

# CPI ANTITRUST CHRONICLE

## MARCH 2023

### CPI TALKS Q&A

*By with Qing Li*



### HIGHLIGHTS AND ISSUES CONCERNING THE AMENDMENT OF CHINA'S ANTIMONOPOLY LAW

*By Xiaoye Wang*



### IN PRAISE OF SAMR's BEHAVIORAL REMEDIES: PREVENTING OVER-DETERRENCE IN GLOBAL MERGER CONTROL

*By Andrew Foster & Cindy Lau*



### MERGER REMEDIES IN CHINA IN 2022 AND THE PREVALENCE OF "CONTINUE TO SUPPLY UNDER FRAND PRINCIPLES" AS THE REMEDIES

*By John Yong Ren, Christine Zhang & Schiffer Shi*



### WHAT TO EXPECT OF CHINESE MERGER CONTROL REVIEWS OF GLOBAL SEMICONDUCTOR DEALS FOLLOWING AMENDMENTS TO THE ANTI-MONOPOLY LAW

*By Hazel Yin, Haoyang Zhuo & Laurent Bougard*



### A REFLECTION ON CHINA'S AML ENFORCEMENT RE CONCENTRATIONS OF UNDERTAKINGS IN THE INTERNET INDUSTRY

*By Roger Xin Zhang*



### THE NOT-SO-SILK ROAD: THE PROLIFERATING REGULATORY OBSTACLES TO CHINESE INVESTMENT IN THE U.S.

*By David Pearl & Bella Solórzano*



### THE INTERACTION OF IPRs AND ANTITRUST: FROM THE PERSPECTIVE OF CHINESE PRIVATE ANTITRUST LITIGATIONS

*By Hao Zhan, Ying Song & Ruichen Liu*



Visit [www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com) for access to these articles and more!

CPI Antitrust Chronicle March 2023  
[www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com)

### CPI TALKS Q&A

*with Qing Li*

In this edition of CPI Talks we have the pleasure of speaking with Qing Li, Vice President of the China Society of Economic Reform and former Deputy Director General at China's SAMR and NDRC.

### Scan to Stay Connected!

Scan or click here to sign up for CPI's **FREE** daily newsletter.





... with *Qing Li*

In this edition of CPI Talks we have the pleasure of speaking with Qing Li, Vice President of the China Society of Economic Reform and former Deputy Director General at China's SAMR and NDRC.

Thank you, Ms. Li, for taking this time to talk to CPI.

## **1. China amended its Anti-Monopoly Law in 2022, in your opinion, what are the important changes?**

Since the implementation of the Anti-Monopoly Law in 2008, one of the most important laws in the market economy system, China's anti-monopoly enforcement and justice has been demonstrating its power and important role in economic governance with a relatively rapid development trend. The three anti-monopoly enforcement agencies merged in 2018, and the first amendment was made in 2022. According to the Decision of the Standing Committee of the National People's Congress of China on Amending the Anti-Monopoly Law of the People's Republic of China, this amendment involved 22 additions to the provisions, 14 amendments to the provisions, and several other provisions were repositioned accordingly.

In summary, there are five major changes: First, to clarify the fundamental status of competition policy and to establish a sound, fair competition review system. Second, to entitle the anti-monopoly enforcement agencies more functions, such as the interview system, the written reporting system, etc., and the corresponding increase in the obligations of the investigated entities and individuals to cooperate. Third, to increase the extent of administrative penalties, including a substantial increase in the upper limit of fines, the new fineable circumstances, the new provisions for individuals, etc.; Fourth, to increase the provisions for the platform economy sector. Finally, to improve the anti-monopoly rules, such as the safe harbor system, the "stop the clock" system for the review period of the concentration of operators, and the specific circumstances of abuse of administrative power to exclude and restrict competition. In these amendments, there is no doubt that the clarification of the fundamental status of competition policy is the greatest highlight of this amendment. The most important feature of this amendment is the trend of strengthening regulation, with higher expectation on the role of anti-monopoly law in the future. This amendment will play a significant role in strengthening the law enforcement of China's antitrust law.

