

# Conflicts and Tradeoffs of Antitrust Policy Goal: Lessons for China

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Shandong University, China

**Ma Jingyuan**

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Ma Jingyuan, PhD researcher at Hamburg University, Germany.

Address: Institute of Law and Economics, Rothenbaumchaussee 36, 20148 Hamburg

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## Table of Contents

<b>1 INTRODUCTION .....</b>	<b>3</b>
<b>2 ECONOMIC PERSPECTIVES CONCERNING THE POLICY GOALS OF ANTITRUST .....</b>	<b>4</b>
2.1 EFFICIENCY .....	5
2.1.1 Theory .....	6
2.1.2 Policy Implications.....	8
2.2 CONSUMER WELFARE AS THE GOAL OF ANTITRUST .....	10
2.2.1 Consumer Welfare and Consumer Surplus.....	10
2.2.2 Concerns of Distributional Effects .....	11
2.2.3 Critics.....	11
2.2.4 Consumer Choice Argument.....	13
2.2.5 Policy Implications.....	13
2.3 NON-ECONOMIC GOALS.....	14
2.4 TRADEOFFS OF THESE GOALS .....	15
2.5 CONCLUSION .....	17
<b>3 POLICY GOAL IN THE US ANTITRUST LAW AND THE EU COMPETITION LAW .....</b>	<b>17</b>
3.1 POLICY GOAL IN THE US ANTITRUST LAW .....	17
3.2 POLICY GOAL IN THE EU COMPETITION LAW .....	18
3.3 CONCLUSION .....	18
<b>4 IMPLEMENTING ANTI-TRUST POLICY GOALS IN CHINA.....</b>	<b>19</b>
4.1 PROTECTING SOCIALIST MARKET ECONOMY: COMPETITION POLICY BEFORE THE ANTI-MONOPOLY LAW .....	20
4.2 THE DRAFTING PROCESS OF THE ANTI-MONOPOLY LAW .....	24
4.3 TRADEOFF OF DIFFERENT GOALS: LEARNING FROM THE EU.....	26
<b>5 CONCLUDING REMARKS .....</b>	<b>27</b>
<b>6 REFERENCES .....</b>	<b>28</b>

## 1 Introduction

For over a century, the goal of competition policy remains a highly debatable issue among economists and legal scholars. The objectives of antitrust law in many jurisdictions are stated as a bundle of different goals. For example the five goals of the Canadian Competition Act are to maintain competition, to promote efficiency, to expand opportunities in world market, to protect small and medium-sized enterprises, to provide consumers with competition price and product choices<sup>1</sup>. The Article 1 of the Chinese Anti-monopoly law states that this law is enacted for the purpose of “*preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy.*”<sup>2</sup> From this article it is not clear yet to which extent, the goal of protecting market reform, achieving social welfare and promoting efficiency are balanced under the enforcement of the Chinese Anti-monopoly law.

It is a common misinterpretation that if the first goal that the antitrust law targets on is achieved, the second and third goals can also be simultaneously achieved, such as promoting competition by punishing monopolists always contributes to the protection of consumers. However, in reality these goals are difficult to be balanced due to their conflicts and tensions. For example, maximizing efficiency may result in a reduction in consumer welfare.

Moreover, the ambiguous statement of policy goals leads to the inconsistency in antitrust enforcement. A wise choice must be made by antitrust policy makers to set the priority of the basic objectives of competition policy and separate other legal instruments for other goals<sup>3</sup>.

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<sup>1</sup> R.S.C. C4-34, Section 1.1., see also Paul Jones, China’s New Anti-monopoly Law: An Economic Constitution for the New Market Economy? China Law Reporter, Vol 3, Issue 5, September 2007

<sup>2</sup> Chinese Anti-Monopoly Law, official translation on People.com available at <http://english.peopledaily.com.cn/90001/90776/90785/6466798.html>

<sup>3</sup> R.Shyam Khemani Competition Policy and Economic Development, Policy Options, October 1997 “In recent years, Canada, the European Union, Italy, New Zealand and the US have placed more weight on the economic efficiency objective. Several developing countries, including Colombia and Mexico, have done the same. But some countries, notably France, India, the UK and some economies in Central and Eastern Europe, pitch competition law toward multiple objectives.”

The question of which goal should be prioritized can be answered differently, from the perspectives in different scientific disciplines, such as political science, history, welfare economics or legal thinking. Political and social considerations played a major role before the emergence of economic analysis, the argument of efficiency in particular, which was initiated by moderate academics in the 1980s<sup>4</sup>. For last three decades, the importance of economic analysis in antitrust policy goal has been substantially strengthened. However, it does not solve the complexity of this question because even among economists a consensus on the relevant economic criteria has been far from reached.

It is hence important in this paper to explore the goal of competition law from a law and economic perspective. The aim of this paper is to reach a better understanding of the goals of competition policy and to provide normative suggestions for the policy implementation in China. The structure of this paper is as follows. The first part, section one and two, investigates the economic rationale for the efficiency and the consumer welfare standard, and discusses the arguments in favor of and against these two standards. The second part, section three, focuses on the policy goal in the EU and US. The objective of the discussion is to explore the appropriate antitrust policy goal for China, which will be addressed in the third part, referring to section four. Section five concludes.

## **2 Economic Perspectives Concerning the Policy Goals of Antitrust**

In general, there are two main standards that have been both accepted by economists and by legal scholars. One is the efficiency approach, or ‘aggregate economic welfare’ or ‘total welfare’ standard, which takes the total welfare gains into account, and neglects the distribution effects between consumers and producers. It has also been widely accepted to calculate ‘total welfare’ as the sum of producer surplus and consumer surplus, and the concept of ‘producer’ does not only include the defendant

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<sup>4</sup> Robert H. Lande, The Rise and (coming) Fall of efficiency as the ruler of antitrust. 33 *Antitrust Bulletin*, 431, 1988

firm but also its competitors<sup>5</sup>. Scholars who support efficiency approach claim that the policy goal of competition law is to promote efficiency and to maximize total welfare.

The other standard is consumer welfare, which only pays attention to the welfare gains of consumers. The policy goal under this approach is to maximize consumer welfare, without regard to the efficiency gains or losses that the producers will create for the whole society. The division of efficiency and consumer welfare has its root in classic economic thinking of efficiency and distribution, although consumer welfare standard does not necessarily lead to a wealth transfer<sup>6</sup>. Whether these two standards will converge in the long run or conflict each other remains a controversial question.

## 2.1 Efficiency

The masterwork<sup>7</sup> by Robert Bork initiates the efficiency standard of antitrust policy. Robert Bork, together with George Stigler, Harold Demsetz, Richard Posner and Milton Friedman, represents one of the most dominant schools in economic thinking of Anti-trust law- Chicago school<sup>8</sup>.

The Chicago school advocates that efficiency, especially allocative efficiency, is the only policy goal that antitrust law should target on. The efficiency theory, being supported by the price theory and “neoclassical market efficiency model”, had a prevailing influence in Anti-trust enforcement in the US, during the Reagan Administration in particular, which also accelerates the development of employing “economic approach” in antitrust decisions<sup>9</sup>.

