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THE DRAGON AWAKES: IS CHINESE COMPETITION POLICY A CAUSE FOR CONCERN?

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Highlights

- China's Anti-Monopoly Law, adopted in 2007, is largely compatible with antitrust law in the European Union, the United States and other jurisdictions. Enforcement activity by the Chinese authorities is also approaching the level seen in the EU. The Chinese law, however, leaves significant room for the use of competition policy to further industrial policy objectives.
- The data presented in this Policy Contribution indicates that Chinese merger control might have asymmetrically targeted foreign companies, while favouring domestic companies.
- However, there are no indications that antitrust control has been used to favour domestic players.
- A strategy to achieve convergence in global antitrust enforcement should include support for Chinese competition authorities to develop the institutional tools they already have, and to improve merger control by promoting the adoption of a consumer-oriented test and enforcing M&A notification rules.

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INTRODUCTION

European and US companies are increasingly asking if they are at a disadvantage in global markets because of disparities between domestic and foreign approaches to competition and industrial policies. A common concern is that antitrust enforcement and regulatory control in companies' home jurisdictions, if strictly implemented, could lead to a reduction in companies' profits to the benefit of consumers, draining resources that could potentially be used by companies to compete in foreign markets[1]. Meanwhile, emerging economies might adopt more flexible regulatory approaches that could in some instances disguise support for domestic companies. Merger policies, for example, can be used to select, build-up and empower national champions, so that they face reduced competitive pressure and their total profits are increased at the expense of their domestic consumers (who would pay higher prices and experience lower quality products).

Conversely, emerging countries are sometimes accused of using antitrust enforcement or merger control defensively to impose restrictions on foreign firms attempting to enter their markets. For example, imposing unnecessary remedies as a condition for clearing a merger, which could even imply that companies cede some autonomy to public authorities, might reduce the ability of foreign firms to compete, to the benefit of domestic players. The same applies to state aid: centralised economies are often accused of heavily subsidising their national champions through direct money transfer or through indirect measures to reduce their production costs, such as low loan interest rates or land rents.

Because of the significance of the competitive pressure exerted by China as the most prominent emerging economy, this concern has crystallised around China's approach to merger and antitrust control[2, 3]. The Chinese approach to the market economy still lags behind the most advanced jurisdictions such as the EU and US. China's reluctance to abandon its 'national champion' rhetoric, the extensive use of direct or indirect subsidies and the still significant role played by state owned enterprises (SOEs), for example, suggest that the Chinese economy still requires significant reforms to enhance the performance of its domestic markets. Nevertheless, China has made significant steps to open markets to competition. With China's entry to the World Trade Organisation in 2001, import tariffs and barriers to foreign direct investment were dramatically reduced, and private investment strongly encouraged. The progress made by China in opening its market in the last 30 years has been deemed 'extraordinary' (OECD, 2010).

A correct implementation of competition policy would take short-term and long-term effects into account, ensuring that customers can access products or services at a competitive price without removing incentives to innovate. We analyse China's actual enforcement of merger control since the implementation of China's Anti-Monopoly Law in 2008. Merger control in particular appears to have been used by the Chinese authorities to protect competitors instead of protecting competition. However, the same does not seem to hold for Chinese antitrust enforcement.

Two limitations of this Policy Contribution should be stressed. The first is that the analysis depends on observable cases. The Chinese competition framework is however relatively young, and the sample of pursued investigations is still too small to allow refined statistical analysis (particularly in the case of antitrust). Moreover, lack of transparency on the part of the Chinese authorities, and the limited amount of information available in the public domain, limit our ability to assess the substance of decisions. More cases will be pursued

soon and transparency in investigative process in China is expected to be enhanced. We therefore expect to be able to complement our research with additional evidence in the future. The second limitation is that the analysis reported in this policy contribution is static; it does not explore how enforcement patterns in China might have affected companies' decisions to locate in different geographical areas, or might have influenced multinational companies' global merger and acquisition strategies[4].

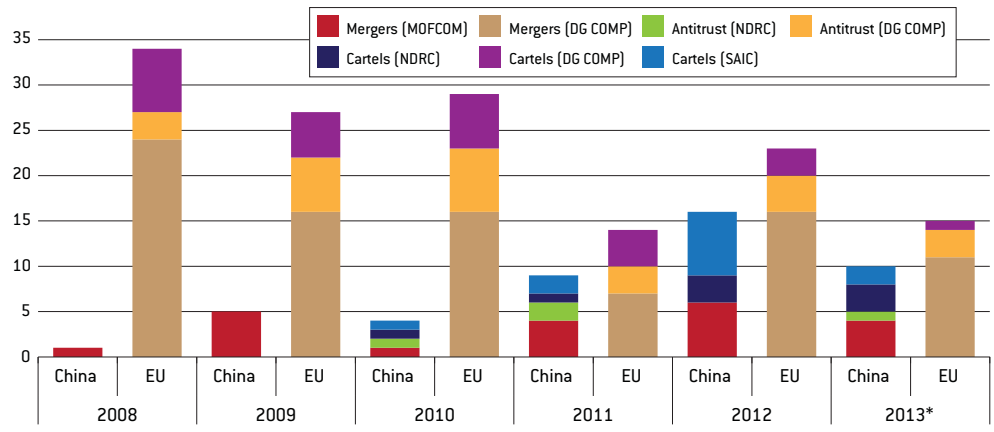
2 THE CHINESE INSTITUTIONAL FRAMEWORK

China's competition policy regime is based on the Anti-Monopoly Law (AML), which was adopted in 2007 and entered into force in January 2008. The adoption of a comprehensive package of competition policy norms marked the end of a gradual process during which measures to address specific competition issues were put in place[5]. Since the introduction of the AML, there has been a constant increase in enforcement activity by the Chinese antitrust authorities (Figure 1). The columns in Figure 1 show how many major decisions that had an impact on companies' assets or conduct were taken by the Chinese and EU competition authorities between 2008 and 2013[6]. In 2008, only one such a decision was published by the Chinese authorities: the first conditional clearance for a merger in the brewery market (InBev/Anheuser-Busch)[7]. During the same period, the European Commission published 34 major decisions. However, enforcement activity in China has since increased: five decisions were taken in 2009; four in 2010. The bulk of actual enforcement kicked-in from 2011, particularly because of anti-cartel enforcement: nine decisions were taken in that year. In 2012, 16 decisions were taken, followed by ten in the first eight months of 2013. The enforcement-activity gap with the European Commission has reduced: in 2013 (to date) the Commission has published just five major decisions more than the Chinese authorities.

