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I. INTRODUCTION

The People's Republic of China adopted its Anti-Monopoly Law ("AML") in 2008. In the following six years, China has made notable progress towards becoming one of the most robust and dynamic competition law regimes in the world. While substantive competition laws are developing rapidly in China, procedural safeguards for parties involved in antitrust proceedings seem to fall short of the due process requirements upheld in more mature jurisdictions such as the European Union and the United States.

This article provides a cursory review of the due process protections available under the current Chinese competition law and general administrative law, with a comparative view towards the due process requirements in the European Union and the United States. The main conclusion is that while the Chinese competition law regime sets out some key due process rights to parties involved in an antitrust proceeding, there is substantial room for development before antitrust due process protections become adequate, effective, and consistent in China.

II. DUE PROCESS REQUIREMENTS

Originating from the Natural Justice doctrine of English law and incorporated in the U.S. Constitution, due process principles have been recognized as providing fundamental procedural safeguards for individuals and companies involved in government proceedings (including antitrust proceedings) in various jurisdictions across the world. While different jurisdictions may have their own adaptations, the core requirements of due process largely remain the same. To quote from Judge Douglas Ginsberg, "[a] precise definition [for due process] has never been attempted… Its fundamental requirement is an opportunity for a hearing and defense." [2]

Due process rights available to parties in an EU competition law proceeding generally include: (i) the right not to self-incriminate, (ii) the right to be informed whether they are potentially suspected of having committed an infringement, (iii) the right to an oral hearing, (iv) access to files, and (v) a fully reasoned decision.[3] Similarly in the United States, due process rights in an antitrust proceeding are generally understood to include: (i) the right to a hearing (before the actual decision maker), (ii) the right to a neutral decision maker, (iii) the right to confront

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[2] *Ballard* v. *Hunter*, 204 U.S. 241, 255 (1907).

[3] Paul Csiszar, Director, DG Competition, European Commission, *Due Process in EU Competition Law – Recent Package of Best Practices and Mandate for the Hearing Officer, Fifth Annual Conference on Competition Enforcement in the CCE Member States*, February 21, 2014, Bratislava; Alexander Italianer, Director General, DG Competition, European Commission, *Best Practices for antitrust proceedings and the submission of economic evidence and the enhanced role of the Hearing Officer, OECD Competition Committee Meeting*, October 18, 2011, Paris; Alexander Italianer, *Safeguarding due process in antitrust proceedings*, Annual Conference on International Antitrust Law and Policy, Session on "Enforcers' perspectives on international antitrust," September 23, 2010.

evidence, (iv) reasoned decisions based solely upon evidence, (v) the right to review by an independent tribunal, and (vi) efficiency.[4] Despite other differences, the right to a fair hearing and the right to a neutral and impartial decision-making process are among the common core requirements of due process principles in the arena of antitrust laws.[5]

III. DUE PROCESS REQUIREMENTS IN THE CONTEXT OF THE CHINESE COMPETITION LAW REGIME

Influenced by thousands years of feudal history, the Chinese legal community traditionally attached significant importance to substantive justice, while procedural justice was largely overlooked. Despite the AML and various implementation regulations all providing for certain procedural rights of parties in antitrust proceedings, currently a unified guideline setting out procedural rights for these parties is still unavailable in China.

Under the Chinese competition law regime, the Ministry of Commerce ("MOFCOM") is in charge of proceedings with regards to merger control; the National Development and Reform Committee ("NDRC") is in charge of proceedings with regards to price-related cartels and abuse of dominance; and the State Administration of Industry and Commerce ("SAIC") is responsible for investigating non-price related cartel agreements and abuse of dominance. Accordingly, each of these agencies issues procedural rules specific to their domains of responsibility. Unfortunately, the provisions promulgated by the different agencies are not always consistent with each other, and the procedural rights offered by one agency—for example, the right to a hearing—may not be available in the provisions issued by another agency.

The State Council's *Outline for Promoting Law-based Administration in an all-round Way* ("Outline") issued in 2004 provides a sound reference to the general due process requirements under the AML. Binding on all the subordinating agencies of the State Council, which includes the above-mentioned three agencies entrusted with the enforcement power of the AML, this Outline explicitly lists "due process" as one of the basic requirements for the "Law-based Administration," one of the key elements of the "rule of law" doctrine enshrined in the *Constitutional Law of Peoples' Republic of China*.