Aside from the above-mentioned modifications, another aspect should also be concerned. Since the Anti-monopoly Law has been implemented in China for just over 10 years, some issues have undergone a lot of discussion during the revision process and a consensus has not yet been formed among various parties, which has not been resolved in this revision and is estimated to require several more years of judicial practice in enforcement to be gradually improved.

For example, competition damage resulting in welfare losses or illegal income had not become the main basis for determining the fine, but 1-10 percent of the operator of the previous year's sales, in addition to two to five times for particularly serious violations. Obviously, it emphasized the characteristics of enhanced supervision and increased deterrence, which also means that more accurate assessments of competition damages or the calculation of illegal income through economic analysis has not been given sufficient weight in determining fines.

A related problem is that, in the case of administrative penalties that reflect more deterrent features, the corresponding procedures are not sufficiently well designed to balance deterrence with the necessary rights of enterprises to defend themselves, and thus to guarantee a more accurate understanding and implementation of the antitrust law. Of course, procedural issues may be addressed in administrative regulations or departmental rules. For example, the existing provisions on the abuse of a dominant market position do not have a clear and complete theory

of harm, nor do they have abstract provisions based on specific abusive behavior, which is yet to be further studied and improved in terms of jurisprudence.

## **2. You are a key driver of China's fair competition review system, established from 2016 until 2022 when it is incorporated into the Anti-Monopoly Law, how do you see the development of this system in China?**

The core element of China's fair competition review system is that policy-making organizations (administrative organizations) conduct self-review against set standards in the process of policy measure formulation to prevent policy measures from excluding and restricting competition.

This system has a special role for China to solve the problem of administrative power to exclude and restrict competition. China is an economic system that is gradually transforming from a highly centralized planned economy to a socialist market economy. Under a highly centralized planned economy, the role of administrative power in determining economic activities has a natural legitimacy, and administrative power determines all levels and aspects of economic operations from macro to micro. In the process of transition from a planned economy to a market economy, the relationship between the government and the market is gradually adjusted, and the decisive role of administrative power on economic activities begins to differentiate, part of it still has legitimacy, and part of it does not adapt to the relationship between the government and the market is regarded as "undue interference" in market competition.

Of course, this differentiation process is gradually evolving, which means that the correction of "undue interference" requires a longer period of time; at the same time, it also means that "undue interference" is of a certain scale, and cannot only rely on the ex post correction by the anti-monopoly enforcement agencies. It also means that "undue interference" is of a certain scale and cannot be corrected ex post by anti-monopoly enforcement agencies, and that self-adjustment by policy-making organs beforehand becomes necessary. This is where the need for a fair competition review system in China lies.

The relationship between the government and the market will change and adjust with the continuous improvement of the socialist market economy system. The more perfect the market economy system is, the more fair competition is needed, and the higher the demand for administrative power in competition is, and it is necessary to keep a clear understanding of this.

Therefore, the incorporation of the fair competition review system into the Anti-Monopoly Law in 2022 reflects a higher level of consensus, although there is still a need for further mutual adaptation of this system and the Anti-Monopoly Law in practice. We have reasons to believe that with the continuous improvement of China's socialist market economy system and the deepening of market-oriented reforms, and with the further understanding and respect of the concept of fair competition by policy-making authorities, the fair competition review system will play a broader role in preventing the exclusion of competition by administrative power, thus enhancing the quality of China's economic policies as a whole.

