

China Competition Bulletin

The China Competition Bulletin summarises the latest developments of competition and regulatory policy in the People's Republic of China, covering laws and policies, cases, agency and other relevant news, and selected publications

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Highlights

In this edition of the China Competition Bulletin, we report on increasing international cooperation by China's Anti-Monopoly Enforcement Agencies (AMEAs), with the signing of memoranda of understanding between the AMEAs and the Australian Competition and Consumer Commission (ACCC), the Brazilian Council for Economic Defense of the Federal Republic of Brazil (CADE), and the Competition Directorate-General of the European Commission (DG Competition). This is notable particularly since the AMEAs are yet to be member agencies of the International Competition Network. We also report the AMEAs' latest enforcement statistics and activities disclosed at the Asia Competition Association 2012 Annual Conference. A number of commentators have recently defended China's state-owned enterprises (SOEs), which comes amid speculation that SOEs have gained massive benefits from monopolies.

Special Report

The Asia Competition Association 2012 Annual Conference Held in Beijing

The Asia Competition Association (ACA) 2012 Annual Conference was held in Beijing on 21 October 2012. This one-day conference was organised by the ACA in conjunction with the Institute of Law, Chinese Academy of Social Sciences. Sessions focused largely on monopoly agreements, abuse of dominance, merger regulation, and private enforcement issues in Japan, South Korea, and China. Twenty-eight speakers, including representatives from China's AMEAs and the Supreme People's Court (SPC), delivered speeches.

Ms Li Qing, Deputy Director General of the Price Supervision and Anti-Monopoly Bureau of the National Development and Reform Commission (NDRC), talked about new developments in the enforcement of the AML by the NDRC. She discussed the capacity building efforts of the NDRC and noted that, since 2011, the NDRC has directly investigated 15 cases involving price-related monopoly conduct. She also discussed the NDRC's implementation of the leniency policy and some enforcement issues related to vertical agreements, administrative monopolies, and the Internet sector.

Ms Yang Jie, Division Chief of the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of the State Administration and Industry and Commerce (SAIC), provided an update on anti-monopoly work at the SAIC, including the drafting of the Guidelines on the AML Enforcement in Relation to Intellectual Property Rights (IP Guidelines). The SAIC has authorised Jiangsu province and other provinces and cities to investigate 16 suspected monopoly cases so far. There was one case of suspected abuse of dominance and 15 cases of suspected monopoly agreement, and punishment decisions were made in 4 cases. For the next stage of AML enforcement, the SAIC plans to investigate the restrictive behaviours of public utilities such as power, water, gas, and cable television; continue its drafting efforts for the IP Guidelines; expand and clarify the commitments procedure; and improve disclosure of typical cases.

Mr Shang Ming, Director General of the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM), discussed new developments in Chinese merger control. In the first half of 2012, MOFCOM has received 83 notifications of concentrations and accepted 78 cases. MOFCOM has concluded 82 cases, approving 4 cases conditionally. Of the 83 notifications received, there were 46 offshore transactions, 5 cases of foreign companies acquiring Chinese companies, 2 cases of Chinese companies acquiring

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foreign companies, 22 Chinese/foreign joint ventures, and 8 purely domestic transactions. Most notifications occurred in the petrochemical and machinery manufacturing industries (with 15 cases each) and the energy and automotive industries (with 11 cases each). MOFCOM is currently focused on drafting the *Rules on Imposing Restrictive Conditions for Concentrations of Undertakings and the Interim Provisions on Simplified Procedures of Assessing Notified Concentrations of Undertakings*.

Dr Zhu Li, Judge of the Intellectual Property Rights Division of the SPC, discussed the objectives and basic legal regime of China's civil anti-monopoly actions. In particular, he discussed issues relating to standing, the relationship between public and private enforcement, burden of proof, and civil liabilities.

Over 110 people attended the conference, including representatives from government departments, academia, law firms, and businesses from China, Japan, South Korea, and United States.

Source:

Conference proceedings and meeting minutes on file with the editors.

Background information:

'SAIC Has Investigated 16 Suspected Monopoly Cases Pursuant to the AML', China Competition Bulletin, Edition 22, July/August 2012, 5.