In the explanatory texts of the due process requirement, the Outline provides that:

1. The administrative agencies shall conduct their proceedings in an open manner, except for those concerning state, commercial, or personal secrets, and shall listen to the opinion of the public;
2. The administrative agencies shall strictly observe legal procedures when discharging their duties, and protect the parties and stakeholders' right to be informed, right to participate (the right to hearing is deemed as the essence of the "right to participate" by Chinese

[4] Judge Douglas H. Ginsburg, U.S. Court of Appeals for the District of Columbia Circuit, *Due Process in Competition Proceedings*, International Competition Network Roundtable on Investigative Process, March 25, 2014, Washington D.C.

[5] WILLIAM WADE, ADMINISTRATIVE LAW [M]. Translated by Xu Bing. Encyclopedia of China Publishing House, 95, (1997).

administrative law scholars)[6] and the right to adequate judicial remedies when the parties seek to redress their injury from the proceedings; and

3. When the official has a conflict of interest with the parties involved, the official shall withdraw from the specific matter in order to ensure that the administrative proceeding is fair and impartial.

Clearly, the Outline recognizes the two most fundamental due process requirements, i.e. the right to hearing and the right to equal and impartial treatment. From the general description of the "right to be informed" and "conducting the affairs in an openly manner," inference can also be made that the parties involved shall be provided with key information relating to the administrative proceedings, and the proceedings shall be conducted in a transparent manner. In addition to these requirements, the Outline also stresses the right to obtain judicial relief after a detrimental decision is made.

As the AML is, by nature, an administrative law, the principles of administrative laws are applicable to the enforcement of the AML. In the absence of any specific due process guidance in the AML and its implementing regulations, the due process requirements under a general administrative legal regime should be observed by the enforcement agencies of the AML. Therefore, we may conclude that, as a matter of principle, in a Chinese antitrust proceeding the parties should at least be entitled to the right to a hearing and the right to equal and impartial treatment, as well as the right to be informed of any necessary information concerning the proceeding. Set out below is an analysis of the actual status of the availability of these due process rights in China.

IV. RIGHT TO A FAIR HEARING AND RIGHT TO STATE OPINION AND DEFENSE

While the AML itself does not explicitly provide the right to hearing, most of the procedural rules issued by the MOFCOM, the NDRC, and the SAIC have either incorporated the procedures for hearing or made reference to the *Law of the People's Republic of China on Administrative Penalty* ("Administrative Penalty Law"). Promulgated in 1996, the Administrative Penalty Law established a set of basic procedural principles that are applicable to administrative proceedings detrimental to the parties involved, and introduced procedural rules of hearing to the Chinese legal system.

In addition, the Administrative Penalty Law provides procedural guidance on other aspects of an administrative proceeding, such as the manner to conduct an administrative investigation, the format of an administrative penalty decision, etc. In the absence of specific rules in the AML, the Administrative Penalty Law offers a general reference of the parties' procedural rights during an antimonopoly proceeding.

Under the AML as well as relevant procedural implementing rules on merger reviews and antitrust investigations (together, the "Anti-Monopoly Laws"), before the antitrust agencies make a penalty decision against anyone, a hearing needs to be granted at the request of the company or individual that will be imposed with such penalties or reviews. When given severe penalties (e.g. order to terminate the business or considerable fines), the agencies shall inform the parties of

[6] Zhou Youyong, *Principle of Due Process in Administrative Law* [J], 4 CHINESE SOCIAL SCIENCES, 123, (2004).

their right to a hearing. The hearing will be conducted by officials not involved in the particular proceeding, and shall be in public unless state, commercial, or personal secrets are concerned. The hearing will be recorded in writing, and the written record is subject to the confirmation of the parties to the hearing.[7] During a merger review, MOFCOM may also conduct hearings either at its own initiative or at the request of the parties concerned, and may invite—at MOFCOM's discretion—the undertakings concerned, competitors, stakeholders in the upstream and downstream markets, experts, and representatives from the industrial associations and/or the governmental bodies to attend the hearing.[8]

Aside from the right to hearing, the Anti-Monopoly Laws also provide parties under an antitrust investigation or a merger control review the right to "state opinions" and defenses. Article 43 of the AML specifically provides that "Undertakings being investigated and interested parties shall have the right to state their opinions. The Anti-Monopoly Enforcement Authority shall verify the facts, reasons and supporting evidences furnished by the undertakings being investigated or interest parties."