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<sup>5</sup> Steven Salop: Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The *True Consumer Welfare Standard*. 22 *Loyola Consumer Law Review* 336

<sup>6</sup> Lande argues that consumer welfare standard does not equal to the concept of welfare transfer. It requires individual consumer choice as a type of property rights must be well defined. *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *Hastings Law Journal* 65 (1982)

<sup>7</sup> Robert H. Bork *The Antitrust Paradox- A Policy at War with Itself*. Basic Books, Inc. Publishers, New York, 1978

<sup>8</sup> According to Hovenkamp, other influential schools are the common law school, the rule of reason school, the monopolistic competition (New Deal) school, the workable competition school, and the liberal school. See Hovenkamp, H. *Michigan law Review*, vol 84, No. 2 (Nov.,1985) pp 213-284

<sup>9</sup> Supra page 217, Hovenkamp referred to the court decisions, made by the Federal Trade Commission and the Department of justice, in the early 1980s. see Gerhart, the Supreme Court and Antitrust Analysis: the (Near) Triumph of the Chicago School, 1982 *Supreme Court Review*, 319. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 *University of*

### 2.1.1 Theory

Efficiency is the situation where the total output is maximized. There are three efficiencies being defined in antitrust economic theory, namely, productive efficiency, allocative efficiency and dynamic efficiency. Productive efficiency is achieved when products are produced at the lowest cost. These two efficiency standards are both in static models under the presumption of perfect competition. Dynamic efficiency describes innovation and the development process aiming at improving social welfare.

Allocative efficiency means through a well functioning price system, resources and the production output are allocated to the consumers who value them the most. Allocative efficiency is achieved when there is Pareto optimality in the society, a situation that cannot be improved by making at least one person better off without making another person worse off.

As Pareto optimality can rarely be achieved, thus the Chicago school advocates that Kaldor-Hicks efficiency can be taken as an alternative solution. It is the situation where the welfare gains of the winner are sufficiently larger than the losses from the loser. It is defined as a potential Pareto optimality because Pareto efficiency will be achieved when the winner compensate the loser. Without considering the distributive effects, both Pareto efficiency and Kaldor-Hicks efficiency make the whole society better off.

#### **Allocative efficiency and productive efficiency**

The goal of achieving allocative efficiency and productive efficiency are not always consistent. The first tension between these two goals is, in contrast to allocative efficiency, productive efficiency does not meet the Pareto Improvement, because less efficient firms are driven out of business by more efficient firms, those who can produce at a lower cost<sup>10</sup>. The second tension is demonstrated by Williamson

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*Chicago Law Review*, 1, 5, 12-13 (1977) , also see Antitrust Policy in Transition: The Convergence of Law and Economics (*E.Fox & J. Halverson eds.* 1984)

<sup>10</sup> Roger Van den Bergh, The Economics of Competition Policy and the Draft of the Chinese Competition Law Economic Analysis of Law in China, edited by Thomas Eger, Michael Faure, Zhang Naigen, Edward Elgar

trade-off. This famous diagram shows the increase of productive efficiency through mergers, is at the cost of allocative inefficiency, in the form of “dead weight loss”<sup>11</sup>.

### **Allocative efficiency and dynamic efficiency**

The concept of dynamic efficiency incorporates the economic theories of innovation. It has been advocated among economists that innovation is the driving force of economic growth and innovators should be incentivized by different legal instruments, such as protecting intellectual property rights. It is therefore also important to discuss the tradeoff between the concept of dynamic efficiency and productive efficiency, which both are used in antitrust enforcement. The start point of the analysis is dynamic efficiency in competition law not only refers to the process of innovation but is also applied to other general concepts, such as “consumer preference”, which involve the development over time<sup>12</sup>. The tradeoff between short term effects on allocative efficiency, such as the reduction of price, and long term dynamic efficiency increase and the positive effects of innovation, leads to the more difficult discussion, starting from the Austrian school, that is, to which extent competition should be viewed as a “process”, rather than the “static outcome”<sup>13</sup>. In this way, through dynamic interaction of innovation, new information and opportunities, the market equilibrium is never achieved. Monopoly profits should be seen as the reward for innovators and can always be taken by new entries. It leads to the more general debate on antitrust goal, whether it should be focused on the static level of efficiency, or to put emphasize on promoting competition<sup>14</sup>.

Furthermore, dynamic efficiency implies firms are engaged in a competition of developing new technology and innovation, and the losers of this competition are made worse off. Therefore, the achievement of dynamic efficiency does not meet the Pareto Improvement neither. In this point dynamic efficiency conflicts the goal of

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<sup>11</sup> Wolfgang Kerber Should competition law promote efficiency? - Some reflections of an economist on the normative foundations of competition law in: Drexler, Josef, Idot, Laurence, and Joel Moninger (eds.), *Economic Theory and Competition Law*, Cheltenham: Edward Elgar

<sup>12</sup> id

<sup>13</sup> Donald Hay, *The Assessment: Competition Policy Oxford Review of Economic Policy* Vol 9, No.2

<sup>14</sup> Id., the author cited the article by Litflechild, S. C. (1986), *The Fallacy of the Mixed Economy*, 1st edn., London, IEA, who advocates the antitrust goal should be promoting competition.

allocative efficiency<sup>15</sup>.

### 2.1.2 Policy Implications

The efficiency approach had a remarkable influence on Anti-trust policy implementation and became the dominant school in the late 1970s.

Bork argued that “The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.”<sup>16</sup> Bork elaborated the importance of allocative efficiency by reviewing the legislative debates in 1890 and concluded that efficiency was the only concern when the Sherman Act was passed by the Congress<sup>17</sup>.

The ‘consumer welfare’ in his statement, however, does not suggest the concept of consumer surplus. He has concluded that ‘consumer welfare’ equals to ‘maximization of wealth or consumer want satisfaction’ and ‘the aggregate efficiency of our economy’<sup>18</sup>. These two concepts can be interpreted as a ‘consumer choice’ perspective and the ‘total surplus’ standard. In Bork’s view, distributive effects should not be taken into account in antitrust decisions<sup>19</sup>.

Contrary to the vague social and political policy goal concepts, such as “big is bad, small is beautiful”, the efficiency standard offers a clear economic criterion and therefore improves the predictability in antitrust enforcement. Bork argues that the efficiency approach is more workable in practice than previous antitrust theories. William Baxter, the first Attorney General for Antitrust under the Reagan Administration, asserted that the efficiency standard provided the only criteria to develop operational rules and by applying this standard the effectiveness of these

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<sup>15</sup> Roger Van den Bergh, *The Economics of Competition Policy and the Draft of the Chinese Competition Law Economic Analysis of Law in China*, edited by Thomas Eger, Michael Faure, Zhang Naigen, Edward Elgar

<sup>16</sup> Bork, *The Antitrust Paradox*, page 91

<sup>17</sup> Bork, *Legislative Intent and the Policy of the Sherman Act*

<sup>18</sup> Bork, *The Antitrust Paradox*, page 26-31

<sup>19</sup> *Id.*, at page 111, Bork argues that “It seems clear the income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity. It may be sufficient to note that the shift in income distribution does not lessen total wealth.”

rules can be judged<sup>20</sup>. One of the goals that set by the US Department of Justice in revising the 1968 Merger Guidelines, is to reduce the uncertainty in Merger assessment. According to the Department, this goal has been achieved, with an economic reasoning of efficiency being adopted in the Guidelines published in 1982<sup>21</sup>.

