

Update on competition developments in China:

## EU-China competition law cooperation

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### 1. INTRODUCTION

The start of the cooperation between the European Union and the Peoples Republic of China (here after the Sides) on competition law can be traced back to the EU-China Summit in 2001 where the Sides agreed to push cooperation regarding competition law.<sup>2</sup> Since then the Sides have developed a good cooperation and signed a number of documents to create a framework for cooperation. The documents refer to consumer welfare and provision of a level playing field and legal certainty. These principles are fundamental in EU competition law and apply irrespective of whether restrictions are erected by public authorities/enterprises or private companies through regulatory measures, subsidies or private agreements. These principles are vigorously adhered to intra-EU and the European Commission advocates for them to the outside world bilaterally and multilaterally. The sharing of experience with China is based on these values.

The EU-China competition cooperation predates the Anti-Monopoly Law from 2007. The European Commission has had the opportunity to follow the birth and the development of the Anti-Monopoly Law closely. In the beginning, in addition to the drafters from Mofcom, the European Commission worked closely with the State Council's Legislative Affairs Office. The cooperation is now extended to the NDRC, SAIC<sup>3</sup> and to some extent some of the Chinese courts.

Although the legislation is young, Anti-Monopoly Law developments in China have been rapid and significant since its entry into force nearly eight years ago. China has produced a significant body of implementing rules and adopted a substantial number of enforcement decisions. China's three Anti-Monopoly Enforcement Authorities, Mofcom, NDRC and SAIC, have displayed a self-confidence which is that of a large and powerful nation added its own footprint to the global competition scene. China's economic position in the global economy and the very active enforcement of the Anti-Monopoly Law, has put China on the map as a must visit jurisdiction for all multilateral enterprises, which are operating globally.

From a substantive angle China generally follows a trend of convergence with mainstream international competition law principles. However, convergence with international mainstream competition law in China has to develop within the legal framework of the Anti-Monopoly Law which in its Article 1 states that *'the Law is enacted for the purposes of preventing and prohibiting monopolistic conducts, protecting fair market competition, improving efficiency of economic operation, safeguarding consumer and public interests, and promoting the healthy*

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<sup>1</sup> DISCLAIMER: "The views expressed are purely those of the writer and may not in any circumstances be regarded as stating an official position of the European Commission."

<sup>2</sup> [http://europa.eu/rapid/press-release\\_PRES-01-312\\_en.htm?locale=en](http://europa.eu/rapid/press-release_PRES-01-312_en.htm?locale=en)

<sup>3</sup> The Ministry of Commerce (Mofcom), National Development and Reform Commission (NDRC) and the State Administration of Industry and Commerce (SAIC).

*development of the socialist market economy*'. As a result decisions by the Chinese competition agencies may in some cases appear to encompass wider considerations such as the public interest.<sup>4</sup>

Procedurally, China is not relying only on specific Anti-Monopoly Law procedural rules, such as the EU is. Anti-Monopoly Law enforcement is just one of several forms of administrative law enforcement in China and has to be carried out pursuant also to related administrative laws.<sup>5</sup> The specific Anti-Monopoly Law procedural rules which have nevertheless been formulated by the Anti-Monopoly Law authorities have to be consistent with those administrative laws, even if this may result in differences with typical procedural approaches in other jurisdictions. This factor limits the scope for convergence of procedural rules applying to Anti-Monopoly Law enforcement with those of the international competition community.

Although private enforcement of the Anti-Monopoly Law in China came early and is rather intensive, judicial review of administrative enforcement decisions and the procedural steps leading to their adoption still has to be developed further in China. It seems that no administrative decision by one of the Anti-Monopoly enforcement Authorities has yet been challenged before the Courts in China, although in principle it should be possible. While factoring in judicial review and litigation before the Courts of Law is of fundamental importance in most jurisdictions, including in the European Union, this is as yet not the case in China. Nevertheless the European Commission continues to highlight the judicial aspect of competition enforcement by addressing the Chinese courts, including the Supreme Peoples' Court, in its technical cooperation. Also judges and staff of the European Court of Justice have participated in events in China and in Europe.

A number of policy initiatives starting in 2013 are likely to increase the importance of Anti-Monopoly Law enforcement in China. In its session from 9 to 12 November 2013 the 3<sup>rd</sup> Plenum of the Communist Party of China called for reform of the government's interference in the economy and stated that: *'The underlying issue is how to strike a balance between the role of the government and that of the market, and let the market play the decisive role in allocating resources and let the government play its functions better. It is a general rule of the market economy that the market decides the allocation of resources. We have to follow this rule when we improve the socialist market economy. We should work hard to address the problems of market imperfection, too much government interference and poor oversight.'*<sup>6</sup>

Moreover, the Chinese State Council's 2016 legislative work agenda includes plans to study the amendment of the Anti-Monopoly Law for the first time.<sup>7</sup> It also lists a

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<sup>4</sup> See e.g. Mofcom's MOFCOM Announcement No. 46 of 2014 on Decisions of Anti-monopoly Review to Prohibit Concentration of Undertakings by Prohibiting Maersk, MSC and CMA CGM from Establishing a Network Center, section VI.

