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I. INTRODUCTION

Recent years have witnessed intensified enforcement activities by Chinese enforcement authorities targeting a broad range of alleged anticompetitive conduct under the Anti-Monopoly Law ("AML"). The National Development and Reform Commission ("NDRC") and the State Administration for Industry and Commerce ("SAIC"), together with their regional offices, have firmly established their position in the international spotlight with a series of high-profile enforcement actions against domestic and foreign companies.[2] Headline cases in recent years involving multinational companies include fines related to the global auto parts cartel investigation, probes of resale price maintenance ("RPM") by foreign auto manufacturers, and high-profile investigations into Qualcomm and Microsoft reportedly focused on abuse of dominance and patent incensing practices.

With the attention raised by these high-profile investigations, these authorities have drawn international scrutiny for both the substance of the investigations and how they have been conducted. Procedurally, critics have argued that these investigations have lacked transparency and that the targets were not afforded sufficient protections under international norms of procedural fairness. In particular, they have argued that many investigations have been characterized by limited opportunity for companies to prepare potential defenses. Anecdotal accounts have also circulated that parties under investigation have been denied legal representation and subject to intimidation tactics by the authorities seeking confessions or price concessions. While these concerns may be overstated in certain areas and do not necessarily reflect current enforcement practices, they serve as a valuable framework for assessing international perceptions of procedural fairness and transparency in China.

This article provides an overview of some of the areas of investigation procedure in China that have drawn criticism under international procedural fairness and transparency standards,

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[2] NDRC and SAIC have distinct but often overlapping enforcement authority over different forms of anticompetitive conduct under the AML. Drawing from its traditional function as a price regulator, NDRC and its regional offices have enforcement authority over price-related anticompetitive agreements such as horizontal price-fixing, resale price maintenance, and excessive, predatory, and discriminatory pricing. SAIC and its regional offices are responsible for enforcement related to non-price restraints such as market allocation, output restrictions, vertical restraints other than resale price maintenance, refusal to deal, exclusive dealing, tying/bundling, and discriminatory treatment not related to pricing. Each also has jurisdiction over enforcement of related statutes, like the Price Law and the Anti-Unfair Competition Law, respectively.

including a meaningful opportunity to prepare a defense, the right to the protections of legal counsel, and transparency in decision-making.

The article also provides insight into the Chinese authorities' reaction to the international criticism and how they have sought to provide companies with greater comfort on procedural protections. These efforts have included measures to further develop their best practices as well as to clarify existing enforcement practices where there may be a misunderstanding in the international business community.

Finally, the article discusses how certain important procedural protections can be further improved and developed. Overall, the Chinese enforcement authorities should be recognized for their receptiveness to external comments in developing their enforcement practices and for their willingness to promote further improvements to address international concerns about procedural fairness and transparency.

II. OVERVIEW OF ENFORCEMENT PROCEDURES IN CHINA

While the AML has been in effect since 2008, enforcement has only really ramped up in the past two years. In a conscious effort to build credibility, Chinese authorities have been regularly consulting on international practices with a range of antitrust practitioners, foreign antitrust authorities, and multinational companies. As a result, Chinese investigative rules and procedures draw elements from other regimes, while also retaining features unique to the Chinese legal system and enforcement regime. While the authorities have been building experience and sophistication, there are still growing pains as the authorities incorporate these procedures into their enforcement practices—particularly in the decentralized regional offices in each province.

As with many other jurisdictions, investigations may originate from various sources at both the provincial and national levels. Complaints from competitors, customers, or suppliers tend to be the most important sources of investigation. The authorities also conduct broader sector inquiries consistent with their enforcement focus. In sector inquiries, NDRC first sends generic questionnaires to a variety of market players and subsequently targets certain companies for follow-up inquiries or even formal investigations. For example, in its probe of the automotive sector, NDRC reportedly began with an "industry sweep" sending requests for information to many major multinational car manufacturers. NDRC has also reportedly circulated questionnaires in other industries that are a high enforcement priority, including the pharmaceutical sector.