In language and structure, the AML resembles the antitrust laws of western countries but, in contrast to other jurisdictions, it does not only pursue the anti-competitive behaviour of private companies; it also addresses abuse of power by public administrations if they are responsible for altering or eliminating competition (Fels, 2012). This norm was introduced in particular to address the issue of artificial internal market segmentation, and to prevent local governments from protecting locally based companies by placing unnecessary administrative burdens on external competition. Notably, article 7 of the AML provides for a special framework for state-owned enterprises (SOEs) that play a key role in 'lifeline' industries for the national economy. Such a framework might explain why few mergers involving SOEs have been investigated by the Chinese competition authorities.

The AML aims to prevent the approval of mergers that would have a likely negative effect on welfare, anticompetitive agreements such as price-fixing,

Figure 1: Competition policy enforcement, 2008-13, number of decisions



Source: Bruegel based on DG COMP (for EU). For China: MOFCOM; SAIC and NDRC do not have official registries for antitrust, so we reverted to studies conducted by law firms and research centres. Note: * up to August. Mergers: conditional clearances + prohibitions. Antitrust: sanctioned cases of abuse of dominance. Cartels: major sanctioned cartels.

and abuse of market power by dominant companies. The main institutions in charge of enforcing the AML are the Ministry of Commerce (MOFCOM), which is responsible for mergers and monopolistic practices related to international trade; the National Development and Reform Commission (NDRC), responsible for abuse of dominance and anti-competitive agreements directly related to pricing issues; and the State Administration for Industry and Commerce (SAIC), which focuses on abuses related to non-pricing issues. Other bodies playing a role in coordination and enforcement are the Anti-Monopoly Committee, the State Council and the Anti-Monopoly Law Enforcement Agency. The complexity of the institutional setting makes it often difficult to identify decision-makers. The ability of companies to anticipate the likely outcome of a process is therefore limited, making deterrence against infringements and encouragement of potentially beneficial conduct (such as cooperation agreements that would foster investment in research and development) more difficult. In particular the separation of responsibility for pricing and non-pricing issues appears artificial, since any antitrust law infringement usually have effects in both areas. This also makes it difficult to understand the reasoning of decisions ex-post, leaving scope for speculation that decisions have been taken to pursue political objectives, such as protection of Chinese enterprises. The Chinese authorities have recently flagged their intention to increase transparency by disclosing information on ongoing and concluded investigations[8].

The AML introduces for the first time in China universal merger control regardless of the origin of the companies involved. The authorisation procedure resembles the one implemented under the EU merger regulation (Regulation (EC) No 139/2004): after notification, MOFCOM has 30 days to investigate the existence of potential competition concerns. A second phase of 90 days for a deeper investigation follows if preliminary concerns are identified during the first phase. The merger can gain full clearance, be cleared subject to commitments that address concerns about a potential reduction in competition due to the merger, or be blocked. Interestingly, the substantive test used by the Chinese authorities to identify potential concerns is broader in scope than that implemented by the European Commission or the US antitrust authorities. Among the factors considered by the Chinese authorities are not only potential drawbacks for consumers, but also factors that could negatively affect 'the national economic development'[9]. The merger moreover may be allowed if the 'concentration is pursuant to public interest'[10]. And if 'state security' is involved, a further test is conducted whenever a foreign investor is involved in the merger[11].

Likewise, the provisions of the AML on anticompetitive agreements and abuse of dominance are partially consistent with those governing antitrust intervention in Europe[12]. Notably, the AML prohibits 'exploitative abuse' (that is the practice of a dominant company charging an unfair price). The provision resembles article 102 of the Treaty on the Functioning of the European Union, but is absent from US law. In common with the provisions on mergers, however, the AML gives greater room for manoeuvre to enforcers in case in which abuses might be deemed to be in the national interest. For example, similar to what is prescribed by EU law, the AML lists exceptions to the application of the law against anti-competitive agreements[13]. Two of those exceptions, however, do not require that consumers share a substantial part of the benefit arising from not enforcing the law (a condition that always applies in Europe): if agreements 'protect foreign trade interests' or if they 'pursue other interests as defined by the State Council'.

The provisions of the Anti-Monopoly Law therefore are partly consistent with Western economies' competition policy frameworks, in that they provide for a substantive test of the impact on competition and consumers of the merger or anti-competitive conduct. In western jurisdictions, however, public interest can play a role only in exceptional and well-identified circumstances. For

'Among the factors that the Chinese authorities consider to identify antitrust concerns are not only the potential drawbacks for consumers, but also factors that could negatively affect "the national economic development".'

example, the EU merger regulation allows EU member states to take public interest considerations into account when mergers might affect public security, plurality of media or prudential rules[14]. A general provision in the Treaty on the Functioning of the European Union, moreover, explicitly grants member states autonomy in the treatment of issues concerning the defence sector[15]. But these are exceptions that are rarely applied and when they are, they require antitrust authorities to follow an explicit and transparent ad-hoc procedure.

The Chinese law instead formally leaves the door open to industrial policy considerations in the substantive assessment of any case dealt with by antitrust authorities. National interest is therefore not an exceptional instance requiring special treatment. It is rather one of the main elements to be considered when assessing the impact of a merger or an antitrust case. To the extent that the interpretation of 'economic development' and 'national interest' can be used to favour domestic industries, the Chinese antitrust law can therefore technically be used to pursue industrial policy objectives[16]. As others have suggested (Fels, 2012), the emergence of a substantive test aligned to those applied by the most advanced economies therefore very much depends on actual implementation by the Chinese antitrust authority.

