China's Antitrust Regime: Retooled, Retrenched and (Potentially) Ready for Battle

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China has introduced a plan to restructure some of its key governmental institutions, including the operations of its three antitrust enforcement agencies. The new scheme, announced in March 2018, for the first time centralizes control over competition regulation under a single administrator, ending a structure that saw enforcement responsibilities spread among several disparate and often conflicting departments. The aim is to enhance consistency of enforcement and independence of operation.

The consolidation also has the potential to boost China's antitrust power at a time when trade tensions are escalating between China and the U.S. As a result, U.S.-based business with interests in China must recognize that the new State Administration for Market Regulation (SAMR) has a role to play in protecting China's economic interests.

Antitrust Enforcement

SAMR will oversee, among other things, the antitrust enforcement responsibilities previously shared by the State Administration of Industry and Commerce (SAIC), the National Development and Reform Commission (NDRC), and the Ministry of Commerce (MOFCOM). The SAIC and NDRC historically shared responsibility for investigating and enforcing anti-competitive conduct, with the NDRC officially focused on pricing behavior such as price-fixing and retail price maintenance, and the SAIC tasked with policing nonpricing behavior such as tying and bundling. Meanwhile, the Anti-Monopoly Bureau of MOFCOM had exclusive responsibility for antitrust review of mergers, acquisitions and joint ventures that could potentially have impacted China's market operations and national economic development.

Now, these processes will all be handled within SAMR, with the consolidation process expected to be completed by the end of September 2018. Unsurprisingly, the consolidation has created a transitional period of uncertainty. Review of simple merger control filings has continued with only minor delays. At the same time, as discussed in more detail below, trade tensions appear to have affected merger control review for some larger, high-profile transactions.

Consolidation of the enforcement teams at the NDRC and SAIC may pose even greater issues for two reasons. First, the two agencies have historically had somewhat overlapping jurisdictional scopes, despite their different official descriptions. As a result, it may take some time to allocate responsibilities and eliminate overlaps in the integrated agency. Moreover, the NDRC and SAIC generally adopted different enforcement approaches: The NDRC tended to move very quickly, sometimes raising questions regarding a perceived lack of respect for due process and procedural fairness, while the SAIC was prone to focus more on long-term, complex investigations using a more even-handed approach. How these overlaps in scope and divergences in approach will be resolved remains to be seen.

Trade Tensions

The consolidation of China's antitrust power comes as its trade tensions with the U.S. continue to increase and could provide China with another, less overt tool to use in pursuing its economic interests. In January 2018, the U.S. imposed countervailing duties on imports of stainless steel flanges from China and India. In March 2018, the U.S. trade representative proposed imposition of a 25 percent duty on Chinese products to retaliate for harm to U.S. businesses caused by China's trade and economic policies, and lodged a complaint with the World Trade Organization (WTO) to "address China's unfair technology practices that run counter to WTO rules." By April 2018, the U.S. had published a proposed list of products from China that could be subjected to additional tariffs, including those from the aerospace, information and communication technology, robotics, and machinery industries, and in June 2018 the U.S. announced that tariffs on Chinese products in these categories — accounting for some US$50 billion in trade — will go into effect in July 2018.

At the same time, the U.S. Department of Commerce has been pursuing a seven-year export ban on China's telecommunications enterprise ZTE, which also has become an important part of negotiations. Even as the U.S. executive branch has sought to make accommodations to China relating to ZTE — which had been forced to announce that it had ceased "major operating activities" as a result of the ban — the Senate has recently signaled that it would seek to impose the full seven-year ban by inclusion in a recent Department of Defense spending bill.

China also has ratcheted up its rhetoric and trade measures, levying its own tariffs, of 15 percent to 25 percent, on 234 U.S. products, including fresh fruits, nuts, wine, pork, soybeans, automobiles, chemicals and aircraft. China also has vowed retaliation against the latest announcements by the U.S., which could serve to further escalate the trade tensions. Indeed, China's Ministry of Commerce responded to threats from President Donald Trump by announcing that it will match any economic attack from the U.S. and "firmly attack, using new comprehensive countermeasures, to firmly defend the interest of the nation and its people." China also has lodged its own WTO complaint against the U.S.

Merger Control Reviews

Amid these very public actions on both sides, China's merger control reviews of several high-profile U.S. transactions appear to have been quietly, but significantly, impacted. For example, the merger review of Bain Capital's US$18 billion purchase of Toshiba Memory was reportedly delayed, with approval even placed "at risk" as a result of the ongoing trade dispute. Similarly, trade reports indicate that Qualcomm's US$44 billion acquisition of NXP Semiconductors may also have been delayed in connection with the dispute. Furthermore, over the past year, MOFCOM has greatly increased the frequency with which it has imposed remedies during merger control reviews, with a significant impact on U.S. businesses, imposing remedies on several high-profile U.S. deals and often using behavioral commitments rarely employed by regulators in other jurisdictions to target transactions that received unconditional approvals elsewhere.

In particular, there seems to be a significant focus on potential conglomerate effects theories, wherein the regulator hypothesizes future anti-competitive harm from a firm leveraging its strength in one market to compete unfairly in another market. These theories, rarely seen in the U.S. though sometimes used by the European Commission, have become common in merger control reviews in China, with MOFCOM and now SAMR pushing for commitments from major global suppliers that they will not bundle or tie products together for five- or even 10-year periods. Other types of commitments may include pricing restrictions in China, prohibitions on future M&A activity in certain markets, divestitures of businesses or research and development pipeline products, and obligations to maintain certain supply levels to Chinese customers.

Conclusion

U.S.-based businesses with mergers, acquisitions or joint ventures potentially notifiable in China or doing business directly in China must be sensitive to the role that the new SAMR may play in safeguarding China's economic interests. With its newly consolidated powers and a reported track record of intervening on China's behalf to tip the scales in an economic dogfight, SAMR could prove a formidable asset for protecting China's national economic development going forward.