The efficiency goal proposed by Chicago school does not refer to the static equilibrium, rather it is a process with the most efficient firms will survive in the market competition and less efficient ones are driven out<sup>22</sup>. No matter the final market structure is concentrated or dispersed; it is all regarded as the outcome of this competition process. Austrian school does not consider the market dominance as indicator of market failure, instead it is the sign of successful innovation and entrepreneurship, which encourages other entrepreneurs to engage in the competition process and discover new profit opportunities<sup>23</sup>. Therefore, efficiency should be interpreted in the dynamic context and inefficient firms are those who fail to response to the changing market conditions.

However, the efficiency standard also has several drawbacks. Hovenkamp<sup>24</sup> claims that this principle both has internal and external problems. Firstly, individual gains and losses are very difficult to quantify, and the identification of the 'efficient' rule is ambiguous. This problem becomes severe when the principle of allocative efficiency is applied to estimate the effect of a monopoly in several different markets. Secondly, the external factors that cannot be transferred to prices are not taken into account in the model, such as preferences. Classifying these factors as 'noneconomic' factors which do not have an implication on social welfare contradicts the basic assumption of rationality. Therefore, the efficiency standard does not cover all the factors that can be economically valued.

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<sup>20</sup> William Baxter, Responding to the Reaction: The Draftman's View, 71 *California Law Review*, 621 (1983)

<sup>21</sup> Baxter, Responding to the Reaction: The Draftman's View, 71 *California Law Review*, 618

<sup>22</sup> Ross C. Singleton, Competition Policy for Developing Countries: A Long-run, Entry-based Approach

<sup>23</sup> id

<sup>24</sup> Herbert Hovenkamp, Antitrust Policy after Chicago, *Michigan Law Review*, vol 84, No.2 (Nov. 1985), pp 213-284

## 2.2 Consumer welfare as the goal of antitrust

### 2.2.1 Consumer Welfare and Consumer Surplus

Another competition policy goal is to maximize consumer welfare. Welfare economists define that consumer welfare can be economically measured by consumer surplus<sup>25</sup>, meaning the difference between market price and consumers' willingness to pay.

Consumer surplus of the market as a whole is estimated by adding up the value of individual consumer surplus. The sum of consumer surplus and producer surplus equals to total surplus, which is used for calculating total welfare, or social welfare. Therefore, the change of consumer welfare can be monetarily evaluated by calculating the change of market price. Marshall explains that when the market price is increased, assuming the income level keeps constant<sup>26</sup>, the utility of individual consumer will be lower as the consumption level is decreased.

Scholars who argue consumer welfare should be the policy goal of antitrust believe that consumers are entitled to purchase products at not higher than competitive prices. This entitlement is also one type of property right being well-protected by antitrust law. Firms with considerable market power are extracting property rights from consumers by charging higher prices. The so-called 'wealth transfer' or 'distributive effects' means the economic wealth being transferred from consumers to firms with market power<sup>27</sup>.

It has been claimed that the consumer surplus standard is more workable than the efficiency standard<sup>28</sup>. Relying on a short-term consumer surplus standard is easier to

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<sup>25</sup> It has been commonly acknowledged that consumer surplus principle was first defined by Alfred Marshall in his book *Principles of Economics* in 1890.

<sup>26</sup> This is one of the drawbacks of the Consumer Surplus assumption that being criticized. There are several technical refinements, such as Hicksian variation.

<sup>27</sup> Robert Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 *Antitrust Law Journal* page 632, 1989-1990

<sup>28</sup> Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, A. Fisher, F. Johnson & R. Lande, *Mergers, Market Power and Property Rights: When Will Efficiencies Prevent Price Increases?* (September, 1985) (unpublished manuscript) (FTC Working Paper No. 130).

monitor the antitrust decision makers<sup>29</sup>. The goal of maximizing consumer surplus can be assessed by calculating the changes in market price whereas measuring total surplus or efficiency gains to firms in the short run is more difficult.

### 2.2.2 Concerns of Distributional Effects

The goal of promoting efficiency does not contradict the goal of preventing individuals from being exploited by firms with market power. The reason is, when the market prices are driven down, consumers with low income are able to purchase more<sup>30</sup>. But it would not be the case when only prices in some product markets are decreased and only the rich are benefited<sup>31</sup>.

Distributional effects can hardly be ignored due to the fact that the transfer from consumers to producers is sometimes substantial<sup>32</sup>. It has been proved in merger case by the U.S. scholars<sup>33</sup>. It therefore implies that producers are more likely to be better off than consumers after the merger and this distributive effect are often ignored by the total welfare standard.

### 2.2.3 Critics

The first problem of the consumer welfare standard is that it ignores the long-term effect on efficiency<sup>34</sup> as they only evaluate the change of the market price to estimate

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<sup>29</sup> Dennis W Carlton, Does Antitrust Need to Be Modernized? *The Journal of Economic Perspectives*, Vol 21, No.3 Summer 2007, page 159

<sup>30</sup> The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts? Kenneth G. Elzinga *University of Pennsylvania Law Review*, Vol. 125, No. 6 (Jun., 1977), pp. 1191-1213

<sup>31</sup> id

<sup>32</sup> Russell Pittman, Consumer Surplus as the Appropriate Standard for Antitrust Enforcement

<sup>33</sup> The substantial transfer from consumers to producers are proved by Ashenfelter and Hosken's study on the impact of consummated mergers in large consumer goods market and Pittman's study on proposed merger in the mid 1980s of one shipper and the Southern Pacific Railroads. Ashenfelter, Orley, and Daniel Hosken, "The Effects of Mergers on Consumer Prices: Evidence from Five Selected Case Studies," unpublished paper, Princeton University and Federal Trade Commission, May 2007. Pittman, Russell W., "Railroads and Competition: The Santa Fe/Southern Pacific Merger Proposal," *Journal of Industrial Economics* 39 (1990), 25-46.

<sup>34</sup> Dennis W Carlton, Does Antitrust Need to Be Modernized? *The Journal of Economic Perspectives*, Vol 21, No.3 Summer 2007, page 157

the gain to consumers. For example, if a merger reduces the fixed cost more than the marginal cost. It will be a biased decision if the commission only focuses on the savings of marginal cost, which can be reflected in the market price. Because fixed cost savings will contribute to the investment in innovation which will drive the market price down in the long-run. The consumer welfare standard neglects the chain between the firms today's fixed cost savings and tomorrow's marginal cost savings<sup>35</sup>. This criticism reflects an important limitation of standard partial equilibrium analysis, that is, the calculation of change on surplus only takes static effects into account, and leave dynamic effects aside<sup>36</sup>.

The second criticism of the consumer welfare standard is that the argument of preventing consumers from the extractions by firms with market power is not plausible<sup>37</sup>. Singling out consumers is in fact difficult as there are always both sellers and buyers involved in market transactions. The profits that firms earned eventually flow to households. There are two issues here that consumer surplus scholars fail to prove- one is whether it is economically and legally justified to give preference to consumers over producers; the other is whether the antitrust enforcers are able to distinguish between consumers and producers in each case decisions. If the cost of determining where the wealth should be transferred to is too high, or there is a large uncertainty regarding distributional effects<sup>38</sup>, applying total surplus might become a better solution as it assume that consumers and producers are equal.

