WEAK POINTS OF COMPETITION LAW ENFORCEMENT IN THE FAR EAST

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Abstract: *Competition law recognizes two principal models of regulating the concentration of economic power, namely the American and European models. The American model prevailed, or rather was enforced, in the course of reception of the Western anti-monopoly law in the Far East. On the other hand, the European model was adopted in China – both the mainland and Taiwan – and in South Korea although elements of the other (American) model can be found in both countries. An answer to the question whether Western antimonopoly law and its interpretation have been successful in eradicating traditional Far Eastern vertical monopolies or horizontal structures determining the functioning of the economy seems to be reserved.*

Keywords: *antitrust law, China, Japan, South Korea, Taiwan*

British historian Niall Ferguson notes that European rulers were fortunately unable to proceed in the same way as Chinese emperors did: to cut their empires off from the outside world, to reduce trade and mobility of people and thoughts.[1] Such isolation not only of China, but also Japan, caused that both countries were ignorant of free competition which, as Ferguson argues, is one of the inventions brought in by the West. Such inventions were the basis of developments of Western civilization in the New Age and its later dominion over the rest of the globe, including the Far East. While "Western" law considered monopolies, cartels and mergers as factors resulting in concentration of economic power which opposes and prevents competition, Chinese and Japanese law regarded them as fully acceptable and supported them.

CONCENTRATION OF ECONOMIC POWER

The development of Chinese law clearly suggests that the concentration of economic power has been linked primarily with the role of the state in the management of economic relations particularly in those areas where state monopolies were established, such as the production of salt, silk, tea, porcelain, non-ferrous metals, etc. Similar monopolies were constituted also by British monarchs but there was a significant difference: as early as in 1602 the Royal Court, in Case of Monopolies,[2] concluded that monopolies had been detrimental to both individuals and the society as a whole. However, the decision did not reach the border of isolated China, where, even if it had, such conclusion would hardly

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[1] FERGUSON, N. *Civilization – The Six Killer Apps of Western Power.* London: Penguin Books, 2012.

[2] [1572] EngR 398, (1572–1611) 11 Co Rep 84.

have been accepted. As a result, the influence of the state upon the concentration of economic power continued during both the Republic established in 1912 and under Chiang Kai-shek's rule as from 1927. In mainland China and subsequently in Thaiwan there have been numerous monopolies directed and managed by the state. The role of the state in economic management in the People's Republic of China (PRC) has been well-known. The Chinese concentration of economic power was rather of a vertical nature in which sense it resembled the grounds leading in Europe to the regulation of monopolies as acts against free economic competition, in this particular case namely monopolies controlled by the state.

Chinese law has traditionally been based upon the management of trade by state officers. In Japan, historically governed not by officers but soldiers, samurais did not understand the principles of trade; as a result they left trade associations to regulate themselves.[3] In that respect, the Japanese basis for the concentration of economic power resembles that of the USA. The *laissez-faire* policy maintained by Tokugawa shogunate regarding the development of economic structures resulted in enormous concentration of economic power at the horizontal level in the same way as could be seen in the USA in the 19th century. However, there was no John Sherman in Japan, who said in his speech delivered in U.S. Congress in 1890: "If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life."[4] Japanese horizontal conglomerates *zaibatsu* were not in conflict with the legal reform Meiji; under the military government it was even supported by the Act providing for the general national mobilisation of 1941. Conglomerates were abolished by the Americans in 1945.

MODELS OF ANTI-MONOPOLY LEGISLATION

After 1945 the USA imposed upon Japan the American antitrust law. Some other countries in the Far East were compelled to adopt antitrust laws particularly as a result of their membership in international organizations. The Constitution of South Korea of 1948 designated its economy as market and capitalist economy. A comparison with North Korea can be considered but is not relevant in this context. Administrative management in South Korea resembled the Japanese or Taiwanese model, i.e. a model based upon capitalist principles. As did Japan, South Korea focused particularly on the restoration of the economy distorted by the War. Moreover, South Korea was trying to diminish its dependence on import. That was why the authoritative administration supported small and middle-sized businesses and managed and controlled large enterprises. The South Korean Constitution of 1987 stipulates that the economy of the country is built upon capitalism and market economy. Undoubtedly under the influence of German understanding of the issue, the interpretation of such provision has come to mean that South Korean economy is social market economy. However, the reality of social market

[3] TOMÁŠEK, M. *Právní systémy Dálného východu sv. I.* Praha: Karolinum, 2016.
[4] John Sherman. In: *AZ Quotes* [online]. [2017]. Available at: <http://www.azquotes.com/quote/891728>.

economy in Germany is rather different from the South Korean reality in consideration of many specific economic and legal features of South Korea.[5]

