Study on the Financial Supervision and Anti-Monopoly Regulation of Integration of Industry and Finance — In View of Confronting Global Financial Crisis and Mitigating Domestic Financial Risks

Abstract  With governmental loose control in the major global economies since 1980s, the integration of industry-finance capital generates group companies. The integration of industry and finance (hereinafter as the “IIF”) is on the way to gradually become the mainstream of the world. It is needed to reconsider the IIF in light of the current global financial crisis. The IIF expands economic scale and increases efficiency, bringing two challenges in practice: financial risk overlay and anti-competition of the market power. What is more, the formation and abuse of market power will amplify the effect of risk overlay. To mitigate financial risks and protect market competition and to improve the regulation of the IIF, it is needed to improve both financial supervision and anti-monopoly regulation, as both are crucial.

Keywords  IIF, financial supervision, financial risk, financial crisis, monopoly and restriction of competition, anti-monopoly regulation
1 Definition of the IIF and the Significance of Its Regulation

1.1 The IIF

1.1.1 Financial Capital and the IIF

The West in a long time studies the IIF through a traditional financial capital theory, who believes that the IIF is just an economic phenomenon that industrial monopoly capital and bank monopoly capital merge together to be financial monopoly capital. To better understand the IIF, we need to first briefly review the theory development and connotation of financial capital.

The earliest study on financial capital is the capital accumulation theory of Marx and Engles. This theory holds that when capitalists pursue profit maximization, the capital tends to accumulate in these two ways: On the one hand, means of production separate from labors day by day; on the other hand, means of production concentrate after the separation, which turn freely competitive capitalism to monopoly.1

Engles also expounded the dialectical unity of competition and monopoly. He said that “...competition is based on interests and interests generate monopoly. In short, competition turns into monopoly. On the other hand, monopoly cannot hold back the tide of competition and it may trigger competition by itself.”2 Therefore, the capital accumulation theory has already scientifically foreseen the inevitability of the generation of monopolistic financial capital. Lafargue firstly proposed a concept of “financial capital” in his article American Trust and its economic, social and political effects (1903). He pointed out that with the expansion of industrial capital, the capital of the industry became more and more concentrated, which further promoted the concentration of bank capital. The merger of two kinds of capital ultimately formed a special kind of capital, i.e., financial capital.3 Rudolf Hilferding further developed the financial capital theory and demonstrated the monopoly problem after the formation of financial capital in his famous work Financial Capital (1910) that hailed as “Continuance of Das Kapital.” He defined financial capital as currency capital that was controlled by banks and used by industrial capitalists, and regarded credit and joint stock company as a powerful lever to stimulate the generation of financial capital. The bank capital and industrial capital, being induced by joint stock

1 马克思恩格斯全集第 23 卷 (Selected Works of Karl Marx and Friedrich Engels, vol. 23), People’s Publishing House (Beijing), at 688 (1972).
2 马克思恩格斯全集第 1 卷 (Selected Works of Karl Marx and Friedrich Engels, vol. 1), People’s Publishing House (Beijing), at 688 (1972).
3 拉法格文选下册 (Selected Works of Lafargue, vol. 2), People’s Publishing House (Beijing), at 212 (1985).
company’s “huge venture profits,” further united and turned into monopoly.4 Lenin critically inherited previous research results and became a master of financial capital theory. In his book *Imperialism: The Final Stage of Capitalism*, Lenin made a penetrating statement: “The history and content of financial capital is the concentration of production and growth of the monopoly by such concentration; the merger or mixed growth of banks and industry.”5 By the 1930s, along with the transformation of corporate governance theory from “shareholder-centered” to “board and manager-centered,” Adolf A. Berle and Gardiner Means proposed “manager revolution,” namely “manager control.” At the same time, Wright Patman, David M. Koz, etc. advocated a theory of “financial institution control.” They believed that various kinds of financial institutions rather than corporate managers controlled large corporations. The aforesaid theories about financial capital generally adapt to the researchers’ specific background of a transformation from freely competitive capitalism to monopoly imperialism, and to some extent reveal the integration of bank capital and industrial and commercial capital.

Unlike traditional analysis of political economics, in recent years, Oliver E. Williamson,6 Aoki Masahiko, Yingyi Qian, Shu Patrick, Joseph Stiglitz and other contemporary economists deepened the study of financial capital from aspects of the bank-corporation relationship or market internalization. Their researches focus on the intrinsic motivation and economic performance of the IIF, incorporate it into theories of financial economics and development economics, and thereby expand research methods of traditional financial capital theory.7 Some Chinese and foreign scholars thus believe that the IIF has the same implication with financial capital. That is, the IIF is just a phenomenon that industrial monopolistic capital and bank monopolistic capital merger together to be financial capital. This definition can be interpreted from the following two aspects: (1) The IIF comes from the fact that operators in capital market perpetually pursue capital appreciation, which is the result of the merger of industrial capital and bank capital impelled by their common goal. (2) The IIF in essence is capital combination, which is the inter-infiltration of industrial monopolistic capital and bank monopolistic capital. Up to now, industrial capital

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5 列宁选集第 2 卷 (Selected Works of Lenin, vol. 2), People’s Publishing House (Beijing), at 769 (1990).
6 Oliver E. Williamson, professor of economics at the University of California, Berkeley, the 2009 Nobel Laureate in economics.
has developed into all industrial and commercial capitals except financial capital, and bank capital has become a comprehensive system of financial capital (still bank capital based), including banks, securities, insurances, trusts, funds and so on.

1.1.2  The IIF’s Economics Implication and Its Juristic Significance

The integration of industrial economy and financial industry is called the IIF, which is referred to as the IIF.\(^8\) Firstly, it is an economic concept.\(^9\) Different from the research from a legal point of view, experts on industrial organization and financial economists in western counties today carry out the economic study on the IIF in a way of analyzing patterns and approaches of integration, failure of capital market and replacing by internal organization (internalization), organization innovation’s impact on corporate performances and the relationship of large business conglomerate and anti-trust policy.\(^10\) Most of their conclusions are positive. The majority of them believe that the IIF facilitates the formation and generation of economies of scale, economies of scope and synergy effects.\(^11\)

In economic circle of China, some representative definition of the IIF: (1) The IIF is just industry and commerce infiltrating into each other through equity relationship and realizing mutual transformation and direct blend;\(^12\) (2) the IIF is

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\(^8\) See Yan Fu, 产融结合之路通向何方 (Where Does the Integration of Industry and Finance Go), People’s Publishing House (Beijing), at 11 (2003).

\(^9\) The IIF falls into the scope of industrial organization theory and financial economics. According to the author’s research, developed countries have discussed and studied the IIF and joint operation of bank and company widely and deeply since late 19th century, while the economics in the Mainland of China began to pay attention to this issue until 1980s. In the beginning, they introduced foreign theory and practice of the IIF. Until 1990s, they began to study it based on the reality of China. The representative of the early study on this issue are two papers: (1) “The Integration of Industry and Finance: the History in Developed Countries and the Enlightenment to China” by Professor Yang Li, published on “Economics of Finance and Trade” (no. 9 1997); and (2) “System Foundation of IIF” written by Professor Jie Wei, published on “Finance & Economics” (no. 5 1997). Nearly 10 years later, Chinese legal scholars began to study on the IIF, and they just mentioned it when discussing legal issues about financial group and financial mixed operation. Previously, no specialized legal works are on this issue.


\(^11\) See Yong Yang, 金融集团法律问题研究 (Study of Legal Issues on Financial Conglomerate), Peking University Press (Beijing), at 87 (2004). Although the dispute on IIF or separation of industry and finance has not stopped, more and more industrialized countries have IIF to different extents since 1980s.

\(^12\) See Zhang & Yang, fn. 7 at 19.
a capital combination of industrial sector and financial sector and an effective form of accelerated concentration of capital;13 (3) the IIF is a combination of some functions (including economic functions and political functions) of capital in certain system structure.14 The third definition mentioned above is too broad as it includes political functions. The first two definitions precisely summarize the economic essence of IIF from different perspectives.