<sup>5</sup> Including: Administrative Penalty Law, Administrative Permission Law, Administrative Reconsideration Law, Administrative Litigation Law and Administrative Procedures Law.

<sup>6</sup> [http://china.org.cn/china/third\\_plenary\\_session/2014-01/16/content\\_31212602.htm](http://china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm)

<sup>7</sup> State Council Legislative work plan for 2016. IV. Research Items (1) Legislative projects related to adjusting to the new normal of economic development, to promoting sustainable and healthy economic development and to opening to the outside.  
[http://chinalawtranslate.com/2016scworkplan/?lang=en#\\_Toc448415642](http://chinalawtranslate.com/2016scworkplan/?lang=en#_Toc448415642)

reform of State Owned Enterprises. It seems that a unification of the three enforcement authorities is on the drawing board. The timetable for these changes is unclear at this stage. Furthermore, in the summer of 2015 China announced the establishment of a Fair Competition Review system to coordinate competition policies with other policies and to subject industrial policies to a competition assessment prior to their adoption. Competition Commissioner Margrethe Vestager visited China in March 2016 and following her meetings, Commissioner Margrethe Vestager said: *"The meetings confirmed our shared interest in strengthening our cooperation on competition matters. They provided me with a first-hand sense of the challenges and urgency of China's reform—in particular the ambition to let the market shape the economy, for domestic and foreign operators alike. I believe the European experience of building our open single market and our history of restructuring and liberalising a number of sectors contains useful ideas in this respect. In particular, I shared with my Chinese counterparts the Commission's experiences as enforcer of state aid control within the single market."*<sup>8</sup>

The EU-China competition cooperation is developing in parallel with these Anti-Monopoly Law policy developments in China. This paper will outline some aspects of the Anti-Monopoly Law cooperation between China and the European Union.

## **2. EU COOPERATION WITH CHINA ON THE ANTI-MONOPOLY LAW**

### **2.1. Historic overview**

The Joint Statement adopted at the EU-China Summit on 5 September 2001 earmarked competition as one of the areas where the EU-China dialogue should be intensified. Competition Commissioner Mario Monti gave follow-up to this political agreement when he visited China on 24 November 2003 and agreed with the Ministry of Commerce of China to create an EU-China Competition Policy Dialogue.

The precise structure, content, and other details are laid down in the Terms of Reference of the EU-China Competition Policy Dialogue which the Ministry of Commerce of China and the Directorate General for Competition of the European Commission signed on 6 May 2004.<sup>9</sup> The basis for the dialogue is the various competition-related policies, laws, and regulations formulated by China and the relatively complete set of competition legislation formulated by the EU.

Mofcom became DG Competition's prime partner under the Terms of Reference during the years leading up to the adoption of the Anti-Monopoly Law on 30 August 2007. When the Anti-Monopoly Law entered into force one year later Mofcom was designated as Enforcement Authority together with NDRC and SAIC. As a result of their designation as enforcement authorities, DG Competition also wanted to establish a more concrete relationship with the NDRC and SAIC in view of their role in implementing the Anti-monopoly Law. On 20 September 2012 the Sides

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<sup>8</sup> <http://ec.europa.eu/competition/international/bilateral/china.html> and [http://eeas.europa.eu/delegations/china/press\\_corner/all\\_news/news/2016/20160318\\_en.htm](http://eeas.europa.eu/delegations/china/press_corner/all_news/news/2016/20160318_en.htm)

<sup>9</sup> [http://ec.europa.eu/competition/international/bilateral/china\\_tor\\_en.pdf](http://ec.europa.eu/competition/international/bilateral/china_tor_en.pdf)

agreed to sign a Memorandum of Understanding on Cooperation in the area of Anti-Monopoly Law.<sup>10</sup>

The 2012 Memorandum of Understanding with the NDRC and SAIC has no reference to a structured dialogue. The 2004 Terms of Reference therefore remains the basis for European Commissions dialogue meetings with all three Anti-Monopoly Enforcement Authorities, and with Mofcom coordinating the dialogue on the Chinese side.

## **2.2. The contents of the policy dialogue**

The aim of the Dialogue is to increase both sides' understanding and awareness of current and forthcoming policy approaches, legislation and related issues, in China and the EU, and to promote exchanges and cooperation between China and the EU in the area of competition policy and legislation. The dialogue is also the basis for the extensive technical cooperation in which the two sides continue to be engaged.

The dialogue normally takes place every year alternating between Brussels and Beijing and is co-chaired at senior official level. On the EU side the Delegation is usually led at least by the Director for Policy or higher. On the Chinese side it is the usually the Mofcom Director-General in charge of the Anti-Monopoly Bureau or higher and flanked by Director-Generals or Deputy Director-Generals from the NDRC and SAIC. Both delegations usually include staff involved in the technical issues or cases at case manager or case handler level. In addition, the Dialogue is often used as an occasion for encounters at Ministerial level where the Competition Commissioner would meet the Mofcom and SAIC Ministers and the NDRC Chair. As a result over the years Commissioners Mario Monti, Neelie Kroes, Joaquin Almunia and Margrethe Vestager have regularly met the ministers responsible for Anti-Monopoly Law enforcement in China.