3 ACTUAL ENFORCEMENT: MERGERS

In the first five years of enforcement, MOFCOM received 754 merger notifications (up to June 2013) and ultimately assessed 692 of those. The great majority of decisions – 97 percent – were clearance with no commitments; 3 percent of cases were cleared with commitments. Only one merger was blocked: Coca-Cola/Huiyuan[17] (see Table 1). During the same five years, the European Commission received 1644 merger notifications, 95 percent of the 1531 assessed cases were cleared with no commitments, 5 percent with commitments. Four mergers were blocked. As Figure 2 shows, China has been handling an increasing number of mergers since the adoption of the AML.

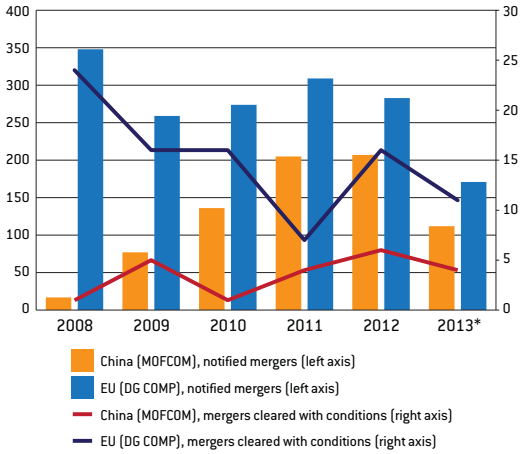
Table 1: Conditional clearances and prohibitions in Chinese merger control

Date	Case	Buyer country of origin	Target country of origin	Only foreign companies involved	Type of remedy
		Prohibitions			
18 Mar 2009	Coca Cola/Huiyuan	US	China	mixed	-
		Conditionally cleared			
18 Nov2008	InBev /Anheuser-Busch	Belgium	US	yes	Behavioural
24 April 2009	Mitsubishi Rayon/Lucite	Japan	UK	yes	Combined
28 Sept 2009	GM/Delphi	US	US	yes	Behavioural
29 Sept 2009	Pfizer/Wyeth	US	US	yes	Combined
30 Oct 2009	Panasonic/Sanyo	Japan	Japan	yes	Combined
13 Aug 2010	Novartis/Alcon	Switzerland	Switzerland	yes	Behavioural
02 June 2011	Uralkali/Silvinit	Russia	Russia	yes	Behavioural
31 Oct 2011	Penelope (AlphaV)/ Savio	France	Italy	yes	Structural
10 Nov 2011	GE/Shenhua Group JV	US	China	mixed	Behavioural
12 Dec 2011	Seagate/Samsung	US	Korea	yes	Behavioural
10 Feb 2012	Henkel Hong Kong/Tiande Chemical (joint venture)	Germany	China	yes	Behavioural
02 Mar 2012	Western Digital/Hitachi	US	Japan	yes	Combined
19 May 2012	Google/Motorola	US	US	yes	Behavioural
15 June 2012	Goodrich/UTC	US	US	yes	Structural
14 Aug 2012	Walmart/Niuhai	US	China	mixed	Behavioural
06 Dec 2012	Advanced RISC Machines/G&D/Gemalto JV	UK, Germany, Netherlands		yes	Behavioural
16 April 2013	Glencore/Xstrata	Switzerland	UK	yes	Combined
23 April 2013	Marubeni/Gavilon	Japan	US	yes	Behavioural
13 Aug 2013	Baxter Int./Gambro	US	Sweden	yes	Combined
27 Aug 2013	MediaTek/Mstar Semicondutor	Taiwan	Taiwan	yes	Behavioural

Source: Bruegel.

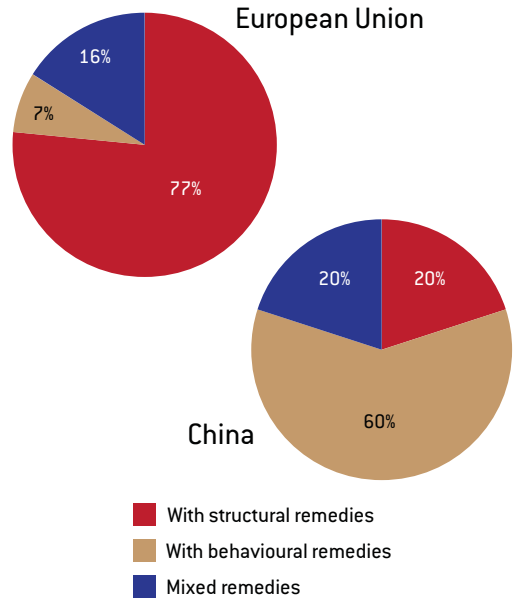
Merger notification trends (shown in columns in Figure 2) appear consistent across the two jurisdictions: notifications in the EU increased from 2009 to 2011, then dropped in 2012. The same happened with merger notifications in China. But the gap between the absolute number of notifications in the EU and China has reduced. While there were approximately 1.7 times more notifications in Europe in 2009 than in China, in 2011 the figure shrank to 1.3, and it can be expected to shrink even more in 2013. Similar convergence is observed in the number of mergers cleared with conditions (represented by the lines in Figure 2).

Figure 2: Merger control trends, EU and China, 2008-13



Source: Bruegel. Note: * notifications for China to 30 June. All other data to 31 August.

Figure 3: Merger remedies as share of conditional clearances, EU and China, 2008-13



Source: Bruegel.

