



STRUCTURE AND RESPONSIBILITIES OF ENFORCEMENT AGENCIES UNDER CHINA ANTI-MONOPOLY LAW CLARIFIED

As the countdown to the August 1, 2008, effective date of the new China Anti-Monopoly Law (“AML”) nears its final stages, the structure and allocation of enforcement responsibilities under the AML is becoming slightly more clear.

Reform and restructuring of the State Council and the ministries under it started in March 2008, after the 11th Session of the National People’s Congress. Since then, the State Council has been defining and finalizing the functions of each ministry under its auspices.

BACKGROUND

The AML establishes a two-tier enforcement structure, with an Anti-Monopoly Commission (“AMC”) and Anti-Monopoly Enforcement Authorities (“AMEAs”). This is understood to be a compromise that maintains the current allocation of powers between existing ministries under the State Council, while also providing an unifying body to coordinate enforcement activities. According to the AML, the AMEAs designated by the State Council will be responsible for the actual enforcement of the AML, while the AMC will be in charge of organizing, coordinating, and supervising AML-related work.

SAIC RESTRUCTURING PLAN

According to the State Council Restructuring Plan (in Chinese, “三定方案”) published by one such ministry, the State Administration of Industry and Commerce (“SAIC”), one of the major functions of SAIC will be¹: being responsible for AML enforcement relating to monopoly agreements, abuses of dominant market position, abuse of administrative power to restrict and eliminate competition (excluding monopolistic pricing behaviors), and investigating and penalizing unfair competition, commercial bribery, smuggling and other economic related infringements in accordance with laws.

1. For details, please visit http://www.saic.gov.cn/zwxqx/zwdt/zyfb/t20080725_43236.htm.

A department called “Anti-Monopoly and Anti-Unfair Competition Bureau” (the “Bureau”) will be established under SAIC and charged with the above responsibilities. The Bureau evolved from the previous Fair Trade Bureau, which was responsible for the enforcement of the 1993 Anti-Unfair Competition Law promulgated in 1993, and also consolidated certain other SAIC enforcement functions arising under other laws. A separate “Consumer Protection Bureau,” established under the 1993 Consumer Protection Law, will remain responsible for the protection of consumer rights and enforcement against faked goods.

DIVISION OF RESPONSIBILITY BETWEEN SAIC AND NDRC

The above Restructuring Plan confirmed the widely held expectations that three current government ministries will share the enforcement responsibilities of the AML: SAIC, the National Development and Reform Commission (“NDRC”), and the Ministry of Commerce (“MOFCOM”). However, the language in the Plan is far from clear, and it is only an administrative document clarifying the functions of the administrative agencies, rather than a law or regulation.

No official Restructuring Plans have yet been published for NDRC or MOFCOM. However, the carving out of “monopolistic pricing behaviors” from the SAIC Restructuring Plan suggests that pricing-related violations under the AML will be supervised by NDRC, which already is responsible for industrial policy and price control in China. Because most cartels and abuses of dominant market position arguably will involve pricing behavior, there is likely to be no clear dividing line between “monopolistic pricing behaviors” (intended for NDRC’s supervision) and “abuses of dominance” (intended for SAIC). For example, predatory pricing cases may fall under the jurisdiction of both agencies: NDRC may take the view that predatory pricing is a monopolistic pricing behavior, while SAIC may take the position that it is a form of abuse of dominance. It remains to be seen how this allocation of enforcement functions will play out in practice, where it may be resolved by detailed working rules for the allocation of cases, or may be decided by a higher-level body such as the AMC.

MOFCOM

In contrast, MOFCOM’s role is relatively clear, with responsibility for merger review. MOFCOM has been enforcing the merger review rules under the Regulation on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors since 2003. A new department within MOFCOM will be established to perform the functions of AML enforcement. It also has been reported that MOFCOM will act as the secretariat of the AMC and in that capacity be responsible for the daily work of the AMC, which will be composed of the ministers of the relevant ministries and headed by a vice premier.

LOOKING AHEAD

As of this writing, neither the AMC nor the AMEA has been formally established yet. Starting up these enforcement agencies and staffing them with competent enforcement officials will take more time. The complexity and uncertainties regarding the allocation of enforcement power among the various AMEAs are likely to pose great difficulties for companies and practitioners as they attempt to ascertain which agency will have jurisdiction over a specific case. Moreover, just as in some other major jurisdictions, coordination on jurisdiction issues is very likely to cause delays in case handling, and concurrent enforcement by multiple agencies may result in inconsistent enforcement standards and analysis.

As structured, the departments responsible for actual enforcement of the AML will be set up under the above three existing government ministries, SAIC, NDRC, and MOFCOM. The relatively low hierarchy of the anti-monopoly enforcement authorities in the Chinese bureaucratic system may render enforcement actions against large state-owned enterprises (“SOEs”) or local governmental “administrative monopolies” more difficult, and may render competition decisions more susceptible to the influence of factors unrelated to competition issues. For example, NDRC also is in charge of industrial policy, while MOFCOM also has simultaneous responsibility for international investment and trade. These functions relating to industrial and trade policies conceivably may conflict or interfere with the roles they will play in enforcing the AML and the realization of procompetitive goals.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General e-mail messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

Peter J. Wang

86.21.2201.8040

pjwang@jonesday.com

H. Stephen Harris Jr.

1.404.581.8197 / 1.202.879.3939

sharris@jonesday.com

Yizhe Zhang

86.10.5866.1111

yzhang@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the author and do not necessarily reflect those of the Firm.