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“The Establishment of a Unified Antitrust Enforcement Authority in China”

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11 April 2016

The Draft Proposal on Formulating the Thirteenth Five-Year Plan on National Economic and Social Development (the ‘13th Five Year Plan’) will be conducted by the State Administration for Industry and Commerce (SAIC) on the authority of the State Council. As part of this initiative, the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau (AAECB) will be in charge of the competition policy section, which will be divided into five sections, including the revision of the Anti-Monopoly Law, the establishment of a fair competition review system, the enhancement of the function of competition policies, the promotion of international cooperation on competition policies, and the establishment of a unified antitrust enforcement body.

China's Five-Year Plans

China's Five-Year Plans are a series of social and economic development initiatives, created by the Communist Party of China through plenary sessions by the Central Committee and national congresses, whose main aim is to establish foundations and principles of Chinese socialism, map strategies for economic development, set growth targets, and launch reforms. Therefore, the Five-Year Plans encompass and intertwine with existing policies, regional plans, and strategic initiatives, and is a living document that undergoes constant review and revision over the five-year period.

Since 2012, President Xi has worked towards the revitalisation of the Chinese nation, promising economic and legal restructuring. Therefore, the recently released 13th Five Year Plan reaffirms this policy vision for China, with a focus on maintaining medium-high growth, which translates into a proposal containing existing policies or a natural expansion of the reforms goals laid out in

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the landmark policy-setting meeting, the Third Plenum, two years ago. The 13th Five Year Plan contains five main principles underpinning the policies for China's future development in order to achieve overall a moderately prosperous society:

1. innovation: a driver of economic development and to shift China's economic structure into a higher quality growth pattern;
2. openness: the utilisation of domestic and global markets and to be more active in global governance;
3. green development: the protection of the environment and the pursuance of environmentally friendly economic growth;
4. coordination: ensure balanced development among rural and urban areas, and across different industries; and
5. inclusive: prosperity is shared among the whole population of China.

The outcomes of the fifth plenum include the following:

1. economic growth: medium-high GDP target of 6.5%, and double GDP and per capita income by 2020 from the 2010 base;
2. foreign investment: negative list approach to market access, and increased transparency in rules for foreign investors;
3. domestic industrial upgrading;
4. financial targets: RMB convertibility by 2020, and for the RMB to join the IMF's basket of reserve currencies;
5. social policy: one-child limit expanded to two children per couple;
6. social welfare: extend coverage of urban welfare services to all resides, universal enrolment in retirement and critical illness health care plans, and to lift 70 million people out of poverty by 2022;
7. urbanization: an urbanization rate of 60% by 2020;
8. green development: reduce emissions per unit of GDP by 40% to 45% by 2020, increase the share of non-fossil fuel energy to 15% by 2022, and ban commercial logging in natural forests; and
9. anti-corruption.

Current structure

The Anti-Monopoly Law establishes a two-tier enforcement structure, with an Anti-Monopoly Commission (AMC), established under Article 9, and the Anti-Monopoly Enforcement Authorities (AMEA), therefore creating a unifying body to coordinate enforcement activities, in which the AMC is responsible for organising and guiding competition and antimonopoly work, including the drafting of competition policies and guidelines and the coordination of administrative enforcement and investigations, and the AMEAs is responsible for the actual enforcement of the Anti-Monopoly Law.

The Anti-Monopoly Law is enforced by three agencies, including the Ministry of Commerce (MOFCOM), the State Administration for Industry and Commerce (SAIC), and the National Development and Reform Commission (NDRC). The MOFCOM is an executive agency of the State Council of China, and through the Anti-Monopoly Bureau, is responsible for reviewing merger and acquisitions transactions and other types of proposed business concentrations. The SAIC, along with AACEB, is responsible for the enforcement of the Anti-Monopoly Law relating to monopoly agreements, abuses of dominant market position, abuse of administrative power to restrict and eliminate competition (excluding monopolistic pricing behaviours), and investigating and penalizing unfair competition, commercial bribery, smuggling and other economic related infringements in accordance with laws. The NDRC, with its Price Supervision and Anti-Monopoly Bureau, is responsible for the enforcement of price-related conduct, including investigations of

pricing practices by companies, price-related aspects of monopoly agreements, and company abuse of dominant market position to set or control prices.

Unified antitrust authority

Under the competition policy of the 13th Five-Year Plan, a proposal for a unified antitrust enforcement body has been put forward in order to optimise the procedures of the Chinese antitrust public enforcement. Such a structural establishment of a unified antitrust authority will overcome institutional weaknesses of the current arrangement that restricts the performance of the three agencies, as well as improve the efficiency of China's competition enforcement agencies.