From a substantive point of view, there appears to be a divergence in the EU and Chinese approaches to merger assessment. In stark contrast to the EU approach, MOFCOM has made extensive use of 'behavioural' remedies as opposed to 'structural' remedies, as a condition to authorise a merger. Structural remedies require the divestment of some of the involved companies' assets in favour of actual or potential competitors in order to maintain the same level of competitive pressure in a market which would otherwise be too concentrated post-merger. Behavioural remedies instead involve a commitment to engage in a specific conduct to preserve the same competition conditions after completing the merger. Examples are non-discriminatory provisions, preventing the merged entity from favouring the acquired target over its competitors; price caps; mandatory licensing provisions; and prohibitions on the sharing of information within the merged entity. Structural remedies are desirable from a social welfare point of view. They are much more likely to be effective in counteracting the potential negative effects of a merger because once they are implemented they do not require the intervention of antitrust authorities. Conversely, behavioural remedies require ex-post monitoring, a difficult exercise to perform, particularly if antitrust authorities lack resources. Moreover, behavioural remedies may distort companies' incentives to compete or to fully exploit the efficiencies brought about by the merger. For example non-discrimination clauses may reduce the total supply of a certain product, reducing consumer welfare (Motta, 2004).

Although structural remedies are more efficient and MOFCOM is severely under-staffed (according to Reuters, MOFCOM's antimonopoly merger bureau can count on about 10-12 case handlers; the European Commission's Directorate General for Competition has 124 officials and external experts assessing mergers assisted by 25 economists from the Chief Economist Team[18]), Chinese authorities made extensive use of behavioural remedies in the first five years of enforcement of the AML (Figure 3). Behavioral remedies were used in 60 percent of the commitment decisions, as opposed to 20 percent for structural remedies. During the same period, only 7 percent of EU com-

mitment decisions entailed only behavioural remedies, while 77 percent imposed structural remedies.

There might be two reasons for China's preference for behavioural remedies. First, for antitrust authorities in their infancy, behavioural remedies have a 'marketing value': they are relatively easy to impose compared to structural remedies. They signal to the outside world that the authority is vigilant and that merger investigations produce concrete outcomes. In other words, they help to promote a competition policy culture and to justify the use of public resources for enforcement. This is particularly evident when commitments to 'honour' existing agreements are imposed (for instance, in the decision taken by MOFCOM on Google/Motorola, the parties were required to abide by their fair, reasonable and non-discriminatory commitment to license their standard essential patents). These types of remedy however do not impose any further burden on the parties or increase the probability that competition will be increased by the merger: to the extent that the parties were already bound by the law to such conduct, a formal commitment to respect the law is redundant.

Second, behavioural remedies can be used to pursue objectives that go beyond competition policy and can leave some room for control by the Chinese authorities after the merger has taken place. In Uralkali/Silvinit, the parties were required to maintain a certain quantity and quality level in potassium chloride products and to report periodically to MOFCOM. In Henkel Hong Kong/Tiande, MOFCOM prohibited the merged entity from charging too-high prices once the merger had been completed. This is unusual for competition authorities, as their aim should be to maximise market self-sufficiency and avoid *ex-post* regulation, which may have ambiguous welfare effects.

Most importantly, Chinese authorities have in several instances used behavioural remedies to protect competitors instead of protecting competition (to the extent that those remedies were effective). In at least four of the 12 decisions in which the merger was cleared subject to behavioural conditions, the 'enhanced' competitiveness of the merged entity was quoted as a factor motivating the remedies. In Inbev/Anheuser-Bush and Wal-Mart/Niu Hai, the parties were prohibited from entering into a specific line of business. In Novartis/Alcon, the parties were required not to relaunch a Novartis product. In Marubeni/Gavilon the parties were prohibited from exploiting synergies that would reduce wholesale costs and increase Marubeni's competitiveness in the supply of soya beans to the Chinese market. These decisions are not consistent with a sound economic approach, because an increase in the competitiveness of the merged entity is normally beneficial for the economy and for consumers; remedies specifically conceived to limit the parties' increase in competitiveness are detrimental, and suggest that Chinese merger control aims to promote pro-domestic objectives. The very same misconception of competition law seems to have played a key role in the assessment of the only blocking decision taken so far by the Chinese competition authorities: Coca Cola/Huiyuan (see Box 1 on the next page).

Confirmation of a pro-domestic bias comes from the analysis of merger decisions on the basis of the origin of the companies involved. In broad terms, merger control bites only when the merging parties have a non-negligible share of at least one of the markets supplied by the parties. Therefore, the number or the value of all M&As completed may provide no direct information on how many mergers should be expected to be deemed problematic by competition authorities. However, it is reasonable to expect a positive correlation between the value of M&A activities and the number of domestic mergers requiring conditional clearance. The bigger the number of M&As, the greater the value, the higher the probability that among those attempted mergers there would be one likely to cause a significant impediment to competition. Between 2008 and 2013, non-foreign mergers in the EU (that is: mergers between companies within one EU country or originating in different EU countries) represented about 3.6 percent of average EU GDP[19]. Compared to this figure, we observe that 60 percent of the mergers that were not unconditionally cleared by the European Commission during the same period were domestic, according to the same definition used above[20]. In the same period, Chinese domestic mergers represented 3.7 percent of average Chinese GDP.

However none of the non-conditionally cleared mergers are domestic.

These numbers seem to confirm the view that merger control is not uniformly applied with regard to the origin of merging companies. One may argue that, China being an emerging economy, M&A is more likely to be a way towards efficient restructuring of industrial sectors, which is natural in the course of the evolution of the national economy. This would therefore explain why domestic mergers tend to be unconditionally cleared. Still, it seems implausible that during five years of enforcement no domestic merger could be deemed capable of harming market competition, particularly because Chinese domestic mergers appear to have involved significant amounts of assets and therefore were arguably more likely to trigger competition concerns.

A more lenient approach by MOFCOM towards domestic mergers is however not the only possible reason why no domestic merger has so far ended up with a conditional clearance decision. The other plausible explanation is that domestic companies simply fail to notify their merger even if they are supposed to. Figure 4 compares the number of merger decisions taken by EU and Chinese antitrust authorities between the fourth quarter of 2012 and the third quarter of 2013. During that period, 269 decisions were taken by the European Commission. Almost half of them concerned domestic mergers. During the same period, MOFCOM took 218 decisions. Amongst them, only 32, or 15 percent, concerned purely domestic mergers[21].