One of the big values added by the dialogue is the good level of personal contact and trust between officials on both sides. The value of good personal contacts between cooperation partners in international contexts should never be underestimated. This applies in particular between two jurisdictions which are so different in system, culture, language and time differences that it is necessary to count with a level of trust and personal knowledge about the other side, if cooperation shall function in earnest.

The dialogue in particular deals with antitrust (including cartels) and merger policy and enforcement developments. The dialogue may also include *'Exchange of views on liberalisation of public utility sectors and State interventions into the market process'*. This could allow for the Sides to exchange views on State Owned Enterprises and State Aid control. There have been ten dialogue meetings since the signing of the Terms of References in 2004 and the most recent meeting was held in Beijing in October 2015.

While the early dialogue meetings were in particular concentrated on broad policy approaches and choices, the meetings increasingly deal with specific policy choices and the application of competition law to specific industrial sectors. During the October 2015 Dialogue, Director-General SHANG Ming and Deputy Director-

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<sup>10</sup> [http://ec.europa.eu/competition/international/bilateral/mou\\_china\\_en.pdf](http://ec.europa.eu/competition/international/bilateral/mou_china_en.pdf)

General Carles Esteve Mosso signed the ‘*Practical Guidance for Cooperation on Reviewing Merger Cases between Ministry of Commerce of P.R. of China and Directorate-General for Competition of European Commission*’ which could lead to improvement in enforcement cooperation on mergers.

Other issues discussed during this last dialogue included the effects of merger simplification package applicable since 2014, the new directive on antitrust damages actions – adopted in November 2014 and the EU State aid modernisation agenda. Mofcom tabled a discussion of its draft proposal for ‘*Measures on Notification of Concentration of undertakings*’ and ‘*Measures on Procedures for Review of Concentrations of Undertakings*’.

Moreover, the dialogue meetings serve among others to confirm the more technical exchanges which take place in the technical cooperation events. During the most recent dialogue meeting in October 2015 it was agreed to put the legislative package consisting of six implementing measures<sup>11</sup> for Anti-Monopoly Law enforcement on the agenda for the technical exchanges during the 2016 Competition Weeks offering the European Commission the opportunity to discuss the Chinese proposals.

The policy cooperation has also led to further bilateral exchanges at staff level. For example, DG Competition staff has exchanged comments with NDRC and SAIC officials regarding the IPR Regulation and draft Guideline. The EU comments were essentially aimed at suggesting drafting which would bring the Chinese Guidelines closer to the rules that apply in the EU, in particular the Technology Transfer Guidelines and the EU policy on Standard Essential Patents.

### **2.3. Technical cooperation**

Despite the very significant differences of economic model, DG Competition has managed to build a framework for cooperation with the Chinese authorities which produces results. In particular, China has been willing to draw inspiration from EU rules and methods in building up its competition policy.

Technical cooperation between DG Competition and the Anti-Monopoly Enforcement Authorities therefore feature high on the EU-China competition agenda. Since 2004 technical cooperation has developed a fertile ground for dialogue and convergence as well as enforcement cooperation.

The technical cooperation has been organised and financed under the EU China Trade Programme<sup>12</sup> (EUCTP) which ran out earlier this year. The European Commission is preparing a new programme which will run from 2017 to 2021. Meanwhile an *ad hoc* programme covers the gap.

Over the years the technical cooperation has evolved into a standard approach with biannual Competition Weeks held somewhere in China, a Competition Summer School held in Belgium and a visitor programme where Chinese officials get the opportunity to briefly visit DG Competition before they have a longer secondment

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<sup>11</sup> Guidelines on leniency, commitments, fining, automobile sector, technology licensing and exemptions.

<sup>12</sup> For an overview of topics dealt with during the EU-China Competition Weeks, please see: [www.euctp.org](http://www.euctp.org)

with one of the EU National Competition Authorities, for example Ireland which has hosted a number of Chinese officials from the NDRC.

The Competition Weeks are the main events of the EU-China technical cooperation. Usually a group of Commission and EU National Competition Authority officials travel to China where they meet their Chinese colleagues to discuss specific predefined topics for up to a week. The Competition Weeks are directed by an experienced independent competition expert.<sup>13</sup> The Competition Weeks are usually organised in a seminar or roundtable format and both sides make presentations of their cases or legislative proposals followed by an exchange of questions and answer. The Competition Weeks take place in a private setting between officials only allowing for freer and deeper discussion on approaches to various current issues. Earlier the Competition Weeks included a broader audience from Chinese academia and Bar together with EU lawyers as lecturers. Topics and presentations are publicly available on the EUCTP website.

