3rd ANNUAL CONFERENCE CUPL/UNCTAD
中国政法大学/联合国贸发会第三届年会

Frontier Issues in China's Competition Policy and AML Enforcement
-At the Tenth Anniversary of the Implementation of the AML
中国竞争政策及反垄断执法前沿问题——反垄断法实施十周年纪念

20-21 SEPTEMBER 2018, Beijing
2018 年 9 月 20 日-21 日，北京

3rd ANNUAL CONFERENCE CUPL/UNCTAD

中国政法大学/联合国贸发会第三届年会

主办

UNCTAD

承办

IIAI CUPL

CCCL The CUPL Center for Competition Law

GW

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Schedule 时间表

DAY ONE 第一日		
Chairs 主席	Shi Jianzhong 时建中	
	Pierre Horna	
08:30-09:00	Registration 登记签到	
09:00-10:30		
Keynote speeches 致辞 / 主旨演讲	Speakers 发言人	Shi Jianzhong 时建中
		Shang Ming 尚明
		Pierre Horna
		Ulrich Weigl
		Paul Csiszar
		Xu Lefu 徐乐夫
10:30-10:45	Break 茶歇	
10:45-12:00	Chair 主持人	Ian Simmons
Cartels:A.I., algorithms and their effect on corporate responsibility 卡特尔：人工智能、算法及其对企业责任的影响	Speakers 发言人	Tom Smith
		Pierre Horna
		Shi Jianzhong
		Ethan Litwin
		Zhang Chunyu 张春雨
12:00-13:00	LUNCH 午餐	
13:00-14:30	Chair 主持人	Sheng Jiemin 盛杰民
		Ioannis Kokkoris
Merger control in the current US	Speakers	James Venit

Administration 本届美国政府的经营者集中管理制度	发言人	Scott Schaeffer
		Jie Tong 童杰
		Kun Huang
		Hu Xinyue 胡馨月
14:30-14:45	Break 茶歇	
14:45-15:45	Chair 主持人	Ioannis Kokkoris
Per se vs. proof of effects in abuse of dominance cases 滥用市场支配地位案件中的本身违法与效果证明原则	Speakers 发言人	James Venit
		Sung-Keun Kim
		Bojana Ignjatovic
		Zhan Hao 詹昊
15:45-17:15	Co-Chairs 主持人	Richard Blewett
		Sun Jin 孙晋
Privacy and abuse of dominance 隐私与市场支配地位滥用	Speakers 发言人	Philip Monaghan
		Hu Tie 胡铁
		Wei Tan 谭伟
		Tian Chen 田辰
DAY TWO 第二日		
Chairs 主席	Shang Ming 尚明	
	Ioannis Kokkoris	
09:00-10:15	Chair 主持人	Michael Gu 顾正平
Excessive pricing as an abuse of dominance	Speakers 发言人	Andrea Zulli
		Bojana Ignjatovic

滥用市场支配地位中的过高定价		Hazel Yin 尹冉冉
		Wang Xianlin 王先林
		Zeng Chuan 曾川
10:15-10:30	Break 茶歇	
10:30-12:00	Chair 主持人	Ninette Dodoo
Antitrust/IP Roundtable 反垄断与知识产权圆桌会议	Speakers 发言人	Hu Shengtao 胡盛涛
		Renata Hesse
		Meng Yanbei 孟雁北
		Jiao Shan 焦姗
		John Gong 龚炯
12:00-13:00	Lunch 午餐	
13:00-14:30	Chair 主持人	Huang Yong 黄勇
EU State Aid and China Fair Competition Review 欧盟国家援助与中国公平竞争审查制度	Speakers 发言人	Paul Csiszar
		Sandra Marco-Colino
		Francois-Charles Laprevote
		Yang Jiajia 杨佳佳
		Dai Long 戴龙
14:30-14:45	Break 茶歇	
14:45-16:00	Co-Chairs 联合主持	Alastair Mordaunt
		Qi Huan 祁欢

Non-antitrust screening of foreign investments in the US and EU: What Chinese companies need to know 美国与欧盟对外国投资的非反垄断审查：中国公司需要知道什么	Speakers 发言人	Charles Pommies
		Nicholas Song 宋友光
		Wang Xiaodong 王筱东
		Han Liyu 韩立余
16:00-17:15	Chair 主持人	Frank Fine
Enforcement Roundtable 执法圆桌会议	Speakers 发言人	Paul Csiszar
		Tom Smith
		Renata Hesse
		Dong Hongxia 董红霞

Map of Beijing Friendship Hotel
北京友谊宾馆示意图

Resumes and Reports of the Speakers
发言人简介与报告

DAY ONE 第一日

Chair 大会主席

Prof. Shi Jianzhong

时建中教授

Vice-President of CUPL

中国政法大学副校长

Dr. Shi Jianzhong, the vice president and a professor of China University of Political Science and Law, a doctoral tutor in economic law, and the director of the Competition Law Research Center of China University of Political Science and Law. He is the vice president of China Economic Law Research Association, vice president of China Science and Technology Law Society, a member of Expert Consultative Group of Anti-monopoly Committee of State Council, a member of Consultative Group for Negotiation of Trade and Competition Policy Issues of the New Round of Multilateral Trade Negotiations by the Ministry of Commerce (convener).

时建中博士，现任中国政法大学副校长、教授、经济法专业博士生导师，中国政法大学竞争法研究中心主任。中国经济法学研究会副会长、中国科学技术法学会副会长、国务院反垄断委员会专家咨询组成员、商务部新一轮多边贸易谈判贸易与竞争政策议题谈判专家咨询组成员（召集人）。

Dr. Pierre Horna

Legal Affairs Officer, UNCTAD
联合国贸易与发展会议法律事务官员

Dr. Horna is a Legal affairs official at the Competition and Consumer Policies Branch of the United Nations Conference on Trade and Development (UNCTAD) for 15 years. He has been responsible for the design, formulation and implementation of technical assistance and capacity building programmes on competition and consumer protection laws and policies. In particular, His regional focus of work at the UN has been select newer and small competition and consumer protection authorities in developing countries and economies in transition in the Association of South East Asian Nations (ASEAN), Balkan, Commonwealth of Independent States (CIS) and Latin American regions. Dr. Horna has drafted several reports on international cooperation on competition law issues, with emphasis on cartel enforcement in newer and small competition regimes. In addition, Dr. Horna has actively assisted governments and policymakers in the design and implementations of competition and consumer protection policies regimes, in particular anti-cartel regulations in emerging markets and small economies. He is a regular speaker at international forums such as the International Competition Network (ICN), Organisation for Economic Cooperation and Development (OECD) and other international and regional forums. He has been part of capacity building activities for competition and consumer protection officials as well as judges and prosecutors in different jurisdictions, in particular in the Latin American and ASEAN regions.

Dr. Horna was a visiting Research Fellow at Oxford's Centre for Competition Law and Policy, Institute of European Comparative Law of the Law Faculty at Oxford University during 2017. From January to June 2017, he was also a Senior Associate at Pembroke College. His area of research at Oxford is "Cross-Border Cartels in Emerging Markets." Dr. Horna has recently earned his PhD Degree in International Law at the Graduate Institute, Switzerland with a *Summa cum laude* thesis entitled: "Cross Border Cartels in Latin America: A Transnational Competition Assessment" (2009-2013, 2017). He earned his Master of Laws in International Business Law from Leiden University, the Netherlands, with a thesis on the developmental dimension of expanding WTO covered agreements into Competition Policy (2002-2003), and also undertook studies on e-commerce and consumer protection at Buckingham University, England (2001).

Horna 博士担任联合国贸易和发展会议（UNCTAD）竞争和消费者政策处的法律事务官员已有 15 年。他一直负责有关竞争和消费者保护法律和政策的技术援助和能力建设计划的设计，制定和实施。特别是，他在联合国的区域工作重点是在东南亚国家联盟（东盟），巴尔干，独立国家联合体（独联体）的发展中国家、经济转型国家和拉丁美洲地区中较新的小型竞争和消费者保护机构。 Horna 博士起草了几份关于竞争法问题国际合作的报告，重点是新型和小型竞争制度中的卡特尔执法。此外，Horna 博士积极协助政府和政策制定者设计和实施竞争和消费者保护政策制度，特别是新兴市场和小型经济体的反卡特尔法规。他经常在国际竞争网络（ICN），经济合作与发展组织（OECD）以及其他国际和地区论坛等国际论坛上发表演讲。他参与了竞争和消费者保护官员以及不同司法管辖区的法官和检察官的能力建设活动，特别是在拉丁美洲和东盟地区。

Horna 博士于 2017 年在牛津大学法律系欧洲比较法研究所竞争法律与政策中心担任访问研究员。2017 年 1 月至 6 月，他还是彭布罗克学院的高级助理。 他在牛津大学的研究领域是"新兴市场的跨境卡特尔"。 Horna 博士最近在瑞士研究生院获得了国际法博士学位，其中包括一篇题为"拉丁美洲跨境卡特尔：跨国竞争评估"（2009-2013,2017）的优秀论文。 他在荷兰莱顿大学获得国际商法法律硕士学位，论文主题是 WTO 所涵盖的协议扩展到竞争政策（2002-2003）的发展方面，并在英国白金汉大学（2001 年）对电子商务和消费者保护进行了研究。

DAY ONE 第一日

Issue 1: Keynote speeches

议题 1：致辞 / 主旨演讲

09:00-10:30

Prof. Shi Jianzhong，Vice-President of CUPL

时建中教授，中国政法大学副校长

Dr. Pierre Horna, Legal Affairs Officer, UNCTAD

Pierre Horna博士，联合国贸易与发展会议法律事务官员

Shang Ming, Head, PCCPL

尚明，中国世贸组织研究会竞争政策与法律专业委员会主任

Ulrich Weigl, Minister Counsellor, EU Delegation to China

Ulrich Weigl, 欧盟驻华代表团公使衔参赞

Paul Csiszar, Director, Directorate E, DG Competition, European Commission

Paul Csiszar, 欧盟委员会竞争总署E部主任

Xu Lefu, Deputy Director General, Bureau of Anti-Monopoly, SAMR

徐乐夫，国家市场监督管理总局反垄断局副局长

Prof. Shi Jianzhong

时建中教授

Vice-President of CUPL

中国政法大学副校长

Shang Ming 尚明

Head, PCCPL;
Member of the expert advisory group of the State Council Anti-Monopoly Committee
中国世贸组织研究会竞争政策与法律专业委员会主任；
国务院反垄断委员会专家咨询组成员

Mr. Shang Ming once served as the Director and Deputy Director General of the Department of Treaty and Law under the former Ministry of Foreign Trade and Economic cooperation, PRC; fair trade commissioner of the Ministry of Commerce; director general of the Department of Treaty and Law; director general of the Anti-monopoly Bureau under the Ministry of Commerce.

Mr. Shang has engaged in the fields of foreign trade, economics, business and law for many years, which includes: the negotiations for the establishment of bilateral and multilateral trade agreements, investment treaties and intellectual property rights agreements; the legislation in internal and foreign trades, foreign investment and economies; government consultations in major trade disputes and intellectual property; WTO legal issues and dispute settlement; investigation on and providing guidance for trade remedy cases about anti-dumping and countervailing; anti-monopoly legislation; anti-monopoly review of operators and providing guidance on how to submit anti-monopoly cases abroad.

尚明先生历任外经贸部条法司处长、副司长、商务部公平贸易专员、条法司司长、商务部反垄断局局长，长年从事对外经贸及商务法律工作，主要包括：双边及多边贸易协定、投资协定及知识产权协定等谈判，内外贸外资外经等方面的立法，重大贸易纠纷及知识产权的政府磋商，WTO 法律事务和争端解决，反倾销、反补贴等贸易救济措施案件的调查和应诉指导，反垄断立法、经营者集中反垄断审查、反垄断海外应诉指导等。

Ulrich Weigl

Minister Counsellor, EU Delegation to China

欧盟驻华代表团公使衔参赞

Paul Csiszár

Director, Directorate E, DG Competition, European Commission

欧盟委员会竞争总署 E 部主任

After graduating from ELTE School of Law of Budapest, Mr. Paul Csiszár studied international comparative law and earned a second Juris Doctorate at Loyola Law School in the United States. Following his admission to the Bar in 1986 in California he practiced as a corporate, securities and M&A lawyer in the US and then from 1997 in Central Europe with the international law firm of Squire Sanders until 2003 when he joined the public sector. Currently Mr Csiszár serves as Director of "Basic Industries, Manufacturing and Agriculture" at the Directorate General for Competition of the European Commission.

Paul Csiszár 先生从布达佩斯 ELTE 法学院毕业后，学习了比较国际法，并在美国 Loyola 法学院获得了第二个法学博士学位。1986 年，在加利福尼亚大学获得律师资格后，他在美国从事关于企业、证券和并购业务的律师工作。1997 年，在中欧一家名为 Squire Sanders 国际律师事务所工作。2003 年，他加入公共部门。目前，Csiszár 先生担任欧盟委员会竞争总司的“基础产业、制造业和农业”部门部长。

DAY ONE 第一日

Issue 2: Cartels: A.I., algorithms and their effect on corporate responsibility

议题 2：卡特尔：人工智能、算法及其对企业责任的影响

10:45-12:00

This panel will discuss how artificial intelligence and algorithms may help facilitate the coordination of competitive behavior. But this raises a larger question: Who is responsible for the collusion and in these situations, can ignorance be a defense?
本组将讨论人工智能和算法会怎样便利竞争行为的协调。但这产生了一个更大的问题：谁对合谋行为负责，以及在这种情况下，无知是否可以成为抗辩理由？

Chair

主持人

Ian Simmons, Partner, O'Melveny & Myers

Ian Simmons, 美迈斯律师事务所合伙人

Speakers

发言人

Tom Smith, Legal Director, Competition and Markets Authority, London

Tom Smith, 英国竞争与市场管理局法务总监

Dr. Pierre Horna, Legal Affairs Officer, UNCTAD

Pierre Horna 博士，联合国贸易与发展会议法律事务官员

Prof. Shi Jianzhong, Vice-President of CUPL

时建中教授，中国政法大学副校长

Ethan Litwin, Partner, Dechert

Ethan Litwin, 德杰律师事务所合伙人

Zhang Chunyu, Director, Bureau of Anti-Monopoly, SAMR

张春雨，国家市场监督管理总局反垄断局调研员

Ian Simmons

Partner, O'Melveny & Myers

美迈斯律师事务所合伙人

The Co-Chair of the Firm's Antitrust and Competition Practice, Ian Simmons has been lead counsel in more than 30 multi-district litigation (MDL) antitrust proceedings and has achieved precedent-setting results. In addition to his extensive experience with cartel cases, Ian litigates matters involving intellectual property issues, including the competitive implications of standard essential patents and FRAND obligations. He pays particular attention to global economic pressures that may affect his clients and has taken more than 30 expert economist depositions.

An alumnus of the US Department of Justice Antitrust Division, Ian uses his prosecutorial skills to maximize his clients' interests. He has argued before the US Court of Appeals for the Second, Third, Fourth, Seventh and Ninth Circuits and the highest courts in New York and South Dakota. Ian has tried seven cases to verdict. His efforts were recognized by Law360, which named Ian an MVP of the Year in Competition in 2011.

A five time moderator or panelist at the American Bar Association Antitrust Spring meeting, and author of over 20 peer review articles, Ian is a Member of the Editorial Board of the American Bar Association Antitrust Magazine.

Ian represented Samsung as an amicus in FTC v. Qualcomm, a filing whose content made its way into the District Court opinion denying Qualcomm's motion to dismiss. He also defeated class certification on a multi-billion-dollar price fixing claim involving Optical Disk Drives in the Northern District of California against Samsung and other major technology companies and obtained a highly significant victory for Asiana Airlines Inc. in long-running antitrust litigation, which extinguished hundreds of millions of dollars of potential exposure.

作为本所反垄断与竞争业务的联合主席，Ian Simmons 曾在 30 多宗作为多地区诉讼（MDL）的反垄断诉讼中担任首席律师，并使之形成判例。除了其在卡特尔案件方面的丰富经验外，Ian 还参与涉及知识产权问题的诉讼，包括标准必要专利与合理非歧视条款（FRAND）义务的竞争影响。他特别重视可能影响其客户的全球经济压力，并曾经收集了 30 多名经济学家的专家证词。

Ian 曾在美国司法部反垄断部门任职，他利用自己的检察官技巧使客户利益最大化。他曾在美国联邦第二、三、四、七和第九巡回上诉法院以及纽约州和南达科他州的高等法院进行庭审辩论，并使得七个案件作出裁决。他的努力得到了《法律 360》的认可，并在 2011 年将其评选为竞争业务的年度佳律师。

Ian 曾在联邦贸易委员会诉高通一案中代表三星作为法庭之友，该诉讼的提起迫使地方法院作出驳回高通提出的撤案动议的意见。他还在加州北区向三星和其他大型高科技公司提起的涉及光盘驱动器的数十亿美元价格垄断索赔中赢得了集体确认的胜利并在长期反垄断诉讼中为韩亚航空公司获得了极其重要的胜利，避免了数亿美元的潜在风险。

Tom Smith

Legal Director, Competition and Markets Authority, London
英国竞争与市场管理局法务总监

Tom is a legal director at the UK's Competition and Markets Authority leading cases across its portfolio such as the retail banking market investigation, the abuse of dominance decision against Pfizer and Flynn for excessive pricing of an epilepsy drug, and the phase two merger clearance of BT's acquisition of EE in the telecoms sector.

Tom was previously at Hogan Lovells in London where he worked on a broad range of UK and EU competition law cases, and he has also spent time at ITV plc and the OFT Mergers Branch.

Tom Smith 先生现任英国竞争与市场管理局法务总监，负责主持相关的反垄断调研案件，例如对小额银行业务市场进行调研，将辉瑞和 Flynn 公司抗癫痫药物定价过高的行为定性为滥用市场支配地位，以及在 BT 收购 EE 案的第二阶段开展审查。

Tom Smith 先生曾于伦敦的霍金路伟律师事务所任职，经手大量的英国和欧盟竞争法案件，此外他也曾在英国独立电视台和英国公平贸易办公室的经营者集中部门工作过一段时间。

Dr. Pierre Horna

Legal Affairs Officer, UNCTAD

联合国贸易与发展会议法律事务官员

Prof. Shi Jianzhong
时建中教授

Vice-President of CUPL

中国政法大学副校长

Ethan Litwin

Partner, Dechert
德杰律师事务所合伙人

Ethan E. Litwin is a partner in Dechert's antitrust group. He has a broad antitrust practice that focuses on complex antitrust litigation, defending civil and criminal government investigations, representing merging parties in international merger control investigations, and antitrust counseling. Throughout the span of his career, he has litigated numerous high-profile cases in state and federal courts, and has represented clients before antitrust regulators in the United States and the European Union.

Mr. Litwin's clients reside in jurisdictions across the globe and cover a range of industries, including pharmaceuticals, financial services, electronics and technology, media and entertainment, transportation, agriculture, industrial chemicals, information systems, and insurance.

Prior to joining Dechert, Mr. Litwin served as a partner and the co-chair of the antitrust group at another international law firm.

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Article From Ian Simmons

Reflections on Cartel Enforcement

BY IAN SIMMONS AND KENNETHR.O'ROURKE

TO PARAPHRASE GEORGE STIGLER, few have the right, and even fewer the ability, to write another article about cartels without offering at least some justification. The twenty-fifth anniversary of the ANTITRUST Magazine provides a fitting opportunity to reflect on the evolution of private and public cartel enforcement in the United States and, most importantly, its expected future course.

It is a given that the face of antitrust enforcement in the United States has evolved considerably over the past twentyfive years. The scope, frequency, and seriousness of cartel investigations have all increased, as has the magnitude of civil litigation that follows. This evolution can, in part, be measured in dollars: total criminal fines averaged $29 million annually from 1987 to 1996,[1] but rose to over $200 million in 1997, and criminal fines have continued to rise ever since.[2] In 2011 alone, the U.S. Department of Justice, Antitrust Division collected more than $1 billion in criminal fines and other monetary assessments as the result of criminal cartel investigations.[3] In the early part of this century, corporate fines of $200 million (or more) were not unheard of. And now, in September 2012, the Antitrust Division has obtained a record fine of $500 million against a company convicted, after jury trial, of participating in an international cartel in violation of Section 1.[4]

Of course, dollar amounts do not tell the whole story. The substantive and geographic scope of criminal cartel investigations have expanded as well. Cartel investigations involve an increasingly diverse range of industries—everything from food and food supplements (chocolate, vitamins) to rubber and plastics (EPDM, urethanes) to computer components (NAND FLASH memory, DRAM and SRAM memory chips, optical disk drives) to transportation services and products (maritime transport, air cargo and air passenger services, auto parts).[5] And the Division's investigations cover a broad geographic spread: the hydrogen peroxide investigation, for instance, targeted corporations headquartered in Belgium, Germany, the Nether lands, and the United Kingdom; the DRAM investigation focused on companies headquartered in the United States, Germany, South Korea, Taiwan, and Japan; and the LCD-TFT investigation zeroed in on companies in Japan, South Korea, and Taiwan.

Three distinct areas in cartel practice are worth considering for the future evolution of cartel enforcement: (1) the Justice Department's corporate leniency program and newly proposed whistleblower incentives; (2) the intersection of criminal and civil enforcement (particularly the effect of guilty pleas, the role of opt-outs in class action litigation, and the likely direction of class certification doctrines); and (3) the increasing globalization of criminal and civil cartel enforcement (including the evolution of Foreign Trade Antitrust Improvements Act doctrine and its central role in international cartel litigation).

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The DOJ's Corporate Leniency Program and Proposed Whistleblower Incentives

The last twenty-five years have witnessed fundamental changes, both in how U.S. and international policymakers attempt to curtail anticompetitive conduct and in how they seek to enforce their respective jurisdictions' antitrust policies. Before 1993, there was no automatic amnesty for the first company to report a potential violation; no amnesty was available if an investigation was already underway; and there was no provision for amnesty for individuals.

The 1993 Revisions. In 1993, the U.S. Department of Justice significantly revised its Corporate Leniency Program (also called the "amnesty" program) to strengthen the DOJ's ability to uncover antitrust violations that might otherwise go undetected. The revised program gave immunity from criminal prosecution to the first antitrust conspirator (ostensibly other than the conspiracy's leader) to

report a particular criminal antitrust violation to the DOJ.[6]The revised leniency program produced remarkable results, but it was limited by concerns over civil exposure. The DOJ did not have an ability to provide any relief from the treble-damages civil actions that the cooperating conspirator still faced.

ACPERA and Civil Actions. In 2004, Congress addressed this issue by enacting the Antitrust Criminal Penalty Enhance ment and Reform Act (ACPERA). ACPERA was intended to "eliminate[] an intractable dilemma previously faced by criminal amnesty candidates"—that is, the very acts of disclosure that the leniency program encouraged would also expose the cooperating firm to a rash of federal and state civil lawsuits for treble damages (with joint and several liability for 100 percent of the damages).[7] ACPERA's aim was to remove this "substantial disincentive" to leniency-program participation by limiting the successful amnesty applicant's civil damages liability. Instead of joint and several liability for treble damages, the successful applicant would be liable only for actual damages attributable to its own conduct. (This benefit was conditioned on the successful applicant's cooperation with civil claimants.)[8]

ACPERA coupled this carrot with the stick of steeper maximum fines for corporations and individuals and increases in maximum jail terms.

The law was originally set to sunset in 2009, but Congress extended it twice, with the most recent extension running until 2020. These extensions, however, did not come easily. Indeed, when the original 2009 expiration date drew near, there was some uncertainty as to whether ACPERA would be renewed at all.[9] At the last minute, ACPERA was extended for one year.

In 2010, the law was extended for ten years, but this extension came with two significant revisions. First, at the insistence of the plaintiffs' bar, the amended ACPERA added timeliness of cooperation as a factor for the district court to consider in determining whether the successful applicant had satisfied the civil-litigation cooperation requirement.[10] Second, given lingering uncertainty over whether ACPERA actually prompted prospective criminal amnesty candidates to come forward,[11] the law commissioned the U.S. Govern mental Accountability Office (GAO) to study the issue and to publish a report on its findings.[12] The ensuing GAO study[13] found mixed results as to ACPERA's role in fostering participation in the amnesty program.[14]

Internationalization of Leniency. The success of the U.S. leniency program did not go unnoticed in other jur isdictions. The number of international authorities with anti trust leniency programs has increased dramatically—from only one program (in the United States) in 1990 to over fifty internationally today.[15]The DOJ credits this "proliferation of effective leniency programs" as "[t]he single most significant development in cartel enforcement."[16] A firm desiring to self-report an antitrust violation can now consult the applicable leniency rules in each such jurisdiction and can assess, with some sense of predictability, the exposure it may face. This internationalization of leniency programs has caused firms to develop detailed internal compliance protocols to maximize the available leniency benefits should they face exposure in multiple jurisdictions.[17]

Leniency Incentives and Whistleblowing. The leniency programs of the 1990s and 2000s were structured to create incentives for firms (as opposed to individuals) to selfreport. The corporation benefited by reducing its corporate exposure to criminal penalties and, under ACPERA, to civil damages. In recent years there have been calls to add incentives for knowledgeable but innocent *individuals* (so-called whistleblowers) to report suspected violations.[18] The incentives come in two types: (1) "whistleblower protections," which are designed to encourage reporting by prohibiting firms from retaliating against an employee who reports suspected cartel activity to a regulator; and (2) "whistleblower bounties," modeled loosely on laws, such as the SarbanesOxley and False Claims Acts, which give the whistleblower a cut of any fine obtained from the whistleblower's report. Although whistleblower protections and whistleblower bounties differ in some important respects, both are aimed at individuals (rather than firms) and are designed to promote the direct reporting of potential anti trust violations to a regulator (rather than to a

firm's internal designee).

Tension Between Whistleblowers and Corporate Len iency. The calls for adding whistleblower programs that give incentives to individuals to the current regime of leniency programs that give incentives to corporations raise a number of questions. For example, will employees use whistleblower protections as a shield against legitimate employment decisions such as suspension or termination? Or will employees report what they honestly (but mistakenly) believe is a violation? Regardless of a whistleblower's motive, will whistleblower protections such as the Leahy-Grassley bill[19] actually contribute to their stated goal of rigorous antitrust enforcement?

Will whistleblower bounties prompt the reporting of falsepositives (and make enforcement more inefficient and costly)? In any event, how would the incremental contribution of whistleblower programs to antitrust enforcement be measured? And, perhaps most important of all, is the individualoriented model—on which whistleblower protections and bounties are based—fundamentally incompatible with the firm-oriented leniency model that the DOJ (and now dozens of other jurisdictions) have so strongly and successfully embraced?

While we do not attempt to provide answers here, these questions suggest that adding a whistleblower protection— much less, a whistleblower *bounty*—may not accomplish their proponents' stated goal of optimal cartel enforcement. The current amnesty model is effective in part because it incentivizes those most likely to know of actual wrongdoing to come forward.[20] By contrast, innocent bystanders (the only ones eligible for whistleblower protection or bounties) are less likely to be aware of actual cartel activity, given the secretive nature of cartels (as opposed to innocuous or even procompetitive information-sharing that could be mistaken for collusion). A firm that has uncovered evidence of a potential violation will likely conduct an internal investigation before self-reporting under a corporate leniency program. As it does so, however, employees (including those who are interviewed) will become aware of the investigation, and will stand to gain financially by reporting suspected conduct to regulators before the company has had a chance to do so.[21]

In short, there is good reason to suspect that the promised benefits of a whistleblower-oriented model of cartel reporting would prove elusive, and whistleblower programs may actually undermine the effectiveness of time-tested, firm-oriented leniency programs that have proliferated in the United States and abroad.

The Intersection with Civil Litigation

As night follows day, civil litigation follows criminal investigations (although at times the reverse is true, too). Civil cases are filed on behalf of direct and indirect purchaser classes as well as by individual purchasers, such as settlement class optouts or direct-action plaintiffs. In antitrust proceedings, these seemingly parallel paths of public and private enforcement actually intersect (and, to change metaphors, the civil and criminal regimes sometimes collide).

Guilty Pleas and* Twombly *Motions. A hallmark of the U.S. corporate leniency program is that only the first firm to report gets the carrot of antitrust immunity. Suspected coconspirators remain vulnerable to criminal charges stemming from the alleged cartel. Ensuing indictments are filed not only against corporations, but increasingly against executives in their individual capacities. Beginning in1999 with the Vita mins investigation, "no-jail" plea agreements largely became a thing of the past.[22] Now, the DOJ has a strong policy against unconditionally agreeing to a "no-jail" sentence for *any* defendant.[23] In the past decade, over forty foreign executives have served, or are currently serving, federal prison sentences in the United States for cartel-related offenses.[24]

Where corporations and/or their executives plead guilty to antitrust offenses, plaintiffs' counsel may leverage those pleas in ensuing private antitrust actions—a tactic one court has described as "cross-fertilization."[25] Guilty pleas often come into play

when defendants move to dismiss under the Supreme Court's decision in *Bell Atlantic Corporation v. Twombly*, which held that plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face."[26] As plaintiffs argued in the *LCD* litigation, for example, it "defie[d] logic" and was "potentially sanctionable" that three corporations that had pled guilty to felony antitrust charges would join a motion to dismiss under *Twombly*.[27] After all, these defendants had "admitted to the same core facts, and the same antitrust violations, that are the subject of this civil action."[28] In denying the motion to dismiss, the district court pointed to several factual allegations supporting the existence of a conspiracy, including "facts of the guilty pleas" entered by defendants.[29]

Still, the guilty plea must actually tend to support the conspiracy alleged in the civil case. In *In re Hawaiian & Guam anian Cabotage Antitrust Litigation*, for example, plaintiffs sued several providers of shipping services between the continental United States, Hawaii, and Guam, alleging price fixing in violation of Section 1 of the Sherman Act.[30] Four individuals had pled guilty to antitrust offenses relating to shipping between the continental United States and Puerto Rico.[31] Plaintiffs relied heavily on those pleas in opposing a motion to dismiss under *Twombly*,[32] but only one of the executives even allegedly had anything to do with the defendants' Hawaii or Guam routes—and the complaint failed to allege any connection between his guilty plea and the shipping lines at issue.[33] The district court granted defendants' motion to dismiss, with the admonition that "[s]imply saying 'me too' after a government investigation does not state a claim."[34]

As night follows day, civil litigation follows criminal investigations (although at times the reverse is true, too). Civil cases are filed on behalf of direct and indirect purchaser classes as well as by individual purchasers, such as settlement class opt-outs or direct-action plaintiffs.

Guilty pleas often dog the defendant throughout the civil litigation in other ways as well. Pleas by foreign entities become the focus in arguments over the extraterritorial reach of the U.S. antitrust laws. For instance, when a defendant's plea admits that the conspiracy was intended to affect and had a direct effect on U.S. commerce, civil plaintiffs frequently cite that admission in contending that the Sherman Act sweeps in the defendant's foreign conduct.

More broadly, a guilty plea makes it much more challenging for a defendant to convince a jury (or perhaps even a judge) to distinguish between the illegal conduct underlying the admitted violation and different (but arguably related) legal conduct that may be more central to the allegations in the follow-on civil litigation. A plea can also bend the lens through which the civil impact of admitted criminal conduct is viewed, even when the criminal conduct caused little impact (e.g., a plea to price fixing "certain" but otherwise undefined sales transactions often is magnified in civil litigation such that "certain" is argued to mean "many" or "most" when in fact the parties to the plea agreement know it did not).

Guilty Pleas and State Courts. Sometimes plaintiffs will file their civil complaints in state courts asserting state law theories—at least arguably to avoid tougher federal procedural doctrines (e.g., *Twombly* and Rule 12(b)(6) pleading standards, *Wal-Mart Stores, Inc. v. Dukes*[35] and Rule 23 class action standards, and *Celotex Corp. v. Catrett*[36] and Rule 56 summary judgment standards) and (at least in many states) to avoid having to obtain a unanimous jury vote to achieve a federal verdict (in contrast, California state court verdicts can be reached by 9 of 12 jurors; New York state court verdicts require 5 of 6 jurors). The recently tried *Rambus v. Micron*[37] antitrust case in state court in San Francisco, a case asserting a state law Cartwright Act violation, is one possible example of a civil plaintiff's perception that state court provides an advantage against a guilty-plea defendant.

But state court procedures can have some downsides for plaintiffs as well. In a federal trial, defendants will be concerned that the jury will watch a videotaped

deposition of an overseas and unavailable witness repeatedly asserting his or her Fifth Amend ment right about his or her role in the alleged wrongdoing. In some state courts (such as in California), the defendants need not share this concern because a witness's Fifth Amendment invocation is off-limits to criminal and civil juries.

Opt Outs. Twenty-five years ago, the notion of opt-out litigation as it is known today was largely unheard of. To be sure, some companies would sue their suppliers for overcharging on sales of the goods, but the prevailing view of large purchasers was a reluctance to sue their key suppliers. These companies risked future supply interruptions from their litigation adversary while simultaneously exposing themselves to the burdens, costs, and risks of litigation. A large purchaser generally preferred the alternative of quietly seeking a resolution via private negotiation or remaining as a largely anonymous member of a class and taking its pro rata share of the class settlement. Some larger companies also worried about creating "bad" law—that is, helping to establish plaintifffriendly antitrust precedents, only to find itself sued under that same precedent in some other future dispute.

Today, opt-out litigation is a staple of the civil litigation arising from a publicly disclosed international cartel investigation. And opt-out litigants have mastered the ability to allow others (i.e., DOJ, class plaintiffs) to take the lead on discovery and then swoop in with their own complaint, quickly inheriting the benefit of the discovery obtained by others. This has minimized the cost of pursuing an opt-out case. And given the successes of some early opt-out litigants, more and more companies are willing to take the risk of voluntarily becoming a litigant. Indeed, not only are large direct purchasers filing an increasing number of direct action lawsuits, but major indirect purchasers and resellers are entering the fray. Opt-out litigation is here to stay.

Opt-out cases typically are filed long after the class actions are filed. Amounting to a third wave of civil litigation (after the first wave of direct purchaser class actions, commonly followed closely by a second wave of indirect purchaser class actions), the opt-out cases necessarily extend the overall length of the MDL proceedings, often by years. This situation can test the patience of the presiding judge whose docket can be consumed with the criminal, class action, and opt-out cases, sometimes for 10 years or more. The opt-out plaintiffs need to concern themselves with their place in line, particularly if the various opt-out litigants think they are entitled to a separate trial, each of which is often a major antitrust litigation in its own right.

Class Certification. Twenty-five years ago, it seemed that certifying a class in an antitrust case was a virtual certainty. But the past twenty-five years have seen a remarkable evolution in the standards for class certification under Federal Rule of Civil Procedure 23. Particularly in the last decade, courts have imposed heightened evidentiary standards on class action plaintiffs and have shown greater willingness to examine merits issues at the class certification stage.

If the last twenty-five years of antitrust cartel litigation yields one observation it is this: the "per se" rule has been placed in its proper context and has not been permitted to subsume the separate inquiry required under Clayton Act Section 4 that an "injury" "by reason" of a violation, be proven. While criminal investigations may set the stage for subsequent class-based civil litigation, the existence of cartel-related investigations, convictions, and even guilty pleas are not enough to establish "classwide injury," much less that that injury can be shown by proof that is "common" to the class.

The Eighth Circuit made this abundantly clear in *Blades v. Monsanto Co.*[38] There, the court held that evidence of a conspiracy affecting all class members would suffice for proving the alleged conspiracy itself, but "proof of conspiracy is not proof of common injury."[39] In that case, the market was highly individualized; the prices for goods varied widely; and crucially, plaintiffs' expert had failed to show that the fact of injury could be proven for the class as a whole with common evidence.[40] The court provided a seminal definition of common proof: the proof on the material element has to be the "same" for each class member.[41]

As the Second Circuit held in *In re IPO Securities Litiga tion*, the district court judge must "assess all of

the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit."[42] This obligation is "not lessened by overlap between a Rule 23 requirement and a merits issue."[43]

Thus, courts should no longer shy away from examining the merits of plaintiffs' claims if necessary to determine whether class-based litigation is appropriate. This way of speaking about class actions twenty-five years ago was virtually unheard of: "presumed impact" (and similar language) has nearly been banished from the vocabulary.

The coming years will likely see further development of Rule 23 doctrine in civil antitrust cases. This Term, the Supreme Court will hear *Comcast Corporation v. Behrend*, a putative class action alleging that Comcast had perpetrated a "clustering scheme" in violation of the Sherman Act.[44] At the Third Circuit, the panel majority and dissenting judge split as to whether, at the class certification stage, the court was required to determine the admissibility of plaintiffs' expert testimony that classwide injury could be shown through common proof.[45]The majority insisted that the district court need only "evaluate whether an expert is presenting a model which could *evolve* to become admissible evidence."[46] Judge Jordan maintained that because the plaintiffs' expert opinion would be inadmissible at trial under Federal Rule of Evidence 702 and *Daubert*,[47] "it cannot constitute common evidence of damages."[48]

The FTAIA remained largely an enigma until the past decade. Seldom had so little attention been paid to a statute so significant to antitrust enforcement (and seldom had so few words in a statute so puzzled the profession once the statute gained notoriety).

In June of this year, the Supreme Court granted certiorari on the question of "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the class is susceptible to awarding damages on a class-wide basis."[49] Thus, if the Supreme Court continues down the path taken in *Blades* and *IPO Securities*, future class action plaintiffs in cartel cases may be required to establish, at the class certification stage, that classwide injury can be shown through evidence that is both common to the class members and *admissible* at trial—further widening the gap between criminal and civil cartel enforcement in federal court.

State Courts and State Law Claims. Twenty-five years ago, many of the class actions (but particularly indirect purchaser claims) were brought under state law in state court. The Class Action Fairness Act of 2005[50] meant that virtually all class actions seeking redress for antitrust and unfair competition would be filed in, or be removed to, federal court. No longer do defendants have to try to coordinate dozens of state court class actions. Instead, these state law class actions are now in the same MDL federal district court as the federal law claims. And, of course, federal standards now apply on procedural issues, such as the sufficiency of the pleadings, summary judgment and, perhaps more importantly, class certification.

Civil Discovery. Criminal investigations color civil discovery in several respects. One major consequence of criminal enforcement is that it essentially lays the groundwork for civil plaintiffs' subsequent discovery efforts. For example, antitrust defendants should expect that documents submitted in response to a grand jury subpoena often will be turned over in civil litigation (typically in response to plaintiffs' very first document request). The discoverability of documents submitted to a government under a corporate leniency program has gone both ways. Nonetheless, documents submitted under a foreign sovereign's amnesty program may be immune from discovery for reasons of comity (at least when the foreign sovereign itself maintains those documents are immune from civil claimants).[51]

In fact, plaintiffs in the United States may even obtain information that escaped disclosure in a criminal investigation. As a matter of comity, the Division does not (and argu- ably cannot) request documents located in another country in the

possession of foreign persons or entities. Yet, the Division has sought the foreign documents once they are in the hands of the civil litigants' lawyers in the United States. Civil plaintiffs are of course not bound by this foreign location restriction, and they may discover relevant documents held overseas so long as they are within the possession or control of the defendants.[52]

A Smaller World: Globalization and the Future of Antitrust

The last twenty-five years have witnessed unprecedented global integration, ushering Sherman Act enforcement into a legal frontier abundant with issues of extraterritoriality, sovereignty, comity, and state immunity. For example, ANTI TRUST's Summer 2012 issue included an article assessing the viability of a foreign sovereign immunity defense among wholly or partially state-owned companies facing Sherman Act scrutiny.[53] Civil and criminal antitrust enforcement have significantly internationalized in the past quarter century but many unresolved questions lie ahead.

Origin and Purpose of the FTAIA. Five years before this magazine's inaugural publication, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) in an effort to make domestic exporters more competitive in foreign markets.[54] The law formalized American exporter immunity in U.S. courts for conduct with purely foreign effects.[55]

The FTAIA makes the Sherman Act inapplicable to conduct involving nonimport trade or commerce with foreign nations unless the conduct has a direct, substantial, and reasonably foreseeable effect on domestic commerce and that effect gives rise to a Sherman Act claim.[56] As a result, U.S. courts may entertain claims involving foreign trade or commerce if the "conduct significantly harms imports, domestic commerce, or American exporters."[57] In *F. Hoffman-La Roche Ltd. v. Empagran*, the Supreme Court held that the FTAIA barred foreign purchasers of price-fixed vitamins from bringing claims in U.S. courts because, though the anticompetitive conduct exerted both harmful foreign and domestic effects, the foreign purchasers' claims depended only on the foreign effects.[58]

Although the FTAIA was enacted to protect domestic producers from antitrust scrutiny when engaging in business abroad, the last three decades have nearly turned the FTAIA on its head. As manufacturing operations continue their migration overseas to foreign companies or to the foreign facilities of foreign affiliates of U.S. companies, the FTAIA—designed primarily to shield domestic manufacturers against foreign purchaser claims—is increasingly wielded by foreign manufacturers to defend themselves against *domestic* purchaser claims.

The FTAIA remained largely an enigma until the past decade. Seldom had so little attention been paid to a statute so significant to antitrust enforcement (and seldom had so few words in a statute so puzzled the profession once the statute gained notoriety). The internationalization of civil antitrust enforcement has forced practioners and the courts alike to grapple with the statute's scope and significance. Fundamental questions about the FTAIA's interaction with the Sherman Act still remain unanswered, such as whether the FTAIA limits the subject matter jurisdiction of the Sherman Act or simply sets forth additional substantive elements that must be satisfied when the challenged conduct involves foreign commerce.

Jurisdiction or Substance. Early decisions by the D.C. and Ninth Circuits treated the FTAIA as a rule of subjectmatter jurisdiction. Under the framework of *Empagran II* and *LSL Biotechnologies*, plaintiffs bear the burden of establishing subject-matter jurisdiction, defendants may move for dismissal under Rule 12(b)(1), and courts are free to examine evidence and resolve factual disputes.[59] In contrast, and relying heavily on the Supreme Court's 2006 pronouncement in *Arbaugh v. Y&H Corporation* that statutes should be treated as non-jurisdictional in character unless Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional,"[60] the *Animal Science* and *Agrium* decisions of the past two years have positioned the

Third and Seventh Circuits on the other side of the debate.[61] This latter view's apparent momentum will have important implications for civil litigation defendants, primarily at the pleading stage (requiring motions to be brought under Rule 12(b)(6) instead of Rule 12(b)(1)).

Import Exclusion. Another battle brews over the meaning of the FTAIA's import exclusion. The statute strips courts of Sherman Act jurisdiction over conduct involving "trade or commerce (other than import trade or import commerce) with foreign nations . . . ."[62] Courts in the Ninth Circuit have held that a defendant is deprived of FTAIA protection only if the defendant actually or directly brings the goods or services into the United States.[63] The Third Circuit arguably adopts a more plaintiff-friendly position, broadly construing the "import trade or import commerce" exclusion to encompass not only physical importers but also defendants whose conduct is "directed at an import market."[64]The latter interpretation has significant implications for foreign input manufacturers that sell to finished product makers known to import into the United States. Because these foreign input manufacturers arguably "target" U.S. import markets, under this view they would likely be denied FTAIA protection from the outset.

