A comparative view of EU and Chinese antitrust law on anti-competitive agreements

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EU socio-economic context

- Historical context is:
  - Widespread State ownership of strategic industries, such as telecoms, post offices, energy, defense, railroads and air transport
  - Prior to EU regulation of monopolies, there was no "competition culture" in Europe. Monopolies and cartels were prevalent.
- Art. 3(3) of TEU refers to the establishment of an internal (or single) market.
- Protocol 27 to the TEU states that the internal market must include a "system ensuring that competition is not distorted."
- The Court of Justice has stated that the EU competition rules are aimed to "protect not only the interests of competitors or of consumers, but also the structure of the market," that is, of competition itself. See e.g. Case C-8/08 T-Mobile Netherlands, para. 38.
- The European Commission has used competition policy to liberalize various markets, that is, to open them fully to competition. See e.g. XXth Report on Competition Policy (1990), point 53.

What is the “internal market”

- The “internal market” consists of all EU members, that is 28 Member States. It is the area within which goods, services, capital and persons are deemed subject to free movement.

- The internal market removes barriers that are commonly imposed by sovereign states, such as immigration controls, right of employment for foreigners, rights of establishment for foreign companies.

- The internal market thus represents a partial transfer of sovereignty to the EU institutions—a unique socio-economic and political structure.

EU competition law and the internal market

- One of the aims of EU competition policy is to promote and safeguard the internal market. It does this in various ways. For example:
  - It prohibits bans on parallel imports
  - It prohibits discrimination by dominant companies on the basis of nationality
  - It prohibits cartels by which competitors allocate/divide national markets between them
  - It prohibits mergers which may raise prices or limit consumer choices in particular national markets
  - It subjects Member State-owned enterprises to the full force of EU antitrust law

The Chinese socio-economic context

- The Chinese Anti-Monopoly Law ("AML") is the product of Chinese economic reforms which began in the late 1980s-1990s, by which price controls were gradually lifted, some SOEs were privatized, and in-bound investment was encouraged. In other words, China was liberalizing its economy and needed to establish rules to protect competition and consumers.

- AML Art. 1: "This law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and the interests of the society as a whole, and promoting the healthy development of socialist market economy."

The Chinese socio-economic context

- However, as noted by economist Prof Wei Tan, Chinese SOEs are still prevalent in the Chinese economy. Of 73 Chinese firms listed in the S&P Global 500, only 5 are privately-owned.

- Chinese SOEs often have deep links with high-ranking government officials, even to the point that their senior executives have a higher ranking than the PRC antitrust agencies. The SOEs are also subject to intense government control, particularly on prices of their goods and services.

- As a result, SOEs have been largely insulated from AML enforcement. As noted by economist Prof Wu Hanhong, “there exists some opposite ideas that the public think that the anti-monopoly policies should be implemented thoroughly while the government consider that the anti-monopoly policies should be carried out on a gradual basis.”

- In fact, Art. 1 of the AML accounts for this internal dynamic, by promoting “fair market competition” and the “socialist market economy” simultaneously. Art. 7 states specifically that the State shall protect and supervise Chinese SOEs.

Summing up so far

- Both the EU and Chinese antitrust laws are the product of market reforms, and both seek to promote competition and the protection of consumers.

- A significant difference in the two systems is that the Chinese model seeks to protect the socialist market economy. This has several dimensions:

  - First, Chinese SOEs have been largely protected from the full application of the AML;
  - Second, the AML may justify conduct/mergers on the basis of industrial policy considerations that do not exist in EU law.

EU enforcement structure

- European Commission: The Directorate General for Competition (or DG Comp) is the central enforcing regulator of the EU competition rules.
- DG Comp is the sole EU institution with the power to investigate mergers, and all infringements of the EU antitrust rules.
- Commission decisions may be appealed to the General Court in Luxembourg, with further appeal to the European Court of Justice.
- National competition authorities and courts are also empowered to apply the EU competition rules (however, the larger cases are dealt with almost exclusively by the EU Commission).

PRC enforcement structure

- The PRC has a bifurcated enforcement system whereby the NDRC has jurisdiction over price-related infringements, whereas the SAIC has jurisdiction over non-price related infringements.

- In “mixed” cases having price and non-price elements, one or the other PRC agency will take charge of the investigation and will probably involve the other agency in the investigation.

