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I. INTRODUCTION

Explaining how China enforces its antitrust law is not an easy task: the most difficult problem for anyone who wants to do so is describing how the enforcement power is allocated, and why. Around the world, there are two basic ways to establish a competition law enforcement regime: to build a stand-alone authority and confer to it exclusive implementation power, or to divide and allocate the power among two or more different authorities. The key to the success of the latter model is to carve out an effective arrangement to determine jurisdiction, so as to avoid power vacuum or overlap. To this end, jurisdiction could be allocated either according to the different facets of a specific enforcement action (*e.g.*, the proposed merger reference system in the United Kingdom between the Office of Fair Trade and the Competition Commission), or according to the sovereign pluralism (*e.g.*, the jurisdictional division in the European Union ("EU") between the European Commission and the national competition authorities, or in the United States and Australia between the federal government and the states, pertaining to all competition matters). The complexity lies in the fact that China has chosen a divided enforcement model that is neither function-based nor sovereignty-based—a system that is simply like no other.

First, the Chinese model uses a hybrid standard to divide enforcement power. Under the Anti-Monopoly Law ("AML"), China's comprehensive competition statute, there are three Chinese government agencies responsible for enforcing antitrust law, namely the Ministry of Commerce ("MOFCOM"), the National Development and Reform Commission ("NDRC") and the State Administration for Industry and Commerce ("SAIC"). MOFCOM has exclusive jurisdiction over merger review, which seemingly resembles the function-based regulation model. However, when it comes to defining the responsibilities of NDRC and SAIC, they have to share power to enforce the law against cartels and abuse of dominance. The decisive factor in allocating jurisdiction is "price:" if the case in question is price-based, it goes to NDRC; otherwise it will be under SAIC's purview.

Second, the Chinese antitrust regime is both centralized and decentralized. On the merger control front, only the central government has the power to clear or block mergers on competition grounds; this arrangement ensures there will be a uniform merger control policy applied nation wide. As for cartel and abuse of dominance enforcement, however, both NDRC and SAIC have said that they will delegate the enforcement power to their provincial counterparts. Under China's constitutional structure, although these functional departments

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accept orders and instructions from the two ministries in the central government, they are politically accountable to their respective provincial governments. If the enforcement policy set by the two central ministries conflicts with local governments' agenda, its effectiveness might be compromised.

The reason that China has chosen such an unusual way to divide power is not because the lawmakers have a unique and different perception about competition law, but because there had been a fragmented antitrust enforcement system in place even before the AML was enacted.

II. SAIC AND THE ANTI-UNFAIR COMPETITION LAW

The history of antitrust in China did not start when the AML was made. Rather, it could be traced back to a much earlier time, from a couple of different sources.

The first source is the 1993 Anti-Unfair Competition Law, China's law against unfair trade practices, whose sole enforcer is SAIC. SAIC is the ministry within the Chinese government that is in charge of corporate/partnership registration, general market conduct examination, trade mark administration, investigation of business fraud, regulation of advertising and direct marketing, consumer protection, and even food distribution. According to its website, SAIC has fourteen functional departments to carry out these responsibilities; the entire headcount of the ministry is three hundred.[2]

The Anti-Unfair Competition Law contains several antitrust provisions such as bid-rigging, predatory pricing, and tying.[3] These provisions gave SAIC limited but practical experience to handle competition matters. It was therefore not surprising that SAIC was instructed to draft the very first draft bill of China's antitrust code back in 1994. For reason unknown to the public, that bill was never tendered to the National People's Congress ("NPC") for discussion.[4] It did not significantly influence the AML that was finally enacted thirteen years later, either. However, the instruction itself was a clear recognition of SAIC's capability in implementing China's future competition code. More importantly, over the years, SAIC and its regional counterparts have built up a huge corps of enforcement officers stationed in almost every town, city, and province in China, with roughly tens of thousands of field enforcers who are good at policing market conducts. If SAIC were to be entrusted with the mission to enforce the AML, they would have the enormous manpower ready to go after antitrust violations. This was an advantage that could not be easily ignored.

III. NDRC AND THE PRICE LAW

NDRC is the successor of the State Planning Commission, the "economic czar" in China under the command economy. When the country gradually abandoned state-planning during the last three decades, the commission was re-organized and transformed into NDRC. The new authority is less ambitious in controlling the input and output of the entire country, but not less powerful in shaping the country's economic development. NDRC has twenty-eight functional departments and a super-broad range of responsibilities, including: formation of strategic

[2] *See* SAIC "San Ding" Notice, *available at* www.saic.gov.cn/zzjg/ (in Chinese).

[3] A revision of the Anti-Unfair Competition Law is currently underway, and the antitrust provisions in this law will reportedly soon be repealed in order to avoid duplication with the AML. By contrast, there is no likelihood of similar revision to the Price Law which has even more significant duplication with the AML.