From a legal point of view, the IIF generally is a combination of financial industry and industrial and commercial enterprises through legal means such as credit and loan, interest, concurrent staffing and others. It is an essential product of the full marketization of industrial and commercial enterprises and full commercialization of banking industry and a combination of the input-output process of industries and the process of circulate necessary funds in financial industry. Market is the best place for industrial capital and financial capital to pursue capital appreciation. Competition mechanism triggers effective combination of industry and finance. The effective combination of industry and finance is a process that the finance promotes the development of industrial economy and the improvement of economic benefit in a maximum way.15 Any construction and improvement of the legal system of IIF is to realize the effectiveness of the IIF. In practice, the legal carrier for IIF is just an IIF-enterprise group consists of multiple financial institutions and non-financial subsidiaries, and finance is usually the major business of the group. That means that an IIF-enterprise group has a strong financial feature. A holding company can hardly be featured as an IIF-enterprise group if it has few financial institutions and limited total scale of financial assets.16 If the parent company of the group holds one or more financial institution, it is a financial holding company or the group is a financial group. However, if most of the subsidiaries of the group are non-financial industrial and commercial enterprises, the group does not have an obvious feature of IIF. For example, there is a kind of enterprise group dominated by industrial and commercial enterprises. The financial institutions in these groups are not dominant due to their small asset size and

13 See Hangsheng Xie, 产融结合研究 (Study of IIF), China Financial Publishing House (Beijing), at 1 (2000).
16 Some Chinese scholars classify enterprise groups into three types: industrial ones, financial ones and the IIF, according to the existence of industrial capital and the close connection between industrial capital and financial capital in the group. The author agrees with this classification since this theory is valuable from the view of anti-monopoly regulation and financial supervision. See Zhang & Yang, fn. 7 at 59–61.
limited number and weak impact on the industry, and these financial institutions
and enterprises in the group hold the stock of each other instead of being held by
the parent company of the group. This kind of group is called mixed business
conglomerate or financial group, which is not a typical IIF-enterprise group. But
if only an industrial and commercial parent company of this kind of group holds
financial subsidiary or is cross-holding with a financial institution, it should be
considered to be an IIF. So industry and commerce may also become the major
business of an IIF-enterprise group, such as GMAC in America, Baosteel Group
in China and Toyota Motor Corp. in Japan. They are all typical IIF developing
from industry to finance.17

The IIF can be interpreted either in a narrow or a broad way from a legal
perspective, according to whether the relationship between industrial sector and
financial sector is only credit or both credit and share. The general concept of IIF
includes not only the relationship of share under a narrow concept, but also a
close credit relation kept by business (as a basic link) between industrial sector
and financial sector.18 That is the debtor-creditor relationship, share holding,
controlling and concurrent staffing relation between industrial and commercial
enterprises and financial institutions such as banks, security companies and
insurance companies and so on.19 Under a narrow concept, the IIF mainly
presents in the relation of controlling and concurrent staffing, including one-way
infiltration from financial capital into industrial capital (or from industrial capital
into financial capital) and mutual both-way infiltration of industrial capital and
financial capital, which finally produces enterprise group of IIF (belonging to
conglomerate company in antitrust economics). Industrial capital refers to the
capital held by non-financial enterprises such as manufacturing enterprise,
transport enterprise, commercial enterprise and so on. Financial capital refers to
the capital held and controlled by financial institutions such as bank, insurance,
trust, security, fund, venture capital institutions and so on. The narrow concept of

17 Generally, the IIF can be divided into two types, one “from finance to industry,” and the
other “from industry to industry” according to whether the holding parent company of the
group is a financial institute or an industrial and commercial company. The first type is more
typical. But the second type “from industry to finance” develops better in China.
18 See Hun Zhu & Jinming Zhang, 略论当前我国的产融结合 (A Discussion of China’s Present
Integration between Industry and Finance), (3) 现代财经 (Modern Finance and Economics)
19 In a broad sense, IIF should include the case that the parent company of the group and its
members jointly invest in a finance company. But the industrial capital changes into financial
capital in a group and it just involves financial risks rather than capital concentration. Thus, it
needs not regulation of operator concentration and is not the object of this paper. However, if
the group or the holding company of the group mergers and controls other financial institution
through its finance company, namely “concentrate once again,” it will become the object of
this study as it belongs to the IIF in a narrow concept.
IIF is a deeper and mature one and the mainstream in developed countries since 1980s and it will be an inevitable future trend in China. Thus, this paper mainly discusses the narrow concept of IIF. It is notable that the IIF develops very fast in China since 1990s. Even the collapse of industry and finance empire DeLong Group in the late 1990s did not hold back such powerful development. Since 2009, SASAC supports the IIF with representatives of two tycoons PetroChina and Sinopec. The deputy director of SASAC Wei Li pointed in April that we must fully realize the importance and necessity of IIF. During his visit and research in PetroChina in May, Wei Li further pointed out that the IIF was an important way for central enterprises to promote their international competitiveness and sustainable development. For now, the typical cases of IIF in China include Baosteel Group, PetroChina, Haier, Orient Group, CITIC and so on.

What is the main difference between the definition of IIF in economics and in the science of law? The simplest explanation is that economics focus on “industry and finance” and “integration” themselves while the science of law places extra emphasis on the regulation of “integration” and its negative impacts. In other words, economics is not so interested in regulation and discipline and concentrates on the definition of the joint industrial capital and financial capital, how to build or select an effective mode of the integration and how to reduce cost, improve economic performance and increase capital appreciation by internalization. Instead, the science of law generally shows less interest in capital efficiency and capital appreciation. It focuses on the integration itself and the regulatory compliance of its behavior as well as regulating and disciplining the behaviors out of rule to maintain order, make full use of advantages, avoid disadvantages or achieve other legal purpose (such as consumer protection). The IIF is driven by a common goal of financial capital and industrial capital to pursue capital appreciation. In essence, the only source of capital appreciation is a substantial economy, especially the surplus value created by surplus labor in an industrial economy. The development of industries in substantial economy is the source of financial capital appreciation. Both economics and the science of law are concerned about the effectiveness of IIF. An effective IIF in a view of

21 See Xiaozhong Liu, 首肯中石油产融结合, 国资委思路骤变 (Approving the IIF of CNPC, SASAC Changes Its Attitude), (8) 董事会 (Board of Directors) 60–62 (2009).
22 See Williamson, fn. 10 at 59. Williamson considered that as “small capital market” mixed operation groups made the function of encouragement and flow control internal so as to improve business revenue.
23 Of course, besides concerning about the effectiveness, the science of law pays more attention to the regulation of IIF and the social justice and equity, which is extended from it and ensured by it.
economics refers to a process that the finance promotes the development of industrial economy and the improvement of its benefits in a maximum way, and the market competition mechanism effectively triggers the combination of industry and finance. The market price mechanism can effectively adjust the process of the IIF and test its effectiveness.\footnote{See Fu, fn. 15.} What the science of law focuses on is to make the IIF conform to the standard so as to ensure the normal functioning of the market competition mechanism and the protection of consumer through the construction and enforcement of law systems such as financial supervision and anti-monopoly regulation, thereby to achieve the effectiveness of IIF.

1.2 The IIF to be Regulated by Law and the Relevant Legal Norms

The IIF itself is a double-edged sword, which can boost the economy under proper use and vice versa.\footnote{See Liu, fn. 21.} The IIF, with the two sides, has made many famous enterprises (groups) at home and abroad to be broken down. The empire DeLong, having great influence in China and advocating the concept “industry + finance,” collapsed suddenly. Its hurt to the market still remain. In recent international financial crisis, cases like the collapse of Lehman Brothers, Citigroup’s spin-off and General Group’s bankruptcy protection are also vivid. We do have reason to worry about the IIF of nationalized business represented by CNPC and Baosteel. We must not repeat the tragedy of DeLong and the mistake of Lehman Brothers and Citigroup. The value of legal norms is to pursue the regulatory compliance of IIF and to realize its effectiveness thereby. We can study the regulation of IIF from various aspects such as the company law, corporate group law, financial law, anti-monopoly law, financial holding company act.\footnote{The development of IIF brings new challenges to the science of law, especially corporate law, financial law and anti-monopoly law rather than investigating the connotation of IIF from these aspects. It requires the science of law to strengthen the study of IIF so as to solve the problem of legal gaps and regulatory loopholes.} The significance of legal regulation of IIF in China actually can be discussed and analyzed by the legal features of IIF and its carrier—an IIF enterprise group. In general, the IIF and its carrier mainly have the following features.