The substantive issues discussed vary over time and has by now touched upon every possible issue relevant for cartel enforcement, dealing with abuse in unilateral conduct, how to efficiently and effectively deal with merger review procedures (simplified procedures etc.). As mentioned above, during the most recent Competition Weeks discussions centred on the proposals for guidelines which the Anti-Monopoly Enforcement Authorities are developing on exemptions, commitments, leniency, fining etc.<sup>14</sup>

A recurring issue, which is always discussed during all Competition Weeks, is the procedures which are applied to enforce competition law. The discussions focus on the differences in approach to procedural fairness and transparency between the EU and China. The EU officials are usually explaining how competition procedures are run by DG Competition on the basis of the *'Best Practices in proceedings concerning articles 101 and 102 TFEU'*.<sup>15</sup> China seems to have taken inspiration from the EU and its Member States as the Anti-Monopoly Enforcement Authorities are increasingly offering transparency in their procedures. The Chinese Anti-Monopoly Enforcement Authorities now regularly publish non-confidential versions of their enforcement decisions and in increasing detail.

#### **2.4. Enforcement cooperation**

Another topic discussed during the Dialogue meetings is enforcement cooperation. So far merger review has featured most prominently on the agenda of the Dialogues, as Mofcom has processed cases from day one after the adoption of the Anti-Monopoly Law and as this is an area where there has been concrete case cooperation. During the meetings the sides may exchange information about their respective enforcement initiatives and priorities. Concrete cases are sometimes discussed on a non-confidential basis.

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<sup>13</sup> The first such expert was the late Dr. Stanley Wong.

<sup>14</sup> For more information about the content of the Competition Weeks, see the agendas and slides on [www.euctp.org](http://www.euctp.org)

<sup>15</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011XC1020%2802%29>

DG Competition and Mofcom have already for some time engaged in case cooperation in cases which are under parallel review in the two jurisdictions. There has not yet been enforcement cooperation with NDRC or SAIC as no relevant case for cooperation has yet appeared.

Like with any other jurisdiction, time difference, culture, language and differences in administrative traditions pose challenges to establish enforcement cooperation. Nevertheless, cooperation has taken place in more than twenty cases since China started to review mergers under the Anti-Monopoly Law and exchanges typically deal with the market definition and theory of harm. A particular feature in the cooperation between the EU and China is the fact that the EU review procedure is often terminated before Mofcom has to pronounce itself on a case. Discussions on appropriate remedies are therefore often difficult to entertain as the EU is often in a position where it has to decide on its case before China's investigation has entered into a decisive phase.

To further improve and facilitate case cooperation, DG Competition and Mofcom signed a practical guidance document for cooperation in mergers.<sup>16</sup> The document acknowledges that DG Competition and Mofcom have a common interest in establishing and maintaining communication with each other during the merger review process, including on the design of remedies. Commissioner Margrethe Vestager, in charge of competition policy, commented at the signature of the document: *"A growing number of international transactions need to get the green light in several jurisdictions. The cooperation framework agreed today between the Commission and China's merger review authority Mofcom reflects our commitment to a stronger cooperation between our two competition authorities."*<sup>17</sup>

The practical guidance document creates a dedicated framework to strengthen cooperation and coordination between the Commission and Mofcom. The guidance should facilitate communication throughout the entire merger review procedure on issues of procedure and substance, including the definition of relevant markets, theories of harm, competitive impact assessments and remedies. The signing of the guidance document reflects the ambition of enhanced cooperation on competition matters between the EU and China. The Sides share the understanding that such cooperation increases the efficiency of investigations and reduces the burden on the merging parties, in particular when authorities are able to share information and to discuss timetables at key stages of investigations and with the merging companies. It is too early to judge about the concrete positive effects of the paper, but the EU has high expectations.

Companies subject to review can contribute significantly to international cooperation between the authorities by offering confidentiality waivers, being transparent about their dealings with other authorities and by encouraging authorities to communicate (give contact details etc.). Supporting the creation of a cooperative atmosphere will speed up an investigation and lead to a conclusion more rapidly and most likely offer more convergence and operability in the remedies accepted by the authorities involved in the case complex.

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<sup>16</sup> Practical Guidance for Cooperation on Reviewing Merger Cases between Directorate-General for Competition of European Commission and Ministry of Commerce of P.R. China:  
[http://ec.europa.eu/competition/international/bilateral/practical\\_guidance\\_mofcom\\_en.pdf](http://ec.europa.eu/competition/international/bilateral/practical_guidance_mofcom_en.pdf)

<sup>17</sup> [http://europa.eu/rapid/press-release\\_IP-15-5843\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5843_en.htm)

### 3. ANTI-MONOPOLY LAW DEVELOPMENTS

China has built up an impressive enforcement record over past years. It is interesting to observe how the body of guidelines and implementing rules grows and with an increasing level of detail and sophistication. Publication of such guidelines is positive as they increase transparency and predictability in enforcement.