Domestic Effects. Perhaps the most consequential open question relates to the scope of the "domestic effects" exception. In recent years, a series of cases involving allegations of price fixing among foreign input manufacturers has tested the scope of the exception.[65] U.S. finished-products purchasers have sought damages for allegedly price-fixed inputs sold to foreign manufacturers for incorporation into finished products.[66] Those claims may be cognizable to the extent that a finished-product overcharge exists, the finished products are alleged to be the object of the conspiracy, and the effect is the direct, substantial, and reasonably foreseeable consequence of the input price fixing.[67]

But what if the object of the conspiracy is simply the input, made and sold abroad and incorporated into finished products that may be imported into the United States (as well as other countries) but the finished products themselves are not alleged to be the object of any conspiracy? Foreign input makers have advocated a narrow interpretation of the domestic effects exception, arguing that the chain of transactions between the initial input sale and the ultimate finished-product purchase implicate intervening developments that render residual domestic effects indirect and not reasonably foreseeable.[68] U.S. purchasers promote a broader interpretation that captures foreign input sales.[69]

Appellate and district courts have divided over how broadly or narrowly the exception's language should be construed. Even within a single district, judges have reached different results. For example, in *In re Static Random Access Memory Antitrust Litigation* (*SRAM*), Judge Wilken of the Northern District of California required the plaintiffs to show more than the input maker's "inchoate hope or intention" that their inputs eventually reach the United States.[70] Plaintiffs could only recover on their claims to the extent they proved that the defendants made certain types of inputs *specifically designed* to be sold to a particular manufacturer in order to be incorporated into a finished product that *in turn was specifically designed* for and actually sold in the United States.[71] But faced with similar facts, Judge Illston, also of the Northern District of California, reached a different conclusion.[72] In *In re TFT-LCD Antitrust Litigation*, she held that a domestic effect is sufficiently direct and reasonably foreseeable so long as that effect does not "change in any substantial way before it reaches the United States consumer."[73] Judge Illston found that the effect of the defendants' anticompetitive conduct did not change significantly between the beginning of the process (LCD panel overcharges) and the end (television and other finished product overcharges); as a result, "[n]o intervening events interrupted its journey."[74]

These interpretations of the domestic effect exception may seem to split hairs but in this delicate and undeveloped area, emphasis in one or another direction can mean the difference between opening Pandora's Box and keeping it shut.

The FTAIA in Criminal Cases. The increasingly integrated global marketplace has also created ripples

in the criminal arena, where a sufficient U.S. nexus is required.[75] In its 1997 decision in *United States v. Nippon Paper Industries Co.*, the First Circuit became the first federal appellate court to adjudicate a criminal antitrust prosecution of extraterritorial conduct.[76] A key question for the court was whether the Sherman Act should be read more narrowly in the criminal setting than in the civil context. The court considered it "common sense" to interpret "the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil."[77] The First Circuit held that since the Supreme Court's decision in *Hartford Fire* had already established Sherman Act jurisdiction over wholly foreign conduct with intended and substantial domestic effects, and since both common sense and canons of statutory construction counseled in favor of "uniform" interpretation for criminal and civil purposes, foreign anticompetitive conduct could be criminally prosecuted under the Sherman Act.[78]

Years later, the Eleventh Circuit in *United States v. Ander son* implied the same in dicta when it engaged in a domestic effects analysis of a Sherman Act prosecution for quasiforeign conduct.[79] Earlier this year, criminal defendants in *United States v. AU Optronics* unsuccessfully argued that a California federal district court lacked subject-matter jurisdiction over their Sherman Act prosecution because the allegations lacked the requisite impact on domestic commerce.[80] The court found jurisdiction because the government's charges related to an anticompetitive domestic conspiracy, not to wholly foreign conduct, as the defendants had argued.[81]

The Future for Criminal Cases Under the FTAIA. With few exceptions, the case law construing the meaning and limits of the FTAIA has been decidedly civil, not criminal. That may change in coming years. Indeed, future Sherman Act criminal prosecutions of foreign conduct appears to be a foregone conclusion. Criminal defendants typically make their stand on whether the alleged conduct has sufficient domestic effects.[82] But the prosecutorial implications of the FTAIA—a statute *Empagran* recognizes as having a force of its own[83]—has yet to be fully explored. Although the law had been in effect for more than a decade, *Nippon Paper* dismissed it as "inelegantly phrased" and expressly declined to rely on it.[84] Other courts to recognize criminal prosecutions of foreign anticompetitive conduct have focused primarily on the statute's domestic effects exception.[85]

If, as the *Agrium* court held, the FTAIA is merely construed as adding *substantive elements* to a Sherman Act charge (and is not therefore a restriction on the subject-matter jurisdiction of the federal courts) and *if*, as the *Nippon Paper* court held, the Sherman Act is construed in a congruent manner in both the civil and criminal settings, then the meaning of the "domestic effects" exception in the criminal context must be explored.

The Undefined "Claim." The FTAIA removes nonimport conduct involving foreign commerce from the reach of the Sherman Act unless that conduct has a direct and substantial effect on U.S. commerce and that effect "gives rise to a claim" under the Sherman Act.[86] *Empagran* makes clear that "a claim" means "the plaintiff's claim" or "the claim at issue," not some third party's claim.[87] What does this mean in a criminal prosecution? *Empagran* recognizes that "a statute can apply and not apply to the same conduct, depending upon other circumstances," such as "the nature of the lawsuit."[88]

Future defendants might well argue that in light of the FTAIA, the Sherman Act does not criminalize some conduct that may nevertheless be subject to a civil action because a criminal prosecution is not a "claim." For one thing, the FTAIA does not define the term "claim."[89] In determining the scope of a statute, courts first look to its plain language,[90] and where a term is undefined, give the statutory language its "ordinary meaning."[91] This fundamental canon of statutory interpretation applies with particular force in the criminal context where the canon serves as a corollary to the rule of lenity construing ambiguous criminal statutes in favor of defendants.[92]

The term "claim" has not traditionally been understood to extend to the government's interest in a criminal proceeding. *Black's Law Dictionary*, for example, defines "claim" as "[t]he assertion of an

existing right"; "any right to payment or to an equitable remedy"; or "[a] demand for money, property or a legal remedy to which one asserts a right, esp[ecially] the part of a complaint in a civil action specifying what relief the plaintiff asks for."[93] Other dictionaries provide similar definitions,[94] none of which can fairly be described as including criminal prosecutions. Unlike "claims," which implicate rights, demands, and remedies, "criminal prosecutions" implicate wrongs, charges, and punishment. Hence, *Black's Law Dictionary* defines "crime" as, *inter alia*, an "act that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding," and "prosecution" as, *inter alia*, a "criminal proceeding in which an accused person is tried."[95]The term is defined in other statutes, both civil and criminal, in a way that likewise accords with the limitation to civil actions.[96] And in practice, courts typically do not construe "claim" to include criminal prosecutions brought by a governmental entity.[97]

In enacting the FTAIA, Congress could easily have formulated the statute to include criminal proceedings, for example, by requiring that the domestic effects "give rise to a claim or charge" or "give rise to an action" under the Sherman Act, or more simply, by providing that jurisdiction exists where a domestic effect results in a "violation of" the antitrust laws. In other words, "if Congress had intended [the asserted meaning], it could have said so in straightforward language."[98] Congress's use of the word "claim" is thus significant when judged against alternative language that on its face would encompass criminal proceedings.

Admittedly, the enacting legislators do not appear to have expressly contemplated criminal proceedings. But as *Nippon Paper* recognizes, antitrust criminal prosecutions for wholly foreign conduct were rare-to-nonexistent even before that case.[99] Congress would not have had to explain its decision to exclude criminal prosecutions from the "domestic effects" exception (if that exclusion is read into the statutory language as it could very well be). Moreover, only "the most extraordinary showing of *contrary* intentions in the legislative history will justify a departure" from plain and unambiguous statutory language.[100] Thus, a future FTAIA battleground may well be whether the FTAIA categorically forecloses criminal jurisdiction over foreign anticompetitive conduct under the

substantial effects text, leaving only the import exclusion applicable to criminal prosecutions. Defendants and courts have yet to explore this area.

Conclusion

Learned Hand wrote that every statute is "at once a prophecy and a choice."[101] A statute is a choice because it purports to strike a balance between competing values, although the balance is not always clear or complete. It is a prophecy because it predicts its own effects, its beneficiaries, and perhaps most relevant for purposes of this article, how completely it can be enforced (and at what cost). The "choices" of the past twenty-five years of Sherman Act Section 1 cartel enforcement—the enhanced extraterritorial enforcement of U.S. law and the international proliferation of amnesty regimes, to name only two—contain their own implicit prophecy, one ensuring that there can be no going back to the view that the Sherman Act is simply a domestic charter of economic freedom. The next twenty-five years will be decidedly foreign in focus.

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1 Scott D. Hammond, Acting Deputy Ass't Att'y Gen., U.S. Dep't of Justice
Antitrust Div., Speech Before the ABA Midwinter Leadership Meeting: An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program 6 (Jan. 10, 2005), *available at* http://www.justice. gov/atr/public/speeches/207226.pdf.

2 *Id.*

3 Gibson Dunn, *2011 Year-End Criminal Antitrust Update* (Jan. 9, 2012), *available at* http://www.gibsondunn.com/publications/Documents/2011Year EndCriminalAntitrustUpdate.pdf.

4 *See* Press Release, U.S. Dep't of Justice Antitrust Div., Taiwan-Based AU Optronics Corporation Sentenced to Pay $500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy (Sept. 20, 2012), *available at* http://www. justice.gov/atr/public/press_releases/2012/287189.htm.

5 *See* U.S. Dep't of Justice Antitrust Div., Sherman Act Violations Yielding a Corporate Fine of $10 Million or More, http://www.justice.gov/atr/public/ criminal/sherman10.html (last visited Oct. 11, 2012).

6 *See* Scott D. Hammond, Deputy Ass't Att'y Gen. U.S. Dep't of Justice Antitrust Div., Speech at the Twenty-Fourth Annual National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement over the Last Two Decades 5–6 (Feb. 25, 2010) [hereinafter Evolution], *available at* http://www.justice.gov/atr/public/speeches/255515.pdf.

7 Ian Simmons et al., *Muddy Waters? Navigating the Antitrust Criminal Penalty Enhancement and Reform Act*, ANTITRUST REP., Aug. 2006, at 25.

8 *See id.*

9 *See* Benjamin G. Bradshaw & Angela Thaler Wilks, *ACPERA—Lasting Limits or Fleeting Experiment?*, LAW360 (Mar. 20, 2009), http://www.law360.com/ competition/articles/92936 (by subscription).

10 *See* Antitrust Criminal Penalties Enhancement and Reform Act of 2004 Extension Act of 2010, Pub. L. No. 111-190, §3(a), 124 Stat. 1275, 1275–76 (2010).

11 *See* Bradshaw & Wilks, *supra* note 9 (explaining that "it is unclear whether [ACPERA] alone has bolstered participation in the DOJ's Corporate Leniency Program").

12 Antitrust Criminal Penalties Enhancement and Reform Act of 2004 Extension Act of 2010, §5, 124 Stat. at 1276.

13 *See* GAO, CRIMINAL CARTEL ENFORCEMENT: STAKEHOLDER VIEWS ON IMPACT OF 2004 ANTITRUST REFORM ARE MIXED, BUT SUPPORT WHISTLEBLOWER PRO -

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TECTION (July 2011) [hereinafter GAO Report], *available at* http://www.gao. gov/new.items/d11619.pdf.

14 *See id.* at 15 (noting "little change" in overall number of leniency applications after ACPERA, but increases in reporting of violations about which DOJ had no prior knowledge).

15 Hammond, Evolution, *supra* note 6, at 1, 3.

16 *See id.* at 1.

17 *See* Andrea L. Hamilton & Joseph F. Wintersheid, *Antitrust Compliance Programs: Risk-Benefit Analysis*, LAW360 (July 20, 2012), http://www. law360.com/articles/362315/antitrust-compliance-programs-risk-benefitanalysis.

[18] *See Carolina Bolado, Lawmakers Propose Antitrust Whistleblower Protections*, LAW360 (July 31, 2012), http://www.law360.com/articles/365638/law makers-propose-antitrust-whistleblower-protections (Senators Leahy and Grassley introducing legislation to add whistleblower anti-retaliation provisions to ACPERA); *see also* Melissa Lipman, *Cartel Whistleblower Bill May Fall Short in Boosting DOJ Cases*, LAW360 (Aug. 7, 2012) (citing proponents of whistleblower bounties), http://www.law360.com/articles/367580/cartelwhistleblower-bill-may-fall-short-in-boosting-doj-cases.

[19] Criminal Antitrust Anti-Retaliation Act, 112th Cong. (July 31, 2012), *available at* http://www.leahy.senate.gov/imo/media/doc/Antitrust%20Legislation %20073112.pdf.

[20] *See* Kevin R. Sullivan et al., *The Potential Impact of Adding a Whistleblower Rewards Provision to ACPERA 5*, ANTITRUST SOURCE (Oct. 2011), http://www. americanbar.org/content/dam/aba/publishing/antitrust_source/oct11_ sullivan_10_24f.pdf.

[21] *See id.*

[22] Hammond, *supra* note 1, at 7.

[23] *Id.*

[24] *Id.* at 7–8.

[25] *In re* Hawaiian & Guamanian Cabotage Antitrust Litig., 647 F. Supp. 2d 1250, 1258 (W.D. Wash. 2009).

[26] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

[27] Direct Purchaser Pls.' Opp. to Joint Mot. to Dismiss Direct Purchaser Pls.' First Am. Compl. at 1, *In re* TFT-LCD (Flat Panel) Antitrust Litig., MDL No. 1827 (N.D. Cal. Jan. 30, 2009), ECF No. 813.

[28] *Id.* at 21.

[29] *In re* TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1184 (N.D. Cal. 2009).

[30] *Hawaiian & Guamanian Cabotage*, 647 F. Supp. 2d at 1254.

[31] *Id.* at 1258.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1258 n.2, 1270–71 (internal quotation marks omitted) (quoting *In re* Tableware Antitrust Litig., 363 F. Supp. 2d 1203, 1205 (N.D. Cal. 2005)).

[35] 131 S. Ct. 2541 (2011).

[36] 477 U.S. 317 (1986).

[37] CGC-04-431105 (Cal. Super. Ct., S.F. Cnty.).

[38] 400 F.3d 562 (8th Cir. 2005).

[39] *Id.* at 572.

[40] *Id.* at 572–73.

[41] *Id.* at 573.

[42] 471 F.3d 24, 42 (2d Cir. 2006).

[43] *Id.* at 41.

[44] Comcast Corp. v. Behrend, 655 F.3d 182, 187 (3d Cir. 2011), *cert. granted*, No. 11-864, 2012 U.S. LEXIS 4754 (June 25, 2012).

[45] *See id.* at 214–15 (Jordan, J., concurring in the judgment in part and dissenting in part).

[46] *Id.* at 204 n.13 (emphasis added).

[47] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

[48] *Behrend*, 655 F.3d at 215 (Jordan, J., concurring in the judgment in part and dissenting in part).

[49] 2012 U.S. LEXIS 4754, at *1.

[50] Pub. L. No. 109-2, 118 Stat. 4 (2005).

[51] *See In re* Rubber Chems. Antitrust Litig., 486 F. Supp. 2d 1078, 1084 (N.D. Cal. 2007) (denying motion to compel discovery of communications with European Commission pursuant to corporate leniency program); *but see In re* Vitamins Antitrust Litig., MDL No. 1285, 2002 WL 34499542, at *10 (D.D.C. Dec. 18, 2002) (ordering production of submissions to European Commission).

[52] *See* Costa v. Kerzner Int'l Resorts, Inc., 277 F.R.D. 468, 470–74 (S.D. Fla. 2011).

[53] Benjamin G. Bradshaw et al., *Foreign Sovereignty and U.S. Antitrust Enforcement: Is "The State Made Me Do It" a Viable Defense?*, ANTITRUST, Summer 2012, at 19.

[54] *See* H.R. REP. 97-686, at 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2492 ("As Chairman Rodino stated in introducing the bill, '[The FTAIA] would allow American firms greater freedom when dealing internationally while reinforcing the fundamental commitment of the United States to a competitive domestic marketplace . . . . [T]he uncertainty of antitrust constraints has remained a

strong concern of potential exporters; that concern is remedied by this bill.' . . . This legislation will send to the export business community the clear signal that it appears to need in order for it to compete with greater confidence and freedom of action in the international marketplace . . . .").

[55] 15 U.S.C. §6a (FTAIA).

[56] *Id.*

[57] F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 158 (2004).

[58] *Id.* at 175.

[59] *See* Empagran S.A. v. F. Hoffmann-Laroche, 417 F.3d 1267, 1269 (D.C. Cir. 2005) (*Empagran II*) ("We . . . conclude that we are without subject-matter jurisdiction under the FTAIA."); United States v. LSL Biotechs., 379 F.3d 672, 683 (9th Cir. 2004) ("The FTAIA provides the standard for establishing when subject matter jurisdiction exists over a foreign restraint of trade."). Notably, Judge Illston of the Northern District of California has relied on post*Arbaugh* decisions of the Third and Seventh Circuits in holding that the FTAIA is not a jurisdictional but is a substantive limitation, despite *LSL Biotech nologies* precedent to the contrary. *See In re* TFT-LCD Antitrust Litig., 822 F. Supp. 2d 953, 958–59 (N.D. Cal. 2011) ("The Court agrees with the Third Circuit that the FTAIA does not implicate the subject matter jurisdiction of the federal courts. Although the Court does not lightly disregard the Ninth Circuit's decision in *LSL Biotechnologies*, that decision cannot withstand *Arbaugh*."); *cf*. Centerprise Int'l Ltd. v. Infineon, 546 F.3d 981, 1110 n.3 (9th Cir. 2008) (opinion amended to state that the court is not deciding whether the FTAIA is jurisdictional statute).

[60] 546 U.S. 500, 515 (2006).

[61] *See* Animal Sci. Prods. v. China Minmetals Corp., 654 F.3d 462, 468–69 (3d Cir. 2011) ("[T]he FTAIA's language must be interpreted as imposing a substantive merits limitation rather than a jurisdictional bar."); Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 848 (7th Cir. 2012) (en banc) ("We hold first that the FTAIA's criteria relate to the merits of a claim, and not to the subject-matter jurisdiction of the court.").

[62] 15 U.S.C. §6a.

[63] *In re* TFT-LCD (Flat Panel) Antitrust Litig., MDL No. 1827, 2010 U.S. Dist. LEXIS 65037, at *18 (N.D. Cal. June 28, 2010) (order granting defendants' joint motion to dismiss) ("Motorola does not allege that the foreign-purchased products were imported into the United States by defendants; to the contrary, the complaint alleges that the foreign-purchased products were brought to the United States by Motorola affiliates . . . . [G]iven the global nature of the economy, defining "imports" as goods that foreign companies "intended" to ultimately make their way into the United States for resale would potentially sweep in much conduct excluded by the FTAIA."); *In re* Korean Air Lines Co. Antitrust Litig., MDL No. 1891, 2008 U.S. Dist. LEXIS 111722, at *16 (C.D. Cal. June 25, 2008) (order granting in part and denying in part defendants' motions to dismiss) ("In sum, the Court must determine whether defendants directly br[ought] items or services into the United States or directly increase[d] or decrease[d] United States imports." (alterations in original) (citations omitted).)

[64] *Animal Science Products*, 654 F.3d at 470 ("Functioning as a physical importer may satisfy the import trade or commerce exception, but it is not a necessary prerequisite. Rather, the relevant inquiry is whether the defendants' alleged anticompetitive behavior was directed at an import market.") (quotations and footnote omitted).

[65] *See, e.g.*, *In re* Static Random Access Memory (SRAM) Antitrust Litig., MDL No. 1891, 2010 U.S. Dist. LEXIS 141968 (N.D. Cal. Dec. 31, 2010); *In re* TFT-LCD Antitrust Litig. (TFT-LCD), 822 F. Supp. 2d 953 (N.D. Cal. 2011).

[66] *SRAM*, 2010 U.S. Dist. LEXIS 141968, at *30; *TFT-LCD*, 822 F. Supp. 2d at 954–55.

[67] *See* 15 U.S.C. §6a.

[68] *See, e.g.*, *TFT-LCD*, 822 F. Supp. 2d at 960–61.

[69] *Id.* at 962–63.

[70] *SRAM*, 2010 U.S. Dist. LEXIS 141968, at *47.

[71] *Id.* ("Mere argument that Defendants must have harbored an inchoate hope or intention that their SRAM would reach the United States is insufficient. However, IP Plaintiffs have proffered some evidence from which it could be inferred that Defendants produced certain types of SRAM products *specifically designed* to be sold to a particular manufacturer, to be incorporated into a product *in turn specifically designed* for the United States market, and actually sold in the United States. Supra-competitive pricing of that SRAM could have had a domestic effect in the United States which could have given rise to antitrust injury. IP Plaintiffs' evidence is thus far insufficient to prove that all or any particular subset of SRAM sold abroad and then imported would meet this test." (emphasis added)).

[72] *TFT-LCD*, 822 F. Supp. 2d at 967 ("SRAM does not help defendants' argument. . . . To the extent defendants argue that this Court should reach the same conclusion as the court in *SRAM*, the Court declines to do so.).

[73] *Id.* at 964.

[74] *Id.*

[75] *See* United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995) ("Punishing crimes committed on a foreign flag ship is like punishing a crime committed on foreign soil; it is an intrusion into the sovereign territory of another nation. As a matter of comity and fairness, such an intrusion should not be undertaken absent proof that there is a connection between the criminal conduct and the United States sufficient to justify the United States' pursuit of its interests.").

[76] United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997) ("Were this a civil case, our journey would be complete. But here the United States essays a criminal prosecution for solely extraterritorial conduct rather than a civil action. This is largely uncharted terrain; we are aware of no authority directly on point, and the parties have cited none.").

[77] *Id.*

[78] *Id.* ("To sum up, the case law now conclusively establishes that civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One's jurisdictional reach.") (citing *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796 (1993)).

[79] 326 F.3d 1319, 1330 (11th Cir. 2003).

[80] United States v. AU Optronics Corp., No. CR 09-0110 SI, slip op. at 7–8 (N.D. Cal. Apr. 18, 2011), ECF No. 287.

[81] *Id.*

[82] *Id.* at 3.

[83] F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S.at 161–62.

[84] United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997) ("In arriving at this conclusion, we take no view of the government's asseveration that the [FTAIA] makes manifest Congress' intent to apply the Sherman Act extraterritorially. The FTAIA is inelegantly phrased and the court in *Hartford Fire* declined to place any weight on it. We emulate this example and do not rest our ultimate conclusion about Section One's scope upon the FTAIA.") (citations omitted).

[85] *See, e.g.*, United States v. Anderson, 326 F.3d 1319, 1330 (11th Cir. 2003).

[86] *See* 15 U.S.C. §6a.

[87] *Empagran*, 542 U.S. at 174–75.

[88] *Id.*

[89] The antitrust laws do not define the word "claim," but they do use the term in a way that evidences the word's ordinary meaning. *See, e.g.*, 15 U.S.C. §§ 15, 15a (using "claim" to describe the effort by civil plaintiffs (including the United States) to recover money damages: "The court may award under this section . . . simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment . . . .").

[90] Moskal v. United States, 498 U.S. 103, 108–09 (1990) (internal quotation omitted).

[91] FCC v. AT&T Inc., 131 S. Ct. 1177, 1182 (2011) (quotation omitted); *see* *Moskal*, 498 U.S. at 109 (same); Pace v. DiGuglielmo, 544 U.S. 408, 413 (2005) (interpreting statutory term according to its "common usage" and "common understanding").

[92] *See, e.g.*, Salinas v. United States, 522 U.S. 52, 57–58 (1997) ("Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language."); United States v. Wiltberger, 18 U.S. 76, 96 (1820) ("The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest."). [93] BLACK'S LAW DICTIONARY 281–82 (9th ed. 2009).

[94] *See, e.g.*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 409 (2d ed. 1955) ("claim" includes (1) "A demand of a right or supposed right; a calling on another for something due or supposed to be due"; (2) "a right to claim something; a title to any debt, privilege, or other thing in possession of another"; (3) "that which one claims"); 1 NEW SHORTER OXFORD ENGLISH DICTIONARY 493 (1993) (claim includes a (1) "demand for something as due; a statement of one's right to something; a contention, an assertion; spec. . . . a demand for payment in accordance with law"; (2) a "right or title (to something); a right to make a demand ((up)on a person etc.)"); *cf.* David M. Walker, THE OXFORD COMPANION TO LAW 227 (1980) (British law) ("claim" is a "general term for the assertion of a right to money, property, or to a remedy").

[95] BLACK'S LAW DICTIONARY *supra* note 93, at 427, 1341; *see also* Lupton v. Chase Nat'l Bank of New York, 89 F. Supp. 393, 397 (D. Neb. 1950) (defining "prosecution" generally as "[t]he instituting and carrying forward of a judicial proceeding to obtain some right *or* to redress and punish some wrong.") (emphasis added).

[96] The Bankruptcy Code, for example, defines "claim" as any "right to payment" or any "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5). And the False Claims Act, a criminal statute, defines "claim" as any "request or demand, whether under a contract or otherwise, for money or property." 31 U.S.C. § 3729(c).

[97] One context in which the word "claim" includes criminal proceedings is in private insurance contracts that provide their own definitions of the term to extend coverage to both civil and criminal legal proceedings. *See, e.g.*, Med. Mut. Ins. Co. of Me. v. Indian Harbor Ins. Co., 583 F.3d 57, 61 (1st Cir. 2009) (considering insurance policy that defined the word "claim" to include civil or criminal proceedings). The insurance usage suggests that an association between "claim" and "criminal action" is not unimaginable, but it certainly is not the predominant understanding.

[98] *See, e.g.*, New Process Steel, L.P. v. N.L.R.B., 130 S. Ct. 2635, 2640 (2010) ("[A]" statute ought, upon the whole, to be so construed that . . . no clause, sentence, or word shall be . . . insignificant." (second alteration added) (quotation omitted)); Carr v. United States, 130 S. Ct. 2229, 2236 (2010) (same); Bailey v. United States, 516 U.S. 137, 143 (1995) (same); *see also* Leocal v. Ashcroft, 543 U.S. 1, 12 (2004) ("[W]e must give effect to every word of a statute wherever possible.").

[99] *See* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997) (recognizing the prosecution as "uncharted territory").

[100] *Salinas*, 522 U.S. at 58 (internal quotations omitted) (emphasis added).

[101] Learned Hand, *The Future of Wisdom in America*, SATURDAY REV., Nov. 22, 1952, at 9.

DAY ONE 第一日

Issue 3: Merger control in the current US Administration

议题 3：本届美国政府的经营者集中管理制度

13:00-14:30

This panel will discuss merger control developments in China, US and EU during the last year and explore whether rising protectionism is having an effect on merger analysis and transparency.

本组将讨论上一年度中国、美国和欧盟在经营者集中管理方面的发展，并探析新兴的保护主义是否会对分析经营者集中以及程序的透明度产生影响。

Chair

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盛杰民，北京大学法学院教授

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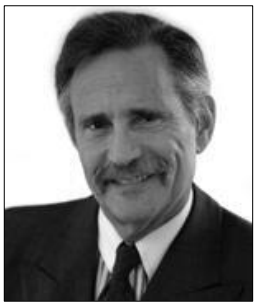
Senior Consultant, World Bank**,** European Bank for Reconstruction and Development (EBRD), OECD, Organisation for Security and Co-operation in Europe

世界银行、欧洲复兴开发银行（EBRD）、经济合作与发展组织、欧洲安全与合作组织，**高级顾问**



James Venit

Partner, Dentons
大成律师事务所合伙人

James Venit has been practicing competition law in Brussels since 1980. He has had extensive international antitrust and European competition law experience and has represented multinational companies in proceedings under the EU Merger Regulation and Articles 101 and 102 involving a wide-range of industries and economic sectors.

He has handled major mergers such as Volvo/Scania, GE/Honeywell, Arcelor/Mittal and Outokumpu/Thyssen Krupp, major Commission investigations such as Intel. And has been involved in landmark cases, including Lufthansa/United Alliance, GSK/Spanish Pricing and Yamaha. He also has extensive experience counseling companies on compliance matters and in the implementation of compliance programs.

Mr. Venit has written extensively on various aspects of EU competition law and was named one of the "Top 10 antitrust lawyers" from around the world by Global Counsel. He repeatedly has been selected for inclusion in Chambers Global: The World's Leading Lawyers for Business. In addition, Mr. Venit was named a leading practitioner in his field by Who's Who Legal: Competition Lawyers & Economists and Who's Who Legal: Competition.

James Venit 自 1980 年以来一直在布鲁塞尔从事关于竞争法的工作。他在国际反垄断和欧洲竞争法方面有广泛的经验，曾根据欧盟并购条例以及第 101 和 102 条条款，在众多行业和经济领域代表跨国公司参与诉讼。他曾处理过众多并购案，如：Volvo/Scania, GE/Honeywell, Arcelor/Mittal and Outokumpu/Thyssen Krupp 等大型并购案。他曾处理过许多具有里程碑意义的案件，包括 Lufthansa/United Alliance, GSK/Spanish Pricing and Yamaha 等案件。他还在合规事宜和执行合规计划方面拥有丰富的咨询经验。

Venit 先生对欧盟竞争法的多个方面均发表过自己的看法，他被全球律师协会评选为全球"十大反垄断领域律师"之一。他曾多次入选"钱伯斯全球：全球领先的商业律师"。此外，Venit 先生还被"法律名人录：竞争律师与经济学家"和"法律界人士：竞争"评选为该领域的领军人物。

Scott Schaeffer

Counsel, O'Melveny & Myers
美迈斯律师事务所资深律师

Scott Schaeffer is a counsel in O'Melveny's Shanghai office and a member of the Antitrust and Competition Practice. Scott represents clients based both in the United States and in Asia. His practice involves complex antitrust and commercial litigation, antitrust counseling, and criminal antitrust investigations. It also involves defending proposed and consummated mergers before antitrust agencies and in merger litigation. Scott has represented US and Asian clients in transactions in the technology, airline, biotech, food service, telecommunications, and manufacturing industries, among others.

Scott counsels multinational clients on a variety of other competition matters, including Section 8 of the Clayton Act, the Robinson-Patman Act, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and compliance issues. He regularly advocates for government interventions on behalf of parties adversely impacted by anticompetitive conduct or proposed mergers.

Scott is also involved in the firm's appellate and white collar practices. He has authored briefs in cases before the United States Supreme Court as well as federal and state appellate courts on subjects including criminal law, class actions, competition law, federal jurisdiction and procedure, federal constitutional law, and employment law. His white collar experience includes criminal defense, government investigations, and internal compliance matters, both in the US and in Asia.

Prior to joining O'Melveny, Scott was a law clerk for the Honorable A. Raymond Randolph on the US Court of Appeals for the DC Circuit and the Honorable Gary Feinerman on the US District Court for the Northern District of Illinois.

Scott Schaeffer 是美迈斯律师事务所上海代表处的资深律师，也是反垄断和竞争业务组的成员。Scott 代理的客户既包括美国境内的客户也包括亚洲地区的客户。他的业务范围涉及复杂的反垄断和商业诉讼、与反垄断有关的咨询和刑事反垄断调查，他还在反垄断机构为拟议中的并购和已完成的并购进行抗辩并代理并购诉讼。Scott 曾代理美国和亚洲客户办理各类交易，范围涉及技术、航空、生物科学、食品服务、电信和制造业等。

Scott 为跨国客户提供各类有关竞争问题的咨询服务，包括《克莱顿法》第 8 条、《罗宾逊-帕特曼法》、1976 年《哈特-斯科特-罗迪诺反垄断法改进法》及合规问题。他时常代表因反竞争行为或拟议并购而受到不利影响的各方对政府干预行为提出主张。

Scott 还参与本所的上诉与白领犯罪业务。他在美国最高法院、各联邦上诉法院和州上诉法院负责起草案情陈述，覆盖范围包括刑事诉讼、集体诉讼、竞争法、联邦管辖权与程序、联邦宪法和雇佣法等。他在白领业务方面的经验包括美国与亚洲的刑事抗辩、政府调查和内部合规事务。

在加盟美迈斯之前，Scott 曾担任美国哥伦比亚特区巡回法院上诉法庭 A. Raymond Randolph 法官的助理以及伊利诺伊州北区地方法院 Gary S. Feinerman 法官的助理。

Jie Tong

童杰

Partner, Head of Competition team, DaHui Lawyers

达辉律师事务所合伙人，竞争法团队负责人

With over 16 years of experience at the Chinese regulator and an international law firm, Jie is the head of the competition team in DaHui. Jie has extensive experience across the full spectrum of non-contentious and contentious competition matters, including merger control, antitrust investigations, antitrust litigation, competition compliance issues.

Prior to joining DaHui, Jie worked in the competition team of Allen & Overy, where he represented clients in numerous complex antitrust cases. Jie also worked at the PRC. Ministry of Commerce (MOFCOM) for over 10 years, where he was deputy director and was heavily involved in drafting regulations and handling matters related to competition, investment and trade. Jie has a thorough understanding of the unique legal, political and cultural environment of China, and is adept at providing pragmatic solutions to clients.

The main clients that he advised include: Merck KGaA, Novartis, Alcon, Sumitomo, Broadcom, TOTAL, Airbus, Berkshire Hathaway, Alibaba, Global Foundries, Seagate, IHG, Indorama, TNT Express, Arla, Vanke, MengNiu, Huawei, State Grid, HP, 21st Century Fox, Caesars Entertainment, ABF, CEPSA, Friesland, International Paper, Lubrizol, LSH, Magna, M&G, Mitsubishi, Mubadala, Veolia, Ucar and CICC etc..

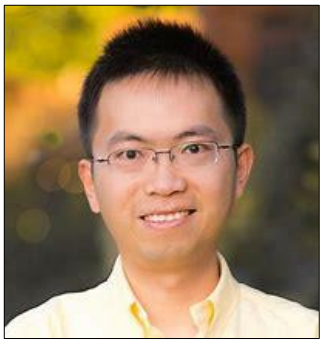
Jie's working language is Chinese and English. He graduated from Columbia Law School and is qualified in both China and New York.

童杰律师业务领域包括反垄断、反不正当竞争、投资、并购、贸易及知识产权等。童律师尤其在竞争法方面拥有丰富经验，已在近百项交易或案件中就并购审查、反垄断调查、反垄断/反不正当竞争争议解决、反垄断合规等为客户提供法律服务。尤其擅长为客户在反垄断申报、反垄断调查、反垄断诉讼以及企业合规方面提供法律服务。

在加入达辉前，童律师曾在安理国际律师事务所执业多年，任资深反垄断顾问，处理了大量复杂的反垄断申报及反垄断案件，为众多跨国企业和中国客户提供企业合规咨询和培训。童律师还曾在中国商务部任职超过 10 年，任条约法律司副处长，在反垄断、贸易和投资争议解决、贸易救济、知识产权方面处理了大量案件并参与制定了相关法规和政策 。他熟悉中国特有的法律、政治和文化环境，擅长为客户提出务实的法律建议。

童律师服务过的主要客户包括：万科、蒙牛、华为、国家电网、惠普、格罗方德、希捷、21 世纪福克斯、凯撒娱乐、英国联合食品、西班牙石油、菲士兰、洲际酒店集团、国际纸业、Indorama、TNT 快递、路博润、利星行、麦格纳、默克公司、M&G 化工、三菱、穆巴达拉、伯克希尔哈撒韦、诺华、爱尔康、住友、道达尔、威立雅、空中客车、神州优车、阿里巴巴、中金公司等。

童律师的工作语言为中文和英文，毕业于美国哥伦比亚大学法学院（LLM），拥有美国纽约州律师执业资格以及中国律师资格。



Kun Huang

Vice-President, Compass Lexecon

Compass Lexecon 经济咨询公司副总裁

Practice Areas: Antitrust & Competition, Class Certification, Damages, Entertainment & Media, High Technology, Intellectual Property, Pharmaceuticals, Public Policy, Securities & Financial Markets, Transportation

Kun Huang is a Vice President with Compass Lexecon. Dr. Huang specializes in antitrust economics and industrial organization. He has performed complex analyses for airline, car rental, video-conferencing, pharmaceutical, and supermarket mergers. He has provided extensive analyses and support for antitrust litigations involving alleged monopolization, price fixing, tying and bundling arrangement, and exclusive dealing in a variety of industries, including high-tech, publishing, media ratings, payment cards, college sports, medical devices, pharmaceuticals, and transportation. He also has experience examining market-timing issues in the mutual fund industry.

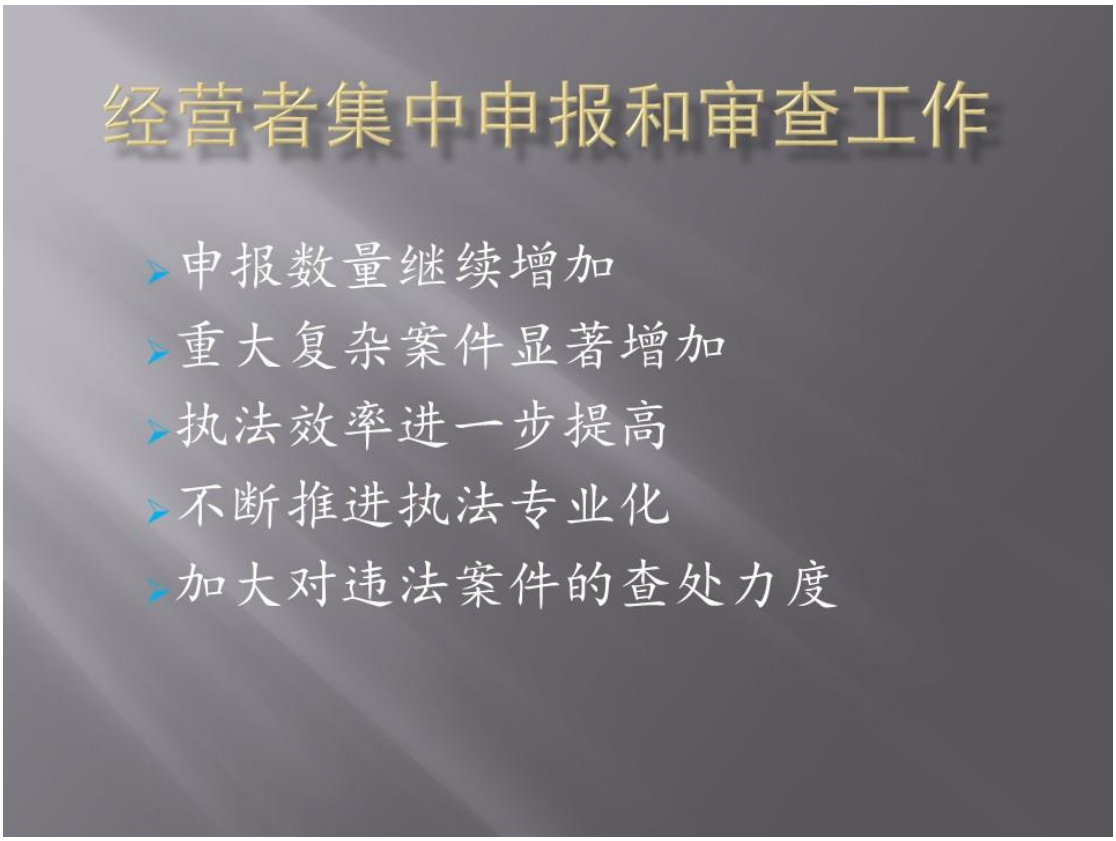
Dr. Huang holds a Ph.D. in Economics from the University of Wisconsin-Madison, and received his undergraduate degree in Economics from Peking University.

