

# Update on Establishment of Single Antitrust Agency in China

October 24, 2018

## Introduction

In March 2018, the Chinese government announced that the State Administration for Market Regulation (**SAMR**) would replace the tripartite structure established by China's 2008 Anti-Monopoly Law (**AML**), under which the Ministry of Commerce (**MOFCOM**) had responsibility for merger reviews, the National Development and Reform Commission (**NDRC**) investigated price-related conduct, and the State Administration for Industry and Commerce (**SAIC**) investigated non-price-related conduct. SAMR commenced operations in April.

Now, after a few months of experience with SAMR, we identify the key procedural developments and potential impacts on enforcement policy. In short, these reforms are unlikely to overhaul Chinese antitrust enforcement priorities in the immediate term. They are intended to rationalize enforcement action, improve procedural efficiency, and potentially align antitrust enforcement action more closely with state industrial policy. In doing so, however, they lay the foundations for more active and potentially more aggressive antitrust enforcement in the future.

## Structure of SAMR

SAMR's institutional framework is still under development. Currently, it consists of 27 bureaus responsible for a range of functions, including antitrust enforcement.

Within SAMR, the Anti-Monopoly Bureau (**AMB**) will take on the responsibilities previously divided between MOFCOM, the NDRC and SAIC. The AMB will have ten divisions:

- three merger review divisions with a separate merger supervision division (all primarily staffed by former MOFCOM personnel);
- three antitrust divisions (responsible for investigating anti-competitive practices);
- a legislative and international cooperation division;
- a coordination division; and
- a general operations division.

Other bureaus of note are the Price Supervision and Anti-Unfair Competition Bureau and the Inspection and Enforcement Bureau responsible for investigating China-wide and cross-province antitrust violations. The activities of these two bureaus are not expected to overlap with the AMB, which will have primary responsibility for enforcement of the AML.

## Merger Control

Historically, Chinese merger control reviews have sometimes diverged from the procedures, theories of harm, and remedies used by agencies in other major jurisdictions. For example, in contrast to the US and EU, China has imposed unusual "hold separate" behavioral remedies to address horizontal competition rather than following the global trend toward requiring clean-cut, structural divestments to address horizontal issues. Furthermore, under the statutory directives of the AML, Chinese merger reviews assess whether a transaction will: (i) eliminate or restrict competition; and (ii) impact the development of the national economy.

Because the majority of the personnel in the AMB merger control divisions have moved across from MOFCOM, SAMR is expected to follow established Chinese merger review practice. However, there may be a gradual deviation from previous practice, as considered below.

## Review Timetables

Local practitioners generally expect that SAMR will continue the recent trend toward faster, more efficient reviews of straightforward transactions. SAMR has accepted formal merger notifications since May 14, 2018 and, to date, has unconditionally cleared the vast majority of transactions, including those it inherited from MOFCOM. Simple cases are often cleared within one to two months of initial engagement with SAMR. In its first quarter, SAMR took an average of 17 days to clear a transaction submitted under the fast-track process, following formal notification.<sup>1</sup>

SAMR has, however, demonstrated its willingness to closely scrutinize sectors of strategic interest, or deals where there are potential competition concerns. Since its establishment, SAMR has effectively blocked one proposed acquisition (**Qualcomm/NXP** (with Qualcomm announcing on July 26, 2018 that it was terminating the planned US\$44 billion transaction)) and conditionally approved another (**Essilor/Luxottica**). In both cases, SAMR has demonstrated its willingness to deviate from the approach followed in other major jurisdictions, including pursuing theories of harm and remedies not commonly seen in the US and EU.<sup>2</sup>

## Notification Form

SAMR requires notifying parties to use a filing form substantively identical to the one used by MOFCOM, typically requiring detailed commentary on the parties' relevant markets. When parties act in the same value chain, SAMR will consider areas of direct competition between the parties as well as potential vertical or conglomerate effects.<sup>3</sup> This often results in notifying parties supplying additional categories of information to SAMR that would not routinely be shared in other jurisdictions, which may in turn lead to SAMR pursuing theories of harm not considered by non-Chinese regulators. There is no suggestion that disclosure requirements will be eased in the near term.

## Sector-Specific Expertise

The consolidation of the agencies may facilitate greater information sharing and pooling of expertise relating to certain sectors. This could potentially benefit notifying parties, who may not have to spend as much time educating case handlers about industry-specific dynamics during the pre-filing consultation stage of a review. It may also allow for industry-specific information gathered in relation to conduct investigations, previously performed by SAIC and NDRC personnel, to inform merger reviews.

