Looking Ahead: The Integration of Chinese Anti-Monopoly Enforcement Authorities

Peter J. Wang, Yizhe Zhang, and Qiang Xue

China recently combined its three anti-monopoly enforcement agencies into one new agency known as the State Administration for Market Regulation (SAMR). SAMR was established under the Institutional Reform Plan of the State Council approved in March 2018 that consolidated the antitrust enforcement responsibilities of the Price Supervision and Anti-Monopoly Bureau of the National Development and Reform Commission (NDRC), the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM), and the Anti-Monopoly and Anti-Unfair Competition Bureau of the State Administration of Industry and Commerce (SAIC). After a short transition period in April and May, the new agency has begun to carry out its antitrust mission even though its internal organization and leadership has not been finalized.

This long-awaited antitrust institutional reform is one of the significant changes in the recent sweeping restructuring of the Chinese central government. In this article, we will examine and explore the background of the reform and major implications of this integration—such as greater independence and efficiency, reducing overlapping jurisdictional responsibilities, resolving inconsistent rules and practices, and facilitating easier issuance of new legislation and industry guidance.

Background of the Reform

The Chinese government has undertaken institutional reforms approximately every 10 to 15 years to reflect its economic reforms. For example, the Chinese government established the State Economic and Trade Commission and retooled a number of industrial regulatory agencies into economic entities as part of an effort to separate governmental and enterprise related functions in a 1993 institutional reform. After China joined the WTO in 2001, it took further steps to move from a planned economy to a more market-oriented economy. As a result, in the 2003 institutional reform, the National Development and Reform Commission was formed to replace the State Planning and Development Commission, the State-owned Assets Supervision and Administration Commission (SASAC) was formed to supervise state-owned enterprises and manage state owned assets, and the Ministry of Commerce was established to integrate the separate agencies regulating domestic and foreign trade.

The current round of government restructuring appears to be focused primarily on consolidation, in which 24 agencies under the State Council were consolidated into 15 newly established

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1 In addition to the antitrust enforcement authorities, SAMR also assumed the non-antitrust responsibilities of the former SAIC as well as the responsibilities of the former State Food and Drug Administration and General Administration of Quality Supervision, Inspection and Quarantine.

agencies. The previously noted creation of SAMR was only one piece of the puzzle of much larger reforms.³

While consolidation of the antitrust enforcement agencies was contemplated during the drafting of the Chinese Anti-Monopoly Law (AML), it was not clear when such consolidation would take place. Before the enactment of the AML, MOFCOM was responsible for the competition review of foreign merger and acquisition (M&A) transactions; SAIC was responsible for enforcement against unfair competition practices and for consumer protection; and NDRC was responsible for price cartels and price supervision over regulated industries.

The previous three-agency concurrent enforcement structure itself was understood to be a compromise that maintained the pre-AML allocation of responsibilities among the three existing ministries while also establishing in the AML a unifying body (i.e., the Anti-Monopoly Commission of the State Council, or AMC) to coordinate enforcement activities and set overall policy.⁴ While the compromise might have facilitated faster enactment of the AML, criticisms have been focused on the sometimes inconsistent application of the law, as well as imperfect coordination issues arising from the structure. Therefore, when Article 10 of the AML established and set out the basic power and responsibilities of the antitrust enforcement agency of China, the agency is referred to as the “Anti-monopoly Enforcement Authority,” instead of MOFCOM, SAIC, and NDRC separately. The use of this generic name left room for potential further consolidation after the AML was enacted.

**Status of the Reform**

Although it will still take time to complete the reorganization, the integration process is well underway. Former SAIC Minister Zhang Mao has been appointed to head SAMR, but the head of SAMR’s Antitrust Bureau has yet to be announced. It has also been reported that personnel from the antitrust divisions of NDRC and MOFCOM have started moving to their new offices at SAMR, formerly the location of SAIC. MOFCOM has issued an official notice that, as of May 14, 2018, all merger filing documents must be submitted to or picked up from SAMR, rather than from MOFCOM.⁵ Other internal organizational and staffing announcements at the level of Antitrust Bureau within SAMR are expected soon. After a short transition period, the agency seems to be fully operational. Merger clearances under the simple case procedure continue as usual and one even sees a trend of faster clearances, although some high profile transactions may be held up due to lingering uncertainty and other reasons. SAMR also started several new conduct investigations.

