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Background

The year 2021 marks several milestones for China's antitrust regime on nearly all major fronts. Platform giants such as Alibaba and Meituan had hefty fines imposed for exclusive dealings prohibited by the Chinese Anti-Monopoly Law ("AML"). Tencent was ordered to give up its exclusive music licensing, the first behavioral remedy of this kind in China. In terms of compliance guidance, the Anti-Monopoly Commission under the State Council (the "Commission") issued two important guidelines to guide competition compliance efforts in the Online Platform and Active Pharmaceutical Ingredients ("API") sectors; at the same time, the State Administration for Market Regulation ("SAMR") rolled out the Guidelines for Overseas Anti-monopoly Compliance of Enterprises. In October, the National People's Congress ("NPC") conducted the first reading of draft amendments to the AML ("Draft Amendments") since the law's passing in 2008. A few days later, the NPC released the Draft Amendments to seek public comments. More recently, the SAMR issued 43 penalty decisions against the failures to file pre-merger notifications. Some well-known companies were on the list.

On November 18, China officially announced the launch of its upgraded anti-trust watchdog - the China National Anti-Monopoly Administration (CNAMA), a "vice-ministerial" level institution, which has higher standing than most of the functional General Directorates regulating specific areas of the economy. Considering these substantial powers and influence over China's economic and industrial policy, several important questions arise: What does the establishment of the CNAMA mean exactly? What will be its focus in the future? Who is its new leader?

A. Upgrading the Antitrust Agency

The most significant effect of the CNAMA's establishment is its elevation within the

government hierarchy. China made a big move in 2018 by consolidating its anti-monopoly authorities, which used to be separated across three different ministries and focused on different areas of antitrust enforcement, into a single Anti-Monopoly Bureau ("AMB") under the mega-regulatory SAMR. As a result, the integrated anti-monopoly authority remained as a General Directorate-level unit under the SAMR, laying the foundation for a more consistent and powerful enforcement approach.

The latest institutional change, however, officially raises the AMB to the "vice-ministerial" level, becoming the CNAMA while remaining under the SAMR, in contrast to the regular General Directorates inside the department. This is a significant leap within China's power structure, paving the way towards a more independent antitrust supervisory authority. Although the CNAMA is set under the SAMR and subject to its general management, according to the laws and regulations governing the operation of the State Council and its functional agencies, the "vice-ministerial" level CNAMA enjoys material independence in the following aspects:

- (1). The CNAMA supervises nation-wide antitrust matters instead of a fraction of the overall regulated areas of the SAMR. Similar examples are the National Energy Administration under the National Development and Reform Commission ("NDRC") and the China Tobacco Administration under the Ministry of Industry and Information Technology ("MIIT"), which oversee energy and tobacco respectively, and are relatively independent from the commission/ministry in charge.
- (2). The CNAMA may directly receive instructions from the State Council, rather than waiting for it to be forwarded by the agency in charge.
- (3). The CNAMA may choose to directly address other central government institutions or local

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government agencies on its own behalf when performing cross-agency work.

- (4).The CNAMA may be instructed to attend the State Council's meetings when it comes to any anti-monopoly-related topics; in case of emergency, the CNAMA can report directly to the State Council, merely notifying the SAMR.
- (5).The CNAMA's head is appointed by the Premier. The heads of the General Directorates need to be approved by the SAMR, but deputy heads and the personnel working under them can be decided by the CNAMA.
- (6).The CNAMA may draft laws and regulations in the area of antitrust. However, the department head in charge must deliver the report themselves whenever the State Council or the NPC reviews the draft.
- (7).The CNAMA may also draft departmental rules, subject to review and approval by the department in charge. Departmental rules must to be issued by the SAMR.
- (8).The CNAMA has the authority to engage in international cooperation activities and exchanges, except for important activities in foreign affairs that require the SAMR's prior approval.

Along with increased independence, another significant change related to the CNAMA's upgrade may be seen through the lens of two other vice-ministerial-level national administrations that were launched this year. In February 2021 the National Rural Revitalization Administration ("NRRRA") was restructured out of the Office of the State Council Leading Group for Poverty Alleviation and Development. Intended as a deliberation and coordination organization, the NRRRA came to the stage as a National Bureau, directly affiliated to the State Council. The Chinese government has considered their successful lifting of nearly 100 million people out of poverty "a great miracle in the history of human poverty reduction." However, the government is also well aware that a transitional period is needed to consolidate these accomplishments in poverty reduction. To this end, the NRRRA is set to lead the charge in post-poverty-lifting