China is regularly criticised for its Anti-Monopoly Law enforcement by stakeholders. Criticism is in particular directed at what is referred to as a lack of procedural fairness. Some argue that *'There is substantial room for development before antitrust due process protections become adequate, effective, and consistent in China.'*<sup>18</sup> This is a criticism that has also hit the EU for quite a while.<sup>19</sup> Enforcement of competition law is a difficult trade. In the EU the position is that regardless of the substantive outcome of a government investigation, it is important that the process used to reach that outcome was fair. The two concerns—substance and process—go hand in hand. A fair, predictable, and transparent process bolsters the legitimacy of the substantive outcome. The European Commission reviewed its procedural rules in 2011 and adopted *inter alia* a *'Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU Best practices'*<sup>20</sup>. In presenting the package at the OECD Competition Committee Meeting on 18 October 2011, Director-General Alexander Italianer stated: *'We are very proud of the end result especially because this package is the product of our discussions with stakeholders over more than a year. We listened to their suggestions and sought to include as many as possible in the final texts.'*<sup>21</sup>

It is obvious that companies that are subject to an investigation will defend themselves and are likely to criticise the investigating authorities. Criticism will intensify proportionally to the enforcement intensity and level of sanction imposed by the authority. This is legitimate. Constructive criticism and debate is always welcome, as it can lead to improvement in enforcement methods. I take note that good enforcement systems have built-in abilities to improve, which seem to be the case of China.

#### 3.1. Mofcom

Mofcom's Anti-Monopoly Bureau undertakes China's merger review.

Mofcom's prohibitions and remedies cases have been under intense international debate although the intervention rate does not differ significantly from other jurisdictions. Compared to the 1385 accepted cases since the enactment of the Anti-

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<sup>18</sup> Michael Han & Janet (Jingyuan) Wang (Freshfields): <https://www.competitionpolicyinternational.com/jun-14/>

<sup>19</sup> See for example the June 2014 issue of Competition Policy International, edited by Paul Lugard and with contribution from a number of practitioners, including Dr. Stanley Wong: <https://www.competitionpolicyinternational.com/jun-14/> and also the Comments on and Analysis of the European Commission's and EU Courts' Antitrust Proceedings by the ICC: <http://www.iccindiaonline.org/policy-statement/may2014/DueProcesPaper.pdf>

<sup>20</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC1020%2802%29&from=EN>

<sup>21</sup> [http://ec.europa.eu/competition/speeches/text/sp2011\\_12\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2011_12_en.pdf)

monopoly Law, the denial rate is 0.14%, a level similar to other jurisdictions. Since the enactment of Anti-Monopoly Law in 2008, there have been two cases which have led to a prohibition.

The first prohibition was the Coca-Cola and China Huiyuan Juice Group case from 2009 where Mofcom prohibited the transaction stating: '*MOFCOM concluded that the concentration of undertakings will have the effect eliminating or restricting competition and will have negative influences on effective competition in the juice market in China.*'<sup>22</sup>

The second prohibition from 2014 is the “P3” operational joint venture between a number of shipping companies stands in contrast to the unconditional approval by the US. The European Commission did not treat the case under its merger rules as it was not a full-function joint venture, but as an anti-trust case. The P3 alliance could not benefit from the safe harbour of the European Commission Consortia Block Exemption Regulation because it appeared that the market share of the combined entity would exceed the 30% market share threshold. The P3 parties had, therefore, to conduct their own self-assessment of the planned cooperation to determine whether or not it was compliant under Article 101(1) TFEU and if not, whether it creates efficiencies and pass-on to customers and the other conditions of Article 101(3) TFEU. The Commission was not required to formally authorise the proposed alliance; however it subjected the details of the deal to a close scrutiny. Because of the unprecedented size and characteristics of the alliance, concerns could have emerged regarding anticompetitive coordination of the parties' behaviour beyond the scope of the consortium agreements, exchanges of sensitive information, foreclosure on related markets as well as regarding the actual significance of efficiencies.<sup>23</sup>

Mofcom has imposed remedies in around 25 cases. In 2015, Mofcom only imposed remedies in two cases, down from five remedies cases in 2014 and four remedies cases in 2013. No remedy was imposed on cases cleared within 2016 up to the moment of drafting this paper.

In some cases, Mofcom has applied very innovative remedies which have not been matched in other jurisdictions. The main example is likely to be Mofcom's decision in the review of the Hard Disc cases in 2011 and between 2011 and 2013 Mofcom imposed 'hold separate' remedies in four cases *Seagate/Samsung* (2011), *Western Digital/Hitachi* (2012), *Marubeni/Gavilon* (2013), and *MediaTek/MStar* (2013). These remedies required the merging parties to hold their respective worldwide businesses separate rather than integrating them after the merger. Many observers criticized these remedies because they prevent the parties from realizing synergies and cost savings. Mofcom's broad behavioural remedies also contrasted with the structural remedies imposed by other agencies to clear these deals.<sup>24</sup> In 2014 and 2015, Mofcom has not imposed any "hold separate" remedies. The divergence between Mofcom's remedies practice and that of other agencies has therefore diminished somewhat. Moreover, in October 2015, Mofcom lifted some of the "hold

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<sup>22</sup> § 6 of Mofcom's decision of 18 March 2009.

<sup>23</sup> For reference see: OECD Paper DAF/COMP/WP2/WD(2015)1, Working Party No. 2 on Competition and Regulation, Competition issues in liner shipping, European Union, 19 June 2015.