Unfortunately, the procedural rules on hearing and defense under the Anti-Monopoly Laws and the administrative laws are lacking in sufficient detail, and give rise to a series of practical concerns with regard to the effectiveness of the hearing mechanism.

First, the evidentiary weight of the information obtained during a hearing remains ambiguous. After reading most of the provisions, including the hearing rules set out in the Administrative Penalty Law, it is still unclear whether the information and evidence obtained during a hearing will form the basis of the final decision-making. The only exceptions are the *Procedural Provisions on Price-related Administrative Penalties* ("Procedures on Price-related Penalties"), adopted by NDRC in 2013, and its accompanying review rules. Here the information obtained during a hearing is listed as part of the materials to be reviewed by the final decision maker.[9] Nevertheless, the regulations remain obscure as to the extent to which information from hearings will be evaluated in relation to other materials such as the reports and opinions obtained from the initial investigators.

In terms of the opinions and defenses put forward by the parties concerned in exercising their right to state an opinion, the general rule from the Administrative Penalty Law is that the opinions and defenses of the parties shall be "accepted" once verified by the administrative agencies.[10] However, the exact process with regard to "acceptance" of the verified opinions and defenses is left unsaid. The specific provision in the AML does not shed any light in this regard, and even fails to clarify whether the opinion and defenses stated by the parties, once verified as true, should be taken into consideration in the agencies' final decisions. The NDRC's Procedures

[7] Article 42, Administrative Penalty Law (1996); Article 29, 34, 36, *Procedural Provisions on Price-related Administrative Penalties* (NDRC) (2013); Article 26, *Measures on Procedures for the Prohibition of Acts of Abuse of Administrative Power to Eliminate or Restrict Competition* (SAIC) (2009).

[8] Article 7, *Measures on the Review of Concentrations of Undertakings* (MOFCOM) (2009).

[9] Article 39, Procedures on Price-related Penalties (NDRC) (2013); Article 13, *Regulations on the Trial and Examination of Cases in Relation to Price-related Administrative Penalties* (attached to the Procedures on Price-related Penalties) (NDRC) (2014).

[10] Article 32, Administrative Penalty Law (1996).

on Price-related Penalties is again the only regulation providing that the decision maker shall consider statements and defenses before making its decision.[11] Otherwise, the laws basically remain silent on whether the parties' defenses outside of a hearing will play any role in the final decision-making process.

Second, the procedural safeguards for the hearing are inadequate. Under the EU system, the Hearing Officers, in full independence of DG Competition, have the function of ensuring that the right to be heard is safeguarded in competition proceedings, and disputes arising between DG Competition and the parties can be brought before the Hearing Officers for resolution.[12] Under the Chinese regime, there is no such a system of checks-and-balances to ensure that the hearing is conducted fairly. Moreover, it has been reported that in some past hearings, the person to conduct the hearing ("hearing monitor") failed to provide the parties equal opportunity when making decisions that were partial to one party and even failed to allocate appropriate time for the parties' defense.[13]

When it comes to procedures regarding the right to state opinions and the right to defense, the EU system has devised a Statement of Opinion to ensure the parties ample opportunity to defend themselves via a written reply to the Statement of Opinion, and offers the parties at least four weeks for making such reply.[14] Under the Chinese administrative and Anti-Monopoly Laws, in contrast, the procedural aspects of stating the opinion, e.g. the timeframe, the person to verify the statements, and the formality of the statements are largely left blank.

It should be noted that according to the recent Procedures on Price-related Penalty, the parties shall make their statements or defenses within three days after receiving the Prior Notice of Administrative Penalty. Although the timeframe provided in the Procedures on Price-related Penalty is rather stringent compared with EU rules, it is the first specific timeline set out in an antitrust procedural regulation for the parties to state their opinions.

In merger control proceedings, the MOFCOM's *Interim Measures on the Investigation and Handling of Concentrations of Undertakings that Have Failed to Notify in Accordance with Applicable Laws* ("Interim Measures on Investigation of Concentrations") provides that the Parties shall submit opinions and evidence in writing,[15] and MOFCOM's *Measures on the Review of Concentrations of Undertakings* provides that the parties may submit written statements or defenses via mail or facsimile to MOFCOM during the review.[16] But overall, the procedural regulations for the parties to state opinions and defenses are far from adequate under the Chinese competition law regime.

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[11] Article 39, Procedures on Price-related Penalties (NDRC)(2013).

[12] European Commission, DG Competition *Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU*, (2011).