In addition, the State Council has recently announced the member agencies of the AMC.⁶ According to the State Council notice, representatives from five additional agencies will be added to the members of the AMC for the first time: SAMR, National Bureau of Statistics, Department of Justice, National Energy Administration, and the People’s Bank of China. These are in addition to the previously existing members, such as NDRC, MOFCOM, SAIC, SASAC, and the Ministry of

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⁶ For the full version of the State Council’s Notice on Adjustment to Members of the AMC (July 19, 2018), see [http://www.gov.cn/zhengce/content/2018-07/19/content_5307747.htm](http://www.gov.cn/zhengce/content/2018-07/19/content_5307747.htm) (in Chinese).
Five Agencies Joined as New Members of AMC During the Restructuring of the Antitrust Agency after 10 Years of Enforcement (July 2018),

Potential Implications of the Reform

The consolidation of enforcement from three separate agencies into one is likely to have a profound impact on Chinese anti-monopoly enforcement.

Combining Enforcement Resources for Solid Enforcement. Lack of enforcement personnel and resources has been one of the major hurdles faced by the three previous enforcement agencies. There has long been a substantial imbalance between the high number of cases handled by each of the previous AML enforcement agencies and their limited staffing. The total headcount of the previous three antitrust bureaus was probably over 100. However, less than half of those officials were actually handling specific antitrust cases. The total number of personnel is unlikely to expand significantly in the near future and, thus, SAMR still will be understaffed as compared to U.S. and EU antitrust agencies. The consolidation will, however, allow SAMR to combine existing enforcement resources, streamline the enforcement process, and optimize the use of resources for its enforcement priorities.

SAMR may also be able to combine the respective experience and skills of the three agencies with respect to various types of data and industries in an attempt to improve overall enforcement efficiency. For example, MOFCOM’s extensive experience and knowledge in market definition and
assessments of market power may prove helpful with enforcement efforts targeted toward abuse of dominance. In particular, MOFCOM—after reviewing over two thousand mergers—has accumulated perhaps the most data among the three agencies, which can now be better used as a resource for non-merger investigations previously carried out by NDRC and SAIC.

Reducing Jurisdictional Uncertainty. The lack of clear allocation of authority among the three agencies was the target of criticism from the very beginning. For example, although NDRC was responsible for price-related AML violations and SAIC for non-price-related AML violations, in practice, violations often included elements of both, giving rise to jurisdictional overlap between agencies. For example, in NDRC’s 2017 penalty decision against two pharmaceutical companies for abuse of dominance by unfair pricing in the market for isoniazid Active Pharmaceutical Ingredients, the agency also found an illegal refusal to deal, a non-price-related violation. Similarly, in SAIC’s penalty decision against Tetra Pak for bundling, it also found anticompetitive loyalty rebates, a price-related violation that would fall under the jurisdiction of NDRC.

In an effort to avoid such conflicts, the agencies are understood to have followed an internal rule of “first to initiate, first to investigate,” according to which the first agency to formally initiate a case would carry out the investigation. However, private parties seeking leniency or reporting AML violations still were required to report to both agencies since they could not know which agency would first initiate the case.

The combination of the three antitrust authorities will resolve the tension created by overlapping jurisdictions.

Harmonizing Inconsistent Rules and Practices Among Agencies. The establishment of the new agency is expected to facilitate the harmonization of inconsistent rules and/or practices under the old regime.

For example, the leniency provisions in the SAIC and NDRC rules differ in significant and important ways, including whether leniency applies to the organizer of the anticompetitive agreement, the definition of “important evidence,” and the specific implementation of the leniency program. The table below illustrates some of the inconsistencies and uncertainties that, pre-reorganization, appear to have hampered the effective implementation of the leniency rules.

Another example relates to “safe harbor” provisions for monopoly agreements. The SAIC Rules on the Prohibition of Abuses of Intellectual Property Rights that Eliminate or Restrict Competition contain safe harbors for agreements involving: (1) competitors with combined market shares of no