Competition law recognizes two principal models of regulating the concentration of economic power, namely the American and European models. The latter model – today's competition law of the European Union, commenced its development after the so-called "great depression" initially sparked by the collapse of the Vienna Stock Exchange in 1873. A response to the panic was control of cartels by the state administration in order to stabilise the economy and suppress potential negative impacts, in particular manipulation with price and supplies.[6] The main motif for the American model and the adoption of Sherman's Antitrust Act 1890 was so-called "consumer welfare" although some claim that the interests of small and middle-sized businesses and farmers were in fact the main drive in this respect. The main impetus to adopt anti-monopoly laws in individual countries of the Far East was willingness to satisfy the pressure from outside although official declarations emphasized the protection of consumers. However, the pressure from outside against East Asian countries was not primarily aimed at the welfare of their consumers; it was directed to destruct Far Eastern monopolies which had been formed and existed for centuries. Gradually, anti-monopoly laws were passed in Japan (1947), South Korea (1980), Taiwan (1991) and the People's Republic of China (2007). The American model prevailed, or rather was enforced, in the course of reception of the Western anti-monopoly law in the Far East. On the other hand, the European model was adopted in China – both the mainland and Taiwan – and in South Korea although elements of the other (American) model can be found in both countries.

What is typical of the American model is prohibiting cartels and monopolization. The model not only bans monopolization but it considers as unlawful all unfair practices intended to acquire a monopoly position even if just attempted. On the other hand, the American model is not directed against monopolies established in a natural manner, such as those created as a result of inventions and skills of entrepreneurs. Sherman's and other antitrust laws deal with the elements of anti-competition activities in rather vague terms adding that courts are to identify details of such conduct.[7] The general legal difference applies also in this area, namely that American judges make the law whilst European judges are to find the law. After WWII the American occupation authorities compelled the Japanese government to adopt antitrust laws; as a result, a law prohibiting private monopolies and regulating fair market conditions was passed in 1947. It should be noted that Americans attempted to enforce in Japan even those principles of antitrust law which had turned out to be unsuccessful in the USA, such as the ban on business corporations to hold shares of other business corporations. Since the bare idea of regulating the concentration of economic power was absolutely foreign to the mentality of Japanese people, the law did not work properly. The law was mitigated as early as in 1953, i.e. shortly after the formal termination of the American occupation, and many exceptions were

[5] KOREA LEGISLATION RESEARCH INSTITUTE. *Introduction to Korean Law.* Heidelberg: Springer, 2013.
[6] ŠMEJKAL, V. *Soutěžní politika a právo Evropské unie 1950–2015.* Praha: Leges, 2015.
[7] SHENEFIELD, J. H., STELZER, I. M. *The Antitrust Laws.* Washington, D. C.: AEI Press, 2001.

allowed in 1955. In fact, the law failed to operate in its full scope until the end of the last century. The situation improved after the reform of the law in 2005.[8]

Unlike the American one, the European model, i.e. today's competition law of the European Union, does not prohibit monopolies – i.e. a dominant position as designated today. It prohibits its abuse. The second substantial difference is in defining the elements of anti-competitive conduct including cartels, or the abuse of a dominant position within the framework of Union primary law. Their clarification is expected to be provided by secondary legislation and by Union courts through their interpretation.[9] The European model was first applied in South Korea. The Korean Act on the regulation of monopolies and fair trade conditions was adopted on 31 December 1980 with effect as of 1 January 1981. The title of the law might suggest that it was a copy of the Japanese antitrust law. However, despite some inspiration by American antitrust law, it was influenced primarily by the European model. The South Korean Act has been amended many times; for example, there were about 40 amendments passed between 1986 and 2010. This may suggest a certain degree of instability of South Korean antitrust law as well as difficulties in its enforcement.[10] Taiwan adopted the law on fair trade on 4 February 1991 and it was built upon the combination of principles of both the American and European models. The law defines unilateral anti-competitive acts in line with the European model, but takes the American position regarding the prevention of monopolies. A dominant position as such is not prohibited, but its abuse is forbidden.[11] The People's Republic of China adopted its antitrust law as a result of its obligations linked to membership in the World Trade Organization (WTO) of which China became a member in 2001. In 2007, the Antitrust Act was passed with effect as of 1 August 2008; its main aim was to fulfil the principles of "socialist market economy" and to discharge the obligations resulting from China's membership in WTO. The basis for this statute was EU law rather than American law since both EU law and Chinese law stem from the continental legal tradition. It should be admitted that some elements of American law can be traced as well as some elements of Japanese law. It was necessary to consider the specificity of the Chinese business environment where a system of state enterprises with state control and management still prevails.[12]

METHODS OF ENFORCEMENT

The described differences between substantive law within the American and European antimonopoly models are coupled with highly significant differences in procedural law. Simply said, the American model relies primarily on courts in the enforcement of antitrust rules, whilst administrative procedures prevail within the European model. More than 90 % of all actions regarding anti-competitive behavior are filed by competitors and

[8] ODA, H. *Japanese Law.* Oxford: Oxford University Press, 2009.
[9] TOMÁŠEK, M., TÝČ, V. a kol. *Právo Evropské unie.* 2nd edition. Praha: Leges 2017.
[10] KOREA LEGISLATION RESEARCH INSTITUTE. *Introduction to Korean Law.* Heidelberg: Springer, 2013.
[11] LUO, C. *The Legal Culture and Legal System of Taiwan.* Alphen aan den Rijn: Kluwer, 2006.
[12] WANG, X. *The Evolution of China's Antimonopoly Law.* Cheltenham: Edwars Elgar, 2014.