[4] *See* Yong Huang, *Pursuing the Second Best: the History, Momentum, and Remaining Issues of China's Anti-monopoly Law*, 75 ANTITRUST L.J. 120 (2008), at 118.

industry policy, oversight of infrastructure and energy projects, development of high-tech industry and the associated government funding, development of clean energy, coping with climate change, building up national reservation of strategic resources, etc. It may be perhaps the largest and most important Chinese ministry overseeing the country's real economy.

Among all of NDRC's responsibilities, the implementation of China's 1997 Price Law is the most significant one in antitrust terms. Pursuant to the Price Law, both the central and regional governments have the power to set fixed a price or a price range upon certain products and services that have been enumerated in a published catalogue. Items in that catalogue typically include scarce resources, utilities, public services, or any other items that could have "significant impact upon national economy or citizens' life."[5] For any product/service that is not enumerated, firms are free to set a market price, but are subject to a series of conditions such as, *inter alia*, that they must not: conspire with each other to manipulate the market price; set a predatory price to exclude competitors or to monopolize markets; offer discriminatory prices in otherwise similar transactions and may not exploit "exorbitant profit."[6]

Similar to SAIC, when NDRC implemented the Price Law, it was actually exercising quasi-antitrust jurisdiction to police cartels and abuses of dominance. In addition, its regional counterparts also have a sizable enforcement team all over the country, comparable to the SAIC team in headcount.

IV. MOFCOM, SAIC, AND THE MERGER ASSESSMENT PROGRAM

MOFCOM is China's principal agency to control the inflow of foreign goods and capital. Foreign investors who want to purchase assets or equity interests located within China must apply to MOFCOM for approval.

Since 2003, the Chinese government started to conduct antitrust assessments for asset/equity transactions that involved foreign buyers, with the aim to safeguard domestic firms from being unfairly disadvantaged in terms of competition by sophisticated foreign purchasing firms. The program was jointly administered by MOFCOM and SAIC at the national level. Their regional counterparts did not have any role to play. The assessment program was mandatory with rather low thresholds and, as a result, a large number of filings were generated within a short period of time.

This program was widely viewed to be an experiment designed in preparation for the formal merger control system that was going to be established sooner or later. Indeed, by processing all those filings, both MOFCOM and SAIC personnel were able to gain a lot of first-hand experience. In particular, the reviewing officials at MOFCOM made remarkable progress, and became highly skillful case handlers. Later on, after the AML was adopted, most of them would become the founding members of the Anti-Monopoly Bureau created within MOFCOM. Perhaps not surprisingly, when the legislative project of the AML was re-initiated in 2004, MOFCOM became the new drafting body.

V. WHEN THE AML WAS ENACTED…

While the 1994 drafting of the first antitrust bill did not draw much public attention, the 2004 revival of the legislation received comments from almost all segments of Chinese society,

[5] Price Law, arts. 18 (1) to (5).

[6] *Id.*, art. 14.

regarding all substantial aspects of the law. As China has become a major economy in the world, anything may profoundly impact the interests of many stakeholders. One of the focal points in 2004, and the subsequent years, was exactly how the enforcement regime should be founded. Various proposals were made and, subsequently, reduced to two: either to consolidate the fragmented administrative forces under a brand new government organ, or to continue to share the enforcement powers among existing agencies.

Though the proposal about establishing a new and stand-alone competition authority received most popular support, particularly the support from academia, it was the least feasible scenario to be adopted. This scenario would have required separating the existing functional units in all three agencies, re-deploying hundreds of civil servants, and integrating three types of very different administrative cultures. The political cost would have been too high.

Eventually the NPC opted for the split jurisdiction model, allowing all three agencies to continue to share antitrust enforcement powers under the AML framework. Moreover, because both SAIC and NDRC rely on their provincial counterparts to enforce their existing antitrust responsibilities, the post-AML regime is inevitably decentralized to a certain degree.

Yet a proper division of the integral enforcement power requires in-depth understanding of each government organ's strength and careful political balancing, probably beyond legislators' capabilities. Therefore, the NPC reckoned that the executive branch should be in better position to precisely divide the jurisdiction. Consequently, the NPC specified in the final version of the AML only that there would be an Anti-Monopoly Commission established to be in charge of the research and coordination of competition policy. The substantial enforcement powers would belong to the "anti-monopoly enforcement agencies" to be designated by the State Council, China's cabinet.[7] The AML was enacted on August 30, 2007, and came into effect one year later.

Between the AML's enactment and its entry into force, the State Council spent a lot of time in designing an operational framework for the new law. Finally, at the end of August 2008, it came up with the solution only a few days before the AML's entry into force: the price-based cartel and abuse of dominance activities (so-called "price monopolistic conducts") should be under NDRC's purview or, more precisely, under the purview of its existing Department of Price Supervision. The non-price monopolistic conducts, on the other hand, should be under SAIC's jurisdiction, and SAIC would restructure its unfair practices department to become the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau. As for MOFCOM, it would pull out the merger-viewing personnel from its legal department in order to establish the brand-new Anti-Monopoly Bureau, which would be sole authority to conduct antitrust review upon proposed mergers. All three agencies duly executed their respective organizational plans, with a significant number of new recruitments.