- As in the EU, the PRC courts also have jurisdiction to hear antitrust claims. And respondents in MOFCOM/NDRC/SAIC decisions have a right of appeal to the PRC courts.

EU system: Anti-competitive agreements

- Art. 101(1) TFEU: Prohibits agreements between firms which may affect trade between Member States and which "have as their object or effect the prevention, restriction or distortion of competition within the internal market."

- Art. 101(3) TFEU: Agreements falling within the scope of Para (1) are exempted from its application where:

  - The agreement contributes to improving the production or distribution of goods or promotes technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

    - Impose restrictions which are not indispensable to the attainment of these objectives; nor
    - Afford the possibility of eliminating competition in respect of a significant part of the goods in question.

AML system: Anti-competitive agreements

- AML Arts. 13 and 14 seem to prohibit certain types of agreements simply by virtue of their existence.

- However, under AML Art. 15, there are various grounds for exemption:
  - Where the ***objective*** of the agreement is one of the following: the improvement of technology, engaging in R&D of new products, improvement of product quality, reducing cost, enhancing efficiency, unifying specifications or standards, implementing specialized production, increasing the efficiencies or competitiveness of small-medium sized businesses, serving public interest in energy conservation or environmental protection, mitigating sharp decreases in sales volumes or overproduction caused by economic depression, or protecting the legitimate interests in foreign trade and economic cooperation.

- Art. 15 also says: Parties relying upon Art. 15 must ***additionally*** show that the agreement will ***not*** have the effect of severely restricting competition and that consumers will share the benefits of the agreement.

Key similarities in overarching approach

- The European Commission must prove that the agreement has the "object or effect" of restricting competition. However, the mere existence of certain agreements, such as cartels, is deemed to have an anti-competitive "object." [therefore no need to prove effects]. To this extent, Art. 101(1) and AML Arts. 13 and 14 are similar.

- Most of the grounds for exemption listed in AML Art. 15 (with some notable exceptions) are applied, in practice, by the EU.

- AML Art. 15 would not apply to any agreement which severely restricts competition (i.e. even if one of the grounds of exemption are met). This is similar to the EU approach: Art. 101(3) would not exempt any agreements which eliminate competition with regard to a substantial part of the goods in question.

- Both Art. 101(3) and Art. 15 provide exemptions only when consumers share in the benefits of the agreement.

Key differences in overarching approach

- Art. 101(3) exemptions are dependent upon proof of pro-competitive effects, whereas AML Art. 15 provides exemptions depending upon pro-competitive *objectives* which may not result in pro-competitive effects. This gives the parties to the agreement much greater latitude to prove their case for exemption [subject to there being no severe anti-competitive effects].

- AML Art. 15 provides as a basis for exemption the legitimate interests of “foreign trade and economic cooperation with foreign counterparts.” This phrasing seems to excuse anti-competitive behavior on grounds of industrial policy, such as: to improve exports or market share in foreign markets, avoid anti-dumping duties, or to protect home markets from foreign competition.

Other key differences in overarching approach

- Under Art. 101(3), the Court of Justice has ruled that the pro-competitive advantages of the agreement must outweigh its harm to competition, that is, compensate for the latter harm. The burden is on the parties to prove this. See e.g. Cases 56-58/64 Consten & Grundig. There is no such requirement under the AML as such. However, in the recent Johnson & Johnson case, a Shanghai appellate court applied a "rule of reason" in a resale price maintenance case.

- Importantly, Art. 101(3) states that the agreement must not contain restrictions that are not indispensable to the achievement of its pro-competitive benefits. There is no such proviso in AML Art. 15. Here too, the AML provides the parties with an easier burden of proof.

- However, in the case of cartels, the parties are never able to show that the pro-competitive benefits outweigh the harm to competition and the restrictions are never "indispensable" for any positive purpose. So, as regards cartels, the EU and PRC approaches are quite similar.

Another critical difference in the overarching approach

- The EU makes a critical distinction between agreements prohibited by "object" and those prohibited due to their "effects," the latter being more difficult for the Commission to prove. The AML does not make this distinction. The PRC agencies must only prove the existence of an agreement (or concerted activity).

- Yet, the PRC authorities give cartelists an opportunity to prove that their agreement does not have the effect of severely restricting competition and that consumers will share the "benefits."