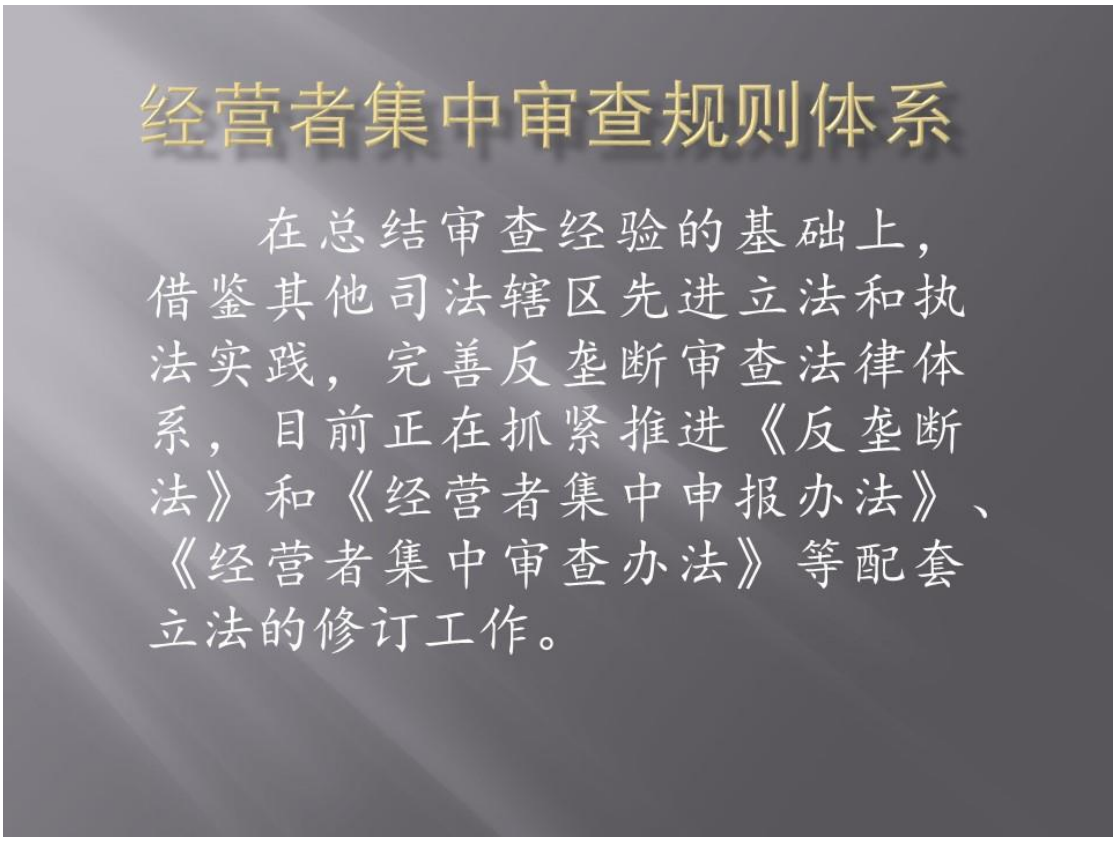
执业领域：反托拉斯与竞争法、等级认证、损害赔偿、娱乐与传媒法、高技术、知识产权、医药、公共政策、证券与金融市场、交通业。

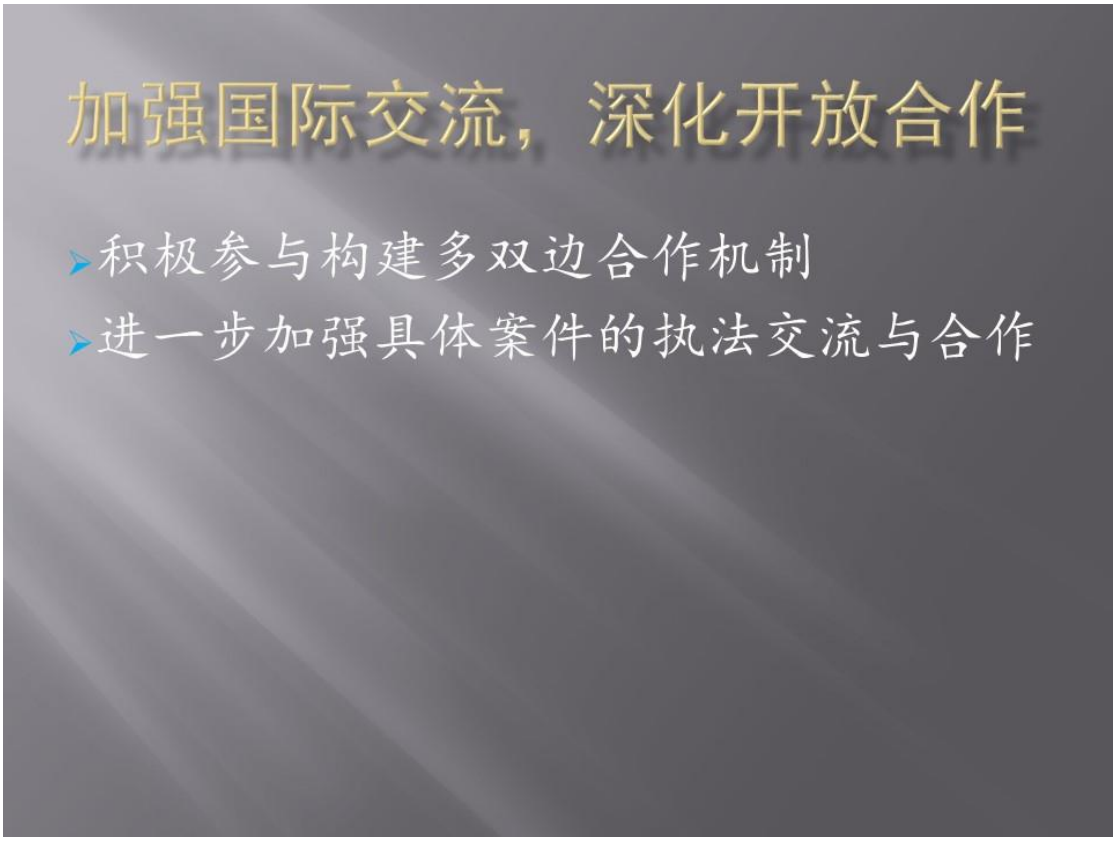
黄博士是 Compass Lexecon.的副总裁。黄博士专攻反托拉斯经济学和工业组织。他曾对航空公司、汽车租赁、视频会议、制药和超级市场合并进行复杂的市场分析。针对反托拉斯诉讼涉及所谓的垄断、定价、捆绑销售、各种行业中的独家交易、包括高科技、出版、媒体评级、支付卡、大学体育、医疗器械、药品和运输等行业，他也曾提供大量的数据分析和支持。他在研究共同基金行业市场时机问题方面也有丰富经验。

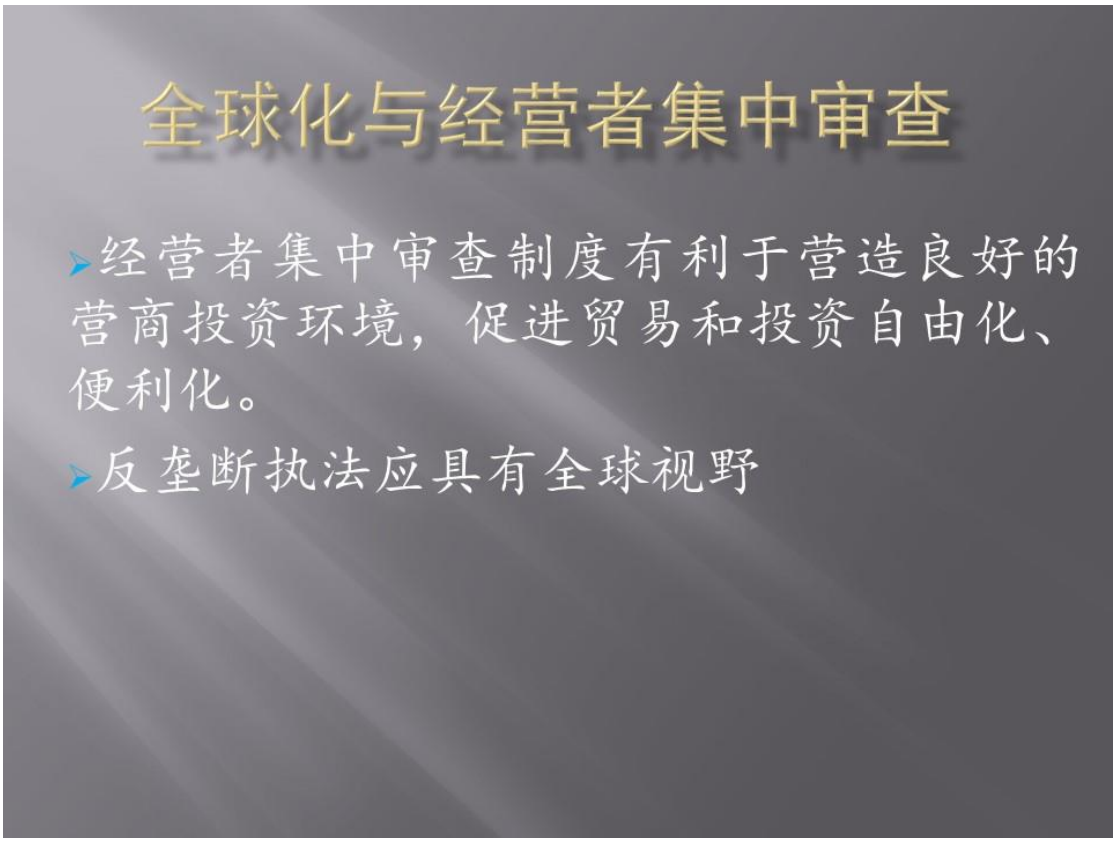
黄博士拥有威斯康星大学麦迪逊分校的经济学博士学位，并获得北京大学经济学专业本科学历。

Reports From Hu Xinyue(胡馨月)




经营者集中审查规则体系
在总结审查经验的基础上，借鉴其他司法辖区先进立法和执法实践，完善反垄断审查法律体系，目前正在抓紧推进《反垄断法》和《经营者集中申报办法》、《经营者集中审查办法》等配套立法的修订工作。


加强国际交流，深化开放合作
积极参与构建多双边合作机制
进一步加强具体案件的执法交流与合作


全球化与经营者集中审查
经营者集中审查制度有利于营造良好的营商投资环境，促进贸易和投资自由化、便利化。
反垄断执法应具有全球视野


谢谢！

Reports From Jie Tong(童杰)

中国经营者集中审查新发展
New Developments in Merger Control Review in PRC

童杰 合伙人律师
Jie Tong Partner

DaHui Lawyers 达辉律师事务所
www.DaHuiLawyers.com

新变化/New Developments

- 执法机构统一
  Consolidation of Enforcement Agencies
- 案件数量增多
  Increase in Number of Cases
- 执法力度提高
  Heightened Levels of Enforcement
- 审查速度加快
  Speeding Review Process
- 执法日趋成熟
  Increasingly Sophisticated Enforcement

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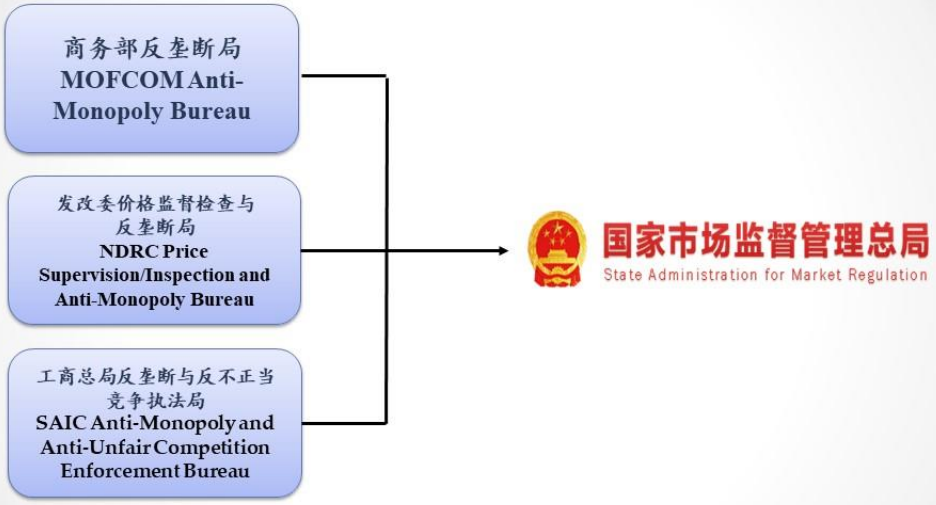
变化一：执法机构统一/New Development I: Consolidation of Enforcement Agencies



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变化一：执法机构统一/New Development I: Consolidation of Enforcement Agencies

机构合并：
Consolidation of Agencies:

- 商务部反垄断局整建制的并入市场监管总局反垄断局
  MOFCOM AMB was entirely consolidated into the new AMB under SAMR
- 商务部反垄断局局长任新反垄断局局长
  The Director General of MOFCOM AMB chaired the new AMB under SAMR
- 商务部反垄断局的机构设置和人员配备基本在新反垄断局予以保留
  Division Structure and staffing of MOFCOM AMB were basically maintained in the new AMB under SAMR

未来预计：
We expect that:

- 商务部反垄断局的工作惯例和审查风格基本会在新反垄断局继续延续；
  The working practices and review style of MOFCOM AMB will be substantially followed at the new Anti-Monopoly Bureau;
- 商务部反垄断局颁布的相关规定和实践中的执法标准会继续适用；
  The relevant provisions promulgated by MOFCOM AMB and the enforcement standards in practice will continue to be applicable;
- 统一的执法机构有利于协调好反垄断执法的事前干预（并购审查）和事后干预（反垄断调查）
  An unified law enforcement agency will better coordinate the beforehand intervention (Merger Control Review) and post intervention (Antitrust Investigation) of the antitrust enforcement.

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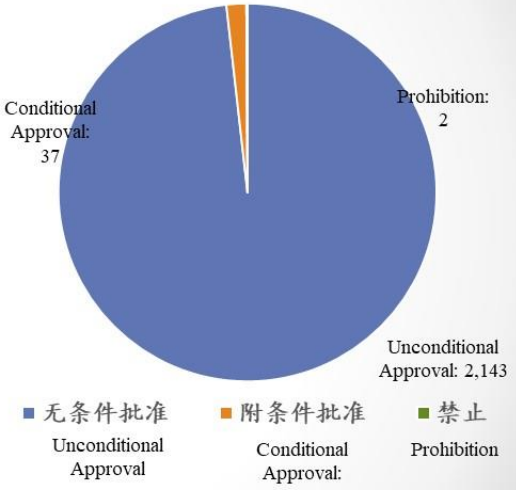
变化二：案件数量增多/New Development II: Increase in Number of Cases

- **截至2018年6月30日，审结2182起经营者集中申报**
  By 30 June 2018, 2,182 merger filing reviews have been concluded
  - 无条件批准：2143起
    Unconditional Approval: 2,143
  - 被禁止案件：2起
    Prohibition: 2
  - 附条件批准：37起
    Conditional Approval: 37



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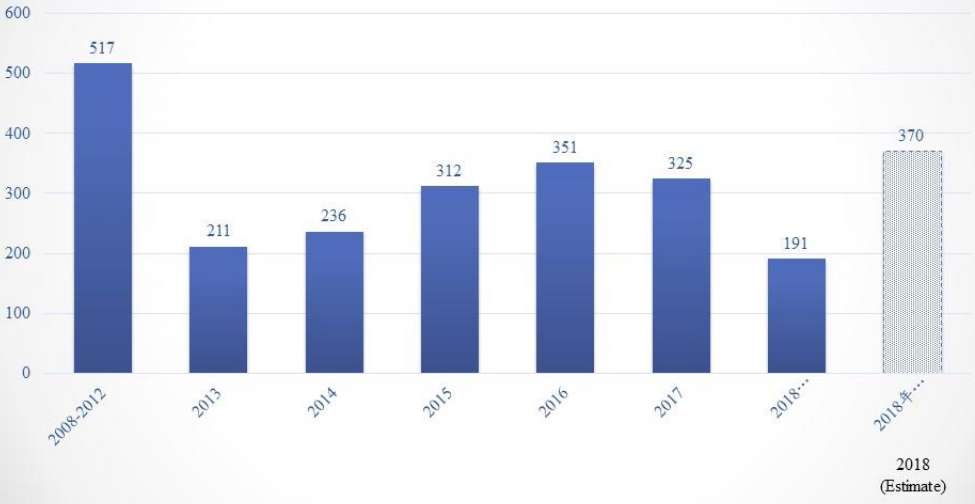
变化二：案件数量增多/New Development II: Increase in Number of Cases

- **无条件批准案件数量**
  Number of the cases approved unconditionally



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变化三：执法力度提高/
New Development III: Heightened Levels of Enforcement Activities

- **应报未报处罚案件公布**
  Published Cases Penalized for Failure to Notify

变化四：审查速度加快/New Development IV: Speeding Review Process

- **简易程序案件审查速度加快**
  Accelerating Review of Simple Cases

(Days)	2017 Q1	2017 Q2	2017 Q3	2017 Q4	2018 Q1	2018 Q2
平均时间 Average Duration	25	23	20	20	18	18
最长时间 Longest Duration	43	42	29	28	31	30
最短时间 Shortest Duration	16	14	11	11	11	11

- 2016年，98.6%的简易程序案件在初步审查阶段审结
  In 2016, 98.6% of simple cases were concluded at the preliminary review phase
- 2017年，97.8%的简易程序案件在初步审查阶段审结
  In 2017, 97.8% of simple cases were concluded at the preliminary review phase
- 2016年，简易程序案件占全部案件的76%
  In 2016, simple cases represented 76% of all cases notified
- 2017年，简易程序案件占全部案件的70%
  In 2017, simple cases represented 70% of all cases notified
- 较2016年，2017年的平均立案时间下降14.2%，平均审查时间下降8%
  Compared to 2016, the average duration for pre-acceptance decreases by 14.2% and the average duration for review decreases by 8% in 2017.

附条件批准案件审查周期变化大
Significant Variation in Reviewing Time of Remedy Cases

案件 Case	立案前阶段 Duration for Pre-acceptance	重新申报 Refiling	批准所用时间 Approval Duration
2016			
雅培/圣犹达 (Abbott/St. Jude Medical)	64天（64 days）	N	179天（179days）
2017			
陶氏化学/杜邦（Dow/DuPont）	46天（46 days）	Y	404天（404 days）
博通/博科（Brocade/ Broadcom）	52天（52 days）	N	221天（221 days）
惠普/三星打印机 (HP/ Samsung's printer business)	37天（37 days）	Y	323天（323 days）
加阳/萨钾（Agrium/PotashCorp）	27天（27 days）	Y	363天（363 days）
马士基航运/汉堡南美 (Maersk Line/ Hamburg Süd)	29天（29 days）	Y	223天（223 days）
日月光/矽品（ASE/SPIL）	111天（111 days）	Y	456天（456 days）
贝克顿/巴德（Becton/BD）	22天（22 days）	N	190天（190 days）
2018			
拜耳/孟山都（Bayer/Monsanto）	81天（81 days）	Y	481天（481 days）
依视路/陆逊梯卡（Essilor/Luxottica）	86天（86 days）	Y	428天（428 days）

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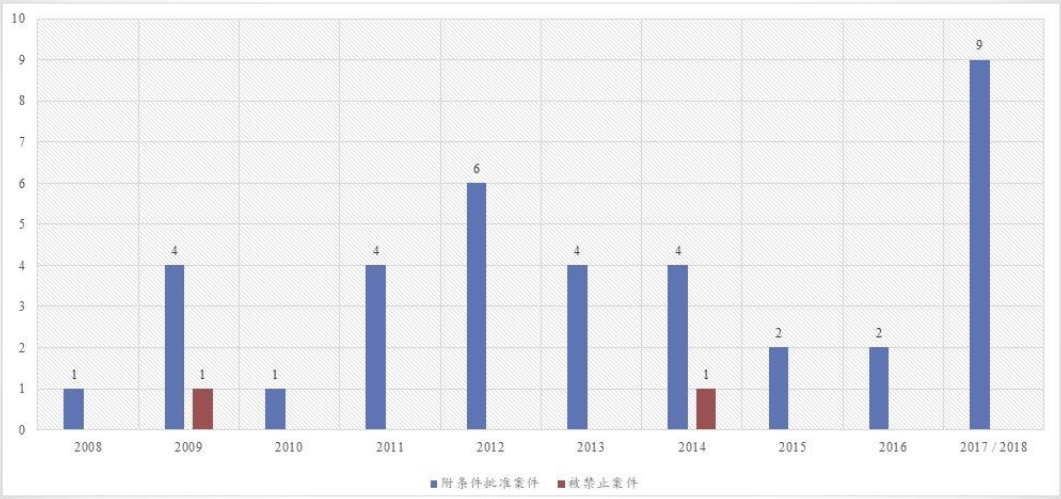
变化五：执法日趋成熟/New Development V: Increasingly Sophisticated Enforcement

- 附条件批准案件/被禁止案件
  Cases Approved Conditionally/Prohibited



注：截至目前，2018年附条件批准案件为2起
Note: To date, two cases approved conditionally in 2018

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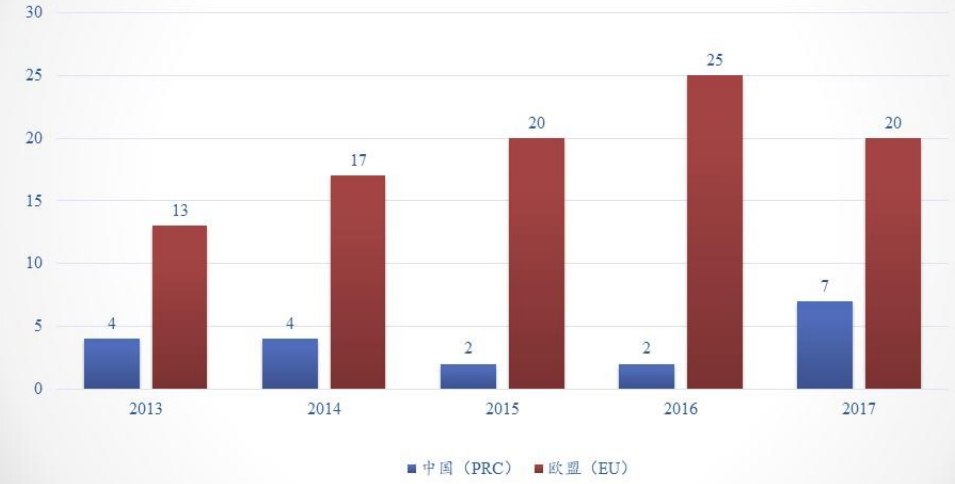
变化五：执法日趋成熟/New Development V: Increasingly Sophisticated Enforcement

- **复杂案件增多，执法自信提高，但较反垄断执法成熟法域仍有差距**
  Increasing number of complicated cases and enhanced confidence in antitrust enforcement, but remaining gap with jurisdictions with mature antitrust enforcement



变化五：执法日趋成熟/New Development V: Increasingly Sophisticated Enforcement

- **针对中国竞争问题提出不同于其他司法辖区的承诺**
  Different remedies from other jurisdictions to address unique competition concerns in China

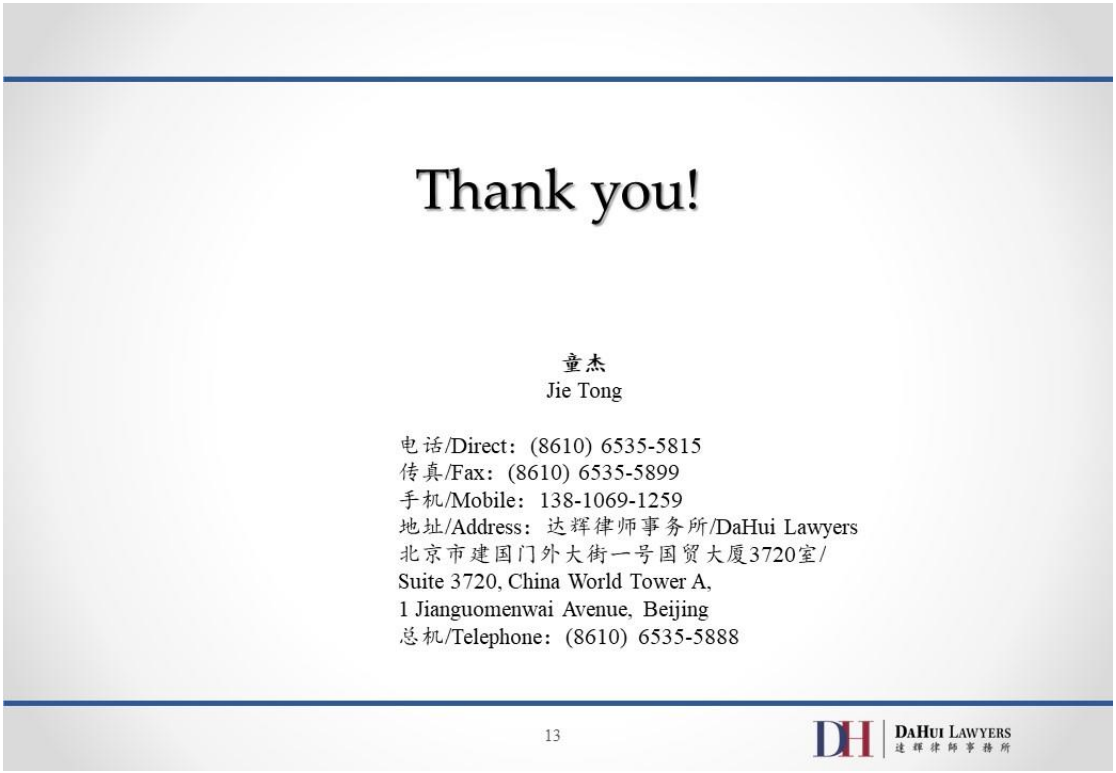
  陶氏/杜邦 Dow/ DuPont（2017）；马士基航运/汉堡南美 Maersk Line/ Hamburg Süd （2017）；惠普/三星打印机 HP/ Samsung's printer business（2017）；拜耳/孟山都 Bayer/Monsanto （2018）;加阳/萨钾 PotashCorp/Agrium （2017）; etc..

- **救济措施标准化---"FRAND"类行为性条件**
  Standardized Remedies, e.g. FRAND Type of Behavioral Remedies

  依视路国际/陆逊梯卡 Essilor/Luxottica（2018）；拜耳/孟山都 Bayer/Monsanto （2018）；
  惠普/三星打印机 HP/ Samsung's printer business（2017）；日月光/矽品 ASE/SPIL（2017）；
  科力远/丰田中国/PEVE/新中源/丰田通商 Corun/Toyota China/PEVE/Xin Zhong Yuan/Toyota Tsusho（2014; etc.

- **Hold-separate救济措施减少**
  Decreasing Cases approved with Hold-separate Remedy

  希捷/三星 Seagate/Samsung HDD（2011）；西数/日立 WD/HGST （2012）；
  丸红/高鸿 Marubeni/Gavilon（2013）；联发科技/展星 MediaTek/Msta（2013）；
  日月光/矽品 ASE/SPIL（2017）


Thank you!
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13
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DAY ONE 第一日

Issue 4: Per se vs. proof of effects in abuse of dominance cases

议题 4：滥用市场支配地位案件中的本身违法与效果证明原则

14:45-15:45

This panel will explore the MEO judgment, in which the ECJ recently rejected a per se approach under Article 102 TFEU to price discrimination and endorsed an effects-based analysis. The panel will discuss how much "proof" is needed to make an effects-based case, and will this burden unreasonably prejudice the victims of the abuse.

本组将讨论 MEO 案的判决。最近欧洲法院根据《欧盟运行条约》第 102 条审理该案时，对价格歧视拒绝适用本身违法原则，而支持了效果分析。本组将讨论采用效果分析的案件中究竟需要多少"证据"，以及此种举证责任是否会对滥用行为的受害方造成不合理的影响。

Chair

主持人

Prof. Ioannis Kokkoris, Queen Mary University of London

Ioannis Kokkoris 教授，伦敦大学玛丽皇后学院

Speakers

发言人

James Venit, Partner, Dentons

James Venit, 大成律师事务所合伙人

Sung-Keun Kim, Expert, UNCTAD，(on secondment from Korea Fair Trade Commission)

Sung-Keun Kim, 联合国贸易与发展会议专家（从韩国公平贸易委员会调任）

Bojana Ignjatovic, Partner, RBB

Bojana Ignjatovic, RBB 经济咨询公司合伙人

Zhan Hao, Partner, AnJie

詹昊，安杰律师事务所合伙人

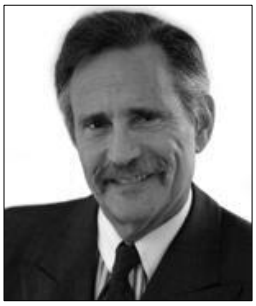
Prof. Ioannis Kokkoris

Ioannis Kokkoris 教授

Queen Mary University of London

伦敦大学玛丽女王学院

James Venit



Partner, Dentons 大成律师事务所合伙人

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联合国贸易与发展会议专家（从韩国公平贸易委员会调任）

Bojana Ignjatovic

Partner, RBB

RBB 经济咨询公司合伙人

Bojana Ignjatovic is a Partner based in the London office of RBB Economics. Bojana has more than fifteen years' experience as an expert in competition economics, in both private and public practice. She has advised on a large number of high-profile cases before the European Commission and many national domestic authorities, in particular in the UK. She has particular expertise in the application of quantitative techniques in the assessment of horizontal mergers: notable recent merger cases include Teva/ Allergan, Muller Wiseman/ Dairy Crest, Eurotunnel/SeaFrance, and Random House/ Penguin.

Bojana has also represented clients on a range of antitrust matters, in relation to horizontal and vertical agreements, abuse of dominance and market investigations – including representing Booking.com as part of the investigations by multiple EU national competition authorities in relation to price parity clauses on online hotel booking platforms.

Bojana has published and spoken widely on competition policy and industrial economics. She has also run training seminars for competition and regulatory agencies, and lectured for the Postgraduate Diploma/Masters in Economics for Competition Law at Kings College, London. She is featured in Who's Who Legal, and in Global Competition Review's Women in Antitrust survey.

Bojana Ignjatovic 是 RBB 经济咨询公司在伦敦的合伙人。Bojana 作为竞争经济方面的专家，在公私领域拥有超过 15 年的工作经验。她曾为欧盟委员会和许多国内机构，尤其是英国的国内机构，在一些著名的案件上提供咨询。她十分擅长使用定量分析方法评估横向合并案件，近期处理过的著名案件包括：Teva/ Allergan, Muller Wiseman/ Dairy Crest, Eurotunnel/SeaFrance, and Random House/ Penguin。

Bojana 还曾代表客户处理一系列反垄断事宜，其中涉及横向和纵向协议、滥用市场支配地位和市场调查，例如：在欧盟多个国家竞争管理机构就在线酒店预订平台的价格平价条款进行调查时，代表 Booking.com 接受调查。

Bojana 在竞争政策和产业经济学方面成果颇丰。她还为竞争和监管机构举办过培训研讨会，并为伦敦国王学院的竞争法经济学研究生学位/硕士课程做过演讲。她曾入选 Who's Who Legal 和《全球竞争评论》发表的反垄断方面的杰出女性名单。

Zhan Hao

詹昊

Partner, AnJie Law Firm
安杰律师事务所合伙人

Dr. Zhan Hao is the Managing Partner of AnJie Law Firm and one of the lawyers who were the earliest to be engaged in competition law related legal services, obtaining a rich practical experience on Anti-monopoly legal services. In recent years, Dr. Zhan Hao has provided legal services to numerous enterprises from different industries, which include telecom, auto-mobile, energy, finance, machinery manufacturing, aviation, IT and Internet, food, pharmaceutical, high-technology, and electronic engineering etc.

From 2009 to 2018, Dr. Zhan Hao has successively been honored as China leading Competition/Anti-monopoly lawyer by various international lawyers rating agencies including Chambers & Partners, Who's Who Legal, GCR, Legal 500, ALB China, and Expert Guide etc.

詹昊博士是安杰律师事务所管理合伙人，作为中国最早从事竞争法相关业务律师之一，詹昊律师在反垄断法律服务领域具备丰富实践经验。近年来，詹昊律师为众多行业内企业提供过法律服务，领域覆盖电信、汽车、能源、金融、机械制造、航空、IT 与互联网、食品、医药、高科技、电子、等。

2009 年至 2018 年，詹昊律师被多家国际著名律师评级机构连续评为中国领先竞争法/反垄断法专业律师，如 Chambers & Partners，Who's Who Legal, GCR, Legal 500, ALB China 和 Expert Guide 等机构。

Reports From Sung-Keun Kim

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
UNCTAD

3th Annual Conference CIIAI and UNCTAD

Per se vs. proof of effects in abuse of dominance cases

Sung Keun KIM
Expert, Competition and Consumer Policies Branch
UNCTAD
Beijing, 20 September 2018

* This presentation is not the opinion of UNCTAD

The transition of regulating abuse of market dominant position in S. Korea

- Competition law in S. Korea was enacted in 1980.
  - ✓ The competition authority designated the market dominant players in previous year and regulated their anti-competitive behaviors. And at the end of the year competition authority designated next year's dominant players and regulated their anti-competitive behaviors during next year.
  - ✓ Such a regulation was closer to per se illegal approach rather than effective basis approach.
- The prior designation system was abolished and post regulation system was introduced in 1998
  - ✓ The criteria of market dominance : a single firm which has more than 50 % or the combined market share of the top three firms is more than 75 %
  - ✓ Such a regulation is closer to effective basis approach rather than per se illegal approach

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The cornerstone case - POSCO case (2007)

❑ The comparison of the approach to abuse of market dominance before and after 2007

Before 2007	After 2007
✓ Market dominant player ✓ Unfairness or illegality of behaviors ✓ Anti-competitiveness of behaviors	✓ Market dominant player ✓ Unfairness or illegality of behaviors ✓ Anti-competitiveness of behaviors ✚ ✓ Intention or purpose of competition restraints

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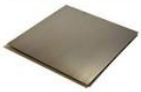
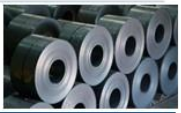


Summary of POSCO case



❑ Facts of the case

✓ POSCO (P) is the domestic monopolist producer of hot coil and the dominant player of cold rolled steel sheets in S. Korea

※ Hot coil is the raw material of cold rolled steel sheets, and P. was the sole producer of hot coil in S. Korea, with 79.8% of market share and the rest were imports.
※ Cold rolled steel sheets are used for making car bodies. Market share as of 2000: P. 58.4%, company A 13.7%, H. 11.1%, company B 7.9%

✓ P. refused to supply hot coil to Hyundai Hysco (H)*, which is in competition with P. in the market for cold rolled steel sheets produced from hot coil, without clear reasons, despite several times of request from H. for the supply.

* Hyundai Hysco was merged with Hyundai Steel in 2015

✓ The KFTC decided that refusal to deal of P. is abusive behavior of market dominant position and ordered corrective measures

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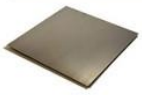

Summary of POSCO case

❑ The grounds of KFTC's decision

- ✓ The behavior of P. is to maintain or strengthen its dominant position in the market for cold rolled steel sheet by using its dominance in hot coil market.
- ✓ H. had no choice but to importing hot coil from abroad due to the behavior of P. By the result, business activities of H. became difficult due to additional cost for import, uncertainty of transaction, etc.

❑ The arguments of POSCO on the KFTC's decision

- ✓ Hot coil used for cold rolled steel sheet is not a goods for external sales but intermediate goods for making its own cold rolled steel sheet.
- ✓ Refusal to supply hot coil was due to its lack of supply capacity, not the intention to exclude competitors.

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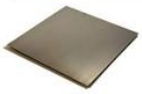

Summary of POSCO case

❑ The ruling of the Supreme Court of Korea (2007)

- ✓ POSCO did not realize the unfairness of refusal to deal for H. enough and,
- ✓ There was no intention or purpose to influence the market order and,
- ✓ Refusal to deal of P. can not be objectively assessed as an act of concerns that would have the effect of restraining competition in the market

SUPREME COURT OF KOREA 대법원 SUPREME COURT OF KOREA

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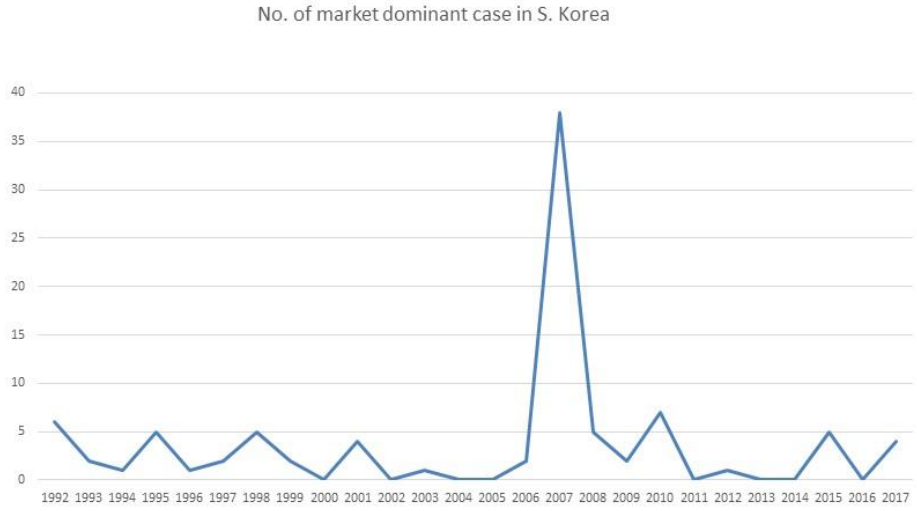
The statistic of abuse of market dominance case



*Source : Korea Fair Trade Commission

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How to prove intentions or purposes of dominant players

- **Factors which the KFTC considered to prove the intentions or purposes of Qualcomm for restraining competition in the market (December 2016)**
  - ✓ Dominant player's motive or incentive to increase its profits
  - ✓ Violating FRAND conditions which Qualcomm declared by itself
  - ✓ Whether a dominant player recognizes the necessity of the product to its competitors when it refuses trade with its competitors or not
  - ✓ Presenting more unfavorable conditions for the more likely competitors

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Closing Remarks

- A lot of criticisms on Supreme Court's decision were presented from academia
- The responsibility to prove the intentions or purposes is too severe to competition authority
- It is enough that competition authority consider the intentions or purposes of a dominant player in calculating administrative fines
- In digital economy it has tendency that the number of dominant players increase due to network effects or first mover advantage effects
- Too much severe proving responsibility to competition authority can cause the prevention of innovation in the markets

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THANK YOU !

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http://www.unctad.org/Competition

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Reports From Zhan Hao(詹昊)

ANJIE LAW FIRM
安杰律师事务所

安杰律师事务所　　北京·上海·深圳·香港

滥用市场支配地位行为在民事诉讼案件中的证明标准

主讲人：詹昊　　日期：2018.09

Speaker
主讲人

詹昊	博士
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中国国际经济贸易仲裁委员会	仲裁员
香港国际仲裁中心	仲裁员
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国际商会中国国际委员会竞争委员会	副主席

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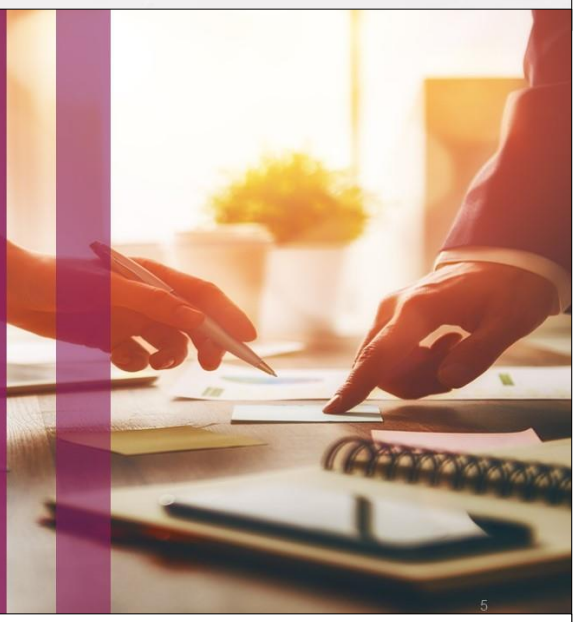
1 关于滥用市场支配地位的实体法规定
2 滥用市场支配地位民事诉讼案件中举证责任的分配
3 相关案例研究

Part
01

关于滥用市场支配地位的实体法规定



5

一、关于滥用市场支配地位的实体法规定

《反垄断法》

第17条

禁止具有市场支配地位的经营者从事下列滥用市场支配地位的行为：

（一）以不公平的高价销售商品或者以不公平的低价购买商品；
（二）没有正当理由，以低于成本的价格销售商品；
（三）没有正当理由，拒绝与交易相对人进行交易；
（四）没有正当理由，限定交易相对人只能与其进行交易或者只能与其指定的经营者进行交易；
（五）没有正当理由搭售商品，或者在交易时附加其他不合理的交易条件；
（六）没有正当理由，对条件相同的交易相对人在交易价格等交易条件上实行差别待遇；
（七）国务院反垄断执法机构认定的其他滥用市场支配地位的行为。

- **本法所称市场支配地位，是指经营者在相关市场内具有能够控制商品价格、数量或者其他交易条件，或者能够阻碍、影响其他经营者进入相关市场能力的市场地位。**

第50条

经营者实施垄断行为，给他人造成损失的，依法承担民事责任。

ANJIE LAW F

6

一、关于滥用市场支配地位的实体法规定

《工商行政管理机关禁止滥用市场支配地位行为的规定》
第4-7条对拒绝交易、限定交易、搭售或附加不合理交易条件以及差别待遇进行了详细规定。

《反价格垄断规定》
第11-16条对不公平高价/不公平低价、掠夺性定价、拒绝交易、限定交易、附加不合理交易条件以及差别待遇进行了详细规定。

二、滥用市场支配地位民事诉讼案件中举证责任的分配

（一）《最高人民法院关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定》
第八条 被诉垄断行为属于反垄断法第十七条第一款规定的滥用市场支配地位的，原告应当对被告在相关市场内具有支配地位和其滥用市场支配地位承担举证责任。 被告以其行为具有正当性为由进行抗辩的，应当承担举证责任。
第九条 被诉垄断行为属于公用企业或者其他依法具有独占地位的经营者滥用市场支配地位的，人民法院可以根据市场结构和竞争状况的具体情况，认定被告在相关市场内具有支配地位，但有相反证据足以推翻的除外。
第十条 原告可以以被告对外发布的信息作为证明其具有市场支配地位的证据。被告对外发布的信息能够证明其在相关市场内具有支配地位的，人民法院可以据此作出认定，但有相反证据足以推翻的除外。

二、滥用市场支配地位民事诉讼案件中举证责任的分配

（二）原告需要举证证明：

1、相关市场（包括相关商品市场和相关地域市场）界定

2、被告在相关市场上具有市场支配地位

3、被告实施了市场支配地位滥用的违法行为

4、被告实施违法行为产生了排除限制竞争的效果，使原告遭受了损失

5、原告遭受损失与被告违法行为之间存在因果关系

二、滥用市场支配地位民事诉讼案件中举证责任的分配

（三）被告需要举证证明：

1、原告相关市场界定不正确

2、被告在相关市场中没有支配地位

3、被告没有实施滥用行为

4、被告实施相关行为具有正当理由

《工商行政管理机关禁止滥用市场支配地位行为的规定》第八条

工商行政管理机关认定本规定第四条至第七条所称的正当理由，应当综合考虑下列因素：

- （一）有关行为是否为经营者基于自身正常经营活动及正常效益而采取；
- （二）有关行为对经济运行效率、社会公共利益及经济发展的影响。

二、滥用市场支配地位民事诉讼案件中举证责任的分配

《反价格垄断规定》第12-14条对掠夺性定价、拒绝交易、限定交易的正当理由进行了详细规定

掠夺性定价“正当理由”包括

01 降价处理鲜活商品、季节性商品、有效期限即将到期的商品和积压商品的；

02 因清偿债务、转产、歇业降价销售商品的

03 为推广新产品进行促销的

04 能够证明行为具有正当性的其他理由

二、滥用市场支配地位民事诉讼案件中举证责任的分配

《反价格垄断规定》第12-14条对掠夺性定价、拒绝交易、限定交易的正当理由进行了详细规定

拒绝交易的“正当理由”包括

01
交易相对人有严重的不良信用记录，或者出现经营状况持续恶化等情况，可能会给交易安全造成较大风险的

02
交易相对人能够以合理的价格向其他经营者购买同种商品、替代商品，或者能够以合理的价格向其他经营者出售商品的；

03
能够证明行为具有正当性的其他理由。

二、滥用市场支配地位民事诉讼案件中举证责任的分配

《反价格垄断规定》第12-14条对掠夺性定价、拒绝交易、限定交易的正当理由进行了详细规定

限定交易的“正当理由”包括

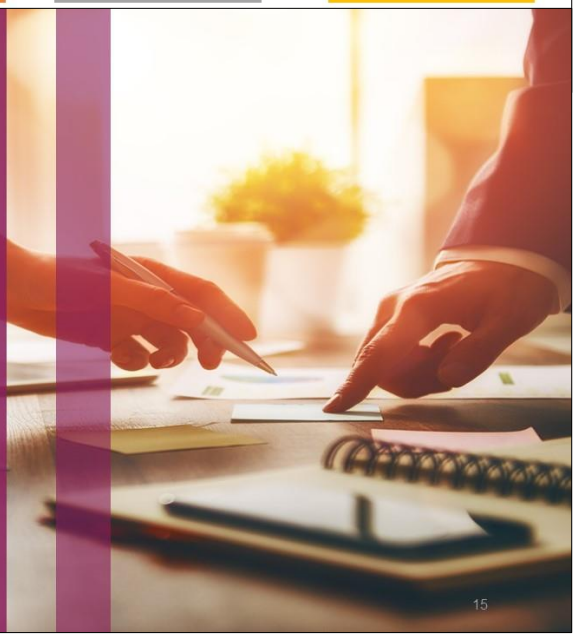
01
为了保证产品质量和安全的；

02
为了维护品牌形象或者提高服务水平的；

03
能够显著降低成本、提高效率，并且能够使消费者分享由此产生的利益的；

04
能够证明行为具有正当性的其他理由。

Part
03
相关案例研究



三、相关案例研究

（一）云南盈鼎诉中石化拒绝交易案

2017.8.28 云南省高院判决驳回上诉，维持原判。

2017.12 云南盈鼎向最高人民法院申请再审。

2018.3 再审开庭审理。

三、相关案例研究

（一）云南盈鼎诉中石化拒绝交易案

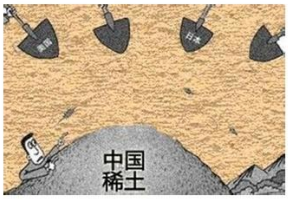
法院实质上采取了“效果证明”（proof of effects）方法

- 法院在认定是否构成拒绝交易行为上考虑了行为导致的竞争效果
- 原审法院认为：“在目前情况下，云南盈鼎公司与中石化云南分公司之间在地沟油制生物柴油的销售问题上并不存在竞争关系，中石化云南分公司的行为，也没有产生排除、限制竞争的效果。”

三、相关案例研究

（二）宁波四家稀土企业诉日立金属滥用市场支配地位纠纷案

案情简介



2012年，日立金属公司向美国国际贸易委员会(ITC)提起诉讼，对中国稀土企业发起“337调查”，要求禁止未授予专利使用权的钕铁硼磁体及下游产品进口到美国和在美国销售。2014年，宁波四家稀土企业在宁波中级人民法院向日立金属公司提起反垄断民事诉讼，主张日立金属不授予其相关专利的行为构成滥用市场支配地位拒绝交易的行为，违反我国《反垄断法》。本案目前仍在审理中。

三、相关案例研究

（二）宁波四家稀土企业诉日立金属滥用市场支配地位纠纷案

“效果证明”（proof of effects）方法应当适用

被告主张，本案中，日立金属已将相关专利许可了8家企业，中国有200多家钕铁硼生产企业在竞争，竞争较为充分。日立金属出于民法合同自由原则，如果在没有造成限制、排除竞争的效果的情况下，应当有自主选择交易对象的自由，并不应当被机械地认定构成滥用市场支配地位行为，从而违反《反垄断法》。

DAY ONE 第一日

Issue 5: Privacy and abuse of dominance

议题 5：隐私与市场支配地位滥用

15:45-17:15

There is growing body of commentary connecting privacy to antitrust and, in particular, to abuse of dominance.This panel will address the links between data collection, privacy and antitrust as they relate to Internet platforms.