The investigation could also start with a meeting with the target's management or, in some cases, dawn raids of the target businesses. Officials from both authorities have relatively broad investigatory powers under the relevant regulations and general enforcement practices. Namely, officials can enter into companies' business premises for investigation, inquire into

companies' employees and interested parties, review and copy companies' books and records, seal and detain evidence, and check companies' bank accounts.[3]

As the authorities gradually accumulate experience, their investigative techniques are becoming increasingly sophisticated. NDRC in particular has developed task forces to carry out the dawn raids and follow-up investigations, including a range of specialized experts in law, technology, and accounting. They have also been using increasingly high-tech investigative techniques, including using forensic IT techniques to recover deleted emails.

After the initial dawn raid or meeting with a target, the investigation will typically continue through a series of engagements with the company. Investigations may entail a series of information requests and site visits supported by the collection of a significant amount of documentary evidence, as well as interviews with relevant employees. The authorities will also typically engage with the target of the investigation on potential settlements or remedies from an early stage, reportedly seeking admissions and cooperation under the leniency rules to support the settlement.

After the case team completes the initial investigation, they are directed to prepare an internal report for central decision-making. This report includes a recommendation based on the relevant evidence and any explanations or defenses raised by the parties.[4] The authority issues an advance penalty notice to the target if it concludes there is a violation of the AML, setting out the basis for their findings and the proposed penalty. The target then has the formal right to make submissions in response to this notice and request a hearing on the merits.[5] Finally, the parties have a formal right to seek administrative or judicial reviews of any final penalty submission.

The pace of the investigations can vary dramatically. Some cases have had final decisions announced only a few months from the launch of formal investigation, such as NDRC's 2013 investigation into RPM practices by milk powder companies. Other cases have lasted several years, including the reported investigations of TetraPak that appear to focus on more complex abuse of dominance theories.

III. INTERNATIONAL CONCERNS AND THE AUTHORITIES' RESPONSE

With intensified enforcement, the international business community has raised concerns about both the substance and procedure of investigations in China. Procedurally, foreign businesses have increasingly expressed concerns about the lack of opportunities to present an effective defense and lack of transparency. Anecdotal accounts of intimidation tactics preventing effective legal representation and judicial review have even been cited.

While some of these reports may be overstated or reflect a misunderstanding of current enforcement practices, they have prompted significant concerns for the broader international business community. Based on these reports, international trade associations from both the

[3] Regulation on the Anti-Price Monopoly Administrative Enforcement Procedure, [2010] NDRC Order No. 8, Dec. 29, 2010, Article 6; Regulation on the Procedure for the Handling of Cases Involving Monopoly Agreements and Abuses of a Dominant Market Position, [2009] SAIC Order No. 42, Jun. 5, 2009, Article 10.

[4] Rules on the Hearing and Review of Cases Involving Price-Related Administrative Penalties, [2013] NDRC Price Supervision and Anti-Monopoly Department Order No.1950, Sep. 30, 2013, Article 14.

[5] *Id.*, Article 12.

United States and Europe have increasingly vocalized their concerns and sought political engagement on reforms. In August 2014, the European Chamber of Commerce publically expressed concerns about the conduct of investigations in China.[6] Shortly after, the U.S.-China Business Council raised similar concerns.[7] The U.S. Chamber of Commerce has published a lengthy report on AML enforcement in China, arguing that Chinese authorities need to improve the quality and fairness of rulings.[8] Further, officials from the U.S. antitrust agencies have publicly expressed some concerns about the procedural protections afforded to foreign companies in China.[9]

The authorities have sought to dispel concerns of the international business community by clarifying their enforcement practices and making some changes to support their arguments. In September 2014, enforcement officials from NDRC, SAIC, and the Ministry of Commerce ("MOFCOM")[10] held a joint press conference defending high-profile investigations of companies like Microsoft and Qualcomm.[11] They assured the international community that the enforcement activities were fair, transparent, and not targeted at foreign firms.