## **3. As a former senior enforcement official with a background in economics, can you briefly describe the application of economic analysis to antitrust practice in China?**

In my opinion, the core value of economic analysis in antitrust practice is to judge and seek the competitive order, market structure, and business model that maximizes the overall welfare of the society from the perspective of efficiency, to present the objective facts for the relevant parties in the whole process of antitrust law implementation, and to provide a reference for judging the legality of business behavior on this basis. Therefore, economic analysis has a wide range of applications in antitrust practice, such as identifying relevant markets, market dominance, analyzing market structure and concentration, assessing the effect of promoting or restricting competition, calculating competition damages or illegal income, etc. Over the past 10 years since the implementation of China's anti-monopoly law, economic analysis has played a very important role in several administrative enforcement and judicial cases. In the merger review of ZF/Wabco by SAMR, Vertical Arithmetic was employed to examine the Parties' incentive of input foreclosure. In the antitrust litigation of Rainbow v. Johnson & Johnson by Shanghai Higher People's Court, economic analysis was conducted to assess the anti-competitive effect of J&J's resale price maintenance ("RPM") agreement.

Since the implementation of China's antitrust law is only more than ten years old, the application of economics analysis in antitrust practice can only be said to be in its infancy. Compared with the level of economics analysis and the role played by analysis in the implementation of antitrust laws in Europe and the United States, there is still much room for development. First, with the revision of the antitrust law and the increase in the strength of antitrust enforcement agencies, the number of cases of antitrust administrative enforcement in China will increase significantly, as well as the number of civil antitrust lawsuits, putting forward a greater demand for economic analysis. Second, some

complex cases, especially antitrust cases involving data and algorithms, technology, platform rules, and intellectual property rights, will require a higher level of economic analysis. In this regard, China's economic analysis can learn from international experience, improve its own level and quality, gain greater development, and have room to make "China" contributions. Third, economic analysis can provide more professional support for anti-monopoly enforcement agencies. For example, the assessment of the competition landscape after the rectification of monopoly behavior. This includes both the restoration of competition in the relevant market and the adjustment of the business model of the enterprise after the monopoly violation of the enterprise is corrected, and the adjustment of the relevant policies, the condition of the industry, the restoration of competition in the relevant market, etc. after the abuse of administrative power to exclude and restrict competition is corrected. My personal observation is that if economic analysis can play a greater role in these points, it will certainly help the antitrust law to play a stronger and broader role in market regulation.

#### **4. Can you give us an outlook on the development of competition policy in China in the next five to ten years?**

In 2022, the Antimonopoly Law was amended to explicitly "strengthen the fundamental status of competition policy." If measured by the criteria of priority of value, universal application and independent authority, the basic status of competition policy has not yet been established in China. From a historical perspective, the construction and development of China's socialist market economy system should be used as the background for the observation of competition policy in China. Taking industrial policy as an example, China introduced the concept of industrial policy in 1986, while the first appearance of competition policy was in the Anti-Monopoly Law enacted in 2007, and the proposal that competition policy has a fundamental status was made in 2015, more than 20 years and nearly 30 years later, respectively. This time difference aptly reflects the stage of development of China's socialist market economy. It took decades of reform and opening up to reach the consensus that competition policy has a fundamental status, but it does take longer to truly realize the fundamental status of competition policy. The next five to ten years will be a critical period for China to "accelerate the construction of a new development pattern, focus on promoting high-quality development" and "build a high-level socialist market economy system" as proposed by the 20th Party Congress, which is also a critical period for competition policy to establish its fundamental status and position.

I personally hold positive expectations for the development of China's competition policy in the next five to ten years, although it may face many challenges and difficulties. First, the additional anti-monopoly enforcement agencies will have more enforcement resources to correct the abuse of administrative power to exclude and restrict competition; second, the policy-making authorities can achieve better self-regulation under the constraints of the fair competition review system; third, competition policy and other economic policies, especially industrial policies, will gradually form a suitable interaction to achieve the goals of industrial policies while reducing the damage to competition; fourth, the development of competition policy will promote China's market-oriented reforms, especially the reform of market allocation of factors and the construction of a unified national market, in which competitors are required to play their unique role. Among them, the fourth aspect is the most important contribution of competition policy to China's economic development.



## CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit [competitionpolicyinternational.com](https://competitionpolicyinternational.com) today to see our available plans and join CPI's global community of antitrust experts.