I. Laws and Policies

1. Ministry of Finance Invites Comments on the Draft Measures on the Administration of Non-tender Government Procurement (《政府采购非招标采购方式管理办法 (征求意见稿) 》) (Legislative Affairs Office of the State Council, 17 October 2012)

Pursuant to China's Government Procurement Law and other relevant laws and regulations, the Ministry of Finance published a draft of the *Measures on the Administration of Non-tender Government Procurement* (draft Measures) for public consultation on 17 October 2012. The consultation period expires on 18 November 2012.

The draft Measures defines 'non-tender government procurement' as government procurement methods except for open tenders and invitations to tender, including competitive negotiations, single-source procurement, price enquiries, and other procurement methods as determined by the relevant authority responsible for supervising and administering government procurement under the State Council. The draft Measures set out general principles and provisions on non-tender government procurement as well as specific provisions on competitive negotiations, single-source procurement, price enquiries, raising questions and complaints, and legal liabilities for violations of the relevant laws and regulations during non-tender government procurement.

In particular, the draft Measures clarify the four circumstances under which non-tender government procurement can be conducted. Further, Article 68 of the draft Measures designates eight types of conduct as 'malicious collusion', including discussing quotes and other substantial information between suppliers, concerted behaviour between suppliers following instructions from trade associations, negotiations between suppliers to determine a specific winning supplier, and other collusive conduct aimed at securing a specific winning supplier or excluding other suppliers. Article 13 prohibits suppliers that have the same person in charge or shareholding and management relations from participating in the same non-tender government procurement deal.

Source:

<http://www.chinalaw.gov.cn/article/cazjgg/201210/20121000376934.shtml> (in Chinese)

Background information:

The text of the *Government Procurement Law* is available at:

http://www.gov.cn/english/laws/2005-10/08/content_75023.htm

<http://www.people.com.cn/GB/shehui/43/20020710/772676.html> (in Chinese)

For comments on issues of access to China's public procurement market, see: 'Facts and figures on EU-China trade: Did you know?', September 2012, at: http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144591.pdf

2. Ministry of Industry and Information Technology Issued the Implementation Plan for the Technology Standard Systems Improvement Project (《技术标准体系提升工程实施方案》) (MIIT, 12 October 2012)

The Ministry of Industry and Information Technology (MIIT) promulgated the *Implementation Plan for the Technology Standard Systems Improvement Project* (Implementation Plan) on 20 September 2012 and published it on 12 October 2012. The Implementation Plan aims to optimise the technology standard system, achieve breakthroughs in strategic emerging industry standards, increase standard technology levels, and significantly enhance basic standardisation capabilities. The Implementation Plan proposes to develop more than 800 important standards in key areas and strategic emerging industries by the end of the 12th Five-Year Plan, further optimise industrial and telecommunications industry technology standard systems, and effectively enhance the overall level of standards. The Implementation Plan sets out the targets, fundamental principles, main tasks, schedules, and requirements for improving technology standard systems in order to improve the innovative capacities and international competitiveness of the Chinese industries.

Source:

<http://www.miit.gov.cn/n11293472/n11293832/n11293907/n11368223/14849840.html> (in Chinese)

Background information:

Adrian Emch, 'Antitrust Rules and Standard-Setting: A New Dawn in China?', *Intellectual Property Magazine*, September 2010, 62-64, available at SSRN: <http://ssrn.com/abstract=1712127>.

II. Cases

1. Guangdong Price Bureau Investigated and Sanctioned a Cartel in the Local Sea Sand Mining Sector (NDRC, 26 October 2012)

The Guangdong Price Bureau, a local authority of the Price Supervision and Anti-Monopoly Bureau of NDRC, has recently investigated and sanctioned a cartel in the local sea sand mining sector pursuant to the AML.

According to the NDRC's news release, the price of land reclamation sand used in the Pearl River estuary in the Guangdong province had increased sharply in the past year and this had seriously obstructed a number of major national construction projects, in particular the Hong Kong-Zhuhai-Macau Bridge artificial islands project. This led Mr Zhu Xiaodan, the Governor the Guangdong province and Deputy Secretary of Guangdong Provincial Committee of Communist Party of China, to call for an investigation into reasons for the price increase and to crack down on hoarding activities according to law.

