sets out three principles that form the basis of the enforcement policies of the two agencies.<sup>305</sup> First, intellectual property is treated in the same manner as any other form of property and therefore is not privileged. Secondly, the agencies do not make any presumption to market dominance because of an intellectual property right, meaning that an intellectual property right holder is not dominant just because of the intellectual property right. Thirdly, the agencies regard the licensing of intellectual property as pro- competitive in nature. Some conduct such as naked price- fixing and market division is seen as per se illegal but during the last years the enforcement of intellectual property antitrust laws has moved to the rule of reason approach.

Also, the Antitrust Guidelines provide a ‘safety zone’ which exempts certain licensing agreements from the application of antitrust legislation.<sup>306</sup> The general two requirements for being in the safety zone are that the conduct is ‘not facially anticompetitive’ and that the joined market shares of both parties of the licensing agreement are not more than twenty per cent. If problems occur when examining the market share the alternative requirements are that the conduct is ‘not facially

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<sup>303</sup> Antitrust Guidelines for the Licensing of Intellectual Property of 6 April 1995 by the U.S. Department of Justice and the Federal Trade Commission.

<sup>304</sup> D Zhang & G Gao & B Guo ‘The IPR Impact of China’s Anti- Monopoly Law: What more to expect?’ (October 2007) *China Intellectual Property Issue 20 op cit.*

<sup>305</sup> Section 2 Antitrust Guidelines for the Licensing of Intellectual Property of 6 April 1995 by the U.S. Department of Justice and the Federal Trade Commission.

<sup>306</sup> Stipulated in Section 4.3 Antitrust Guidelines for the Licensing of Intellectual Property of 6 April 1995 by the U.S. Department of Justice and the Federal Trade Commission.

anticompetitive' and that four or more substitutable technologies are present on the market for the consumer or alternatively that four or more independent operators can research and develop in the substitute technology market. This 'safety zone' pursues the objective of giving some certainty to the market operators and by that enhancing innovation and development.<sup>307</sup>

Furthermore, the Antitrust Guidelines state that conduct including harmful refusal to license, tying, cross-licensing, exclusive grantbacks and patent pooling agreements that fix prices or foreclose competition are generally understood to be anti-competitive.<sup>308</sup> Again, this can be compared to the future guidelines in China that also declare certain discriminatory refusals to license, tying and grantbacks as harmful to competition and thus, prohibited.<sup>309</sup>

In summary it can be said that the Antitrust Guidelines give detailed information of the application of the United States antitrust laws to the market operators and also contain several hypothetical examples that illustrate the application to make it understandable for the entities. The rule of reason analysis is a good way to deal with the complex issue of the interface of intellectual property law and antitrust as it balances the positive and negative outcome of the conduct and looks at the long term development of the competition on the internal market. Since China has also decided upon a balancing practise the decisions in the United States could give some information on how Article 55 AML will be enforced.

#### **b) The 2003 Report by the Federal Trade Commission**

In 2003 the Federal Trade Commission issued a Report that analyses the balance of antitrust – especially patent law – and intellectual property rights.<sup>310</sup> The Federal Trade Commission emphasizes in that report that innovation is very important for the consumer welfare and innovation can be promoted by an effective antitrust intellectual property policy that motivates entities to access the market or existing entities to engage in more research and development.<sup>311</sup> A very important aspect that

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<sup>307</sup> A Ng & D Liang & P Waters 'The Intersect between Intellectual Property Law and Competition Law – Implications for China' (2008) *King & Wood Mallesons IP Bulletin Special Issue* at IV B *op cit.*

<sup>308</sup> Section 5 Antitrust Guidelines for the Licensing of Intellectual Property of 6 April 1995 by the U.S. Department of Justice and the Federal Trade Commission.

<sup>309</sup> Look at Chapter 3 V 1-3.

<sup>310</sup> Federal Trade Commission 'The Proper Balance of Competition and Patent Law and Policy' (October 2003).