The merger control aspect of the post-AML enforcement model is clear and undisputed, since jurisdiction now solely belongs to MOFCOM. However, the functional division between NDRC and SAIC is still vague in the eyes of the business community and the rest of the outside world. After all, no other established antitrust regime has ever used the price element to divide antitrust jurisdiction. So the question remained: What could the Chinese competition authorities do to assure outsiders?

[7] AML, arts.9 and 10.

VI. A CLEAR BORDERLINE FINALLY… YET?

Between August 2008 and January 2011, NDRC and SAIC worked on implementing rules, *inter alia*, to further elaborate the division of responsibilities between them. SAIC moved a bit faster by publishing its own procedural rules of processing competition cases in May 2009, while NDRC lagged behind. But on substantive rules, neither of them was able to make the first move, because those rules could not be made unless they sorted out a detailed plan to define the scope of their respective responsibilities. Probably for the same reason, neither of the two agencies had ever exercised their antitrust jurisdiction exclusively under the AML despite the fact that the law had been in effect for two and a half years. NDRC continued to investigate and fine firms engaging in price-fixing and exclusionary conduct under the Price Law regime, while SAIC reportedly only conducted informal investigations on a few complaints over abuse of a dominant position. The two agencies were rightly cautious not to trigger a jurisdictional conflict before detailed division rules are devised. Meanwhile, internal and coordinated discussions continued to be held.

At last, in January 2011, both agencies produced regulations to announce how to jointly enforce the law against cartels and abuse of dominance. The new regulations were clear evidence of good coordination between the agencies. Indeed, they were announced almost simultaneously (within three days), and defined the major terms consistently (but not always so). When read in combination, the new provisions produce a full picture of the division of jurisdictions between NDRC and SAIC:

Type of offense		**NDRC**	**SAIC**
Anticompetitive agreements			
Horizontal	Price-fixing	√	
	Output restriction		√
	Market allocation		√
	Restriction on		√
	Group boycott		√
Vertical	Resale price maintenance	√	
	Setting floor price	√	
Abuse of dominance			
Excessive pricing and unfairly low pricing		√	
Predatory pricing		√	
Refusal to deal	Through excessive pricing or margin	√	
	Non-price measures		√
Exclusive dealing	Loyalty discounts	√	
	Non-price measures		√
Imposition of unreasonable expenses		√	
Tying/bundling			√
Discrimination	Discriminatory pricing	√	
	Non-price measures		√

Type of offense	NDRC	SAIC
Abuse of administrative power to restrain competition	√	√

Nevertheless, it is unrealistic to expect that any potential for jurisdictional conflicts over cartel and abuse of dominance cases has been cleared once and for all. There are still many questions left unanswered in these newly published regulations. For example, the regulations are based on the presumption that all cases are in a single dimension, *i.e.*, they are either price-based or not price-based. But what if a suspected anticompetitive conduct involves both price and non-price aspects? Will NDRC investigate alone or jointly with SAIC? If jointly, how will the two agencies avoid duplicated actions and other unreasonable burdens imposed upon the firm to be investigated? Will the firm be faced with two conflicting, but both binding, decisions? Alternatively, many types of anticompetitive conduct tend to affect price; if a case in question does not look like involving price initially, but is subsequently found out to be price-related, how will SAIC turn over jurisdiction to NDRC, if at all?

If clearer rules of allocating jurisdiction could be further developed, they would help firms to better foresee the legal outcome. This would be particular important considering the subtle differences in the approaches that the two agencies adopt in investigations. For example, when probing concerted practice, SAIC says that it will allow for "reasonable explanations" raised by the firms underlying the parallel conduct in question,[8] while NDRC does not have such a provision, suggesting perhaps a harsher stance against this type of conduct. Another possible difference can be found in the leniency policy: while SAIC explicitly says that ringleaders may not be exempted from penalty even though they turn themselves in,[9] NDRC is again silent on this issue, suggesting that it might grant discretional immunity to the leading conspirator.

Having identified some of the major issues that may worry the business community in China, it would be unfair not to point out that firms also need to be realistic about what they can expect from a new antitrust regime. History has shown that it may take many years of efforts before two agencies with parallel antitrust jurisdictions can work out a smooth way to co-exist. The sometimes uneasy relation between the U.S. Department of Justice and the Federal Trade Commission, or between the European Commission and the national competition authorities of the European Union member states, shows the difficulty of shared systems of antitrust enforcement. Chinese antitrust agencies have tried very hard to develop a clear jurisdictional borderline for a system that is built upon a fragmented enforcement regime and political compromises. Yet they will need to invest further time and energy to make this system work in the real world.

[8]SAIC Regulation on the Prohibition of Conduct Involving Monopoly Agreements, art.3(3).

[9]SAIC Regulation on the Procedure for Investigation and Handling of Cases of Monopoly Agreements and Abuses of a Dominant Market Position, art.20(2).