The central authorities have expressed their ongoing commitment to ensure that they strictly follow statutory limits on their authority, procedures, and requirements under the law. They have committed to provide the parties with the right to state their cases and to defend themselves, notifying the parties of the facts, reasons, and basis on which penalties are decided and of the rights that they enjoy under the law. Moreover, China has committed to treating all business operators equally in its enforcement. These statements have since been reiterated in the commitments by the Chinese delegation to the 25th U.S.-China Joint Commission on Commerce

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[6] European Union Chamber of Commerce in China, Statement on China AML-Related Investigations (Aug. 2014), *available at* http://www.europeanchamber.com.cn/en/press-releases/2132/european_chamber_releases_statement_on_china_aml_ related_investigations ("Inspections must not prejudge the outcome of the investigation and full rights of defence must be afforded to the companies in question. Disconcertingly, the European Chamber is not convinced that this has systematically been the case in China's recent investigations").

[7] *See*, e.g., *US-China Business Council, Competition Policy and Enforcement in China* (Sept. 2014), *available at* https://www.uschina.org/reports/competition-policy-and-enforcement-china ("Some companies [...] have raised concerns that there is undue pressure to confess they have violated the AML. In these cases, company representatives are often not told why they are under investigation or on what grounds an investigation has been launched, but they are still told they will face a reduced penalty if they 'cooperate'").

[8] U.S. Chamber of Commerce, *Competing Interests in China's Competition Law Enforcement* (Aug. 2014), *available at* https://www.uschamber.com/report/competing-interests-chinas-competition-law-enforcement-chinas-anti-monopoly-law-application ("AML enforcement give[s] rise to growing concern about the quality fairness of enforcement, and […] raise[s] legitimate questions about China's commitment to the global antitrust commons, which is at the least as valuable to China as any other country").

[9] *See*, e.g., FTC Commissioner Maureen K. Ohlhausen, Speech, *Antitrust Enforcement in China – What Next?* (New York, Sept. 6, 2014), *available at* http://www.ftc.gov/public-statements/2014/09/antitrust-enforcement-china-what-next-second-annual-gcr-live-conference; FTC Chairwoman Edith Ramirez, Speech, *Core Competition Agency Principles: Lessons Learned at the FTC* (Beijing, May 22, 2014), *available at* http://www.ftc.gov/public-statements/2014/05/core-competition-agency-principles-lessons-learned-ftc-keynote-address.

[10] While SAIC and NDRC have joint enforcement authority related to anticompetitive conduct, MOFCOM is the enforcement authority with sole responsibility for merger review and enforcement.

[11] Press Conference on Antitrust Enforcement Work Organised by the State Council State Council Information Office, *available* at http://www.scio.gov.cn/xwfbh/xwbfbh/wqfbh/2014/20140911/.

and Trade ("JCCT") and by the Chinese enforcement authorities in dialogues with foreign antitrust authorities.[12]

IV. ASSESSMENT UNDER INTERNATIONAL STANDARDS

Basic procedural protections of a party under investigation are widely regarded as fundamental to the rule of law and international acceptance of an enforcement regime. Although global antitrust authorities vary significantly in their procedures and local legal systems, international practice recognizes as a general rule of procedural fairness that parties should have the right to be heard and should be able to have effective representation during the proceedings.[13] In order to be able to effectively prepare a defense, a party needs transparency on the relevant evidence and the legal theory of the claim against it. To support this environment, decisions must further provide sufficient detail about their legal and factual grounds. These procedural protections not only support international enforcement norms, but also more generally increase the effectiveness and accuracy of the enforcement process. Preparation of reasoned decisions also gives broader clarity into the enforcement practices to enhance the legitimacy of the enforcement process as a whole.

Although still relatively inexperienced, given the short enforcement history for the AML in China, the enforcement authorities have demonstrated a commitment to incorporating international standards. The recent statements by high-level Chinese authorities should be recognized as reinforcing or establishing positions on enforcement practices that are directionally in line with best practices. Several new initiatives also appear to have been implemented in practice, including, for example, recent steps to increase transparency by releasing prior decisions. However, the commitments remain high-level and need to be further demonstrated in practice across the authorities and their local offices. They will also need to be supported by more detailed implementing regulations.

