

The inside track on competition  
law and regulatory change

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# 8th China Competition Policy Forum

Haikou Hainan, May 7-8

Every year, global antitrust officials, lawyers and inhouse corporate counsel gather in Beijing or Shanghai for the China Competition Policy Forum. To mark the anniversary of the implementation of China's Antimonopoly Law (AML), the annual forum is usually held on 1 August -- the day the AML took effect in 2008. In a refreshing change, this year's event - the 8th China Competition Policy Forum - was held 7-8 May on the subtropical island province of Hainan. Organized since 2012 by the Antimonopoly Commission (AMC) of the State Council, the forum in Hainan was for the first time hosted by the State Administration for Market Regulation (SAMR) and the Hainan Provincial People's Government.

Amid the escalating trade war, the forum's theme was "A Higher-Level of Opening-up and Competition Policy - From the perspective of the free trade zone/free port construction in China," which presented China's next-step strategy to develop and implement competition policy by way of a free trade zone and pilot area on Hainan. As in year's past, PaRR was on hand to cover the two-day event, delivering 16 articles and analysis on keynote addresses and panels, providing insight and perspectives from competition professionals in attendance.

### 8th China Competition Policy Forum

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# China to explore proactive review instead of self-examination in FCRS, says SAMR Vice Minister

by Lisha Zhou

- Competition policies to be introduced on trial basis in pilot FTZs
- SAMR to adhere to 'flexible regulation plus strong antitrust enforcement'

China will explore shifting from self-examination by government agencies during the fair competition review process to proactive reviews by antitrust enforcers, said Gan Lin, the Vice Minister of the State Administration for Market Regulation (SAMR).

Speaking at the opening ceremony of the 8th China Competition Policy Forum held today in Haikou, the capital city of Hainan Island, Gan said China will also set up a platform to accept complaints and a mechanism for whistleblowers, as well as establishing a third-party assessment system to better implement the fair competition review system (FCRS).

China will ensure the implementation of competition policies through establishing and enforcing the FCRS, said Gan, adding that China will enhance the fundamental role of competition principles in economic policy.

According to Gan, implementing competition policies and developing Free Trade Zones (FTZs) are two important decisions made by the Central Economic Work Conference in December last year to promote China's new round of economic development.

Meanwhile, implementing competition policies is also in accord with the function of pilot FTZs, which is to test new policies and accumulate lessons and experiences, said Gan. As FTZs lead China's economic development direction and systematic innovation, competition policies will be introduced on a trial basis in pilot FTZs, Gan told the forum titled "A Higher Level of Opening-Up and Competition Policy From the Perspective of the Free Trade Zone/Free Port Construction in China."

The Vice Minister further suggested exploring a comprehensive competition system with local characteristics in the pilot FTZs, while also establishing a system to assess the local competition environment with clear indexes and standards. Abolishing restrictive policies and regulations that harmed competition will be accelerated, Gan said.

"We will implement competition policies through antitrust enforcement," said Gan who oversees antitrust affairs at China's unified antitrust agency SAMR.

SAMR will stick to flexible regulation plus strong enforcement to create a fully competitive business environment, according to Gan. Competition advocacy and consultancy will also be enhanced, Gan added.

# China FTZs should pioneer enhanced implementation of competition policies, says MOFCOM deputy DG

by Qianwen Lu

- Economic test areas ‘pioneering venues for testing laws and policy’
- Competition policy evolving alongside country’s market economy

Free trade zones (FTZs) in China should play a leading role in strengthening the implementation of competition policies across the country, according a senior official from the Ministry of Commerce (MOFCOM).

Ye Jun, deputy director general from the department of treaty and law at MOFCOM, made the comments at the 8th China Competition Policy Forum on Tuesday (7 May) in Haikou, capital city of the Hainan Province.

The island of Hainan became China’s latest and largest FTZ last year. It is also the country’s first pilot area for competition policy – a designation approved last week by China’s competition authority, the State Administration for Market Regulation (SAMR).

Ye said that China’s 40 years of opening up has demonstrated that economic test areas -- especially special economic zones and FTZs -- are pioneering venues for the exploration of various laws and economic policies.

Before joining the department of treaty and law in 2017, Ye was the director of the policy department at the Antimonopoly Bureau under MOFCOM, which has now been placed under SAMR.

In the past 40 years, China has established a dozen economic test areas including economic special zones, bonded zones, export processing zones and FTZs. The Shanghai FTZ’s management of foreign investment, which features pre-establishment national treatment with a negative list, has been promoted across the country. And the case-by-case approval system has also been replaced by a registration and recording system, marking significant progress for foreign investment management across the country in 40 years, said Ye.

