

CPI's Asia Column Presents:

2008-2018: A Retrospect of China's Anti-Monopoly Law Enforcement System and Prospect and Commentary on the New System

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On March 17th, 2018, the 1st Session of the 13th NPC (National People's Congress) of China approved the plan on institutional restructuring submitted by the State Council. Major adjustments are made to the establishment and function of various commissions and ministries of the State Council. Adjustments to the anti-monopoly law (AML) enforcement system are also involving in the restructuring, which will have massive influence on China's AML enforcement and the development of competition policy. On the basis of reviewing the development and progress of China's AML enforcement system in the past decade, this article will give a prospect and commentary on the upcoming new AML enforcement system.

1. The Law Enforcement System Stipulated in China's AML

The ninth article of China's AML stipulates that: "the State Council shall establish an Anti-Monopoly Committee that shall be responsible for organizing, coordinating, and directing anti-monopoly tasks, and shall perform the following duties: 1) research and draft policies relating to competition; 2) organize investigation and evaluation of the overall status of the market competition, and issue evaluation report; 3) formulate and issue anti-monopoly guidelines; 4) coordinate administrative enforcement of anti-monopoly law; and other duties specified by the State Council." With regard to law enforcement agencies and law enforcement power, the tenth article of China's AML stipulates that: "the agencies undertaking the duties of anti-monopoly law enforcement as appointed by the State Council (hereinafter referred to as the 'anti-monopoly law enforcement agency of the State Council') shall carry out anti-monopoly law enforcement tasks in accordance with the provisions of this Law." "The anti-monopoly law enforcement agency of the State Council may, based on the actual need, authorize the corresponding authorities of the provinces, autonomous regions, and municipalities directly under the Central Government to carry out anti-monopoly law enforcement tasks in accordance with provisions of this Law."

2. The Development and Dilemma of China's AML Enforcement System during the ten-year period of the implementation of China's AML

(1) The AML Enforcement System in China Over the Past Decade

According to the provisions of AML, China's anti-monopoly law enforcement systems include the Anti-Monopoly Committee of the State Council (AMCSC), anti-monopoly law enforcement agencies of the State Council and the authorized provincial law enforcement agencies, a three-tier system.

Firstly, the AMCSC is one of the inter-ministerial coordination bodies of the Chinese government. It is responsible for organizing, coordinating and directing anti-monopoly works. The vice-premier of the State Council is the director of the AMCSC, deputy directors include the heads of the three anti-monopoly law enforcement agencies and the Deputy Secretary General of the State Council who is responsible for the coordination of relevant affairs. In addition to three AML enforcement agencies, the constituent agencies include twelve government departments such as the Ministry of Industry and Information Technology, the Ministry of Transport, People's Bank of China, China Banking Regulatory Commission and China Securities Regulatory Commission, etc. The office of the AMCSC is located in the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM), the vice minister of the MOFCOM serves as the Secretary General of the Committee and the director of the Anti-Monopoly Bureau of the MOFCOM also serves as the director of the office of the Committee. According to the working principles of the Committee, the Committee shall hold a plenary session every year in principle and may convene an interim meeting as required. In addition, the AMCSC has also hired an expert advisory group. Members include professors and retired officials in law, economy and related industries, who are responsible for providing advice to the Committee.

Secondly, there are three agencies undertake the AML enforcement works, namely the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM) and the State Administration of Industry and Commerce (SAIC). NDRC is responsible for investigating the monopolistic behavior related to price. MOFCOM is responsible for the reviewing of concentration of undertakings, and SAIC is responsible for investigating the monopolies that have nothing to do with the price. The bureaus that undertake the specific responsibility for AML enforcement is the Bureau of Price Supervision and Anti-Monopoly of NDRC, the Anti-Monopoly Bureau of MOFCOM and the Anti-Monopoly and Anti Unfair Competition Bureau of SAIC. The total number of law enforcement officials was less than one hundred. The law enforcement activities of each agency still comply with their respective administrative enforcement procedures and separately issued their respective supporting rules for law enforcement procedures.