The third criticism is consumer surplus standard would encourage the buying cartel. Monopsony power<sup>39</sup> should not be tolerated in antitrust decisions. The reason is when

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<sup>35</sup> Id, page 157

<sup>36</sup> Gregory J. Werden, Consumer Welfare and Competition Policy, page 13, in *Competition Policy and the Economic Approach, Foundations and limitations*, edited by Josef Drexl, Wolfgang Kerber and Rupprecht Podszun. Edward Elgar 2011

<sup>37</sup> Dennis W Carlton, Does Antitrust Need to Be Modernized? *The Journal of Economic Perspectives*, Vol 21, No.3 Summer 2007, page 157

<sup>38</sup> Farrell, Joseph and Katz, Michael, The Economics of Welfare Standards in Antitrust, published by Competition Policy Center, Institute of Business and Economic Research, UC Berkeley. In their article they proved this point by citing Mathewson and Winter (2000) quote the Canadian *Merger Enforcement Guidelines* (footnote 57): "when a dollar is transferred from a buyer to a seller, it cannot be determined *a priori* who is more deserving, or in whose hands it has a greater value". It is the so-called "constant dollar" welfare assumption by Chicago School, who claims that a transfer of one dollar from a consumer to a monopolist does not lead to welfare changes and hence distribution effects should not be taken into consideration by competition law. See Posner, R, *The Economics of Justice* 1981.

<sup>39</sup> Dennis W Carlton, Does Antitrust Need to Be Modernized? *The Journal of Economic Perspectives*,

monopsonist has market power, the inputs will be paid at the low monopsony price, which will lead to the output reduction and welfare loss on the downstream as well as the final consumers<sup>40</sup>. When monopsonist does not have market power, the upstream customers, instead of the downstream customers, suffer welfare loss<sup>41</sup>.

#### **2.2.4 Consumer Choice Argument**

Robert Lande extended the concept of consumer welfare to consumer interest. He argues that consumer interest is protected by maximizing consumer surplus or the ensuring consumer choice, with the latter being the ultimate goal of antitrust law.

Lande<sup>42</sup> argues that consumers are aware of their preferences and the right of choosing products at competitive price according to their preferences, as one type of individual rights, should be protected.

The consumer choice argument not only takes the price competition into account but also consider the factors that cannot be transferred into price, such as quality, product safety, convenience, variety, service and product innovation. Lande argues that the consumer choice standard is superior to efficiency and the consumer surplus standard because it targets on the right question, that is what do consumers really want. It captures the factors that essentially affect the decision of consumers that cannot be reflected by price, as well as the long-term effect of innovation.

#### **2.2.5 Policy Implications**

When the economic concept of consumer welfare is applied to policy analysis, the meaning of “consumer welfare” or “consumer surplus” should be carefully interpreted. The first issue is how to define “consumer” and separate this group from other players in the market transaction, such as distributors, and retailers. It should be emphasized that “consumers” are not the same as “customers”, who are at the end of the

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Vol 21, No.3 Summer 2007

<sup>40</sup> Russell Pittman, Consumer Surplus as the Appropriate Standard for Antitrust Enforcement, also Schwartz (1999)

<sup>41</sup> id

<sup>42</sup> R. Lande, Consumer Choice as the Ultimate Goal of Antitrust, 62 *University of Pittsburgh Law Review* 503, 2000-2001

distribution chain<sup>43</sup>.

### 2.3 Non-Economic Goals

For nearly a century, there has been a considerable debate on the relationship between non-economic goals and economic goals. Although the efficiency approach advocated by Chicago School has significantly influenced antitrust decision making in both sides of the Atlantic, a consensus still has not yet reached regarding to which extent economics goals of antitrust can be valued more than other goals.

Since 1980s, being heavily influenced by the Chicago School, it has been widely accepted in the US that economic goals play a highly important role. Some scholars argue that political and social goals should be subordinate to economic goals. For example, Baxter argues that “where there is a conflict, social and political goals should yield to economic considerations primarily for two reasons: first, the statutes themselves focus on efficiency; and second, non-efficiency goals are too intractable to be used as enforcement standards.”<sup>44</sup>

In many other jurisdictions, however, Antitrust Laws still share the concern of non-economic goals, such as public interest. Public interest is a broad concept and it usually includes fairness, wealth distribution, and protection of small and medium businesses. For example, there are five criteria in assessing public interest that listed in Section 84 of the United Kingdom (UK) Fair Trading Act 1973<sup>45</sup>. The first one is effective competition between suppliers. The second is “promotion of interests of consumers and purchases of goods and services via quality and variety.” The third one is “long-run competition through new products, processes, and entry to the market.” The fourth one is “maintaining and promoting the balanced distribution of industry and employment in the United Kingdom.” The fifth one is the concern of the effects of the merger on the area outside the UK.

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<sup>43</sup> Gerden, Consumer Welfare and Competition Policy in the book *Competition Policy and the Economic Approach*

<sup>44</sup> William Baxter, Responding to the Reaction: The Draftman’s View, 71 *California Law Review*, 621 (1983) At page 619

<sup>45</sup> Donald Hay, The Assessment: Competition Policy, *Oxford Review of Economic Policy*, vol 9, No.2

To summarize, although many scholars agreed that economic analysis of antitrust law should be play a role, the possible mechanisms which can be applied to tradeoff economic and non-economic goals are still under debate<sup>46</sup>.

## 2.4 Tradeoffs of these goals

The analysis of the tradeoffs between efficiency and consumer welfare lies on two questions. The first one is whether these two goals can simultaneously achieved, and the second question is if there is a conflict between them, which goal should be prioritized.

Can efficiency and consumer welfare both be the goal? There are both positive and negative answers.

Judge Easterbrook<sup>47</sup>, one of the most influential advisors to the Reagan Administration, has claimed that the difference between the efficiency standard and the consumer welfare standard is only at the margin. In the long run, consumer will be benefited from the goal of efficiency. The latter subordinates to the former because in the long run consumers benefit from the competition policy which promotes productive and allocative efficiency.

The counterarguments for this question are as follows. Firstly, long term goal and short term objectives cannot be simultaneously achieved. It is worth emphasizing that there is a time difference between the targets under the consumer welfare standard and the efficiency standard. The consumer welfare standard weights the price reduction higher than the long-run efficiency increase. In high-tech industries for example, the product cycle often takes several years<sup>48</sup>. The fixed costs that being saved today, will

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<sup>46</sup> J. Thomas Rosch, Commissioner at Federal Trade Commission, Speech at the International Bar Association Antitrust Section Conference: I say Monopoly, You say Dominance: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics? (Sept. 8, 2007), *available at* <http://www.ftc.gov/speeches/rosch/070908isaymonopolyba.pdf> He cited Justice Breyer that ever said “economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate economists’ Leegin, 127 S. Ct. at 2729.

<sup>47</sup> Easterbrook, Workable Antitrust Policy, 84 *Michigan Law Review* 1696, 1702-03 (1986) at page 1703, also see Easterbrook, The Limits of Antitrust, 63 *Texas Law Review*, 1, 3-4 (1984)

<sup>48</sup> Dennis W Carlton, Does Antitrust Need to Be Modernized? *The Journal of Economic Perspectives*, Vol 21, No.3 Summer 2007, page 157. The examples in his paper were largely rely on his experience as Deputy Assistant of Attorney General for Economic Analysis in Antitrust Division, US Department of Justice

be used for research and development for new products, the social benefit of which can only be valued after several years. But these cost-saving effects and the long-term efficiency gains would be underestimated by the antitrust commission under a consumer welfare standard, although the future efficiency gains will in turn benefit the consumer. Therefore, in this analysis, the total welfare standard is superior to take cost-saving into account in antitrust enforcement, which will encourage firms to invest in research and development, and create long-term benefits for the consumers and the whole society.