policymaking and implementation, heralding the strategic direction of China's emerging rural economy. Another new agency is the vice-ministerial-level National Administration of Disease Prevention and Control ("NADPC") under the National Health Commission ("NHC"), with a set-up very similar to the CNAMA. Before the NADPC, the Bureau of Disease Prevention and Control ("BDPC") and the Chinese Center for Disease Control and Prevention ("CDC"), two agencies under the NHC, handled different aspects of disease prevention and control, and both played critical roles in the fight against the COVID-19 pandemic. The prolonged battle has called for a more powerful authority to mobilize resources, formulate disease control and prevention policies, and engage in health promotion and advocacy. The CNAMA is the third national bureau introduced by China this year, after the NRRRA and the NADPC. A quick review of the other two national bureaus suggests that China is giving priority to its antitrust regulation, at least at the same level as it does rural revitalization and national healthcare.

B. The structure of CNAMA

When launching the CNAMA, China also revealed the General Directorates that will operate within the national bureau. The new design, coupled with the proposed amendments to the AML, provides some clues to the agency's future focus.

Three General Directorate-level divisions were created under the CNAMA, namely the Anti-monopoly Enforcement Division I, Anti-monopoly Enforcement Division II, and the Division of Competition Policy Coordination. This structure, with two separate enforcement divisions, shows the importance given to enforcement under this approach. The two Anti-monopoly Enforcement Divisions are mainly responsible for handling cases, especially those related to the broadly-defined digital economy. The Draft Amendments include the provision that "data and algorithms, technology, capital advantages and platform rules shall not be abused to eliminate or restrict competition." We anticipate that China will continue to watch closely for antitrust violations in the digital sector. and that the CNAMA will

address these challenges on the road towards a level playing field in the digital era.

To be more specific, the Anti-monopoly Enforcement Division I is said to investigate cases related to monopoly agreements, abuse of dominant market position, and abuse of intellectual property rights. Presumably, the controversial behaviors in the digital world such as self-preferencing, algorithm-led conspiracies, hub-and-spoke agreements, and the abuse of SEP-empowered dominance, will be at the top of Division I's list of targets.

Anti-monopoly Enforcement Division II, which is responsible for merger review, might become the busiest department within the new agency. The Draft Amendments are intended to codify the antitrust watchdog's authority regarding merger review on an *ex officio* basis. This means that Division II will have more solid legal standing to proactively investigate transactions that do not meet the filing criteria, but may have adverse post-merger competition impacts. In particular, the new "Stop the Clock" mechanism introduced by the Draft Amendments may give more room to the new agency in handling complex merger deals.

Finally, the newly established Division of Competition Policy Coordination may yield some surprises in the years to come. The department seems to have been built to tackle issues related to the so-called administrative monopoly and competitive neutrality, which often results from the abuse of administrative or rule-making powers to restrict market access or post-entry competition. As China actively moves forward with multilateral or bilateral trade agreements such as the CPTPP and the Europe-China Comprehensive Agreement of Investment, this division may shoulder a bigger burden of ensuring competitive neutrality.

C. CNAMA's New Leadership

Ms. Gan Lin will head the CNAMA. She has been in charge of the antitrust regulatory body since

2018 as one of the vice-ministerial-level Senior Leaders within the SAMR. Her assignment will ensure continuity with present policies. Beginning her career as a scientist and educator, Ms. Gan also served as a provincial vice-governor and is still the Acting Vice-Chairperson of the China Zhi Gong Party. Her leadership and decisiveness in law enforcement are well reflected in the antitrust cases we have seen recently. Based on previous statements by Ms. Gan, we would expect that the CNAMA will continue to tackle anticompetitive conduct in key areas such as the digital economy, technology innovation, information security, and safeguarding livelihoods in the immediate future.

Conclusion

The way in which CNAMA conducts merger reviews and enforces other areas of the AML will undoubtedly be watched closely as this new chapter in Antitrust gets written. But it is really worthwhile to track how local anti-monopoly authorities in China will implement the government's reforms, given that general powers have been delegated to provincial authorities since late 2018 in terms of antitrust enforcement for local cases. Track records show that provincial authorities have made a splash in some high-profile antitrust cases, for instance, the isoniazid API case (collective dominance) and the administrative litigation between Heze Auto Industry Association and the Anti-Monopoly Division of Shandong's Administration for Market Regulation. It is not yet clear whether or not, or when, local antitrust departments will be "upgraded" by mirroring what happened at the CNAMA. But as China places more effort in antitrust enforcement and addresses competition law issues in relation to new technologies, online platforms, and intellectual property, it is highly likely that provincial bodies will be expected to take on cases on a Pilot basis to build up experience. Interested parties should not lose sight of the importance of what may be happening at the local level.