consumers. The Federal Trade Commission or the antitrust division of the Department of Justice may deliver cease and desist orders; in addition, the Department of Justice may bring even criminal actions in antitrust cases. The European system prefers the method of public-law enforcement with a possibility of subsequent judicial review. This aspect of the European model is vital in all countries in the Far East namely because these countries have adopted the continental system of justice, and so the American model of enforcement would be rather incongruous. Thus, the system of American substantive antitrust law enforced through procedural law of a European type operates with no substantial problems even in Japan. In 1947, the Fair Trade Commission was established as part of the Government; however, under the law it is independent of the Executive. The Commission holds quasi-legislative and quasi-judicial powers. It may, within its quasi-legislative powers, issue not only decisions addressed to individual parties, but also normative legal acts primarily defining which acts or conduct are against free competition.[13]

The European concept of an independent body supervising economic competition was naturally linked with a possibility to appeal its decisions before independent courts. The Japanese Fair Trade Commission took over some elements of the cease and desist orders approach since it discharges a quasi-judicial function in first instance decision making regarding concrete conduct against free competition. Decisions are made at the end of "contentious" procedure and appeals against such decisions may be lodged with a second-instance court, namely the High Court in Tokyo. The same model was accepted by South Korea in 1981 and the appellate instance is the High Court in Seoul. The procedure may end up in both countries before the respective Supreme Court. As a result, there has been voluminous case law of the highest courts in competition matters in both countries. For example, a decision of the South Korean Supreme Court from 2003 determines that measures taken by the Fair Trade Commission not only cancel acts of particular parties to proceedings, but forbid all other persons in the market to carry out similar practices.[14] The Commission for Fair Trade was established in Taiwan in 1992; however, it became fully independent of the Executive Yuan as late as in 2012. For a long time, it was only possible to apply for administrative review of its decision. A possibility to lodge an appeal against its decisions with a court was instituted in 2015.

In the People's Republic of China, the establishment of an independent Fair Trade Commission is envisaged by antitrust law; however, the State Council entrusted the following three bodies with controlling powers: the National Commission for the Development and Reform, the State Authority for Industry and Trade, and the Ministry of Trade. The first two bodies focus on penalizing agreements disruptive of free competition and abusing a dominant position. The Ministry of Trade focuses on issues regarding international trade. The Fair Trade Commission exists in China but its activities are reduced to consultative and coordinating activities. The overall fragmentation of control over economic competition in the People's Republic of China has been a result of disunity

[13] RÖHL, W. (ed.). *History of law in Japan since 1868*. Leiden/Boston: Brill, 2005.
[14] Supreme Court Decision 2001Du5347, February 20, 2003.

of opinions in this area within the state and political bodies; it may be also seen as a consequence of the strong position of the state socialist sector of the Chinese economy, where competition issues have been under the control of the National Commission for the Development and Reform. Bodies in charge of enforcement of competition law in China are part of state administration and are far from being independent. Their decisions may be subject to administrative review with just a theoretical chance that the legality of an administrative decision would be subject to review by people's courts.[15]

It should be noted that an appeal against decisions of antimonopoly bodies is one issue; the other is a private action brought before court for compensation of damage caused by conduct violating free competition. Such action may be filed in all countries in the Far East. A procedure before the Fair Trade Commission may be launched by any party believing that harm was caused to him or her by the competitor, and may seek damages. Japanese, South Korean and Taiwanese law, in the spirit of Far Eastern legal traditions, provides a possibility of resolving the matter before conciliation commissions for fair trade. The possibility of seeking damages due to anti-competitive conduct exists in the People's Republic of China, but the role of people's courts in interpreting antitrust law has just been instituted. An interpretive opinion of the Supreme People's Court of China of 18 February 2011 not only confirmed the liability of businesses for damage caused as a result of acts violating free competition, but also defined the scope of causes of action in such cases.[16] They include agreements breaching competition, agreements regarding prices, unreasonably low prices, refusing supplies, exclusive sales, tied sales or mergers of businesses. Actions for damages should be dealt with in regular civil proceedings independent of ongoing procedure before an administrative body which may consider the respective acts violating competition. The biggest issue in such civil claims in the People's Republic of China is to carry the burden of proof under circumstances when the conduct allegedly breaching the competition is described in extremely vague terms in both legislation and case law.

IMPACT UPON COMPETITORS

One of the prerequisites for antitrust legislation to be effective is to define recipients to whom the law should be addressed so that a minimum number of entities might escape the regulation. Primarily, the concept of an "enterprise" (or an "undertaking") should be determined. The law of the European Union applies the definition formulated by the European Court of Justice in 1991 in Höfner case, namely that an undertaking encompasses every entity engaged in economic activity regardless of the legal status of the entity and the way in which it is financed.[17] However, the case law of Union courts suggests that such extensive definition has been subsequently revised in the sense that certain legal forms (e.g. a public enterprise) in which the respective economic entity

[15] ZHANG, A. H. The Enforcement of Antimonopoly Law in China: An Institutional Design Perspective. *Antitrust Bulletin*. 2011, Vol. 56, No. 3.
[16] 人民法院报, 2011, 02, 18.
[17] Decision of the European Court of Justice, Höfner, C-41/90.

operates on the market, and possibly its mode of funding, have been excluded from the essential definition of an undertaking.