At last, In December 2008, NDRC issued the "Decision on the Authorization of the Price-related Anti-Monopoly Law Enforcement" ([3509]), authorizing the provincial price authorities to be responsible for the enforcement of AML in each province. In 2010, the original Department of Price Supervision of NDRC was renamed the Bureau of Price Supervision and Anti-Monopoly, and the staffing was increased by 20 people. At the same time, eight provinces and cities as Beijing, Shanghai, Jiangsu, Liaoning, Shaanxi, Hubei, Guangdong and Chongqing increased the staffing for anti-monopoly law enforcement for a total of 150 people. SAIC has taken the way of case-by-case authorization, that is to authorize the provincial Administration of Industry and Commerce(AIC) to investigate anti-monopoly cases according to the needs. At present, one hundred anti-monopoly cases have been authorized for the local AIC to investigate. In 2014, Anti-Monopoly and Anti Unfair Competition Bureau of SAIC adjusted the internal organs and personnel, offices directly responsible for anti-monopoly affairs was increased to three. MOFCOM has not authorized the local departments of commerce to enforce the law against monopoly, but the local departments of commerce can assist MOFCOM in accepting the application for declaration and conducting formal examinations.

According to the Administrative Reconsideration Law of China and the Administrative Procedure Law of China, the parties who do not accept the decision of the anti-monopoly law enforcement agencies can bring the administrative reconsideration to the people's governments at the same level or the superior agencies in charge. Therefore, NDRC and SAIC have the right to accept the application for the administrative reconsideration of the anti-monopoly law enforcement decisions involving provincial agencies. The parties may also choose to bring an administrative lawsuit on the anti-monopoly law enforcement decision. For the decisions of NDRC, SAIC and MOFCOM, the parties can sue at the First Intermediate People's Court of Beijing and appeal to the Higher People's Court of Beijing. During the litigation period, the enforcement decision of the anti-monopoly law enforcement agencies shall not be suspended.

(2) Advantages and Disadvantages of China's Anti-Monopoly Law Enforcement System in the Past Decade

For the past decade, there have been some criticisms for China's AML enforcement system. Some consider that the tripartite law enforcement system in China has led to the following problems: 1) law enforcement experience is scattered in different agencies and it is difficult to fully share and absorb with each other; 2) the anti-monopoly law enforcement personnel are affected by their own agencies and these agencies (especially NDRC) themselves are responsible for the implementation of domestic industry policies and price control functions; 3) increase the risk of inconsistency of application of law. The tripartite AML enforcement system is very rare around the world. Most countries have only one AML enforcement agency. Taking the lack of personnel and experience in China's anti-monopoly law enforcement agencies into account, the allocation of law enforcement

power to several different agencies has affected the efficiency of law enforcement in practice. There are only more than 20 officials dealing with specific cases in the Anti-Monopoly Bureau of MOFCOM. The Bureaus in NDRC and SAIC involving anti-monopoly only have more than 40 and 30 officials respectively. In contrast, there are about 100 officials in the European Commission merely responsible for dealing with mergers and acquisitions, and there are approximately 900 officials in the United States DOJ and the FTC combined. Moreover, officials in China's three anti-monopoly law enforcement agencies cannot guarantee that they are fully engaged in anti-monopoly matters, sometimes they may need to deal with other matters temporarily.

In fact, in the decade since the effectiveness of the China's AML, the achievements of China's AML enforcement agencies have attracted worldwide attention. The AML enforcement system in China is directly related to the existing distribution of law enforcement power, it was a compromise to the bureaucratic system at that time. Although in the process of the drafting of the AML, many experts and scholars had called for the establishment of an independent, unified and high-level AML enforcement agency in favor of the implementation of the AML. However, from the law enforcement experiences in recent years, it is precisely under the tripartite law enforcement system, the three law enforcement agencies "competing" with each other, that promoted the enforcement of China's AML. The continuous strengthening of professionalism of MOFCOM in the process of law enforcement has brought pressure to the other two agencies, NDRC has given pressure to the other two agencies regarding the law enforcement efforts in recent years, and MOFCOM has strengthened the efforts on the supervision and investigation of undeclared violation cases. Meanwhile, SAIC has published its decisions on penalties for anti-monopoly cases and related evidence in full since 2013. Its open and transparent measures have also brought "pressure" to NDRC. Since September 2014, NDRC has also published decisions on the penalties in full on related cases. Compared with the previously publishing of short press releases, there is no doubt that this was a significant step forward. Under the tripartite system, MOFCOM, as an export-oriented economic sector, its AML enforcement activities are the most fully integrated with the world, is promoting the internationalization and specialization of China's AML enforcement, while NDRC, as an industrial policy maker, has a strong style of work and a relatively authoritative image of law enforcement, providing a backing of its high intensity and powerful AML enforcement. Therefore, it is of positive significance to see that China's current AML enforcement system is compatible with the environment.