The decentralization of the enforcement authorities have caused many issues, such as resource constraints and overlapping institutional settings, especially in view of the magnitude of assigned tasks. There are several benefits to the decentralisation of enforcement, such as the promotion of competition among agencies, which increases efficiency in the form of output and the quality of results, the hedging of risks if any single agency fails to perform, and the opportunity to test different implementation options. However, the current institutional arrangement allows inter-agency depletion of precious enforcement resources and imposes delays in the resolution of cases. Also, entrusting two or more agencies with overlapping authority inherently implies not only a source of tension and a coordination burden for those three agencies, but also a source of uncertainty for antitrust compliance. Therefore, having three AMEAs is not only inefficient but can also cause conflict, and friction, leading to fragmented, incoherent or inconsistent decision-making.

Especially, the main conflict comes between NDRC and the SAIC, the two agencies that share enforcement responsibilities in the areas of restrictive agreements and abuse of dominant positions. Specifically, NDRC is responsible for enforcement against restrictive agreements and abuse of dominant positions that are price-related, while SAIC is responsible for enforcement against those aspects that are non-price-related. However, given that monopolists ultimately achieve their profits through the influence of price, most monopolistic activities, whether in the form of restrictive agreements or abuse of dominant positions, are price-related. Therefore, it is imperative for NDRC and the SAIC to have a work-sharing agreement that clearly delineates their rights and obligations in cases of concurrent jurisdiction.

In 2011, NDRC and the SAIC each adopted the implementation rules of the Anti-Monopoly Law, which explained further the division of the agencies' labour. In the area of restrictive agreements, NDRC is responsible for enforcement against price fixing, while SAIC is mainly responsible for enforcement against the restriction of output or sales, the division of sales or raw material markets, the restriction of the purchase or development of new technologies or equipment and boycotting. Meanwhile, in the area of abuse by dominant parties, SAIC is responsible for enforcement against refusal to deal, exclusive dealing, bundling, tying and discriminatory treatment (through non-price-related transactional terms), while NDRC is mainly responsible for enforcement against resale price maintenance, unfairly high or low prices, predatory pricing, price discrimination, refusal to deal by setting unfairly high or low prices, exclusive dealing through price discounts and the imposition of unreasonable fees in addition to sales price. However, there are still situations where ambiguities exist to cast doubt on the division of the agencies' jurisdictions, such as a situation where a party may bring a case alleging that a firm has abused its dominant position by tying and selling at an unfairly high price, which would trigger the jurisdiction of both NDRC and the SAIC, as NDRC would lack jurisdiction over the conduct of tying and the SAIC would lack jurisdiction over the conduct of selling at an unfairly high price. Therefore, these situations pose difficult questions, such as whether NDRC and SAIC would each conduct their own investigation or work together, or the mode of reconciliation when the agencies reach divergent conclusions.

For example, in the case of the *Paper Manufacturing Cartel Case* in 2013, where two South Korean and four Taiwanese manufacturers together were fined RMB 353 million for price fixing activities, both NDRC and the SAIC's jurisdiction were attracted. However, only the NDRC was involved in relation to the investigation and enforcement, with no indication of how such divisions of labour decisions were made. Also, in another case in 2010 where the Wuchang branch of Hubei Salt Group Co., Ltd was penalized for engaging in anti-competitive bundling, it was a situation enacting the SAIC's jurisdiction due to its non-price-related nature, however, the NDRC was responsible for the penalization and the publication of the announcement. Therefore, there are doubts relating to any strict adherence to the division of labour set out in the relevant legislation and regulations.

Finally, dividing enforcement of the three enforcement agencies means these antitrust departments are forced to compete with each other for resources, and are therefore finding themselves constantly under-resourced. Although each enforcement agency has responsibilities pertaining to a certain area, each agency is likely to engage similar procedural steps in its initial investigation on antitrust behaviour regardless of whether the conduct is price or non-price conduct, or related to a business transaction. These steps may involve defining the relevant market involved, identifying the market's consumers and substitutes of the goods available to the consumers, and determining whether the entities involved have market power. Therefore, such duplication, as a result of the tripartite structure, is a waste of resources.

Conclusion

The tripartite system of antitrust enforcement agencies is a source of confusion, and the establishment of a unified antitrust enforcement body will largely improve China's Anti-Monopoly Law enforcement efficiency and coherence, enable separate and stand-alone Anti-Monopoly Law decisions, and allow more certainty and convenience for undertakings in their antitrust compliance work. Therefore, the establishment of such a body will be a benefit to China's antitrust enforcement.