The Guangdong Price Bureau investigated all levels of the supply chain of the local sea sand mining sector and conducted nearly 100 interviews, conducted dawn raids, and collected key evidence. The Guangdong Price Bureau found that around 20 local enterprises with sea sand extraction licences, led by the Guangdong Baohai Sand and Stone Ltd. (Baohai) and Dongguan Jianghai Trading Co. (Jianghai), had set up a sea sand alliance. The alliance held 4 meetings (November 2010, and April, August, and November 2011) and its members regularly discussed and fixed sea sand extraction fees, monitored the implementation of the agreed fee levels, punished deviating members, and squeezed out non-member enterprises. As sea sand extraction fees are an important component of the sea sand price, increasing the sea sand extraction fees directly increased the price of sea sand. The price of sea sand doubled because of the cartel's monopoly conduct, which seriously impacted downstream enterprises and adversely affected a number of national major construction projects in Guangdong, such as delaying the Hong Kong-Zhuhai-Macau Bridge artificial islands project. The Guangdong Price Bureau found that the enterprises that had participated in the alliance had, through making and implementing an agreement to increase sea sand extraction fees, eliminated and restricted competition in the market and harmed the legitimate interests of downstream enterprises.

Pursuant to the AML, the Guangdong Price Bureau, under the guidance of the Price Supervision and Anti-Monopoly Bureau of the NDRC, imposed an aggregate fine of CNY 759,200 on the two ringleaders, Baohai and Jianghai, and Shenzhen Donghai Shiji Information Consulting Co. (Donghai), the cartel member that benefited most from the cartel. Pursuant to paragraph 2 of Article 46 of the AML, the fine imposed on Baohai, the 'whistleblower', was reduced by 50% to CNY 145,300, which is equal to 5% of Baohai's turnover last year. Jianghai and Donghai were fined CNY 134,500 and CNY 479,400 respectively, equal to 10% of their respective turnovers last year. Other cartel members were given warnings.

The Guangdong Price Bureau reported that the price of sea sand has returned to a reasonable level and that the backfilling stage of the Hong Kong-Zhuhai-Macau artificial islands project has been completed smoothly.

Source:

http://jjs.ndrc.gov.cn/gzdt/t20121026_510834.htm (in Chinese)

III. News of the Anti-Monopoly Enforcement Agencies and the Courts

1. The SAIC and the ACCC Sign a Memorandum of Understanding (SAIC, 25 September 2012; ACCC, 18 September 2012)

On 18 September 2012, the SAIC and the ACCC signed a Memorandum of Understanding. The MOU promotes cooperation and coordination between the SAIC and the ACCC, in particular with respect to competition law enforcement, consumer protection, online commodity trading and its related services, information sharing, and staff training. The MOU was signed during a visit by Mr Zhou Bohua, the Minister for the SAIC, to Australia. Prior to signing the MOU, the SAIC and the ACCC held high level discussions.

Sources:

<http://www.accc.gov.au/content/index.phtml/itemId/1079582/fromItemId/2332>

http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201209/t20120925_129858.html (in Chinese)

2. The SAIC and CADE Sign a Memorandum of Understanding (SAIC, 19 September 2012)

On 13 September 2012, the SAIC and CADE signed a Memorandum of Understanding. The MOU promotes and strengthens the institutional partnership between the SAIC and CADE, especially through information exchange and capacity building activities. In particular, the SAIC and CADE agreed to organise training seminars, study visits, and other meetings to discuss competition issues of mutual concern. The MOU was signed during a visit by Mr Zhou Bohua, the Minister for the SAIC, to Brazil.

Sources:

http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201209/t20120919_129735.html (in Chinese)

<http://www.cade.gov.br/upload/Acordo%20em%20Ingl%C3%AAs%20CHINA.pdf>

3. The NDRC, the SAIC, and the European Commission Sign a Memorandum of Understanding (NDRC, 20 September 2012; European Commission, 20 September 2012; SAIC, 22 October 2012)

On 20 September 2012, the NDRC, the SAIC, and DG Competition signed a Memorandum of Understanding. The MOU aims to strengthen cooperation and coordination between the NDRC, the SAIC, and DG Competition in the area of competition legislation, in particular cartels, other restrictive agreements, and abuse of dominant market positions under the AML. The parties agreed to exchange views on the development and enforcement of competition legislation, operational enhancement of their competition authorities, multilateral competition initiatives, competition advocacy, and technical cooperation. The MOU was signed in Brussels during the 15th China-EU Summit. The MOU complements the EU-China Competition Policy Dialogue that was signed between MOFCOM and DG Competition in 2004.