越来越多的评论将隐私与反垄断，尤其是滥用市场支配地位相关联。本组将阐述与互联网平台有关的数据收集、隐私和反垄断之间的关系。

Co-Chairs

联合主持

Richard Blewett, Foreign Legal Consultant, Clifford Chance

Richard Blewett，高伟绅律师事务所外国法律事务顾问

Prof. Sun Jin, School of Law，Wuhan University

孙晋，武汉大学法学院教授

Speakers

发言人

Philip Monaghan, Partner, O'Melveny & Myers

Philip Monaghan，美迈斯律师事务所合伙人

Hu Tie, Partner, DeHeng

胡铁，德恒律师事务所合伙人

Wei Tan, Managing Director, Mingde Economic Research

谭伟，明德经济研究公司总裁

Tian Chen, Legal Counsel, Department of Legal Affairs, Tencent Music Entertainment Group

田辰，腾讯音乐娱乐集团法务部法律顾问

Richard Blewett

Partner, Clifford Chance
合伙人，高伟绅律师事务所

Mr. Richard Blewett is a Partner of Clifford Chance and also a Member of the Law Society of England and Wales .He has more than ten years' experience working across a range of antitrust matters. His main focus has been on merger control, where he has advised on UK, EU and Chinese filings.

Mr. Richard also has experience of advising on conduct issues across a range of industries including energy, consumer goods and retail and industrial/commodities.

Richard Blewett 先生是高伟绅律师事务所的一位合伙人，同时也是英格兰和威尔士法学会会员。他在反垄断方面拥有超过十年的工作经验。他的研究领域主要是合并控制，曾处理过英国、欧盟和中国的许多案件。

Richard Blewett 先生曾对能源、消费品、零售和工业/商品等一系列行业中的行为问题提供过咨询建议。

Prof. Sun Jin
孙晋

School of Law, Wuhan University
武汉大学法学院教授

Sun Jin, the professor and doctoral tutor of the School of Law, Wuhan University, is also the director of the Research Center of Competition Law and Competition Policy, Wuhan University. Meanwhile, Prof. Sun serves as the executive director of Chinese Research Society of Economic Law, the executive director of Chinese Research Society of Business Law, the executive director of Asian Academic Society of Competition Law, the Legal Counselor for Hubei People's Government, the Legal Counselor for Hubei Supervision Department, the Consultant Expert for difficult cases of Hubei High People's Court, the leader of the group of consultant experts for anti-monopoly law enforcement of Hubei Price Bureau. Prof. Sun has published more than 100 pieces of essays and more than 10 volumes of treatises.

孙晋，武汉大学法学院教授、博士生导师，武汉大学竞争法与竞争政策研究中心主任，武汉大学互联网空间治理研究中心主任。兼任中国经济法研究会常务理事，中国商业法研究会常务理事，亚洲竞争法学会常务理事，湖北省人民政府法律顾问，湖北省纪委监察厅法律顾问，湖北省高级人民法院疑难案件咨询专家，湖北省物价局反垄断执法咨询专家组组长。发表论文 100 余篇，出版专著 10 余部。

Philip Monaghan

马立恒

Partner, O'Melveny & Myers
美迈斯律师事务所合伙人

Philip is a former senior competition regulator who, in private practice, advises Asia-based and multinational clients on competition issues arising under antitrust laws globally. In particular, Philip leverages his extensive private practice experience and his appreciation of the regulatory perspective to guide clients through complex vertical, cartel, abuse of market power, and multi-jurisdictional merger control matters. Where necessary, he helps clients navigate and robustly defend themselves in investigations and/or prosecutions of alleged antitrust and competition offenses or contraventions. He also works with clients to deliver competition compliance solutions that serve their commercial objectives while effectively managing regulatory risk.

From 2014 to 2017, Philip served as the first Executive Director (General Counsel) of the Hong Kong Competition Commission (HKCC). In that capacity, Philip was a member of the HKCC's Executive management team with responsibility for the HKCC Legal Division. The HKCC is the competition enforcer for Hong Kong with power to prosecute competition law contraventions across all sectors of the economy.

Philip is an English (England and Wales) and Hong Kong-qualified lawyer who, prior to his appointment to the HKCC, practiced for more than a decade as a competition lawyer with international legal practices in London, Brussels, Beijing, and Hong Kong.

马立恒（Philip Monaghan）律师曾是一名资深的竞争事务监管者，而他在私人执业领域为亚洲及跨国客户在全球反垄断法律项下产生的竞争事宜提供意见。他利用其曾经身为香港竞争事务委员会首席律师的经验就有关香港和亚洲的合规、卡特尔、市场权力滥用、跨司法管辖区经营者集中事项，以及反垄断与竞争犯罪或违法行为调查和起诉向客户提供指导。

自 2014 年至 2017 年，马律师担任香港竞争事务委员会的第一任行政总监（总法律顾问）。在任职期间，马律师作为香港竞争事务委员会行政管理团队的一名成员负责香港竞争事务委员会的法律部。他撰写、合着或签署香港竞争事务委员会的所有指导和政策性文件，并为所有营运事宜提供法律意见，包括香港竞争事务委员会的调查，以及启动和升级依据《香港竞争条例》向香港竞争事务委员会提出投诉所产生的调查。

马律师是一名英国（英格兰和威尔士）和香港的注册律师，在接受香港竞争事务委员会的任命之前，他在伦敦、布鲁塞尔、北京和香港担任竞争事务律师达十年以上。

胡铁

Hu Tie

Partner, DeHeng Beijing
合伙人，北京德恒律师事务所

Mr. Hu's main areas of practice include competition law (especially antitrust law), financial insurance, mergers and acquisitions and restructuring and intellectual property. He has advised many companies on antitrust law and participated in civil litigation cases with a significant impact on antitrust law. He has also participated in major research projects conducted by the Ministry of Commerce. I worked with another American professor to teach the students of three law schools in the United States the summer course "Comparison of Competition Laws and Antitrust Laws in China and the United States." In the financial field, lawyer Hu Tie participated in the loan financing projects of a number of China Development Bank and the research on a special legal affairs commissioned by the bank. At the same time, Lawyer Hu also advises clients on the company's daily operations, mergers and acquisitions, and intellectual property.

Mr. Hu was previously a postdoctoral fellow in antitrust law at the Institute of Law, Chinese Academy of Social Sciences, and also practiced in another large law firm. Prior to that, he once worked for a central SOE and a listed company.

胡铁律师主要的业务领域包括竞争法（尤其是反垄断法），金融保险，以及并购重组和知识产权。曾为多家企业提供反垄断法咨询，并参与了有重大影响的反垄断法民事诉讼案件，还参加了商务部的重大课题研究。曾与另一位美国教授一起为美国三所法学院的学生讲授《中美竞争法与反垄断法比较要览》暑期课程。

在金融领域，胡铁律师参与了多个国家开发银行的贷款融资项目以及该行委托编写的某专项法律事务的研究。同时，胡铁律师也在公司日常业务、并购重组和知识产权领域为客户提供法律服务。

Wei Tan
谭伟

Managing Director, Mingde Economic Research
明德经济研究公司总裁

Dr. Tan is an expert in antitrust and competition policy, intellectual property right, and econometric analysis. He has extensive experience in analyzing a broad spectrum of industries, including insurance, pharmaceuticals, telecommunications, microprocessors, chemicals, shipping, and computer equipment. In his recent antitrust work he has applied econometric models to estimate demand function, and conducted merger simulation to assess the competitive effects of horizontal mergers. Dr. Tan has conducted research, prepared expert reports and presented his research before Chinese antitrust enforcement agencies, including the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration of Industry and Commerce (SAIC).

Dr. Tan is a Managing Director at Mingde Economic Research Inc. and an adjunct professor at Johns Hopkins University. Prior to founding Mingde Economic Research Inc., he was a Vice President at Compass Lexecon. Before that, he was the Chair of Economics Department at Hanqing Advanced Institute of Economics and Finance at Renmin University of China and an Academic Affiliate of NERA Economic Consulting. He has taught courses in economics and econometrics at Johns Hopkins University, Renmin University of China and State University of New York at Stony Brook.

谭博士是在反垄断和竞争政策、知识产权以及经济分析学领域的专家。他在大部分的产业领域都拥有丰富的经济分析经验，包括保险，制药，电信，微电子、化学、航运以及电脑设备。在他最近的反垄断工作中，谭博士通过应用计量经济学模型来评估需求功能，并进行并购模拟测试来考量横向经营者集中可能带来的竞争影响。谭博士多次应中国反垄断执法机构的邀请，为其提供调查研究和专家报告服务，这些机构包括商务部，国家发改委，国家工商总局（现已调整为国家市场监督管理总局）等。

谭博士是美国约翰霍普金斯大学客座教授和明德经济咨询公司董事总经理。在创立明德之前，谭博士任 Compass Lexecon 经济咨询公司副总裁一职。在此之前，谭博士曾是中国人民大学汉青经济与金融高级研究院经济系主任和美国国家经济研究协会经济咨询公司的学术会员。谭博士也曾在约翰霍普金斯大学、中国人民大学和纽约州立大学石溪分校教授经济学和计量经济学课程。

Tian Chen　田辰

Legal Counsel, Department of Legal Affairs, Tencent Music Entertainment Group
腾讯音乐娱乐集团法务部法律顾问

Dr. Chen TIAN specializes in Competition Law, graduated from University of International Business and Economics and supervised by Professor Yong HUANG, one of the most renowned legal experts in the Antitrust and Competition Law area in China; As a visiting scholar, Dr. TIAN researched and studied in George Mason University during Aug 2015- Aug 2016, supervised by Judge Douglas Ginsburg, a Senior United States Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit. Dr. TIAN Joined Tencent Music Entertainment Group in 2018 and takes charge of the legal affairs of competition law in TME Group.

田辰，对外经济贸易大学法学博士，研究领域：竞争法。田辰在博士在读期间，师从国内著名反垄断法学者黄勇教授；并于 2015 年 8 月至 2016 年 8 月，以访问学者身份前往乔治梅森大学进行研究学习，其导师为著名的美国哥伦比亚特区巡回上诉法院高级巡回法官道德拉斯 金斯伯格。田辰博士于 2018 年正式加入腾讯音乐娱乐集团，负责集团竞争政策相关的事务。

Reports From Tian Chen（田辰）

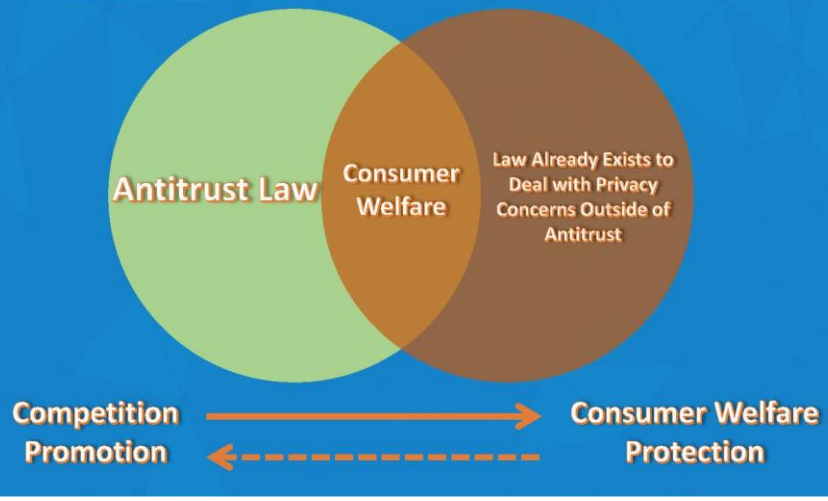
I Incorporating Privacy and Data into Antitrust

- Individual Right: Necessary Concession to Economic Benefits?
- Concentration of Market Power: Big is Bad?
- Foreclosure of Access to Data: Input or Output? How to Define the Relevant Market?
- Exploitation: Anticompetitive Price Discrimination or Consumer Welfare?
- Privacy/Data as Nonprice Competition: Are There Sound Approaches to Assess?

II Abuse: What is the Foreclosure?

- **Relevant Market Definition**
  - Online data market used for target advertising? (Google, Amazon, Netflix, Twitter, Alibaba, Tencent, Baidu, JD)
  - Difficulties in excluding other firms from access to substitutable data (Tinder, Bytedance)
- **Competitive Effect: Foreclosure**
  - Dependent on the choice of consumers to buy goods and services
- **Entry Barrier**
  - Disruptive innovation and sustainment of innovation
  - Should data be characterized as essential/indispensable for participation of effective competition

III Consumer Welfare: Connection between Privacy Policy and Antitrust Law



III Consumer Welfare: Connection between Privacy Policy and Antitrust Law

IV Conclusion: Not All Social Problems are Amenable by Antitrust Law

- Clarification of Antitrust theory and Objectives of Antitrust Law
- Construction of Legislative System
- Coordination between Different Administrative Agencies
- Consumer Welfare Protection from Multi-Angle Perspectives

Thank You

Chen TIAN
Sep 20, 2018

Reports From Wei Tan(谭伟)

明 德 经 济 研 究
MING·DE
Economic Research Inc.

大数据、知识产权和反垄断
BIG DATA，IP AND ANTITRUST

谭伟
2018年九月

2

主题

1. 什么是大数据（What is big data）
2. 大数据与知识产权的相似点（Similarity between big data and IP）
3. 关于大数据的反垄断案件 （Big data antitrust cases）
4. 大数据反垄断可以被视为新的知识产权反垄断吗？Is big data a new IP for antitrust?

3

什么是大数据(What is big data)

- 大数据的典型特征包括四个V （Attribute of big data includes 4V's, Volume, Variety, Velocity and Veracity)
- 大数据的价值链 （Big data value chain）
  - 收集 Collection
  - 存储 Storage
  - 分析 Analysis
  - 使用 Usage
- 与反垄断相关的大数据特征
  - 数据的非排他性 Non rivalrous nature of data
  - 数据的普遍性 Ubiquity of data
  - 数据的边际价值递减 Decreasing marginal value of data
  - 数据的时效性 Decreasing value of data over time

4

大数据与知识产权的相似点（Similarity between big data and IP）

- 大数据与知识产权有很多相似点。There are many similarity between big data and IP
  - 大数据与知识产权都可以被视为信息产品 Big data and IP can be viewed as information goods.
  - 大数据的价值通常包括了新的收集、分析和使用数据的方法 The value of big data commonly includes new method for collection, analysis and use of data.
  - 获取大数据和知识产权都需要大量的投资 Acquiring big data and IP requires lots of investment upfront.
  - 大数据和知识产权往往通过授权他人使用以获得回报 Big data and IP typically profit from licensing to others.
- 从反垄断视角，大数据与知识产权都面临相似的利益平衡 From an antitrust point of view, big data and IP face similar trade off.
  - 允许企业拥有垄断权力以鼓励创新。Encourage innovation by allowing firms to exercise market power.
  - 防止企业滥用垄断权力而限制竞争。Prevent firms from abusing market power to limit competition.

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关于大数据的经营者集中案件(Big data merger cases)

- 美国/欧盟 US/EU
  - Microsoft/Linkedin
  - Google/Doubleclick
  - Facebook/Whatsapp
- 数据可以成为一个反垄断市场 data can be an antitrust market.
- 主要执法关注是纵向封锁 Enforcement tendency is to look for vertical foreclosure.

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关于大数据的经营者集中案件(Big data merger cases)

- 中国 China
  - 目前尚未对大数据经营者集中案件实施禁令或附加限制性条件。Has not issued a block or remedy for big data merger case.
  - 大量大数据经营者集中案件并未申报。Many big data mergers have not filed for merger review.
    - 2012 优酷/土豆
    - 2014 快的/滴滴
    - 2015 58 同城/赶集网
    - 2015 携程收购去哪儿、艺龙案
    - 2015 美团/大众点评
    - 2016 滴滴/优步
    - 2017 饿了么/百度外卖
    - 2018 美团/摩拜

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关于大数据的滥用案件(Big data abuse cases)

- 有观点认为大数据应当被视为必要设施。There are calls to apply the essential facility doctrine to big data.
- 执法部门对大数据采用必要设施理论采用谨慎态度。The agencies have been cautious against applying the essential facility doctrine to big data.
- 美国在Trinko案后就很少有单边拒绝交易案件了。In the US, valid unilateral refusal to deal claims have been very rare since Trinko.
- 可能会削减在创新领域的投资。Forced sharing of critical assets reduces the incentive to invest in innovation.
  - Assistant Attorney General Delrahim recently emphasized that "[n]ew inventions do not appear out of the ether, and excessive use of the antitrust laws … can overlook and undermine the magnitude of investment and risk inventors undertake"
- 政府干预可能被认为是一种管制行为。A second reason to be skeptical of forced sharing is that it is an inherently regulatory approach.
  - Assistant Attorney General Delrahim said "Antitrust is law enforcement, it's not regulation. At its best, it supports reducing regulation, by encouraging competitive markets that, as a result, require less government intervention

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大数据反垄断可以被视为新的知识产权反垄断吗？

Is big data a new IP for antitrust?

- 知识产权反垄断案件 IP antitrust case
  - 标准必要专利案件：华为/IDC，发改委调查高通
    standard essential patent case: Huawei/ID, NDRC investigation of Qualcomm
  - 非标准必要专利案件：日立金属
    Nonstandard essential patent case: Hitachi metal
  - 标准必要专利制定的过程可能导致市场势力 The process of creating standard could create market power
  - 公平合理非歧视原则可被视为参与制定标准的企业的承诺以回应反垄断关切。FRAND commitment could be viewed as a commitment from the standard setting companies to address the antitrust concern.
- 未向商务部申报的大数据经营者是否有FRAND责任？Does the unfiled big data merger have FRAND responsibility?
  - 集中产生了市场势力。Merger creates market power.

9

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Reports From Philip Monaghan

O'Melveny

多边平台与大数据：对反垄断政策的影响

3rd ANNUAL CIIAI/UNCTAD CONFERENCE

马立恒 Philip Monaghan，合伙人
北京，2018年9月

多边平台：什么是多边平台

- 将希望进行交易的不同各方聚集在一起的平台；以**间接网络效应**为特征。
  - 平台对一边的客户的价值主要取决于平台另一边的参与者数量。

参与各边	平台
司机和乘车人	乘车共享应用程序
商家与购物者	信用卡、电子商务平台、房地产经纪人
寂寞的人	约会网站
应用开发者与用户	操作系统、视频游戏机
广告商与消费者	报纸、社交网站、搜索平台

2

O'Melveny

多边平台：为什么多边平台重要

- 经济意义：
  - 全球最大的上市公司越来越多地使用平台商业模式
- 监管关注：
  - 美国 - 联邦贸易委员会（FTC）公开听证会"[FTC主席Joe]Simons表示，听证会不会关注某一特定行业，但突出了平台的具体主题。 他表示，技术平台正变得如此重要，而且考虑到双边平台和网络效应，"他们的竞争方式与标准竞争方式不同。"（GCR）
  - 欧洲 - "[欧盟竞争委员Margrette] Vestager也指出，平台可能比其他任何东西更能引起她和她的同事的关注。"（GCR）
  - 日本 - "'我们对平台非常感兴趣，因为他们如果在与商业伙伴打交道时利用市场支配地位或试图排斥竞争对手，就可能引发反垄断问题，'[Akinori] Yamada [日本公平贸易委员会(JFTC)]在每周一次的新闻发布会上说 [2018年9月5日]。 "所以我们已经在下一财政年度做了预算进行研究……"JFTC的市场调查不应被视为空洞的行为; 其于2016年发布第一份关于手机市场的报告两个月后，启动了对苹果公司的调查。"（MLex）

多边平台： 什么是多边平台

- 某些情况下，平台在向一边进行销售的同时无法不也向平台的另一边进行销售。
  - 相关产品可被视为交易本身。
  - 例如信用卡(一边是商品，另一边是消费者)。

多边平台：是什么让多边平台与众不同

- 市场定义：
  - 传统分析– 市场由可合理替代的商品与服务组成
  - 平台分析– 提供给平台一边的服务不能与提供给另一边的服务相互替代，但它们可能同属单一"双边"市场的一部分
    - ❖ 另一个问题：假定的垄断者测试必须考虑间接网络效应（如果价格上涨减少了平台一边的需求，就会产生"连锁"效应从而减少另一边的需求）。
    - ❖ 仅市场一边的价格上涨可能不足以确定反竞争损害。
    - ❖ 对市场双边造成的损害可能是必要因素。

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多边平台：是什么让多边平台与众不同

- 市场力量与定价：
  - 传统分析 –高于成本的定价是市场力量的一种表现; 低于成本的定价会是掠夺性定价的危险信号
  - 平台分析 –通常是向一边收取高价而另一边收取低价（甚至是负价）[或至少不收金钱成本]
- 对市场力量的约束：
  - 传统分析 –来自替代产品/服务的竞争
  - 平台分析 –来自其他平台的竞争，或来自替代平台任何一边的服务的竞争

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平台：美国政策

- 美国运通卡(Amex)2018年最高法院判决(1)
  - Amex: 连接商家和持卡人的信用卡平台。
  - 受到质疑的限制条件：限制引导规则阻止商家鼓励使用其他信用卡，即使其他信用卡向商家收取的费用低于美国运通卡。 这对商家不利，但对美国运通卡持卡人可能有好处。 原告声称限制引导规定阻碍了支付卡之间的竞争从而提高了价格。
  - 地区法院："法院认为，尽管认识到这些市场彼此密不可分……但定义单独的 [为商家提供服务和为持卡人提供服务]产品市场是必要且适当的 。"
  - 上诉中被推翻。

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平台：美国政策

- 美国运通卡(Amex)2018年最高法院判决(2)
  - "最高法院明确指出，在界定相关市场和评估反竞争影响时，法院必须考虑平台双边的互动："[法院]在定义信用卡市场时，必须将平台的两边，即商户和持卡人考虑在内"。
  - **对市场的一边进行限制可能是为吸引另一边的客户所必须的。**
  - 由于政府只提供了对商家价格上涨的证据，未提供对客户或整个市场的价格上涨的证据，因而无法证明其主张。
  - 影响：原告只有证明对商家的损害超过了给持卡人带来的利益，才能证明反竞争损害：市场的两边都很重要。
  - 剩余问题：裁决仅适用于交易平台， 还是也适用于非交易平台（如脸书或谷歌）？
  - 裁决可能无法延伸至其他双边平台（如报纸），如果平台一边对另外一边是否参与 "基本无动于衷"。

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平台与大数据

- 众多多边平台都依赖以数据为中心的商业模式
  - 为用户提供免费内容或服务
  - 收集用户数据
  - 通过使用用户数据来以广告和产品定位用户，从而通过用户数据获利

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数据与竞争政策： 数据是进入的障碍吗?

- 利： 以**网络效应**为特征、以数据为中心的业务（用户越多，对其他用户的价值就越大）；数据可创建**积极的反馈循环**（用户数据越多使平台得以创建更好的内容或服务，从而吸引更多的用户和数据）
- 弊：数据是**非竞争性**的（你可以收集我收集的相同数据）；（收集或购买）数据**便宜**；数据**迅速陈旧**（因此长时间积累数据没有优势）
- 为什么重要： 影响对涉及数据的并购的评估和对使竞争对手更难获取数据的单方行为的评估

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数据与竞争政策：隐私属于反垄断问题吗?

- 利:
  - *执法人员的观点*: 在以数据为中心的商业模式中，用户用他们的数据而不是用钱来进行支付，因此数据隐私而非价格才是核心竞争变量。
  - *商业的观点:* 过度的隐私监管可能使新企业进入和小企业成长变得更加困难。
- 弊: 目前的分析工具并不很适宜来严格处理隐私等非价格变量; 一些研究表明，消费者可能不像监管机构那样关心隐私。
- 为什么重要：消费者数据是数字经济的命脉，因此错误监管的成本很高。

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数据与竞争政策

采用以数据为中心的商业模式的公司在以下情况下应考虑反垄断方面的影响:

- 考虑涉及竞争对手、新生/潜在竞争对手或拥有有价值数据的公司的合并和收购
- 从事任何使竞争对手更难进入或成长的行为（例如使用户难以将数据移植到不同平台）
- 在自己的平台上与第三方供应商竞争（例如对专有产品或内容的优惠待遇或排除第三方提供商）

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平台与数据

- 由数据推动的平台是一个新问题，因此几乎没有具体的政策指导
- 一些机构的决定和法院案例提供了一些暗示：
  - 对谷歌的调查
  - 脸书与WhatsApp的合并
  - 欧盟委员会对谷歌的罚款
- 反垄断执法人员最近的演讲最能说明当前的政策
- 今年秋冬举行的FTC公开听证会将提供更多见解

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平台与数据：美国政策

- 对谷歌的调查
  - 2013年，美国联邦贸易委员会对谷歌是否在搜索结果中不公平地偏向自己的内容进行了调查："证据总体显示，谷歌采用被委员会调查的设计修改主要是为了提高搜索结果质量，并且对实际或潜在竞争对手的任何负面影响是附带次要的"。
  - 但密苏里州检察长于2017年启动对谷歌的调查
    - 调查搜索的偏向、收集和使用消费者的私人信息以及使用其他内容提供商的信息

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平台与数据：美国政策

- 2014年美国联邦贸易委员会批准了脸书与WhatsApp的合并
  - 脸书和 WhatsApp均提供短讯应用
    - ❖ WhatsApp 未收集大量个人数据，而且提供了更高级别的隐私保护；如果隐私数据是一个重要的竞争变量，那么WhatsApp可说是一位特立独行的竞争对手
  - 美国联邦贸易委员会没有对交易提出质疑或就反垄断方面的影响发表评论
  - 美国联邦贸易委员会消费者保护局要求脸书兑现WhatsApp的隐私承诺，并在对其使用订户数据的方式作出重大改变之前先征求明确同意

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平台与数据：美国政策

- 很少有案例或法规，执法人员的演讲提供了最好的线索

Bruce Hoffman,
联邦贸易委员会
竞争局主任

- **"当你向一家科技公司提供数据时，公司通常会立即使用这些数据来改善为你提供的服务……**对于价格上涨而言，这根本不是真的，而且与质量下降明显不同"。
- "**许多消费者是否认为他们的数据很有经济价值这一点不是很清楚**，不同的消费者是否都同等地认为该等数据很有价值这一点也不是很清楚……有关公司获取和使用消费者数据的问题更像是差异化的产品，其中不同消费者可能对市场上可获得产品的每一方面的价值看法不同，并且每个消费者基于他或她自己的用途做出购买的选择"。
- **"因此我们无法得出数据收集的增加等同于价格上涨或质量降低这样一个一般观点。** 具体事实将会非常重要，而且希望对这个问题的研究和分析状况会继续发展并完善。" 2018年4月12日演讲 - *"竞争政策与科技产业 - 有什么危害？"*

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平台与数据：美国政策

- 很少有案例或法规，执法人员的演讲提供了最好的线索

Makan Delrahim,
司法部助理检察长

- "随着偏好的转变 - 或是随着数字平台的用户更了解共享其个人数据的后果 - **我们可能正在进入这样一个世界，即大量消费者将他们的数据看作是不会免费分享的资产**"。
- "有一些迅速发展的证据支持**数据隐私新兴市场**的想法。"
- "反垄断执法人员可能需要密切**关注竞争是否正在受到影响，消费者是否正因现有垄断者的不当行为而失去新的创新。**"2018年4月19日演讲 - *"不要停止信念：数字时代的反垄断执法"*。
- "**当前的[消费者福利]标准能够解决新兴数字技术带来的执法挑战.....** [已揭示的]消费者的偏好可以帮助我们将消费者价值归因于某些互联网平台提供的零成本商品" 2018年6月12日演讲 - *"支持我：消费者福利标准和第一修正案"*。

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美国政策：FTC公开听证会

- 这是一个新主题，执法者仍在确定政策的过程中
- FTC于今年秋冬举行一系列公开听证会
  - 计划在听证会后发布政策指导
  - 自1995年以来第一次举行这样范围的听证会
- 听证会将涵盖各类主题，包括平台和数据问题（10月15日至17日，11月6日至7日）
- 有兴趣的企业有机会：
  - 关注政策讨论以及最终形成的政策指导
  - 通过自己或通过行业协会提交公开意见来影响政策讨论

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平台和数据：欧盟政策

- 很少有案例或法规，执法人员的演讲提供了最好的线索

Margrethe Vestager, 欧盟竞争专员

- "在某些领域，这些数据极具价值。**这些数据可以封锁市场 - 可以给相关方提供其他人无法获得的巨大商机。**"2018年1月2日，华尔街日报采访
- "我们正在努力了解不同的数据规律 – 数据如何作为资产运作，如何影响市场。"2018年5月5日，纽约时报采访
- "直到最近，有一种感觉，公司可以把我们的数据作为放在旁边任何人都可以拿的东西，就像淘金热时候的采矿者从地上收集金块一样。**但那些日子结束了。人们都知道移交数据会产生成本。因为每次我们分享数据，我们都放弃了非常有价值的东西。**可以用来对付我们的东西……当然，使用我们的数据提供的服务也可以给我们带来巨大的好处。"2018年6月1日，演讲 - "*当技术为人们服务时*"。

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平台和数据：欧盟对谷歌的罚款

- 欧盟因谷歌滥用其在安卓手机操作系统的市场支配地位而向谷歌罚款43.4亿欧元
- 重点关注谷歌确保预安装谷歌搜索应用程序和Chrome浏览器、并选择谷歌作为默认搜索引擎的策略
  - 谷歌将搜索应用和浏览器与其谷歌Play商店捆绑
- 有争议的市场定义：苹果iOS和黑莓与安卓不属于同一市场
- 更广泛的问题：在与第三方供应商竞争的平台上提供服务的平台所有者总有办法支持自己的服务
  - 如果反垄断执法过于严格，是否只会促使平台开发商不向第三方开放他们的平台?

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平台和数据

- 关于执法人员对数据反垄断问题的演讲中的重点：
  - 以证据为依据的方式
  - 以消费者福利为基础，而不是对公司规模或力量的无形政治或民粹主义担忧
  - 认识到可能存在数据/数据隐私市场
    - ❖ 但即使数据是具有竞争力的相关变量，它也与价格非常不同
    - ❖ 重点关注已透露的偏好来衡量数据隐私对消费者的价值
  - 认识到对数据的垄断可能是一个反垄断问题，特别是在网络效应造成进入障碍的情况下
    - ❖ 但也认识到使公司得以提供更好产品的数据采集可能是一件好事而不是一种损害
- 欧盟与美国的方式比较： 是哲学问题？欧盟由于历史原因更担心过多的监控？

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谢谢！

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关于美迈斯

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伦敦大学国王学院硕士
竞争法研究生文凭
(2004-2005)

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研究生文凭(2000-2001)

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法学士(1998-2000)

马立恒（Philip Monaghan）律师曾是一名资深的竞争事务监管人员，他在私人执业领域为亚洲及跨国客户在全球反垄断法律项下产生的竞争事宜提供意见。马律师尤其利用他丰富的私人执业经验和本地的各方面监管专业知识引导客户解决棘手复杂的事宜，卡特尔、市场权力滥用、跨司法管辖区监管备案申请，必要时他还协助客户在涉嫌反垄断和竞争违法行为或评估行为的调查和/或起诉中解决问题并进行抗辩。 他还与客户协作，提供符合客户商业目标的竞争合规解决方案，同时还有效管理监管风险。

自2014年至2017年，马律师担任香港竞争事务委员会的第一任行政总监（总法律顾问）。在任职期间，马律师作为香港竞争事务委员会行政管理团队的一名成员负责香港竞争事务委员会的法律部。香港竞争事物委员会是香港的竞争执法机构，有权起诉涉及各经济领域的竞争违规行为。

马律师是一名英国（英格兰和威尔士）和香港的注册律师，在就职香港竞争事务委员会的任命之前，他在伦敦、布鲁塞尔、北京和香港担任竞争事务律师达十年以上。

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美迈斯律师事务所简介

全球分布	• 约7500名律师在全球15个办公室工作：北京、布鲁塞尔、世纪城、香港、伦敦、洛杉矶、纽约、新港滩、旧金山、首尔、上海、硅谷、新加坡、东京和华盛顿特区。
一流的诉讼团队	• 以全球分布的最大广度和专业覆盖程度名列《法律360》全球最著名的20家律师事务所排行榜。 • 连续被《美国律师》杂志评为“年度最佳诉讼业务组”——能每年获此殊荣、进入候选名单、或被提名或获奖的仅有的两家律师事务所之一。 • 资深的律师团队在史上最大宗案件中代表全球最大型的公司
强有力的交易平台	• 在过去六年间，连续五次被《公司董事会成员》评为全球最优秀的公司法律师事务所。 • 我们的全球并购业务团队在2016年完成了300多宗交易，被《并购市场》评为全球和美国最活跃的律师事务所之一。 • 获奖金融与资本市场团队于2016年为客户金额超过500亿美元的融资交易提供咨询服务
行业专家	• 优质的业务团队——优秀的客户基础——服务的行业广泛，包括工业/制造业、技术、软件、航空、生命科学、医疗保健、银行和金融、娱乐和媒体、消费/零售、能源和基础设施、酒店、私募股权和风险投资。
杰出的律师	• 我们的32名律师和 26 个业务领域入选《钱伯斯全球》排行榜，66名律师和 31 个业务领域入选《钱伯斯美国》排行榜，还有 21 名律师和24个业务领域入选《钱伯斯亚洲》排行榜。 • 我们的73名律师和 26个业务领域入选《法律500强美国》排行榜，16名律师和 27 个业务领域入选《法律500强亚太》排行榜。 • 我们的17名律师和 22个业务领域入选《国际金融法律评论1000强》排行榜。

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全球分布

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DAY TWO 第二日

Chairs 主席

Shang Ming 尚明

Head, PCCPL;

Member of the expert advisory group of the State Council Anti-Monopoly Committee

中国世贸组织研究会竞争政策与法律专业委员会主任；国务院反垄断委员会专家咨询组成员

Prof. Ioannis Kokkoris

Ioannis Kokkoris 教授

Queen Mary University of London

伦敦大学玛丽女王学院

DAY TWO

Issue 1: Excessive pricing as an abuse of dominance

议题　1：滥用市场支配地位中的过高定价

09:00-10:15

The European Commission, European Court and NDRC have all been active in addressing of excessive pricing outside the SEP context. This panel will explore the tools used to determine whether products are "excessively" priced and whether antitrust regulators are well-positioned to determine what is a fair price.

欧盟委员会、欧盟法院和中国国家发改委均非常关注非标准必要专利的过高定价问题。本组将探索用什么手段来判断产品定价是否过高，以及反垄断监管者是否有条件决定什么是公平价格。

Chair

主持人

Michael Gu, Partner, AnJie

顾正平，安杰律师事务所合伙人

Speakers

发言人

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Bojana Ignjatovic, Partner, RBB

Bojana Ignjatovic, RBB 经济咨询公司合伙人

Hazel Yin, Partner, Freshfields

尹冉冉，富而德律师事务所合伙人

Wang Xianlin, Distinguished Professor, Shanghai Jiao Tong University， Director of the Research Center for Competition Law and Policy of SJTU

王先林，上海交通大学特聘教授，竞争法律与政策研究中心主任

Zeng Chuan, Bureau of Anti-Monopoly, SAMR

曾川，国家市场监督管理总局反垄断局

Michael Gu 顾正平
Senior Partner 高级合伙人
AnJie Law Firm 安杰律师事务所

Michael Gu is a founding partner and a principal competition partner of AnJie Law Firm based in Beijing. Mr Gu was a principal competition partner of another leading PRC firm prior to funding AnJie. Mr Gu also spent five years at the competition practices of Linklaters and Allen & Overy. He is among the few top practitioners in China who can provide clients with a full range of cutting-edge legal advice on all types of antitrust matters in China, covering merger filings, antitrust investigations, antitrust civil litigations and compliance audit and trainings.

Michael Gu has a strong background in both legal education and economic research. He studied EU competition law under the EU-China Legal and Judicial Co-operation Program, sponsored by the PRC Ministry of Justice and European Commission, from 2002 to 2003. He also holds a master's degree from the China Center for Economic Research at Peking University.

Antitrust Deal Sheet

As a competition law pioneer in China, Mr Gu has secured merger clearance from the Ministry of Commerce of the PRC (MOFCOM) for numerous merger transactions involving variety of industries (e.g. healthcare, pharmaceutical, electronics, manufacturing, consumer products, telecommunications, transportation, energy, financial service, etc.) Particularly in 2008, **Mr Gu successfully submitted the first merger filing under the Anti-Monopoly Law which also received the first approval from the Anti-Monopoly Bureau of the MOFCOM.** Mr Gu has also represented clients in high-profile antitrust investigation proceedings, antitrust civil litigations and leniency programs. In addition, Mr Gu frequently provides strategic preventive advices to clients with respect to the potential antitrust risks associated with distribution agreements, IP licensing, restrictive measures, marketing events, pricing and bidding process, etc.

Michael Gu has actively participated in the drafting process of the PRC Anti-monopoly Law and its implementing rules. He has submitted numerous suggestions and comments to the relevant legislative authorities. He has also been invited to present keynote speeches on the topics of anti-monopoly law and other legal issues at various seminars.

顾正平迄今已有超过 23 年的专职律师经验，服务过上百家全球 500 强企业和大型国有企业、领军民营企业等。顾正平律师为安杰律师事务所创始合伙人、执行合伙人及反垄断业务主要负责合伙人。在创办安杰之前，顾律师为中伦律师事务所的合伙人。在加入中伦之前，顾律师曾先后在英国年利达(Linklaters)、英国安理(Allen & Overy)等国际顶级律师事务所执业多年，担任高级中国法律顾问。

顾律师具有竞争法和经济学双重教育背景。顾律师作为获得欧盟委员会全额奖学金的优秀青年律师（全国仅选派四名），于 2002 年至 2003 年期间参加由欧盟委员会和中国政府联合组织的中欧法律和司法合作项目，赴伦敦大学、比利时鲁汶大学和根特大学等欧洲知名大学进修欧盟法和竞争法。顾律师还曾在北京大学国家发展研究院（中国经济研究中心）攻读经济学，获管理硕士学位。

<u>近年反垄断主要业绩</u>

顾律师是国内从事反垄断法律业务的先驱，代理了大量有影响力的大型并购交易的经营者集中申报项目。顾律师代理的客户涉及行业广泛，涵盖汽车和汽车零部件、生物制药、互联网、高科技、能源、化工、航运、金融、机械、电子、纺织、航空、服装、食品、文化娱乐和消费品等各个领域。**顾律师于 2008 年代表德国舍弗勒集团申报的收购大陆集团并购交易案为中国《反垄断法》（2008 年 8 月 1 日）生效后商务部批准的首例并购交易反垄断审查案。**

顾律师还为诸多跨国公司和国内领先企业就涉及垄断协议和滥用市场支配地位的反垄断调查、申请宽大处理和反垄断诉讼等方面的专项事务提供过法律风险评估、代理和咨询服务。顾律师目前还担任多家跨国公司的反垄断业务常年法律顾问，就其涉及的经销模式、定价政策、知识产权许可、经销协议、营销推广活动、排他性协议安排等经营活动中可能涉及的反垄断问题提供战略性咨询，并提供相关的反垄断合规培训等。

顾律师长期跟踪、参与中国反垄断立法，经常应邀参加全国人大法工委、反垄断执法机构等组织的法律研讨，并向全国人大法工委、国务院、商务部、国家工商总局等部门提交过多份关于《反垄断法》及其配套法规和实施细则的立法建议。

Andrea Zulli

Counsel, Covington

科文顿·柏灵律师事务所顾问

Andrea Zulli advises on all aspects of EU, Italian and international competition law, including merger control, cartels and other restrictive practices, and abuses of a dominant position, compliance and antitrust litigation.

Mr. Zulli has an extensive knowledge of a variety of sectors, with a particular focus on financial services (specifically private equity and banks), food & beverages, consumer & luxury goods, life sciences, and energy.

Mr. Zulli has represented major international businesses in relation to merger control notifications to the EU, Italian and other national competition authorities, and has defended major international companies in a number of cartel investigations and other behavioral matters.

Mr Zulli is recognized as a top competition lawyer by GCR, Chambers Global, Chambers Europe, Legal 500 EMEA, The International Who's Who of Competition Lawyers, Best Lawyers, and LMG Life Sciences. According to Chambers Europe, "clients report 'he provided the right solutions and ideas, and perfected the case so that we brought the results home successfully.'"

Mr Zulli regularly speaks at conferences and he has written for numerous legal publications. Previously partner and head of the Italian antitrust and competition group at a leading international law firm, he is dual-qualified in Italy and the United Kingdom and is registered in the EU List of the Brussels Bar in Belgium. Mr Zulli speaks English and Italian.

Andrea Zulli 为欧盟、意大利及国际竞争法提供各个方面的咨询，包括合并管制、卡特尔和其他限制性做法、以及滥用支配地位、合规和反垄断诉讼等方面。

Zulli 先生行业涉猎广泛，尤其关注金融服务（特别是私人股本和银行）、食品和饮料、消费品和奢侈品、生命科学和能源等领域。

在向欧盟、意大利和其他国家竞争当局提交并购控制通知方面，Zulli 先生代表了主要国际企业，并在一系列卡特尔调查和其他行为问题上为主要国际企业辩护。

Zulli 先生是《全球竞争评论》、《钱伯斯环球指南》、欧洲律师联合会、和 Legal 500 EMEA（欧洲、中东、非洲法律 500 强）、知名期刊 The International Who 's Who of competition Lawyers, Best Lawyers 和 LMG Life Sciences 公认的顶级竞争律师。据欧洲律师联合会介绍：“客户回复说，‘他提供了正确的解决方案和想法，并完善了案例，我们因此得以成功。’”

Zulli 先生经常在会议上发言，并为许多法律出版物撰稿。他曾是一家知名国际律师事务所的意大利反垄断与竞争小组的合伙人和主管，在意大利和英国都有双重资格，并被列于比利时布鲁塞尔律师事务所的欧盟名单上。Zulli 先生讲英语和意大利语。

Bojana Ignjatovic

Partner, RBB

RBB 经济咨询公司合伙人

Hazel Yin 尹冉冉

Partner, Freshfields

富而德律师事务所合伙人

Ms. Hazel Yin is a partner and co-head of the China competition practice of Freshfields. Based in Freshfields' Beijing office, Hazel specialises in antitrust and competition law matters in China and her practice includes merger control advice, competition compliance and audits, and investigations.

Hazel's expertise includes representing clients to apply for merger control clearance; advising clients of deal structures from the antitrust perspective, providing antitrust and anti-unfair competition compliance advice; conducting antitrust trainings and in-house audits; representing clients in antitrust and anti-unfair competition administrative investigations.