  - The PRC approach gives cartelists a free pass if the cartel is never implemented. In the EU, cartels that are abandoned before implementation are still penalized (analogize to conspiracy to commit a crime).

  - Also, in the case of implemented cartels, cartelists should be unable to show a lack of competitive harm and presence of consumer benefit. It is arguably a waste of administrative resources to hear such claims.

Summing up so far

- With regard to cartels and other hard-core restrictions, the EU and AML models operate very similarly. In other words, in both jurisdictions, such restrictive arrangements should be ordinarily prohibited.

- The glaring exception is that Chinese SOEs are given special protection by the State. AML Art. 7 states expressly that their business operations and prices shall be regulated by the State. Although they are not explicitly exempted from the application of the AML, the trend so far has been for the PRC agencies to apply a "hands-off" policy to SOEs—perhaps in recognition of the policy of promoting the "socialist market economy."

EU: Which horizontal agreements are prohibited?

- Art. 101(1) TFEU: Prohibits horizontal agreements which fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development or investment; or share markets or sources of supply.

- In practice, there are horizontal agreements which are *per se* illegal; that is, they are deemed to have the very "object" of restricting competition. These cartels are:

  - Price fixing
  - Market sharing
  - Bid rigging
  - Agreements on output
  - Collective exclusive dealing (joint boycotts)
  - Certain information exchanges

- There are other types of horizontal agreements, which are analyzed in terms of their anti-competitive "effects." These include: joint production agreements, R&D agreements; joint selling and purchasing agreements; standard-setting agreements; and patent pools. See the EU Horizontal Guidelines (2011). In most cases, they are approved under Art. 101(3).

AML: Which horizontal agreements are prohibited?

- AML Art. 13: Prohibits horizontal agreements to: fix or change commodity prices; restrict production or marketing of commodities; split the sales or purchasing markets for raw materials and semi-finished goods; restrict the purchase of new technologies or equipment or the development of new technologies or products; jointly boycott third parties; and other monopoly agreements deemed as such by the PRC authorities.

- It is now understood that Art. 13 applies generally to:
  - Price fixing
  - Agreements to limit production
  - Market sharing
  - Joint purchasing
  - Joint boycotts
  - Bid rigging

Can antitrust law apply to concerted behavior not constituting a horizontal "agreement"?

- The EU prohibits anti-competitive agreements and "concerted practices," whereas the AML Art. 13 applies to agreements and other "concerted conduct." So plainly, in both systems, there is room for enforcement against concerted activity which does not reach the level of an actual agreement.

- In the EU, the ECJ has stated that a concerted practice must involve "coordination between undertakings" which knowingly results in cooperation rather than competition between them. Case 48/69 Dyestuffs, para. 64.

- In other words, there must be one or more contacts between competitors with the object or effect of disclosing one's own future intentions or conduct to the other OR of influencing the conduct of the latter. See e.g. Case 40/73 Suiker Unie, paras. 173-74. In other words, a concerted practice may arise simply when one competitor discloses its future conduct to another. Case T-202/98, British Sugar, para. 60.

- In these situations where a competitor discloses its future intentions or conduct to another, it is presumed that the latter has taken account of such information in shaping its own conduct. Case C-199/92P Huls v Commission, paras. 158-66.

Concerted practices (continued)

- Where there is documentary evidence of a concerted practice [e.g. where one competitor discloses its future pricing intentions to another], this is deemed sufficient to prove the concerted practice. See e.g. Case T-53/03 BPB v. Commission, para. 178. It is no defense that the accused party only passively attended a meeting in which anti-competitive disclosures occurred.

- In the absence of documentary evidence of the concerted practice, the Commission must rely upon circumstantial evidence of collusion. Where there is no credible evidence of contacts between competitors, it is still possible for the Commission to find an infringement on the basis of the parties' market conduct.

- In such instances, the Commission must find that the parties operated in parallel fashion on the market and that collusion is the *only plausible explanation* for the parallel conduct. Case C-89/85 Wood Pulp II, para. 71.

Can a concerted practice be rebutted?

- Under EU law, there are two possible defenses:
  - The firm can show that it publicly distanced itself from the illegal meeting;
  - Where the alleged infringement is based solely on circumstantial evidence of parallel conduct, the firm must show that there was a *plausible explanation* for the alleged conduct other than collusion.
    - For example, in a 2004 case before the Paris Court of Appeals, the court held that price convergence among gas stations arose from the highly transparent and concentrated market and not as the result of exchanging information.

