EUROPEAN PARLIAMENT

At a glance

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China: anti-trust probes targeting foreign firms

Since 2013, China's anti-trust regulators have drastically stepped up the enforcement of China's competition law against foreign firms. Major EU and Japanese automobile companies have recently been heavily fined for alleged price-fixing and monopolistic conduct. Western media and business lobbies have claimed that Chinese anti-trust investigations have targeted foreign companies in a discriminatory manner, and that China is using competition law as a tool to promote industrial policy objectives. Chinese official statements and media outlets, on the contrary, have emphasised that anti-trust probes have been launched against Chinese and foreign companies equally, and are aimed at creating a 'fair, open and transparent market' and enhancing consumer protection.

China's competition law enforcement regime

In 2008, China's new Anti-Monopoly Law (AML) came into force. It currently coexists with the 1993 Unfair Competition Law and the 1997 Pricing Law which were still enforced in the recent past for monopolistic conduct that occurred prior to 2008. Although inspired by US and, specifically, by EU competition law, the AML has *Chinese characteristics* and thus differs in a number of substantive and procedural aspects. Most importantly, it requires industrial policy considerations to be taken into account. These are primarily enshrined in Article 4, on competition rules, which must be 'compatible with' the socialist market economy, and in Article 7 on the special status of state-owned enterprises (SOEs) important to 'the national economy or national security'. Procedural issues, mainly due-process rules, transparency standards during investigations and as regards the disclosure of *reasoned* decisions, the leniency policy for cooperating firms, and the calculation of fines, have been applied at variance with EU and US competition law.

Unlike in most other jurisdictions, including the European Union, where competition law is enforced by one single agency, China's AML is applied by **three different regulators** entrusted with partly overlapping competences: the Ministry of Commerce (MOFCOM) deals with merger control; whereas 'monopoly agreements' and the abuse of a dominant market position fall under the competence of *both* the State Administration for Industry and Commerce (SAIC) *and* the National Development and Reform Commission (NDRC). The former is in charge of non-price issues (Tetra Pak and Microsoft cases) and the latter deals with price-related issues, such as horizontal price-fixing between competitors, and vertical price-fixing, e.g. resale price maintenance, between manufacturers and distributors. As in the EU but unlike in the US, regulators investigate *and* adjudicate cases in first instance, and there is only civil and not criminal liability.

Recent NDRC pricing investigations

A steep increase in NDRC staffing levels and growing expertise has translated into a corresponding rise in the number of investigations, from 20 in the period 2008-12 to 80 in 2013 alone. A list of cases in 2008-14 in a 2014 US-China Business Council report reveals that over half the companies investigated were domestic firms. But scrutiny of foreign firms has intensified since 2013, with the infant formula case, and subsequently has focused on six key industries set out in the NDRC 2014 work plan for closer price monitoring, such as telecommunications (InterDigital and Qualcomm cases) and pharmaceuticals (optical lens industry case).

Currently, the automobile sector faces the most scrutiny, with 1 000 domestic and foreign companies allegedly under investigation. In July 2014, the NDRC levied total record fines of $201 million on 12 Japanese automotive-bearings and car-parts manufacturers, for horizontal price-fixing over ten years. As in the 2013 Liquid Crystal Display (LCD) panels case involving Taiwanese and South Korean firms, the Japanese companies were previously fined in the US and EU, with much higher penalties. High-level investigations of European luxury car-makers Audi, BMW, Daimler and Fiat-owned Chrysler, for abuse of a dominant market position and vertical restraints involving resale price maintenance of parts and after-sales services, led to a

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wave of proactive corporate price reductions and on-site investigations (dawn raids) by regulators. In September 2014, FAW VW, Audi's Chinese Joint venture, and Chrysler's local sales units had a combined fine of $46 million imposed, with other firms expected to be fined too. The NDRC has significant leeway under Articles 46 and 47 AML, and under the broad leniency provisions of Article 46, to determine penalties. These may range from 1 to 10% of a company's annual sales in the previous year in the relevant market. Overall, fines have been rising constantly. A change in strategy from educating industry to sanctioning is apparent. While a 1% fine was originally the rule, in 2013 the NDRC more often fixed a higher penalty, of 3-6%, as in the infant formula case. The Chinese firm Biostime was imposed a 6% fine for lack of cooperation, and the Japanese car part manufacturers, fines of 4-8%. Higher fines, of 2 and 5%, were also imposed on domestic firms in the tourism sector.