Secondly, the economic model has proved that pursuing one goal often goes at the cost of the other. In his classic paper<sup>49</sup> Oliver Williamson argues that efficiency and consumer welfare are substantially conflicting each other. The Williamson diagram shows that mergers may improve social welfare and increase efficiency level at the cost of consumer surplus. Meanwhile, in his status goods example<sup>50</sup>, he proved that consumer surplus maximization may lead to a lower social welfare and undermine markets. Due to this reason, the total welfare standard is superior to the consumer welfare standard.

Nevertheless, it is still unclear in practice which of the two goals will be prioritized by the court. Bork and Posner<sup>51</sup> argued that efficiency is the ultimate goal that US antitrust policy is targeting on. Lande, Brodly, Fox, Flynn, Pitofsky, and Sullivan are trying to prove that consumer standard has been taken the place of efficiency and has been accepted by the Congress and implemented by the Horizontal Merger Guidelines<sup>52</sup>.

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<sup>49</sup> O.E. Williamson, Economies as an antitrust defense: the welfare trade-offs. 58 *American Economic Review* 18 (1968)

<sup>50</sup> O.E. Williamson, Allocative Efficiency and the Limits of Antitrust

<sup>51</sup> P.Areeda & D. Turner, Antitrust Law: An Analysis of Antitrust, Principals and Their Application 149 No.2 (1980) R.Posner, Antitrust Law: An Economic Perspective 1976

<sup>52</sup> U.S. Department of Justice and Federal Trade Commission, *Commentary on the Horizontal Merger Guidelines*, March 2006, states that the standard being enforced is “close to a consumer surplus standard, focusing on the effect of a merger on the prices paid by customers and emphasizing the desirability of efficiencies that lower marginal costs and thus are likely to have a direct impact on post-merger prices.” Lande claimed that “When conduct presents a conflict between protecting consumers and promoting the efficiency of the economy (for example, a merger that raises prices but reduces costs), the courts have always chosen consumer protection over efficiency.” The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency. 84 *Notre Dame Law Review* 191 (2008-2009)

## 2.5 Conclusion

It is not an easy task to balance the pros and cons of efficiency and consumer welfare standards. Examining whether these economic standards are applied in the case decision in practice is also under debate. In fact, making a choice between an efficiency standard and the consumer welfare standard does not only rely on the results from a static economic model. The answer to the ultimate question of how to divide social wealth to consumers and producers is still to a large extent influenced by other factors.

## 3 Policy Goal in the US Antitrust Law and the EU Competition Law

### 3.1 Policy Goal in the US Antitrust Law

Prior to the efficiency argument by Bork and others of Chicago School, it has been argued that Antitrust Law in the US, started from Sherman Act enacted by the Congress in 1890, was enacted to restrict the power of cartels and protect small business as well as consumers<sup>53</sup>. This concern was reflected in the case decision of *Alcoa v. United Shoe Machinery*, where the term of “monopolization” was used to criticize the company’s behavior in the market, although the company acquires this dominant position by using normal competition means<sup>54</sup>. After the 1970s the efficiency approach became the most influential thought in antitrust policy, and since then economists are more involved in the judgment of antitrust cases, for example the IBM case<sup>55</sup>. Nevertheless, the perception of “big is bad, small is beautiful” still gains its popularity. The enforcement of antitrust policy is also not always consistent and contradicts with other governmental regulations<sup>56</sup>.

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<sup>53</sup> Neale, A. D. (1970), *The Antitrust Law of the USA: A Study of Competition Enforced by Law*, 2<sup>nd</sup> edn., Cambridge, Cambridge University Press (a third edition with D. G. Goyder as an author, was published in 1980). Thomas B. Leary, Comm'r, Fed. Trade Comm'n, Speech at the Western Economic Association: Antitrust Economics: Three Cheers and Two Challenges (July 7, 2001), *available at* <http://www.ftc.gov/speeches/lary/learythreecheers.htm>

<sup>54</sup> Hay, Donald, *The Assessment: Competition Policy*, Oxford Review of Economic Policy, Vol 9, No.2 cited a paper by George Hay (1987)

<sup>55</sup> *Id*, Fisher *et al.*, 1983

<sup>56</sup> Hay, Donald, *The Assessment: Competition Policy*, Oxford Review of Economic Policy, Vol 9,

The goal of antitrust policy in the US is heavily influenced by the economic cycles<sup>57</sup>. During the “economic stagflation” in the 1970s, antitrust policy came under scrutiny<sup>58</sup>. After this crisis, the US antitrust policy put emphasis on breaking up “dominant” firms.

### 3.2 Policy Goal in the EU Competition law

The question of what should be the normative foundation of the competition policy in the EU has also been long debated. Followed the recent discussion on “modernization”, the economic goals that the EU competition law is pursuing include (1) enhancing consumer welfare (2) increasing total welfare (3) promoting market integration (4) protecting the “freedom to compete” which follows the German Ordoliberal approach.

### 3.3 Conclusion

It has often observed that under EU Competition Law and US Antitrust Law, private monopolies and governmental monopolistic conducts are both at the target of competition law and are treated equally<sup>59</sup>. Under the EU Law, the government intervention in member states which impedes cross-border imports and exports, or creates barriers for market integration and competition within the Union has been strictly restrained<sup>60</sup>. State-owned Enterprises in the industries such as telecommunications and airlines, which used to play the role of national monopolists, are in the progress of privatization. A similar trend has also been found in the US in the last thirty years, where deregulation was promoted by the antitrust agencies in the field of trucking, airlines, railroads, banking, professional services and

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No.2 cited a paper by George Hay (1987)

<sup>57</sup> Thomas R. Howell, Alan Wm. Wolff, Rachel Howe, Diane Oh, China’s New Anti-monopoly Law: A perspective from the United States 18 *Pacific Rim Law and Policy Journal* (2009)

<sup>58</sup> Id, see also the footnote 22 of this paper, William Kolasky, the former Deputy Assistant head of the International Enforcement, Antitrust Division, in the US Department of Justice, at the Tokyo America Center: The Role of Competition in Promoting Dynamic Markets and Economic Growth (Nov. 12, 2002), expressed it, “pursuit of these types of antitrust policies contributed ...to the stagflation we experienced during the 1970s.”

<sup>59</sup> Owen, B.M. Sun, S., Zheng, W.T. (2008) “China’s Competition Policy Reforms: The Anti-monopoly Law and Beyond” 75 *Antitrust Law Journal*. Page 235

<sup>60</sup> id

telecommunications<sup>61</sup>.

#### 4 Implementing Anti-trust Policy Goals in China

The Article 1 of Chinese Anti-monopoly law states the goal of this law is enacted for the five objectives, including restraining monopolistic behaviors, protecting competition, promoting efficiency, protecting the interests consumers and social public interests, and contributing to the development of the socialist market economy. Nevertheless, by analyzing the ten published merger cases of the MOFCOM, which is the competition commission in China, it has been argued that consumer surplus standard has mostly been applied. The main evidence is the case decisions have mentioned the price change after merger and also emphasized the importance of consumer choice<sup>62</sup>.