The Chinese perspective on concerted practices

- AML Art. 13 states that the prohibitions therein apply to both agreements and "concerted conduct." So, clearly, the AML anticipates that various forms of collusion ***not*** amounting to an agreement will be prohibited.

- Both the 2010 NDRC Anti-Price Monopoly Regulations (APMR) and the 2011 SAIC Prohibition of Monopolistic Agreements Regulations (PMAR) explain what constitutes a concerted practice under Art. 13.

  - Under the APMR, there is a concerted practice if parallel conduct is shown, as well as evidence that the parties communicated with each other.
  - Under the PMAR, SAIC added this additional element: The parties may show as a defense that there is a reasonable alternative explanation for their parallel conduct other than collusion.

- It is unclear why the APMR and PMAR differ on the last point. However, the SAIC approach is closer to the EU model.

The Chinese experience with cartels/points of comparison with EU law

- There have been very few cartel cases brought by NDRC and SAIC. This is perhaps a reflection of the fact that both agencies have been historically understaffed, though public statements by senior officials have denied that lack of enforcement has been due to inadequate resources. This begs the question: why has enforcement been so lax?
- Most cases brought until now have involved price fixing.
- Only one decision, Moutai/Wuliangye seems to have involved Chinese SOEs. SOEs seem to be believe that they are insulated from antitrust liability, perhaps due to the protections afforded by AML Art. 7.
- No cases seem to have been brought for illegal information exchanges. Indeed, it would appear that until now, there is no legal basis for such enforcement actions.

EU framework for vertical agreements/restraints

- Vertical agreements are between parties at different levels of trade, e.g. manufacturer/wholesaler, or wholesaler/retailer.
- The general approach of EU Block Exemption 330/2010 is to exempt vertical agreements, except those containing hard-core restrictions, up to a market share of 30%.
- Hard-core restrictions are (for most cases):
  - Bans on parallel imports (except for “active” sales)
  - Resale price maintenance
- Vertical agreements containing hard-core restrictions are presumed to infringe Art. 101(1) and not to benefit from Art. 101(3). In other words, hard-core restrictions are dealt with as “object” based infringements, such as cartels.

AML framework for vertical agreements

- AML Art. 14 prohibits vertical price-fixing and the fixing of minimum prices.
- The Shanghai People's High Court on 1 Aug 2013 decided an important ruling on RPM in the Johnson & Johnson case. In this case, which alleged that J&J imposed a minimum resale price on a distributor, the Court held as follows:
  - At least in RPM cases, the Court held that a "rule of reason" applies. In sum, there are 4 elements to be examined: (i) the degree of competition on the relevant market; (ii) the market position of the defendant; (iii) the motivation of the defendant in committing RPM; and (iv) whether the pro-competitive benefits of the restraint outweigh its anti-competitive effects.
- This approach in J&J is consistent with the earlier NDRC decision in Moutai/Wuliangye of 22 Feb 2013. In this case too, the NDRC had examined Wuliangye's market power and the anti-competitive effects of its conduct.
- The 7 Aug 2013 Baby Milk decision is a bit unclear as to the NDRC's approach. However, according to one commentator, the NDRC stated that the defendants failed to prove its entitlement to the AML Art. 15 defenses, thus suggesting that economic considerations were taken into account.

Comparing the EU and PRC approaches on vertical agreements/restraints

- The PRC legal position is now closer to that of the US than to the EU.
- In the EU, hard-core restraints are still dealt with under a virtual "per se" analysis. Only non-hard-core restraints are analyzed on a more comprehensive "rule of reason" basis.
- The spate of recent PRC investigations and lawsuits involving RPM have been driven by the alleged need to reduce high market prices. The use of individual RPM investigations on such a large scale to achieve lower prices is somewhat unique.

Conclusions

- Experience has shown that the EU and Chinese systems for dealing with anti-competitive agreements are quite similar.

- The main difference between systems lies in the fact that the AML promotes a socialist market economy. This policy objective shelters a huge segment of the Chinese economy from pure market forces. The question is whether the new Government will continue to pursue this path.

- However, in terms of the investigations and private litigation already decided, the outcomes have been “more or less” in line with Western standards.

Thank you!

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