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## WHITE PAPER

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### Combination of China's Three Antitrust Enforcement Agencies May Bring More Aggressive Enforcement Over Long Run

Ten years after the introduction of China's Anti-Monopoly Law, the functions and duties of the three agencies originally charged with enforcing the law's provisions are now unified under the direction of the newly formed State Administration for Market Regulation ("SAMR"). Consolidating of the enforcement activities of the three separate agencies is likely to have significant impact on the country's antimonopoly efforts.

This Jones Day *White Paper* provides background information on China's antimonopoly actions and describes the possible implications of the new enforcement landscape under SAMR.

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China recently combined its three separate antimonopoly enforcement agencies into one new agency as part of a broader set of institutional reforms of the central government of China. The State Administration for Market Regulation (“SAMR”) was established under an Institutional Reform Plan of the State Council, which was approved in March 2018. A new agency established directly under the State Council, SAMR combines the antitrust enforcement responsibilities of the previous Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission (“NDRC”), the Antimonopoly Bureau of the Ministry of Commerce (“MOFCOM”), and the Antimonopoly and Anti-Unfair Competition Bureau of the State Administration of Industry and Commerce (“SAIC”).<sup>1</sup>

In addition to antitrust enforcement, the new SAMR has a broad range of other market supervision responsibilities, including food and drug administration, quality control, trademarks, consumer protection, and antibribery responsibilities previously handled by the SAIC. MOFCOM and NDRC will continue to exist and carry out other non-antitrust functions, while SAIC will dissolve into the new SAMR.

## BACKGROUND AND THE REFORM

Since China’s Anti-Monopoly Law (“AML”) came into effect 10 years ago, antimonopoly enforcement has been split among NDRC, which dealt with price-related AML conduct violations; SAIC, which dealt with non-price-related AML conduct violations; and MOFCOM, which handled merger reviews. The three agencies worked in parallel and were all supervised by the Anti-Monopoly Commission (“AMC”) of the State Council. By imposing unique, China-specific remedies on global transactions and aggressively enforcing against conduct such as resale price maintenance, bundling, and abusive IPR licensing practices, China has become one of the important jurisdictions for global merger clearances and competition law compliance.

The consolidation of enforcement from the three separate agencies into one is likely to have a profound impact on Chinese antimonopoly enforcement. Although it will take time to complete the reorganization, the integration process already has started. Zhang Mao, who previously headed SAIC, was appointed to head SAMR, but the head of SAMR’s Antitrust Bureau has not yet been announced. It has been reported that

personnel from the antitrust divisions of NDRC and MOFCOM already have moved into their new offices at SAMR, formerly the location of SAIC. MOFCOM has issued an official notice that, as of May 14, 2018, all merger filing documents must be submitted to or picked up from SAMR, rather than MOFCOM.<sup>2</sup> Indeed, the new agency already has issued its first unconditional merger clearance, to a joint venture between Qualcomm and several Chinese partners.<sup>3</sup>

## POTENTIAL IMPLICATIONS OF THE INSTITUTION REFORM

In the short term, integration of the three Chinese antimonopoly enforcement agencies into the new SAMR may give rise to some uncertainties and delays for ongoing merger reviews and conduct investigations. It may be possible that the new agency will avoid making high-profile, significant moves or decisions during the reorganization period. On the other hand, as discussed below, institutional reform likely will have profound implications in the long run.

### Combining Enforcement Resources for Solid Enforcement

Lack of enforcement personnel and resources has been one of the major hurdles faced by the previous three enforcement agencies. There has long been a substantial imbalance between the high number of cases handled by each of the previous AML enforcement agencies and their limited staffing. Some reports have indicated that, prior to the institutional reform, the staff headcount specifically responsible for enforcement activities in each agency was only 12 in MOFCOM, 12 in SAIC, and 16 in NDRC.<sup>4</sup> While those numbers probably include only those officials actually handling specific cases, even adding all staff members and supervisors probably would not bring the total around 100. Although SAMR still will be understaffed as compared to the U.S. and EU antitrust agencies, the consolidation will allow for the combination of existing enforcement resources, streamline the enforcement process, and optimize the use of resources for SAMR’s enforcement priorities.

### Reducing Jurisdictional Uncertainty

The previous enforcement agency structure was the target of criticism from the very beginning. The allocation of authority among the agencies was not always clear. Although NDRC was responsible for price-related AML violations and SAIC for

non-price-related AML violations, in practice violations often included elements of both price-related and non-price-related conduct, giving rise to jurisdictional overlap between agencies. For example, in NDRC's 2017 penalty decision against two pharmaceutical companies for abuse of dominance by unfair pricing in the market of isoniazide APIs, the decision also found an illegal refusal to deal, although that was a non-price-related violation. Similarly, in SAIC's penalty decision against Tetra Pak for bundling, and it also found anticompetitive loyalty rebates, even though those are price-related violations.

In an effort to avoid such conflicts, the agencies are understood to have followed an internal rule of "first to initiate, first to investigate," according to which the first agency formally to initiate a case would carry out the investigation. However, private parties seeking leniency or reporting AML violations still were required to report to both agencies since they did not have any information regarding which agency would first initiate the case.

The combination of the three antitrust authorities will resolve the tension created by overlapping jurisdictions.

### Harmonizing Inconsistent Rules and Practices Among Agencies

The establishment of the new agency is expected to facilitate the harmonization of inconsistent rules and/or practices under the old regime.