Given the law and economics analysis of antitrust goal in previous sections, two normative suggestions can be given on the enforcement of merger control policy in China. The first one is law and economics literature has shown that economic analysis does play an important role. It has been acknowledged that efficiency standard and consumer welfare standards are two major economic criteria for antitrust decisions. In addition, the distinction as well as the correlation between these two standards should be well understood by the decision makers as they have different impact on policy effects. The second suggestion is implementing antitrust policy goal may also be affected by other factors. In the US, empirical evidence has proved that the incentive of antitrust agency is not align with the interest of consumers. It could be well explained by the theory of public choice. By extending this finding to the antitrust practice in China, it could be concluded as the implementation of antitrust policy goal does not solely rely on static economic models. The influential external factors could be interpreted as the fast changing market environment. The market changes much more rapidly than the improvement of regulation. It is therefore important to look at the merger on a case-by-case basis rather than trying to find the so called

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<sup>61</sup> id

<sup>62</sup> Shan, P., Tan, G., Wilkie, S., Williams, M., China's Anti-Monopoly Law, What is the Welfare Standard. *USC Center in Law, Economics and Organization Research Paper No. C11-18*, USC Legal Studies Research Paper No.11-25

“One-Size-Fit-All” standards.

#### **4.1 Protecting Socialist Market Economy: Competition Policy before the Anti-Monopoly Law**

In order to understand the policy goals that this Anti-monopoly Law is targeting on, it is necessary to review the competition policy in China before the promulgation of this law.

The earliest competition policy in China is Provisional Rules on the Development and Protection of Socialist Competition, an administrative regulation that promulgated by the State Council on Oct 17, 1980<sup>63</sup>. This regulation for the first time acknowledged the pricing system under planned economy should be adjusted to stimulate competition, under the condition that prices of key products must remain stable. It also encourages technology exchange and development<sup>64</sup>. Seven years later, a more detailed administrative regulation on price control was adopted by the State Council<sup>65</sup>.

The Law of the People’s Republic of China for Countering Unfair Competition<sup>66</sup> promulgated in 1993 sketched the basic framework for competition policy before the Anti-Monopoly Law. It prohibits setting predatory prices, price fixing, and collusion in bidding, as well as explicitly forbids the behavior of forced transactions and local protectionism, as the result of administrative monopoly<sup>67</sup>. The other issues that this law addresses, such as bribery, coercive sales, made some commentators believe this law is more like a consumer protection law<sup>68</sup>.

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<sup>63</sup> “关于开展和保护社会主义竞争的若干规定” This regulation was promulgated by the State Council on Oct. 17, 1980 and effective Oct. 17, 1980, and repealed on Oct. 6, 2001). Available at <http://finance.sina.com.cn/g/20050418/12411526820.shtml> (last visit April 20, 2012)

<sup>64</sup> Youngjin Jung and Qian Hao, The New Economic Constitution in China: A Third Way for Competition Regime? *24 Northwestern Journal of International Law and Business* 107, 2003-2004

<sup>65</sup> Regulations of the People’s Republic of China on Price Control (中华人民共和国价格管理条例), promulgated by the State Council on Sept 11, 1987, effective on Sep 11, 1987 available at [chinalawinfo.com http://en.pkulaw.cn/display.aspx?cgid=3479&lib=law](http://en.pkulaw.cn/display.aspx?cgid=3479&lib=law) (last visit April 24, 2012)

<sup>66</sup> Countering Unfair Competition Law of the People’s Republic of China (反不正当竞争法), promulgated on Sept.2, 1993, effective Dec. 1, 1993), available at <http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027909.html>.(last visit March 13, 2012)

<sup>67</sup> Youngjin Jung and Qian Hao, The New Economic Constitution in China: A Third Way for Competition Regime? *24 Northwestern Journal of International Law and Business* 107, 2003-2004

<sup>68</sup> Owen Bruce M., Su Sun, Wentong Zheng, China’s Competition Policy Reforms: The Anti-monopoly

It should be highlighted that the enforcement agency under the Law of Countering Unfair Competition is State Administration for Industry and Commerce (SAIC) with their local branches (AIC), the one of the enforcement agency of the Anti-monopoly Law<sup>69</sup>. In 1994, both SAIC and AIC set up their offices that being especially responsible for fair trade affairs<sup>70</sup>. After the enactment of the Anti-monopoly Law, the function of dealing with antimonopoly practices was formally regulated by the State Council<sup>71</sup>.

After the SAIC was empowered the antitrust duties, in December 1993, SAIC promulgated the “Certain Regulations on Prohibiting Anti-competitive Practices of Public Enterprises”<sup>72</sup>. This regulation focuses on the abuse of market position of public utility companies. In addition, this administrative provision for the second time emphasizes on the problem of administrative monopoly. The earliest rule on administrative monopoly was promulgated by the State Council in November 1990<sup>73</sup>, named as “The Notice Concerning the Breaking of Local Market Blockades and Further Encouraging Commodity Circulation”. It was targeted on breaking down trade barriers established by the local governments. April 2001, after upgraded SAIC to a ministerial level<sup>74</sup>, the State Council enacted “Provisions of the State Council on Prohibiting Regional Blockade in Market Economic Activities”<sup>75</sup>. This provision

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Law and Beyond, 75 *Antitrust Law Journal*, 231 2008-2009

<sup>69</sup> Youngjin Jung and Qian Hao, The New Economic Constitution in China: A Third Way for Competition Regime? 24 *Northwestern Journal of International Law and Business* 107, 2003-2004

<sup>70</sup> Salil K. Mehra and Meng Yanbei, Against Antitrust Functionalism: Reconsidering China's Anti-Monopoly Law, 49 *Virginia Journal International Law* 379 2008-2009

<sup>71</sup> 国务院办公厅关于国家工商行政管理总局主要职责，内设机构和人员编制规定的通知 [The State Council Notice on Major Duties, Institution and Staff of the SAIC] (July 25, 2008) <http://baike.baidu.com/view/7919215.htm>

<sup>72</sup> 关于禁止公共企业限制竞争行为的若干规定, Certain Regulations on Prohibiting Anti-competitive Practices of Public Enterprises, issued on Dec 24, 1993, effective on Dec 24, 1993, issued by State Administration for Industry and Commerce, available at <http://en.pkulaw.cn/display.aspx?cgid=8847&lib=law> (last visit April 23, 2012)

<sup>73</sup> Salil K. Mehra and Meng Yanbei, Against Antitrust Functionalism: Reconsidering China's Anti-Monopoly Law 49 *Virginia Journal International Law* 379 2008-2009

<sup>74</sup> id

<sup>75</sup> Provisions of the State Council on Prohibiting Regional Blockade in Market Economic Activities (国务院关于禁止在市场经济活动中实行地区封锁的规定) promulgated by the State Council on April 21, 2001, effective on April 21, 2001. available at <http://en.pkulaw.cn/display.aspx?cgid=35595&lib=law> (last visit April 20, 2012)

specifically focuses on the problem of regional protectionism. The promulgation of these regulations has shown that administrative monopoly has been a major concern in the development of competition policy in China. In the same month, the State Council enacted another decision on rectifying and standardizing the order in the market economy<sup>76</sup>. Administrative monopoly and local protectionism are both prohibited in its article 11. SAIC has been playing an important role in facilitating the enforcement, although it has been criticized that the implementation of these rules has been rather ineffective<sup>77</sup>. It worth mentioning that in addition to the anti-monopoly regulations, administrative monopoly is also prohibited by the Administrative Reconsideration Law<sup>78</sup> and Administrative Procedure Law<sup>79</sup>.