However, it is undeniable that the criticisms against China's AML enforcement system also point out the drawbacks of the current law enforcement system. For example, in addition to three law enforcement agencies as members, the AMCSC, a superior agency serves as consultant and coordinating body, also includes some industrial agencies, industry regulatory and macro-control departments as members. Moreover, the three agencies are currently enforcing the law separately, but the specific functional bureaus are limited to their level, and the corresponding AML enforcement is not the only or the most important function in these three agencies. It is discounted greatly in the aspects of putting resources in AML enforcement, pursuing the effect of law enforcement and adhering to the concept of supervision, it is not conducive to the formation of strong authoritativeness of AML enforcement obviously. At last, the three agencies' enforcing the law separately also brings internal frictions to the law enforcement ability and law enforcement effect. The three agencies' overlapping and crossing in the division of responsibilities, may cause disputes and prevarication. In addition, the differences of law enforcement standards and law enforcement decisions may occur due to the agencies' different approach of work. Therefore, China's "tripartite law enforcement and pluralistic coordination" of AML enforcement system has its certain historical inevitability and stages.

3. Plan of The Structural Reform of AML Enforcement and Prospect of the New System

(1) Structural Reform Plan of AML Enforcement System Published in 2018

On March 17th, 2018, the 1st Session of the 13th NPC (National People's Congress) approved the plan on institutional restructuring submitted by the State Council. According to the plan, major adjustments are made to the AML enforcement system: establishing the State Administration for Market Regulation (SAMR). Functions of the SAIC, AQSIQ, CFDA, the Price Supervision and Anti-Monopoly Bureau of NDRC, the Anti-Monopoly Bureau of MOFCOM will be incorporated into the new administration directly under the State Council.

On March 21st, 2018, the SAMR was officially established. Former director of CFDA Bi Jingquan and former director of SAIC Zhang Mao served as Secretary of Party Committee and director respectively. SAMR's responsibilities include, being responsible for the comprehensive supervision and administration of the market; unifying the registration of the market entities and establishing the system of information publicity sharing; organizing the comprehensive law enforcement work of market supervision; being responsible for the unified AML enforcement; regulating and maintaining the market order; Implementing the quality strategy; taking responsibility for industrial products quality and safety, food safety and special equipment safety supervision; unifying the management of measurement standard, inspection, certification and accreditation work, etc. At the same time, Administrating the State Intellectual Property Office and the China Drug Administration.

In April, Zhang Mao, director of SAMR, pointing out at an interview with the media that "the current market supervision and law enforcement standards are not unified, the law enforcement power is scattered, the basic level's regulatory forces are weak and the professional competence is not strong. "The original supervision system has played an active role in maintaining the market order, but there were also major problems such as duplication of functions, poor coordination, regulatory gaps and resources difficult for sharing, which are not adapted to the development of the market economy." The above problems needs to solve through the reform, and the aim of the reform is to "integrate and optimize the administrative resources, improve the supervision capacity and service level, reduce the administrative examinations and approvals, reduce the burden of the enterprises and the society, maintain the effective operation of the market economy, and promote a unified, open, competitive and orderly modern market system."

After the establishment of SAMR, a working group was set up immediately for the reformation and 11 specific working groups were set up for the specific and key works of the transition period of the reform. It is reported that the various organs of regulation, including the anti-monopoly ones, have completed the transfer to SAMR and the daily work of supervision and regulation are still in normal operation. It is expected that the internal structural establishment and staffing plans will be determined at the end of June, which also means the specific executive organs of the internal functions of SAMR will be finalized.

(2) Prospect of the New AML Enforcement System

The establishment of SAMR is a major departments' integration of the Chinese government based on the goal of a unified market regulation. The adjustment of AML enforcement system is a part in the framework of the reform. AML enforcement, along with the food and drug supervision, product quality supervision, the management of intellectual property rights (except for copyright), unfair competition (including price supervision) and consumer protection, all belong to the market regulation system. According to the reform plan, SAMR will take total responsibility of China's AML enforcement duties and will be the only agency involving anti-monopoly function in the Chinese government. The AMCSC will remain in place and the office will locate at the SAMR. China's AML enforcement system will face

the following adjustments in the future:

First of all, due to the fact that SAMR is not one of the component organs of the State Council, matters regarding anti-monopoly and competition policy can only be delivered to the State Council level for discussion through the AMCSC. SAMR is the only AML enforcement agency and the only agency that formulates and implements the competition policy in the AMCSC. So, further observation is needed on how to implement the "basic position of the competition policy" at the macro policy level with the new system in the future.

