# Kluwer Competition Law Blog

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Jose Rivas (Bird and Bird, Belgium) · Sunday, March 13th, 2022

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

### Wouter Wils, Procedural Rights and Obligations of Third Parties in Antitrust Investigations and Proceedings by the European Commission

This Article provides a systematic overview of the procedural rights and obligations of third parties in investigations and proceedings conducted by the European Commission for the enforcement of Articles 101 and 102 TFEU. Third parties are all natural or legal persons, undertakings and associations of undertakings other than those under investigation. This article examines the possibilities for third parties to inform the European Commission about a suspected infringement and to trigger an investigation by the European Commission; the obligations and rights of third parties when responding to requests for information sent to them by the European Commission, when participating in interviews, and when submitting to inspections conducted by the European Commission; the possibilities for third parties to obtain information about pending proceedings and to express their views in them; the rules on the use of languages; and the protection of business secrets and other confidential information, and the restrictions on the use of information obtained by third parties through their participation in the European Commission's proceedings.

### Qianlan Wu & Xiaoye Wang, Two Steps Forward and One Step Back?: US, EU and China's Bilateral Antitrust Cooperation and International Trade

Greater antitrust enforcement is argued to have positive correlations with the promotion of international trade. By 2019, the US, the EU and China, as global trade powers, have formed and strengthened bilateral antitrust cooperation to seek greater enforcement. However, the impact of such development on international trade has remained underexamined. The article argues that irrespective of their different legal forces, the US-EU, US-China and EU-China antitrust cooperation share convergences at the optimum and minimum levels. Based on the case study of the US, the EU and China's regulations of the international Liquid Crystal Display (LCD) panel cartel, the article illustrates that as the effects doctrine continues to serve as the main normative

value underpinning antitrust cooperation, matured competition regimes lack the incentive to share information with new regimes, competition regimes converge to apply comity restrictively and the consultation mechanism plays a limited role in holding the sides accountable under bilateral cooperation. Consequently, international antitrust remains fragmented, positing restraints to trade. The article calls for reconsideration of the effects doctrine as part of the transnational normative repertoire shaping bilateral antitrust cooperation and for devising policy tools to guarantee minimum information exchange among agencies.

### Dermot Cahill & Jing Wang, Addressing Legitimacy Concerns in Antitrust Private Litigation Involving China's State-Owned Enterprises

China's Anti-Monopoly Act (AML) incorporated key antitrust provisions inspired by EU antitrust concepts into China's law in 2007. By analysing leading post-2007 antitrust cases heard before China's courts taken by private parties challenging State-Owned Enterprises (SOEs) anti-competitive activities, the authors argue in this significant and original contribution that, despite the AML's enactment, China's Judiciary has not accepted antitrust Legitimacy. Leading antitrust cases challenging SOEs anti-competitive activities, taken by either consumers or enterprises are analysed, highlighting the contrast with how EU antitrust jurisprudence deals with similar matters. The analysis illustrates how China's courts have applied key antitrust concepts (such as abuse of dominant position, prohibition of market-sharing; price-fixing; etc.) in a questionable manner. Given that the understanding of such concepts are accepted in over 125 jurisdictions, this raises major questions about the Legitimacy and Effectiveness of antitrust principles in the legal system of the world's most dynamic economy.

That there is an antitrust Legitimacy and Effectiveness problem to be addressed has been recently partially recognized by the State in China, with the putting forward of reform proposals by its antitrust regulator (the State Administration of Markets Regulator (SAMR)) in 2020 in an effort to get major State agencies to recognize the primacy of antitrust. However, these reform proposals omitted reference to the Judiciary's role in antitrust enforcement against SOEs, even though they play a large role in the economy. The article demonstrates how the reform proposals, which appeared in October 2021 in the AML Amendment Bill 2021, will not solve the private antitrust enforcement Legitimacy problems identified by the authors in cases involving SOEs. Several suggestions to overcome judicial deference to SOEs' overly robust anti-competitive practices are proposed by the authors, including soft measures that in the long run may be more effective than legislative change. The article also discusses the need for the AML to incorporate a single economic entity test and a collective dominance test in order to give the courts dealing with allegations of SOE anti-competitive behaviour a more comprehensive conceptual toolbox to assist the courts make findings of dominance. Without movement also on the judicial side, the authors conclude that the Legitimacy of antitrust principles will continue to be in question inside China's legal framework, and consequently the Effectiveness of private antitrust remedies will continue to be weak in one of the world's largest economies.

### Shuping Lyu , Caroline Buts & Marc Jegers, China's Fair Competition Review System: A Single Case Study

The case study methodology has proved to be a useful empirical tool for competition policy evaluation. However, as far as China's Fair Competition Review System (FCRS) is concerned, empirical studies are scarce. This article aims to partly fill this gap by thoroughly studying the first litigation case in light of three questions: (1) does China's FCRS contribute to a competitive market?; (2) does it face challenges regarding implementation, including judicial proceedings?; and (3) how to tackle these challenges? We find that China's FCRS promotes a competitive market to some extent, but diverse issues need to be tackled in the coming years. Some policymakers still lack understanding of the system. Public antitrust enforcement also faces understanding and capability problems to fully implement the FCRS. The review standards are not specific enough. Regarding judicial scrutiny of the FCRS, we note that also judges lack knowledge of the FCRS, especially in primary courts. Court jurisdictions for filing administrative monopoly litigation are not of high enough rank. In addition, the nature of the FCRS brings up doubts when entering into litigation as the case has to be connected with the Anti-Monopoly Law (AML). Consequently, we formulate several suggestions for improvement: First, strengthening competition advocacy and FCRS training for policymakers, antitrust enforcement officials, and judges. Second, establishing disciplinary and incentive mechanisms. Third, increasing enforcement capacity. Fourth, specifying industry-specific review standards. In terms of judicial scrutiny, in addition to the training for judges, we also propose to reform the administrative proceeding system, adding corresponding clauses connected to Chapter V of the AML and the FCRS into the Administrative Procedure Law. Abstract administrative actions should also have the possibility to initiate litigation in the near future, and administrative monopoly cases should be filed at least to an intermediate court or intellectual property court, rather than to a primary court. The establishment of a dedicated competition court could also add value. Last, we recommend upgrading the FCRS to proper law.

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