Hazel is one of the few lawyers who have handled national security review cases and acquired clearances for clients.

Hazel advises clients in various industries such as pharmaceutical, automobile, internet, aviation, finance and consumables, hi-tech, manufacturing, chemical, logistics, mining, beverages, consumer electronics. With rich experiences and thorough understanding of the business model of various industries, Hazel provides clients in different industries with customised advice that are feasible from business perspective.

Hazel's working languages are Mandarin and English. Hazel is recognised in the 2017 edition of Who's Who Legal: Competition – Future Leaders and recognized as a leading lawyer by Chambers Asia Pacific Guide 2018 for Competition and antitrust in China.

尹冉冉律师为富而德律师事务所合伙人，同时也是富而德律师事务所中国反垄断业务联席主管。尹律师专长于中国反垄断及竞争法事宜，她的执业范围包括：合并控制咨询、竞争法合规和审计以及调查。

尹律师擅长为客户申请反垄断批准；从反垄断角度就交易结构提供咨询；提供反垄断及反不正当竞争合规咨询；进行反垄断培训及内部审计；就反垄断及反不正当竞争行政调查为客户提供咨询。

尹律师是曾处理过国家安全审查案件并为客户获得批准的为数不多的律师之一。

尹律师为多个行业客户提供服务，其中包括制药、汽车、互联网、航空、金融和消费品、高科技、制造、化工、物流、采矿、饮料、消费电子等。她经验丰富，而且对各个行业的业务模式具有深入的了解，因此可以为不同行业客户提供业务上可行的定制化建议。

尹律师的工作语言为普通话和英语。她在 2017 年版《法律名人录》中位列竞争法未来领袖，在 2018 年《钱伯斯亚太概览》中位列中国竞争及反垄断领先律师。

Wang Xianlin
王先林
Distinguished Professor, Shanghai Jiao Tong University，
Director of the Research Center for Competition Law and Policy of SJTU
上海交通大学特聘教授，竞争法律与政策研究中心主任

Mr. Wang Xianlin is a distinguished professor of Shanghai Jiao Tong University, executive vice dean of Law School and Director of Center for Competition Law and Policy of SJTU. He is a member of the Advisory Group of Experts of the Anti-Monopoly Commission of the State Council of China，a member of the Expert Committee of State Administration for Industry and Commerce, and Vice president of Economic Law Association of China Law Society.

His research focuses on competition law and intellectual property law, especially the interface between the two fields.

王先林，法学博士，上海交通大学特聘教授、博士生导师、法学院常务副院长、竞争法律与政策研究中心主任，兼任国务院反垄断委员会专家咨询组成员、国家工商总局市场监管专家委员会委员、中国经济法学研究会副会长、中国市场监督管理学会常务理事、中国法学教育研究会常务理事、上海市法学会竞争法研究会会长等。主要研究方向为竞争法和知识产权法。出版独著、合著十多部，发表学术论文一百余篇，有十多项研究成果获得省部级奖，并获全国“杰出中青年法学家提名奖”和“上海市优秀中青年法学家”称号，被教育部、人事部授予“全国模范教师”称号，享受国务院特殊津贴，入选教育部“新世纪优秀人才支持计划”，被人力资源和社会保障部等七部门批准为“新世纪百千人才工程”国家级人选，获上海市育才奖和宝钢优秀教师奖。

Reports From Andrea Zulli

Excessive Pricing: Recent Key Developments in the EU

3rd Annual Conference CULP/UNCTAD
21st September 2018

Andrea Zulli

COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG LONDON LOS ANGELES
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Preamble

"*Ronald* [Coase - Nobel Prize in economic in 1991] *said he had gotten tired of antitrust because when the prices went up the judges said it was monopoly, when the prices went down they said it was predatory pricing, and when they stayed the same they said it was tacit collusion.*"

Edmund W. Kitch, "The Fire of Truth: A Remembrance of Law and Econ at Chicago", JLE (1983) p. 193.

Overview

1. Excessive pricing in the EU – Background
2. EU Assessment Criteria – The *United Brands* test reloaded
3. A glance at EU Member States – Ahead of EU enforcement?

1. Excessive pricing in the EU

Background

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Art. 102 TFEU - Abuse of a dominant position

- *"**Any abuse by one or more undertakings of a dominant position** within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, **consist in**: (a) **directly or indirectly imposing unfair** purchase or **selling prices** or other unfair trading conditions; (b) […]; (c) […]; (d) […]"*
- A dominant position can be defined as a position of economic strength which enables the undertaking to prevent effective competition by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers
  - "Special responsibility" of dominant firms
- Two basic types of abuse
  - Exclusionary conduct (e.g. exclusive dealings, predatory pricing, loyalty rebates, etc.)
  - **Exploitative conduct** (e.g. excessive pricing, imposing unfair conditions, etc.)

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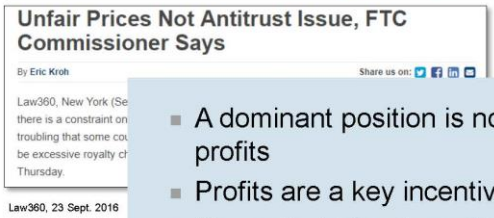
Excessive pricing: need for intervention?


Unfair Prices Not Antitrust Issue, FTC Commissioner Says

By Eric Kroh

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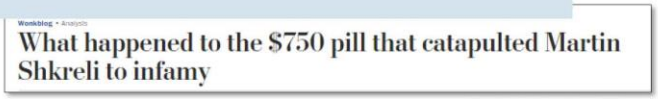
Law360, New York (Se
there is a constraint on
troubling that some cou
be excessive royalty ch
Thursday.

Law360, 23 Sept. 2016

- A dominant position is not illegal – neither is the pursuit of profits
- Profits are a key incentive for investments
- Normally, high prices attract competitors and market entrants – market should thus be (normally) self-correcting
  - Several jurisdictions follow this approach, e.g. the USA
- Sector regulation


Wonkblog • Analysis

What happened to the $750 pill that catapulted Martin Shkreli to infamy

Washington Post, 1 August 2017

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Challenge of market failure

AGCM, 5 July 2018

CMA, 28 June 2018

Certain pharma cases show that some customers would pay any price if the stakes are high enough and there are no substitute products available

"...there may be markets which, because of their particular features, are not run efficiently when open to competition"
(AG Wahl, 6 April 2017)

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On EU Commission's agenda

Commissioner Vestager indicated that:

- *"[…] But there are times when competition rules need to deal with very high prices. Last year, we launched an investigation into Aspen Pharma. We are looking at indications that the company raised the price of five cancer medicines by several hundred percent, after the protection for these medicines expired. We are taking a very close look because these are medicines that patients literally can't live without."*

(NorWho, Copenhagen, 20 August 2018)

- *"[…] Because we are one European Union. And it simply cannot be acceptable for consumers in Central and Eastern Europe to pay excessive prices, just because there's less competition in their markets.."*

(European Competition Day, Sofia, 31 May 2018)

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Excessive pricing: a self-restrained enforcement in the EU

- The EU Commission has wisely been reluctant to act as a "price regulator"
- As a result of well-thought self-restrained enforcement of Art.102(a), the number of recent key EU excessive pricing cases is limited

Key cases since 2000	Year
Aspen Gazprom	Pending 2018
Rambus	2009
Scandlines / Port of Helsingborg	2004
Deutsche Post	2001

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Enforcement activity is stronger at Member State level...

- ICA Italy: Aspen – price increase between 300-1500% for certain oncology medications considered as excessive; fine of ca. Euro 5 million imposed in Sept. 2016
- CMA UK: Pfizer/Flynn – price increase of up to 2600% for epilepsy medication; fine of ca. GBP 90 million imposed in Dec. 2016 but, following appeal, case remitted back to CMA by UK Competition Appeal Tribunal
- CMA UK: pending investigation against Concordia international – alleged price increase by ca. 6000% for a thyroid drug
- BKartA Germany: Lufthansa domestic flights – closure without finding of an infringement

2. EU assessment criteria

The *United Brands* test reloaded

The CJEU's United Brands test (1978) – Case 27/76

- **Definition:** *"Charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be […] an abuse."* (para 250)
- **Two-step test**
  - Comparison of production cost and price: **Is the difference between costs incurred and actual price excessive**?
  - Can the price be considered to be **unfair in itself – or when compared with competing products**?
- Four approaches have in practice been adopted by the EU Commission:
  - price-cost margin analysis;
  - comparisons of prices across markets and competitors
  - geographic comparisons of prices
  - comparisons of prices over time

Picture © https://www.maxpixel.net

Main criticism

- Competition authorities should not determine maximum prices but implicitly do so – risk of quasi-price regulation
- Approach remained imprecise and did not define what "excessive" nor what "value of a product" means – what is the benchmark?
- Price in a "competitive market" no helpful indicator: perfect competition would lead to price = marginal costs, so how competitive should a comparator be?
- Lack of legal certainty

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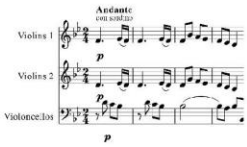
Case C-177/16 – *AKKA/LAA* (2017)



- AKKA/LAA allegedly abused its dominant position by imposing excessive music license fees for musical works in Latvia
- **Supplemented test:**
  - Identify an **appropriate and sufficient comparator**: no minimum number of markets to compare – choice of appropriate comparator markets depends on case-specific circumstances
  - For the difference between rates to be appreciable and therefore indicative of abusive behavior, it must be both **significant and persistent** on the facts, with respect to the market in question
  - **Objective justification** possible: e.g. costs, regulations that impose a heavier administrative burden than in other markets, …

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AKKA/LAA: Comparison

- Comparison of comparable geographic markets for the same product – prices applied in the relevant Member State compared to prices in other Member States
- Limitation of number of comparator markets can be justified if selected by **objective, appropriate and verifiable criteria** like consumption habits, GDP per capita etc.
- Basis for comparison needs to be **consistent**, i.e. method of calculating rates should be analogous to the method applicable in the relevant market; **deviating factors** like variations in purchasing power/standard of living need to be taken into account
- Competition authorities retain a "***certain margin of manoeuvre***"

(see also *Tournier,* C-395/87 and *Lucazeau*, C-110/88)

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AKKA/LAA: Difference between prices

- No precise/minimum threshold for excess – **case-specific** assessment
- Prices need to be "***appreciably higher***"
- Difference must be "***significant***"
- Difference must persist for a **certain length of time** and must not be temporary or episodic
- Difference is then considered as "***indicative for abusive behavior***"
  - Undertakings may **rebut this presumption**
  - Justification of the difference possible if objective dissimilarities between the relevant market and the comparator markets
  - Factors to be taken into account can be high input costs – high overhead costs (admin, distribution etc.), however, may argue for lack of competition / inefficient management unless there are specific reasons for them

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Did *AKKA/LAA* provide more clarity?

- *AKKA/LAA* endorses the *United Brands* test and largely confirms and expands on existing case-law *(Lucazeau, Tournier)*
- Defines potential benchmarks by comparator markets
- Left to case-by-case assessment: indicative threshold
- Did not expressly endorse *AG Wahl*'s approach to determine benchmark price by combining several methods – risk of fallacies if analysis is limited to one method only

Some initial conclusions

- Excessive prices remain an area of enforcement where the utmost caution ought to be exercised
- The *United Brands* test continues to apply
  - Tendency to put more emphasis on comparison with competing products limb instead of "unfair in itself" limb?
- Selection of the right comparators is key
- Rebuttal of presumptions: affected undertakings will have to put forward sound economic evidence in their defense, in particular why a comparator may be flawed, or why specific circumstances apply that justify the high price
- Case-by-case assessment
  - Very little general guidance for compliance efforts by potentially affected undertakings

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3. A glance at selected EU Member States

Ahead of EU enforcement?

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Italy – the *Aspen* saga (2014-2018)

- Investigation started in 2014 and concluded in 2016
- In 2009 Aspen acquired a portfolio of antineoplastic medicines used for certain oncologic diseases ("Cosmos Drugs")
- In Italy Cosmos Drugs are reimbursed by the healthcare system
- Aspen's conduct
  - request to de-list Cosmos Drugs into a category where drugs are not reimbursed and prices can be freely set despite Cosmos being life-saving drugs and hence not classifiable as such
  - successfully negotiating price increases of 300-1500% by threatening the Italian sector regulator (AIFA) to withdraw the Cosmos Drugs if price increases were not accepted and by taking advantages of Cosmos Drugs' scarce availability in Italy due to the Aspen's distribution model
- Market definition based on ATC level 5 where Aspen was deemed dominant
  - Inelastic demand due to lack of sufficient (viable) alternative treatments
  - Despite expired MA expired, credible entry was not likely because of (low) prices

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Italy – the *Aspen* saga (cont.)

- Complex and detailed substantive assessment by ICA
  - Determination of excessiveness by using previous prices as comparator:
    - First, ICA investigated percentage gross margin which was in line with average group gross margin before the price increase, i.e. the drugs were profitable before price increase
    - Second, ICA tried to approximate the economic value of the drugs taking into account the economic effort undergone by Aspen to market the drugs (incl. direct variable costs, portion of indirect fixed costs and rate of profitability based on return on sales)
    - Third, ICA compared margin cash flows over 20 years to estimate the internal rate of return
  - Determination of unfairness:
    - ICA took multiple factors into account such as comparison between old and new price, absence of economic justifications for price increases (e.g. no need for investment recovery, no freeze of financial resources of Aspen since no owned production facility was used, no promotional costs, no substitutability, high barriers to entry, no buyer power), nature and characteristics of Cosmos Drugs, increased cost for Italian national health system
- In Dec. 2016, Aspen was fined €5.2 million for excessive prices implemented via an instrumental and distorted use of its negotiations with AIFA and was ordered to take all necessary/appropriate steps to set fair prices for Cosmos Drugs

(Case currently pending with the Italian supreme administrative court)

(Following ICA's 2016 decision, in May 2017, the EU Commission opened an investigation against Aspen re: its conduct in other EU Member States)

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Italy – the *Aspen* saga (cont.)

- In February 2017, AIFA started the process to re-negotiate with Aspen Cosmos Drugs' prices
- In March 2017, ICA opened an investigation to verify Aspen's compliance with the conditions imposed in the 2016 decision (namely the setting of fair prices for Cosmos Drugs)
- In April 2018, AIFA and ASPEN finally agreed new prices for Cosmos Drugs with price reduction between 29%-82% compared to the 2014 abusive prices. For example:

Leukoran (consumer prices)	2013 Euro 7,5	2014 Euro 95,1	2018 Euro 17,34	Price reduction: -82%

- In June 2018, ICA closed this investigation without imposing any sanction

Germany – *Lufthansa* (2018)

- In 2017, Air Berlin became insolvent, capacity decreased temporarily by up to 40%, Lufthansa used bigger planes but on average 20% of capacity was unavailable
- As a result, Lufthansa held a monopoly for a few months on some domestic routes; ticket prices increased up 25-30% and were even higher in some individual cases until the entry of EasyJet 7 months after Air Berlin's exit
- Assessment by FCO:
  - comparison of prices of Lufthansa and its subsidiary Eurowings with identical prices from previous year on a number of routes
  - comparison with prices for the same flights after entry of EasyJet
  - assumption that capacity decreases would have led to higher prices even if there had been more than one market player (this was taken into account as upward correction of the compared prices)
- Ultimately, price increases were not considered as significant as to justify the finding of an abuse – investigation closed without findings

UK – *Pfizer/Flynn* (pending)

- Pfizer/Flynn were found to have a dominant position on the markets for phenytoin sodium capsules which experienced a price hike in 2012/2013 by up to 2,600% after Pfizer transferred its marketing authorization for this drug to Flynn
- CMA imposed fines totaling GBP 90 million for excessive pricing
- Its assessment followed a pure "Cost Plus 6%" approach – applying the United Brands test, CMA found that the price was unfair in itself
- On appeal, Competition Appeal Tribunal (CAT) set aside the decision because it considered the "Cost Plus" approach as insufficient to determine the economic value and to conclude on a price unfair in itself. The CAT held that (para 443):
  - To determine excessiveness, CMA should have identified a benchmark price or price range which would have applied in a counterfactual scenario under conditions of normal and sufficiently effective competition
  - CMA entitled to select a credible basis of analysis (to establish unfairness in itself) but may not ignore other basis that are also credible (that may argue against unfairness in comparison to competing products)
  - If there is a finding of unfairness, the CMA needs to determine the economic value and whether the price bears no reasonable relation to it

Some initial conclusions on EU Member States' enforcement

- Excessive prices is becoming an area of increased interest for EU NCAs
- Multiple-method approach as suggested by AG Wahl is applied by EU Member States' authorities
- Tendency to investigate price increases – which permits using previous price situation / historical data as comparator
- It remains to be seen whether geographic markets comparator will play an increasing role after *AKKA/LAA* to determine excess in other cases
- Awareness of fallacies - corrections re. costs, capacity restraints or other market-specific or temporary characteristics - need to be reflected in assessments
- Time factor / persistence of increase (e.g. limited time in *Lufthansa*)

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Reports From Hazel Yin（尹冉冉）

Regulatory framework
法律框架

国家市场监督管理总局 SAMR

Anti-Monopoly Bureau
反垄断局

- The Anti-Monopoly Law and supporting regulations applicable to undertakings with dominant market positions
- 《反垄断法》及其配套法规条例，适用于具有市场支配地位的经营者

Price Supervision and Anti-Unfair Competition Bureau
价格监督检查和反不正当竞争局

- The Price Law and supporting regulations applicable to all undertakings in general
- 《价格法》及其配套法规条例，适用于所有经营者

Regulatory framework
法律框架

The Price Law (1997) 《价格法》（1997年）

- Pushing up prices to an excessive extent by fabricating and spreading price increase information or by hoarding products to influence the market supply, or by other means;
  通过捏造、散布涨价信息，或囤积商品影响市场供应，或其他方式，哄抬价格；
- Making exorbitant profits, etc.
  牟取暴利等。

The Anti-Monopoly Law (2007) 《反垄断法》（2007年）

- Undertakings with dominant market positions sell products at an unfairly high prices.
  具有市场支配地位的经营者以不公平的高价销售商品。
- Factors to be considered when determining "unfairly high prices":
  认定"不公平的高价"应考虑的因素：
  - **Measures on Anti-Price Monopoly (2010)**
    《反价格垄断规定》（2010年）
  - In Pharmaceutical sector: **Guidelines on Pricing Conducts by Undertakings of Drugs in Short Supply and Active Pharmaceutical Ingredients (2017)**
    在医药领域：《短缺药品和原料药经营者价格行为指南》（2017年）

3

Tools to determine excessive pricing
认定过高定价的方法

The following tools are usually used to assess whether an undertaking with a dominant market position charges an excessive price or not:
判断具有市场支配地位的经营者是否从事过高定价行为的常用方法如下：

1. Historical price increase
历史价格比较法
2. Cost-price comparison
成本-价格比较法
3. Price comparison across geographic regions
不同地域市场价格比较
4. Price comparison with comparable products
与同种产品的价格比较

Isoniazid API case (2017)
异烟肼原料药案（2017年）

Market definition:
市场界定：

- The isoniazid API market in China
  中国异烟肼原料药市场

Dominant market position:
市场支配地位：

- Company A and Company B have a combined market share of more than 2/3 in the isoniazid API market in China.
  A公司与B公司在中国异烟肼原料药市场的合计市场份额超过三分之二。
- Company A and Company respectively have a market share of no less than 10%.
  A公司与B公司各自在中国异烟肼原料药市场的市场份额均不低于10%。

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Isoniazid API case (2017)
异烟肼原料药案（2017年）

Excessive pricing
过高定价：

- Historical price increase
  历史价格比较：
  - Company A's 2017 average price of the isoniazid API was 3.52 times the 2016 average price.
    2017年A公司销售异烟肼原料药的平均价格为2016年平均价格的3.52倍。
  - Company B increased the price of one batch of its products in 2015 to a level that was 19 times the highest price in 2014 and 17.27 times the highest price of 2015.
    2015年B公司销售个别批次的异烟肼价格为2014年最高价格的19倍，为2015年最高价格的17.27倍。
- Other factors considered
  其他考虑因素：
  - Costs increase 生产成本上涨
  - Supply-demand changes 市场供需变化
  - Restrictions on switching of suppliers for downstream players 下游企业转换供应商的限制

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Cases
案例

Cases 案例名称	Tools 方法	Findings 事实	Duration 持续期间
Promethazine hydrochloride case (2012) 复方利血平案（2012年）	- Historical price increase 历史价格比较法	- Less than RMB 200/kg to RMB 300-1350/kg 由每公斤不足200元提高到300-1350元	1 month 1个月
River sand case (2013) 河砂案（2013年）	- Cost-price comparison 成本-价格比较法 - Comparison of prices of sand in adjacent cities 与附近城市的河砂价格比较	- Selling price increased by 54.5% while the cost only increased by 20% 提价幅度达54.5%，而成本上涨幅度仅为20% - Much higher 明显高于	A few years 数年
Natural gas case (2016) 天然气案（2016年）	- Cost-price comparison 成本-价格比较法 - Comparison of prices/profits of the same services provided by other similar undertakings 与其他相同经营者的价格/利润比较	- Significantly higher 明显大幅高于 - Significantly higher 明显大幅高于	3 years 3年

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Obstacles in law enforcement
执法难点

A price increase exceeding a normal range
价格上涨超过正常幅度

Significantly higher
明显高于

Comparable product
同种产品

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Thank you
谢谢

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Reports From Prof.Wang Xianlin（王先林教授）

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一、反垄断法中过高定价规制的争议与制度差异

- 所谓过高定价，通常是指经营者在正常竞争条件下所不可能获得的远远超出公平标准的价格，也就是以经营者具有市场支配地位为前提的过高价格。
- 具有市场支配地位经营者的过高定价可能是其市场支配地位滥用的表现，因而成为一些国家和地区反垄断法所规制的对象。
- 但是，对过高定价是否应当作为反垄断法所禁止的滥用市场支配地位的一种表现形式，在各国理论上和制度实践上都是存在争议的。

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Disputes over and systematic differences in overpricing regulation in antitrust laws

- Overpricing usually refers to the price far beyond the fair standard, which can not be obtained under normal competition conditions. It is based on the premise that the operators have the dominant position in the market.
- Overpricing of the operators with a dominant market position may be a manifestation of the abuse of their dominant market position and thus becomes the object regulated by the antitrust law of some countries and regions.
- However, it is controversial both in theory and practice in many countries whether overpricing should be regarded as a form of abusing dominant market positions prohibited by the antitrust law.

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- 美国反托拉斯法中没有关于过高定价的规定，理论上也认为没有必要对过高定价进行规制。
- 欧盟为了消除或者减少过高定价对消费者或者资源配置的不利影响，其竞争法对过高定价作出了明确的规定。
- 还有一些国家（如德国、英国、波兰、韩国、日本、俄罗斯等）在其反垄断法中也有规制过高定价的规定。
- 即使是在美国，虽然过高定价一般并没有被明确作为滥用市场支配地位的一种独立形式，但是它在认定有关滥用市场支配地位行为时也还是有意义的。

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- In American Antitrust Law, there is no provision for overpricing, and theoretically it is believed that there is no need to regulate overpricing.
- EU competition law, in order to eliminate or reduce the adverse effects of overpricing on consumers or resource allocation, has made clear provisions for it.
- Other countries (Germany, Britain, Poland, South Korea, Japan, Russia, etc.) also regulate overpricing in their antitrust laws.
- Even in America, although overpricing is not generally recognized as an independent form of abuse, it makes sense in identifying relevant behaviours of abusing of dominant market position.

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- 中国原来没有从反垄断法角度对具有市场支配地位经营者的过高定价行为的明确规范，只是在《价格法》等法律、法规中主要从维护消费者利益出发禁止“违反法律、法规的规定牟取暴利”。国家发改委2003年6月发布的《制止价格垄断行为暂行规定》第7条也有类似规定。
- 在中国反垄断立法过程中，对于是否应当规定过高定价问题进行了反复的讨论。
- 中国2007年出台的《反垄断法》最终也还是对过高定价作出了规定：“（一）以不公平的高价销售商品或者以不公平的低价购买商品”。（第17条第1款第1项）
- 国家发改委2010年发布的《反价格垄断规定》第11条还对认定“不公平的高价”和“不公平的低价”应当考虑的因素做了进一步的规定。

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- China did not have clear regulations on overpricing of operators with dominant market positions from the perspective of the anti-monopoly law, but only prohibited “profiteering in violation of laws and regulations” from the perspective of safeguarding consumers' interests in laws and regulations such as the Price Law. Article 7 of Interim Provisions on Preventing the Acts of Price Monopoly issued by the National Development and Reform Commission (NDRC) in June 2003 has similar provisions.
- During the process of anti-monopoly legislation in China, the issue of whether overpricing should be stipulated was discussed repeatedly.
- China's Anti-Monopoly Law, which was introduced in 2007, eventually regulates overpricing: “(1) selling goods at unfairly high prices or buying goods at unfairly low prices”. (article 17, paragraph 1, item 1)
- Article 11 of the Provisions against Price Fixing, issued by the NDRC in 2010, also provides further provisions on factors that should be considered in determining “unfair high prices” and “unfair low prices”.

二、过高定价规制制度在实施中面临的更大困难

- 反垄断法的各项制度、尤其是滥用市场支配地位规制制度在总体上都是非常复杂的，但其中的过高定价规制制度无疑是更为复杂的，因此其在实施中面临着比其他反垄断制度更大的困难。
- 虽然一些国家和地区基于各自的历史背景和现实需要在其反垄断法规定了过高定价规制制度，但是一般采取比较谨慎和温和的态度，该制度在实践中是很少适用的，只适用于非常特殊的情形（in exceptional circumstances）。
- 最主要的原因在于过高定价的标准不易确定，即究竟该怎样去判断特定的价格是否为不公平的高价。

Greater difficulties encountered overpricing regulation

- The anti-monopoly law systems, especially the systems regulating dominant market positions, are very complex in general, among which the overpricing regulation system is undoubtedly more complex, so it faces greater difficulties than other anti-monopoly systems in implementation.
- Although some countries and regions have stipulated their over-pricing regulation systems in their anti-monopoly laws based on their historical background and practical needs, they generally adopt a more cautious and mild attitude. This system is rarely applicable in practice, but only in exceptional circumstances.
- The main reason is that it is difficult to determine the standard of overpricing , that is, how to determine whether a particular price is unfairly high.

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- 通常认为，在反垄断法的框架中有四种判断超高定价的方法，分别是成本加合理利润、同类产品比较、同一企业相同产品的空间比较和同一企业产品的时间比较。每一种判断方法都有其不足，这给执法机构和法院在实际适用时带来了困难。
- 在知识产权等特殊领域认定过高定价时，情况会进一步复杂。在评估创新者利用其知识产权的合理回报时，确定不公平定价的难度的确更大。
- 在这个问题上还需要注意发展中国家与发达国家之间的差异。基于对自身知识产权实力和消费者承受能力的考虑，一些发展中国家在有关法律中对涉及知识产权产品特别是专利药品的高价作为具有反竞争意义的知识产权滥用的一个方面加以规制。（如阿根廷、南非）

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- It is generally believed that there are four methods to judge ultra-high pricing in the framework of the anti-monopoly law, which are cost plus reasonable profit, comparison of similar products, spatial comparison of the same products in the same enterprise and time comparison of the same products in the same enterprise. Each of these methods has its own shortcomings, which makes it difficult for law enforcement agencies and courts to apply in practice.
- The situation is further complicated when overpricing is identified in particular areas such as intellectual property. It is indeed harder to determine unfair pricing when assessing the reasonable returns of innovators when using their intellectual property.
- On this issue we should also pay attention to the differences between developing and developed countries. Considering the strength of intellectual property rights and the affordability of consumers, some developing countries regulate the high prices of intellectual property products, especially patented drugs, as abuse of intellectual property rights which is anti-competitive in relevant laws. (Argentina, South Africa)

三、过高定价规制中适用经营者承诺制度的优势

- 在一些选择对过高定价进行反垄断规制的国家和地区往往面临着这样的尴尬处境：一方面，反垄断法中有关于禁止超高定价的明确规定，消费者和相关经营者也欢迎这样的制度并期待其实施；而另一方面，这一制度在实施中存在认定的特殊困难，因此执法机构很少适用而名存实亡，或者适用后招致众多的批评。
- 解决这种困境需要从两方面着手：一方面，重新审视这一制度，在确认不需要这一制度时干脆予以废除或者并入其他相关的制度中，在确认仍然需要这一制度时对其制度规则进行必要的完善和细化，以尽可能增加其操作性；另一方面，在现有的制度框架下，利用好相关的程序规则，以便相对灵活和弹性地实施该制度。

The advantages of applying the Commitment System in overpricing regulation

- In some countries and regions that choose to regulate overpricing, there exists such an awkward situation: on the one hand, the anti-monopoly law contains clear provisions prohibiting ultra-high pricing, and consumers and relevant operators welcome such a system and expect it to be implemented; on the other hand, this system has special difficulties in implementation, so it is rarely applied by the law enforcement agencies and has no real substance, or it has attracted a lot of criticism after application.
- To solve this dilemma, we need to start from two aspects. On the one hand, we need to review the system: abolish it or incorporate it into other relevant systems if we confirm that it is not needed, and refine its rules if we still need it, so as to increase its maneuverability as much as possible. On the other hand, in the existing institutional framework, we should make full use of relevant procedural rules to implement the system with relative flexibility.

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- 在中国目前来说，尤其需要就后者进行考虑，而在这方面充分利用反垄断法实施中的经营者承诺制度就是一种较好的选择。
- 中国《反垄断法》第45条借鉴了有关国家和地区的经验，规定了经营者承诺制度（和解制度）。
- 经营者承诺制度当然可以适用于对各种类型的垄断行为的反垄断调查程序中，而其适用于对过高定价行为的调查就更有意义，更能体现其制度优势。
- 对过高定价行为适当适用经营者承诺制度是灵活运用反垄断法相关制度实现该法根本目的的具体体现，也是在现实面前的明智选择。
- 中国在这方面已有相关的实践，如发改委调查的IDC案。

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- As for China today, we should especially take the latter into consideration, for which making full use of the Commitment System in implementation of antitrust law is a good choice.
- Article 45 of China's Anti-monopoly law, drawing on the experience of certain countries and regions, stipulates the commitment system for operators (the settlement system).
- The Commitment System can certainly be applied to the antitrust investigation procedures of various types of monopolistic behaviors, and it is more meaningful to apply the system to the investigation of overpricing behaviors, which can better reflect its institutional advantages.
- The application of the Commitment System to overpricing is a concrete embodiment of applying flexibly the relevant systems of the antitrust law to realize the fundamental purpose of the law. It is also a wise choice in the face of reality.
- China already has relevant practices in this regard, such as the IDC case investigated by the NDRC.

Reports From Bojana Ignjatovic

RBB Economics

Excessive pricing: a misdiagnosis? Lessons from Pfizer/ Flynn

Bojana Ignjatovic

Beijing, 21 September 2018

Phenytoin sodium – the headlines

RBB Economics

Milestone	
The conduct	• Phenytoin sodium capsules: an old, off-patent, anti-epilepsy drug • Narrow therapeutic index limits switching • 2012: Pfizer sold MA to Flynn but continued to manufacture the product (exclusive supply agreement) • Pfizer/Flynn de-branded the drug (leading to shift in regulatory regime) • Subsequently, a significant increase in the price charged for the product **(2600%)**
The UK CMA's case	• Pfizer and Flynn are dominant (despite evidence of generic entry) • Price charged substantially above cost plus "reasonable return" benchmark • "Unfair in themselves" • Fines of £90m to Pfizer and Flynn combined
The appeal at the CAT	• CAT upheld the findings on dominance, but not on abuse • The CMA *"did not correctly apply the legal test for finding that prices were unfair; it did not appropriately consider what was the right economic value for the product at issue; and it did not take sufficient account of the situation of other, comparable, products, in particular of the phenytoin sodium tablet"* • CAT considered the case could be remitted back to CMA for further consideration • Currently on **appeal**

The CMA's case against Pfizer and Flynn

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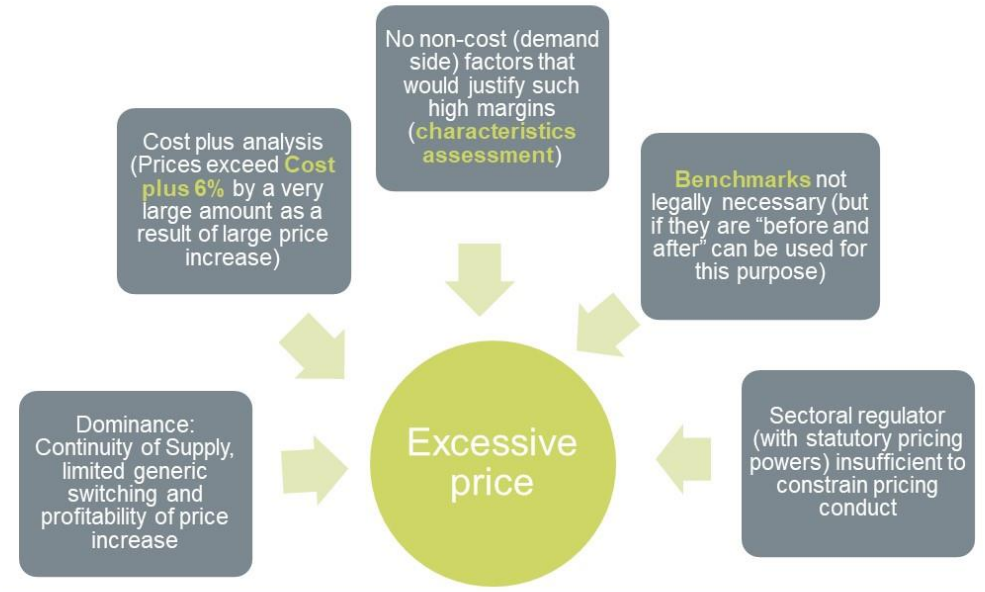

What to look out for in the CAT decision

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1. **The limits of cost based benchmarks**
2. **Economic value – what is it and how do we measure it?**
3. **The role of benchmarks**
   - Types of benchmarks available
   - Importance of benchmarking
   - How to deal with a wide dispersion of comparators

1. The limits of cost based benchmarks (or why economists hate excessive pricing!)

RBB Economics

– Price above "**normal competitive levels**" may result in economic inefficiency and harm consumers. But how to define?

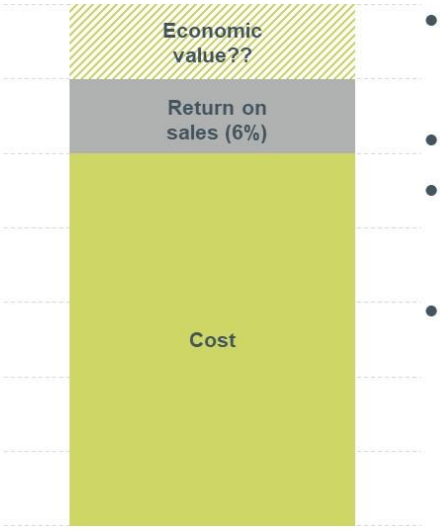
1. The limits of cost-based benchmarks – CAT judgement

RBB Economics

- Theoretical "long run competitive equilibrium" characterised by cost plus reasonable return is based on theoretical, "idealised" competition
- It represents the price *"at which point, it would just be profitable for a firm to enter or remain in the market"* (§321)
- CAT dismisses this as an appropriate benchmark
  - *"We do not think that is what United Brands requires which, rather, relates to conditions of normal and sufficiently effective competition"* (§321)
  - *"Any approach should be premised on a comparison with prices likely to have pertained in normal and sufficiently effective competition not idealised competition"* (§324)

2. Economic value – what is it and how to measure it?

RBB Economics



- United Brands test defines a price as excessive if it "bears no reasonable relation to economic value" of a product
- But what is economic value?
- Economics defines value as what customers are willing to pay, but this would rule out excessive pricing cases
- CMA treats economic value as a potential "add-on" to cost plus; decided on product characteristics

2. Economic value – need versus want

RBB Economics

- CMA's view: a dominant firm cannot use features that result in customers being "dependent" as a basis for "value" arguments; it ascribed zero economic value
- An implication of the CMA's approach is that firms selling products that customers "want" can charge high prices but those selling products customers "need" cannot
- If economic value is meant to capture the demand side (brand value, customer "liking" for the product), why is "want" rewarded but not "need"?

- **CAT: Some allowance must be made for the "significant contribution" of phenytoin to treating epilepsy for a significant number of patient** (§417)

3. Interesting questions: the role of benchmarks

RBB Economics

- **CMA reading:**
  - price is unfair in itself – no need for comparators
  - If they are required, "before and after" sufficient
- **CAT: key benchmarks cannot be ignored**
  - Insufficient information in the decision on phenytoin sodium tablets
- **Unresolved issues…**
  - **If benchmarking is appropriate which benchmarks to use and how to interpret the results?**
    - **Product benchmarks:** how "similar" do products need to be on the **demand side** and **supply side** to make them valid benchmarks? And how competitive do markets need to be?
    - **International benchmarks:** How to deal with regulated markets and international reference pricing?
    - **Prices over time:** Can loss-making prices represent a valid benchmark?
  - **What to do when valid benchmarks tell different stories?**

3. The role of role of benchmarks

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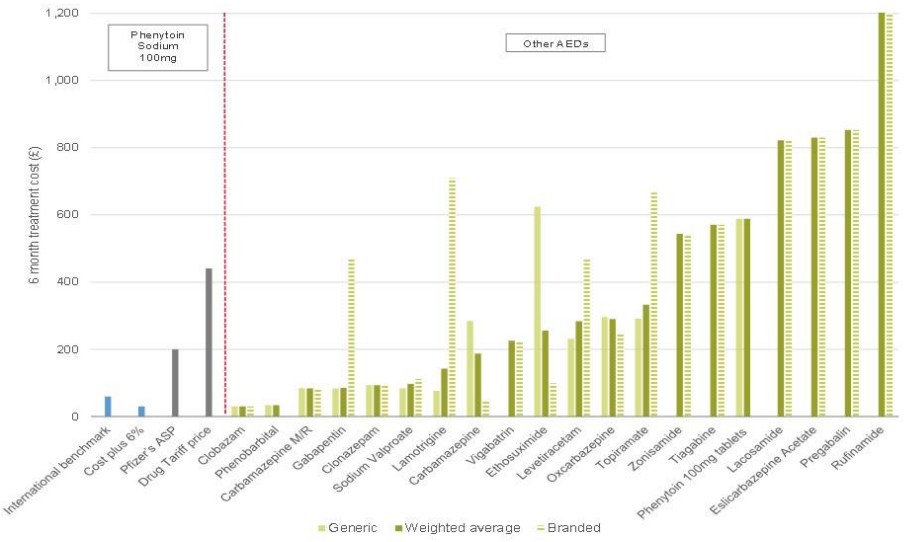


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国家市场监督管理总局
State Administration for Market Regulation

不公平高价有关问题探讨

反垄断局滥用行为调查处　　曾　川
2018年9月21日

国家市场监督管理总局
State Administration for Market Regulation

主要内容
Main Content

一　认定不公平高价是执法的焦点和难点

二　执法的基本原则

三　认定不公平高价的考虑因素

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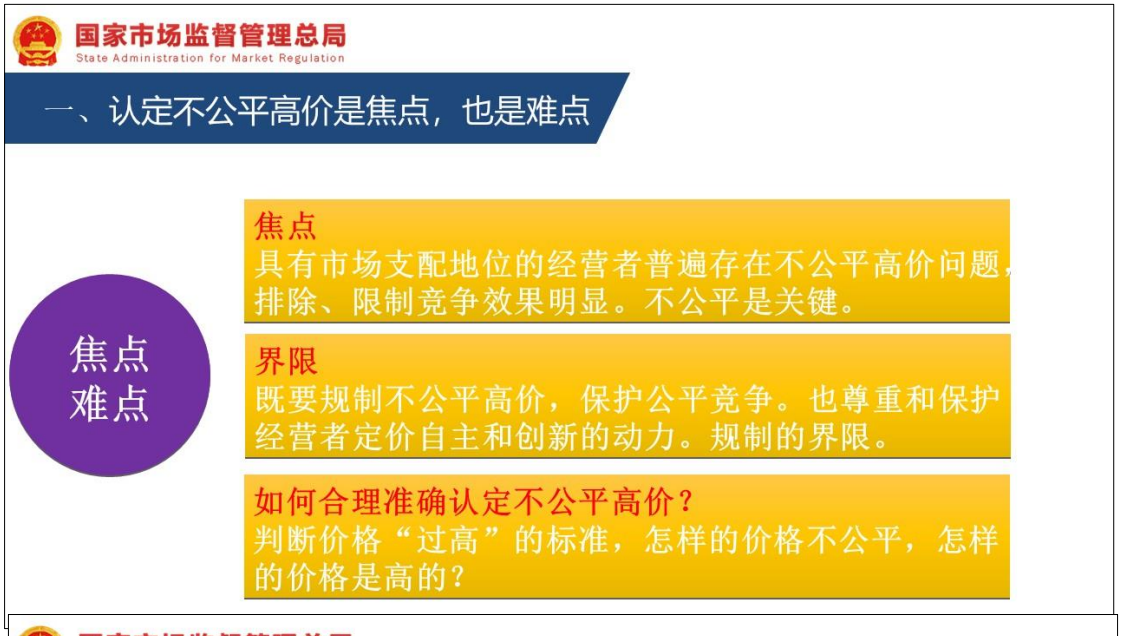
一、认定不公平高价是执法的焦点和难点


国家市场监督管理总局
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一、认定不公平高价是焦点，也是难点
焦点
难点
焦点
具有市场支配地位的经营者普遍存在不公平高价问题，排除、限制竞争效果明显。不公平是关键。
界限
既要规制不公平高价，保护公平竞争。也尊重和保护经营者定价自主和创新的动力。规制的界限。
如何合理准确认定不公平高价？
判断价格“过高”的标准，怎样的价格不公平，怎样的价格是高的？


国家市场监督管理总局
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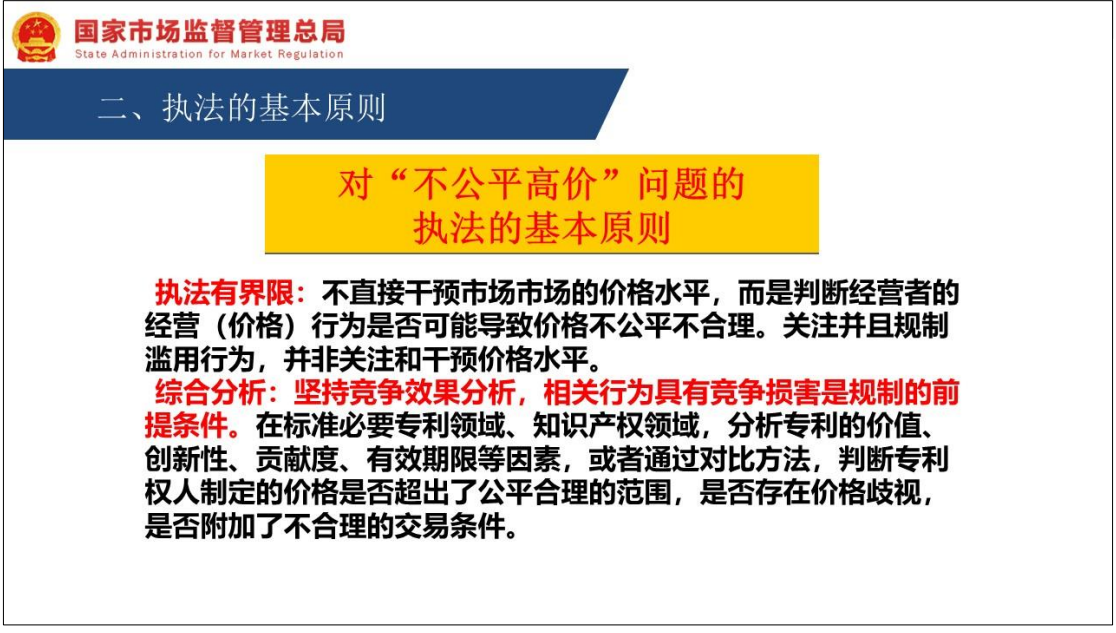
二、执法的基本原则


国家市场监督管理总局
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二、执法的基本原则
对“不公平高价”问题的
执法的基本原则
执法有界限：不直接干预市场市场的价格水平，而是判断经营者的经营（价格）行为是否可能导致价格不公平不合理。关注并且规制滥用行为，并非关注和干预价格水平。
综合分析：坚持竞争效果分析，相关行为具有竞争损害是规制的前提条件。在标准必要专利领域、知识产权领域，分析专利的价值、创新性、贡献度、有效期限等因素，或者通过对比方法，判断专利权人制定的价格是否超出了公平合理的范围，是否存在价格歧视，是否附加了不合理的交易条件。

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二、执法的基本原则

中华人民共和国国家发展和改革委员会令

第 7 号

根据《中华人民共和国反垄断法》，特制定《反价格垄断规定》，经国家发展和改革委员会主任办公会议讨论通过，现予公布，自2011年2月1日起施行。

国家发展和改革委员会主任，张平

二〇一〇年十二月二十九日

《反价格垄断规定》第十一条 认定“不公平的高价” 应当考虑下列因素：

（一）销售价格是否明显高于其他经营者销售同种商品的价格；

（二）在成本基本稳定的情况下，是否超过正常幅度提高销售价格；

（三）销售商品的提价幅度是否明显高于成本增长幅度；

（四）需要考虑的其他相关因素。

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二、执法的基本原则

高通公司“收取不公平的高价专利许可费”认定

1. 直接价格比较

比较经营者对不同公司的许可行为是否存在价格歧视。对下游手机企业的报价是否客观公平。

2. 行为反竞争效果分析

经营者最终的许可费用的得出，是否采用附加的不合理条件，是否存在不公平不合理的因素。标准必要专利和非标准必要专利捆绑，免费的专利交叉许可，过期专利收费等。

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三、认定不公平高价的考虑因素（SEP）

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三、认定不公平高价的考虑因素

《标准必要专利领域价格行为指南》（草稿）

六章，相关概念，市场界定，垄断协议，滥用行为

认定以不公平高价许可标准必要专利的考虑因素：

（1）许可费的计算方法，及专利对相关商品价值的贡献；

（2）经营者对标准必要专利许可做出的承诺。

（3）标准必要专利的许可历史或者可比照的许可费标准。

（4）在提供组合许可时是否就过期或者无效的标准必要专利收取许可费。

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三、认定不公平高价的考虑因素

《标准必要专利领域价格行为指南》（草稿）

（5）是否存在滥用禁令、断货威胁或者其他非正常商业协商的情形。

（6）许可人和被许可人之间是否存在交叉许可。

（7）是否存在不公平高价的情形，包括强制搭售其他商品或服务，要求免费提供交叉许可或者回授，附加不质疑义务或者其他不合理交易条件等。

（8）。。。

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谢 谢!