[13] Wang Ning, *A Study on Legal System of Antitrust Hearing*, Master's thesis, College of Politics and Law, Central China Normal University, 22, (2011).

[14] European Commission, DG Competition *Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU*, (2011).

[15] Article 14, Interim Measures on Investigation of Concentrations (MOFCOM) (2012).

[16] Article 10, *Measures on the Review of Concentrations of Undertakings* (MOFCOM) (2009).

V. RIGHT TO EQUAL AND IMPARTIAL TREATMENT

To ensure the parties' right to a fair and impartial proceeding, the "rule of avoidance," i.e. to request an official to withdraw from a matter where he has a conflict of interest, has been well-established in the Chinese legal system. Under the anti-monopoly law regime, both the hearing monitor and the person in charge of the investigation are subject to the rule of avoidance. Request of avoidance can be made by the parties, or at the initiative of the official who considers himself as having a conflict of interest. The head of the administrative agency shall make the decision whether to grant the application of avoidance.

However, detailed rules on exercising the right to request avoidance are not available. Questions arise as to the timeline for making such a request, the deadline for the decision to be made, and whether the underlying proceeding should be suspended when the request of avoidance is made.

Another concern related to the parties' right to receive a neutral and impartial treatment lies in the judicial remedies available to them in the case where an adverse decision is rendered by the antitrust agencies. The decisions made by the EU Commission are subject to the independent review of the courts. In the United States, the antitrust agencies need to challenge an anticompetitive merger or conduct before a court and have the court to make the final decision. In contrast, the decisions of the Chinese anti-monopoly agencies are subject to administrative reconsideration (to be reviewed by the same agencies (normally by the legal services division of the agencies) or an administrative agency with superior hierarchy) and/or administrative litigation (to bring a lawsuit in court).

For the anti-monopolistic decisions by the SAIC and the NDRC, parties contesting the agencies' decisions can either request administrative reconsideration or initiate an administrative litigation. For MOFCOM's merger review decisions, however, parties are not allowed to file administrative lawsuits without first seeking remedies in the form of administrative reconsideration.[17] And a problem arises here: According to the *Law of People's Republic of China on Administrative Reconsideration* ("Administrative Reconsideration Law"), for decisions made by the ministries under the State Council (including all three of the agencies enforcing the Anti-Monopoly Laws), administrative reconsideration shall be made by the ministries themselves.[18]

In other words, when the parties request administrative reconsideration of decisions made by MOFCOM, the decisions will be reconsidered by MOFCOM itself, albeit a different division within MOFCOM (namely the legal services division) from the merger review division that initially made the decisions. When the same enforcement agency serves as the reviewer of its own decisions, the neutrality and adequacy of the remedies to the parties are highly questionable.

Finally, the neutrality of the hearing monitor is not guaranteed. While the Administrative Law Judge in the United States and the Hearing Officer in the European Union are both fully independent from the competition authorities, members of the competition agencies in China will serve as the hearing monitors, as long as they do not directly participate in the specific proceedings in question. Apparently, influences from colleagues or superiors of the agencies in

[17] Article 53, AML; Article 18, Interim Measures on Investigation of Concentrations (MOFCOM) (2012).
[18] Article 14, Administrative Reconsideration Law (1999).

charge of the case are allowable, although they may only have an indirect impact on the impartiality of the hearing monitors.

VI. RIGHT TO BE INFORMED AND TRANSPARENCY

Compared with the right to a hearing and the right to neutral treatment, the right to be informed and obtain key information seems to be even more limited under the Chinese competition law regime. Despite the requirements in the Outline issued by the State Council, the parties' right to be informed is only reflected in some high-level principles in the administrative laws and the Anti-Monopoly Laws, and the parties in general do not have access to the agencies' files.

According to Article 31 of the Administrative Penalty Law, prior to an administrative penalty being made, the administrative agencies shall inform the parties of the facts, reasons, and basis for making such penalty, as well as the rights the parties are entitled to. The Interim Measures on Investigation of Concentrations issued by MOFCOM and the Procedures on Price-related Penalties issued by the NDRC have adopted similar provisions. In particular, the Procedures on Price-related Penalties also requires the NDRC to issue a notice informing the parties of the proposed penalty. This is, to a certain extent, similar to the Statement of Objection under the EU system, in which the Commission indicates whether it intends to impose fines, as well as the laws and facts for imposing, aggregating, or attenuating the fines.[19]

Other than the notice prior to the penalties, no other official documents are required to be served on the parties throughout the proceedings before the decision notice is issued. In the case of an on-site inspection or dawn raid, the Procedures on Price-related Penalties provides that the NDRC "may" issue an inspection notice[20] (but this is not an obligation that the NDRC must fulfill). The other procedural regulations simply do not contain any requirements in this respect.