Sources:

http://jjs.ndrc.gov.cn/gzdt/t20120929_508124.htm (in Chinese)

http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201210/t20121022_130313.html (in Chinese)

http://ec.europa.eu/competition/international/bilateral/mou_china_en.pdf

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/993&format=HTML&aged=0&language=EN&guiLanguage=en>

4. Hu Zucai Visits the United States to Attend the First Sino-US High-level Competition Policy Dialogue (NDRC, 24 September 2012)

On 24 September 2012, a high-level dialogue on Chinese and US competition policy was held at the US Department of Justice (US DOJ). This was the first meeting held between the Chinese and US antitrust enforcement agencies since the signing of the Memorandum of Understanding between MOFCOM, the NDRC, the SAIC, the US Federal Trade Commission (US FTC), and the US DOJ in July 2011. The parties discussed the latest developments in competition law and enforcement and exchanged views on issues of mutual concern. Mr James Cole, Deputy Attorney General of the US DOJ; Mr Joseph Wayland, Acting Assistant Attorney General for the Antitrust Division of the US DOJ; Mr Jon Leibowitz, the Chairman of the US FTC; Mr Hu Zucai, Deputy Commissioner of the NDRC; and representatives from the Price Supervision and Anti-Monopoly Bureau of the NDRC, the Department of Foreign Affairs of the NDRC, and the Chinese Embassy in the United States attended the meeting.

Source:

http://jjs.ndrc.gov.cn/gzdt/t20120928_507587.htm (in Chinese)

Background information:

'The Chinese and US Antitrust Agencies Sign a Memorandum of Understanding on Antitrust Cooperation', China Competition Bulletin, Edition 11, July 2012, 4.

5. The 5th EU-China Competition Week Held in Xi'an (EU-China Competition Policy Mini-site, October 2012; MOFCOM, 11 October 2012)

The 5th EU-China Competition Week was held from 9 to 12 October 2012 in Xi'an, the capital of Shaanxi Province. Two training sessions were designed and delivered by EU-China Trade Project (II) in collaboration with the AMEAs. More than 100 participants from China's central and provincial governments attended the training. The interactive workshops and seminars covered merger remedies, simplified procedures in merger review, vertical agreements, and intellectual property rights in the field of competition policy. Speakers included officials from DG Competition, the UK Competition Commission and Office of Fair Trading, and the Portuguese Competition Authority, lawyers from the Beijing offices of Clifford Chance and Freshfields Bruckhaus Deringer LLP, and relevant Chinese experts. Sessions were filmed and will be distributed to officials all over China, particularly those unable to attend the sessions. In addition, all materials produced from the training are available at www.euchinacomp.org in English and Chinese.

Sources:

<http://www.euchinacomp.org/index.php>

<http://fldj.mofcom.gov.cn/aarticle/xxfb/201210/20121008379338.html> (in Chinese)

Background information:

'The Conference on Innovation and Competition Policy in the IT Sector and the Launch of the EU-China Competition Policy Mini-site', China Competition Bulletin, Edition 21, June 2012, 1.

'The Third EU-China Competition Week Held in Wuxi', China Competition Bulletin, Edition 18, March 2012, 3.

III. Central and Local Government News

1. Nike Fined in Beijing For Applying Double Standards on Chinese Consumers (Beijing Evening News, 24 October 2012)

Nike was fined CNY 4.87 million by the Beijing Administration for Industry and Commerce (BAIC) for selling the same model of basketball shoes at a higher price and lower standards in the Chinese market. This information was disclosed by Mr Liu Jian, Deputy Head and Spokesperson of the BAIC, during the BAIC's "open day" on 24 October 2012.

According to Mr Liu, a high-end model of Nike basketball shoes priced at CNY 1,299 and advertised with dual air cushions were found to have only one air cushion and selling at CNY 500 cheaper outside of China. Even though Nike published a statement immediately after the BAIC accepted the case, clarifying that the Chinese product had only one air cushion and promising that purchasers can return the shoes for a refund, the BAIC considered that the double standards applied by Nike harmed Chinese consumers and thus imposed a fine. This is the first time that the BAIC has penalised a business for having double standards.

The news report does not state which laws or regulations were relied upon by the BAIC in this case or how it calculated the fine.