Western business lobbies' views on China's AML enforcement

Concerns about unfair and unequal treatment, non-competitive factors in competition enforcement, lack of due process and transparency are the key issues raised by four Western business lobbies. An August 2014 **American Chamber of Commerce** survey reveals that 49% of its members feel that Chinese regulators target foreign companies selectively and subjectively applying 'legal and extra-legal approaches'. Also in August 2014, the **European Union Chamber of Commerce** in China released its stance, stating that some sectors had faced heavy-handed 'administrative intimidation tactics', such as urging foreign firms to admit guilt and accept punishments and remedies without full hearings, and not to bring lawyers to hearings or challenge investigations. It contends that in some of the industries under investigation, domestic companies have not been targeted for similar conduct. In several cases involving joint ventures allegedly only the foreign partner has been mentioned as being a party to the investigations. A recent **US Chamber of Commerce** report asserts that NDRC investigations were directed disproportionately against foreign corporations, with a view to pursuing industrial policy goals. It claims that the NDRC's failure to publish reasoned decisions falls well short of basic standards of transparency. A September 2014 **US-China Business Council** survey shows that 86% of members are concerned (61%) or very concerned (25%) about the competition environment, with the primary concerns being enforcement (56%), and the legal and regulatory framework (36%).

In August 2014, the European Commission announced that it will closely follow developments in China and, if appropriate, discuss issues with Beijing. Since 2004, an EU-China Competition Policy Dialogue has developed into a permanent consultation and cooperation mechanism between DG Competition, the NDRC and the SAIC, set out in a 2012 memorandum of understanding. In September 2014, Joaquín Almunia, outgoing EU Competition Commissioner, warned of the need for care in assessing how other jurisdictions enforce their competition laws, but underlined shortcomings in China's cooperation with the EU and other competition regulators.

Chinese positions on AML enforcement

At a rare joint press conference in September 2014, the heads of the three anti-trust regulators responded to criticism on selective law enforcement, lack of procedural fairness and transparency. They stressed that companies were scrutinised irrespective of their nationality. As in Western jurisdictions, they asserted, investigations are mainly driven by complaints from whistle-blowers and consumers, and there is no room for selectivity due to lack of capacity. Chinese experts confirm that domestic companies now tend to use competition rules as a business strategy against competitors. While the NDRC asserts that only 10% of anti-monopoly cases involve foreign firms, Chinese experts reckon on 50%. Defending their approach, regulators referred to harsh fines recently imposed on domestic companies, such as in the cement industry. As for procedural unfairness, the Qualcomm and Microsoft cases were cited as examples of full involvement of in-house and external lawyers.

But Chinese experts acknowledge shortcomings in due process and invoke lack of experience due to the short enforcement track record as an explanation. They say that the perception of selectivity arises because in the past foreign firms were not investigated or fined at all. It is argued that large foreign corporations have now appeared on regulators' radars because of their strong market position and the relative weak position of domestic firms. Less media coverage of domestic cases is another reason. There is also the widespread argument among Chinese commentators that decades-long preferential treatment of foreign firms to attract investment is drawing to an end. The strongest advocate of this position is China's Association of Automobile Manufacturers (CAAM) which has repeatedly decried price differences between foreign high-end cars and spare parts in the EU, the US and China, even after considering China's high import duties and several taxes.