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1. Institutional structure

Potential violations of China's Anti-Monopoly Law (AML) are investigated, adjudicated and sanctioned by the anti-monopoly enforcement agencies, which currently includes three departments under the National Development and Reform Commission (NDRC), State Administration for Industry and Commerce (SAIC), and Ministry of Commerce (MOFCOM). Enforcement actions may entail administrative reconsideration or judicial review.¹ Above the anti-monopoly enforcement agencies is the **Anti-Monopoly Commission** (AMC), a high-level consultative and coordinating organ without law enforcement power. The AMC has no standing office and its day-to-day work has been assigned to MOFCOM.

NDRC is responsible for price-related infringements of the AML in the areas of restrictive agreements, abuse of dominance, and administrative monopoly. The responsible unit within the NDRC is the Price Supervision Department, which also has other regulatory roles pursuant to the Price Law. The Price Supervision Department has seven divisions. The Anti-Price-Monopoly Division, equipped with only three officials, is the functioning unit responsible for NDRC's role in anti-monopoly enforcement.

SAIC is responsible for non-price-related infringements of the AML in the areas of restrictive agreements, abuse of dominance, and administrative monopoly. The responsible unit within the SAIC is the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau (hereinafter 'Competition Enforcement Bureau'). The Competition Enforcement Bureau has five divisions. The Anti-Monopoly Enforcement Division and the Anti-Monopoly Legislative Affairs Division, which have eight officials in total, are the functioning units responsible for SAIC's role of the anti-monopoly enforcement.

MOFCOM is responsible for enforcing the merger control regime under the AML. The responsible unit within the MOFCOM is the Anti-Monopoly Bureau, which currently has six divisions and thirty-one officials in total.

The AML provides that, based on the needs of the enforcement work, the enforcement agencies may authorize their corresponding organs at the provincial

¹ The current institutional structure of the AML, namely, the NDRC, SAIC and MOFCOM are responsible for investigative, adjudicative and sanctioning functions, with rights of review in the ordinary courts, may be categorized as a 'variant' of an 'integrated agency model'.

level to assume responsibility for the anti-monopoly enforcement work.

2. Mandate

The AML

Objectives of China's AML are prescribed or implied in Articles 1, 4, 5, 7, 15, 27, 28 and 31, including promoting efficiency, encouraging free competition, safeguarding healthy development of a socialist market economy and public interest, protecting state-owned economy and small business, encouraging the expansion of domestic enterprises and scrutinizing foreign takeovers, etc. No clear hierarchy has been established between these various objectives. The admission of broader non-competition goals may cause inconsistency in interpretation and enforcement.

The AML provides a statutory exclusion for the agriculture sector and set out general exemptions for restrictive agreements. However, the AML also provides a sweeping clause that exempts 'other circumstances as stipulated by law and the State Council'. The sweeping clause implies more discretionary space for the enforcement agencies and provides leeway for particular sectors and special interest groups.

The Anti-Monopoly Enforcement Agencies

The division of AML enforcement responsibilities among the three agencies, especially the division of price and non-price related matters between NDRC and SAIC, creates scope for frictions and conflicts. There is a need to reinforce cooperation and create collective memory between NDRC, SAIC, and MOFCOM.

NDRC, SAIC and MOFCOM have concurrent mandates and authorities to implement industrial, trade and wider economic and public policies with different policy agenda and political considerations. There is a need to set out clear enforcement priorities and to inform the public of such priorities.

The boundaries between the mandate of NDRC, SAIC and MOFCOM and sectoral regulators is unclear, especially in connection with the regulated industries where state-owned enterprises may be protected by sectoral regulations and Article 7 of the AML.

3. Due Process norms in case-by-case decision-making

NDRC and SAIC

The AML and accompanying implementing regulations have set up basic procedural rules for NDRC and SAIC. Further procedural rules, for example,

more systematic and administrable rules for the leniency programme and imposition of fines, are expected to be formulated in the future.

The AML and accompanying implementing regulations do not require NDRC and SAIC to publish their enforcement decisions. To date, the NDRC local price bureaus have made several decisions on cartels. NDRC has not published any decision in full but has made public announcements instead. These announcements contain only general descriptions of facts and of the sanctions imposed and do not provide any reasoning.

Since the AML entered into force on August 2008 there have been no reported decisions of the SAIC. However, SAIC made a statement that it started to verify complaints that SAIC and its local bureaus had received and that it had already investigated and prevented 76 cases involving restrictive competitive behaviour in the first quarter of 2009 alone. Given the lack of published decisions or announcements, it remains unclear whether these cases were informally settled or closed under SAIC's formal decisions, and whether SAIC's decisional practices complied with the prescribed procedural rules.

MOFCOM

As the enforcement agency solely responsible for the AML merger control regime, MOFCOM enjoys expansive investigation and adjudication powers and is obliged to comply with the same prescribed procedural rules as those of NDRC and SAIC outlined in the above section. Given the specific features of merger control, the AML and the relevant implementing regulations provide further procedural rules for MOFCOM.

MOFCOM is required to timely publish decisions that prohibit or conditionally approve concentrations, thus producing a public record of blocked and conditionally cleared deals. Thus, publication of unconditional clearance decisions is left to MOFCOM's discretion. To date, MOFCOM's published decisions are all relatively light on reasoning.

Regarding the principle of non-discrimination, it is rumored that Chinese lawyers advising on merger transactions normally advise that purely domestic transactions do not need to be notified. Due to the lack of a full statistical profile of enforcement activities, a factual question is whether purely domestic merger transactions have ever been filed to MOFCOM pursuant to the AML.

4. Institutional performance norms

Timeliness of Disposition

The AML and to date its implementing regulations do not provide for a limitation

period for the delivery of decisions regarding monopoly agreements and abuse of market-dominant position. This implies more discretions and results in legal uncertainty as it is unclear how quickly NDRC and SAIC will act pursuant to the AML. On the other hand, the AML provides clear time limit rules in the merger control area. The length of MOFCOM's review in the seven published decisions to date indicates that MOFCOM has been able to complete merger reviews within prescribed time limits.

Transparency

Pursuant to the AML, MOFCOM is required to publish its review decisions that prohibit or conditionally approve the proposed concentrations but does not require MOFCOM to publish unconditional merger clearance. For monopoly agreements and abuse of dominance, the AML provides that the enforcement authorities 'may publish the decisions', which means that the publication of decisions is at the discretion of NDRC and SAIC. Because of the obvious structural shortcoming of the AML, the transparency of reasons for decisions and reasonable predictability in application of law are therefore open to doubt.

Transparency in decision-making and policy-making and clarity of reasoning are improved but still insufficient in anti-monopoly enforcement agencies' decisional practices. Published decisions seems not fully or accurately to provide the underlying reasoning and the enforcement agencies need to improve their ability to handle cases in ways that are procedurally sound and render decisions that are substantively meritorious.

Sufficiency of Investigative and Sanctioning Powers

The NDRC, SAIC and MOFCOM have expansive investigative and sanctioning powers as regards monopoly agreement, abuse of dominance and merger control. The generality of the statutory languages has been substantiated by the AML implementing regulations to some extent. However, the effective use of the investigative and sanctioning powers may be compromised because of the lack of human resources.

Public Accountability for General Agency Functioning

Insufficient degree of public accountability is a problem of China's current administrative system in part because of the concentration of the legislative, executive and juridical powers. As regards the enforcement of the AML, for example, the budget allocated to the AML enforcement is publicly unavailable. To date, the anti-monopoly enforcement agencies have not conducted systematic and periodic reviews of performance of their legislative mandate and agency effectiveness.