

China to Merge Antitrust Authorities

Kluwer Competition Law Blog

March 21, 2018

Adrian Emch (Hogan Lovells, China)

Please refer to this post as: Adrian Emch, 'China to Merge Antitrust Authorities', Kluwer Competition Law Blog, March 21 2018, <http://competitionlawblog.kluwercompetitionlaw.com/2018/03/21/china-merge-anti-trust-authorities/>

Over the past weekend, the Chinese legislature decided on a major restructuring of governmental agencies – with a profound impact on antitrust enforcement in the country. The restructuring plan was announced by the State Council – the equivalent of China’s cabinet – on 13 March 2018 and was approved by the legislature on 17 March.

Although there had been discussions and rumours about the government restructuring for a while, the extent and significance of the planned reform measures went beyond the expectation of many commentators. It is clear that there will be major changes to the ministries and other institutions under the State Council.

As far as antitrust is concerned, the focus lies on the new super market regulator – the State Administration for Market Supervision (“SAMS”). This new agency will assume the functions of the existing State Administration for Industry and Commerce (“SAIC”), the Administration of Quality Supervision, Inspection and Quarantine (“AQSIQ”) and the China Food and Drug Administration (“CFDA”). It is also tasked to supervise the restructured State Intellectual Property Office (“SIPO”).

Importantly for the antitrust world, the three existing antitrust enforcement units within the National Development and Reform Commission (“NDRC”), SAIC, and the Ministry of Commerce (“MOFCOM”) will all be transferred to SAMS, which is anticipated to merge them into a single antitrust bureau.

At present, the powers to enforce the Anti-Monopoly Law (“AML”) are divided between:

- the NDRC Price Supervision and Anti-Monopoly Bureau, whose jurisdiction covers enforcement actions against restrictive agreements, abuse of dominance and anti-competitive government practices that are related to pricing,
- the SAIC Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau, whose scope of enforcement relates to the same types of activities as NDRC’s, except where they are not related to pricing, and
- the MOFCOM Anti-Monopoly Bureau, which is in charge of merger control.

The three-headed antitrust enforcement regime was the result of a compromise between competing factions vying for enforcement powers at the time the AML was enacted in 2007. This institutional set-up has remained in place for almost 10 years, but has led to some inconsistency and uncertainty both for the authorities and market players. Both NDRC and SAIC issued substantive rules implementing the AML which, however, are not entirely consistent and there are some areas of overlap. Both authorities also released procedural rules which are similar, but not identical. Perhaps most importantly, the culture and enforcement styles of the authorities have been markedly different. This has led to uncertainty for market players as to what the applicable rules are and how they should ensure compliance.

The plan to merge the three antitrust units into SAMS should reduce this uncertainty to a large extent. In the future, the SAMS antitrust bureau is expected to issue a single set of implementing rules and guidelines and follow the same procedures in its enforcement actions. In this sense, the merger of antitrust units should be a positive development for businesses.

The government restructuring will have additional repercussions on the antitrust world. In the short term, the restructuring is likely to have an impact on existing cases before the authorities. In general, I would expect the officials in the existing antitrust authorities to set aside time for transitioning to the new agency, which in turn has the potential of slowing down the pace of on-going proceedings such as merger investigations. In some instances, however, we may see the opposite effect – an acceleration in procedures relating to on-going cases – if the officials in the existing authorities want to “clean desks” before moving to the new agency.

In the medium term, I would expect the SAMS antitrust bureau to get off to a slow start. It would be understandable for the SAMS officials to focus their attention on drafting internal rules and protocols and issuing fresh AML implementing rules and guidelines for businesses. These rules may cover both substantive and procedural aspects, replacing or consolidating existing NDRC, SAIC and MOFCOM rules. It is also possible that the new antitrust bureau will continue the efforts of drafting new guidelines on a variety of aspects of AML implementation - on the leniency program; the commitment procedure; the exemption procedure; the principles for imposing fines (at present, put on hold); sector-specific rules for the automotive industry; the relationship of antitrust and intellectual property; rules on standard essential patents; and rules on vertical restraints more generally - a process which is currently on-going (mainly at NDRC's initiative).

It is probably too early to have a clear idea about the direction of future competition policies and enforcement priorities of the new antitrust bureau. This will depend not only on the structure of the bureau, but also on which and how many officials will join the bureau and its appointed leadership. On a high-level note, however, I would anticipate some degree of continuity in policy and enforcement action. For example, the healthcare sector has been a focus of antitrust enforcement for all three existing antitrust authorities. The top levels of the Chinese government and consumers view this sector as important to China's future development, so I would expect antitrust enforcement to continue after the government restructuring.

In short, while the longer-term implications of the government reshuffle for the antitrust community are not yet all known, it is clear that the merger of the three existing antitrust enforcers is a game-changer, just as the AML approaches its 10th anniversary.