

## **The Public Interest-Defense in Cartel Offenses and Chinese Antimonopoly Law**

### **--The experiences and illuminations from a Hybrid of European-German Law and Chinese consideration**

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#### **Abstract:**

The Antimonopoly Law of People's Republic China (AMLC), which is already in effect since 1.8.2008, is a Hybrid of European Competition Law and the rules of German Act against restraint Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB), but some of which are deleted by Germany in order to harmonize with the European Competition Law are adopted by Chinese Lawmaker with their own consideration. A very good example for that is Art. 15 AMLC, which orientates towards Art. 101 para. 3 TFEU but includes the exceptions of cartels from prohibition in older GWB before its 6. and 7. Amendment, e.g. cartels for Environmental Protection, defense against natural disasters and economic structural crisis, even export and import cartels, which protect the reasonable interest in the international trade and cooperation, while Art. 15 AMLC has not the explicit principle of proportionality.

As government officials, lawyers, and scholars from China and around the world recently gathered to celebrate the fifth anniversary of AMLC, it's to mention that there are also some cartel cases with Public Interest-Defense in China or involved by Chinese Company in USA: the association of Companies in the City Shenzhen for guarding against injurious insects want to keep a limit price for their service and has gotten support by Chinese courts according to Art. 15 AMLC; the associations of publishers aim to restrain the resale price of the new books to protect the variegation of the publication and have applied for an exception from cartel probation; the associations in the cement industry have asked for an exception in order to survive in the background of capacity surplus and strict rules for environment protection; the Chinese solar panel Companies have been issued by one company of USA because of fixing dumping price, but it is allowed by Art. 15 AMLC and is helpful to avoid the destructive price competition. But besides the Public Interest-Defense the economics interests hide in all of these Cartels. There are no robust proofs which suggest the companies or associations have no alternative to protect the Public Interest served by their cartels exempt from restraint the price competition.

If the competition authorities accept the cartels with Public Interest-Defense, should the companies harming the Public Interest be required by the authorities to give the commitments which are good for Public Interest but involve fixing price? In three cases the Chines local authorities have just forced the undertakings that have cartels in restraining the stable supplies to raise the price of sugar, herbal medicines and beach sands. If that means a resurrection of plan economic and bring other problems like inefficiency, then why can man believe in the

cartels by the undertaking themselves, especially fixing price, will service the Public Interest or limit the damage of Public Interest efficiently?

The story of AMLC has proved again that the deletion of the exceptions because of Public Interest consideration by 6. and 7. Amendment of GWB was right: for attainment of the objectives which good for Public Interest, it is not the most important thing to judge which kind of Public Interests or to evaluate how much the consumers now or in the future gain the positive externalities or reduce the negative externalities; two conditions for the Public Interest-Defense are just (1) the indispensability of the cartels to realize the Public Interest, and (2) protection of the functional competition from elimination. Even one cartel reach the two conditions and success the Public Interest Defending, it should neither discriminate the other competitors from other region or the potential competitors nor hinder the four freedoms in the single market. The last point is not only necessary for Dutch Authority, but also for Chinese Authorities to be noticed, because the open market entrance could guarantee the functional competition between the members of the cartel for Public Interest and the new comer or the potential competitors and make the achievement the Public Interest efficient.