1.2.1 The Entities of IIF Is Engaged in Cross-Regional and Even Cross-Border Financial Business and Diversified Operations

The entities of IIF, namely IIF enterprise groups, are mainly engaged in financial businesses which shall be no less than two types from banking, securities, insurance and other financial business. In other words, an IIF enterprise should
have entities like banking subsidiary, security subsidiary, insurance subsidiary or others. In addition, such entity also has non-financial business in some degrees, such as industry, commerce, real estate investment and trade, construction and transportation and so on, forming a complete IIF. The diversification of IIF is to realize a high degree of complementation and share of financial resource between different businesses.\(^{27}\) The organizations of IIF provide diversified financial services to satisfy customer's demand of comprehensive financial services, so as to expand client resources with a maximum efficiency and to obtain a stable resource of revenue. Every business unit in the group has its own advantages and customers. Under the high integration of the group, they work corporately and play a team advantage. All the subsidiaries in the group are independent legal entities. They accumulated a large number of superior financial resources at an early stage and shared the resources within the group. The diversified and cross-border operation, on one hand, is good for the synergy effect and economics of scales; on the other hand, it brings many challenges to the domestic financial supervision. The first one is the stability of the banking system. According to the ground that America long hold the separation policy of industry and finance since 1990s, when a bank’s non-financial affiliate falls in financial crisis, clients will treat the bank and its industrial and commercial affiliate equally which will threaten the bank’s stability, even if the financial sector and the industrial sector are independent legal entities in the group. Inter-group transactions cause risk transference. The second challenge is the conflict of interests. The IIF is likely to cause conflict of interest between banks and their industrial and commercial affiliates or other market operators, which affects the due basic functions of banks and the operation and management of industrial and commercial enterprises.\(^{28}\) Thirdly, the domestic separate supervision system of finance cannot effectively respond to comprehensive management of finance in an IIF enterprise group. Regulatory loopholes make it much more difficult to face financial market with increasing globalization. In addition, our existing law has a strict financial supervision of IIF “from finance to industry” while there are still no legal regulation of IIF “from industry to finance.”\(^{29}\) This fully shows that the first legal barrier for IIF in China is how to improve the financial supervision.


\(^{28}\) See Yang, fn. 11 at 83–86.

\(^{29}\) Taking China as an example, there are large enterprises (generally state-owned companies) join, hold or actually control some financial institutions, forming integration “from industry to finance.” But this kind of integration drifts away from financial supervision and becomes the source of potential financial risks.
1.2.2 The IIF Is a Conglomerate Merger of Industry and Finance

The IIF is a product of cross-industry operation of finance and industry and commerce, which is easy to form monopoly power in the market and to generate an abuse of market dominance to limit competition, being exactly not the same as horizontal merger and vertical merger. That is, it is not exactly the merger of companies producing same or similar products, nor mainly concentration of operators which are supplier of each other. It is mainly mixed enterprise group formed by conglomerate merger and cross-industry operation of some financial and non-financial enterprises under the holding or controlling company in a group. The companies achieve concentration of operators through cross-shareholding, collectively holding and part-time personnel and form a closely connected and interactional enterprise group with the same interest leading by financial enterprise or controlled by industrial and commercial enterprise, coordinately providing a variety of businesses or multiple services. According to an economics analysis, the risk of reciprocity and cross-subsidies is high in the enterprise group. This kind of operator concentrations should be regulated from the aspect of controlling enterprise mergers by China’s Anti-Monopoly Law in order to avoid excessive and improper concentration of operators. In special enforcement practice, it does not need to be treated so strictly as horizontal merger. The conglomerate merger cases in the IIF should be analyzed and treated case by case according to the theory of potential competition. As the group of IIF enterprises includes both financial institutions and non-financial institutions, the group’s total assets are generally much larger than most independent financial institutions and business enterprises. All the financial or non-financial institutions are working in coordination with a common goal of the group, which has a synergistic effect of 1+1>2. Thus, the influence of the group in the economic and financial operation is often larger than that of the general independent financial institutions. The group may easily abuse of market dominance to restrict competition or impede effective competition, driven by the pursuit of profit after the formation of market monopoly power through the excessive concentration.

32 Just as David Einhorn, the president and founder of hedge fund “Green Light Capital” said on October 19, 2009, “The lesson that Lehman, AIG brings to us is not that the government shall prevent them from bankrupt, but is the scale of Lehman, AIG should not expand so large, to the extent that it had harmed the entire financial system’s security. See Zhixiong Zhang,雷曼教训 (Lehman’s Lesson), at http://www.caijing.com.cn (last visited November 9, 2009).
It is the Anti-Monopoly Law that can effectively regulate financial industrial group’s abuse of market dominance and the removing of barriers to competition. Based on the above analysis, we can see that the IIF is an economic concentration process, the description of the status, and the definition of results. IIF involves many legal issues and shall be regulated by laws. There are two important points in the process of IIF. Firstly, the financial risk is accumulating and passing away by cross-industry business. Secondly, operators become market powers due to excessive concentration, restrict market competition or limit effective competition and infringe rights of consumers. We should regulate these two big IIF issues by laws of financial supervision and laws of antimonopoly. Meanwhile, we should also pay attention to the reaction there between and the coordination during the enforcement so as to have an effective IIF. The importance of financial supervision is well known by the academics and practitioners. There are many theoretical research results and the corresponding legislation and enforcement are improving. Comparatively, because the China’s Anti-Monopoly Law is newly promulgated and implemented, the anti-monopoly value of IIF is not known by the public. No need to say that besides maintaining the market competition order, the Anti-Monopoly Law’s regulation on excessive and improper concentration of operators in IIF will control and mitigate the financial risks. Thus, it is the reason that this article will focus on the demonstration of anti-monopoly regulation and the functional complementation of IIF financial regulation.

2 Approaches for Legal Regulation of the IIF: Financial Supervision

2.1 The Status of Financial Supervision in China

China’s current financial regulatory system is gradually developed and established along with the deepening of financial sector reform. Prior to 1992, the People’s Bank of China was mainly in charge of China’s financial

33 Besides involving the financial supervision and anti-monopoly rules, IIF also involves such issues as the industrial policy and supervision. But the former two are the most important legal issues. To elaborate the centralism, this article mainly elaborated the former one and intended to neglect other questions.

34 Certainly, IIF will also involve legal departments with corporate laws, financial holding company laws and tax laws, for instance, enterprise groups with mixed industries (such as Citigroup), their voluntary stockholder’s action involves corporation tax laws and securities laws; but most importantly, the main question depends on supplementary solution in the financial supervision laws and anti-monopoly law as well as two laws’ interaction. This is also what this article studies on.
supervision. In 1992, the State Council established the Securities Commission (in 1998, incorporated into the Securities Regulatory Commission of China) and the China Securities Regulatory Commission, replacing the central bank to supervise securities institutions and capital market. The separation of regulatory system was initially established. With the establishment of Insurance Regulatory Commission of China in 1998, the authority to regulate insurance agencies and insurance market was separated from the People’s Bank of China’s financial regulatory system, marking the continuous separation of regulatory systems. In 2003, the Banking Regulatory Commission of China was set up, mainly supervising banks, financial asset management companies, trust companies and other deposit-taking institutions. The People’s Bank of China is mainly responsible for monetary policy-making and the currency regulation, which marked that China’s financial supervision authorities composed of the CBRC, CSRC and CIRC, and the sub-sector regulatory system of financial industry finally established. In terms of specialization, the separation of regulatory system regulates in a specific and unified way, which plays under a special context of the primary stage of China’s economic development, financial separation and financial isolation.

2.2 The Impact of the IIF in China’s Current Regulation System

Since 1990s, the financial concentration is wide-spread all over the world under the tides of economic globalization, financial liberalization and finance. The financial industry is experiencing the unprecedented centralism and the merge in three aspects: the merger of banks, the mixed financial management and the IIF. Take the banking industry as an example, over 4000 banks of the main industrialized country were under reorganizations or acquisitions and mergers in the 1990s, with the volume of trade amounts up to 1,200 billion US dollars. To

35 “Financial liberalization” means that financial deregulation and relaxed, allow banks, securities, insurance and other financial products to go to the comprehensive management even the industry and finance from isolation toward integration. It makes the financial system instable while it brings national economic growth and efficiency to the enforcement, and has brought great challenges to financial supervision. “More Finance” means the focus of economic activity on the industrial sector (real economy) turned to the financial sector (the virtual economy). Since the 1980s, the performance in developed countries is obvious. See Peiwei Yu, 美国经济日益金融化 (American Economy Becomes Increasingly Financial), 中国 经济时报 (China Economic Times), March 26, 2007. But over-reliance on financial innovation and the virtual economy is very dangerous. The global financial crisis in 2008 is a good example.