Next, SAMR will serve as the total package of market supervision and regulation instead of the total package of anti-monopoly, which means that the function of anti-monopoly is just one of the functions of SAMR. After decade's developing, China's AML enforcement agencies have greatly enriched their functions, in addition to the specific AML enforcement duties, they are also responsible for the formulation and research of the competition policy, the fair competition review on government's policy, the anti-administrative monopoly, the international cooperation, the advocacy of competition and so on. It will be too much for one bureau-level organ to achieve these functions after the integration, whether on the administrative levels or on the personnel scale. However, its uniformity may not be as good as the functions of China Drug Administration and functions of the State Intellectual Property office which have relatively independent and complete organs if the functions of AML enforcement undertaken by different bureaus separately. One possible solution is that one or two bureaus will be responsible for the AML enforcement duties (anti-monopoly case investigation and concentration of undertakings), while another bureau will be responsible for the part of competition policy (competition policy research and formulation, the fair competition review and anti-administrative monopoly, etc.). Anyway, since the Chinese government has proposed to "gradually establish the basic position of the competition policy", the affairs involved in the competition policy must be coordinated and integrated at a higher level. Hence, how the anti-monopoly regulation can be truly unified in SAMR in the future, remains to be further observed.

At last, China's AML enforcement belongs to the central authority, there are only central and provincial levels of law enforcement agencies that actually have enforcement powers according to China's AML. First of all, this means that the function of AML enforcement in the provincial level of market regulation is very limited, as well as the law enforcement authority and capacity. Secondly, most of other market regulatory functions have a four-level law enforcement system of agencies of central, provincial, city and county. Major regulatory forces are usually from the city and county levels of law enforcement agencies, which means that the basic regulatory forces will focus their work on unfair competition, quality supervision and drug supervision, etc. in the future. In the past, AML enforcement system, whether NDRC's, MOFCOM's or SAIC's basic levels' organs, they actually undertake the work of anti-monopoly case information collection, research in the field and advocacy of competition as the quasi functions of law enforcement. Under the new plan, how will the functions of the basic levels of AML enforcement develop is worth observation.

4. Conclusion: Further Reforms and Reinforces are Expected for China's AML Enforcement System

After the 2008 global financial crisis, there has been a trend of AML enforcement system reform around the world. Two paths of reform, one is the integration of scattered anti-monopoly functions and agencies, the establishment of a unified and independent AML enforcement agency. For example, in 2008, the former French Competition Commission and the competition bureau in the Industry Department were merged into the Autorité de la concurrence. In 2010, three AML

enforcement agencies were substantively merged into one in Brazil. In 2013, Belgium's competition Bureau and the Competition Commission were merged into the Belgian Competition Authority. In early 2014, the United Kingdom completed the merger of OFT and the Competition Commission. The other path is the integration of the independent anti-monopoly agency and other relevant agencies. For example, in April 2013, Netherland's Competition Authority, Post and Telecommunications Authority and the Authority for Consumers were merged into the Authority for Consumers and Markets. Denmark in 2011, Finland and Spain in 2013 and Ireland in 2014 have taken similar measures of mergers. However, the European Commission has expressed concern about the merger of authorities in Netherland and Spain, it was believed that it may weaken the strength and independence of the enforcement of competition law.

From the point of view of competition law enforcement and anti-monopoly regulation, anti-monopoly regulation is the most important regulatory responsibility of the government to the market in modern market economy. Therefore, AML is regarded as the "constitution" of the market economy, and the establishment of anti-monopoly authority should be beneficial to the independence and unity of competition policy and anti-monopoly regulation. Currently, most countries have established unified AML enforcement authorities, China is probably the last anti-monopoly jurisdiction to integrate the AML enforcement power (besides the United States). The adjustment of the AML enforcement system is for sure an important step for China's anti-monopoly system to move forward. It helps to solve the previously questioned problems of decentralization and overlapping of enforcement power. However, from the reform plan, we can tell that the AML enforcement administrative level has no substantial improvement, the agencies that take the AML enforcement functions turned from the previous component departments of the State Council (like NDRC and MOFCOM) to the administration directly under the State Council, and the AML enforcement function is included in the greater market supervision system. The importance of anti-monopoly regulation does not seem to be strengthened during the reform. In addition, how to integrate or whether it is effective to integrate anti-monopoly regulation with other market regulations still remain to be further observed. The allocation of administrative resources for anti-monopoly regulation will be strengthen or weaken after being brought into the greater market supervision system remains to be further observed. In a word, we look forward to the strengthening and developing China's AML enforcement system and law enforcement authority, and it becoming the strength in support of the implementation of the strategic objective of "basic position of the competition policy."