The Japanese Antitrust Act defines an enterprise as a natural or juridical person carrying out business activities in the area of commerce, industry and finance. The definition covers agencies of the central and local government if they are engaged in those three fields. A similar definition is contained in the Antimonopoly Act in the People's Republic of China, namely "natural persons, juridical persons and other organizations engaged in manufacturing or selling products or supplying services." The Chinese Antimonopoly Act excludes certain specific entities from that definition and subordinates them under specific regulation, for example agricultural enterprises. Although the definition of an enterprise in the Antimonopoly Act appears to be sufficiently systematic and clear, there have been certain interpretive issues dealt with by the Supreme People's Court. For example, in its interpretation opinion from 2012 the Court stated that a so-called "association of enterprises" was responsible for complying with the Antimonopoly Act.[18] The interpretation of the Antimonopoly Act has not distinguished yet between enterprises carrying out economic activities and those based upon the principle of solidarity, which means a certain disadvantage for the latter.

The impact of antitrust legislation on commercial associations plays a significant role in the Far East, especially in Japan, although not that much in China where such associations were historically quite rare. The Japanese Antitrust Act applies to business associations and federations representing common interests of entrepreneurs. The concept of interest groups of entrepreneurs has had a long tradition in Japanese society and Japanese law. As early as under Tokugawa shogunate there were such associations called *"kabunakama"* to maintain the relations between trade and samurais.[19] More recently, associations called *"tósei-kai"* were successful under the military government which supported their development after 1940.[20] Today associations and federations are to seek links between government and business, to contribute to the exchange of information among the membership and to arrange for out-of-court settlement and conciliation of controversies. However, there were many cases of practices against free competition which culminated in the Petroleum Cartel case in 1984, which concerned the making of cartel agreements within the Japanese Association of Petroleum Industry. Having relied on the decision in this case, the Fair Trade Commission more precisely defined the elements of anti-competitive activities within such associations.[21] The exchange of information is not considered as anti-competitive activity; what is, for example, is the restriction of the participation of some members in free competition, compelling entrepreneurs to engage in anti-competitive activities, and/or open or hidden support of such activities. A similar approach can be found in South Korea.

The conception of a special position of state enterprises persists, as a result of the Chinese tradition of state influence upon trade and business, also with respect to

[18] 人民法院报, 2012, 05, 03.
[19] TOMÁŠEK, M. *Právní systémy Dálného východu sv. I.* Praha: Karolinum, 2016.
[20] RÖHL, W. (ed.). *History of law in Japan since 1868.* Leiden/Boston: Brill, 2005.
[21] Tokyo High Court Decision, Petroleum Cartel Case, 26 September 1980. *Kōkeishū* 33-5-359.

antimonopoly law; this applies primarily to the People's Republic of China where economic sectors directly managed and controlled by the state have been very strong. Chinese antimonopoly law (like European antimonopoly law) recognizes a special position of enterprises owned by the state which may enjoy special treatment due to their significance within the economy. The framework of their control is defined in Article 7 of the Antimonopoly Act in the way that the state provides protection to such enterprises. However, the interpretation of such regime differs; whilst the interpretation by Union Institutions focuses on economic impacts on competition, the Chinese interpretation encompasses the referential principles of socialist market economy in combination with public interests, but in the absence of a proper economic analysis. It should be noted that such approach slightly improved at the end of the 2010s but the principle of socialist market economy penetrating the whole Chinese Antimonopoly Act allows for its very flexible application and interpretation when desirable and necessary for the pragmatic interests of the PRC. State enterprises enjoy extraordinary advantages in Taiwan as well; they were excluded from the applicability of the Act until 1996. After that the Act introduced many exceptions to be approved by the Executive Yuan to last for a maximum of five years. Such exceptions have been rather common in practice; in addition, the Fair Trade Commission has been quite supportive in its interpretation of maintaining a special position of state enterprises.

DOMINANCE AND MONOPOLIZATION

The indicated sceptical perspective of the application and interpretation of antimonopoly laws should not be understood as an opinion that the laws are not functioning at all in the Far East. The practice shows that concrete anti-competitive acts may be penalized. Let us compare the functioning of two models, namely the American model in Japan and the European model in China. The Antitrust Act in Japan rather precisely defines circumstances under which preventive mechanisms should be set in motion in order to prevent prohibited monopolization. Statutory provisions are complemented by the interpretive opinions of the Fair Trade Commission as well as courts deciding on appeals, including the Supreme Court. Like in the USA, the interpretive practice uses the concept of so-called *"dangerous probability"*.[22] It is applied to situations when a competitor has not reached a dominant position yet but his or her conduct suggests this would happen. Attaining excessive economic power is among such activities of competitors which indicate a dangerous probability that they would reach a monopoly position. This is one of the reasons why the Antitrust Act restricts the possibility for both Japanese companies and foreign companies carrying out business in Japan, to hold a certain portion of shares of other entities. The threshold is determined by interpretive opinions of the Fair Trade Commission. The Antitrust Act also prohibits associations of small and middle-sized businesses to control a particular segment of the market thus preventing free competition. Interpretation of anti-competitive activities focuses on the