36 See Jun Huang, 商业银行：竞争、集中和效率的关系研究 (Commercial Banking: Studies on the Relationship among Competition, Concentration and Efficiency), China Renmin University Press (Beijing), at 2 (2008).
be adapted to the worldwide current tendency for the mixed management in finance, China’s financial industry will undoubtedly move from the separate management to the convergent financial management.\(^{37}\) Specially, the financial comprehensive management and the industry-finance union will have significant impacts on the financial supervision system. Specifically speaking, there are three impacts in this regard.\(^{38}\) The first one is about challenges for the financial supervision legal framework. Due to the absence of laws, it is under urgent need to promulgate “Financial Holding Company Act,” “Enterprise Group Act,” “Foreign-Capital Financial Institution Act” and so on. Laws and regulations serving comprehensive management supervision on bank, securities, and insurance shall be timely updated and improved. There shall be feasible implementing regulations and measures supporting the existing financial supervision laws and regulations, so as to solve “the difficulties in the enforcement of laws.” The second one is about the challenge to the financial supervision. Under the separate regulation system in China, the finance supervision still focuses on the financial institute approval and the management compliance review. It still has more work to do with the daily operational risk supervision such as the risk superimposition and the risk transmission arising from the financial separate management and the industry-finance union. With the ongoing development of the financial separate management and the industry-finance union, there is an emerging demand of the sole financial supervision.\(^{39}\) The third one is about the challenge to the coordinated mechanism of financial supervision. Chinese Banking Regulatory Commission, Securities Supervisory Association and the Insurance Regulatory Commission signed a “Memorandum of the Division of labor and cooperation in Financial Supervision” in June 2004, which established a joint taskforce on supervision and proposed an idea of “the main major-domo” in relation to the finance holding companies' comprehensive management principal business. In 2007, the national finance workshop also proposed that we have to enhance the financial supervision capability, promote the financial supervision system, strengthen the coordination in financial supervision, and improve the financial legal system.


\(^{38}\) See Jianming Song, 金融控股公司理论与实践研究 (Study on Theory and Practice of Financial Holding Company), People’s Publishing House (Beijing), at 366–69 (2007).

\(^{39}\) The unitary regulatory system, also known as centralized supervision, is that a single integrated regulator comprehensively supervises the financial business of an economic entity, such as banking, securities, insurance. The author believes that to establish a unified supervision of financial institutions is in coordination with sub-sector regulation. Some scholars do not agree with that at this stage we shall establish a single financial regulation. They think that our regulation mode has to be gradually changed from institutional to functional regulation. See Song, fn. 38, at 367.
Therefore, considering the above three impacts, the Chinese finance supervision system has to keep pace with the times. Countries which traditionally adapt the financial comprehensive management such as German and England, are trying to establish the sole financial supervision system in the near future through legislation. The same thing happens to the countries which implement the financial comprehensive management gradually since 1980s. At present, it is after all a temporary choice and solution for China to rely on the coordinated cooperation of the Banking Regulatory Commission, the Securities Regulatory Commission and the Insurance Regulatory Commission, based on the separate regulation. However, we have to establish the sole financial supervision system in the end. This important work can be carried out together with the legislation and promulgation of rules on finance holding company.

Unlike the financial comprehensive management, the IIF forms a factual cross-industry mixed management of financial industry and the industry and commerce. This is the biggest challenge to financial supervision in a country with IIF, which serves as important grounds for some scholars to oppose the IIF and some nations’ policy to separate industry from finance. The impact caused by this kind of cross-industry management on Chinese existing finance supervision system is self-evident.

2.3 The Limitations of Financial Supervision on IIF

The text above mainly discusses the impacts of the IIF and cross-industry management on Chinese finance supervision system. The author believes that, even the unified supervision system is unable to effectively regulate the IIF and cross-industry management. Thus, it needs to establish “the super supervision system” in which the Central Bank is a leader, supporting by the financial supervision institutions and anti-monopoly organization. There is a doubt on high cost of such a super supervision system, but we shall not doubt it in front of the huge cost that international finance crisis brings to the whole world. Even if the current conditions are not sufficient to establish this system in a short term, we shall at least actively plan to establish a coordination mechanism between finance sole supervision system and anti-monopoly rules at present stage.

The international finance crisis caused by American loan crises in 2007 is bringing havoc the entire world. Under the trends of financial liberalization and

40 In China, IIF enterprise groups “from industry to finance” (called “mixed operational conglomerate” by some scholars), such as Baosteel Group and bankrupted Delong Group, are beyond the financial supervision as they do not belong to financial institutions. At present, only the “important (cross industry) investment reporting system” of central enterprises to SASAC restrains and regulates it. Thus, there are great system deficiencies, which will inevitably create huge financial risks.
the associated finance comprehensive management and interdisciplinary management, China, as a country still in a process of industrialization and improvement of market economy, is in its urgent need to face and solve the following crucial issues, i.e., how to properly handle the complex relationships between speeding up national economic development and expanding opening up to the outside world and maintaining the financial stability to mitigate finance risks and protecting the state economy security and the benefits, so as to achieve the effectiveness of IIF. Because the main developed countries relaxed the control to stimulate financial market concentration like bank amalgamation, financial comprehensive management and IIF since 1980s, it is widely believed that the increasing centralism strengthens the market power, which imposes negative influence on the competition and efficiency. In 2003 and 2005, World Bank and European Central Bank respectively held the seminars “centralism and the competition of the bank” in Washington and Brussels to specifically study on this issue. Therefore, even there is an effective solution for the IIF, i.e., the financial regulation issues are well solved under a legal framework, problems like the limitation of market competition caused by excessive concentration of market power and the composition and enlargement of financial risk caused by IIF cannot be solved.

In China, the IIF is mainly conducted by large enterprises like the central enterprises in a way that the industrial capital has equity interests in or even controls the financial institutions, namely, from products to finance. Their economic capability and operation scale is big enough. After they become IIF enterprise groups with enlargement of its superimposed effect and propagation effect, their market position and economic strength increase a lot. Such powerful operators are beyond the financial supervision as they are non-financial institutions, and we can easily see their internal accumulated financial risks. Therefore, when talking about the improvement of laws no Chinese finance supervision, we must pay high attention to the reality and development of IIF, to include the enterprise labeled of “from industry to finance” in the financial supervision, so as to make sure that the financial risks are under supervision and control. In order to achieve this goal, the financial supervision on IIF shall be transferred from organization supervision to functional supervision and target supervision. Secondly, we need to strengthen the international harmony of financial supervision. The cross-border feature of IIF and the globalization of financial service make it impossible to limit supervision of the enterprise and financial service within a country. The current financial crisis warns us that, we have to strengthen international cooperation of financial supervision and be

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41 See Huang, fn. 36 at 10.
42 See Yang, fn. 11 at 189–92.
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dedicated to establish a new international finance supervision system, so as to
to ensure the stable development of international and domestic financial system and
the effective protection of financial benefits. Last but most important one is that
we should coordinate the legislation and enforcement of financial supervision
and the anti-monopoly rules to make them functionally supplementary to each
other. Only financial supervision on IIF is not enough. The anti-monopoly
rules on IIF can not only maintain the effective competition of the market, but
also mitigate and eliminate the financial risks. This point of view will be
discussed below specifically in the paper.

It is too early to assert that the financial crisis from Wall Street has already
passed today. Each country faces a practical issue of how to resist the
international finance crisis as well as mitigate its own financial risks. On
February 2, 2009, Premier Wen Jiabao gave a lecture at Cambridge to appeal to
the world, “this great financial crisis cautioned people that, we should reconsider
profoundly on the present economic system and economic theory.” This crisis
forced the people to realize that the market is not everything, and cannot be
indulged. Since the crisis, American president Obama reiterated many times
government’s importance when the market is malfunctioned. That is to
strengthen the supervision of finance and enhance the anti-monopoly law to
regain the market order and rebuild the consumer’s confidence. In China, the
present enterprise group with a combination of finance and industries and
commerce is beyond the financial supervision. We should mitigate and eliminate
finance risks during the process of pursuing economy scale, the scope economy
and cooperative effect. The world is now reconsidering the reasons for this crisis.
Some Chinese realized that of the entire financial crisis is closely related to the
financial monopoly. The author holds that the crisis is caused by the relaxation
of both America’s finance supervision and the antitrust policy. This case
teaches us that the financial supervision and the anti-monopoly rules should be

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43 The financial crisis in 2008 let people realize the importance of the international finance
supervision as well as the various countries’ finance supervision coordination. In fact the
anti-monopoly caused by financial comprehensive management and IIF rules and the financial
supervision are equally important.
44 See Neal R. Stoll & Shepard Goldfein, President Obama’s Centrist Antitrust Enforcement,
45 See Yitao He, 金融垄断才是金融危机的根源 (Financial Monopoly Is Just the Root of
46 From the subprime crisis in 2007 to now, many scholars reconsidered the reasons. Someone
thought that it was because of the US government’s relaxation of control, and somebody
thought that it was because finance innovation in Wall Street’s was beyond supervision.
Someone thought that financial monopoly was the root of crisis. It should say that each
viewpoint above reflects from one side or a certain fact, which is not very comprehensive. The
excuse that blames China’s high deposit is not worth refuting.
enforced together to counter the risk accumulated by the excessive concentration during the development of IIF in China, to resist the financial crisis and prevent domestic financial risk, and to maintain China’s economic development and the market competition vigor.