This appears even more surprising considering that on average, Chinese mergers involve bigger assets than European mergers. According to Mergermarket M&A Data, the mean value of the assets involved in Chinese deals during the period 2008-2013 was €149 million. The corresponding figure for European deals is €70 million.
Therefore, it would be reasonable to expect a greater involvement of domestic companies in the mergers investigated by MOFCOM. Chinese companies should notify whenever the combined

BOX 1: THE COCA-COLA / HUIYUAN JUICE GROUP MERGER PROHIBITION

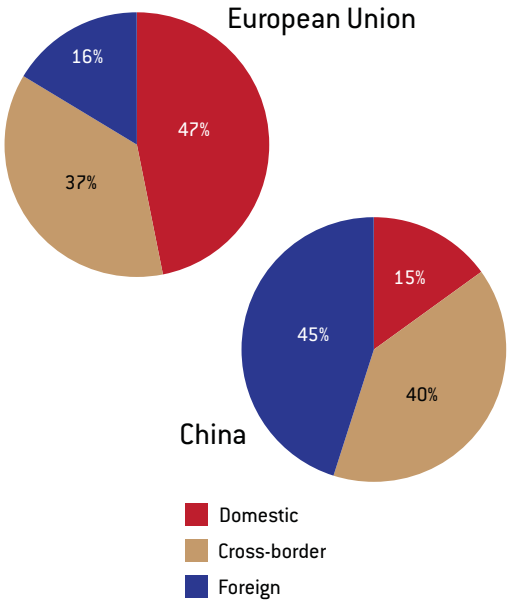
Since the adoption of the AML, MOFCOM has blocked only one merger: Coca-Cola's attempt to buy China's number one private company in the juice market, Huiyuan Juice Group. The prohibition decision was issued on 18 March 2009, six months after notification. Coca-Cola made two offers of remedies, which were deemed insufficient to alleviate MOFCOM's concerns.

MOFCOM's substantive assessment identified three concerns: (1) Coca-Cola's incentive to leverage its dominant position in the carbonated soft drink market to reinforce Huiyuan's position in the market for fruit juice; (2) the unfair advantage that Coca-Cola's branding would have given to Huiyuan, making entry into the market allegedly more difficult; (3) the negative effect on the ability of small and medium-sized enterprises ability to compete in the juice market.

The information published by MOFCOM does not allow for an exhaustive assessment of the decision, but there seem to be clear indications that the identified concerns are not backed up by economic reasoning. In particular, the Chinese authority may have overestimated the likelihood of abuse of dominance after the merger and seems to have followed an erroneous approach sometimes referred to as 'efficiency offence': the merger would have increased Coca-Cola's competitiveness at the expenses of smaller rivals but to the benefit of consumers, who could have shared Coca-Cola's efficiency gain in the form of lower prices.

MOFCOM's approach could therefore be criticised for economic patriotism or for having erroneously protected competitors instead of protecting competition. It is interesting to note, however, that other competition authorities have made similar mistakes (see, for example, the heavily criticised prohibition of the GE/Honeywell merger in 2001, where similar arguments were put forward by the European Commission). The prohibition of the Coca-Cola/Huiyuan deal may have been due to the Chinese authority's inexperience, rather than to a well-thought through industrial policy plan to defend national producers.

Figure 4: Origin of merger cases



Source: Bruegel.

turnover within China of all undertakings involved in the merger in the preceding financial year exceeds RMB 200 billion (approximately €240 million) and the turnover of at least two of the involved companies each exceeds RMB 400 million (approximately €48 million). These thresholds do not seem particularly high compared to other jurisdictions, and a significant number of deals should qualify for notification. Lack of awareness of legal obligations may explain why Chinese companies do not notify. Likewise, companies may not be seriously concerned about the consequences of failing to notify. Fines may not be high enough to dissuade them from attempting to hide acquisitions, or public enforcement may not be deemed a credible threat[22]. The Chinese authorities seem aware of this issue and have recently signalled that they are increasing their efforts to enforce notification rules[23]. However, to our knowledge, no company has until now been sanctioned for failing to file a merger.

Lastly, bigger companies may count on the tacit approval of public authorities, particularly in strategic sectors. State-owned enterprises (SOEs) have been undergoing a constant restructuring process during the last few years, especially thanks to consolidation[24]. But Chinese merger control does not seem to really apply to SOEs: a merger between the two biggest telecom operators in China (China Unicom and China Netcom) in 2008 was not notified to MOFCOM (Li, 2009); restructuring in key industrial sectors has led to the creation of over 100 'national champions' since the adoption of the AML (Lin and Zhao, 2012); in 2012, the biggest 110 state-owned enterprises conducted 918 M&A deals (Wei Tan, 2013). Yet amongst the 20 merger decisions cleared with commitments until now, only one involved an SOE (and a foreign buyer): Ge/Shenhua[25].

4 ACTUAL ENFORCEMENT: ABUSE OF DOMINANCE AND ANTI-COMPETITIVE AGREEMENTS

Abuse of dominance cases and anti-competitive agreements are pursued by the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC). Private litigation is the other channel through which the AML can be enforced; this policy contribution however focuses on the action of Chinese antitrust authorities and an analysis of Chinese courts' legal proceedings is outside its scope[26].

So far only two cases of abuse of dominance have been sanctioned by Chinese antitrust authorities: Wuchang Salt Company for anticompetitive bundling practices in the washing powder market, and Unilever for anticipating publicly a future price increase in household and personal care products. A high profile investigation into Tetra-Pak for alleged anticompetitive tying and discrimination practices in the market for food and liquid packaging has been announced and is pending[27].

In terms of anticompetitive agreements, since the adoption of the AML, more than 30 cases have led to sanctions imposed by the Chinese authorities (either by NDRC or SAIC, at national or provincial level). For smaller and local cases between 2008 and 2010, no significant information has been made public. Some information has been revealed for 22 bigger cases, and the statistics we report here concern those cases.