[22] SHENEFIELD, J. H., STELZER, I. M. *The Antitrust Laws*. Washington, D. C.: AEI Press, 2001.

structure of the market rather than on the activities of competitors. The method of economic analysis used is the one that has been applied in the USA for a long time. Every case is individually assessed with positive consequences and negative impacts identified regarding market activity; should positive results be indicated activities in the market may be considered as permitted although formally they might meet the elements of anti-competitive conduct.[23]

The concept of a relevant market is the focus of every evaluation of activities with potential impact upon competition. Therefore, its definition is extremely important in both the law of the European Union and Chinese law. The Fair Trade Commission of the State Council of PRC has defined the concept of a relevant market as a territory within which enterprises are located, and the goods they deal with, occurring in a competitive context with respect to the sale of the goods and rendition of services during a certain period of time.[24] Similarly to the case law of the Court of Justice of the European Union, the interpretive practice of antimonopoly authorities in PRC has worked with categories of a relevant market regarding products, geographic location and applicable time. Similarly to the Chiquita judgment of the ECJ 1978,[25] Chinese antimonopoly authorities evaluate interchangeability of products and their fitness to be replaced by another product with the same features. Japanese law also uses the concept of a relevant market designating it as a "special area of market". It is defined either by products (such as in the above Petroleum Cartel Case) or territorially. For example, the Fair Trade Commission, in Strech Film cartel case 1992, determined Tokyo to be the special area of film theatres market.[26]

BILATERAL AND MULTILATERAL ACTS AGAINST FREE COMPETITION

Antitrust law in China, Japan and South Korea distinguishes between bilateral and multilateral anti-competitive acts (such as cartels as a result of an anti-competitive agreement, mergers with an anti-competitive impact) on the one hand, and unilateral practices against free competition (abusing significant market power, abusing market dominance and monopolization) on the other. Unlike the American preventive approach where the framework of elements of anti-competitive conduct is determined by courts, European Union law is built upon individual definitions of various types of such conduct violating free competition stipulated by law. The People's Republic of China uses an approach based on the Union approach, but with some modifications. Union law considers as anti-competitive conduct all agreements meeting the general definition, namely conduct aimed at restricting or violating economic competition; Chinese law, in Art. 13 of the Antimonopoly Act, provides for a full list of such agreements. Both approaches allow for quite flexible interpretation, with the European

[23] ODA, H. *Japanese Law.* Oxford: Oxford University Press, 2009.
[24] Fair Trade Commission Decision, May 29, 2009.
[25] Decision of the European Court of Justice, United Brands Company and United Brands Continental BD v. Commission, 27/76.
[26] Recommendation Decision of the FTC, 8 January 1992, Strech Film cartel case, *Shinketsushū* 38-150.

approach being more extensively regulated. In China, it is the discretion of a state authority to qualify particular conduct as a particular type of agreements stipulated by law. Although decision-making of relevant Chinese authorities focuses on agreements whose impact upon free competition does not seem to be negligible, they could not be assumed to apply the doctrine *de minimis* in a way reflecting that in the EU. Explicitly defining the doctrine *de minimis* in Chinese law would in fact mean that the interpretive and enforcement potential of Chinese authorities would be restricted and their discretion weakened.[27]

The Japanese Antitrust Act considers as anti-competitive conduct all concerted acts leading to the restriction of market opportunities for other competitors, to fixing or reducing prices and/or restricting production, technologies and services for consumers. As with American or European law, Japanese law determines the concept of concerted conduct rather extensively, particularly considering their express or implied nature. Both the Fair Trade Commission and the High Court in Tokyo have dealt with the interpretation of the concept of implied conduct several times. In 1995, the Court decided that "notification of intention" in the course of determining price need not be an express term binding upon parties.[28] In order to accomplish elements of unlawful cartel, it suffices that parties were aware of the intention of another competitor to increase a price, or they could have envisaged it, and they acted in the same or similar way. The Fair Trade Commission in its interpretation considers secret agreements among participants in competitive bidding (*bid-rigging*) as cartel agreements. The concept of *bid-rigging* was introduced in Japanese law in 2005 when interpreted in relation to the public competitive bidding procedure regarding the construction of bridges for Japanese railways, where 45 companies took part in bid-rigging. The whole issue resulted in criminal prosecution of managers of participating companies and the management of the railway company.