<sup>311</sup> Federal Trade Commission 'The Proper Balance of Competition and Patent Law and Policy' (October 2003) Executive Summary at 1.

was determined in the analysis by the Federal Trade Commission is that patents should not be awarded carelessly for every technology that seems patentable and antitrust laws should not be too wide and restrict conduct that could actually be pro-competitive.<sup>312</sup>

**c) The 2007 Report by the U.S. Department of Justice and the Federal State Commission**

Another document providing information about the intersection of intellectual property rights and antitrust laws in the United States is the Report on Antitrust Enforcement and Intellectual Property Rights (2007 Report).<sup>313</sup> The rule of reason approach of the intellectual property antitrust enforcement was again pointed out in the report and the Commission highlighted once more that the licensing of intellectual property rights, if it is used lawfully, is actually enhancing competition and innovation.<sup>314</sup> The first and second chapters give advice on lawful licensing practises and the way in which companies can benefit from holding intellectual property rights. The third chapter focuses on the per se legal cross-licensing practises and patent pooling and analyses what kind of conduct amounts to antitrust liability. Chapter four gives some more insight into the complex issue of the rule of reason analysis and especially gives assistance in the evaluation of non-assertion clauses, grantbacks and reach-through licenses. The fifth chapter sets out the concerns of tying and bundling of intellectual property rights and the sixth chapter gives information about the practises firms engage in to protect a patent that has expired such as continuing to demand royalties or bundling the patent rights with trade secrets.

In comparison to the 1995 Antitrust Guidelines the 2007 Report is much more detailed and can be used more easily to analyse economic conduct concerning antitrust and intellectual property.<sup>315</sup>

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<sup>312</sup> Federal Trade Commission 'The Proper Balance of Competition and Patent Law and Policy' (October 2003) Executive Summary at 1.

<sup>313</sup> U.S. Department of Justice and the Federal Trade Commission 'Report on Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition' (2007) *DoJ & FTC Report*.

<sup>314</sup> U.S. Department of Justice and the Federal Trade Commission 'Report on Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition' (2007) *DoJ & FTC Report* at Chapter 4.

<sup>315</sup> Y Tian 'The Impact of the New Chinese Anti-Monopoly Law on IP Commercialization in China & General Strategies for Technology-Driven Companies and Future Regulators' (2007) *Duke Law & Technology Review* 4 \*18.

#### IV. Reflections

As one can see the European Union has chosen a system of block exemption on certain kinds of agreements relating to intellectual property rights which proves to be an effective model of dealing with the problematic intersection of intellectual property rights and competition law. It is advisable to China to look at the system the European Union has established and to implement something similar or at least guidelines on how the AML works so that undertakings obtain legal certainty and can act more freely on the market in the People's Republic of China.

In contrast to that the United States antitrust enforcement has approached the issue by subjecting conduct to the 'rule of reasons' analysis and thereafter, based on the analysis, deciding whether a conduct is mainly pro- or anti- competitive. However, the United States also provide a 'safety zone' for entities and exempt some agreements from antitrust liabilities based on the market share or the above discussed alternatives.<sup>316</sup> The guidelines and reports of both the Department of Justice Antitrust Division and the Federal Trade Commission are not binding like the guidelines and regulations in the European Union but nevertheless provide some detailed information on how an antitrust analysis is executed.<sup>317</sup>

The analysis shows how two different jurisdictions cope with the complex issue of intellectual property rights and competition policy and provide some guidance to China on how their competition law – especially Article 55 AML – could be applied in the future and gives some ideas on how to structure possible guidelines.

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<sup>316</sup> Look at Section III 2. a) *Guidelines* of this chapter.

<sup>317</sup> D Zhang & G Gao & B Guo 'The IPR Impact of China's Anti- Monopoly Law: What more to expect?' (October 2007) *China Intellectual Property Issue 20 op cit.*

## CONCLUSION

This dissertation has provided an overview of the newly enacted competition legislation in the People's Republic of China and the interface with intellectual property rights. The reaction to the Chinese Anti-Monopoly Law by calling it an 'Economic Constitution'<sup>318</sup> or 'a milestone in China's economy'<sup>319</sup> can be affirmed when looking at its content. The Chinese legislative organ obtained technical assistance from both the United States of America and the European Union and the structure of the AML shows significant similarities to the structure of the European Union competition rules.

In Article 55 AML China has put emphasis on the existence of intellectual property rights and states that the exercise thereof is exempted from the application of the AML as long as it is in line with the intellectual property legislation. China is one of the only jurisdictions that has explicitly stated the exemption of intellectual property right holders in its competition law. The relationship between intellectual property laws and competition law is a complex issue because intellectual property rights create monopolies whereas competition law tries to break down monopolies or monopolistic conduct to achieve a fair competition on the market. However, both areas of law also share – to some extent – similarities or unified goals such as enhancing consumer welfare and promoting innovation and development.<sup>320</sup> Therefore, it can be concluded that intellectual property laws and competition law can coexist and ways have to be found to balance the two laws.