<sup>24</sup> The European Commission cleared *Western Digital/Hitachi* based on a divestiture of the 3.5 inch HDDs business.

separate" conditions in *Seagate/Samsung* and *Western Digital/Hitachi*. However, Mofcom has kept in place the prohibition to integrate Western Digital and Hitachi's sales teams and product brands for another two years after which the conditions will lapse.

Another example from Mofcom's practice showing divergence of Mofcom's analysis compared to international practice is the Nokia/Alcatel case, which involved the combination of two companies in the telecommunications equipment industry. Mofcom approved the transaction subject to a commitment by the merged entity to license Standard Essential Patents for 2G, 3G and 4G on FRAND terms. By contrast, various other authorities cleared Nokia/Alcatel without conditions. Since Nokia was selling its handset business in the EU, the company was no longer regarded as a market player in that market and no remedies could therefore be imposed regarding its future licensing policy post-transaction in this other market. Mofcom found that the transaction would increase Nokia's share of 2G, 3G and 4G standard essential patents (SEPs) and that SEP licensing could constitute a barrier to enter the smartphone manufacturing market. Mofcom also found that, pre-merger, Chinese smartphone makers do not have sufficiently strong portfolios and negotiating power to cross-license with Nokia and, post-merger, Nokia could withhold its SEPs in a way that could force Chinese smartphone makers out of the market or force them to pass higher prices on to consumers.

### 3.2. NDRC

The NDRC's Bureau of Price Supervision and Anti-Monopoly enforces the Anti-Monopoly Laws provisions prohibiting restrictive agreements and the abuse of dominance with regard to price related issues.

The NDRC seems to have started Anti-Monopoly Law enforcement in earnest in 2012 when the first press report surfaced about NDRC investigation of the State Owned Enterprises, China Telecom and China Unicom, for abuse of dominance. Prior to this there were few reports on enforcement by the regional Development and Reform Commissions. Between 2008, when China's Anti-Monopoly Law, came into effect, and until 2014, the NDRC and its local branches allegedly investigated 78 cases. But that overall number conceals the rapid increase in cases – and the complexities they present to the regulator – that has occurred in only the 2012-13. Of the 78 cases, 45 of them were launched in 2013 and 2014. In 2008, there were no cases and in 2009, there were only two. The number increased to 6 in 2010; 11 in 2011; and 14 in 2012 and with 12 cases in 2015. At the beginning of 2013, the NDRC imposed fines amounting to 353 million yuan (approximately \$56 million) on six liquid crystal display panel manufacturers. This is the harshest penalty that the NDRC had imposed until then and was also the first time that the NDRC had investigated multinational companies. Only two years later Qualcomm was fined 6.605 billion yuan (\$1.02 billion).

Since then, NDRC enforcement has taken off and reached a level which made for example the US-China Business Council write in its September 2014 report on *Competition Policy and Enforcement in China* that '*China's increased level of competition enforcement activity and the high-profile reporting of its competition investigations have prompted growing attention and concern from US companies.*'<sup>25</sup>

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<sup>25</sup> [https://www.uschina.org/sites/default/files/AML%202014%20Report%20FINAL\\_0.pdf](https://www.uschina.org/sites/default/files/AML%202014%20Report%20FINAL_0.pdf)

In August 2014 the NDRC investigated the car sector and issued fines in a number of cases. The cases made headlines not only because of the number of investigations and fines handed out, but also the investigative methods used.<sup>26</sup> Peak of the attention to NDRC's enforcement came in February 2015 when Qualcomm settled its case with the NDRC regarding the licensing conditions for licensees using Qualcomm's patent portfolio. Since then it has been quieter around the NDRC's enforcement but there are regular reports about new cases investigated by the NDRC.

Like for any other competition enforcer which investigates actively and hands out significant fines, public reaction to the enforcement is to be expected. Since the car cases in 2014, the NDRC seems to have been calibrating not only its public relations policy but also its transparency and its investigative procedures which came into very strong focus. The new legislative package under preparation is likely to contribute to a more standardised enforcement approach and procedures and with a higher degree of transparency.

### **3.3. SAIC**

The SAIC Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau enforces the Anti-Monopoly Law provisions prohibiting restrictive agreements and the abuse of dominance with regard to non-price related issues.

SAIC has also gradually increased its enforcement and it is estimated that it has investigated 30 cases between 2008 and 2014 with only ca. 22 cases on SAIC's public webpage. All decisions so far involve only domestic companies. However, SAIC has two ongoing high-profile investigations of Microsoft and Tetra Pak. The Tetra Pak case was initiated in July 2013 and is an investigation into a possible abuse of a dominant position – SAIC's first case involving a foreign company. The Microsoft case was initiated in July 2014 in response to concerns related to the compatibility of its Windows operating system and Office software suite.