<table>
<thead>
<tr>
<th>Agency</th>
<th>Whether Applicable to Organizer</th>
<th>Definition of “Important Evidence”</th>
<th>Implementation of Leniency</th>
<th>Level of Reduction of Fines</th>
</tr>
</thead>
<tbody>
<tr>
<td>SAIC</td>
<td>No</td>
<td>Evidence that plays a key role in the decision to initiate an investigation or in a finding of monopoly agreement.</td>
<td>The first to voluntarily self-report and provide Important Evidence, and comprehensively and voluntarily cooperate with the investigation.</td>
<td>Should be exempted from penalties.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Others that voluntarily self-report and provide Important Evidence.</td>
<td>Reduction of penalties at SAIC’s discretion.</td>
</tr>
<tr>
<td></td>
<td>No clear prohibition</td>
<td>Evidence that will play a critical role in finding a price monopoly agreement.</td>
<td>The first to voluntarily self-report and provide Important Evidence.</td>
<td>May be exempted from penalties.</td>
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<td>The second to voluntarily self-report and provide Important Evidence.</td>
<td>May be granted a 50% or more reduction of penalties.</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Others that voluntarily self-report and provide Important Evidence.</td>
<td>May be granted a 50% or less reduction of penalties.</td>
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more than 20 percent of the affected relevant markets (or in markets with at least four other independently controlled substitutable technologies available at reasonable cost); or (2) companies in vertical relationships, with none having more than a 30 percent market share (or where at least two other independently controlled substitutable technologies are available at reasonable cost). However, the draft antitrust guidelines that NDRC issued on behalf of the AMC for public comment contain slightly lower market share thresholds (15 percent for horizontal relationships and 25 percent for vertical relationships) for the safe harbors, leaving uncertainty as to how parties with in-between market shares would be treated.

These inconsistencies have caused confusion and uncertainty in AML enforcement. With the integration of antitrust authorities, it can be hoped that the new agency will be able to harmonize prior inconsistent rules and practices. However, it is likely that, at least for some initial period, regulations promulgated by the respective legacy enforcement agencies will remain in effect until new rules are available to replace them.

**More Efficient and Independent Enforcement.** The institutional reform of the Chinese antitrust agencies also reflects the government’s increasing focus on antitrust and competition issues. There has been a steady trend of increasing antitrust enforcement since the birth of the AML in 2008. The three legacy agencies had become more and more active in their enforcement actions, however measured: the level of fines; the number of companies under investigation or transactions under review; the range of industries under scrutiny; and their willingness to look into more complicated competition issues. With broader and unified authority, the new agency will only be more active and aggressive in its enforcement of China’s AML. Zhang Mao, the head of SAMR, recently stated that the new agency will “strengthen antitrust and anti-unfair competition enforcement.”8 Moreover, as noted above, SAMR should be able to combine the respective experience and skills of the three agencies in an attempt to improve the overall quality of enforcement.

Under the old structure, both NDRC and MOFCOM maintained—as they continue to do now—other arguably more important responsibilities beyond antitrust enforcement, particularly for industrial policy (NDRC) and trade policy (MOFCOM). Thus, there always were concerns about industrial and trade policy considerations influencing merger reviews, conduct investigations, and competition analysis. Specifically, one of NDRC’s main functions is to “put forward targets and policies concerning the development of the national economy, the regulation of the overall price level and the optimization of major economic structures.”9 Similarly, one of MOFCOM’s functions is to “formulate the strategies, guidelines and policies of developing domestic and foreign trade and international economic cooperation.”10 Such policy-driven functions motivated by national economic interest raised concerns as to whether the anti-monopoly conduct investigations and merger review procedures of the same agencies would remain independent in cases or transactions that may have a potential impact on the industrial or trade policy that the agencies were also charged with promoting.

After the integration, it may be hoped that the new antitrust enforcement agency will be able to maintain greater distance from MOFCOM and NDRC, and presumably thus also from industrial and trade policies. If so, then the antitrust enforcement of SAMR may be able to become more

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Accelerating the Legislative Process. Last but not least, the consolidation may also influence ongoing antitrust legislative efforts. In September 2017, a number of seminars and workshops were held by the legacy antitrust enforcement agencies to discuss potential amendments to the AML. In addition, in 2015 and 2016 NDRC also issued for public comment, on behalf of AMC, several draft guidelines on various antitrust issues. These guidelines included: Guidelines on Abuse of Intellectual Property Rights, Guidelines on Anti-Monopoly in Automobile Industry, Guidelines on Leniency, Guidelines on Commitments of Undertakings, Guidelines on Calculation of Illegal Gains and Penalties, and Guidelines on Exemption from Monopoly Agreement.11 These guidelines reflect China’s ongoing efforts to increase the transparency and predictability of AML enforcement. However, none of the above efforts resulted in the issuance of new amendments or final guidance. Part of the reason for the delay is believed to be unresolved conflicts and competition among the legacy enforcement agencies. The consolidation of the agencies into SAMR likely will smooth in due time the legislative process.

China has become one of the important jurisdictions for global merger clearances and competition law compliance by putting its own stamps on global transactions and aggressively enforcing against conduct, such as resale price maintenance, bundling, and abusive licensing practices involving intellectual property rights. Some continuity in enforcement can be expected for at least the short term given that the AML will be enforced by essentially the same group of enforcement personnel, albeit with some reshuffling. In addition, the consolidation will provide new momentum for antitrust enforcement in China.