3 Approaches for Legal Regulation of the IIF: Anti-Monopoly Regulation

3.1 The Significance of Anti-Monopoly Regulation of the IIF

Compared with financial supervision, the significance of anti-monopoly regulation of IIF has not been well recognized in China. Therefore, the most urgent legal issue of IIF is not financial supervision but anti-monopoly regulation.

In terms of anti-monopoly law, as indicated by the Financial Capital Theory, the IIF is a specific form and important way that a monopoly is formed by the concentration of market economic power.\footnote{Concentration of market economic power is also called Enterprise Integration, in the Anti-Monopoly Law of China enforced in 2008 is called concentration of business operators. Without specific indication, this paper uses these concepts.} In France and Taiwan region of China, concentration of market economic power is called “Integration.”\footnote{Zhimai He, 公平交易法专论 (Monograph on Fair Trade Law), China University of Political Science Press (Beijing), at 170–72 (2004).} Undoubtedly, the IIF is a specific form of enterprises integration. In light of anti-monopoly legislations around the world, the market integration shall be subject to the anti-monopoly regulation at certain level and scale. While the concentration of business operators investigated under anti-monopoly law was mainly performed as monopolized economic consolidation. The core of anti-monopoly law is against the excessive concentration of market economic power and prevents the abuse of market monopoly power to restrict an effective competition. From a historical prospective, we know that the excessive concentration of financial capital and industry capital may restrict the free competition and even lead to economic crisis.\footnote{See Hilferding, fn. 4 at 227, 250.} In addition, the competition restrictions resulting from mutual transaction by enterprise group may also occur in the entity of IIF.\footnote{Wenyu Wang, 控股公司与金融控股公司法 (Holding Company and Financial Holding Company Act), China University of Political Science Press (Beijing), at 209 (2003).} The IIF enterprise groups having industries and subsidiaries engaging in cross-industry business and a verity of financial service such as bank, security, insurance, foundation and futures, which played a pivotal role in the...
economic and financial system. They can occupy a large market share by relying on their advantages of technology, capital, scale and talents. These market giants seek the huge economic profit by rapidly increasing business scale and scope which sole financial institute can hardly obtain. The high concentration of these resources is quite likely to form market monopolies and help to restrict competitive behaviors. USA and Japan adopt separation regulation of industry and finance before 1990s, in order to avoid the financial companies making the business companies series. The evil thereof is that the commercial companies within an IIF group accept bank financing with favorable conditions, by which they get improper priority when competing with other independent commercial companies and then undermine the fair competition.

For China, proper concentration of IIF may adjust the efficiency of resource allocation, bring economic of scale and economic of scope and synergistic efficiency. In this economic crisis, mergers and acquisitions and economic concentration are prevailing in Chinese capital market. Central enterprises are especially active. The total amount of property rights transactions with central enterprises as either transferors or transferees has increase by twice in 2008. However, the excessive concentration of economic power may have many negative impacts and cause unfair competition. In practice, the IIF in China tends to extend the monopoly of state-owned banks and transnational financial giants to the industry and commerce, leading to the “Monopoly Chain,” Meanwhile, financial risks are easily to be accumulated by cross-industry pool operation and integration operation and then to be transferred within the group. With the continued concentration of economic power of an IIF group, the financial risk expanded geometrically. Finance supervision is powerless in this regard. It requires the anti-monopoly law to mitigate and defuse the financial risk by regulating the excessive concentration and abuse of market power. Thus, it is really theoretically and practically valuable to study on this issue from a perspective of anti-monopoly regulation, considering Chinese rapid development

51 See Mark J. Roe, Some Differences in Corporate Structure in Germany, Japan and United States, 102 (8) Yale L. J. 1927 (1993).
53 Generally, there are mainly four drawbacks: Firstly, it makes use of the subsidy of financial safety net from the government to obtain unfair competitive advantage; secondly, it causes that technology develops slowly and the quality of management is not good enough; thirdly, it closes specific market; fourthly, it goes against the increase of consumer welfare. See Yang, fn. 11 at 81–82.
54 From the development trend, it does not rule out the possibility that the monopoly chain of industry and commerce extends to finance and forms a reverse monopoly chain.
55 See Song, fn. 38 at 78.
of IIF, accumulation of financial risks, urgent need for the legislation of anti-monopoly law and challenges from the global financial crisis. According to the interpretation of Article 7 of China’s Anti-Monopoly Law by legislators, “industries having dominant positions in national economy and crucial to national economic lifeline and state security include natural monopoly industries and public utilities, as well as financial industry. The paragraphs one and two of this Article on the one hand aim to emphasis the national protection of these industries; on the other hand show that this kind of protection is not exempted or excluded by the Anti-Monopoly Law. The state-owned enterprises are also subject to the regulation of anti-monopoly laws.56

The international financial crisis once again convincingly proves that a market economy without supervision and regulation is deemed to be failure. We must well balance the relationship between financial supervision and anti-monopoly regulation and coordinate them so as to maximize the effect of regulation both at home and abroad, which in short term can help to resist and resolve current financial crisis and in long term can prevent and mitigate the domestic financial risks.

3.2 Monopolistic Behaviors and Its Negative Impacts Caused by IIF

3.2.1 Monopolistic Behaviors Caused by IIF

Generally speaking, the financial industry is a kind of special industry with strong externality. The consequences of its failure operation or even bankruptcy are disastrous, which is more serious than that of general corporation. Therefore, the competition in financial industry shall not be too intensive, so as to keep their operation stable and avoid bankruptcy. However, it does not mean that we have to indulge the formation and development of monopoly force in the financial industry.57

In order to facility the precise implementation of anti-monopoly regulation, it is necessary to classify monopolistic behaviors of the IIF. Some scholars, based on their investigation, believe that the most likely monopolistic behaviors in an IIF group include: (1) Financial subsidiaries, especially depository institutions, provide other subsidiaries of the group with financial support incompliance with standards or below the reasonable market price; (2) financial subsidiaries refused

57 See Song, fn. 38 at 345.
to provide financial products or services to the competitors of other subsidiaries of the group so as to boycott to ensure the market advantages of other subsidiaries; (3) mandatory tying, i.e., threatening the fixed clients by raising the financing costs or denial of service to force the clients to accept the service of the subsidiaries.\footnote{See Hai Yan, 銀行控股公司法律制度研究 (Legal System Research on Financial Holding Companies), at http://www.cel.cn (last visited April 21, 2008). Similar opinions by EAG, see Alexander Raskovich, Should Banking Be Kept Separate from Commerce, Economic Analysis Group Discussion Paper, August 2008.} But the author believes this conclusion is bias. It fails to contain all the monopolistic behaviors caused by the IIF.

According to Article 3 of China’s Anti-Monopoly Law, we classify the monopolistic behaviors of an IIF group as follows: (1) monopoly agreements; (2) abuse of a dominant market position; (3) excessive concentration of undertaking. If the academics or the national supervision agencies fully understand the hazard of the monopoly of the IIF group, and pay high attention to both the theory and the practice, it is possible to legislate special rules or relevant implementing rules on the monopolistic behaviors of the IIF group. The subjects being regulated and the focus of such rules may be different from that of the Anti-Monopoly Law. However, the Anti-Monopoly Law classifies the monopolistic behaviors based on the combination of the market behaviors of undertakings and foreign advanced legislation, with sophisticated theories. Meanwhile, the special legislation must be in line with the framework of the Anti-Monopoly Law. Thus, the author believes that, it is relatively scientific and reasonable to classify the monopolistic behaviors of a financial group in accordance with the legal framework of the Anti-Monopoly Law and the actual market behaviors under the existing conditions.