## International Cooperation

SAMR has established a division of the AMB dedicated to international cooperation. Chinese regulators have historically engaged with their counterparts in the EU, US, and other major economies, often

---

<sup>1</sup> Please note that this does not take account of the pre-filing consultation period, which typically takes two to three weeks for straightforward cases. As noted above, fast-track cases are often cleared within one to two months of initial engagement with SAMR (i.e., taking both the pre-filing consultation and formal review periods into account).

<sup>2</sup> SAMR is the only agency to have imposed remedies following its review of **Essilor/Luxottica**, and the only agency not to have cleared **Qualcomm/NXP**.

<sup>3</sup> Conglomerate effects theories of harm are much more commonly considered by Chinese enforcers than is the case in the US or EU. In its **Essilor/Luxottica** review, SAMR considered conglomerate theories of harm such as whether the transaction would allow for the merged entity to tie or bundle sales of lenses, frames, and sunglasses.

requesting confidentiality waivers from parties in complex cases. Cooperation is likely to intensify and procedures are likely to be simplified now that there is a single agency for foreign regulators to work with.

## Sanctions for Failure to File

SAMR appears set to continue MOFCOM's practice of investigating parties that have failed to notify a transaction and/or implement the transaction before the deal has been cleared (commonly referred to as "gun-jumping"). In January 2017, MOFCOM announced its first ever gun-jumping fine for a transaction not involving a Chinese company.<sup>4</sup> Fines imposed by SAMR have been relatively modest and seem unlikely to be of the scale seen in other major jurisdictions for the near future.<sup>5</sup> Nevertheless, in keeping with the global trend toward higher fines and MOFCOM's prior practice, SAMR has already demonstrated its willingness to sanction non-Chinese parties breaching the standstill obligation, even if the transaction itself will have no anti-competitive effects in China. On July 20, 2018, SAMR imposed a fine of RMB300,000 (US\$43,897) on Paper Excellence BV, a Netherlands-based paper pulp maker, for failure to report its acquisition of Eldorado Brasil Celulose S.A.

## Trade Tensions

Although procedural efficiencies are likely to result from the consolidation, there are concerns that current trade tensions may lead to delayed reviews for certain categories of transactions, particularly those involving US companies and/or relating to sensitive strategic sectors such as robotics, aerospace, mining and information technology. Reportedly, the review of Bain Capital's proposed acquisition of Toshiba Memory was delayed and approval put at risk (although it was eventually granted) due to the Trump administration's announcement of tariffs on Chinese imports in March 2018. Similarly, it has been suggested that delays to the **Qualcomm/NXP** review (which resulted in Qualcomm missing its deadline to complete the deal, leading it to terminate the agreement with NXP and pay a US\$2 billion break fee) were also influenced by tensions with the US.

If these trade tensions persist, it remains possible that future transactions requiring SAMR review may be similarly impacted. This is particularly the case because, although China remains publicly committed to liberalizing its regulatory regime to make inward bound investment easier for foreign companies,<sup>6</sup> the consolidation of antitrust powers within a single agency will likely allow for Chinese industrial policy to exert greater influence over enforcement activities than was the case under the previous regime. We wait to see the extent to which SAMR's activities will be impacted by a political agenda at a time when there are continuing trade tensions between the US and China and when the EU, at both a supra-national and Member State level, is in the process of increasing regulatory powers to scrutinize foreign (and, in particular, Chinese) investment in key strategic sectors.<sup>7</sup>

## Enforcement Actions

SAMR will have responsibility for antitrust enforcement activities, previously divided between SAIC and the NDRC. The two agencies have not historically conducted investigations in a consistent manner; the

---

<sup>4</sup> The fine was imposed in relation to Canon's acquisition of Toshiba Medical, which used a two-step transaction structure which MOFCOM determined breached the standstill obligation under the AML.

<sup>5</sup> See, e.g., [the EC's April 2018 fine of EUR124.5 million on Altice](#). By contrast, to date the largest fine imposed by Chinese regulators for a violation of reporting requirements is RMB400,000 (about US\$58,000), imposed on Bombardier in 2016.

<sup>6</sup> See, e.g., <http://www.mofcom.gov.cn/article/ae/ai/201809/20180902787875.shtml>.

<sup>7</sup> For example, [the UK has increased its powers to review transactions in strategic sectors](#) and [EU-level proposals on foreign direct investment screening are expected to be in place by early 2019](#).