In June 2003, another enforcement agency of Anti-monopoly Law, the National Development and Reform Commission (NDRC) issued Interim Provisions on Preventing the Acts of Price Monopoly<sup>80</sup>, which is in accordance with the 1997 Price Law. Article 3 of this regulation defines the market predominance should be determined by three elements, the market share in the relevant market, the substitutability and the difficulty of market entry. This regulation has also mentioned the prohibition of the abuse of market dominance, price coordination and the government agencies' illegal price intervention<sup>81</sup>. It indicates that NDRC starts to share the responsibility of the enforcement of combating monopolistic practices, with a focus on the conduct of pricing<sup>82</sup>.

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<sup>76</sup> Decisions of the State Council on Rectifying and Standardizing the Order in the Market Economy (国务院关于整顿和规范市场秩序的决定) promulgated on April 27, 2001, effective on April 27, 2001. available at <http://en.pkulaw.cn/display.aspx?cgid=35594&lib=law> (last visit April 24, 2012)

<sup>77</sup> Owen, B.M. Sun, S., Zheng, W.T. (2008) "China's Competition Policy Reforms: The Anti-monopoly Law and Beyond" 75 *Antitrust Law Journal*. Page 235

<sup>78</sup> Administrative Reconsideration Law (行政复议法) promulgated on Apr. 29, 1999, effective Oct. 1, 1999

<sup>79</sup> Administrative Procedure Law (行政诉讼法) promulgated on Apr. 4, 1989, effective Oct. 1, 1990

<sup>80</sup> Interim Provisions on Preventing the Acts of Price Monopoly (制止价格垄断行为暂行规定), promulgated by the State Development and Reform Commission on June 18, 2003, effective on Nov 1, 2003. available at china law info.com <http://en.pkulaw.cn/display.aspx?cgid=47253&lib=law> (last visit April 20, 2012)

<sup>81</sup> id

<sup>82</sup> Salil K. Mehra and Meng Yanbei, Against Antitrust Functionalism: Reconsidering China's Anti-Monopoly Law 49 *Virginia Journal International Law* 379 2008-2009

The Ministry of Commerce established their antitrust office in 2004, showing their interest in participating in antitrust case investigations and drafting legislations, especially in the field of merger and acquisitions. The office was named as the Ministry of Commerce Anti-monopoly Bureau (MOFCOM). This office was responsible for the implementation of the Interim Provisions for Foreign Investors to Merge Domestic Enterprises, an administrative regulation on merger and acquisitions issued by six administrations in March 2003<sup>83</sup>. This provision has explicitly mentioned the premerger notification requirements for the antitrust concern in its chapter 5. This notification should be submitted both to MOFCOM and SAIC. During 2007, MOFCOM has conducted over 220 anti-monopoly reviews<sup>84</sup>. These practices made MOFCOM more experienced in investigating in antitrust cases after the enactment of the AML and other merger control guidelines.

Besides, there are several other governmental agencies that are able to play a role in antitrust decisions<sup>85</sup>. Anti monopoly policies have also been reflected in other laws such as Law on Protection of Consumer Rights and Interests in 1993<sup>86</sup>, Foreign Trade Law in 1994<sup>87</sup>, Law on Commercial Banks in 1995<sup>88</sup>, The Price Law in 1997<sup>89</sup>, and The Bidding Law in 1999<sup>90</sup>.

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<sup>83</sup> Interim Provisions for Foreign Investors to Merge Domestic Enterprises (外国投资者并购境内企业暂行规定), promulgated by Ministry of Foreign Trade and Economic Cooperation (include Former Ministry of Foreign Economy and Trade), State Administration of Taxation, State Administration for Industry and Commerce, State Administration of Foreign Exchange on March 7, 2003, effective on April 12, 2003. available at <http://en.pkulaw.cn/display.aspx?cgid=44880&lib=law> (last visit April 23, 2012) This provision was revised in July 2006.

<sup>84</sup> Wu Zhenguang, Perspectives on the Chinese Anti-monopoly Law 75 *Antitrust Law Journal* 73, 2008-2009

<sup>85</sup> Id, also see 王晓晔, 论反垄断法执法机构与行业监管机构的关系 <http://www.civillaw.com.cn/article/default.asp?id=28604>

<sup>86</sup> Law of the People's Republic of China on Protection of Consumer Rights and Interests (中华人民共和国消费者权益保护法) promulgated on Oct 31, 1993, effective on Jan 1, 1994 available at <http://en.pkulaw.cn/display.aspx?cgid=6384&lib=law> (last visit April 24, 2012)

<sup>87</sup> Foreign Trade Law of the People's Republic of China (中华人民共和国对外贸易法) promulgated on May 12, 1994, effective on July 1, 1994. Available at <http://en.pkulaw.cn/display.aspx?cgid=9003&lib=law> revised on April 6, 2004, Effective on July 1, 2004. Revised version available at <http://en.pkulaw.cn/display.aspx?cgid=52228&lib=law> (last visit April 22, 2012)

<sup>88</sup> Law of the People's Republic of China on Commercial Banks (中华人民共和国商业银行法)

## 4.2 The Drafting Process of the Anti-Monopoly Law

The discussion in the previous section has shown that prior to the draft of the Anti-monopoly Law, the antitrust laws and regulations were issued as well as enforced by different administrative agencies, with the SAIC, the NDRC and the MOFCOM take most of the responsibilities. This enforcement structure has heavily influenced the drafting process and the implementation of the AML.

In 1987, an Antitrust Law drafting team was established under the Legislative Bureau of the State Council<sup>91</sup>. The task of drafting the AML was allocated to the SAIC and State Economic and Trade Commission (SETC) in 1994. After SETC was abolished during the government agency reform in 2003, MOFCOM took its place<sup>92</sup>. The

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promulgated on May 10, 1995, effective on July 1<sup>st</sup>, 1995, amended on Dec 27, 2003 available at [http://www.pkulaw.cn/fulltext\\_form.aspx?Gid=11600](http://www.pkulaw.cn/fulltext_form.aspx?Gid=11600) (last visit April 23, 2012) see Article 9 in Chapter 1, “Commercial banks should follow the principle of fair competition in their business and should not be engaged in unfair competition.”

<sup>89</sup> Price Law of the People's Republic of China (价格法) promulgated on Dec.29,1997, effective May 1, 1998, administered by the National Development and Reform Commission (NDRC), available at [http://www.pkulaw.cn/fulltext\\_form.aspx?Db=chl&Gid=19158&keyword=%E4%BB%B7%E6%A0%BC%E6%B3%95&EncodingName=&Search\\_Mode=accurate](http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=19158&keyword=%E4%BB%B7%E6%A0%BC%E6%B3%95&EncodingName=&Search_Mode=accurate). (last visit April 13, 2012)

See Article 14 in Chapter 1, “Business operators must not act whatsoever in the following ways to effect abnormal price behaviors: 1. To work collaboratively with others to control market prices to great detriments to the lawful rights and interests of other business operators or consumers; 2. To engage in dumping sales (except the cases of sales of fresh and live merchandises, seasonal merchandises and stockpiled merchandises at discount) at below cost prices in order to attain an upper hand over rivals or dominate the market and disrupt the normal production and operation order to great detriments to the interests of the State or the lawful rights and interests of other business operators; 3. To fabricate and spread price rise information for pushing up the prices to excessively high level; 4. To resort to deceitful or misleading means in terms of prices to entice consumers or other business operators into trading in terms of prices; 5. To discriminate in terms of prices same kinds of merchandises or services offered by certain business operators under same trading conditions; 6. To disguisely raise or lower prices at irrational ranges by artificially raising or lowering grades of merchandises or services; 7. To seek exorbitant profits in violation of laws and regulations; and 8. To effect other illicit price behaviors that are forbidden by law or administrative decrees.”