For example, the leniency provisions in the SAIC and NDRC procedural rules differ in significant and important ways, including whether leniency applies to the organizer of the anti-competitive agreement, the definition of "important evidence," and the specific implementation of the leniency program. The table below illustrates some of the inconsistencies and uncertainties that, pre-reorganization, appear to have hampered the effective implementation of the leniency rules.

Agency	Whether Applicable to Organizer	Definition of "Important Evidence"	Implementation of Leniency	
SAIC	No	Evidence that plays a key role in the decision to initiate an investigation or in a finding of monopoly agreement	The first to voluntarily self-report and provide important evidence, and comprehensively and voluntarily cooperate with the investigation	Should be exempted from penalties
			Others that voluntarily self-report and provide important evidence	Reduction of penalties at SAIC's discretion
NDRC	No clear prohibition	Evidence that will play a critical role in finding a price monopoly agreement	The first to voluntarily self-report and provide important evidence	May be exempted from penalties
			The second to voluntarily self-report and provide important evidence	May be granted a 50% or more reduction of penalties
			Others that voluntarily self-report and provide important evidence	May be granted a 50% or less reduction of penalties

Another example relates to "safe harbor" provisions for monopoly agreements. The SAIC Rules on the Prohibition of Abuses of Intellectual Property Rights that Eliminate or Restrict Competition contain safe harbors for agreements involving: (i) competitors with combined market shares of no more than 20 percent of the affected relevant markets (or in markets with at least four other independently controlled substitutable technologies available at reasonable cost); or (ii) companies in vertical relationships, with none having more than a 30 percent market share (or where at least two other independently

controlled substitutable technologies are available at reasonable cost). However, the draft antitrust guidelines that NDRC issued on behalf of the AMC for public comment contain slightly lower market share thresholds (15 percent for horizontal relationships, and 25 percent for vertical relationships) for the safe harbors, leaving uncertainty as to how parties with in-between market shares would be treated.

These inconsistencies have caused confusion and uncertainty in AML enforcement. With the integration of antitrust

authorities, it can be hoped that the new agency will be able to harmonize prior inconsistent rules and practices to the predictability of competition law enforcement for market participants. However, it is likely that, at least for some initial period, regulations promulgated by the respective legacy enforcement agencies will remain in effect until new rules are available to replace them.

### **More Efficient and Independent Enforcement**

The institutional reform of the Chinese antitrust agencies also reflects the government's increasing focus on antitrust and competition issues. There has been a steady trend of increasing antitrust enforcement since the birth of AML in 2008. The three legacy agencies had become more and more active in their enforcement actions, however measured: the level of fines, the number of companies under investigation or transactions under review, the range of industries under scrutiny, and their willingness to look into more complicated competition issues. With larger scale as well as wider and unified authority, the new agency will only be more active and aggressive in its enforcement of China's AML. Zhang Mao, the head of SAMR, recently stated that the new agency will "strengthen antitrust and anti-unfair competition enforcement."<sup>5</sup> Moreover, SAMR should be able to combine the respective experience and skills of the three agencies in an attempt to improve the overall quality of enforcement.

Under the old structure, both NDRC and MOFCOM maintained—as they continue to do now—other and arguably more important responsibilities beyond antitrust enforcement, particularly for industrial policy (NDRC) and trade policy (MOFCOM). Thus, there always were concerns about industrial and trade policy being factored into merger reviews, conduct investigations, and competition analysis. After the integration, it may be hoped that the new antitrust enforcement agency, given its overall market supervision role, will be able to maintain greater distance from MOFCOM and NDRC,

and presumably thus also from industrial and trade policies. If so, then the antitrust enforcement of SAMR may be able to become more independent as compared to its predecessors, although SAMR presumably will continue to solicit opinions from other regulators and stakeholders during merger reviews and generally to receive input from those stakeholders in other enforcement contexts too.

### **Accelerating Legislative Process**

Last but not least, the consolidation may also influence ongoing antitrust legislative efforts. In September 2017, a number of seminars and workshops were held by the legacy antitrust enforcement agencies to discuss potential amendments to the AML. In addition, NDRC also issued on behalf of AMC for public comment several draft guidelines on various antitrust issues during 2016. But none of the above legislative efforts resulted in the issuance of new rules. Part of the reason for the delay is believed to be unresolved conflicts and competition among the legacy enforcement agencies. The consolidation of the agencies into SAMR likely will smooth the legislative process after their initial institutional integration.

Agency reorganization within SAMR is still ongoing. However, SAMR has begun to function as a new agency. Merger reviews continue as usual, in particular for less complicated transactions going through simple or otherwise noncontroversial filing procedures. New conduct investigations have launched. Some continuity in enforcement can be expected in the short term, given that the AML will be enforced by essentially the same group of enforcement personnel after the reform, albeit combined and with some reshuffling.

We will closely follow the development of the new agency and its impact on AML enforcement and provide further insights on how this reorganization will affect companies doing business in China.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com/contactus/](http://www.jonesday.com/contactus/).

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## ENDNOTES

- 1 The full version of the Institutional Reform Plan of the State Council is available in Chinese.
- 2 The MOFCOM Notice on Matters Related to Notifications of Concentration of Undertakings is available in Chinese.
- 3 The public announcement on the clearance at Shanghai Stock Exchange is available in Chinese.
- 4 See *Beijing Business Today*, “AML Enforcement Authorities To Be Combined in SAMR,” available in Chinese.
- 5 Zhang Mao, “Devoted to Promoting Innovation and Reform in Market Regulation,” available in Chinese.

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