The number of investigations has increased over time: the first two cases were sanctioned in 2010, in 2011 there were four sanctioned cases, 10 in

2012 and finally six in the first eight months of 2013. The vast majority of cases are cartel cases (20 out of 22). The remaining cases concern anti-competitive exclusive dealing agreements in the pharmaceutical distribution sector (Shuntong/Huaxin) and 'resale price maintenance' agreements (White Liquor). Another major investigation into anticompetitive agreements was announced in 2011 and is ongoing at the time of writing: it concerns China Telecom and China Unicom, the two SOEs dominating the Chinese telecommunication market, which have been accused of implementing a type of abuse commonly known as 'margin squeeze' to keep competitors out of the downstream market.

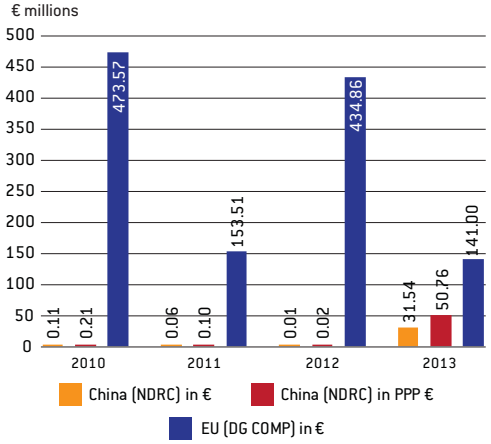
Contrary to what can be observed in merger control, the underlying motivation justifying intervention by NDRC and SAIC against abuse of dominance and anticompetitive agreements appears to have been protection of the Chinese consumer, with no evident bias in favour of domestic companies or SOEs. This approach is consistent with the approach of EU and US antitrust authorities and is compatible with what is suggested by economic reasoning, although in some instances the Chinese authorities appear more concerned about seeking consent from the public, than about economics. In the rice noodle cartel case, for instance, the NDRC forced the parties to revert to pre-cartel pricing to *"quickly stabilise the rice noodle market, protect the consumers' legal rights and interests, and ensure the people have a peaceful and happy Chinese New Year"*[28]. In Unilever, the investigation started in the aftermath of Unilever's announcement of a 10 percent price increase that caused Chinese customers to 'panic'[29]. Unilever was compelled to apologise and to suspend the implementation of the price increase. Economic reasoning would suggest caution. Direct price control is dangerous to the extent that it is difficult to identify the price that would emerge in a competitive market. Requiring a specific price level might reduce welfare. It appears in these cases that antitrust has been used more as a tool for direct price control and for fighting inflation, rather than to preserve market competition.

There does not appear to be any selection bias in cases pursued according to companies' origins[30]. Although the majority (65 percent) of sanctioned companies in Europe between 2007 and 2013 were domestic, among all the cases pursued, only 30 percent concerned cartels with no foreign company involved. Conversely, among the eight major pure cartel cases pursued by NDRC during the same period, six concerned cartels that involved only Chinese companies. Only the LCD and the milk powder cases also involved foreign companies.

Moreover, imposed fines are much lower in China than in Europe. Fines have been negligible if compared to the fines delivered by the European Commission in nominal or PPP terms (Figure 5). One possible explanation for the difference is that earlier investigations concerned cases in which the infringement started before the adoption of the new AML law. For those cases, the fine was set on the basis of the old Price Law[31], which implied smaller penalties (this was the case for the LCD cartel, for example). However, even looking at the more recent cases, fines levels are much lower in China than in Europe: for 2013, when Chinese fines peaked, the total value of fines imposed by Chinese authorities was more than three times smaller than the total fines imposed by the European Commission.

Fines are sunk costs, they do not affect the marginal cost of production and in principle they are potentially distortive only if they are so high that they push companies into bankruptcy – an unrealistic scenario under current penalty levels in

Figure 5: EU and Chine, fines per cartel, 2010-13



Source: Bruegel. Note: PPP € has been calculated from IMF WEO data. PPP $ are not defined for the currency but for the countries. To re-index PPP $ to Euro, GDP weights of the 17 euro-area members have been used.

Europe (for a discussion, see Mariniello, 2013). If the two Chinese cartel cases involving at least one foreign company (LCD and milk powder) are compared with the average cartel case sanctioned by the European Commission between 2008 and 2013, a significant difference in the size of the sanction per undertaking can be observed. Companies in the LCD and milk powder cases received a fine on average of approximately €10 milion. The average fine per undertaking in Europe is instead €64 milion. Moreover the European Commission imposed on average fines of 2.6 percent of the involved companies' global turnover, whereas for the two cartels sanctioned by NDRC, the average fine level was just 0.17 percent of the companies' global turnover. Therefore, even if fines could significantly hamper a company's competitiveness, it seems unrealistic to believe that current fines in China are a tool to protect Chinese domestic industry against potential European competitors (which, for the same infringement, would face much harsher sanctions at home). If anything, one should point out that Chinese fines are far below the level that would ensure deterrence of anticompetitive behaviour by companies, regardless of whether they are domestic or foreign.

5 CONCLUSIONS

Our analysis suggests that the Chinese institutional framework for competition policy is largely compatible with that of western economies, but leaves more room for industrial policy considerations in the assessment of competition policy cases. This flexibility may have been used by Chinese authorities to favour domestic players in the context of merger control, but not in the context of antitrust control. In particular, biases in merger control appear to be due to an erroneous substantive assessment of cases resulting in the protection of competitors instead of the protection of competition, and to a lack of enforcement of notification obligations for domestic deals.