In Japan, state-owned enterprises are not exempted from the applicability of the Antitrust Act; however, practice indicates their special position regarding the application of competition rules. Elements of the planned management of Japanese economy, which was the responsibility of the Ministry of Foreign Trade and Industry and its Agency for Economic Planning until 1971, resulted particularly in cartel-like conduct in determining the volume of production and setting prices. The Fair Trade Commission kept the position for a long time that administrative management by itself may not legitimize cartel. The discrepancy between administrative management and the independent position of the Fair Trade Commission was challenged in the Petroleum Cartel case in 1973. The Association of Petroleum Industry with 24 petroleum companies under the lead of the Ministry of Industry and Trade set volumes of refining crude oil. The Fair Trade Commission instituted proceedings for the violation of competition and imposed penalties upon the members of the Association of Petroleum Industry. The

[27] ECHO, H. B. The Definition of Relevant Market: Comparative Analysis and Practice in China. *Hong Kong Journal of Legal Studies*. 2013, Vol. 7.

[28] Judgment of the Tokyo High Court, 21 September 1995, *Hanta* 906-136.

High Court in Tokyo as an appellate court decided that the conduct of the Association of Petroleum Industry had been in violation of antitrust laws; however, the conduct could not be penalized as the Association acted in good faith and in compliance with instructions of the Ministry. The Court concluded that the Ministry had exceeded its powers in that case. In a similar case when the Ministry of Foreign Trade and Industry, in concert with the Association of Petroleum Industry, set the price of crude oil the Supreme Court decided in 1984 that administrative management which had no direct basis in legislation would be justified only if carried out in a reasonable and socially acceptable extent and not in contravention of the main purpose of the Antitrust Act.[29] A price cartel in such case cannot be considered unlawful if it is the result of administrative management imposed by law.

Both American and European competition law assume that acquiring decisive influence of one enterprise over another can result in endangering competition in the respective market segment. The same approach is behind the Japanese Antitrust Act and its interpretation. In 1969 the Fair Trade Commission forbade the merger of two large steel corporations, Yawata and Fuji, on the grounds that such a merged enterprise would acquire the dominant position which was prohibited by Japanese law following US law. Both corporations lodged an appeal with the High Court in Tokyo which affirmed the decision of the Fair Trade Commission. Further debates with the Commission followed and the Commission subsequently approved the merger under the condition that the newly constituted corporation would transfer part of its manufacturing capacity to other entities in order to establish another "efficient competitor" in the market.[30] The doctrine of "efficient competitor" was applied by the Fair Trade Commission in its decision making several times. The most significant case was in 2003 when the Commission on the same grounds as in the Yawata/Fuji case approved the merger of the first and third largest of the country's air carriers, namely Japan Airlines and Japan Air System. Since 1998 the Fair Trade Commission has been responsible for decision in mergers of Japanese and foreign corporations. The People's Republic of China has not adopted the Union regulation of mergers of enterprises as a whole but it may be assumed that a common criterion for evaluating the scope and extent of potential anti-competitive conduct is the factor of direct or indirect control. Both systems connect this factor with attaining prevailing influence of one enterprise over another.[31]

Acquiring a minority share may be considered concentration of an enterprise in both the EU and PRC. Chinese legal regulation appears to be stricter than that in the EU as far as the concentration of common enterprises is concerned. Turn-over is an important criterion for evaluation. Both legal regulations link turn-over with the duty to notify rather than with a relevant market share or position. Although the Chinese and Union conceptions of evaluating mergers and concentrations of enterprises are essentially identical, there is a significant difference in the sources of their respective regulation.

[29] Judgement of the Supreme Court, 24 February 1984, *Keishū* 38-4-1287.
[30] Consent Decision of the Fair Trade Commission, 30 October 1969 Yawata/Fuji steel case, *Shinketsugshū* 16-46.
[31] HAMP-LYONS, C. The Red Dragon in the Room: China's Anti-Monopoly Law and International Merger Review. *Vanderbilt Law Review*. 2009, Vol. 62, No. 5.

European law relies on extensive case law of its courts in addition to sources of secondary Union law. This does not apply yet to the Chinese legal culture. There is a certain decision making practice of state authorities; however, judicial interpretation in this and other parts of Chinese competition law is yet to develop.[32]

UNILATERAL ACTS AGAINST FREE COMPETITION

The Japanese Antitrust Act stipulates the elements of abusing significant market power encompassing unfair business practices and unfair prices, discrimination against other competitors, undertaking business under restrictive circumstances, etc. Penalty is considered rather as an instrument for the protection of consumers. Abusing significant market power is understood as compelling business partners to carry out disadvantageous transactions or to accept inconvenient business terms. There must be inequality with regard to usual business circumstances along with abuse of a dominant market position. For example in 1982, the Fair Trade Commission determined that the prestigious department store Mitsukoshi had abused its significant market power because the store had forced its suppliers to accept other goods under unfair circumstances, to compete for business space and to pay for the reconstruction of the department store.[33] In 1977, the Supreme Court decided that the bank Gifu had abused its significant market power because it had agreed to provide a loan only if the applicant had borrowed more money than needed and the balance would have been deposited in the bank as a source of unfair interest generated for the benefit of the bank.[34] Such activities strongly resemble usurious practices of banks in the time of shogunate.