A. Opportunity to Present an Effective Defense

The AML provides a formal right of defense to parties under investigation, including a right to present their explanations and arguments during the course of an investigation.[14] The implementing regulations on procedure of NDRC and SAIC also provide the party under investigation the right to submit a defense.[15] However, there is no express right of access of the authority's enforcement file, and the formal notice of the claims may be provided too late in the investigation in practice for the target to have a meaningful opportunity to respond. Although

[12] US-China Joint Fact Sheet on 25th Joint Commission on Commerce and Trade (Dec. 2014), *available at* http://www.commerce.gov/news/fact-sheets/2014/12/29/us-china-joint-fact-sheet-25th-joint-commission-commerce-and-trade.

[13] *See* Organisation for Economic Co-operation and Development ("OECD"), *Report on Procedural Fairness and Transparency* (April 2012), *available at* http://www.oecd.org/competition/abuse/proceduralfairnessandtransparency-2012.htm.

[14] Article 43 provides that "[t]he business operators under investigation and interested parties are entitled to make statements. The Anti-Monopoly Enforcement Authority shall verify the facts, explanations and evidence brought forward by the business operators under investigation and interested parties."

[15] Regulation on the Anti-Price Monopoly Administrative Enforcement Procedure, [2010] NDRC Order No. 8, Dec. 29, 2010, Article 11; Regulation on the Procedure for the Handling of Cases Involving Monopoly Agreements and Abuses of a Dominant Market Position, [2009] SAIC Order No. 42, Jun. 5, 2009, Article 13.

enforcement practice and recent decisions have confirmed that the authorities do engage with targets on the merits of the case, there are also still lingering reports that targets may be denied an opportunity to fully consider the relevant evidence.[16]

The procedural right to evidence in the file is well established in international practice. Under the European Union rules, for example, the European Commission must issue a detailed Statement of Objections and grant the target access to a broad range of materials documenting the evidence in its file.[17] Although the United States does not recognize a formal right to access the files of the antitrust authorities, defendants typically are given notice of the claims against them in significant detail from an early stage of the investigation. Under procedural due process standards, defendants are also entitled to a broad range of discovery and penalties generally cannot be imposed without a public trial or administrative hearing on the evidence.

In response to concerns about limited opportunities for parties to effectively exercise their rights of defense, China committed in the JCCT meeting to notify parties of the facts, reasons, and basis according to which the decision is to be made.[18] To follow through on this commitment, the Chinese authorities should grant further procedural protections to ensure the party under investigation has an opportunity to access, from an early stage, at least the key documents based on which the authorities pursue the case.

Although the parties are entitled to a formal notice of the evidence against them and the proposed penalty, this notice is provided in practice only shortly before the penalty is issued. At this stage, the proposal may be viewed as nearly final and there is limited opportunity prepare meaningful defenses on the merits. Accordingly, steps should be taken to ensure that a formal statement of the claims and evidence against a target is provided earlier. Further engagement may also be necessary at an institutional level to ensure that the right of defense is clearly recognized at all levels, including the regional offices in each province.

B. Effective Legal Representation

To support international enforcement norms, parties must be assured of the right of access to effective legal representation.[19] This generally includes the right to be represented by experienced counsel in engagements with the authorities, as is standard practice in most jurisdictions. In the early years after the implementation of the AML, parties were unsure

[16] US-China Business Council, Competition Policy and Enforcement in China (Sept. 2014), *available at* https://www.uschina.org/reports/competition-policy-and-enforcement-china ("Companies [raise] concerns about transparency and information-sharing during competition reviews. […] This makes it difficult for companies to be able to place complaints in context or to address specific concerns.")

[17] Article 27(2) of Regulation (EC) No 1/2003 and Articles 15 and 16 of the Implementing Regulation (EC) No 773/2004; Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty of 2005 and Council Regulation (EC) No 139/2004, Article 18(2).

[18] *See* US-China Joint Fact Sheet on 25th Joint Commission on Commerce and Trade (Dec. 2014), *available at* http://www.commerce.gov/news/fact-sheets/2014/12/29/us-china-joint-fact-sheet-25th-joint-commission-commerce-and-trade.