Since the AML appears sufficiently refined to allow for unbiased enforcement, it seems that a potentially efficient avenue to achieve a level playing field in global competition would be to support China's efforts to improve actual enforcement within the boundaries of the existing institutional framework. Exporting the consumer-oriented culture from antitrust to merger control could be a significant step towards an approach consistent with that adopted by more mature economies. Requesting China to effectively enforce notification rules by sanctioning companies that fail to file for merger review would be another significant step. Moreover, reducing regulatory fragmentation by clearly defining the competences of the different institutional actors in charge of enforcing competition law and by increasing transparency, would promote the modernisation of Chinese antitrust control. If external assessment becomes feasible, because decisions containing substantiated information on the reasoning applied by the authorities are made publicly available, the risk of a biased application of competition law is minimised. By being more transparent, Chinese authorities would be less exposed to the accusation that they are pursuing industrial policy objectives. The differences in the approach of different jurisdictions would naturally shrink, because transparency would increase the inflow and outflow of information on procedures and would increase the influence that China and other major jurisdictions can mutually exert on each other. Convergence on the same substantive assessment tests and improvements in the process would make Chinese merger control more efficient and consistent with mainstream economic reasoning, bringing benefits to the Chinese domestic economy and preserving fair competition with foreign companies. Convergence has also clear-cut benefits from the perspective of companies willing to do business in multiple jurisdictions, because devising a mechanism for assessing mergers with an international dimension that would minimise the administrative burden on business (for example arising from different notification procedures) is considered one of the major issues faced by the 'world' of competition law (Whish and Bailey, 2012).

International cooperation on competition policy has been discussed in different contexts. At a multilateral level, developed countries have in the past advocated the introduction of competition policy principles in the WTO rules, though with no success[32]. Ad-hoc international initiatives are carried out to support coordination and cooperation between antitrust authorities: in 2001 an International Competition Network (ICN) was created with

the objective of promoting international convergence. China however declined to join: a *"striking omission in the membership of a body that plays an important role in the development of voluntary standards with regard to substantive policy and procedure"* (Kovacic, 2013)[33]. Bilateral initiatives offer other opportunities. A Memorandum of Understanding between Chinese and EU authorities aimed at facilitating coordination and exchange of information was signed in 2012 (the year before a similar agreement between Chinese and US authorities was reached). Joaquin Almunia, EU Competition Commissioner, has on a few occasions called for more international cooperation in the enforcement of competition policy[34] and the European Commission has recently flagged its intention to discuss harmonised antitrust and merger rules for SOEs in the context of the EU and US trade talks[35].

Bilateral negotiations aimed at facilitating foreign direct investment between the EU and China are set to start on 24 October 2013. These may represent a key opportunity to bring the issue of convergence in competition policy enforcement to the negotiation table.

NOTES:

1 Generally speaking, antitrust enforcement aims to maximise consumer welfare. Most competition authorities (including the EU and US) do this, but economists debate whether that or total welfare should be the objective of competition policy (see Motta, 2004, for a discussion). Some argue that, under certain conditions, maximising consumer welfare yields optimal social outcomes. See Neven and Roller (2005).

2 See, for example, the *Financial Times* on 22 August 2013 http://www.ft.com/intl/cms/s/0/82599dbe-08bc-11e3-ad07-00144feabdc0.html#axzz2d9ZheMKZ or *China Daily Asia* on 16 September 2013 http://www.chinadailyasia.com/business/2013-09/16/content_15088331.html.

3 Competition policy is just one of the many avenues through which industrial policy can be pursued. Other include direct subsidies or the imposition of import duties. A comprehensive analysis of all industrial policy tools is outside the scope of this paper.

4 For such an analysis, further empirical evidence covering a longer period would be needed. Particularly challenging would be to disentangle competition policy effects from other contingent factors, such as the 2009 global financial crisis. One way to overcome this is to resort to surveys, although this question has not until now been dealt with by anybody in the economic literature (foreign companies' complaining about being negatively affected by Chinese competition authorities are often reported in the press, instead. See for example *Reuters*: http://www.reuters.com/article/2013/08/21/us-china-antitrust-idUSBRE97K05020130821). Sokol (2012) is the only attempt we are aware of to overcome data limitation in the analysis of Chinese competition policy with the use of survey techniques. Sokol reports evidence in support of a general perception by practitioners across multiple jurisdictions that Chinese merger control tends to be biased in favor of domestic companies. It does not address, however, the question as to how such a bias may affect global competition.

5 Most notably: in 1980, the 'Promotion and Protection of Competition in the Socialist Economy' represented a first attempt to foster national integration by pulling down internal regional barriers to competition; in 1993, the Anti-Unfair Competition Law prohibited unfair trading practices, such as bribery, bid-rigging, predatory below-cost sales and misleading advertising. In 1997, the Price Law introduced norms against exploitative abuse or excessive pricing and price-fixing. A merger control regime for acquisition by foreign companies was introduced six years later in 2003 and then improved in 2006 in response to increasing concerns about foreign investors purchasing stakes in domestic industries. Economic patriotism and the fear of losing control of the domestic economy appear to be among the key driving forces behind developments in the Chinese competition policy framework.

6 These are mergers that did not end up in unconditional clearance, abuse of dominance or major cartel cases. Major investigations may end up in unconditional clearance of a merger or of an initially alleged antitrust abuse. Public information about those investigations (particularly from the Chinese competition authorities) is however scarce and they are therefore not included in the calculation. This means that those figures do not provide any indication about the efficiency of enforcement (zero activity may also indicate that companies refrain from anticompetitive conduct). The reported figures nevertheless provide a good indication of the intensity of authorities' enforcement activity.

7 Approximately ten cartel cases were sanctioned by NDRC between 2008 and 2010. However sanctions were negligible: approximately RMB 50,000 or about €6,000 on average. Anti-cartel enforcement became a credible threat only from 2010, when fines ramped up to approximately RMB 1,000,000 or €121,000 per case. See http://www.paulhastings.com/Resources/Upload/Publications/NDRC%E2%80%99s_Recent_Enforcement_of_the_PRC_Anti-Monopoly_Law_-_A_More_Aggressive_and_Transparent_Direction.pdf

8 See http://www.legaldaily.com.cn/index/content/2012-08/13/content_3767571.htm?node=20908.

9 The AML lists six factors that should be taken into account by MOFCOM in its assessment: (1) the parties' market shares and the extent of their market power; (2) the existing level of concentration in the market; (3) the effect of the merger on

potential market entry or technological development; (4) the effect on customers (consumers or business); (5) the effect on the national economic development; (6) other elements which could affect competition as determined by the Anti-Monopoly Authority – Art 27, AML.