<sup>90</sup> The Bidding Law of the People's Republic of China (招标投标法, promulgated on August 30, 1999, effective Jan. 1, 2000), available at

[http://www.pkulaw.cn/fulltext\\_form.aspx?Db=chl&Gid=23176&keyword=%E6%8B%9B%E6%A0%87%E6%8A%95%E6%A0%87%E6%B3%95&EncodingName=&Search\\_Mode=accurate](http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=23176&keyword=%E6%8B%9B%E6%A0%87%E6%8A%95%E6%A0%87%E6%B3%95&EncodingName=&Search_Mode=accurate) (last visit April 13, 2012) see Article 32 in Chapter 3, “Tenderers shall not collude with each other in setting bidding prices, nor shall they exclude other tenderers from fair competition and harm the lawful rights and interests of the tenderee and other tenderers. Tenderers shall not collude with the tenderee in injuring the interests of the state, general public and other people. Tenderers shall be forbidden to win any bid by offering any bribe to the tenderee or any member of the bid-evaluation committee.”

<sup>91</sup> Peter Neumann, *The Slow Boat to Antitrust Law in China*, Dec 23, 2003, available at <http://www.faegrebd.com/4709> (last visit April 22, 2012)

<sup>92</sup> Speech by Shang Ming, the Development and Legislation of Competition Policy in China (发展中的中国竞争政策与立法) published on MOFCOM website, April 22, 2005, available at <http://tfs.mofcom.gov.cn/aarticle/dzgg/f/200504/20050400081489.html> (last visit April 22, 2012) see

standing committee of National People's Congress listed "Anti-trust law" in the 8th (in 1994), the 9th (in 1998) and 10th (in 2003) legislative scheme. The drafting process, however, takes nearly a decade. The first finished draft was distributed among business professionals and legal scholars in 2002<sup>93</sup>. In October 2004, the draft was submitted to the Legislative Affairs Office of the State Council<sup>94</sup>.

In 2004, the drafting process was restarted after the Ministry of Commerce submitted another Anti-Monopoly Law draft to the State Council. Mr. Cao Kangtai, the Director of the Legislative Office under the State Council, stated three reasons in the advocacy of passing the act in his submission to the National People's Congress<sup>95</sup>: "Firstly, abuse of dominance and cartel practices are so prevalent that they jeopardize the interests of consumers and other competitors, and stand in the way of building a national common market. Secondly, mergers and reorganization transactions have been very active, and they need to be guided by a law to avoid restrictive effects. Thirdly, as a market economy, China needs to establish a clear competition law framework so as to give business an open, transparent, and predictable expectation of the legal environment."

From his notes, it is clear that there are three goals that this law initially would achieve: (1) the promoting of a national common market by restraining cartel and the abuse of dominant positions. (2) Guiding merger and reorganizations. (3) The establishment of a competitive environment. These three goals are motivated by the growing private and foreign investments, which were dramatically increased during last twenty years, as well as the internal structure change of State-Owned Enterprises under the support of central and local governments.

The revised draft was submitted to the Standing Committee of the National People's Congress in 2006. In June 2006, Premier Minister Wen Jiabao chaired the State

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also Owen, B.M. Sun, S., Zheng, W.T. (2008) "China's Competition Policy Reforms: The Anti-monopoly Law and Beyond" 75 *Antitrust Law Journal*. Page 235

<sup>93</sup> Jared A Berry, Anti-Monopoly Law in China: A Socialist Market Economy Wrestles with Its Antitrust Regime

<sup>94</sup> Id, see also Zhang Yi, The Submitted Version of the Anti-monopoly Law has been formed.我国《反垄断法》送审稿已形成 available at Xinhua Net [http://news.xinhuanet.com/legal/2004-10/27/content\\_2146394.htm](http://news.xinhuanet.com/legal/2004-10/27/content_2146394.htm) (last visit April 22, 2012)

<sup>95</sup> Huang, Y.(2008) "Pursuing the Second Best: The History, Momentum and Remaining issues of China's Anti-Monopoly Law", 75 *Antitrust Law Journal*, 117

Council executive meeting, discussed and passed “Chinese Anti-Monopoly Law (draft)”. The draft was revised and further reviewed by the Standing Committee of the National People’s Congress in June 2007<sup>96</sup>. On August 30, 2007, twenty-ninth session of the Tenth National People’s Congress passed “The People’s Republic of China Anti-Monopoly Law” and this law took effect on August 1, 2008.

### **4.3 Tradeoff of different goals: Learning from the EU**

To gain knowledge from these countries, experts and officials from the US, Europe and Asia, Australia have been invited to China to participate in seminars and conferences, introducing the experience of drafting and practicing competition law. Suggestions and comments are also received from foreign government and organizations. It has been commonly concluded that this AML is more following the pattern of the EU, rather than the US Antitrust Law. There are several reasons.

The first reason is the multiple objectives of EU competition law, and more fairness based rather than pursuing the single goal of economic efficiency<sup>97</sup>. It has been commonly believed that protecting consumer welfare, promoting economic efficiency, facilitating market integration are all the goals of Competition Law. Similarly, The Anti-monopoly Law in China also takes social goals into consideration, such as safeguarding the socialist market economy and protecting public interest. In terms of restraining monopolistic conducts and facilitate market integration, both EU Competition Law and the Anti-monopoly Law in China share a comparable concern<sup>98</sup>. The second reason is the public enforcement of this law and the sanctions are relying on administrative fines. The enforcement of the US Antitrust laws is driven by incentives of private parties. As a civil law tradition country, China does not have a well-developed judicial review system.<sup>99</sup>

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<sup>96</sup> Owen, B.M. Sun, S., Zheng, W.T. (2008) “China’s Competition Policy Reforms: The Anti-monopoly Law and Beyond” 75 *Antitrust Law Journal*. Page 235

<sup>97</sup> Dan Wei, China’s Anti-Monopoly Law and Its Merger Enforcement: Convergence and Flexibility. *Journal of International Economic Law* 14(4), 807-844

<sup>98</sup> id

<sup>99</sup> Jung, Youngjin and Qian Hao, The New Economic Constitution in China: A Third Way for

These findings have shown that the implementation of the competition policy in China is more likely to follow the EU approach. The experience in the EU regarding making tradeoffs of multiple policy goals is more relevant than the Chicago School efficiency approach.

## **5 Concluding Remarks**

This paper discusses the goal of competition law from law and economics perspectives. The analysis starts from focusing on two economic welfare standards, namely, efficiency standard and consumer welfare standard, as the antitrust goals and explores the conflicts and tradeoffs between them. It further addresses the topic of balancing economic goals and non-economic goals, such as public interest and market integration, and compare the US and EU experiences in this aspect. By reviewing the competition policy in China before the Anti-monopoly Law, it can be concluded that competition law in China is also more likely to achieve multiple goals. It is therefore important for the enforcers in the antitrust agency to be inspired by the discussion of antitrust policy goal from economic theory and comparative law perspectives, and evaluate the potential tensions between these goals in their daily decisions.

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