NDRC has previously been criticized for conducting faster investigations than SAIC, with less regard for due process.<sup>8</sup> Going forward, the establishment of SAMR may address these concerns by adopting a more consistent and procedurally transparent approach to investigations, utilizing the combined expertise of personnel formerly of both SAIC and the NDRC.

The consolidation also resolves prior jurisdictional uncertainties. Previously, the NDRC had primary responsibility for price-related violations, and SAIC responsibility for non-price-related violations. In practice, however, alleged violations often involved both price- and non-price-related conduct and it was often unclear which agency should take the lead on an investigation. It was also unclear to which agency parties should apply under the (inconsistent) leniency rules. SAMR will provide a one-stop shop for leniency applications and greater procedural certainty for parties involved in future investigations.

An early indication of SAMR's enforcement focus came in May 2018, when it conducted a dawn raid on DRAMeXchange's Shenzhen premises as part of its investigation into manufacturers of DRAM memory chips. DRAMeXchange is a research unit of TrendForce, rather than a manufacturer, and the raid may be an indication of SAMR's willingness to broaden investigations beyond direct participants in alleged anti-competitive conduct. With better-resourced teams and by resolving jurisdictional uncertainties, SAMR is likely to be able to increase its caseload and investigate activities that have previously escaped close scrutiny. At a provincial and local level, it is yet to be seen how the local Development and Reform Commissions (**DRCs**) and the local Administrations for Industry and Commerce (**AICs**) will consolidate and coordinate enforcement of the AML.

The establishment of SAMR may also allow for a re-focusing of Chinese antitrust enforcement priorities. Madam Gan Lin, the vice minister of SAMR, has publicly stated that SAMR will increase its scrutiny of certain sectors, notably information technology and telecoms, high-tech, pharmaceuticals, agriculture and chemicals. In addition, industries such as electricity, water, gas supply, education and medical services will be monitored closely for any potential monopoly behavior.

## Conclusions

The consolidation of antitrust powers into a single agency is unlikely to result in a radical overhaul of Chinese antitrust enforcement activities in the immediate term. SAMR's policy objectives and many of the personnel and procedures will remain the same as prior to the reforms, particularly as regards merger reviews. The primary objectives of the AML also remain essentially unchanged.

Since 2008, however, there has been a steady increase in Chinese antitrust enforcement, often departing meaningfully from the approaches pursued by antitrust authorities elsewhere in the world. By ironing out procedural inefficiencies, resolving jurisdictional uncertainties, encouraging greater pooling of expertise, and centralizing antitrust powers, the establishment of SAMR lays the foundations for more active and potentially more aggressive Chinese antitrust enforcement going forward. Within the context of the current trade tensions, greater political influence over the consolidated agency may also be exerted by the central government.

---

<sup>8</sup> See, e.g., comments from [the US-China Business Council](#) and [the European Union Chamber of Commerce in China](#).

---

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Arthur J. Burke	212 450 4352	<a href="mailto:arthur.burke@davispolk.com">arthur.burke@davispolk.com</a>
Arthur F. Golden	212 450 4388	<a href="mailto:arthur.golden@davispolk.com">arthur.golden@davispolk.com</a>
Ronan P. Harty	212 450 4870	<a href="mailto:ronan.harty@davispolk.com">ronan.harty@davispolk.com</a>
Christopher B. Hockett	650 752 2009	<a href="mailto:chris.hockett@davispolk.com">chris.hockett@davispolk.com</a>
Jon Leibowitz	202 962 7050	<a href="mailto:jon.leibowitz@davispolk.com">jon.leibowitz@davispolk.com</a>
Mary K. Marks	212 450 4016	<a href="mailto:mary.marks@davispolk.com">mary.marks@davispolk.com</a>
Howard Shelanski	202 962 7060	<a href="mailto:howard.shelanski@davispolk.com">howard.shelanski@davispolk.com</a>
Miranda So	+852 2533 3373	<a href="mailto:miranda.so@davispolk.com">miranda.so@davispolk.com</a>
Jesse Solomon	202 962 7138	<a href="mailto:jesse.solomon@davispolk.com">jesse.solomon@davispolk.com</a>
Annie Yan	+86 10 8567 5010	<a href="mailto:annie.yan@davispolk.com">annie.yan@davispolk.com</a>
Howard Zhang	+86 10 8567 5002	<a href="mailto:howard.zhang@davispolk.com">howard.zhang@davispolk.com</a>