[19] *See* U.S. Chamber of Commerce, Competing Interests in China's Competition Law Enforcement (Aug. 2014), *available at* https://www.uschamber.com/report/competing-interests-chinas-competition-law-enforcement-chinas-anti-monopoly-law-application (noting that barring parties' participation alongside foreign or local counsel "contributes to a perception of bias and unfairness").

whether external counsel were entitled to be present at all during the course of an investigation under the AML. Anecdotal reports even suggested a misunderstanding that enforcement authorities may view the involvement of external legal counsel as equivalent to obstruction.[20]

The Chinese enforcement authorities have taken steps over the course of 2014 to clarify and reassure multinational companies that they have access to legal representation in proceedings under the AML. For example, in an interview in May 2014, the Director General of NDRC's antitrust department said that internationally well-known lawyers were welcome to be involved in the ongoing Qualcomm investigation.[21] Most recently, the Chinese delegation to the JCCT formally reiterated a party's formal right to external counsel during an investigation, recognizing that the authorities allow lawyers to accompany their clients in meetings and proceedings.[22] In addition, they have indicated that representatives of foreign law firms in China may even be permitted to attend to advise on international law and practice. These commitments represent a significant step forward in giving transparency to enforcement proceedings. They should be reflected more explicitly in the relevant rules to give parties further confidence in the enforcement process.

Another area of sensitivity affecting international standards for effective representation is the protection of legal privilege for external legal advisors. Currently the concept of legal privilege is not recognized in China more broadly. Unlike in most established jurisdictions, therefore, this essentially means client-attorney communications may be discoverable by the authorities. While a full concept of legal privilege would be difficult to introduce, a public commitment consistent with international best practices to respect external legal advice that would be privileged in other jurisdictions would give significant comfort to the international community. [23]

C. Review and Accountability

Another important aspect of procedural fairness under international standards is a clear mechanism for review of enforcement decisions and accountability of the relevant authorities. The AML formally allows parties to seek reconsideration or bring an administrative litigation to

[20] *See*, e.g., US-China Business Council, Competition Policy and Enforcement in China (Sept. 2014), *available at* https://www.uschina.org/reports/competition-policy-and-enforcement-china ("In [some] cases, companies have been pressured to omit legal counsel from the process to help the process 'run more smoothly.' Such practices […] are out of line with international best practices.").

[21] Interview with DG Xu Kunlin on Price Regulation and Antitrust, *Price Supervision and Anti-Monopoly in China*, 7 (July 2014).

[22] U.S. Fact Sheet: 25th U.S.-China Joint Commission on Commerce and Trade, *available at* http://www.ustr.gov/about-us/press-office/fact-sheets/2014/December/US-FACT-SHEET-25th-US-China-Joint-Commission-on-Commerce-and-Trade.

[23] Privilege protections vary significantly across jurisdictions. As a start, the authorities may limit the scope of information subject to the protection of legal privilege to communications that "are made for the purpose and interest of the exercise of the client's rights of defence in competition proceedings and that they emanate from independent lawyers." European Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU, ¶16. *See* also International Competition Network, Anti-Cartel Enforcement Manual: Digital Evidence Gathering, §8.3, *available at* http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/manual.aspx.

challenge a decision.[24] Targets of investigations may be reluctant to seek review due to concerns about reprisals or retaliation based on the broad authority of the relevant authorities outside of AML enforcement.[25] While such concerns may be unfounded, further measures would be helpful to allay the concerns of the international business community.

Successful efforts to seek administrative or judicial review of a decision are rare and not widely publicized. In the only known decision on an administrative litigation to challenge an enforcement decision, a case brought by three concrete companies seeking to overturn a price-fixing penalty by the local price bureau was dismissed for failure to comply with the relevant three-month statute of limitations. Other judicial challenges have reportedly been withdrawn before a final decision.

In recent statements, the Chinese authorities have sought to allay international concerns by committing to strictly follow formal procedures and notify parties of their rights under the AML.[26] Overall, these procedural protections can only be ensured if companies become more confident in seeking administrative or judicial review. Confidence can only be developed over time as the fairness of these procedures is demonstrated publicly.