If you look at China’s competition policies, you will notice that they are evolving in tandem with the country’s ever improving market economy, said the MOFCOM official.

China started drafting its Antimonopoly Law (AML) and Anti-Unfair Competition Law (AUCL) as early as 1987, however, the AUCL was promulgated in just six years with some individual articles also touching antimonopoly, while the AML was not officially released until 2007, said Ye.

The AUCL regulates unethical commercial behavior that disrupts market competition and hence is especially suitable for the early stage market economies featuring chaotic market competition, said the official. Whereas the AML fits more into the stage where market economy has developed at a certain degree, and monopolies begin to emerge, he added.

It cannot be expected that the market will play a decisive role in resources allocation in one stroke. It needs to be thoroughly explored and constantly tested over time in order to accomplish such a result, said Ye.

FTZs should be the “pioneers to enhance the implementation of competition policies, and to realize their fundamental role in market economy,” Ye stressed, emphasizing that they need to fully implement the negative list of foreign investment, enabling all entities to compete in sectors not on the list.

Ye said: “We encourage all FTZs including the Hainan FTZ to further enhance the implementation of competition policies, to fully implement the Fair Competition Review System and truly realize competitive neutrality by treating all companies equally.”

# US DoJ official prioritizes diverging policy goals, SOEs for further cross-border dialogue

by Lisha Zhou

- Ponders impact of enforcing different standards on “global multinationals”
- Businesses not “organs of the state” when profit-making drives conduct

Competition enforcement goals and the application of antitrust laws against state-owned enterprises (SOEs) are two areas where further dialogue can assist the US Department of Justice (DoJ) and the other antitrust agencies reach their shared goal of sound competition enforcement, said the DoJ’s top international antitrust official Roger Alford.

Speaking at the 8th China Competition Policy Forum held on 7 May in Haikou, the capital city of Hainan Island, Alford drew attention to the current debate comparing the consumer welfare and the public interest standards within the US, as well as around the world.

“We believe the consumer welfare standard should remain our guiding light because the goals of consumer welfare and competition go hand-in-hand,” Alford told the forum.

The role of antitrust is to ensure that there are adequate incentives for innovation, which is the heart of competition, said Alford.

Some competition agencies consider the impact of a merger or conduct, or furthering economic growth domestically, helping socially disadvantaged groups, supporting national champions, protecting privacy, or enhancing national security, he added.

This could invite competition agencies to sacrifice the welfare of consumers in pursuing these goals, Alford told the forum.

Not every jurisdiction agrees with the US view, so the DoJ welcomes continued dialogue, he said. “In a world of global multinationals whose conduct spans multiple jurisdictions, we should have a deeper understanding of how these different standards impact our enforcement,” he stated in his prepared remarks.

## Role of SOEs

Over the past decades, SOEs have increasingly played a more prominent roles in international commerce, Alford said. The DoJ will challenge SOEs’ anticompetitive commercial behavior and subject foreign SOEs “to the US antitrust laws to the same extent as the activities of privately owned firms,” he told the forum.

For a company to enjoy foreign sovereign immunity, it must be majority-owned by a foreign government or engage in a public activity on behalf of the foreign government such that it is an organ of the state, said Alford.

“While commercial enterprises can qualify as organs of a foreign state in certain circumstances, they do not constitute organs when they are acting to maximize profits rather than pursue public objectives on behalf of the foreign state,” said Alford.

“We should all think creatively as to how we can promote competition law enforcement in cases involving foreign SOEs,” he said.

# US-China talks on competition procedural framework 'productive', DoJ official says

by Lisha Zhou

- SAMR unlikely to sign on to deal next week
- China considers possibility of participating in ICN and MFP

Talks between the US Department of Justice (DoJ) and China's State Administration for Market Regulation (SAMR) regarding a framework to promote due process in competition law enforcement were "productive", a senior DoJ official told PaRR.

Roger Alford, the deputy assistant attorney general for international affairs with the DoJ's Antitrust Division, told PaRR that SAMR is interested in signing on to the so-called Framework on Competition Agency Procedures (CAP).

Alford added that the two agencies discussed the matter this morning (8 May) in conjunction with the 8th China Competition Policy Forum currently taking place in Haikou, the capital city of China's Hainan province.

While Alford said he expects several countries to sign on to the proposal during an event in Colombia next week, China is unlikely to be one of them.