10 Art 28, AML.

11 Art 31, AML.

12 According to the AML, a dominant firm commits an abuse if: (1) sells or buy goods at an unfair price; (2) sells below cost with no justification; (3) refuses to deal with no justification; (4) imposes exclusionary restrictions to a trading party with no justification; (5) ties products or imposes restrictions with no justification; (6) discriminates against counterparts; (7) other conduct is deemed as abuse by the State Council.

13 The AML prohibits horizontal and vertical anticompetitive agreements in a fashion broadly similar to EU law. It also identifies seven different categories of exemption, for those agreements for which anticompetitive effect can be balanced by benefits: agreements that (1) improve technological development; (2) enhance product quality or increase productive efficiency; (3) improve the competitiveness of small and medium enterprises; (4) pursue public interest (eg environmental protection, energy conservation, disaster relief); (5) mitigate the effects of an economic depression (crisis cartel); (6) protect foreign trade interests (eg export cartels); (7) pursue other interests as defined by the State Council. The first five categories of exception can be applied only if it can be shown that consumers share a significant part of the claimed benefits.

14 Art 21(4) of the European Union Merger Regulation: *"[...] notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph. Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication"*.

15 Article 346 of the Treaty on the Functioning of the European Union: *"1. The provisions of the Treaties shall not preclude the application of the following rules: (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security; (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes"*.

16 Note that this does not mean that the EU and US do not implement industrial policy measures, just that their antitrust laws do not explicitly allow for protection of domestic industry, unless consumers share the benefits from it.

17 The decision has been criticised for being driven by industrial policy objectives (see Box 1).

18 Source: *Reuters*, http://www.reuters.com/article/2013/05/02/us-mergers-regulation-china-insight-idUSBRE94116920130502.

19 Data kindly provided by Mergermarket (www.mergermarket.com). The figures were drawn from data on M&A announced deals, excluding lapsed and withdrawn bids and property transaction and restructurings where the ultimate shareholders' interests are not changed, thereby covering the transactions that may fall under the reach of merger control. Chinese deals include M&As taking place within the borders of mainland China.

20 Note, moreover, that these statistics refer only to EU merger control and do not include national merger control, therefore most likely underestimating the number of non-unconditionally cleared domestic mergers.

21 The figure does not change if all decisions taken by MOFCOM between 2008 and 2013 are considered: 671 decisions were taken. Amongst them, only 95, or 14 percent, concerned purely domestic mergers.

22 Article 48 of the AML: *"Where any business operator implements concentration in violation of this Law, the antimonopoly authority shall order it to cease [...] and may impose a fine of less than 500,000 yuan"*.

23 http://www.mwe.com/Chinas-Ministry-of-Commerce-Announces-Investigations-into-Failures-to-Notify-Concentration-Introduces-New-Transparency-Measures-01-09-2013/

24 From *The Economist*, October 2012 (http://www.economist.com/node/21564274): *"Though fewer in number, today's SOEs are more powerful than ever. One reason is that they can be vast (see chart) and so their market power is often greater in a given industry. Their shrinking number is the result of a concerted effort to consolidate disparate SOEs into national champions in a range of "strategic industries", which range from telecoms to shipbuilding"*.

25 It should be stressed that the economic literature does not exclude that lower levels of competition in emerging markets may sometimes be desirable. That would be the case, for example, if restrictions of competition are deemed indispensable to guarantee incentives to develop new technologies in a weak institutional setting (Laffont, 1998). However, there is a consensus that proper enforcement of competition policy and in particular of merger control would be beneficial to domestic economies even at an early stage of their development for fostering productive efficiency, for example (see Rey, 1997, for an analysis of competition policy in developing markets). There is little support for biased enforcement of competition law that would favour domestic companies in emerging markets relative to their foreign competitors (most

notably: Singh, 2002, arguing that competition authorities in emerging economies should relax merger control against domestic mergers but not against multinational companies).

26 For a recent analysis of antitrust private litigation in China see: Lu and Tan (2013). Until mid-2012, 107 cases were dealt with by lower courts in China. Most of those were cases of alleged abuse of dominance. Only three cases reached the appeal Courts: Renren v. Baidu, Li Fangping v. China Netcom, Huzhou Yiting Termite v. Huzhou City Termite. All of these cases were won by the plaintiffs. Other high profiles antitrust cases that have been recently dealt with by Chinese courts include: Beijing Ruibang Yonghe Technology-Johnson & Johnson, Huawei-InterDigital, Qihoo-Tencent.

27 Note that Tetra Pack has a long history of tying antitrust allegations with EU and US antitrust authorities (for the EU, see Case T-51/89 Tetra Pak Rausing SA v Commission (Tetra Pak I), ECR II-309, Case T-83/91 Tetra Pak International SA v Commission (Tetra Pak II)).

28 http://www.omm.com/china-rice-noodle-cartel-04-02-2010/.

29 http://www.industryweek.com/global-economy/china-fines-unilever-after-it-sparked-panic-buying.

30 This is based on only cartel cases handled by the European Commission for the EU and by NDRC for China. That is: only major cases are considered – national and local cases normally handled by member states in Europe and SAIC in China are excluded from the analysis.

31 See footnote 5.

32 This issue was discussed during the Singapore Ministerial held in 1996, at which WTO ministers launched working groups on trade and investment, trade and competition and transparency in government procurement. These topics together with trade facilitation collectively took the name of Singapore Issues. Despite the attempts to start substantive negotiations made before and during the Doha Development Round started in 2001, however, the discussion on harmonisation of competition policy issues was dropped in 2004, because of opposition from developing countries.

33 http://chillingcompetition.com/2013/08/02/review-of-chinas-anti-monopoly-law-the-first-five-years-adrian-emch-david-stallibrass-eds/.

34 http://europa.eu/rapid/press-release_SPEECH-13-250_en.htm.

35 http://www.lexology.com/library/detail.aspx?g=1442dff4-df16-4665-82f0-9ac66a70c0cd.

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