DAY TWO

Issue 2: Antitrust/IP Roundtable

议题　2：反垄断与知识产权圆桌会议

10:30-12:00

This panel will discuss recent developments in China, the US and EU as regards standard-essential patents assured by voluntary FRAND commitments.

本组将探讨通过自愿承诺“公平合理非歧视”加以保证的标准必要专利近期在中国、美国和欧盟的发展。

Chair

主持人

Ninette Dodoo, Counsel and Co-Head of Antitrust Practice, Freshfields

Ninette Dodoo，富而德律师事务所法律顾问与反垄断实践联合主管

Speakers

发言人

Hu Shengtao, Director, IPR Policy, Ericsson

胡盛涛，爱立信知识产权政策总监

Renata Hesse, former head of DOJ Antitrust Division, Partner, Sullivan & Cromwell

Renata Hesse，前美国司法部反托拉斯局局长，美国苏利文·克伦威尔律师事务所合伙人

Meng Yanbei, Professor, School of Law, Renmin University

孟雁北，中国人民大学法学院教授

Jiao Shan, Partner, Lifang

焦姗，立方律师事务所合伙人

John Gong, Professor,University of International Business and Economics

龚炯，对外经济贸易大学经济系教授

Ninette Dodoo 杜宁

Counsel and Co-Head of Antitrust Practice, Freshfields

富而德律师事务所法律顾问与反垄断实践联合主管

Ms. Ninette Dodoo is co-head of Freshfields' competition practice in China. She spent over 10 years in Brussels advising on EU and multi-jurisdictional matters before relocating to Beijing in 2009.

Ninette's practice covers advising clients on competition matters in the EU, China, Hong Kong and the Asia-Pacific region. She specialises in cross-border mergers and acquisitions, joint ventures, distribution arrangements, cartels, abuse of dominance, compliance and audits, and investigations.

Ninette has acted on some of the most significant merger control matters (and a substantial number of transactions involving remedies) and investigations in China including in the shipping, beverages, healthcare and technology sectors. In Hong Kong, she has advised several clients in the fast-moving consumer goods, retail and telecommunications sectors. Her clients include multinational companies, state-owned enterprises and sovereign wealth funds active across a range of sectors, including shipping, pharmaceuticals, healthcare and life sciences, consumer goods, food and beverages, mining and IT.

Ninette has authored several publications on competition matters, and speaks frequently at international conferences on merger control and enforcement issues. Ninette is recognised as a leading antitrust lawyer by each of the principal directories, including Chambers Global, Legal 500 Asia Pacific and Global Competition Review. Ninette is listed as one of the Global Top 100 Women in Antitrust in the 2013 and 2016 editions of Global Competition Review.

杜宁律师为富而德律师事务所中国反垄断业务联席主管。之前她曾在布鲁塞尔工作逾 10 年时间，为欧盟及多法域事宜为客户提供法律服务，杜宁于 2009 年来北京工作。

杜宁律师的执业范围涉及就欧盟、中国内地、香港以及亚太地区的竞争法事宜为客户提供咨询。她专长于跨境并购、合营企业、分销安排、卡特尔、滥用支配地位、合规和审计、以及调查。

杜宁律师曾就中国一些最为重要的经营者集中案件（以及大量涉及救济的交易）和调查（涉及航运、饮料、保健和技术等行业）为客户提供法律咨询。在香港，她曾为快速发展的消费品、零售及电信业客户提供咨询。她服务的客户包括活跃于多个行业（如航运、制药、保健和生命科学、消费品、食品和饮料、采矿和 IT 等）的跨国企业、国有企业和主权财富基金。

杜宁律师就反垄断问题撰写了一些文章，并经常在国际会议上就经营者集中和执法问题发表演讲。她被钱伯斯全球、亚太法律 500 强及《全球竞争评论》等评为领先的竞争法律师，并在 2013 年和 2016 年版《全球竞争评论》中位列全球反垄断百强女律师。

胡盛涛

Shengtao Hu

Ericsson, Director, IPR Policy
爱立信公司知识产权政策总监

Shengtao Hu is working as Director IPR Policy at Ericsson. Before that, she spent three years for APAC public affairs with a US company. Prior to joining the private sector, she worked more than15 years in the Department of Treaty and Law, Ministry of Commerce of China, dealing with the bilateral and multilateral negotiations on IPR issues, Free Trade Agreements, investment treaties and other trade related issues as well as the domestic legislative work in such areas. In addition, for about 2 years, Shengtao was the representative for IPR and anti-trust law issues at the Economic and Commercial Section of the Chinese Embassy to the United States.

胡盛涛女士现为爱立信公司知识产权政策总监，之前有三年时间在一家美国公司负责亚太新兴市场公共事务。曾在商务部条约法律司工作十余年，主要从事和负责知识产权产权领域的多双边谈判、自由贸易协定谈判、双边投资条约谈判，以及相关经贸领域的国内立法工作。此外，她还曾在中国驻美大使馆经济商务参赞处工作两年，主要负责知识产权和反垄断方面的中美双边事务。

Renata B. Hesse

former head of DOJ Antitrust Division, Partner, Sullivan & Cromwell

前美国司法部反托拉斯局局长，美国苏利文·克伦威尔律师事务所合伙人

Renata Hesse is a member of the Firm's Litigation Group. Her practice focuses on antitrust counseling, cartels and merger clearance. Ms. Hesse is frequently recognized as a leading and influential antitrust lawyer, with a particular emphasis on the intersection of antitrust and intellectual property matters in high-tech industries. She is currently co-chair of the ABA Antitrust Section's Spring Meeting and is a frequent speaker at antitrust and legal forums.Ms. Hesse counsels some of the world's biggest companies on a range of high-stakes antitrust matters. Over the last year she advised client Amazon on its $13.7 billion acquisition of Whole Foods Market; Tanker Investments on Hart-Scott-Rodino matters for its $188 million merger with Teekay Tankers; and United Rentals Inc., the world's largest equipment rental company, on antitrust matters in its $1.3 billion acquisition of Neff Corp.

Ms. Hesse joined Sullivan & Cromwell following a distinguished career in government, including leading the Antitrust Division at the Department of Justice twice as Acting Assistant Attorney General and serving that division for more than 15 years. During her time at the Division, Ms. Hesse worked on a number of high profile transactions, as well as other key initiatives related to the licensing and enforcement of standards-essential patents. She also had oversight of the criminal program as the Principal Deputy Assistant Attorney General, where she was a decision-maker on a range of significant criminal matters. Ms. Hesse was previously Chief of the Networks and Technology Section (now the Technology and Financial Services Section) and a Trial Attorney in two Division sections, and has worked extensively with antitrust and competition law enforcement agencies at the highest levels across Asia, Europe, Australia and Latin America.

Ms. Hesse also served as Senior Counsel to the Chairman of the Federal Communications Commission, where she advised Chairman Genachowski on transactions pending FCC approval. In 2018, she co-authored the United States chapter of the Third Edition of "The Intellectual Property and Antitrust Review."

Renata Hesse 是本所诉讼组的成员。她的业务重点是反垄断咨询、卡特尔和合并审批。Hesse 女士经常被认为是一位领先且有影响力的反垄断律师，尤其专注于高科技行业的反垄断和知识产权问题。她目前是 ABA 反垄断部门春季会议的联合主席，经常在反垄断和法律论坛上发表演讲。

Hesse 女士为一些全球最大公司就一系列高风险反垄断问题提供咨询。在过去的一年里，她建议亚马逊以 137 亿美元收购 Whole Foods Market，Teekay Tankers 向 Hart-Scott-Rodino 投资 1.88 亿美元，以及为全球最大的设备租赁公司 United Rentals 以 13 亿美元收购 Neff 提供反垄断法律服务。

Hesse 女士加入 Sullivan & Cromwell 前曾在政府任职，她两次担任代理助理检察长，领导司法部反垄断局，任职超过 15 年。在该部门工作期间，Hesse 女士参与了许多重要的交易，以及与标准必要专利的许可和执行相关的其他关键举措。 作为首席助理检察长，她还负责监督刑事部门，就一系列重大刑事案件作出决策。

Hesse 女士曾任网络和技术执行处处长（现为技术和金融服务处）和两个分处的审判律师，并与亚洲、欧洲、澳洲和拉丁美洲最高级别的反垄断和竞争执法机构进行了广泛的合作。Hesse 女士还曾担任联邦通信委员会主席的高级法律顾问，在此期间负责就 FCC 在批准交易之前，向 Genachowski 主席提供建议。2018 年，她与人合著了第三版《知识产权与反垄断审查》的美国部分。

Meng Yanbei

孟雁北

Professor, School of Law, Renmin University of China
中国人民大学法学院教授

Meng Yanbei, Professor, Doctoral tutor, Law School of Renmin University of China, Vice-Dean of Asia-Pacific Institute of Law of Renmin University, Vice-Director of Economic Law Research Center of Renmin University, Standing Commissioner of China-Korea Market & Regulation Law Center (MRLC). Honored as one of 16 professors about "Best of the Best: Top Female Antitrust Economics and Law Professors" by "Antitrust & Competition Policy Blog" website.

Ms. Meng focus on Competition Law, Industry Law, Foreign Investment Law, etc. And has published 78 papers, such as "Research on Issues about the Applicable Scope of China's Anti-Monopoly Law in Monopolistic Industries" etc. independently or jointly published 46 books or textbooks, such as "Anti-monopoly Law"; "Research on Theory and system of China's Oil & Gas Law" etc. Ms. Meng was in charge of or took part in almost 29 research projects in China, such as "Research on Issues of Antitrust Enforcement in Monopolistic Industries" etc.

孟雁北，中国人民大学法学院教授，博士生导师，中国人民大学亚太法学研究院副院长，经济法教研室副主任，中韩市场暨规制法研究中心（MRLC）中方执行主任。长期从事竞争法、产业法、外资法的教学和研究工作，曾被美国 Antitrust& Competition Policy Blog 网站评为反托拉斯法律与经济全球最具影响的 16 位女教授之一(best of the best)。迄今已发表《我国反垄断法之于垄断行业适用范围问题研究》等学术论文 78 篇，单独或合作出版了《反垄断法》、《中国<石油天然气法>立法的理论研究与制度构建》、《企业合营-竞争者之间合作行为的反垄断分析》等著作、教材、译著 46 部，主持或参加研究《垄断行业反垄断执法问题研究》等科研项目 29 项。

Jiao Shan 焦姗

Partner, Lifang

立方律师事务所合伙人

Ms. Jiao specializes in antitrust and competition law, intellectual property and dispute resolution. Ms. Jiao has gained diverse experience in dealing with antitrust issues related to SEPs. She is responsible for dealing with FRAND issues in a series of SEPs-related litigations between Huawei and Samsung. She witnessed the antitrust investigation into Qualcomm as a government counsel and interpreter for NDRC. She represented several local companies and associations in filing complaints to the NDRC against SEP holders; assisted licensor/licensee with competition issues in SEP licensing negotiations; submitted a third party opinion to MOFCOM regarding a SEP-related acquisition. In addition, she has assisted clients in merger filings and antitrust investigations. She also handled antitrust litigations, including Qihoo v. Tencent. In the area of IP, Ms. Jiao involved in several software infringement cases against commercial end users by Microsoft.

焦律师的专业领域包括反垄断及竞争法、知识产权及争议解决。

在标准必要专利相关的反垄断问题上，焦律师积累了多样化的经验。她在华为与三星标准必要专利侵权系列诉讼中，负责处理 FRAND 相关问题。在对高通公司的反垄断调查中，她作为政府顾问及会议口译，参与了调查案件的处理过程。此外，焦律师曾代表中国公司及行业协会向国家发改委针对标准必要专利权人提交举报；为许可人和被许可人在标准必要专利许可协商中涉及的竞争问题提供咨询意见；代表客户就标准必要专利相关交易向商务部反垄断局提出第三方意见。

在反垄断领域，焦律师协助客户进行多起商务部经营者集中申报，及应对反垄断行政调查，包括国家发改委针对海运行业的调查以及商务部针对客户未依法申报经营者集中调查。此外，焦律师也参与了奇虎诉腾讯滥用市场支配地位案二审程序。在知识产权领域，焦律师曾参与多起微软诉终端用户计算机软件侵权案件。

John Gong 龚炯

Professor,University of International Business and Economics
对外经济贸易大学经济系教授

Dr. John Gong is professor of economics at the University of International Business and Economics (UIBE), where he teaches and researches in areas of microeconomics, finance, industrial organization, and antitrust and competition policies. Dr. Gong is a prolific researcher and writer with a list of publications in leading international academic journals. He was the executive editor of the Journal of Chinese Economic and Foreign Trade Studies (JCEFTS) published in UK. He is also a renowned op-ed columnist for several leading English newspapers and medias in Asia, including the South China Morning Post, Global Times and CGTN (China Global Television Network), writing extensively on economic and political issues.

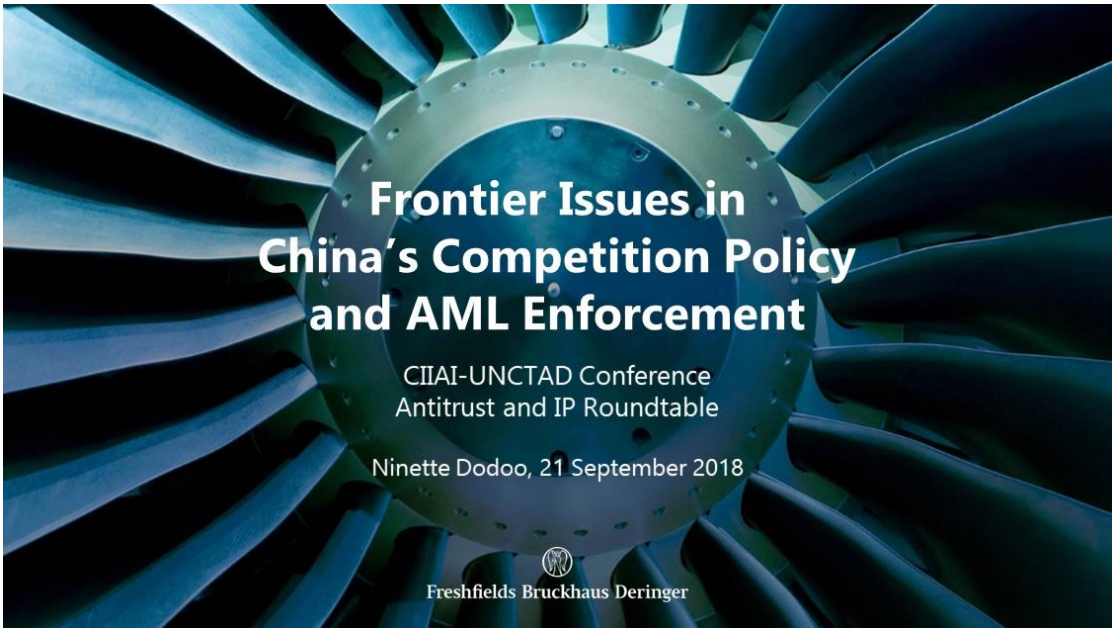
Dr. Gong is one of the recognized antitrust authorities in China, serving as an academic affiliate with Global Economics Group, a leading global economics consulting firm based in the US. He serves as an expert consultant with the Ministry of Commerce's (MOFCOM) Antitrust Bureau in China, and acted as the chief architect of the Bureau's national competition database project. He has been regularly hired by the Bureau to help examine numerous merger reviews of high profile multinational merger applications filed with competition authorities in multiple countries, e.g. Western Digital acquiring Hitachi's, Seagate acquiring Samsung's storage businesses and the meger between PCS and Agrium Potash. He also participated in the antitrust filing petition for the merger between Didi and Uber. He played a vital expert witness role in successfully appealing the lawsuit Beijing Rainbow vs. Johnson & Johnson, which is the first anti-monopoly lawsuit in China won by a plaintiff in history. Since then he has served as an expert witness in abuse of dominance and monopoly agreement lawsuits to successfully defend notable multinational defendants in the court of law, including Panasonic, Hitachi, Sinopec, Motorola and Netease.

Dr. Gong has extensive consulting experiences for renowned international organizations. He works regularly for the World Bank Group to advise countries on competition policies, including Kazakhstan and Namibia. He has advised Caincross Foundation regarding China's competition policies, and the World Bank regarding China's SOE reform. He is also the principal author for the China section of the policy position paper by the BRICS New World Bank's steering committee during its foundation time.

龚炯，1995 年毕业于美国得克萨斯大学奥斯汀总校，获经济学博士学位。目前任职对外 经济贸易大学经济系教授、博导，研究领域包括微观经济学、产业组织，反垄断竞争政策、规制经济学和国际贸易等。龚炯是位多产学者，在经济学、管理学和电子工程领域 均有国际一流期刊论文发表。他曾是英国 Emerald 出版社发行的中国国际贸易权威英文期 刊 Journal of Chinese Economic and Foreign Trade Studies (JCEFTS) 的执行主编。他也是多 家亚洲英文报纸的评论版特约专栏作家，包括为 South China Morning Post, Global Times, 央视新媒体 CGTN 等固定撰写政经文章，同时也是央视多套节目的经常嘉宾。

龚教授是中国经济学界的反垄断专家，是美国 Global Economics Group 的学界聘请专家 (academic affiliate)，该公司是一家全球领先的经济学咨询公司。同时担任中国世界贸易组 织研究会兼并反垄断研究中心副主任。他还是商务部反垄断局特约专家，曾负责国家竞争数据库的总体设计工作。曾受商务部反垄断局委托，主持、参与了多起跨国公司并购 案的全球反垄断审查，包括美国 Seagate 公司收购韩国三星电子硬盘业务的中国反垄断审 查，美国 Western Digital 公司收购日本 Hitachi GST 公司的中国反垄断审查，加拿大萨省 钾肥收购加阳钾肥的中国反垄断审查，滴滴收购 Uber 的中国反垄断申报。在中国第一例 纵向垄断协议诉讼案"北京涌和锐邦诉强生医疗"中担任原告方专家证人，出庭作证。此案 是中国第一起纵向垄断协议诉讼案，也是中国历史上第一起原告胜诉的反垄断诉讼案。 此后作为专家证人成功参与多起反垄断诉讼，包括云南盈顶诉中石化、松下电器和经销 商纠纷、宁波的日立金属的专利拒绝授权案、网易诉华多著作权侵权案、海能达诉摩托 罗拉滥用市场支配地位案等。龚教授也曾经为世界银行做国家竞争政策方面的咨询工作， 例如代表世界银行为哈萨克斯坦国和纳米比亚咨询竞争政策。

Reports From Ninette Dodoo



Overview

European Union: Balanced approach

"[T]he Court must strike a balance between maintaining free competition — in respect of which primary law and, in particular, Article 102 TFEU prohibit abuses of a dominant position — and the requirement to safeguard that proprietor's intellectual-property rights and its right to effective judicial protection, guaranteed by Article 17(2) and Article 47 of the Charter, respectively.."

Case C-170/13 Huawei vs. ZTE, 16 July 2015, para. 42

"The Commission considers that there is an urgent need to set out key principles that foster a balanced, smooth and predictable framework for SEPs. These key principles reflect two main objectives: incentivising the development and inclusion of top technologies in standards, by preserving fair and adequate return for these contributions, and ensuring smooth and wide dissemination of standardised technologies based on fair access conditions."

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European Commission, Communication, Setting out the EU approach to Standard Essential Patents, November 201

Overview

United States: 'New Madison' approach?

"[W]e at the Antitrust Division over the past year have taken a fresh look at how antitrust enforcers and the courts have sought to apply the antitrust laws in the context of intellectual property disputes. We have modernized our policy orientation with respect to the treatment of intellectual property under the antitrust laws, which we refer to as the "New Madison" approach [...].

"The first prong of the "New Madison" approach is that antitrust law should not be used as a tool to police FRAND commitments that patent-holders unilaterally make to standard setting organizations [...]"

AAG Makan Delrahim, Remarks at Iam's Patent Licensing Conference in San Francisco, September 18, 2018

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Overview

China: An emerging balanced approach?

"This Law does not govern the conduct of business operators to exercise their intellectual property rights under laws and relevant administrative regulations on intellectual property rights; however, business operators' conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law."

Anti-Monopoly Law, Article 55

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Overview

China: a patchwork quilt of law, rules, regulations and guidance including

- Guangdong High People's Court Guidelines on the Trial of Standard Essential Patent Disputes (Guidelines) (April 2018)
- Beijing High People's Court Guidelines for Patent Infringement Determination (April 2017)
- Anti-Monopoly Commission of the State Council draft Guidelines on the Prohibition of Abuses of Intellectual Property Rights (March 2017)
- Supreme People's Court Judicial Interpretation on Issues concerning the Application of the Law in the Trial of Patent Infringement Dispute Cases (II) (April 2016)
- State Administration for Industry and Commerce Rules on the Prohibition of the Elimination or Restriction of Competition by Abusing Intellectual Property Rights (August 2015)
- MIIT draft Template for Intellectual Property Policies in Industry Standardization Organizations (October 2014)

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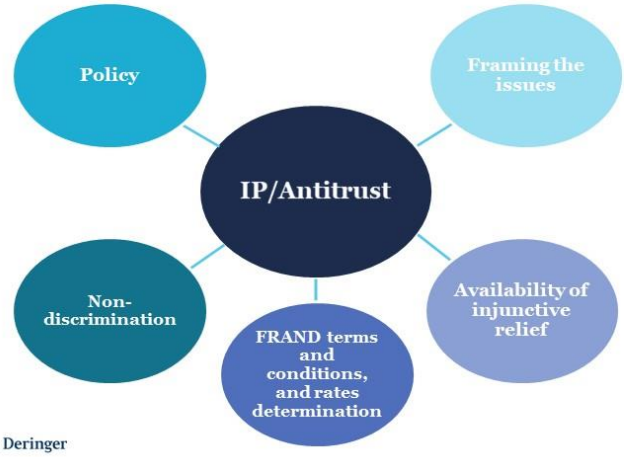
The discussion



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DAY TWO

Issue 3: EU State Aid and China Fair Competition Review

议题　3：欧盟国家援助与中国公平竞争审查制度

13:00-14:30

In June 2017, the EU and China signed an MOU to "start [a] dialogue on state aid control." The stated purpose of this dialogue is to "share with China the European experience in enforcing state aid control" and to assist China to "prevent public policies from distorting and restricting competition." This panel will discuss the recent EU experience in State aid and explore how this mechanism may be of practical use in the implementation of China's Fair Competition policy.

2017 年 6 月，欧盟与中国签订一份备忘录以"开启国家援助管理方面的对话。"对话所述的目的是"与中国分享欧盟在国家援助管理方面的经验"以及协助中国"预防公共政策扭曲和限制竞争。"本组将讨论欧盟近期在国家援助方面的经验并探索此种机制对中国执行公平竞争政策的。

Chair

主持人

Prof. Huang Yong, Law School, UIBE, Dean of the Competition Law Research Center

黄勇，对外经贸大学法学院教授，竞争法研究中心主任

Speakers

发言人

Paul Csiszar, Director, Directorate E, DG Competition, European Commission

Paul Csiszar, 欧盟委员会竞争总署 E 部主任

Prof. Sandra Marco-Colino, Chinese University of Hong Kong

Sandra Marco-Colino 教授，香港中文大学教授

Francois-Charles Laprevote, Counsel, Cleary Gottlieb

Francois-Charles Laprevote，美国佳利律师事务所顾问

Yang Jiajia, Director, Price Supervision and Anti-Unfair Competition Enforcement Bureau, SAMR

杨佳佳，国家市场监督管理总局价格监督检查与反不正当竞争局调研员

Prof. Dai Long, Faculty of International Law, CUPL

戴龙教授，中国政法大学国际法学院

Huang Yong

黄勇

Law School, UIBE, Dean of the Competition Law Research Center

对外经贸大学法学院教授，竞争法研究中心主任

Doctor Huang Yong, a professor in University of International Business and Economics. He also services as the doctoral supervisor and the director of the Department of Economic Law.

He is the vice president of the State Development and Reform Commission, an expert in the Ministry of Commerce, State Administration for Industry and Commerce Competition, AQSIQ Legal Advisory Committee, State Administration of Taxation Administrative Reconsideration Committee of Experts, China Insurance Regulatory Commission Insurance Legal consultants.

In February 2005, he was hired as an consultative expert in the State Council on Anti-monopoly Law. In July 2006, he was hired as an expert on antitrust law by NPC Law Commission and participated in the formulation and revision of China's antitrust law.

黄勇博士，对外经济贸易大学法学院教授，博士生导师，经济法系主任，法学博士。

国务院反垄断委员会专家咨询组副组长，国家发改委、商务部、国家工商行政管理总局竞争法专家，国家质检总局法律顾问委员会委员，国家税务总局行政复议委员会专家委员，中国保险监督管理委员会保险法律事务咨询专家。

2005 年 2 月被聘为国务院反垄断法立法专家顾问委员会委员，2006 年 7 月被聘为全国人大法工委反垄断法立法专家，全程参加中国反垄断法的制定和修改。

Paul Csiszár

Director, Directorate E, DG Competition, European Commission

欧盟委员会竞争总署 E 部主任

Sandra Marco Colino

Professor, Chinese University of Hong Kong

香港中文大学教授

Ms. Sandra Marco Colino specializes in competition law, tort, EU law, contract law, commercial law, communications law, the regulation of gambling and gender issues. She a Director of the Centre for Financial Regulation and Economic Development (CFRED) and the Deputy Director of the European Union Academic Programme Hong Kong (EUAP).

As a qualified lawyer in Spain and a member of the Madrid Bar, Prof. Marco. She is a member of the Competition Law Scholars Forum and the American Bar Association, a Fellow of the Transatlantic Technology Law Forum of Stanford University (USA) and an Associate Researcher at the Institute for European Studies in Madrid. She is on the Editorial Board of the China Antitrust Law Journal. She is also the Hong Kong news correspondent of the European Competition Law Review and an analyst for Agenda Pública. In July 2015, Prof. Marco Colino was appointed as a Hong Kong Non-Governmental Advisor (NGA) to the International Competition Network, and in September 2016 she was appointed to the Academic Board of the law firm Dictum Abogados (Hong Kong office).

Sandra Marco Colino 女士擅长竞争法、侵权法、欧盟法、合同法、商法、通讯法、赌博和性别问题。现任金融监管与经济发展中心（CFRED）主任，欧盟学术项目副主任（EUAP），是西班牙的合格律师和马德里律师协会的成员、竞争法学者论坛和美国律师协会的成员，斯坦福大学（美国）跨大西洋技术法论坛研究员和马德里欧洲研究学院的副研究员。她在“中国反垄断法”期刊编委，也是“欧洲竞争法评论”的香港新闻通讯员，也是“Pública 议程”的分析师。

2015 年 7 月，Marco Colino 教授获委任为国际竞争网络的香港非政府顾问（NGA），并于 2016 年 9 月获委任律师事务所（香港办事处）的学术委员会成员。

François-Charles Laprévote

Counsel, Cleary Gottlieb
美国佳利律师事务所顾问

François-Charles Laprévote is a partner based in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. His practice focuses on European competition and international trade law, including merger control, state aid, cartel investigations, market dominance and trade defense instruments. He has advised corporate clients and financial institutions as well as government and public entities in numerous cases before the European Commission, the European Courts in Luxembourg and the French Competition Authority.

Mr. Laprévote has advised on a number of State aid matters and has worked on several cases involving financial institutions in the aftermath of the 2008 financial crisis, as well as on high profile cases regarding companies in distress, services of general economic interest, and regional State aid. He has also published on antitrust, State aid and trade. He is an editor and co-authored several chapters of the Research Handbook on State Aid in the Banking Sector, recently published by Edward Elgar Publishing.

Mr. Laprévote is recognized as a leading lawyer in the areas of competition/antitrust and State aid by various legal directories, including The Legal 500 and Chambers and Partners.

Mr. Laprévote graduated from the École Nationale d'Administration in 1998, from the Université de Paris II – Panthéon-Assas (Master in Law) in 1994 and from the Institut d'Études Politiques de Paris in 1993.

Mr. Laprévote joined Cleary Gottlieb in 2007. From 1998 to 2007 he served at various posts in the French and European administrations, including as economic adviser to the French Minister for European Affairs, detached expert to the European Commission's DG Trade, and member of the French General Finance Inspectorate.

Mr. Laprévote is a member of the Bars of Paris and Brussels.

François-Charles Laprévote现任美国佳利律师事务所布鲁塞尔办公室的合伙人。其执业领域专注于欧盟竞争法与国际贸易法，包括经营者集中、国家援助、卡特尔调查、滥用市场支配地位和贸易保护措施。Laprévote先生参与了众多由欧盟委员会、卢森堡欧洲法院以及法国竞争执法机关审理的案件，服务的客户包括企业、金融机构、政府部门以及公共机构等。

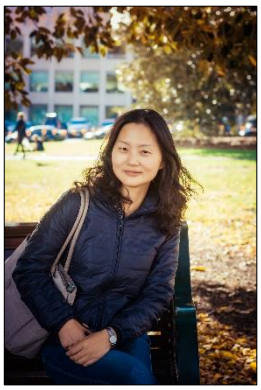
Laprévote先生曾为各种国家援助事项提供法律咨询服务，参与过多起涉及2008年金融危机后金融机构的案件，并曾参与多个有关财务困境企业、共同经济利益服务以及地区性国家援助的重大案件。其著有反垄断、国家援助和贸易方面的文章，是Edward Elgar Publishing最近出版的《银行业国家援助研究手册》一书中多个章节的编辑和合著者。

Laprévote先生被包括《法律500强》和《钱伯斯》等在内的多家法律评论机构评选为在竞争法/反垄断和国家援助领域的杰出律师。

Laprévote先生于1998年毕业于法国国家行政学院，1994年毕业于巴黎第二大学（取得法学硕士学位），并于1993年毕业于巴黎政治学院。

Laprévote先生2007年加入美国佳利律师事务所。1998年至2007年期间，其在法国和欧盟政府机构工作，历任多个职务，包括法国欧盟事务部长经济顾问、欧盟委员会贸易总司独立专家以及法国财务督查局成员。

Laprévote先生是巴黎和布鲁塞尔律师协会会员。



Yang Jiajia 杨佳佳

Director, Price Supervision and Anti-Unfair Competition Enforcement Bureau, SAMR

国家市场监督管理总局价格监督检查与反不正当竞争局调研员

Yang Jiajia, Director from the Price Supervision and Anti-Unfair Competition Enforcement Bureau, State Administration for Market Regulation(SAMR).

With a master degree in accounting, she is a Chinese certified public accountant and has long been engaged in price supervision, inspection and Anti-monopoly Law enforcement.

杨佳佳女士现为国家市场监督管理总局价格监督检查与反不正当竞争局调研员，会计学硕士，中国注册会计师，长期从事价格监督检查与反垄断执法工作。

Dai Long

戴龙

Professor, Faculty of International Law, CUPL
中国政法大学国际法学院教授

Professor Dai Long, he is the Executive Director of the Competition Law Institute in CUPL. Mr. Dai obtained his PhD from Nagoya University, Japan. He owns a post-doctoral degree of Law. He is also one member of the Competition Policy Commission of Chinese Society of Industrial Economics, as well as the Vice Secretary of Competition Policy Commission of China WTO Institute, Vice Director of China International Anti-monopoly and investment research institute. Mr. Dai focuses on the field of Anti-monopoly law, WTO law and other International Economic law. He published more than 30 papers on many mainstream academic journals in Japanese, Chinese and English. Mr. Dai has published several books in various fields as well.

戴 龙，中国政法大学竞争法研究中心执行主任。日本名古屋大学法学博士，法学博士后。兼任中国工业经济学会竞争政策专业委员会委员，中国世界贸易组织研究会竞争政策专业委员会副秘书长，中国国际反垄断与投资研究中心副主任、中国法学会经济法学研究会理事、世界贸易组织法研究会理事和中国国际经济法学研究会理事。主要从事反垄断法、WTO 法与国际经济法的相关研究，用中、英、日文在国内外主流学术期刊上发表论文 30 余篇。著有《滥用市场支配地位的规制研究》（中国人民大学出版社 2012 年版）、《日本反垄断法研究》（中国政法大学出版社 2014 年版）、《反垄断法域外适用制度》（中国人民大学出版社 2015 年版）等著作。

Reports From Francois-Charles Laprevote

CLEARY GOTTLIEB

EU State Aid Control- a practitioner's perspective

François-Charles Laprévote
CUPL/ UNCTAD Seminar- Beijing
September 21, 2018

clearygottlieb.com

Why does State aid control matter today ?

Ireland to finally start collecting €13bn Apple back taxes early next year

Italy's bank rescues raise issue of EU state aid rule changes: Dijsselbloem

EU orders Amazon to pay Luxembourg €250 million tax bill

EU court upholds order for EDF to repay French state aid

FINANCIAL TIMES

Apple faces record-breaking €13bn penalty over Irish taxes

The Guardian

French finance minister blasts UK's £130m Google tax deal

Outline

- Introduction
- The complainant's perspective
- The beneficiary's perspective
- The investor's perspective

Introduction- State Aid Rules In The EU

- **Principles:**
  - General prohibition of State aid (Article 107 TFEU)
  - By way of exception, the Commission can find a State aid measure to be *"compatible with the common market"*, for example where it remedies 'a serious disturbance' in the economy of a Member State or helps promoting development in a certain area.
  - Standstill principle: State aid may not be granted before it is cleared by the Commission

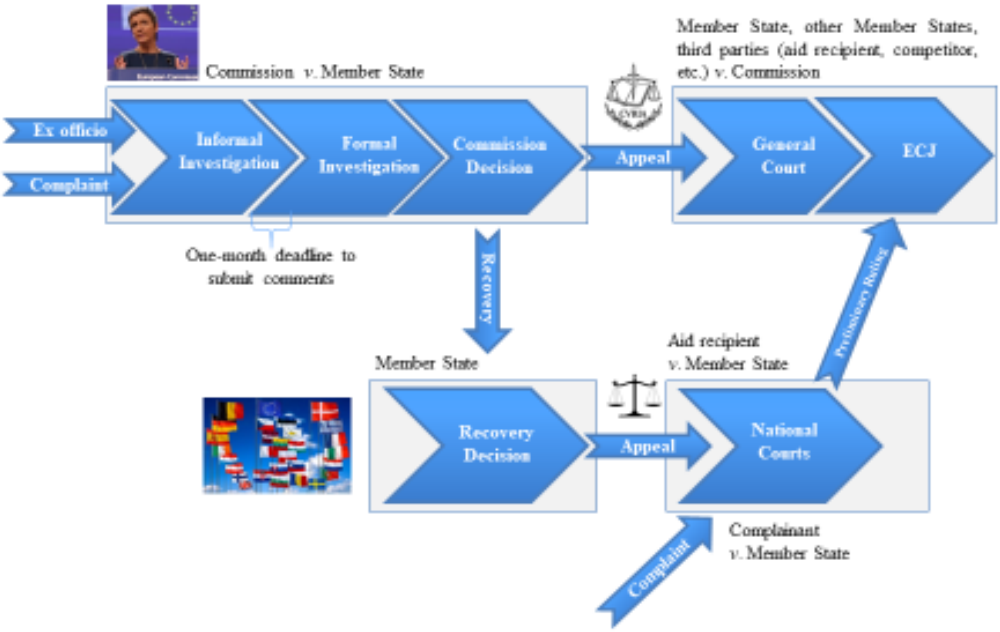
- **Definition.** Four criteria :
  - Intervention by the State or through State resources
  - Selective advantage for the beneficiary
  - Distortion of competition
  - Affects trade between Member States

The complainant's perspective

- Basic rules of State aid procedure
- A key issue: procedural rights

CLEARY GOTTLIEB 1

Overview of the State Aid Procedure – The basic rules



CLEARY GOTTLIEB 6

A key issue for complainants- procedural rights

- Complainants as interested parties have very limited procedural rights
- Since 2013 complainants must fulfill a specific form to request the Commission to investigate
  - The Commission "shall examine without undue delay any complaint submitted by any interested party"
  - The Commission keeps prosecutorial discretion on priority cases and will send a letter within 2 months informing the complainant about whether the complainant is a priority case or a non-priority case
  - Within 12 months, the Commission endeavors to adopt a decision in priority cases and to provide its preliminary views in non-priority case, within 12 months
  - A complainant may ask for a formal decision under if it is not satisfied with the Commission's (lack of) processing of a complaint
  - A complainant will automatically receive a copy of the Commission decision on the case.
  - Right to appeal to the courts provided the complainant is considered admissible. The court re-assesses whether the complainant is directly and personally affected

Complainants and EU State Aid Control – Some Takeaways

- Things to be pleased about:
  - Several channels to contest unlawful State aid
  - EU/Commission channel can be a powerful tool to change State's behaviour
  - Commission has improved procedural framework and reached out to national courts
- Things to worry about:
  - Still limited due process rights, including when appealing Commission decision to EU Courts
  - Process can remain lengthy, both before Commission and EU courts

The beneficiary's perspective

— A key issue: legal certainty and the definition of aid
— The recovery process

Key issue: Legal certainty vs extension of the notion of State aid

Tax rulings - what is a "selective" measure ?

- Court of Justice: the *Autogrill* case (C-20/15 and C-21/15 [2017])
- Commission: *Fiat* (S.A38375 [2015]), *Apple* (SA.38373 [2016]), *Belgian Excess Profit Regime* (SA.37667 [2016]), *Starbucks* (SA.38374 [2015])

Infrastructure aid- when can a public infrastructure be State aid?

- Court of Justice: the *Leipzig-Halle* case (C-288/11 P [2012])

Services of general economic interest- can funding of public services be State aid?

- Court of Justice: *Altmark* (C-280/00 [2013]), *SNCM* (T-366/13 [2017])
- Commission: the « Almunia » package (2013)

The market economy operator principle

- Court of Justice: *Frucona Kosice* (C-300/16 P) [2017]), *EDF* (C-124/10 P [2012]), *SNCM* (T-454/13 [2017])

Privatizations

- Court of Justice: *Bank Burgenland* (Joined Cases C-214/12 P, C-215/12 P and C-223/12 P [2013]), *Niki Luftfahrt case* (Case T-511/09 [2015])

Guarantees – if it's State aid, who is the beneficiary?

- Commission 2008 Communication on guarantees
- Court of Justice: *Residex* (C-275/10 [2011])

The recovery process

- Article 16 (1) Procedural Regulation and constant court case law: Commission must order recovery of unlawful and incompatible State aid (with interest), unless doing so would violate a general principle of EU law
- Article 14 Procedural Regulation: Commission may also issue provisional injunctions to suspend and recover aid
- Court of Justice: *Commission v Germany (C-527/12 [2014])* case law: national courts must draw all legal consequences of illegality of aid (i.e. suspend/ recover) regardless of its compatibility
- Commission recovery decisions are addressed to Member States, not beneficiary- appeal is in principle not suspensive
- Beneficiary may appeal before national courts (and ask for suspension) the national decision ordering recovery- but excessive suspension would violate EU law (Court of Justice: *Commission v France* case law (C-232/05 [2006]))

Beneficiaries and EU State Aid Control – Some Takeaways

- Things to be pleased about:
  - Commission has tried to clarify concept of State aid and establish " safe harbours" through several communications
  - Commission has significantly increased the scope of "non-problematic" aid trough extension of *de minimis* threshold and GBER
  - Possibility to appeal Commission decisions before EU courts
- Things to worry about:
  - Limited due process rights can be an issue, in particular when the State may be tempted not to defend the measure before the Commission
  - Case law and full review by EU courts may extend the "objective" concept of State aid- questions on key concepts (e.g. selectivity) are still pending
  - Interim measures system for suspension of State aid recovery is not homogenous and not always preventing bankruptcy

The investor's perspective

— The burden sharing concept
— The Kotnik case

The « burden sharing » concept

The Commission 2013 Banking Communication

- To address moral hazard, bank losses must be first absorbed by equity, hybrid capital and subordinated debt holders
- State aid rules do not require contributions from senior debt holders (but other EU rules e.g. BRRD may require such contributions)
- Burden sharing can entail :
  - Prohibition/limitation of buy-backs, coupons, dividends
  - Write offs/ conversion in ordinary shares
- Exceptions would be possible where their implementation would endanger financial stability or lead to disproportionate results.