During an afternoon session of today's forum, Zhang Guangyuan, the deputy director-general of SAMR's Antimonopoly Bureau (AMB), said that China is actively studying and considering the possibility of participation in relevant international multilateral platforms, such as the International Competition Network (ICN) and the Multilateral Framework on Procedures (MFP).

"We are willing to actively participate in international competition enforcement cooperation under the 'One China' condition and on the basis of mutual respect for judicial sovereignty," said Zhang, adding that China is willing to work together with other competition agencies across the globe.

As reported, the DoJ proposed the MFP almost a year ago, with one of its goals being to improve cooperation between competition agencies. However, the European Commission balked at the notion of creating an entirely new competition bureaucracy and insisted the MFP come under the purview of the ICN.

The DoJ had initially sought for the MFP to operate outside of the ICN because it saw non-ICN member China as a key signatory, PaRR reported. According to a previous report by PaRR, China has yet to be an ICN member due to its opposition to the inclusion of Taiwan, over which it claims sovereignty.

On 3 April, the ICN approved the CAP, which incorporates many of the principles and review mechanisms of the original MFP.

The framework will be formally launched at the 2019 ICN Annual Conference in Cartagena, Colombia, on 15 May, as reported. Alford told conference attendees yesterday that he expects dozens of agencies to sign on to the agreement, including Japan, Australia, Singapore, New Zealand and South Korea.

# China State Council advisor suggests big data intensifies burden of proof

by Lisha Zhou

When it comes to regulatory enforcement, the burden of proof should be stronger for parties possessing larger amounts of data, according to an advisor to China's State Council.

Shi concluded that while the commercial use of personal information in the digital economy is continuously growing, there are still significant challenges surrounding protection and proper use.

Speaking at the 8th China Competition Policy Forum on 8 May in Haikou, the capital city of China's Hainan province, Shi Jianzhong told the attendees that weak data protection could weaken consumer confidence and thus harm the digital economy.

Shi is the vice president and professor of the China University of Political Science & Law (CUPL) and the director of the Competition Law Center. He is also a member of the Expert Advisory Board to the Antimonopoly Commission (AMC) of the State Council.

"The more capable the platform is to control the users' data and thus making profits, the heavier responsibility it should hold," said Shi.

According to Shi, data protection has become a basic human right, however, the exact nature of these data rights is still unclear. When it comes to the algorithms and business methods of platform operators, a clear set of rules governing how they should operate has yet to be established.

# Chinese senior judge warns of impact of E-Commerce Article 35 on industry

by Lisha Zhou

- Rule covers platform operators' quasi-abusive conduct; independent from AUCL, AML
- Platform operators' responsibility for regulating on-platform operators should not be deemed advantageous
- Article may exaggerate platform operators' position, could be abused in enforcement

Enforcement of Article 35 of China's E-Commerce Law could impact heavily on industry, according to a specialist IP antitrust judge of China's Supreme People's Court (SPC).

Zhu Li, the presiding judge of the SPS' Intellectual Property Court's (IPC) No.1 panel and a member of the Antimonopoly Commission (AMC) of the State Council's expert advisory board, made the remarks in a speech (8 May) at the 8th China Competition Policy Forum in Haikou, the capital of Hainan Island.

He said that the article in question covers platform operators' quasi abusive conduct and is unusual insofar as it takes its steer from neither the Anti-Unfair Competition Law (AUCL) nor the Antimonopoly Law (AML).

Article 35 stipulates that e-commerce platform operators must not use service agreements, transactions rules, technologies, or other means to unreasonably restrict or impose unreasonable conditions on the transactions or prices within the platform, or transactions between on-platform operators and other operators, or demand unreasonable fees from on-platform operators.

Zhu said that the article reflects a legislative assumption that platform operators enjoy in-built advantages over on-platform operators in terms of technology, rule-making and enforcement, and that they may abuse the power these advantages confer. Article 35 was constituted for the sake of preventing such possible abusive conduct, he added.

Zhu questioned the rationale of this assumption, saying platform operators are also responsible for managing and regulating on-platform operators, and that the burden of this responsibility is not necessarily advantageous.

Meanwhile since violations of the article do not require evidence of corresponding violations of the AUCL or AML, the article operates independently from the framework of those statutes, Zhu said.

"On the one hand, Article 35 may unilaterally exaggerate platform operators' potential advantageous positions in law, on the other

enforcement of the article is bound to the frameworks neither of the AUCL nor the AML, and it is possible that the article may be abused in enforcement," Zhu told the forum.