### 3.2.2 Harm of Monopolistic Behaviors Caused by the IIF

Monopolies with monopoly force change the ratio of the market resource in terms of strength and behaviors, thus breaking the resource allocation system and market circulation system in a free competition environment, resulting in the lack of competition mechanism.\footnote{See Lawrence A. Sullivan & Warren S. Grimes, The Law of Antitrust: An Integration Book, Thomson West (Minnesota), at 213 (2006).} The main harm of monopoly is infringing the legal right and due rights of relevant interesting parties.

Under full competition, market rules can create a unified, open, competitive and orderly market framework, which ensure a fair and transparent entry and exit of undertakings. While monopoly ruin the rules. The harm of monopolistic behavior caused by IIF is mainly as follows.
First, it damages the unification of the market of financial market. Though, the information of financial industries is relatively transparent and consistent in the market, the development and growth of the IIF groups will definitely change this. They have informational advantages in market transaction. When a nonfinancial industry has shares in or controls an enterprise or when an enterprise is making a decision, the IIF enterprise group trend to force the relevant parties to accept their self-interested investment programs by taking advantages of its the market position or its superior position in information asymmetry, so as to affect the relevant arrangement of the enterprises, to eventually fragmentize financial industries and establish their own sphere of influence.60

Second, it damages access of the private finance to the financial market. The financial market operates under the tight supervision of the government, which to some extend caused the closure of financial market in the context of economic globalization.61 Especially in a relative closed financial environment of China, the competition of private capital even the foreign capital is limited.62 Therefore, the IIF group will try to avoid the domestic and foreign competition so as to maintain its current monopolistic position and to expand their advantages. Meanwhile, to consolidate its dominant position in China, they prefer closed financial markets as well. Specifically, they occupy most of market share by using its monopoly advantages and build barriers for the new entrant, especially for the private financial agency; or they influence policy on market access threshold which is in favor of them by using their government resources.

Third, it excludes competition in the financial market. Competition brings efficiency and efficiency brings about the development of science and technology and the emergence of new financial products. However, at the same time, this series synergistic effect reduces transparency of the market and profit margin, which is not conductive for the market force to pursue excessive profits.63 Therefore, the IIF groups, who pursue profit-maximizing and have

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62 The combination of state-owned monopoly and the monopoly of IIF does not leave enough system space and market space for the development of private finance. Although the five-year transitional period after WTO is expired, there are still limits for the access of foreign finance. The author thinks in order to safeguard the national economic interests and financial security, to some extent it is understandable for the State to make some necessary limitation for foreign finance. However, the State should provide strong support to the private finance so that there is moderate competition in the domestic financial market in order to optimize the allocation of financial resources.
market power, will take the competitive private financial institutions or multinational financial group competed as barriers to prevent them from gaining the excessive profits by using their monopolistic advantages. That is why the IIF groups would like to avoid market competition in the process of economic operation.

In addition, from a prospective of the main participators in the economic operation, the monopolistic behaviors of the IIF groups will seriously damage the interests of competitors, as well as the interests of consumers and the public.

As for the query that anti-monopoly regulations are not conductive to form scale economy for the IIF, the author believes that what the modern anti-monopoly law prohibits against is monopoly behaviors, rather than monopolistic conditions. It is not an issue on the legitimacy of an IIF group, which is just an economic organization. The monopolistic organizations shall be deemed illegal and to be restricted and prohibited by the anti-monopoly law only in the event that they are established for the purpose of restricting competition, or against the market or that the organizations conduct monopolistic behaviors impeding market competition and the order of competition. In other words, antimonopoly law is not against economy scale and large enterprises group, but against the abuse of dominant market position by the operators who are restricting competition. China’s Anti-Monopoly Law protects the fair and free competition, which at the same time promotes the healthy development of our economy scale.

3.3 The Routes of Anti-Monopoly Regulation for the IIF Groups

3.3.1 Implement the Control of Concentration of Undertakings for the IIF

Concentration undertaking means that the market undertakings achieve monopoly status through mergers, acquisitions, joint venture and other means. Since the holding company of the IIF enterprises group controls the share and interlocks personnel of the subsidiaries, this concentration is subject to the regulation of anti-monopoly law. In the process of combination of business capital and financial capital, especially for those having dominant market position before the combination, they will threaten or is threatening the market, forming a more powerful market force. This combination may not be regulated and controlled due to its complex internal relationship and loopholes of supervision. Therefore, it is necessary for the IIF to be submitted for approval. China’s Anti-Monopoly Law stipulates: The operators shall apply to the anti-monopoly enforcement authorities when the concentration thereof meets the criteria set forth by the State Council; otherwise such concentration shall not be carried out. Thus, an IIF meeting the above criteria shall be definitely submitted
to the anti-monopoly enforcement authorities. This pre-control mechanism provides effective policy guidance for the enterprise mergers, and it at the same time supervises enterprise mergers so as to avoid the damages to the market after the merger and to maintain the competition order of the domestic market.64

Enterprise group is an operation entity in view of the anti-monopoly law.65 The organizations of IIF is a powerful enterprises group composed of a core enterprise, which is a holding company, and affiliates under its control, which are legal persons. While the enterprise group as a vector is not a legal person in the corporation laws and security laws. But this does not prevent the enterprise group act as a subject with common interest and unified action so as to have independent legal status under the anti-monopoly law.66 In other words, the IIF enterprise group can be regarded as a complete market undertaking and an independent market operator under the anti-monopoly law. This is critical in the enforcement of the anti-monopoly law. The provisions of Chapter 4 of China’s Anti-Monopoly Law have great significance for the IIF enterprise group. The provisions on concentration of undertakings directly address the possibility of the formation and the expansion of an enterprise group. In practice, the monopolistic behaviors made by different organizations of enterprise group have different effects on the market monopolistic condition.

The IIF enterprise groups are easier subject to the undertakings concentration control under anti-monopoly law. The following items are notable for China’s future legislation for enterprise groups or financial holding companies: (1) To explicitly set forth the ownership percentage of holding company of the group; (2) to limit the business scope of holding company of the group, not to participate and intervene specific business activities of their subsidiaries, and in particularly, to strictly limit the managers of holding companies to hold a concurrent post in the subsidiaries; (3) to build effective pre-notification system for the concentration of holding company of the group and set up specific implementation measures by the anti-monopoly enforcement agency and financial regulators to prevent excessive concentration of the IIF; (4) to work out the specific notification criteria of the IIF as soon as possible. China’s Anti-Monopoly Law only, in principle, provides the criteria of application and approval of undertakings concentration with no specific implementation criteria. Provisions of the State Council on Thresholds for Prior Notification of

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64 See Heping Liu, 欧盟并购控制法律制度研究 (Legal System Research on the Control of European Mergers and Acquisition), Peking University Press (Beijing), at 171–72 (2006).
66 The Provisional Regulations on Registration of Enterprise Group issued by the State Administration for Industry and Commerce clearly define that enterprise groups have no legal status.
Concentrations of Undertakings (hereinafter referred to as the “Provisions”) issued by the State Council on 4th August 2008 emphasizes that the undertaking(s) concentration shall file a prior application with the competent commerce department of the State Council, otherwise the concentration cannot be carried out, in the event that such concentration reaches any of the following thresholds: (1) The combined worldwide turnover of all the undertakings concerned in the preceding financial year is more than RMB 10 billion yuan, and the nationwide turnover within China of each of at least two of the undertakings concerned in the preceding financial year is more than RMB 400 million yuan; or (2) the combined nationwide turnover within China of all the undertakings concerned in the preceding financial year is more than RMB 2 billion yuan, and the nationwide turnover within China of each of at least two of the undertakings concerned in the preceding financial year is more than RMB 400 million yuan.

However, this is not applicable to the industries like banking, security, insurance and futures etc. Thus, which category does a cross-industry of IIF belong to? If it belongs to the common business and commerce, then the Provisions is applicable; if it belongs to the industry of banking, security, insurance and futures, the Provisions is not applicable. In practice, is it possible that a financial concentration of “from industry to finance” will apply the Provisions while a financial concentration of “from industry to finance” will not? The author believes this may be a solution but its effectiveness has to be tested in practice.