Other companies in distress: the 2014 Communication on undertakings in difficulty

- Communication transposes to « real » economy the burden sharing principle
- Losses must first be absorbed by shareholders and, where necessary, subordinated creditors. The contribution of the subordinated creditors should be either via write-down of the principal of the relevant instruments or conversion into equity.

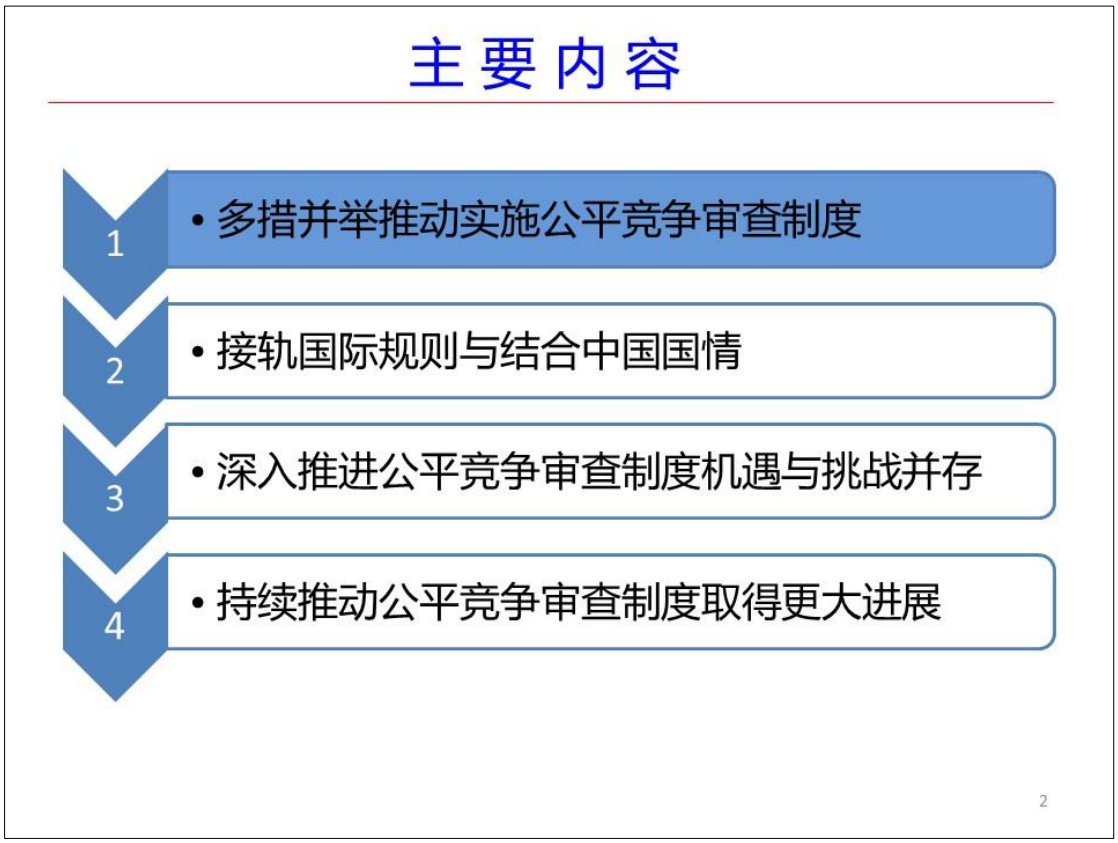
Burden sharing in the Court: The *Kotnik* case (2016)

- Key questions: how binding is the Commission Banking communication ? Is the burden sharing principle compatible with EU law?
- Burden-sharing measures are designed to prevent recourse to State aid merely as a tool to overcome financial difficulties
- Burden-sharing ensures that the State resources used are limited
- If creditors do not contribute, banks would receive more resources than necessary, leading to a distortion of competition. This would be corroborated by the inexistence of moral hazard.
- Burden sharing in itself does not frustrate the principles of legitimate expectations or right to property:
  - ➢No consistent assurances given by the EU institutions in the past
  - ➢The right to property does not supersede the need to ensure financial stability
  - ➢Crucially, under the 2013 Communication the Commission may allow exceptions from full implementation of the burden sharing measures if this would otherwise lead to disproportionate results

CLEARY GOTTLIEB 15

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Reports From Yang Jiajia（杨佳佳）



2016年6月1日公平竞争审查制度正式出台

2016年6月1日，国务院正式印发《关于在市场体系建设中建立公平竞争审查制度的意见》（国发[2016]34号），部署开展公平竞争审查工作，以规范政府有关行为，促进统一开放、竞争有序的市场体系建设。

000503

国务院文件

国发〔2016〕34号

国务院关于在市场体系建设中建立公平竞争审查制度的意见

各省、自治区、直辖市人民政府，国务院各部委、各直属机构：

公平竞争是市场经济的基本原则，是市场机制高效运行的重要基础，随着经济体制改革不断深化，全国统一市场基本形成，公平竞争环境逐步建立。但同时也要看到，地方保护、区域封锁、行业壁垒、企业垄断、违法给予优惠政策或减损市场主体利益等不符合建设全国统一市场和公平竞争的现象仍然存在。为规范政府有关行为，防止出台排除、限制竞争的政策措施，逐步清理废除妨碍全国统一市场和公平竞争的规定和做法，现就市场体系建设中建

国办发〔2016〕34号

— 1 —

3

多措并举积极推动制度落地实施

建立协调机制
- 28个部门参与的公平竞争审查部际联席会议
- 组织召开第一次全体会议

出台配套规则
- 印发《公平竞争审查制度实施细则（暂行）》

开展存量清理
- 印发并组织落实《2017-2018年清理现行排除限制竞争政策措施的工作方案》

组织专项督查
- 全面督查覆盖31个省（区、市）
- 重点督查针对进度较慢地区

强化行政垄断执法
- 十八大以来查办130起行政垄断案件，充分发挥执法监督作用

加强宣传培训
- 举办和参加各类培训班、研讨会、座谈会培训各级政府部门相关工作人员1万人次以上

4

强化制度建设

◆2017年10月，经国务院批准，《公平竞争审查制度实施细则》由国家发改委等五部门联合印发

◆2017年12月，经国务院批准，《2017-2018年清理现行排除限制竞争政策措施的工作方案》由国家发改委、财政部、商务部联合印发


国家发展和改革委员会
财政部
商务部 文件
国家工商行政管理总局
国务院法制办公室

发改价监〔2017〕1849号

关于印发《公平竞争审查制度实施细则（暂行）》的通知


国家发展和改革委员会
财政部
商务部 文件

发改价监〔2017〕2091号

关于印发《2017-2018年清理现行排除限制竞争政策措施的工作方案》的通知

公平竞争审查制度取得阶段性成效

6

部署落实全面推开

部委层面

- 部际联席会议28个成员单位均已开展审查工作
- 15个成员单位专门发文部署落实

地方层面

	省级政府	市级政府	县级政府
印（转）方案	100%	93.7%	48.9%
建立联席会议	100%	89.1%	43.8%
注：数据统计截至2017年底			

7

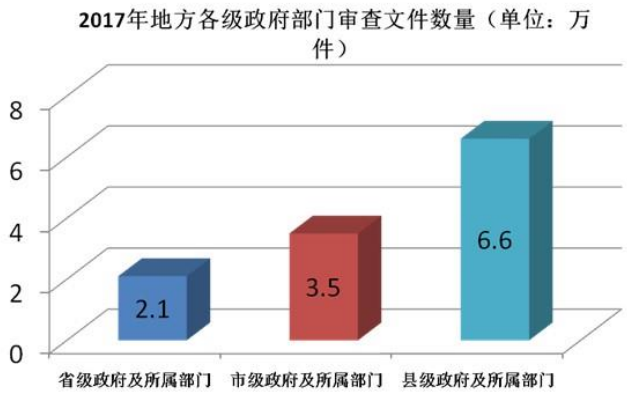
文件审查有序开展

部委层面

- 28个成员单位2017年共审查979件文件
- 经审查对24件含有排除限制竞争内容的文件进行了修改

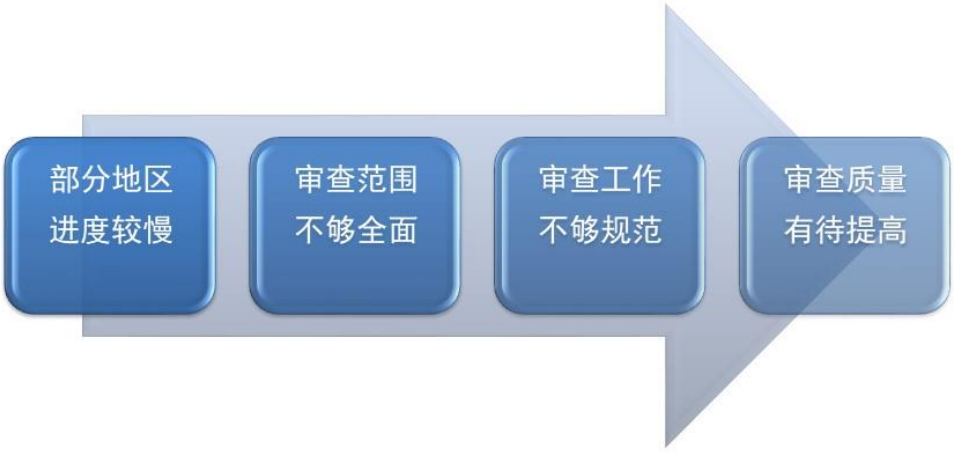
地方层面

地方各级政府部门2017年共审查文件12.2万件，对其中641件排除限制竞争的文件进行了修改



8

制度实施存在的问题与不足



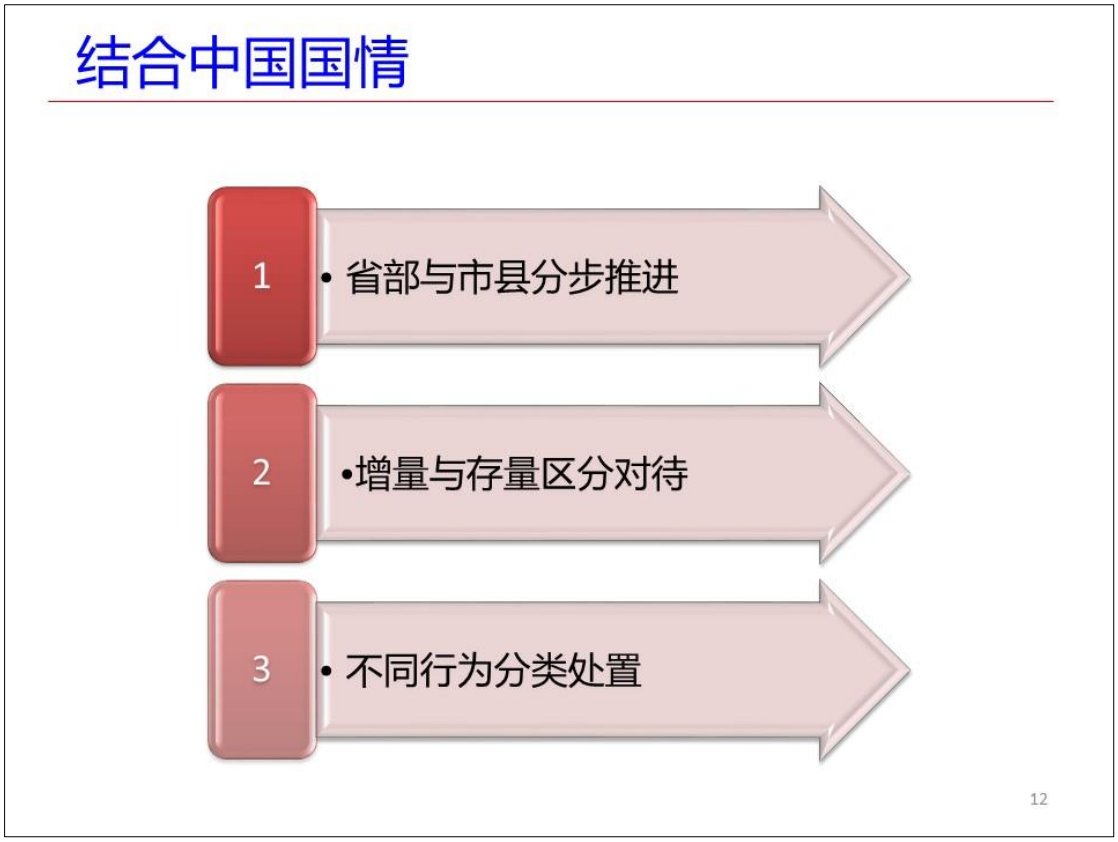
9

主要内容

1. 多措并举推动实施公平竞争审查制度
2. 接轨国际规则与结合中国国情
3. 深入推进公平竞争审查制度机遇与挑战并存
4. 持续推动公平竞争审查制度取得更大进展

10


接轨国际规则
1
• 制度理念与国外相关制度一致
2
•制度设计充分借鉴国际经验
3
• 深化公平竞争审查国际合作
11


结合中国国情
1
• 省部与市县分步推进
2
•增量与存量区分对待
3
• 不同行为分类处置
12

主要内容

1. • 多措并举推动实施公平竞争审查制度
2. • 接轨国际规则与结合中国国情
3. • 深入推进公平竞争审查制度机遇与挑战并存
4. • 持续推动公平竞争审查制度取得更大进展

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党的十九大首次提出“打破行政性垄断”

2017年10月，党的十九大报告首次提出“打破行政性垄断”，强调“清理和废除妨碍统一市场和公平竞争的各种规定和做法”，为公平竞争审查制度的全面落实提供了历史性机遇，也提出了更高的要求。

14

2018年全国深化“放管服”改革电视电话会议

李克强总理在2018年全国深化“放管服”改革转变政府职能电视电话会议上再次明确要求，“各地区各部门要大力清理废除妨碍统一市场和公平竞争的各种规定和做法，今后制定政策都要进行公平竞争审查评估，出台优惠政策也要以普惠性政策为主”。

15

面临的挑战

- 各级政府传统行政管理理念和方式短期内难以彻底扭转
- 审查的质量和效果还有待切实提高
- 审查资源和能力客观上存在制约
- 需要其他相关改革举措协调推进

16

主要内容

1. 多措并举推动实施公平竞争审查制度
2. 接轨国际规则与结合中国国情
3. 深入推进公平竞争审查制度机遇与挑战并存
4. 持续推动公平竞争审查制度取得更大进展

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未来工作展望——六个结合

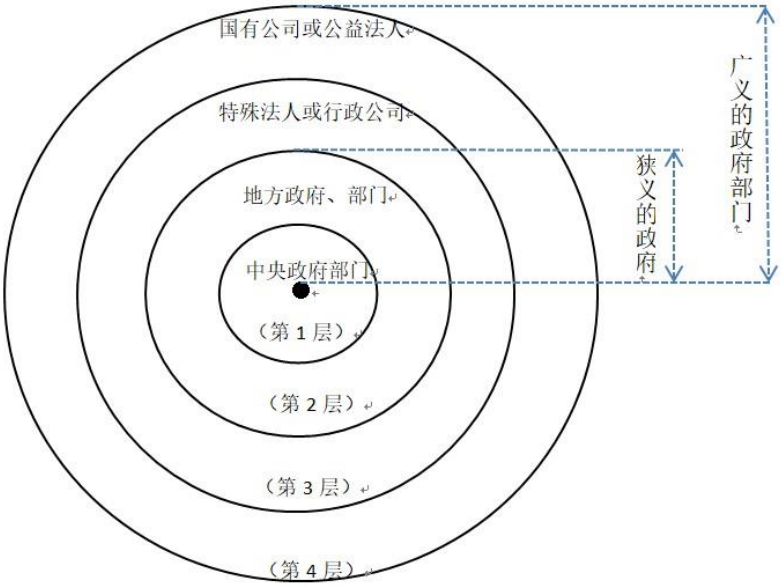
顶层设计 基层创新	审查增量 清理存量	全面覆盖 提高质量
自我规范 外部监督	横向协调 纵向指导	正面监督 负面约束

18

Reports From Prof. Dai Long(戴龙教授)

行政性垄断的主体要件

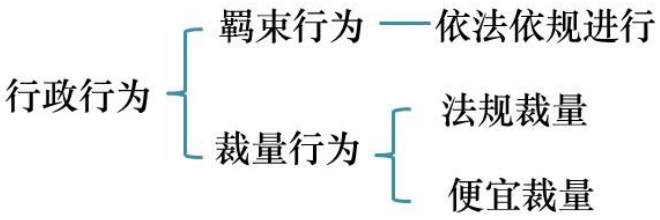
图 1：广义的政府部门构造图



行政性垄断的主观要件

- 中国《反垄断法》：滥用行政权力
- 中国特色，俄罗斯等原社会主义国家反垄断法无此规定
- 如何判断“滥用行政权力”？反垄断法没有做出解释
- 西方国家：三权分立、司法判断
- 中国现行法律，由立法机关或上级行政机关纠正

行政法学的一般理论



- 法规裁量：按正常人价值标准，法官独立心正判断
- 便宜裁量：由行政部门根据行政责任和公共利益进行便宜与否的裁量判断，法院一般不予审理
- 现代法治国家：不承认绝对的裁量行为
  - 超出法律法规授权范围：裁量权限的僭越
  - 出于不当的动机与目的：裁量权限的滥用

行政性垄断的客体要件

- 反垄断法宗旨：维护市场公平竞争
- 行政性垄断侵害的社会关系：市场主体之间的公平竞争关系
- 行政机关的经济行政管理行为中，即便损害了国家、集体和公民个人财产和人身权利，也不能认定时行政性垄断行为

行政性垄断的客观要件

- 中国反垄断法：排除、限制竞争
- 统一适用于垄断协议、滥用市场支配地位、经营者集中和行政性垄断
- 区别于其他国家的标准
  - 美国：实质性减少竞争
  - 欧盟：现住地阻碍有效竞争
  - 日本：实质性竞争限制
- 中国特色：规制门槛更低，行政裁量权限更大

内蒙古公安厅行政性垄断分析

- 主体要件：完全符合
  - 公安厅属于省级政府组成部门，狭义的政府部门
- 主观要件：
  - 缺乏上位法依据，不构成“羁束行为”
  - 构成“便宜裁量行为”，但缺乏合法、合理的动机与目的
  - 基本属于“裁量权限的滥用”

内蒙古公安厅行政性垄断分析

- 客体要件：
  - 迫使自治区7个盟市更换原有印章系统，大量供应商被清楚出印章软件市场
  - 侵害了印章市场主体之间的公平竞争关系
- 客观要件
  - 限制、排除印章市场竞争
  - 强化了金丰公司垄断地位，增大了刻章企业与印章用户的成本

行政性垄断规制的制度反思

- 司法审查的制度局限
  - 目前司法审查仅限于具体性行政行为
  - 应扩大对抽象性行政行为的司法审查
- 公平竞争审查制度的局限
  - 目前限于自查，行政机关缺乏自查动机
  - 反垄断执法机关仅限于建议权，由上级机关责令改正实际效果不佳

中国和欧盟国家援助制度的对比

- 欧盟国家援助控制制度
  - 欧盟运行条约以推动欧盟统一市场建设为原则，对阻碍市场公平竞争的国家援助行为进行规范，欧盟委员会和欧盟法院发挥有效作用
- 中国行政性垄断和公平竞争审查制度
  - 行政性垄断无所不在，源自于地方和部门利益保护和行政权力的滥用
  - 公平竞争审查制度和《反垄断法》行政性垄断试图构筑从具体性到抽象性行政行为的规范，
  - 缺乏对于抽象行政行为的司法审查，仅仅依靠上级督查的实施效果有待观察

谢谢倾听！

DAY TWO

Issue 4: Non-antitrust screening of foreign investments in the US and EU: What Chinese companies need to know

议题　4：美国与欧盟对外国投资的非反垄断审查：中国公司需要知道什么

14:45-16:00

The US and EU are increasingly concerned about the acquisition of their key industrial or technological assets by Chinese firms. The Committee on Foreign Investment in the United States (CFIUS) is a US non-antitrust procedure for the screening of foreign investment in the US. In the EU, non-antitrust screening of foreign investments, until now, has been dealt with at Member State level. The draft EU Regulation for the screening of foreign investment was conceived to provide the European Commission with greater oversight of foreign investments. CFIUS is already a tool for the vetting of Chinese investments, and the draft EU Regulation has similar objectives. This panel will discuss how these review mechanisms operate (or will operate) in practice, the procedures applicable, and how legal advocacy may be helpful to Chinese companies seeking to obtain these clearances.

美国与欧盟越来越关心中国公司对其核心工业和技术资产的收购。美国外国投资委员会(CFIUS)是美国对外国投资的非反垄断审查程序。在欧盟，到目前为止，一直是成员国在处理外国投资的非反垄断审查问题。欧盟外国投资审查条例草案意欲让欧盟委员会获得对外国投资更大的监管权。美国外国投资委员会已是审查中国投资的工具，欧盟条例草案也有相似的目标。本组将讨论这些审查机制在实践中怎样运作（或将怎样运作），适用哪些程序，以及法律游说如何为希望获批的中国公司提供帮助。

Chair

主持人

Alastair Mordaunt, Partner, Freshfields

Alastair Mordaunt, 富而德律师事务所合伙人

Prof. Qi Huan, Faculty of International Law, CUPL

祁欢教授，中国政法大学国际法学院

Speakers

发言人

Charles Pommies, Counsel, Allen &Overy, Brussels

Charles Pommies,布鲁塞尔安理国际律师所事务所顾问

Nicholas Song, Partner, Dechert

宋友光, 德杰律师事务所合伙人

Wang Xiaodong, Partner, Global Law Office

王筱东，环球律师事务所合伙人

Prof. Han Liyu, Law School , Renmin University of China

韩立余，中国人民大学法学院教授

Alastair Mordaunt

Partner, Freshfields

富而德律师事务所合伙人

Mr. Alastair Mordaunt is co-head of the Freshfields' Asia antitrust practice. Based in our Hong Kong office, he has more than 15 years of regulator and private practice experience, acting on both investigations and merger reviews. This includes four years at the UK's Office of Fair Trading, originally as director of its mergers group and then director of a dedicated competition enforcement team.

Alastair also co-heads the firm's public interest and foreign investment (PIFI) group. He specialises in international cross-border merger review and foreign investment related work.

He has previously worked in Freshfields' offices in London, Brussels and Washington DC.

His extensive experience both at the regulator and as a private practitioner across three continents gives him a deep understanding of working effectively with regulators and devising successful strategies for his clients in the context of transactional and investigatory work.

Alastair is recognised in the 2017 edition of Global Competition Review's Who's Who Legal: Competition – and is ranked as a leading lawyer in the directories. Chambers 2018 states "clients note - "The 'excellent' Alastair Mordaunt benefits from a strong understanding of competition law, not only from his many years in private practice but also from those spent acting for the regulator ."

Alastair is currently a non-Governmental Advisor to the Hong Kong Competition Commission in respect of the authority's membership of the International Competition Network ("ICN").

Alastair Mordaunt 为富而德律师事务所亚洲反垄断业务联席主管，常驻香港。他有超过 15 年的监管机构及私人执业经验，执业领域包括调查和经营者集中审查。Alastair 曾在英国公平贸易办公室工作达四年之久，最初担任其合并业务组主管，之后又担任专门的竞争执法团队主管。

Alastair 同时亦担任富而德公共利益及外国投资（PIFI）业务组联席主管，专长于跨境合并审查以及外国投资相关工作。

Alastair 之前曾在富而德律师事务所伦敦、布鲁塞尔和华盛顿办公室工作。他在监管机构的工作经历以及在三大洲执业所积累的丰富经验使他非常了解如何与监管机构有效合作以及在交易及调查工作中如何为客户设计成功的策略。

在《全球竞争评论》的 2017 年版《法律名人录》中，Alastair 位列竞争法未来领袖。钱伯斯 2018 称"客户指出—Alastair Mordaunt'非常出色'，这得益于他对竞争法的深入了解，这种深入了解既来自于他多年的私人执业经验，也来自于他在监管机构的工作经历。"

Alastair 目前就香港竞争事务委员会加入国际竞争网络（"ICN"）事宜担任该机构非政府顾问。

Qi Huan

祁欢

Prof. Qi Huan, Faculty of International Law, CUPL

祁欢教授，中国政法大学国际法学院

Mrs. Qi Huan, PhD, Associate Professor, Director of the Institute of International Economic Law of the School of International Law of China University of Political Science and Law (CUPL), Vice-Dean of Faculty of International Law of CUPL. Mrs. Qi Huan is also the deputy Secretary General of the Professional Committee of Competition Policy and Law of China Society for World Trade Organization Studies, Deputy Director of Maritime Law Center of CUPL, and is a council member of several societies: Chinese Society of International Economic Law, WTO Law Research Society of China Law Society, and Beijing Law Society. Her research focuses mainly on international economic law, international investment law (including competition law), maritime law and WTO rules. Besides The Exemption System of Anti-monopoly in Public Services (monograph), Principles of International Investment Law (Chinese translation), She has also edited many textbooks, including International Economic Law, International Investment Law, Maritime law,and has presided over a lot of research projects sponsored by the Ministry of Education, NDRC, MOFCOM, and the Development Research Center of the State Council, covering subjects ranging from international investment, anti-monopoly, the WTO system to maritime law.

祁欢教授，中国政法大学国际法学院副院长、中国政法大学国际法学院国际经济法研究所所长、教授、法学博士。此外，祁欢教授还是中国世贸组织研究会竞争政策与法律专业委员会副秘书长，中国政法大学海商法研究中心副主任，中国国际经济法学会理事，中国法学会 WTO 法研究会理事，北京国际法学会理事。主要研究方向：国际经济法、国际投资法（含竞争法）、海商法、WTO 法等。专著：《公共服务业反垄断豁免法律问题研究》；译著：《国际投资法原则》；主要参编教材：《国际经济法》、《国际投资法》、《海商法》等。祁欢教授主持并参与了教育部、发改委、 商务部、国务院发展研究中心等关于国际投资、反垄断、WTO 制度和海商法领域的多个科研项目。

Charles Pommiès

Counsel, Allen &Overy, Brussels
布鲁塞尔安理国际律师所事务所顾问

Charles relocated to Allen & Overy's Brussels office in May 2018 from Beijing, where he had been since 2014. He focuses on advising Chinese companies, in particular State-owned entities, on merger control issues and other regulatory issues (such as foreign investment reviews) arising from their investment abroad. He has also developed a rich experience in counselling multinational companies on merger filings with competition agencies in China and general issues regarding compliance with China's Anti-Monopoly Law.

Charles's practice also includes assisting leading Asian, European and U.S. companies in antitrust investigations (cartels and abuses of dominant position) and merger control reviews by the European Commission and national competition agencies. He works with clients from a wide range of industries, including technology, pharmaceuticals, automotive and financial services.

Charles 于 2018 年 5 月调回本所布鲁塞尔办公室。在此之前，他曾在本所北京办公室工作约四年。Charles 专注于向中国公司特别是中国国有企业就其海外投资涉及的经营者集中问题和其他监管问题（例如外国投资审查）提供法律服务。他在协助跨国公司向中国竞争监管机构进行集中申报以及提供中国反垄断法一般性合规咨询方面同样具有丰富经验。

Charles 的执业范围还包括协助领先的亚洲、欧洲和美国公司应对由欧洲委员会和国家竞争机构进行的反垄断调查（卡特尔和滥用支配地位）和经营者集中审查。与他合作的客户来自各行各业，包括技术、制药、汽车和金融服务等。

Nicholas Song

宋友光

Partner, Dechert LLP

德杰律师事务所合伙人

Nicholas Song focuses his practice on corporate matters, with particular emphasis on the energy industry, including the mining and metals, oil and gas, and power sectors. Mr. Song represents a number of China's largest state-owned companies on cross-border mergers, acquisitions and investments.

Mr. Song also advises clients on international arbitration matters in the energy industry. He has significant experience in arbitrations conducted under the rules of the HKIAC, ICC, LCIA, LMAA, SIAC and UNCITRAL.

Mr. Song has been recognized as a leading lawyer in arbitration and energy in publications such as Global Arbitration Review, The International Who's Who of Energy Lawyers and Who's Who Legal.

宋友光律师主要从事公司法领域的法律事务，尤其专注于能源行业，包括石油和天然气、矿业和金属、以及能源领域。宋律师代表多家中国最大的国有企业处理跨境合并、收购和投资。

宋律师还向客户提供能源行业国际仲裁事务方面的法律咨询。他还拥有根据香港国际仲裁中心、国际商会、伦敦国际仲裁院、伦敦海事仲裁员协会、新加坡国际仲裁中心和联合国国际贸易法委员会的仲裁规则处理仲裁事务的丰富经验。

宋律师被诸多出版物认可为在仲裁与能源领域的领先性律师，如《全球仲裁评论》，《国际 Who's Who 能源法律师》和《Who's Who Legal》。

Wang Xiaodong

王筱东

Partner, Global Law Office

环球律师事务所合伙人

Vincent Wang is a partner of the firm. Mr. Wang has represented various multinational clients and Chinese State-owned and private companies in cross-border investment and commercial transactions. Before joining Global, he has worked in three international and Chinse law firms, including his 18 years practice with Davis Wright Tremaine LLP. His practice areas cover regulations on new and emerging technologies (such as AI, Blockchain, IoTS, e-mobility, Cloud Computing and etc), compliance with cyber security and data regulation, international trade and investment compliance, business operation and commercial transactions, merger acquisition, complex transaction, intellectual properties, regulatory and compliance, and dispute resolution in a wide range of industries, including telecommunication, ecommerce, electronic payments, internet related businesses, high technology manufacture and engineering, automotive, media and entertainment, food and beverage, agriculture and farming and etc.

Mr. Wang's services include advice on business transaction strategy and structure, due diligence, drafting, negotiating and providing legal opinion on various legal and transactional documents to find practical solutions for the parties to consummate transactions, international investment and trade compliance, cyber security and data compliance, eCommerce platform and electronic payment operation, offering practical and effective solutions to solve complicated issues in company daily operation and industrial compliance on employment, intellectual properties, environment protection, China inbound and outbound investment, corporate restructure, dissolution and bankruptcy, as well as dispute resolution.

王筱东律师是本所合伙人。王律师在各种跨境投资和交易中代表众多跨国企业以及知名的中国国有和民营企业，拥有丰富经验。在加入环球律师事务所之前，王律师曾在三家国内和国际的律师事务所工作，包括在美国戴维斯律师事务所的十八年工作经历。王律师的主要执业领域为电信、电商、电子支付、互联网、高科技制造和技术、媒体娱乐、食品饮料、农业种植等行业的新兴技术管制（诸如人工智能、电子货币、物联网、运输电气化及云计算等）、网络安全和数据合规、国际投资贸易合规、公司运营、收购兼并、重大交易、知识产权、合规风控和争议解决。

王律师在前述领域中提供全方位的综合法律服务，包括交易结构设计、尽职调查、各类法律和交易文件的起草、谈判和提供相关法律意见并协调各方最终完成交易、国际投资贸易合规、网络安全和数据合规、电子商务和第三方支付许可与运营、电信投资与服务、企业日常运营及合规、环境保护、土地、劳动、知识产权交易、境内外投资及公司重组、解散和破产清算，以及争议解决。

Prof. HAN Liyu
韩立余

Law School , Renmin University of China
中国人民大学法学院教授

Mr. Liyu HAN, Chinese, is currently a professor of Law at Renmin University of China Law School, and Director of Research Center for WTO Law of Renmin University of China, teaching International Economic Law, WTO Law, International Trade Law, International Finance Law and Commercial Arbitration. His research interests focus on trade law and trade-related issues. Prof.HAN has published many books and articles in Chinese and English.

Prof. HAN got his Doctor, LLM and LLB at Renmin University of China and got Postgraduate Diploma in Common Law at The University of Hong Kong. Prof. HAN visited several universities and institutions in America and Europe as a visiting scholar.

Prof. Han is also Vice President of China Law Society WTO Law, Vice President of Chinese Society of International Economic law, and on the Indicative List of Panelist, WTO DSB.

韩立余先生是中国人民大学法学院教授，中国人民大学 WTO 法研究中心主任，教授国际经济法、WTO 法、国际贸易法、国际金融法和国际商业仲裁。他的研究兴趣集中在贸易法和与贸易有关的问题上。韩教授出版了许多中文和英文的著作和文章。

韩教授在中国人民大学获得了法学博士、硕士和学士学位，并获得了香港大学法律学院普通法研究生深造文凭。韩教授曾作为访问学者访问美国和欧洲的几个大学和机构。

韩教授还是中国法学会世界贸易组织研究会副会长，中国国际经济法研究会副会长，WTO 争端解决专家组成员。

3rd ANNUAL CONFERENCE CUPL/UNCTAD

中国政法大学/联合国贸发会第三届年会

Reports From Alastair Mordaunt


内容
背景
全球范围内贸易保护主义崛起
英国
过渡期后关系的背景
总结
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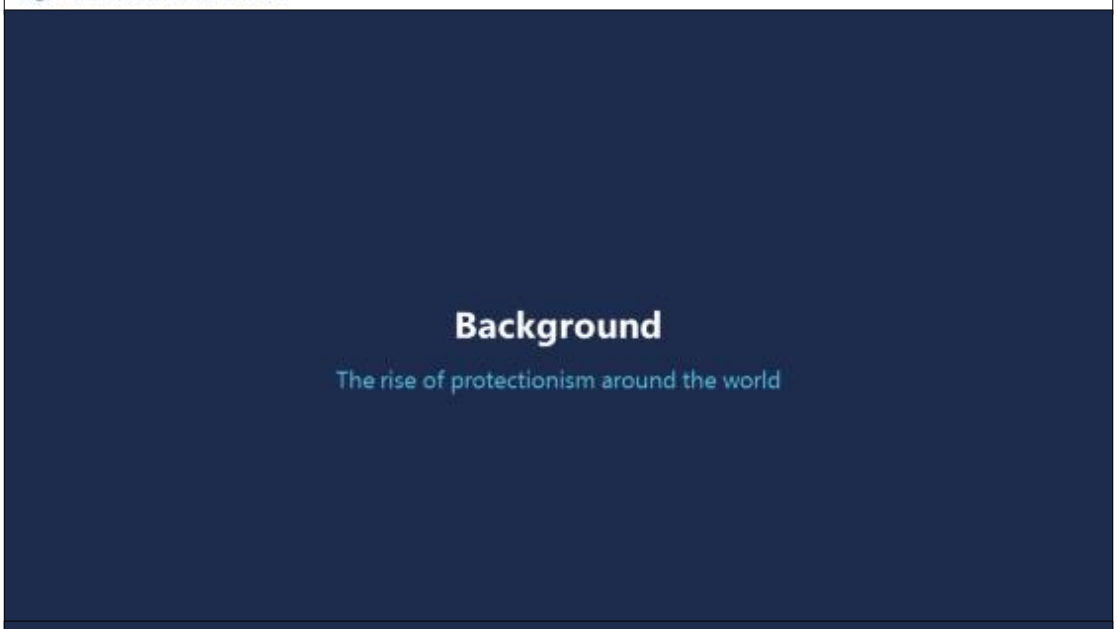
Background
The rise of protectionism around the world


背景
全球范围内贸易保护主义崛起

A growing number of jurisdictions review inbound M&A

Over 100 jurisdictions now have investment laws

Freshfields Bruckhaus Deringer

7

A growing number of jurisdictions review inbound M&A

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7

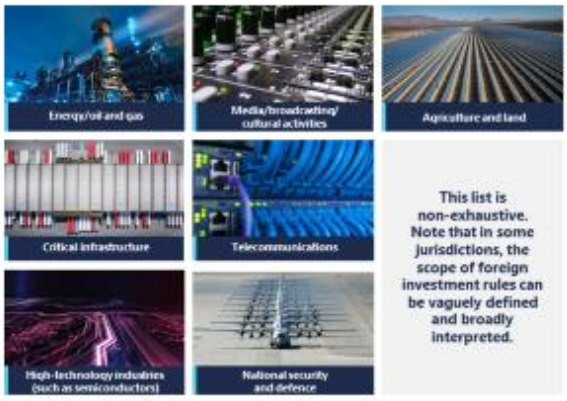
The world's leading economies are becoming increasingly restrictive

Countries that have strengthened, or are considering new, restrictive measures on foreign investment or public interest grounds

Why?

- Record levels of Chinese investment
- Changing concerns around national security
- Shifting political climate
- Global race for technology leadership
- Stifled bilateral trade negotiations

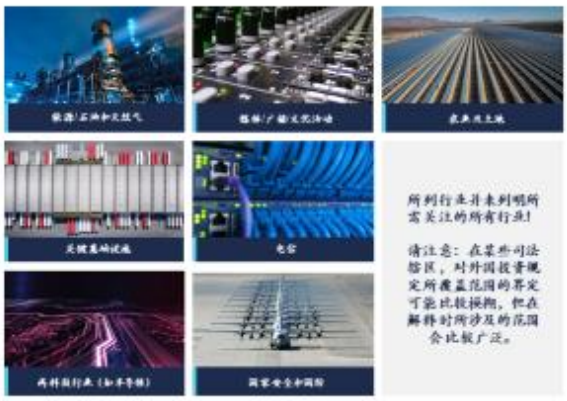
Key sectors and jurisdictions to watch out for



This list is non-exhaustive. Note that in some jurisdictions, the scope of foreign investment rules can be vaguely defined and broadly interpreted.

Australia, Brazil, Canada, China, France, Germany, India, Italy, Japan, New Zealand, Russian Federation, South Africa, United Kingdom, United States...

需要关注的主要行业及司法辖区

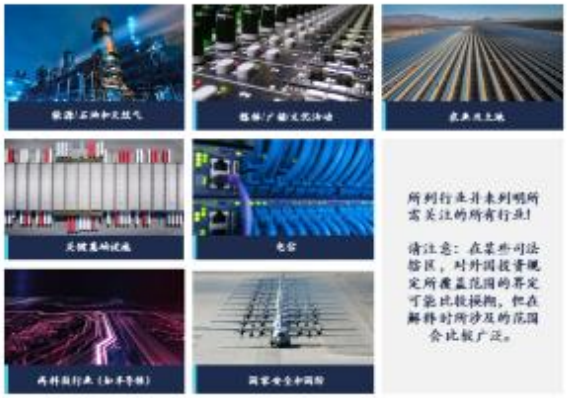


所列行业并未列明所需关注的所有行业！

请注意：在某些司法辖区，对外国投资规定所覆盖范围的界定可能比较模糊，但在解释时所涉及的范围会比较广泛。

澳大利亚、巴西、加拿大、中国、法国、德国、印度、意大利、日本、新西兰、俄罗斯联邦、南非、英国、美国等

需要关注的主要行业及司法辖区



澳大利亚、巴西、加拿大、中国、法国、德国、印度、意大利、日本、新西兰、俄罗斯联邦、南非、美国、美国等

并购交易中会涉及哪些主要的外国直接投资相关问题？

近期部分例证

UK

Recent reforms and government proposals

英国

近期改革及政府方案

Existing UK regime

Voluntary notification regime

- Government can intervene provided UK merger control thresholds are met: target UK sales >£70m; **or** 25% share of supply created or enhanced
- Public interest considerations include national security, plurality of the media and financial stability
- Government has intervened in only 8 mergers on the basis of national security (7 defence-related, 1 related to emergency services)

Recent reforms

- Government enabled to scrutinise smaller transactions in three sectors:
  - Development and production of items for military and dual use
  - Multi-purpose computing hardware
  - Quantum technology
- Lower jurisdictional threshold: target UK sales >£1m (instead of >£70m) or share of supply of >25% (no increase needed)

英国现行制度

自愿申报制度

- 若达到英国合并申报标准（即目标公司在英国的营业额超过7,000万英镑；或供应份额达到或升至25%），则政府可以干预
- 公共利益考量包括国家安全、媒体多元性以及金融稳定性
- 政府仅以国家安全为由干预了8起合并案（其中7起与国防相关，1起与紧急服务相关）

近期改革

- 使政府能够对三个行业的较小规模交易进行审查
  - 军事及军民两用产品开发生产
  - 多用途计算硬件
  - 量子技术
- 管辖标准降低：目标公司在英国的营业额超过100万英镑（而不是超过7,000万英镑）或供应份额超过25%（无需增加）

Reform proposals

Major overhaul and significant increase in national security screening powers

- **No turnover or share of supply thresholds**
- **Regime not sector-specific**, but targets involved with (i) national infrastructure, (ii) advanced technology, (iii) critical suppliers to government and emergency services and (iv) military and dual-use goods most likely to raise national security concerns
- **Minority investments and asset acquisitions** firmly within scope: any acquisition of 'significant influence or control' over an entity or asset could be covered
- **Voluntary** nature of regime unchanged but **penalties** for completing a transaction before clearance or non-compliance with remedies and other orders: custodial sentences, fines and director disqualifications
- **Call-in power:** potentially up to six months

Changes likely: 2020 (primary legislation required)

Other considerations

- **Marked increase in transactions subject to scrutiny:** 200 notifications and 100 in-depth reviews expected per year – up from only two cases in past two years.
  Impact on **deal timeline and certainty** as well as need for target/seller co-operation and appropriate risk allocation mechanisms?
- **Impact of the White Paper on existing public interest regime:** will the UK government feel emboldened to intervene in transactions that meet existing thresholds on the basis that they fall under the new national security headings?
  Need for **informal engagement** with relevant government bodies?

改革方案

主要改革及大幅提升国家安全审查权

- **不设立营业额或供应份额标准**
- **相关制度并不针对特定行业**，但潜在标公司涉及（1）国家基础设施；（2）先进技术；（3）面向政府及国急服务业的关键直接供应商；以及（4）军用及军民两用产品，则更有可能导致国家安全担忧
- **少数股权投资及资产收购**肯定在审查范围之列：可能足以得对某一实体或资产的"重要影响力或控制权"
- **制度所具有的自愿性质保持不变，但未获得批准即完成交易或不遵守救济措施及其他命令会导致处罚**：监禁判决、罚款及取消董事资格
- **通知审查权**：可能不超过6个月

变更时间可能为：2020年（预进行主体立法）

其他考量

- **需要审查的交易数量明显增加**：预计每年有200起申报以及100起深入审查——过去两年只有2起。
  需考虑对**交易时间安排及确定性**的影响，以及是否需要目标公司/卖方配合、是否需要适当的风险分配机制。
- **白皮书对现有公共利益制度的影响**：英国政府是否很基于新的国家安全标准对适用现有标准的交易进行干预？
  考虑是否需要与相关政府部门进行**非正式接洽**。

Key takeaways

总结

Key takeaways

总结

Reports From Nicholas Song（宋友光）

Update on National Security Reviews of Foreign Investment in the United States

Nicholas Song
21 September 2018

Dechert LLP

CFIUS

- The Committee on Foreign Investment in the United States (CFIUS) is an inter-agency committee chaired by the US Department of the Treasury
  - it conducts reviews of certain proposed investments in US businesses by non-US persons to determine whether they pose a threat to US national security
  - other members of CFIUS include agencies with both national security and economic/trade-related responsibilities, including the Departments of Commerce, Defense, Energy, Homeland Security, Justice, and State as well as the Office of the US Trade Representative

Mitigation of National Security Concerns

- When national security issues arise in connection with a transaction, CFIUS may require the parties to implement certain measures to mitigate risks
  - mitigation agreements can vary in scope and purpose depending on the specific national security concerns at issue
- If CFIUS is not satisfied that national security concerns can be mitigated, it can recommend that the President suspend or prohibit such a transaction
  - the President may also order divestment if the transaction has been completed

Historical Trends

- Growing number of notified transactions over the years:
  - 2013: 97 2016: 172 2017: ~240
- CFIUS is subjecting transactions to closer scrutiny
  - today almost half of all reviews go on to a 45-day investigation
  - more withdrawn notifications, and more abandoned deals
  - more blocked transactions:
    - 1988-2011: 1 transaction blocked 2012-2018: 4 transactions blocked
- From 2013-2015, 74 transactions involving Chinese investors were reviewed, almost 20% of all reviews

Impact of FIRRMA – Some Highlights (cont.)