As a result, Zhu urged a cautious approach to assessing platform operators' restrictive conduct, suggesting such assessments should account for whether the conduct might also benefit platform regulation.

Enforcers should also bear in mind the spirit of competition laws when enforcing the article, using rule of reason and considering whether platform operators' conduct is genuinely harmful, Zhu said.

Zhu also pointed out that Article 35 has legal consequences, since article 82 of the E-Commerce Law stipulates that where an e-commerce platform operator violates the provisions of Article 35, the market supervision and management department shall order rectification within a prescribed time limit, and may impose a fine no less than CNY 50,000 (USD 733) and not exceeding CNY 2m (USD 293,126).

The legal consequences are lighter than those of the AML, Zhu said. He suggested that once Article 35 has been applied the violator should not suffer double jeopardy under the AML.

# Antitrust analysis should begin with ‘assessment of choices,’ says Apple counsel

by Qianwen Lu

- Emergence of 5G and IoT brings more opportunities for consumers and app developers
- Antitrust analysis should avoid political temptation with subjective market definitions

Antitrust analysis in the new digital economy should begin with an assessment of choices for consumers and application developers, according to Kyle Andeer, associate general counsel and vice president at Apple Inc.

Apple’s app store model has in the past 10 years fueled the digital economy and led to an explosion in software development. Developers, big and small, have found easy access to hundreds of millions of consumers, said Andeer at the 8th China Competition Policy Forum held by the State Administration for Market Regulation on Wednesday (8 May) in Haikou city, Hainan Province.

During this period, hundreds of developers in China including big players such as Tencent, Alibaba, Meituan, JD.com and Didi Chuxing have emerged, said Andeer.

The Apple app store now has more than 300,000 apps from Chinese developers. Many of those apps are available not only in China, but in the 155 countries where the app store is available, he said.

The last 10 years have also created disruption as new businesses and new models emerge, putting pressure on all sectors, said Andeer.

Competition law enforcement is particularly important in this era, and regulators face new challenges posed by the new digital economy, said Andeer.

But competition law is not about picking winners and losers, he said, adding that from his perspective, antitrust analysis should begin with an assessment of choices, meaning what choices consumers have and what choices developers have.

In this process defining the relevant market is fundamental to assessing the choices for developers and customers, according to Andeer.

In the market where Apple competes there are many choices. The company “works hard every day here in China and around the world to compete for customers and developers” and competition is growing ever harder, he said.

Andeer said Apple is just one of the many choices available to consumers and developers. There are a dozen app stores in China alone, he noted.

Developers have an ever growing number of choices available to them. They are developing PCs with gaming systems, televisions, cars and the emergence of 5G and the Internet of Things (IoT) creating even more opportunities for developers and consumers, he said.

The number of choices available to consumers and developers create competition, said Andeer.

In addition to an assessment of choices, Andeer said antitrust should “avoid political temptations and defining markets with subjective definitions that shortcuts reasonable analysis.” For example, we should not simply “apply labels to a market that develops in real world competitive dynamics.” Nor should we “simplify the analysis by defining the market by identifying the platforms that provide products,” he added. It may be good for politics in jurisdictions where politicians are running for office or positions, but it’s not a good policy, he said.

# Government behavior should not be exempt from competition regulations, says Huawei antitrust counsel

by Qianwen Lu

Government behavior should be regulated by competition policy considering it has a bigger anti-competitive impact compared to the monopolistic conduct of dominant companies, according to Gao Lin, chief antitrust counsel for Huawei Technologies Co.,LTD.

While dominant companies need some market strategies to hinder the entry of new competitors, administrative monopolies by governments can simply and directly block entry, Gao said, addressing the attendees of the 8th China Competition Policy Forum on Tuesday (7 May) in Haikou, capital city of Hainan Province.

In fact, for a company possessing a dominant position in the market, it can never actually block the entry of new competitors regardless of how dominant it is, said Gao, adding that if government opts to set restrictions in certain areas, new competitors have no way to enter the market no matter how hard they try.

So free market competition will never be guaranteed if the Antimonopoly Law is only enforced against companies without regulating government behavior as well, said Gao.

“China’s competition legislations regarding market access, government procurement and tendering have been treating both domestic and foreign companies equally which I think is quite forward-looking even from an international perspective,” said Gao.

Gao said Huawei has “suffered a lot because of insufficient implementation of competitive neutrality.” Huawei hopes all international enforcers will implement competitive neutrality by treating all companies equally, she added.

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