D. Enforcement Transparency

Finally, decisions should not only provide solid reasoning for the parties subject to penalties. They should also provide valuable predictability to other businesses.[27] While the Chinese authorities historically have not publicly revealed much about their enforcement practices and the reasoning of their enforcement decisions, this is an area that has seen significant improvements over the past year. Until recently, NDRC only provided at most a very brief press release announcing its decision to impose penalties. However, in an effort to increase transparency, in September 2014 NDRC published full decisions for the first time, specifically in the Japanese auto parts and bearings cartel cases. It also published the full text of decisions in two additional cases closed at the end of 2013. Similarly, SAIC did not release any decisions in its first

[24] Article 53 of the AML states: "In case of dissatisfaction with the decisions taken by the Anti-Monopoly Enforcement Authority pursuant to Articles 28 and 29, administrative reconsideration may be applied for. In case of dissatisfaction with the administrative reconsideration decision, they may initiate administrative litigation in accordance with the law."

[25] *See*, e.g., U.S. Chamber of Commerce, *Competing Interests in China's Competition Law Enforcement* (Aug. 2014), *available at* https://www.uschamber.com/report/competing-interests-chinas-competition-law-enforcement-chinas-anti-monopoly-law-application ("Once NDRC issues a determination or a penalty, firms technically have the legal right to appeal either administratively […] or judicially. However, firms are generally reluctant to appeal, […] or because they fear retribution for appealing NDRC determination, given NDRC's broad regulatory powers over investment projects and the economy as a whole.").

[26] Press Conference on Antitrust Enforcement Work Organised by the State Council State Council Information Office, *available at* http://www.scio.gov.cn/xwfbh/xwbfbh/wqfbh/2014/20140911/.

[27] FTC Chairwoman Edith Ramirez, Speech, *Core Competition Agency Principles: Lessons Learned at the FTC* (Beijing, May 22, 2014), *available at* http://www.ftc.gov/public-statements/2014/05/core-competition-agency-principles-lessons-learned-ftc-keynote-address ("Transparent and predictable decisions provide parties with guidance, facilitating their ability to determine in advance whether their actual or proposed conduct may violate the antitrust laws." Furthermore, "predictable, and transparent processes bolster the legitimacy of the enforcement outcome [and are] essential to maintaining the agency's credibility with its important stakeholders.").

three years of enforcement. Since 2013, however, SAIC has apparently published all of its current and historical AML decisions with increasing levels of detail.

However, decisions still may not include a detailed analysis of the relevant facts or the application of the law. Businesses may therefore lack clarity on how the AML has been applied in practice and have ongoing uncertainty in assessing compliance risks. For example, NDRC's previous decisions do not provide clarity into the mechanics of NDRC's assessment of the legal standards for RPM cases. While the press releases have suggested that some form of anticompetitive effect is required, they have not provided details on how the analysis should be applied. The decisions also have not provided extensive analysis of defenses presented by defendants, such as when conduct may be exempt under Article 15 of the AML.

While the enforcement authorities have made meaningful improvements in transparency in publishing these decisions, additional detail would be encouraged under international best practices. In particular, multinational companies seeking to assess the relevant compliance risks will be keen to understand the detail of enforcement decisions in ongoing cases involving abuse of dominance and IP licensing. Further transparency regarding enforcement practices and procedures would also help to clarify any misunderstandings and reinforce the enforcement authorities' compliance with international best practices. For example, the enforcement authorities could demonstrate that the parties had adequate opportunity to be heard on the merits of the investigation by providing a more detailed assessment of factual and legal defenses submitted by the parties.

V. LOOKING FORWARD

Overall, the Chinese enforcement authorities should be recognized for their receptiveness to external comments and willingness to promote measures to address international concerns about procedural fairness and transparency. Despite early questions about legal representation, the authorities have clearly established the right to external counsel, including the right to participation by foreign firms. The authorities have also taken significant steps to allow parties a more effective right to respond to the evidence against them and improve transparency on the substance and procedure of investigations.

While the commitment of the authorities cannot be doubted and further efforts can be expected, further measures to significantly support procedural rights and transparency are recommended. Given the short enforcement history in China, perceptions of the accountability of the enforcement authorities would also be supported over time by both further efforts of the parties to seek judicial review where they view potential concerns as well as by efforts by the courts to meaningfully address those concerns. However, expectations must be framed to a certain extent by the limits of the legal environment in China, including for example the lack of an established framework for recognizing legal privilege.