In addition, unlike the EU system where the parties are granted access to the Commissions' investigation files upon the receipt of the Statement of Objections, parties under the Chinese antitrust proceedings generally do not enjoy the right to review the files of the enforcement agencies during the course of the proceedings.

After the penalty decision is made, the Administrative Penalty Law requires the agencies to issue a detailed administrative penalty decision notice, which shall set out the facts, evidence, and basis for the decision; the required manner and time limit to perform the obligations under the decision; the remedies available, etc.[21] These requirements are only reflected in the Procedures on Price-related Penalties issued by the NDRC.[22]

Interestingly, although the Outline requires that administrative affairs be conducted in a transparent manner, under the current Anti-Monopoly Laws, the decisions of the agencies are

[19] European Commission, DG Competition *Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU*, (2011).

[20] Article 20, Procedures on Price-related Penalties (NDRC) (2013).

[21] Article 39, Administrative Penalty Law (1996).

[22] Article 41, Procedures on Price-related Penalties (NDRC) (2013).

only to be published at the discretion of the agencies.[23] In practice, the three antitrust enforcement agencies in China have not taken a consistent approach. Starting from July 2013, the SAIC has published its decisions on its websites, including the factual background, evidence collected, the legal analysis of the SAIC, and penalties, etc. MOFCOM releases its detailed decisions for the conditional clearances or prohibition, but for the unconditional clearances that constitute the majority, MOFCOM does not publish its decisions. The NDRC has not yet published any official decision on its website, but it has released announcements regarding some of its high-profile investigations, including a summary of the key findings of the violations.

In general, the decisions published by the Chinese antitrust agencies, in comparison with the decisions of their counterparts in the European Union and the United States, are very brief—often a few pages long with less detailed legal analysis and reasoning. Therefore, the published decisions generally are less valuable in terms of providing guidance to the parties for future cases.

VII. CONCLUSION

Safeguarding parties' procedural rights is an intrinsic requirement both for achieving equitable outcomes under any competition law regime and for conferring legitimacy upon the work of the competition authorities. Legislation in China has gained momentum during the past decades in strengthening the procedural protections to parties involved in judicial/administrative proceedings. Under the current legal regime, the parties involved in antitrust proceedings in China are entitled to most of the fundamental due process rights upheld by other major jurisdictions, such as the right to a hearing and defense, the right to receive equal and impartial treatment, and the right to be informed. It is evident that the ultimate objective for the legislators is to ensure that the parties have the right to have their affairs handled impartially, fairly, and effectively.

This said, to what extent due process rights are actually available to parties in antitrust proceedings remains a major challenge to legislators and practitioners. While the law reflects certain concepts of due process, most of the relevant provisions lack sufficient practical details, rendering due process rights difficult to be implemented. It should be noted that more refined provisions have been envisaged in recently adopted legislative documents. However, given that legislative activities are undertaken separately by the MOFCOM, NDRC, and SAIC, parties' procedural rights under the proceedings of different enforcement agencies may be inconsistent. The Administrative Penalty Law is also unable to provide ample reference of parties' due process rights, as it was promulgated at a time when the Chinese legislative body's understanding of due process was rather primitive.

The right to hearing will only be meaningful when a proper mechanism is in place to ensure that parties' defenses will be fully considered, and that procedures in conducting the hearing are observed. The right to be treated impartially will only be relevant when the decision-maker is not only free from a conflict of interest, but also not unduly influenced by bias or pressures from peers or superiors. The right to be informed will not be effective if parties are not granted with access to the information showing their alleged violations, the supporting evidence, and the reasoning in finding for the illegality.

[23] Article 44, AML (2008).

Currently, a unified administrative procedural law is being drafted by the Chinese legislative body. It is expected that this law will comprehensively update the current administrative procedural framework in China and, hopefully, improve the status of due process rights for the parties in administrative proceedings. It is also foreseeable that this law will become a better reference for the procedural aspect of Anti-Monopoly Laws, and lead to a series of amendments and new legislation in China's competition law regime that strengthen due process protection to the parties in antitrust proceedings.