	Before FIRRMA	After FIRRMA
Timeline	• 30 days for initial review • May conduct an additional 45-day investigation • If a case is referred to the US President, he has 15 days to make a decision	• 45 days for initial review • May conduct an additional 45-day investigation (with a 15-day extension under extraordinary circumstances) • If a case is referred to the US President, he has 15 days to make a decision
Fees	No fees payable	• CFIUS can impose filings fees for full notices • Fees cannot exceed the lesser of 1% of the transaction value or US$300,000 (to be adjusted for inflation)

CFIUS Reform - FIRRMA

- The Foreign Investment Risk Review Modernization Act (FIRRMA) was signed into law on 13 August 2018
- FIRRMA 'modernizes' CFIUS by, among other things:
  - expanding its jurisdiction
  - extending timelines for CFIUS review
  - creating certain mandatory filings
  - increasing its focus on particularly sensitive industries
- But, full impact of FIRRMA will not be known until CFIUS issues new regulations to implement FIRRMA (required within 18 months)

Impact of FIRRMA – Some Highlights

	Before FIRRMA	After FIRRMA
Covered Transactions	Mergers, acquisitions and takeovers that could result in a foreign entity's control over a US business	Expansion of scope to also include: • Certain real estate transactions • Non-passive, non-controlling investments in US businesses involving sensitive personal data, critical infrastructure or critical technology • Changes in a foreign investor's rights regarding a US business • Attempts to circumvent or evade CFIUS review

Impact of FIRRMA – Some Highlights (cont.)

	Before FIRRMA	After FIRRMA
Nature of Filing	• Full written notice process • Voluntary	• Creation of "declaration" as an alternative to a full notice (not to exceed 5 pages) • Declarations are mandatory for certain transactions in which a foreign government has a "substantial interest" in the investor • If a declaration is filed, CFIUS has 30 days to respond, either that the parties should file a full notice, CFIUS wants to begin its own review, or CFIUS has completed its review

FIRRMA – Some Other Matters

- CFIUS may suspend a proposed or pending covered transaction for the length of its review or investigation
- CFIUS can consider "certain categories of foreign persons" when determining whether or not to limit its jurisdiction
- CFIUS may enforce an interim risk mitigation agreement with transaction parties to a completed covered transaction for the length of CFIUS' review or investigation
- Where parties choose to abandon a proposed transaction, CFIUS may require the parties to agree to certain conditions governing how the deal will be abandoned

Chinese Investment Still Strong

- Chinese businesses are still successfully investing in the US, even for investments that involve CFIUS review
- Transactions involving non-sensitive sectors are more likely to gain approval
- Potential investments by Chinese investors in US businesses involved in financial services, semiconductors, and other high-technology businesses face greater scrutiny
- FIRRMA requires a detailed report every two years (until 2026) about Chinese investment in the US

Proactive Considerations

- Chinese investors considering investing in a US business should consider and analyze potential CFIUS issues at an early stage to ensure proper deal terms and develop an integrated strategy to address legal requirements and political realities
- Deal terms which can proactively address potential CFIUS concerns in a covered transaction could include:
  - forgoing governance rights
  - forgoing access to sensitive US technology and technical data
  - forgoing access to sensitive information and personal data
  - committing to maintain/expand existing US operations
  - committing to retain US personnel in key leadership positions

For further information, visit our website at **dechert.com.**

Dechert LLP

Reports From Wang Xiaodong(王筱东)

CFIUS Analysis and Filings
美国外国投资委员会审查和申报

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王筱东，合伙人｜北京环球律师事务所上海分所
Allison A. Davis，合伙人｜美国戴维斯·莱特·特里梅因律师事务所
二0一八年六月二十二日

中国首家律师事务所
The First Chinese Law Firm

Composition of CFIUS
CFIUS 机构构成

- The CFIUS members include the heads of the following:
  CFIUS成员包括以下部门和办公机构的负责人：

  1. Department of the Treasury: Chair, Mr. Steven Mnuchin Staff Chairperson;
     财政部（财政部部长Stephen Hanson任委员会主席）
  2. Department of Justice
     司法部
  3. Department of Homeland Security
     国土安全部
  4. Department of Commerce
     商务部
  5. Department of Defense
     国防部
  6. Department of State
     国务院
  7. Department of Energy
     能源部
  8. Office of the U.S. Trade Representative
     美国贸易代表办公室
  9. Office of Science & Technology Policy
     科学技术政策办公室

- The following offices also observe and may participate in CFIUS' s activities: Office of Management & Budget, Council of Economic Advisors, National Security Council, National Economic Council, Homeland Security Council.
  以下部门人员作为观察员单位可参与CFIUS活动：管理和预算办公室、经济顾问委员会、国家安全委员会、 国民经济委员会、国土安全委员会。
- The Director of National Intelligence and the Secretary of Labor are non-voting, *ex-officio* members of CFIUS with roles as defined by statute and regulation.
  国家情报局主管和劳工部部长属无投票权成员，其职责由相关法规确定。

Exon-Florio Amendment
埃克森-弗罗里奥修正案

- Purpose: to review transactions for issues of National security prior to consummation
  目的：在并购交易实施前对该项交易进行国家安全审查
- History and background of enforcement
  修正案出台的历史背景
- Elements:
  要素:
  - Transaction involving change of control
    交易涉及控制权变更
  - Implicating National Security
    涉及国家安全
  - 30-day waiting period
    30天初步审议期
  - Joint Filing
    联合申报
  - Strategy and considerations
    策略与考量因素

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Exon-Florio Amendment
埃克森-弗罗里奥修正案

- Enacted in 1988 as an amendment to the Defense Production Act of 1950
  1988年通过，对1950年《国防生产法》进行修正
- Authorize the president to investigate foreign acquisitions, mergers and takeovers of or investments in US Company from a national security perspective
  授权总统从国家安全角度调查外资收购、兼并、接管或投资美国企业的行为
- President may prohibit a transaction that appears to threaten national security
  总统可以禁止任何威胁美国国家安全的交易
- President delegated authority to CFIUS
  总统授权CFIUS进行审查
- FINSA (2007) : expanded membership; increases accountability, narrowed scope
  2007年《外国投资与国家安全法》：扩大成员单位、增强问责制、缩小范围
- Pending Legislation: making CFIUS mandatory instead of voluntary and expanding it's scope beyond national security
  待定立法：使CFIUS成为强制性而非自愿性的，并将其范围扩大到国家安全范围之外

CFIUS Procedure
CFIUS程序

- CFIUS Filing is "voluntary" – i.e., no penalty for failure to file
  自愿向CFIUS申报，未经申报不受处罚
- Has jurisdiction only over "covered transactions"
  有权管辖"受监管的交易"
- CFIUS can review at any time and may delay transaction
  CFIUS可以随时审查和延迟交易
- Concept of "control" is not fixed (can be as little as 10%)
  自由解释"控制权"（持股比例可以低到10%）
- Impairment of national security has changed since 1988 and is somewhat controversial
  对损害国家安全的界定从1988年起不断变化且颇具争议

"Covered Transaction"
"受监管的交易"

- Any merger, acquisition or takeover by a foreign entity
  任何外国实体收购、兼并和接管行为
- That confers "control" (power to direct or decide important matters affecting the business)
  赋予"控制权"（直接影响或决定企业的重要事项的权力）
- Over any person or entity engaged in interstate commerce in the U.S.
  涉及任何在美国从事州际商业的个人或企业
- That affects "national security interests."
  影响了"国家安全利益"
- Greenfield investments where no existing business is being acquired outside of CFIUS scope
  "绿地投资"完全在CFIUS审查范围内被收购

CFIUS Procedure
CFIUS 程序

- Preliminary analysis; contact with CFIUS to discuss filing and timing
  初步审议；联系CFIUS磋商申报和时间事宜
- Prepare Notice with both sides, include exhibits and send DRAFT Notice to CFIUS for comment
  准备双方的收购审查申报（包括附件），将审查申报意见稿发送给CFIUS等候批复
- Takes comments, revise Notice and submit final; optional live presentation to CFIUS
  收到CFIUS的意见后根据意见修改审查申报并提交终稿；可选择向CFIUS现场演示
- After review (30 day, or additional 45 days), discuss mitigation measures unless cleared
  CFIUS审查后（30天或额外的45天），除非认为对美国"国家安全"没有影响，否则协商一个缓解措施

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CFIUS Procedure and Notice
CFIUS 程序和审查申报

- CFIUS does not issue advisory opinions as to whether a transaction might raise national security concerns or be considered a covered transaction subject to review.
  对于某一交易是否引起国家安全问题或是受审查的被监管交易，CFIUS不发布咨询意见。
- Parties should consult with CFIUS in advance of filing a notice and/or file a draft notice or other appropriate documents describing the transaction.
  各方应通过收购审查申报和（或）申报意见稿或其他描述交易的合适文件，提前与CFIUS磋商。
  - This provides an opportunity for the Committee to request additional information to be included in the actual notice
    委员会可要求将额外信息囊括在实际申报中
  - At least five business days before the filing of a voluntary notice.
    至少在自愿申报前五个工作日进行
- All information and documentary material made available to the Committee as part of pre-notice consultations is accorded confidential treatment pursuant to § 800.702 of the regulations.
  所有作为预申报磋商的一部分、提交给委员会的信息和文件资料，都将根据《外国人收购、兼并及接管条例》第800.702条予以保密。

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Notice Information
收购审查申报内容

- Joint Filing
  联合申报
- Draft submitted before final
  终稿前先提交意见稿
- Information about the company, and previous CFIUS Notices.
  公司有关信息和先前提交给CFIUS的审查申报
- Description of the transaction and business plan
  交易描述和商业计划
- Ownership structure of the corporate family and organizational chart, affiliates and businesses
  公司的股权结构、组织架构、关联企业和业务
- What countries does it operate in?
  公司经营所在国
- Biographical information on officers and directors (key information)
  高管和董事的履历资料（关键信息）
- Relationships with foreign governments
  同外国政府的关系
- Information on non US citizens' access to private or certain strategic information
  非美国公民获得私人或特定战略信息的情况

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Notice Information: Security Inquiry
收购审查申报内容：安全性审查

- Describe national security impact
  描述对国家安全的影响
- List gov't contracts or transactions
  列举与政府达成的合同或交易
- Provide map and description of assets and whether they are near US military installation
  提供资产描述和所在地地图以及资产是否位于美国军事设施附近
- Products or services sole supplier to US government or military
  美国政府或军事产品或服务的唯一供应商
- Any products or services used for defense purposes?
  任何产品或服务具有国防用途
- Plans for US businesses, technology or current contracts
  在美的业务计划、科学技术、或现有合同
- Any foreign government control
  受任何外国政府控制

Review Factors
审查因素

- Domestic production needed for national security
  出于国家安全需要的国内生产
- Capability and capacity of domestic industries to meet national defense including human resources, products technology, materials and other supplies and services
  满足国防建设需要的国内产业能力和产能，包括人力资源、产品技术、材料及其他供应和服务
- Control of domestic industry by foreign citizens as it affects the US to meet requirements
  外国公民对国内产业的控制和影响
- Potential effects on sale of military goods, equipment or technology to any country that maybe a threat to US (terrorism, biological weapons, etc.)
  对军事用品、器械、技术销往可能威胁美国的国家（恐怖主义、生化武器等）存在潜在影响

Review Factors (cont' d)
审查因素

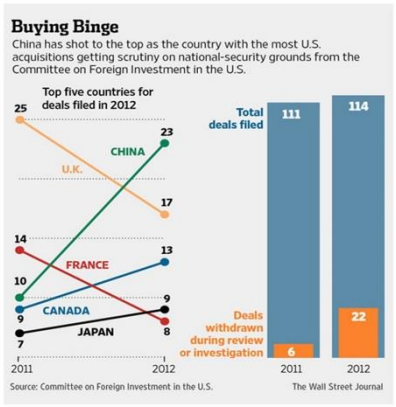
- Potential effects on technology leadership
  对技术领先的潜在影响
- Potential effects on critical infrastructure including energy
  对包括能源在内的关键基础措施的潜在影响
- Potential effects on critical technologies
  对关键技术的潜在影响
- Control by a foreign government
  外国政府的控制
- Assessment of nonproliferation control, arms control, counter-terrorism, diversion of technologies with military applications
  对防扩散和军备控制、反恐、转移军事应用技术的评估
- Long term sourcing of natural resources
  对自然资源的长期使用
- Catch all (such other...)
  兜底条款（其他）

More Factors Regarding Adverse Effects
其他具有不良影响的因素

- Among the considerations presented by transactions recently review by CFIUS, are foreign control of U.S. business that:
  CFIUS近期的交易审查中，关注涉及以下行为的有外国控制的美国企业：
  - Provide products or services to U.S. government entities
    向美国政府机构提供产品和服务
  - Provide cyber security concerns or supply chain issues
    涉及网络安全问题和供应链问题
  - Infrastructure businesses
    从事基础设施业务
  - Classified or sensitive government information
    涉及机密或敏感的政府信息
  - Operate in Weapons or munitions, aerospace, satellite and radar businesses
    经营武器弹药、航空航天、卫星和雷达业务
  - Operate in defense, security or law enforcement sectors
    在国防、安全、执法领域开展业务
  - Operate in semiconductors or related components manufacturing
    经营半导体或相关元件的制造
  - Provide technology products or services
    供应科技产品和服务
  - Are physically near U.S. government facilities
    企业位于美国政府设施附近

China in the CFIUS hot seat
CFIUS对中国愈加重视

- In 2012, Chinese entities, led by manufacturing companies, filed 23 deals with CFIUS, up from 10 in 2011 and six in 2010.
  2012年，由制造企业率领的中国公司向CFIUS申报了23件交易，而2011年仅有10件，2010年6件。
- 2014: 24 notices and 2013: 21 notices.
  2014年申报了24份审查，2013年21份。



Current CFIUS cases: Focus on China
CFIUS当前案例：着眼于中国

- Money-Gram/Ant Financial (Jan 2018): Ant Financial, a Chinese electronic payments company abandoned a $1.2 billion deal to purchase MoneyGram when CFIUS refused to approve in spite of lobbying by Jack Ma.
  速汇金/蚂蚁金服（2018年1月）：蚂蚁金服，一家中国电子支付公司，当CFIUS在马云游说后仍然拒绝交易的情况下，放弃了以12亿美元购买速汇金的交易。
- Canyon Bridge Capital-Lattice (Sept 2017): Blocked by CFIUS because US Private Equity fund received an investment from China Venture Capital Fund, owned by the PRC.
  峡谷桥资本-莱迪思（2017年9月）：被CFIUS阻止因为美国私募股权基金收到了一笔来自中国所有的中国风险投资基金的投资。
- Go Scale – Phillips (Jan 2016): Phillips, a Dutch electronics giants, agreed to sell its automative and LED business for $2.9 billion to company sponsored by GSR Ventures of China and could not resolve CFIUS concerns.
  GO Scale Capital-飞利浦（2016年1月）：飞利浦，一家荷兰电子产品巨头，同意将其汽车照明和LED业务以29亿美元的价格出售给一家由中国金沙江创业投资公司出资的公司，但无法消除CFIUS的顾虑。

CFIUS Strategy
CFIUS 战略

- Plan for lengthy review (Notice drafting plus 75 days)
  计划开展更长时间的审查（审查申报草拟外加75天）
- File ***before*** you close: Ralls; Procon v. Wanxiang, Shanhui and CNOOC
  交易实施完成前进行申报（如三一关联公司案和普康案同 万向案、双汇案和中海油案的对比）
- Have a plan in place to address concerns (Smithfield and CNOOC)
  提前指定计划解决问题（如史密斯菲尔德案和中海油案）
- Provide draft notice
  提交收购审查申报意见稿
- Meet with CFIUS members before and during review
  审查前或审查期间与CFIUS成员会面
- Structural distance from foreign gov't entity and other mitigation factors
  与外国政府机构或其他缓解因素战略性保持距离

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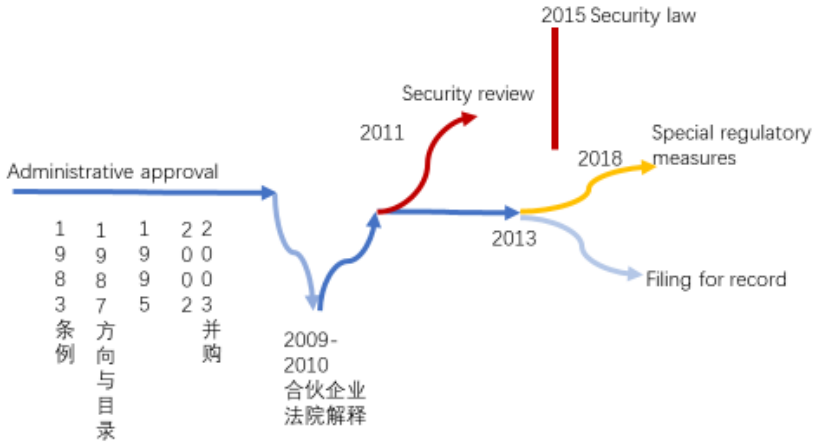
Reports From Prof.Han Liyu(韩立余教授)

中国应建立什么样的外国投资安全审查制度

中国人民大学法学院
韩立余教授
2018.09.21
友谊宾馆

6 1

外商投资审批制度演变过程



6 2

行政审批的特点

- 逐项审批
- 综合审批，包括了国家安全事项
- 重点是行业准入、股权控制等
- 试图弱化取消后，分化和强化
  - 2011国家安全审批
  - 2013，二分法
    - 特别管理措施
    - 备案
  - 2016年人大修法，缩减审批事项
  - 2018特别管理措施清单/负面清单

6 3

国家安全审批制度现状

- 201102 国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知
  - 建立联席会议，国务院领导，发改委和商务部牵头
- 201108商务部实施外国投资者并购境内企业安全审查制度的通知
  - 向商务部提出申请；地方要求提出申请；其他部门或企业可建议审查
- 201504国务院办公厅关于印发自由贸易试验区外商投资国家安全审查试行办法的通知

6 4

现有制度安排存在的问题

- 非正式独立机构，组成不明确
- 机构不统一：两套程序，中央与地方
- 审查范围不统一：投资，并购，金融
  - 政府企业?
- 审查内容不统一
- 程序不透明，无程序救济手段
- 救济手段不充分
- 制度不规范不完善

未来制度建构

- 正式立法，并与国家安全法接轨
- 统一的机构
  - 包括中央与地方，一般与自贸试验区，中央事权
  - 金融安全审查?
- 独立、负责、专门的机构
- 明确的审查标准
- 相对完善的审查要素
- 强制性发起审查程序
- 强化追溯式救济和临时措施
- 行政诉讼?

DAY TWO
Issue 5: Enforcement Roundtable
议题　5：执法圆桌会议
16:00-17:15

Chair

主持人

Frank Fine，CIIAI Executive Director

Frank Fine，CIIAI 执行董事

Speakers

发言人

Paul Csiszar, Director, Directorate E, DG Competition, European Commission

Paul Csiszar，欧盟委员会竞争总署 E 部主任

Tom Smith, Legal Director, Competition and Markets Authority, London

Tom Smith，英国竞争与市场管理局法务总监

Renata Hesse, former head of DOJ Antitrust Division, Partner, Sullivan & Cromwell

Renata Hesse，前美国司法部反托拉斯局局长，美国苏利文·克伦威尔律师事务所合伙人

Dong Hongxia, Director, Bureau of Anti-Monopoly, SAMR

董红霞，国家市场监督管理总局反垄断局处长

Frank Fine

CIIAI Executive Director

CIIAI 执行董事

Mr. Fine has been practicing EC competition law in Brussels since 1986. He is currently Head of International Antitrust at DeHeng Law Offices, a leading PRC law firm, as well as Managing Director of EC Competition Law Advocates, which is based in Brussels.

Mr. Fine is the Executive Director of the China Institute of International Antitrust and Investment and a Visiting Professor of Competition Law at the China University of Political Science and Law. He also sits on the Advisory Board of the Center for Financial Regulation and Economic Development of the City University of Hong Kong.

Mr. Fine is the author of several seminal books in the field of EC competition law, notably, *Mergers and Joint Ventures in Europe: The Law and Policy of the EEC* (first edition, Graham & Trotman; second edition, Kluwer) and *The EC Competition Law on Technology Licensing* (Sweet & Maxwell). Mr. Fine is General Editor of the three-volume loose-leaf treatise, *European Competition Laws: A Guide to the EC and Its Member States* (LexisNexis), and the Editor-in-Chief of the *China Antitrust Law Journal* (LexisNexis).

Frank Fine obtained his law degree from Loyola Law School (Los Angeles), where he was Editor-in-Chief of the *Loyola International & Comparative Law Journal*. He subsequently obtained an LL.M. (with honors) and Ph.D. in EC competition law from the University of Cambridge in England. He is a member of the California and D.C. Bars and of the Law Society of England and Wales. He has served as Vice Chair on several committees of the ABA Antitrust Section, notably, the Cartels and Criminal Practice, Intellectual Property, International Committees, and he was a member of the Section's Civil Redress Task Force.

He is listed in *European Legal Experts* as a leading practitioner in the field of EU competition law. He is a Life Fellow of the American Bar Foundation in recognition of his contribution to the legal profession.

Fine 先生自 1986 年起即在布鲁塞尔从事欧共体竞争法执业活动，他目前是德恒律师事务所国际反垄断主管，同时也是位于布鲁塞尔的欧共体竞争法律师协会的常务理事。

Fine 先生是中国国际反垄断与投资研究中心的执行董事以及中国政法大学的竞争法访问教授。他也是香港城市大学金融监管与经济发展中心咨询委员会的成员。

Fine 先生在欧共体竞争法的学术方面也深有造诣，著有：《欧盟境内的并购与合资企业：欧洲经济共同体的法律与政策》（第一版，Graham & Trotman; 第二版，Kluwer）和《欧共体技术许可竞争法》(Sweet & Maxwell)》。Fine 先生也是三卷本活页论文出版物《欧洲竞争法：对欧共体及其成员国的指南(LexisNexis)》以及《中国反垄断法期刊(LexisNexis)》的总主编。

Frank Fine 先生于洛杉矶罗耀拉法学院获得法学学位，在大学里他是《罗耀拉国际与比较法》期刊的主编。他随后在英国剑桥大学获得欧共体竞争法法学硕士和 博士学位。他现在是加利福尼亚州和华盛顿特区律师协会以及英国和威尔士法律学会的会员。Fine 先生一直在美国律师协会反垄断部下的几个委员会中担任副主席，尤其是卡特尔和刑事实践委员会，知识产权委员会，国际委员会，同时他也曾是该部门下的民事赔偿特别小组成员。

Fine 先生因其在欧盟竞争法领域的杰出执业表现被评为欧洲法律专家，同时也因为出色的法律贡献而被列为美国律师基金会的终身会员。

Paul Csiszár

Director, Directorate E, DG Competition, European Commission

欧盟委员会竞争总署 E 部主任

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Introduction of Organizers

主办方简介

UNCTAD

Globalization, including a phenomenal expansion of trade, has helped lift millions out of poverty. But not nearly enough people have benefited. And tremendous challenges remain.

We support developing countries to access the benefits of a globalized economy more fairly and effectively. And we help equip them to deal with the potential drawbacks of greater economic integration. To do this, we provide analysis, consensus-building, and technical assistance. This helps them to use trade, investment, finance, and technology as vehicles for inclusive and sustainable development.

Working at the national, regional, and global level, our efforts help countries to:

Comprehend options to address macro-level development challenges

Achieve beneficial integration into the international trading system

Diversify economies to make them less dependent on commodities

Limit their exposure to financial volatility and debt

Attract investment and make it more development friendly

Increase access to digital technologies

Promote entrepreneurship and innovation

Help local firms move up value chains

Speed up the flow of goods across borders

Protect consumers from abuse

Curb regulations that stifle competition

Adapt to climate change and use natural resources more effectively

Together with other UN departments and agencies, we measure progress by the Sustainable Development Goals, as set out in Agenda 2030.

We also support implementation of Financing for Development, as mandated by the global community in the 2015 Addis Ababa Agenda, together with four other major institutional stakeholders: the World Bank, the International Monetary Fund, the World Trade Organization, and the United Nations Development Programme.

While we work mainly with governments, to effectively deal with the magnitude and complexity of meeting the Sustainable Development Goals, we believe that partnerships and closer cooperation with the private sector and civil society are essential.

Ultimately, we are serving the citizens of the 194 countries that make up our organization. Our goal is prosperity for all.

UNCTAD 联合国贸易和发展会议

联合国贸易和发展会议（简称贸发会议，英文是 United Nations Conference on Trade and Development，英文简称是 UNCTAD）成立于 1964 年，是联合国大会常设机构之一。

联合国贸易和发展会议是审议有关国家贸易与经济发展问题的国际经济组织，是联合国系统内唯一综合处理发展和贸易、资金、技术、投资和可持续发展领域相关问题的政府间机构，总部设在瑞士日内瓦，目前有成员国 192 个。

该组织的任务与世界范围的商务领域有着直接的关系，因为其中心目的是给发展中国家和向市场经济过渡的前社会主义国家一些工具，使它们能成功地融入国际贸易和经济体系。这些工具包括从规范的标准制定活动，如环境会计这样的新领域，到旨在加快货物流通的实际工程；从有关投资趋向与政策的分析研究和数据收集，到推动中小型企业和企业职权。它为政府和企业提供竞争法律和政策咨询。同时，它从世界资本市场为微观金融计划创造新的渠道，加强发展中国家利用电子商务的能力。联合国贸易和发展会议每年主要的出版物：贸易和发展报告、世界投资报告和最不发达国家报告，在它们各自领域起着权威性作用。这些报告提供最新的资料，分析全球趋势，制定政府和私营部门有用的实用政策建议。联合国贸易和发展会议的中心工作是提供地方和跨国企业得以繁荣的最佳政策框架，以此培养发展中国家固有的能力。但是能力的培养还有其它越来越重要的方面，如官员和企业行政人员在国际贸易和投资问题方面的培训。

贸发会议的宗旨是促进国际贸易，特别是加速发展中国家的经济和贸易发展，制订国际贸易和有关经济发展问题的原则和政策；推动发展中国家和发达国家在国际经济、贸易领域的重要问题谈判的进展；检查和协调联合国系统其他机构在国际贸易和经济发展方面的各项活动；采取行动以便通过多边贸易协定；协调各国政府和区域经济集团的贸易和发展战略。贸发会议的主要目标是帮助发展中国家增强国家能力，最大限度地获取贸易和投资机会，加速发展进程，并协助它们应付全球化带来的挑战和在公平的基础上融入世界经济。贸发会议通过研究和政策分析、政府间审议、技术合作以及与非政府机构企业部门的合作实现其目标。其当前的工作领域涉及贸易、资金、技术、企业、可持续发展，以及南南合作和最不发达国家等问题。

中国政法大学

中国政法大学是一所以法学为特色和优势，兼有文学、历史学、哲学、经济学、管理学、教育学、理学等学科的“211 工程”重点建设大学，“‘985 工程’优势学科创新平台”、“2011 计划”和“111 计划”（高等学校学科创新引智计划）重点建设高校，直属于国家教育部，正致力于建设世界一流大学和一流学科。现有海淀区学院路和昌平区府学路两个校区。

学校的校训是：厚德、明法、格物、致公。学校的办学目标是：学校遵循国家教育方针和高等教育规律，弘扬传统，与时俱进，努力办成开放式、国际化、多科性、创新型的世界一流法科强校。

学校现有法学院、民商经济法学院、国际法学院、刑事司法学院、政治与公共管理学院、商学院、人文学院、外国语学院、马克思主义学院、社会学院、光明新闻传播学院、中欧法学院、法律硕士学院、国际儒学院、国际教育学院/港澳台教育中心、继续教育学院/网络教育学院、科学技术教学部、体育教学部共 18 个教学单位；设有诉讼法学研究院（教育部人文社会科学重点研究基地）、法律史学研究院（教育部人文社会科学重点研究基地）、证据科学研究院（教育部重点实验室）、法治政府研究院（北京市哲学社会科学研究基地、教育部青少年法制教育研究基地）、人权研究院（国家人权教育与培训基地）、比较法学研究院、法律古籍整理研究所、法学教育研究与评估中心/高等教育研究所、法与经济学研究院、全球化与全球问题研究所、公司法与投资保护研究所等 11 个在编科研机构；设有资本金融研究院、仲裁研究院、互联网金融法律研究院、绿色发展战略研究院、制度学研究院 5 个新型研究机构；设有司法文明协同创新中心、国家领土主权与海洋权益协同创新中心、马克思主义与全面依法治国协同创新中心、全球治理与国际法治协同创新中心、知识经济与法治发展协同创新中心、人权建设协同创新中心、法治政府协同创新中心 7 个协同创新中心。其中，由中国政法大学牵头组建的司法文明协同创新中心是首批经教育部、财政部认定的 14 个国家“2011 计划”协同创新中心之一，学校参与组建的“国家领土主权与海洋权益协同创新中心”成为第二批获得认定的 24 个国家“2011 计划”协同创新中心之一,学校牵头组建的“马克思主义与全面依法治国协同创新中心”获批北京高校中国特色社会主义理论研究协同创新中心之一。学校积极推进新型智库建设，2016 年设立了国家治理研究院，作为新型综合性实体研究机构和学校科研发展的总平台，聚焦重大问题，服务国家战略，为国家法治和经济社会发展持续提供高质量的智力支持。

学校先后与 45 个国家和地区的 215 所知名大学和机构建立了合作关系，每年通过各类合作交流项目派出千余名师生赴境外交流学习，聘请三百余名长短期外国专家来校讲学。2008 年建立的中国政法大学中欧法学院是中国政府和欧盟在法学教育领域最大的合作项目。学校从 2009 年开始全面实施国际化发展战略，不断提升国际化办学水平，学校培养国际型人才的格局已经初步形成。2012 年以来，学校先后在英国、罗马尼亚、巴巴多斯建成 3 所孔子学院。

China University of Political Science and Law (CUPL)

China University of Political Science and Law is a first tier institution within the national key university Project 211 and the Project 985 Innovative Platforms for Key Disciplines as part of the national endeavor to build world-class universities. CUPL is widely considered to be one of the best Chinese universities in legal studies. It is also one of the most competitive and selective universities to enter in China.

Under the motto of "Cherish the Moral, Understand the Law, Know the World, Serve the Public"; CUPL made its contribution to the development of legal education and training in China. It was the first university to establish specialties such as Legal History, Civil and Commercial Law, Economic Law, Procedure Law and Comparative Law in the PRC. It also contributed to the education and promotion of Roman law in China. With over 100,000 graduates in the past 50 years who have become the elites of law enforcement and practitioners in China, CUPL has developed a niche for the enactment and enforcement of law in China.

To face the challenge of globalization, CUPL developed joint programs with international partners. CUPL provided the first opportunity to study Chinese law in Beijing with an American Bar Association-approved program inaugurated in 1995 by the Duquesne University School of Law. In 2008, an exchange program was formed with Fordham University School of Law.

CUPL maintains relationship with the University of Exeter and the University of Oxford, Deakin University in Australia, the University of Pennsylvania, Georgetown University, Washington University in St. Louis, the UIUC, the University of California, Berkeley, the University of California, Davis in the United States, the University of Montreal in Canada, and National University of Singapore Faculty of Law in Singapore.

CUPL also offers two LLM programs and a PhD program for international students in English. One of them is in Changping and is with the China-EU University. This is an EU funded course, and its focus is on educating Chinese students on EU law.

There is another LLM program at Haidian campus, in downtown Beijing, which is aimed at International students to learn about Chinese law. There is also a PhD programs in English at Haidian campus. These are flexible and taught entirely in English. They include the option to study Mandarin, and gain law work experience in Beijing and other cities in China.

These postgraduate programs are also open as a semester program to international students from any institution around the world who would like to study at CUPL for one semester.

Introduction of Co-Organizers

承办方简介

中国国际反垄断和投资研究中心（CIIAI）

2012 年，在中国最高法学学府之一的中国政法大学及其国际法学院的支持下，中国国际反垄断和投资研究中心（以下简称“CIIAI”） 在北京正式成立并开始运作。

中心旨在通过搭建“产学研”平台，鼓励国内外政府机构、专家学者、行业协会、企业管理者和法律执业者之间开放、理性的交流，提高反垄断调查中的透明性以及程序的合理性，并且在切实可行的前提下推进政策的一体化。该宗旨并非只针对某一国家，而是同样适用于中国之外的其他区域。为此目的，CIIAI 的活动包括：

- 在北京举办反垄断和投资领域的高端年度论坛
- 培训中外反垄断领域的专业人员
- 对中国反垄断立法和指南的草案进行研讨和评论
- 资助反垄断领域前沿问题的学术研究

CIIAI 的执行董事是从 1986 年起在布鲁塞尔致力研究欧盟竞争法的专家、法律硕士、法学硕士、法学博士 Frank Fine 先生。Fine 先生是德恒律师事务所高级法律顾问，欧共体竞争法律师团主管，也是三部欧盟竞争法著作的作者，LexisNexis 出版的三卷活页专著《欧洲竞争法》的主编。Fine 先生还担任中国政法大学的客座教授，以及香港中文大学金融规管和经济发展中心咨询委员会成员。

CIIAI 的常务董事是中国政法大学国际法学院副院长、中国政法大国际法学院国际经济法研究所所长、教授、法学博士祁欢女士。此外，祁欢女士还是中国世贸组织研究会竞争政策与法律专业委员会副秘书长，中国政法大学海商法研究中心副主任，中国国际经济法学会理事，中国法学会 WTO 法研究会理事，北京国际法学会理事。主要研究方向：国际经济法、国际投资法（含竞争法）、海商法、WTO 法等。专著：《公共服务业反垄断豁免法律问题研究》；译著：《国际投资法原则》；主要参编教材：《国际经济法》、《国际投资法》、《海商法》等。祁欢女士主持并参与了教育部、发改委、商务部、国务院发展研究中心等关于国际投资、反垄断、WTO 制度和海商法领域的多个科研项目。

CHINA INSTITUTE OF INTERNATIONAL ANTITRUST AND INVESTMENT

In 2012, the China Institute of International Antitrust and Investment (or "CIIAI") formally started its operation in Beijing under the auspices of the International Law School of the China University of Political Science and Law (or "CUPL"), one of the top three law schools in China.

CIIAI aims at setting up a platform among enterprises, students and scholars, encouraging open and rational communication among governmental agencies, experts and scholars, trade associations, business managers and legal practitioners, so as to promote due process and transparency in antitrust investigations, and to promote policy convergence where it is practical and advisable to do so. This mandate is not country-specific, but it applies to China as well as to other jurisdictions. To this end, the CIIAI's activities will include the following

- Hosting an annual high-level symposium in Beijing;
- Training of antitrust enforcement professionals;
- Commenting on draft antitrust legislations and guidelines;
- Funding scholarly research on cutting-edge antitrust issues.

The CIIAI is funded entirely from private sources. Its sponsors currently include: AirFrance/KLM, Apple, Applied Materials, Clifford Chance, Compass Lexicon, Cooley LLP, DeHeng Law Offices (PRC), ExxonMobil, Freshfields, FTI Consulting, General Motors, the George Washington University Law School, Global Law Office (PRC), Grandall Law Firm (PRC), IAG (parent of BA/Iberia Airlines), Intel, Kirkland & Ellis, Microsoft, Paul Hastings, Procter & Gamble, Qualcomm, RBB Economics, Siemens, Skadden Arps, Tian Du Law Office (PRC), and Unilever. The CIIAI is now in the process of concluding a formal cooperation with the George Washington University Law School (or "the GW").

The Executive Director of the CIIAI is Frank Fine, JD, LLM, PhD, an EU competition law specialist in Brussels since 1986. Mr Fine is Senior Counsel to DeHeng Law Offices and is the Director of EC Competition Law Advocates. He is also the author of three books on EU competition law and is the General Editor of *European Competition Laws*, a three-volume loose-leaf treatise published by LexisNexis. He is also Visiting Professor at the CUPL and sits on the Advisory Board of the Center for Financial Regulation and Economic Development of the Chinese University of Hong Kong.

The Managing Director of the CIIAI is Mrs. Qi Huan, PhD, Associate Professor,

Director of the Institute of International Economic Law of the School of International Law of China University of Political Science and Law (CUPL) and the Vice-Dean of Faculty of International Law of CUPL. Mrs. Qi Huan is also the deputy Secretary General of the Professional Committee of Competition Policy and Law of China Society for World Trade Organization Studies, Deputy Director of Maritime Law Center of CUPL, and is a council member of several societies: Chinese Society of International Economic Law, WTO Law Research Society of China Law Society, and Beijing Law Society. Her research focuses mainly on international economic law, international investment law (including competition law), maritime law and WTO rules. Besides *The Exemption System of Anti-monopoly in Public Services* (monograph), *Principles of International Investment Law* (Chinese translation), She has also edited many textbooks, including *International Economic Law*, *International Investment Law*, *Maritime law*, and has presided over a lot of research projects sponsored by the Ministry of Education, NDRC, MOFCOM, and the Development Research Center of the State Council, covering subjects ranging from international investment, anti-monopoly, the WTO system to maritime law.

中国政法大学竞争法研究中心（CCCL）

经中国政法大学批准，竞争法研究中心（CCCL）于 2007 年 6 月正式成立。

中心以竞争法律与政策为学术研究重点，以不断推动中国竞争法治建设和提升竞争法学科学研究和教学水平为己任。

中心聘请校内外专门从事竞争法律和政策研究的法学、经济学专家学者担任中心的研究人员。时建中教授担任中心主任。

中心与国家改革和发展委员会价格监督检查与反垄断局、商务部反垄断局、国家工商行政管理总局反垄断与反不正当竞争执法局等竞争执法机构保持密切联系，并经常就竞争法律与政策的热点及难点问题接受新华社、中央电视台、人民网、凤凰卫视、搜狐网、网易以及其他互联网和纸质媒体的采访。

中心承担了中央及地方政府部门和国际知名企业委托的有关市场竞争法律的科研课题。

中心积极开展竞争法研究的对外合作与交流，已经与美国、德国、英国、比利时、澳大利亚、瑞士、日本、韩国、印度等国家以及我国大陆及台、港地区从事竞争法研究和实务的部分机构和专家建立起良好且卓有成效的合作与交流。

中心定期举办“中国政法大学竞争法研究中心竞争法治论坛”，并承办了国务院反垄断委员会专家咨询组主办的第一届“中国竞争政策论坛”，不定期地举办多种形式以竞争法律与政策为主题的讲座和研讨会。

中心创办的“中国竞争法网（www.competitionlaw.cn）”是国内外专家学者了解中国竞争法治建设信息的重要渠道，是展示我国竞争法学科研成果的重要平台。

中心积极从事竞争法学研究和学术交流，在近年编辑出版了一系列竞争法研究成果，中心已经成为国内竞争法研究中心的重要研究机构之一。

中心热忱希望与国内外竞争法学术界、实务界的学者、专家以及企业界的朋友进行更加深入、广泛的合作与交流。

CUPL Center for Competition Law (CCCL)

The CUPL Center for Competition Law (CCCL) was officially founded in June 2007 with the approval of China University of Political Science and Law(CUPL).

CCCL focuses on the research of competition laws and policies in order to improve the competition laws of China, and to promote the research and teaching in this field in China.Professor Shi Jianzhong is the director of CCCL. Besides, many scholars, who specialize in the study of competition laws and policies in and outside CUPL, have been engaged as researchers of CCCL.

CCCL sets up a website（www.competitionlaw.cn）for domestic and overseas scholars to understand Chinese competition law. This website has been an important platform to show the achievements of competition law research in China.

CCCL emphasizes international cooperation and communication of competition law research. Now it has established sustainable and productive collaboration with institutions and experts specializing in competition law research and practices. Our partners are from many countries, including the United States, EU, Germany, UK, Belgium, Japan, Korea, and from the territories, including Hong Kong, Macao and Taiwan.

"Competition Law Forum of CCCL in CUPL" is held regularly. Besides, there are many irregular lectures or seminars concerning competition laws and policies.

CCCL is constantly interviewed for hot issues on competition laws and policies by major media like Xinhua News Agency, CCTV, People's Daily Online, Phoenix TV, Sohu, Netease and some print media.

CCCL successively undertakes some projects on market competition laws. The projects are entrusted by governmental departments and enterprises including the Legislative Affairs Office of State Council, Ministry of Commerce, North China Electric Power Company and Beijing Unicom Company.

Some books have also been edited and published in recent years. For example, Anti-monopoly Law---Code Interpretation and Theoretic Analysis was published in 2008 and Competition Code of Thirty-one Countries in 2009.

CCCL plays an active role in competition law research and academic communication, which makes it one important competition law research institution.

CCCL sincerely looks forward to more thorough and extensive collaboration and communication with competition law scholars and experts and business friends.

The George Washington University Law School

Since enrolling its first class in 1865, The George Washington University Law School has produced some of the finest minds across the spectrum of legal scholarship.

That tradition continues today, as GW Law graduates use the knowledge and skills they gain here to influence the critical legal conversations of our times. The school is accredited by the American Bar Association and is a charter member of the Association of American Law Schools. The law school is located on the GW campus in the downtown neighborhood familiarly known as Foggy Bottom.

Students have unmatched opportunities to learn from expert faculty and distinguished visitors and to pursue internships, clerkships, and employment, all while enjoying the city's vibrant culture, nightlife and dining.

With a history of more than 145 years in the heart of Washington, D.C., life at The George Washington University Law School is inextricably linked to the life of its surrounding community. Our campus is only four blocks from the White House, and within easy reach of the World Bank, Department of Justice, Department of State, federal and local courts, and countless nonprofit and nongovernmental organizations. GW Law students have unmatched opportunities to learn from expert faculty and distinguished visitors and to pursue internships, clerkships, and employment, all while enjoying the city's vibrant culture, nightlife and dining.

乔治华盛顿大学法学院

乔治华盛顿大学法学院是最古老的一批法学院之一，自从 1865 年开设第一堂课以来，乔治华盛顿大学法学院在法学方面培养了一批批最优秀的人才。

这个传统在今天仍在继续，因为乔治华盛顿大学法学院的法学博士毕业生利用他们获得的知识和技能来影响着我们这个时代。本学院获得美国律师协会认证，是美国法学院协会的特许成员。法学院位于市区附近的 GW 校园，被称为雾谷（Foggy Bottom）。

华盛顿特区华盛顿大学法学院的历史超过 145 年，与周围社区的生活密不可分。校园离白宫只有四个街区，可以方便地到达世界银行，司法部，国务院，联邦和地方法院以及无数的非营利和非政府组织。GW Law 的学生拥有无与伦比的机会向专家学者和尊敬的游客学习，有着充分实习和就业的机遇，同时享受城市充满活力的文化、夜生活和餐饮。

Acknowledgement

鸣谢

Give the sincere regards to George Washington University, Freshfields, RBB Economics, O'Melveny & Myers, Dechert, Allen & Overy and the Belt and Road Institute for the sponsorship and support to the meeting!

谨对乔治华盛顿大学、富而德律师事务所、RBB 经济咨询公司、美迈斯律师事务所、德杰律师事务所、安理国际律师事务所以及"一带一路"人才培养与法律研究院对本次会议的支持和赞助致以诚挚的感谢！