In April 2015 SAIC adopted a Regulation which provides guidance on the application of the Anti-Monopoly Law on IPRs. Some of the guidance is generally applicable to the exercise of IPRs: refusal to license; exclusive dealing; tying; imposition of unreasonable conditions; and discriminatory treatment. Another part of the Regulation looks at certain types of IPRs and specific situations, such as patent pools and patent standard setting and implementation. Many of the Regulation's provisions are modelled over the EU Technology Transfer Regulation. Shortly after the adoption of the SAIC Regulation it was announced that the State Council had commissioned the three Anti-Monopoly Enforcement Authorities to each draft a proposal for a new IPR Regulation which would apply to the three authorities. Latest news is that the State Council's Antimonopoly Commission has set up a working team to coordinate the legislation on China's antitrust guidelines for the intellectual property rights.

SAIC is also the enforcer of the Anti-Unfair Competition Law which although it is not a competition law in the sense of the Anti-Monopoly Law, it nevertheless contains certain provisions which are relevant from a competition angle. On 25

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<sup>26</sup> European Chamber statement on China's anti-monopoly law: <http://www.autonewschina.com/en/pressdetail.asp?id=262>

February 2016, the Legislative Affairs Office of the State Council released draft amendments to the Anti-Unfair Competition Law for public comment. The draft amendment contains important revisions to the Anti-Unfair Competition Law, which was first enacted in 1993. The revisions aim to bring the Anti-Unfair Competition Law in line with more recent legislation (such as the Trademark Law and the Anti-Monopoly Law), codify settled case law, and modernise the Anti-Unfair Competition Law through the adoption of an array of new principles and provisions. There are several substantial proposed revisions to the Anti-Unfair Competition Law that have competition law implications. Existing Anti-Unfair Competition Law provisions on administrative monopolies, predatory pricing, and tying have been deleted from the draft amendment, since they are now directly regulated by the Anti-Monopoly Law. The Anti-Unfair Competition Law has a new provision on the abuse of superior bargaining power which was originally under consideration for the Anti-Monopoly Law but which was not retained in the Anti-Monopoly Law at the end. It is a concept which is inspired by German cartel law.

#### 4. OTHER ANTI-MONOPOLY LAW RELATED DEVELOPMENTS

The role of the Anti-Monopoly Law is likely to increase in China. As explained above, in November 2013, the 3<sup>rd</sup> Plenum of the Communist Party of China adopted the most far-reaching set of economic and social reforms since the 1978 Deng Xiaoping reform package. The 3<sup>rd</sup> Plenum considered that *'The underlying issue is how to strike a balance between the role of the government and that of the market, and let the market play the decisive role in allocating resources...'*. The Plenum also stated that the *'property rights protection system will be improved and state-owned enterprises will adhere to modern corporate practices, supporting healthy development in the non-public economy.'*<sup>27</sup>. The intentions seem clear: a stronger, leaner, more competitive state sector, combined with a more vigorous non-state sector. The 3<sup>rd</sup> Plenum programme has initiated general economic reform and a change of growth model where the emphasis is on a better resource allocation, innovation and introduction of a service economy.

The Chinese State Council's 2016 legislative work agenda includes plans to study an amendment of the Anti-Monopoly Law for the first time.<sup>28</sup> The legislative agenda also includes plans for a reform of State Owned Enterprises which calls for China's SOEs to modernize, better manage assets, and establish market-oriented operating systems. A revision of the Anti-Unfair Competition Law is also incorporated in the 2016 legislative plan of China's State Council, according to a notice issued by the department. The revision of the Anti-Monopoly Law will be led by China's three antitrust agencies, the Ministry of Commerce, the National Development and Reform Commission and the State Administration of Industry and Commerce. The revision of the Anti-Unfair Competition Law is in urgently needed for the government to deepen reforms, the notice said.

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<sup>27</sup> <http://www.chinamission.be/eng/more/18CPC3/t1099161.htm>

<sup>28</sup> State Council Legislative work plan for 2016. IV. Research Items (1) Legislative projects related to adjusting to the new normal of economic development, to promoting sustainable and healthy economic development and to opening to the outside.  
[http://chinalawtranslate.com/2016scworkplan/?lang=en#\\_Toc448415642](http://chinalawtranslate.com/2016scworkplan/?lang=en#_Toc448415642)

Similarly China has announced the establishment of a Fair Competition Review system to coordinate competition policies with other policies. In March 2015, the State Council released its opinions on deepening the reform of systems and mechanisms to be speed up the implementation of an innovation-driven development strategy. As part of this document, the Fair Competition Review program came into the public domain for the first time.<sup>29,30</sup> Ms Li Qing, Deputy Director-General of the NDRC's Price Supervision and Anti-monopoly Bureau, gave a speech at the opening ceremony of the Shanghai Zhangjiang Competition Policy and Antitrust Research and Consulting Centre on 19 February 2016 and is quoted for saying that the proposal for establishing a fair competition review mechanism has been submitted to the State Council and that the NDRC will focus mainly on establishing the review mechanism during 2016 in order to reinforce antitrust law enforcement against competitive restraints by administrative monopoly.<sup>31</sup>