Concentration of undertakings also relates the definition of relevant market in aspects of product market and geographic market. The smaller of product market is defined, the more possibility of monopoly will be; the greater of product market is defined, the less possibility of monopoly will be. Therefore it is complex to identify the relevant market for the IIF enterprise group. We can only define the product market separately for the financial business such as banking, security, futures and the departments of industry and commence. Mixed definition is not preferred; otherwise the relevant product market may be too board to conclude the monopoly. Geographic market is geographical sale of particular products. The size of geographic market is a decisive factor that whether an enterprise has a dominant market position.

3.3.2 Regulations on the Abuse of Dominant Market Position of the IIF

The regulation methods of structuralism protect the existence of competitors in a nearly exclusive market; the regulation methods of behaviorist maintain the competition order of the market in such market.⁶⁷ Since the financial business of

the IIF enterprise group involves all the financial market which has large scale and far-reaching impact on market, it is easy to form a dominant market position. However, the dominant position in itself is legal. From the Anti-Monopoly theory, two elements should be taken into consideration in the definition of dominant market position. The first one is the market share of the dominant position enterprise. Usually the market share of the bank industry is calculated on the basis of deposit and the calculation of the market share of an IIF enterprise group is complex. Therefore it needs to use economic analysis methods. The second one is the degree of market entry barriers. The IIF enterprise group holds in the financial business such as banking, security and futures and even the non-financial business by their strong financial advantages to form monopoly power. The core enterprises of an IIF group (in China they mainly tend to be financial holding companies) are likely to control the financial business and restrict their competition by holding shares so as to damage the interests of consumers. Externally, the group is easy to conduct acts like monopoly pricing, predatory pricing, discrimination, tying and so on. The liability of the abuse acts of the group can be determined according to the principle triple damage of USA.

Along with the development of financial liberalization and mixed cross-industry operation, coupled with China’s accession to WTO, particularly, after the 5-year transitional period, foreign financial multinational corporations have entered into China, which allows and promotes domestic financial sector to concentrate properly while breaking the oligopoly condition of the four state-owned commercial banks, and thus take advantage of economics of scales to promote domestic and international financial markets to compete effectively and to enhance the international competitiveness of our whole financial and industrial sectors. It is very necessary. In practice, we shall stick to the state’s financial industrial policy and encourage IIF to make necessary concentration and expansion of financial groups through financial holding companies so as to improve national competitiveness. Meanwhile, we must be very cautious to various behaviors of monopoly and restriction of competition in domestic market, regulate them and master the key properly. We should also take into account the strong correlation and weak specialization between financial resources. The emergence of financial holding companies maximizes the superiority of strong information slants caused by the professionalism of financial products. Thus, we

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68 See Ming Shang, 对企业滥用市场支配地位的反垄断法规制 (Anti-Monopoly Regulation on Abuse of Dominant Market Position), Law Press (Beijing), at 71 (2007).

69 The author believes the presumption of Article 19 of China’s Anti-Monopoly Law should make the calculation combined the market share of absolute holding company and controlled company.

70 See Shang, fn. 68 at 261.
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should regulate the behavior of domestic IIF groups abusing their monopoly dominance in order to create a fair competition environment.71

3.3.3 Regulations on Restricted Competition Agreements Reached by IIF Enterprise Groups

Restricted Competition Agreements is an act that two or more persons jointly decide the market price of products or service, the amount of sales, technical standard, trading partners and trading areas and so on by agreement or decision to restrict the market competition and seek excessive profit.

The holding company of an IIF group (financial holding company) controls several industries and financial industry through share-holding. For its own interest, it is very likely to facilitate the performance of the restricted competition agreement. The theory of internal collusion of the group of USA is worthy learning. According to this theory, the parent company and the subsidiaries are excluded from the liability of article one of Sherman Act simply because of coparcenaries. In the case of United States V. Yellow Cab Company, the court’s decision shall set forth whether the behaviors of the affiliates including vertical mergers constitute a collusion of monopoly. It is because that the collusion of affiliates, like the collusion of separate enterprises, will also cause unreasonable restriction on trade. The United States Supreme Court held that compared with the review of unilateral acts of the enterprises, it will have a more stringent review of the collaboration of different enterprises within a group under the anti-monopoly law, because the cooperative behavior is very likely to hinder the competition, which will limit the multiple options in the pursuit of different targets, and will break the balance in the competition due to the sudden strengthen of certain economic power.72 In judicial practice, we can set forth the following provisions: (1) To prohibit the holding company to control or influence the financial business of their subsidiaries to reach restricted competition agreements for their own interest; (2) to identify the restricted competition agreement to be invalid without effect from the beginning and those behaviors damaged the consumer’s interest to be liable; (3) to set forth the liabilities of the financial holding company for the injured parties under restricted competition agreements.


4 The Complementation and Coordination of Financial Supervision and Anti-Monopoly Regulation for the IIF

4.1 The Complexity of Legal Regulation for the IIF

China is currently on a highway of economic development. It shall fully take the opportunities of economic globalization, financial liberalization and world integration, and actively participate in the international competition.

The laws on IIF is very complicated. This is because the organizations of IIF are not only regulated by anti-monopoly law, but also regulated by financial laws due to their financial business. Considering the particular situation of anti-monopoly regulation for IIF, on the one hand, the regulation of financial businesses of a holding company of a group is very complicated, which needs the coordination of supervision with Bank Supervisory Committee, Security Supervisory Committee and Insurance Supervisory Committee by a joint-conference mechanism and eventually to establish a single regulatory; on the other hand, the anti-monopoly regulation is a professional review so that the above three Committees cannot work separately. Therefore, referring to the experience of foreign countries, it is a valuable option to establish a joint anti-monopoly regulation by regulatory department and enforcement agency on the IIF. What is the more valuable is to further establish a super regulator in the future. Either in a short term or in a long term, there are limitations to solely rely on the financial supervision, which need the complementation and combination of financial supervision and anti-monopoly regulation. The final aim of anti-monopoly regulation for the excessive concentration of IIF is to prevent risks and safeguard the profits of consumers by controlling the excessive concentration of undertakings.

4.2 The Difference and Complementation between Financial Supervision and Anti-Monopoly Regulation for the IIF

Financial supervision focuses on the inherent unity of efficiency and safety. It controls and mitigates financial risks by prior reporting and (mainly) in-process monitoring. The legal regulation of IIF includes the market access and exit mechanism, the stringent capital adequacy requirements, the risks of

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73 See Song, fn. 11 at 318.
75 The State Assets Administration Committee stipulates that the Central Companies have to report to the SAAC for their major investment and non-core business included.
concentration of the internal exchange and diffusion of supervision. When the Financial Holding Company Act has not yet been legislated in China, the memorandum of cooperation reached by BSC, ISC and SSC takes a quasi-regulation without legal effects and determines main business supervision (i.e., the financial holding company take their respective supervision liability according the nature of the business). The judgment and analysis and monitory of the potential risks are based on the characteristics of the high-risk financial industry. To safeguard the national economy security, it is very important to mitigate the financial risks. The laws on the financial regulation of enterprises groups “from the industry to the finance” are still need to be further clarified.

Anti-Monopoly aims at preserving free enterprise system and free trade, increasing competition and restricting monopoly. Therefore anti-monopoly law stresses on competition and order. The anti-monopoly law is both preventative and remedy. Advanced prevention is mainly reflected in the pre-notification of enterprise concentration, while sanctions are the most common. The consequence of the behavior is compensated through sanctions and pre-regulation so as to correct the market order after the behavior. The anti-monopoly law mainly stipulates what you cannot do, while the governmental regulation tells you what you should do and the product pricing. The anti-monopoly law involves regulations on post-intervening to effectively regulate random violations.

The anti-monopoly regulation is a product under a highly developed market. Under the acceleration of the economic integration and the financial globalization at present, the IIF involves many areas and multiple industries. It is easy to form a strong monopolistic power in the market since capital pursues profits. The IIF may abuses of its dominant position and damage the fair competition of the market so as to pursue the monopoly profits. The mitigation of financial risk itself cannot reduce the risks and solve the legal issues incurred by the great competition in the industry and international community. Thus, we expect a pre-or post- solution in this regard. That is, anti-monopoly regulation.

In addition to the mentioned above, the differences of financial supervision and anti-monopoly regulation in function: The financial supervision emphasizes risk supervision, while anti-monopoly regulation focuses on regulatory review. The former one is mainly dependant on administrative measures while the latter mainly relies on legal measures. The former one mainly concentrates on financial comprehensive operation, non-horizontal merger and risk transfer, while the latter one mainly regulates IIF, horizontal merger and excessive concentration.