The doctrine of so-called *"essential facilities*" is a specific form of a potential abuse of significant market power. Its application in Japan was allowed by the amendment of the Antitrust Act from 2005. This means a situation when a competitor keeps exclusive control over an economic resource which could not be duplicated but would be needed by other competitors in order to take part in bidding. In addition to standard facilities of this sort, such as electric and gas networks or water mains, these may include facilities that are unique in a respective region, for example a ski resort or funeral hall. Owners of such facility may be in a dominant position but they are obliged to do business with everyone until the capacity has been exhausted. In 2004, the Supreme Court of the United States, where the doctrine of essential facilities had been in fact conceived, significantly restricted the interpretation of the doctrine in favor of owners of essential facilities in the case Verizon v. Trinko.[35] The Japanese Fair Trade Commission warns public and private owners of essential facilities against potential exclusion of other competitors from the market, but it takes no further steps.

The law of the People's Republic of China defines a dominant position regarding activities in the market irrespective of other competitors; however, unlike European law,

[32] GUILLAUMOND, R., JIANPING, L., BIN, L. *Droit chinois des affaires*. Paris: Larcier, 2013.
[33] Consent Decision of the Fair Trade Commission, 17 June 1982, Mitsukoshi Department Store case, *Shinketsugshū*, 29-31.
[34] Judgement of the Supreme Court, Gifu Credit Bank case, *Minshū*, 31-4-449.
[35] 540 U.S. 398 (2004).

it does not consider consumers. As in the EU, the scope of market share in the respective market is relevant in China. However, the EU takes the market share only as the starting point for considering dominance, whilst it plays a decisive role in PRC.[36] Both systems take the same approach as far as the assessment of the financial position of an enterprise, or access to funds as an important factor for determining dominance, is concerned. There is no general definition of elements in abusing dominance in the market either in EU law or in China; both systems rather use demonstrative lists of such activities. In China, such list is provided by the Antimonopoly Act itself along with its judicial interpretation, such as the judgment of the High People's Court in Beijing in the Baidu case from 2009.[37] It particularly means buying and selling for unreasonably high or low prices, under-priced sale, refusing supplies, compelling to make exclusive contracts, unfair business terms, using varying prices, etc.

EVADING ANTIMONOPOLY LEGISLATION

The Japanese Antitrust Act defines anti-competitive activities from the perspective of the US Sherman Antitrust Act, namely the prohibition of monopolization. Monopolization is defined by the Japanese Act as a business activity by which an entrepreneur – individually or in concert with another entrepreneur – excludes or controls business activities of another entrepreneur thereby restricting in a particular market segment free competition in the public interest. Excluding business activities of another entrepreneur was interpreted by the Fair Trade Commission in Snow Brand Dairy case in 1956 as an act hampering a competitor to enter the market or to continue its business there.[38] The concept of controlling business activities of another was explained by the Commission in Tōyō-Seikan case in 1972 as depriving another entrepreneur of possibility to freely decide regarding his or her business.[39] Despite the clear definition Japan does not frequently apply the prohibition of monopolization often to either private entities or entities under state control; there are on average one or two cases a year. Following the American model, intent must be proven in order to show that a dominant position is to be, or has been, reached. Japanese anti-competition authorities have not been very successful in such proving, or they might not have tried their best to do so.

It is undoubtedly true that horizontal conglomerates built upon personal and family relations have been escaping from the interpretation of antitrust legislation in Japan and South Korea. If considered from the perspective of "Western" competition law such conglomerates stand in between cartels and monopolies, or more precisely, they share some features of both. Americans, through administrative interventions, successfully removed Japanese *zaibatsu* groups; however, they did not suppress traditional Japanese understanding of the intertwining of government and business, personal and family

[36] ZHOU, Y. China's Anti-Monopoly Law: Insights from U.S. and EU Precedents on Abuse of Dominance and IP Exemptions Provisions. *Hastings International and Comparative Law Review.* 2009, Vol. 32, No. 2.
[37] 人民法院报, 2009,12,18.
[38] Hearing Decision of the FTC, 28 July 1956, Snow Brand Dairy, *Shinketsugshū* 8-12.
[39] Recommendation Decision of the FTC, 18 September 1972, *Shinketsugshū* 19-97.

ties among businesses or life-long loyalty to one's employer. The influence of such Japanese traditions resulted in that former *zaibatsu* was replaced by a newer type of similar entities designated as *keiretsu*. These are groups of firmly interlinked enterprises undertaking business among each other. Historically, such format is traditional in Japanese family businesses. Their scope was later expanded but the internal cohesion has persisted. What is typical of *keiretsu* are mutual shares for the purposes of business cooperation, stabilization of production and corporate management. The factor of personnel is of primary importance, which is in opposition to both the American and European models where the property of an entity plays a crucial role. *Keiretsu* exist in various forms. One is a chain of suppliers and purchasers, primarily within the automotive industry. Such chains function upon established business contacts in a way resembling that of *kaisha* in Tokugawa shogunate, which formed vertical distribution networks and a horizontal system of sister companies.[40] Today, suppliers of automotive parts are mainly small and middle-sized businesses in which their client – the purchaser of parts – holds a property interest and/or includes its own people in their management. Precise functioning of supplier-client relations may be an advantage of such system; a disadvantage is that it is impossible for outsiders to become part of the system. Such complaints are heard primarily from American corporations. Japanese antitrust law has been quite loyal regarding such practices, as if there was no interest in standing up for foreign entities in the market. Japanese authorities react only if interests of Japanese consumers may be affected, such as in the case of suppliers of home appliances where *keiretsu* had attempted to block the supplies for newly established discount shops.