In an announcement on 18 April 2016 from China's top leadership<sup>32</sup> it was stated that the establishment of the Fair Competition Review system was approved to safeguard a united national market and an environment of fair competition.<sup>33</sup> The review policy will specify review subjects, methods, provide market access and exit standards and explain what is considered anticompetitive. This is likely to allow competition law to play a more important role in the Chinese government's economic decision making. An example given refers to industrial-stimulus policies which are plentiful in China which should be replaced by the application of competition policies. A commentator in China suggested that the Fair Competition Review mechanism is similar to the EU's state aid rules.<sup>34</sup> The review mechanism intends to reconcile conflicts of existing laws with the Anti-Monopoly Law in an effort to build a consistent regulatory environment for the market players. It will set up a prior review mechanism to assess all the government supports granted to private

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<sup>29</sup> *'The government should be bold in imposing a reform on itself so as to leave ample space for the market and society to play their respective roles and level the playing field for fair competition.'* [http://www.npc.gov.cn/englishnpc/Special\\_12\\_3/2015-03/17/content\\_1909942.htm](http://www.npc.gov.cn/englishnpc/Special_12_3/2015-03/17/content_1909942.htm) and also Susan Ning: <http://www.lexology.com/library/detail.aspx?g=bc95729a-810f-45b4-b471-776cc9300ec0>

<sup>30</sup> China Daily European edition of 25 July 2015: [http://europe.chinadaily.com.cn/china/2015-07/25/content\\_21408195.htm](http://europe.chinadaily.com.cn/china/2015-07/25/content_21408195.htm). See also: <http://sports.chinanews.com/cj/2016/02-19/7765173.shtml>

<sup>31</sup> <http://www.mondaq.com/x/475610/Antitrust+Competition/China+Monthly+Antitrust+Update>

<sup>32</sup> General Secretary of the CPC Central Committee, State President, and Chairman, and XI Jinping, head of the Central leading group on deepening reform stated on 18 April 2016 at a meeting of the Central leading group on deepening reform is quoted for endorsing the fair competition review system: *'Meeting stressed that establishing fair competition review system, from the point of view of safeguarding national unity and fair competition in the market, clearly targeted and, in accordance with market entry and exit criteria, free movement of goods and factors standards, affecting the cost of production and operation standards, affecting the production standards of business conduct, to review the relevant policies and measures, from the source to prevent exclusion and limitation of market competition. Review to establish fair competition safeguards, combining self-review and external oversight, strengthen social supervision.'* <http://www.hubgold.com/2016/04/18/central-deep-reorganization-meeting-beijing-guangdong-and-chongqing-to-regulate/>

<sup>33</sup> [http://news.xinhuanet.com/english/2015-07/25/c\\_134446376.htm](http://news.xinhuanet.com/english/2015-07/25/c_134446376.htm) and [http://www.chinadaily.com.cn/opinion/2016-04/20/content\\_24686093.htm](http://www.chinadaily.com.cn/opinion/2016-04/20/content_24686093.htm)

<sup>34</sup> See Susan Ning: <http://www.chinalawinsight.com/2016/03/articles/corporate/antitrust-competition/the-establishment-of-fair-competition-review-in-china/>

undertakings. Once received the approvals, the government supports could only then proceed. The Fair Competition Review would therefore seem to be wider than Chapter V of the Anti-Monopoly Law which prohibits the abuse of administrative monopolies. No detail has yet surfaced on the practical implementation of the policy or about the body which is likely to be in charge of its enforcement. This is an interesting development to follow closely.

## 5. CONCLUSION

China is a fairly new competition jurisdiction which has undergone tremendous developments since the entry into force of the Anti-Monopoly Law in August 2008. Enforcement transparency has increased significantly. The body of published secondary implementing rules and regulations is growing rapidly leading to more predictability in Anti-Monopoly Law enforcement.

It should be remembered that competition law is a market economy instrument which China has adopted among others to promote '*...the healthy development of the socialist market economy.*'<sup>35</sup> Inevitably this will give the Anti-Monopoly Law enforcement specific characteristics and at times lead to results which would not normally be chosen by Western competition jurisdictions. This being said staff of China's Anti-Monopoly Enforcement Authorities has a very professional approach to enforce the Anti-Monopoly Law. Anti-Monopoly Law enforcement is done in an enlightened and deliberate manner. The specific Chinese characteristics are known, predictable and closely linked to China's economic development and industrial policies. China is balancing its Anti-Monopoly Law enforcement between a national industrial interests and the desire to attract Foreign Direct Investment and being an attractive trade partner.

Dialogue seems to be the best way to achieve convergence and it is therefore positive that the European Commission very actively cooperates with the Chinese competition agencies. As stated in the 2004 Terms of Reference, the aim is to increase mutual understanding and awareness developments in competition legislation and enforcement. The European Commission's cooperation with China is coherent with its efforts in favour of creating convergence of procedural and substantial rules globally in the ICN, the OECD and bilaterally and its attempts to provide a level playing field as well as legal certainty for the business community in the global market.

Also China is engaging internationally in the competition scene. Its agencies are active in the contexts of Asian Regional cooperation, UNCTAD, BRICS, and it is an *ad hoc* observer in the OECD Competition Committee. China's agencies still have to accept the invitation to join the International Competition Network

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<sup>35</sup> Anti-Monopoly Law Article 1.