Through the above analysis we know that when the combination of legal supervision and regulation for IIF, competition policy and financial supervision in function have different emphases: The former one stresses on security and

energy market order, while the later one focuses on balancing economic efficiency and safety. The analysis of the above differences leads to the following conclusion: In a view of regulation intensity, anti-monopoly law regulate three forms of concentration of undertakings- horizontal, vertical and conglomerate mergers in an order of horizontal, vertical and conglomerate merger; on the contrary, for financial supervision, such order is changed to conglomerate, vertical and horizontal merger.

In addition, the legal concepts of “security and stability” are no longer applicable under economic globalization and financial liberation. USA, European, Japan, Korea and Taiwan area of China all are in the tide of economic globalization and financial liberation, to promote their competitiveness and achieve the maximum efficiency, they practice “efficiency and competitiveness” in relevant legislation.77 As we know, the modern society is a competitive society with increasing pursuit of efficiency. Moreover, with the full liberation of financial business in post-WTO, it is the top priority to enhance the competitiveness of our financial institution and to improve their operational efficiency. We can imagine that if we over emphasize the security and stability of the financial system but ignore the efficiency, our domestic financial market will be occupied by foreign financial institutes. Without the existence of domestic financial institutes, there is no national financial security and order. The 2008 international financial crisis reminds us all the time that in the pursuit of efficiency and state competitiveness we cannot ignore the vigilance of financial risks, and the efficiency and security must be a high degree of unity. Therefore, a good financial supervision and anti-monopoly regulation and its effective interaction can ensure the pursuit of financial efficiency and promote the international competitiveness of the financial business of the state provided that the financial security and risks are under controlled.

4.3 The Coordination of Financial Supervision and Anti-Monopoly Regulation of the IIF in Legal Norms

4.3.1 Deal with the Relationship between Anti-Monopoly Law and Industry Supervision Law

The relationship between anti-monopoly law and industry supervision law in essence is the relationship between Anti-Monopoly policy and industry policy. China anti-monopoly law and other laws are still unclear on this issue. The current consensus in the world is when there is a conflict between competition

policy and industry policy, the competition policy is preferred.\textsuperscript{78} Since 1980s, regulatory agencies in the world loosen the regulation of entry limitation of areas such as finance, auto motors and transportation so as to expand competition. Many industry laws introduce anti-monopoly provisions to prohibit the implementation of industry laws to effect the application of anti-monopoly law.\textsuperscript{79} Taking the regulation of Anti-Monopoly of USA telecommunication as an example, according to provisions of the \textit{1996 telecommunication law}, any provisions of 1936 telecommunication law and 1996 telecommunication law can not change, undermine or replace the application of all provisions of antitrust laws.\textsuperscript{80} Therefore, it can not simply apply the principle of “special law (industry law) superior to the general law (antitrust law).” When the industry laws are in a form of administrative regulations, their effects are inferior to the anti-monopoly law, and the anti-monopoly law is preferred. When industry laws are in a legal form, any application of priority of special laws shall not restrict competition and conflict with antitrust laws.\textsuperscript{81} Here is a good example. In response to the current financial crisis, the EU member states in January 2009 took out 2 trillion to rescue the market. The high scale financial rescue-plan shall be pre-reviewed by European Commission Directorate General for Competition and approved by Competition Committee before the implementation so as to maintain the continuity of the financial markets and authority of competition policy. This indicates that the competition policy is superior.\textsuperscript{82} Similarly, in the United States, without the approval of antitrust law enforcement authorities, financial institutions’ merger, transition or combination of industry and finance are infeasible.\textsuperscript{83}

\textsuperscript{78} See Dong Yang, 反垄断法与行业监督法的协调关系 (The Coordination of Anti-Monopoly Law and Industry Supervision), (1) 法学家 (Jurist), 2008.
\textsuperscript{79} See Zhu, fn. 76 at 202.
\textsuperscript{81} See Jichun Shi, 反垄断法理解和适用 (The Application and Understanding of Anti-Monopoly Law), China Legal Publishing House (Beijing), at 207 (2007).
\textsuperscript{82} See EU Competition Policy and Crisis Response, at http://www.ampec.org (last visited June 19, 2009).
\textsuperscript{83} The United States carries out the antitrust review system of finance. The “Bank Holding Company Act” prohibits that the Fed agrees to the proposal that may lead to monopoly, and prohibits it to approve the merger that will substantially reduce competition in related banking market, unless the public welfare, such as the need and convenience of the community it serves, exceeds the anti-competition effects. On September 22, 2008, the Fed announced that it has agreed with the transition of Goldman Sachs and Morgan Stanley, after talking with the U.S. Department of Justice. See Lin Zhang & Zhen Li, 高盛和摩根史丹利通过金融反垄断审查获准转型 (Goldman Sachs and Morgan Stanley Have Passed the Antitrust Review and Been Approved to Reform), at http://www.chinalawinfo.com/index.aspx (last visited January 4, 2009).
However, Japanese historical experience also tells us that, when an emerging country implements its catch-up strategy in a period of rapid economic development, it is just an expedient measure for economic development that the industry policy is superior to competition policy.\textsuperscript{84} For IIF in China, the author believe that generally, the competition policy shall be superior for domestic market while the industry policies shall be superior in the international market\textsuperscript{85}. Such flexible policies help to improve the implementation of catch-up strategy for national competitiveness, which is of great significance for developing countries.

4.3.2 Deal with the Relationship between Enforcement Agencies of Anti-Monopoly and Industry Regulators

The relationship between enforcement agencies of anti-monopoly and industry regulators is actually the ownership and distribution of enforcement power of Anti-Monopoly. Some scholars in China advocate that the industry enforcement power of anti-monopoly law is better to be solely controlled by the anti-monopoly enforcement agencies.\textsuperscript{86} However, it is not realistic in China, because the industry regulation in China has rich systematic accumulation and experiences, while the China’s Anti-Monopoly Law is newly issued, which needs improvements and lacks of systematic accumulation and enforcement experiences. In January 7, 2009, China Insurance Regulatory Commission published a Notice on Efforts to Work-Related Motor Vehicle Insurance Coverage Issues (hereinafter referred to as the “Notice”) issued on 5 December 2008. This Notice requires to fully protect the policy-holder’s right of free choice and strictly prohibit the activities of refusal to deal, limiting trade, boycotting and dividing markets, so as to prevent the financial monopoly of motor insurance market. In the long run, the significance of the system innovation of the financial regulation of anti-monopoly is far-reaching, which can be regarded as the beginning of taking initiative to financial regulation of anti-monopoly by anti-monopoly enforcement agencies.\textsuperscript{87} However, for the whole financial

\textsuperscript{84} At the end of October 2009, the author heard some Japanese officers from the Japan Fair Trade Commission and antitrust scholars claimed in Asian Competition Law Forum that during this international financial crisis, Japan always insists that the competition policy is superior to industrial policy.

\textsuperscript{85} Ensuring the competition policy in priority at home is just to ensure the domestic market competition mechanism working, to create and maintain a fair competitive market environment for state-owned capital and private capital even foreign capital competing fairly, to develop the economy in competition and improve international competitiveness.

\textsuperscript{86} See Yang, fn. 78.

anti-monopoly system, the problems such as the coordination of anti-monopoly enforcement agencies and industry regulators remain unsolved. The author holds that, to establish and improve the enforcement mechanism of IIF in domestic market, the cooperative anti-monopoly mechanism should be constructed mainly with anti-monopoly enforcement agencies supplemented by financial regulators. Based on that, a super supervision agency is established with a central bank as a leader and supported by enforcement agencies and financial regulators, to regulate the monopolistic behaviors and acts of restricting competition in the financial market and IIF group.\textsuperscript{88} In the international market, the cooperative anti-monopoly mechanism should be constructed mainly with financial regulators, supplemented by anti-monopoly enforcement agencies. It is crucial to establish a consultation and coordination mechanism and to have cooperation of enforcement and rule-making during the transition period.\textsuperscript{89}

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\textsuperscript{88} In the “super supervision mechanism” general financial risks are mainly supervised and controlled by financial regulatory agencies while the behavior of monopoly and restraining competition as well as the financial risks are mainly regulated by anti-monopoly enforcement agencies.

\textsuperscript{89} See Zhu, fn. 76 at 219–20.