In this dissertation it was established that the current version of the AML still contains some ambiguity and uncertainties because the text of the AML does not say anything about the scope of Article 55.<sup>321</sup> It is unclear to whom Article 55 AML applies and what conduct amounts to an abuse of intellectual property rights according to Article 55 AML. However, the proposed guidelines, which are currently drafted by the SAIC will provide some information of how Article 55 AML is meant

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<sup>318</sup> P Jones 'Licensing in China: The New Anti Monopoly Law, The Abuse of IP Rights and Trade Tensions (2008) *XLIII (2) Les Nouvelles: J. Licensing Soc'y Int'l 106* at 2 (see footnote 9 as well) saying that the AML is recognised widely – by both Chinese officials and scholars – as an 'Economic Institution' [经济宪法 (Jingji Xianfa)].

<sup>319</sup> N Peng 'China's First Anti-monopoly Law Takes Effect' *Xinhua News Agency* (1 August 2008) *op cit.*

<sup>320</sup> In contrast to that: Both the European Union and the United States do not explicitly specify the exemption of intellectual property rights.

<sup>321</sup> Chapter 3 II *Ambiguity and Uncertainties in the Law.*

to be applied and enforced.<sup>322</sup> These guidelines can be said to be a major step toward an effective enforcement of the AML because they will finally clarify which exercises will be found to be harmful to competition and therefore, anti-competitive and which conduct is pro-competitive and will not be prohibited by the AML.

As discussed in Chapters 3 and 4 the guidelines will also provide rules on how to evaluate whether a conduct restricts competition in the meaning of Article 55 AML. The approach followed by the SAIC shows similarities to the United States ‘rule of reason’ approach because the harmful effect on competition is to be measured by balancing the negative and positive effects on the market and deciding upon which impact outweighs the other. Because of that similarity, and also the similarity of the AML’s structure to the European Union competition rules, the enforcement practises in such states might act as possible ‘signposts’ for China.

It is suggested that companies and investors engaging in economic activities concerning intellectual property rights in the People’s Republic of China align their conduct with the Chinese legislation in order to avoid court actions being brought against them. The proposed guidelines – discussed in Chapter 3 – offer some assistance in that direction because they constitute the first interpretation by an official organ concerning the complex issues of Article 55 AML. The previous discussion in Chapter 3 shows that companies can make use of defences to avoid conviction. First, the firm could use the ‘non-dominant firm defence’ meaning that the enterprise relies on its non-dominant position and argues that a conduct by a non-dominant firm, even though it might abuse its intellectual property rights, is not likely to distort the competition on the internal market.<sup>323</sup> Another possible defence could be provided in Article 15 AML<sup>324</sup> which exempts monopolistic agreements that hinder technological development. It is submitted that enterprises use such defences once an action has been filed against them.

In conclusion it can be said that the communist People’s Republic of China has finally made a step toward the liberalisation of the market by promoting private competition and discouraging state monopolies. When the AML was first enacted in 2008 it could have been argued that China only wanted to establish a law in the

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<sup>322</sup> W Zhang ‘知识产权领域反垄断将出执法指南’ *SIPO* (16 August 2012) *op cit*.

<sup>323</sup> Y Tian ‘The Impact of the New Chinese Anti-Monopoly Law on IP Commercialization in China & General Strategies for Technology-Driven Companies and Future Regulators’ (2007) *Duke Law & Technology Review* 4 \*32.

<sup>324</sup> Discussed in Chapter 3 IV *Article 15 AML*.

books without actually enforcing it. Now however, in 2013, the enforcement agencies as well as the courts have implemented many guidelines, regulations and judicial interpretations that assist in clarifying the application of the AML and it can be argued that China has finally shown genuine effort to liberalise its market.<sup>325</sup> The guidelines dealing with the interface of competition law and intellectual property which are supposed to be issued this year are long awaited and will finally shed some light to the application of the AML to intellectual property right holders. Over time the judgments of the courts will also provide assistance to the understanding of the AML and provide some legal certainty to the companies doing business in China.

Enterprises engaging in economic activities in China are recommended to observe and closely watch proposed guidelines, interpretations and cases and align their conduct accordingly to avoid court actions.

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<sup>325</sup> Q Wu 'Eu-China Competition Dialogue: A New Step in the Internationalisation of EU Competition Law?' (2012) *European Law Journal* Vol 18 No 3 at 467-468.

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