Six large *keiretsu* groups were essentially built upon former *zaibatsu* groups. As in the past, such group have their own bank, several business corporations in different fields of industry and are interconnected by mutual shares and ties to management structures. Between 1989 and 1990 Japan was facing strong criticism from the USA claiming that such *keiretsu* violate antitrust legislation and primarily that they bar access of American corporations to the Japanese market. The Japanese Fair Trade Commission concluded that the volume of mutual shares did not exceed 20 % and that most shares were owned by outsiders. As a result, there was no risk of monopolization identified by the Commission interpreting Japanese antitrust legislation. The Japanese Fair Trade Commission maintains its interpretation that the system of *keiretsu* is not in violation of free competition. The Commission argues that the economic rationale of the system consists of its efficiency and quality; building and maintaining long-lasting business ties established upon choice according to price, quality and level of services does not contravene the Antitrust Act.[41] It should be noted that, however susceptible to respecting traditional Japanese practices the interpretation of the Japanese Antitrust Act might be, the Act does not penalize the formation of personal ties. And personal ties are what *keiretsu* are built upon.

[40] TOMÁŠEK, M. *Právní systémy Dálného východu sv. I.* Praha: Karolinum, 2016.
[41] MIYASHITA, K., RUSSEL, D. *Inside Japan's Keiretsu.* Tokyo, 1996.

An escape of traditional forms of Far Eastern business cooperation from modern anti-monopoly laws can be traced not only in Japan but also in South Korea. After WWII, when Japanese businesses were taken back, many Korean entrepreneurs used the situation and established business and financial conglomerates named *chaebols*. A linguistic analysis shows that the designation is composed of two parts *chae* – wealth, and *bol* – clan. The transcription of the word in Chinese – 財閥 – is the same as the transcription of the Japanese *zaibatsu*: *cai* – wealth, and *fa* – powerful family. However, the Japanese term *keiretsu* has a different linguistic meaning. Signs 系列 – the first sign *kei* in Japanese and *xi* in Chinese means "system"; the second sign is *retsu* in Japanese and *lie* in Chinese and means a succession. *Chaebols* are successors of Japanese conglomerates which were formed in South Korea at the same time when Americans were abolishing them in Japan. The position of *chaebols* strengthened under the authoritarian governments; as a result, their influence was extremely extensive in the beginning of democratization of South Korea as they controlled about two thirds of the South Korean economy.

Eleven *chaebols* collapsed during the great East Asian crisis of 1997–1999 but in the 2010s there are still 30 *chaebols*, including Hyundai and Samsung, having control over half of the South Korean economy. It is beyond any doubt that *chaebols* are considered by Western competition law as monopolies and that the South Korean government is being compelled by international institutions, such as and primarily the International Monetary Fund, to at least regulate such entities if not fully remove them from the market. The Antimonopoly Act appears not to be very efficient as it does not forbid the existence of a dominant position and is incapable, within the prohibition of its abuse, of penalizing personal and family ties in such conglomerates. Family clans, for example, can have control over corporations through another private corporation standing outside the whole pyramid. One example can illustrate the situation: the pyramid of Samsung corporation was controlled and managed by a private corporation, Samsung Everland, governed by the son of the President of Samsung. The Antimonopoly Act considers *chaebols* as a large business group and tries to restrict some practices, such as mutually holding shares, mutually guaranteeing loans, etc. Originally, the Act forbade the formation of holding companies; however, in 1999 the ban was lifted on the grounds that it was necessary to implement economic restructuration.[42] If the application of the South Korean Antimonopoly Act is assumed to function, it applies just to half of the South Korean economy. The impact of the interpretation of the Act (i.e. restricting the power of conglomerates) upon the second half – managed by *chaebols* – takes effect very slowly.

Assessing the scope and extent of the Far Eastern interpretation of accepted Western law, it may be reasonably assumed that antimonopoly law has been interpreted primarily by traditional interpretive methods. In China and Taiwan the respect to traditions of administrative business management prevails, whilst in Japan and South Korea, the respect is paid to Tokugawaian practices centred on personal and family ties.

[42] KOREA LEGISLATION RESEARCH INSTITUTE. *Introduction to Korean Law.* Heidelberg: Springer, 2013.

An answer to the question whether Western antimonopoly law and its interpretation have been successful in eradicating traditional Far Eastern vertical monopolies or horizontal structures determining the functioning of the economy, seems to be reserved. Both vertical monopolies and horizontal conglomerates escape from the scope of statutory interpretation. Logically, the remaining entities are subject to the interpretation of antimonopoly legislation, which appears to be more efficient. It is evident primarily in situations where the interests of consumers – potential voters – are concerned. This aspect is of marginal relevance in China but one may hope that it will play some role one day.