Sources:

http://bjwb.bjd.com.cn/html/2012-10/24/content_152205.htm (in Chinese)

Comments by Stan Abrams are available at:

<http://www.businessinsider.com/beijing-aic-fines-nike-for-having-double-standard-2012-10>

IV. News of State-Owned Enterprises

1. Analysts Defend the Role of SOEs (Xinhua, 11 October 2012; Qiushi Journal, 16 September 2012)

Recently, a number of analysts have defended China's SOEs, arguing that SOEs have played a huge role in enhancing China's global competitiveness. This support comes amid speculation that SOEs have gained massive benefits from monopolies.

Mr Xu Baoli, an analyst of the State-owned Assets Supervision and Administration Commission (SASAC), stated that State-owned capital has been the main driver in creating competition in industries such as iron, and steel, and chemical, and machine manufacturing. He believes that competition is alive in sectors where there is more market concentration, such as the refined oil retail market where foreign oil giants, including BP and Shell, have been given access to China's profitable east coast. Mr Shao Ning, Deputy Director of SASAC, said that China needs its SOEs, as well as other types of ownership, to compete internationally. He said that SOEs play a leading role in advancing technological innovation and helping to support industrial competitiveness. Mr Cheng Enfu, an analyst at the Chinese Academy of Social Sciences, commented that private ownership does not necessarily mean high-efficiency. He believes that large SOEs are better placed to withstand economic downturn than their smaller private counterparts and that the exit of SOEs could risk China's global competitiveness.

In an article published recently by the Qiushi Journal (a journal affiliated with the Central Committee of the Communist Party of China), Mr Wu Qiang examined some issues related to the reform of China's monopoly sectors. He considers whether monopoly reform is lagging, whether all monopoly sectors should be opposed and broken up, which aspects of China's monopoly sectors should be reformed, whether China could copy privatisation reform program models from Western countries, whether consumers could benefit from the privatisation of monopoly sectors, and the reasons why Western countries pay such close attention to SOE reform in China. Mr Wu notes that China's large SOEs have their strengths. He argues that the reform of monopoly sectors should aim at promoting benefits, abolishing harms, and avoiding the removal of existing strengths.

Sources:

http://news.xinhuanet.com/english/china/2012-10/11/c_131900756.htm

http://www.qstheory.cn/zxdk/2012/201218/201209/t20120912_181094.htm (in Chinese)

<http://www.globaltimes.cn/content/734109.shtml>

Background information:

'Unirule's Report on Administrative Monopolies in China', China Competition Bulletin, Edition 22, July/August 2012, 1-3.

'Discussion on the Nature, Performance and Reform of China's State-owned Enterprises', China Competition Bulletin, Edition 14, October 2011, 3.

VI. Other News/Media Comments

1. Medtronic to Acquire China Kanghui for US\$ 816 Million (various sources, September 2012)

On 27 September 2012, Medtronic, Inc. announced that it will acquire China Kanghui Holdings, a leading provider of orthopedic devices in China, for US\$816 million in cash. Medtronic, based in the United States, is the world's largest maker of medical devices specialising in pacemakers and spinal implants. The proposed deal is the biggest foreign acquisition in the Chinese medical device market.

Sources:

http://wwwp.medtronic.com/Newsroom/NewsReleaseDetails.do?itemId=1348791292656&lang=en_US

http://news.xinhuanet.com/world/2012-09/28/c_113248934.htm (in Chinese)

<http://fldj.mofcom.gov.cn/aarticle/i/201210/20121008400864.html> (in Chinese)

<http://news.investors.com/technology/092812-627413-medtronic-acquires-china-kanghui.htm>

Major Acronyms

AML Anti-Monopoly Law 2007, PRC

MOFCOM Ministry of Commerce, PRC

(MOFCOM is one of China's three competition enforcement agencies which applies the AML and is responsible for enforcing the merger control regime under the AML.)

NDRC National Development and Reform Commission, PRC

(NDRC is one of China's three competition enforcement agencies which applies the AML and is responsible for enforcing price-related infringements of the AML in the areas of restrictive agreements and abuse of dominant market position.)

SAIC State Administration for Industry and Commerce, PRC

(SAIC is one of China's three competition enforcement agencies which applies the AML and is responsible for enforcing non price-related infringements of the AML in the areas of restrictive agreements and abuse of dominant market position.)

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