ANTI-MONOPOLY LAW AND MERGERS IN CHINA: AN EARLY REPORT CARD ON PROCEDURAL AND SUBSTANTIVE ISSUES

Deborah Healey

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Abstract

The Anti-Monopoly Law of the People's Republic of China ("AML") prohibits mergers and acquisitions ("concentrations") which lessen competition. This article examines the relationship between the AML merger provisions and China's industrial policy. It also examines MOFCOM (Ministry of Commerce) merger determinations to date in relation to market definition and assessment of competitive impact. The article concludes that the interpretation of the AML and the intentions of the regulator remain unclear in a number of respects. At a procedural level, MOFCOM's determinations contain insufficient information and analysis to draw the conclusion that MOFCOM is applying standard competition analysis.

The political and economic environment of China is complex. The legal system has been developing swiftly since its renaissance in the early 1990s. China's first comprehensive competition law, the Anti-Monopoly Law, was passed on 30 August 2007 by the National People's Congress and came into effect on 1 August 2008. The AML includes prohibitions on mergers and acquisitions, known as "concentrations", which lessen competition. It applies to acquisitions by both foreign and domestic corporations. Notification is mandatory over specified turnover thresholds. A number of Guidelines and draft guidelines have been issued by the Ministry of Commerce ("MOFCOM"), the nominated regulator, to aid in the operation and interpretation of the AML provisions.[1]

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[1] Guowuyuan Fanlongduan Weiyuanhui Guanyu Xiangguan Shichang Jiedingde Zhinan (国务院反垄断委员会关于相关市场界定的指南) [Guide of the Anti-monopoly Committee of the State Council on Definition of the Relevant Market] (promulgated by the St. Council May 24 2009, effective May 24 2009) 2009 ST. COUNCIL GAZ., 14; Jingyingzhe Jizhong Fanlongduan Shencha Banshi Zhinan (经营者集中反垄断审查办事指南) [Working Guidance for Anti-Monopoly Review on Concentration of Business Operators] (promulgated by the Ministry of Com., Jan. 5 2009, effective Jan. 5 2009), http://fldj.mofcom.gov.cn/aarticle/xgxz/200902/20090206034057.html?3522922240=2320678451; Shangwubu Fanlongduanju Guanyu Jingyingzhe Jizhongshenbao de zhidao yijian (商务部反垄断局关于经营者集中申报的指导意见) [Guiding Opinions of the Anti-monopoly Bureau of the Ministry of

This paper examines the new regime in the context of its commercial, political and legislative background to examine two main issues. The first is the relationship between the merger provisions of the AML and China's strong industrial policy, particularly the way in which the AML is applied to State-Owned Enterprises ("SOEs"). The AML contains a number of provisions which provide flexibility and discretion in enforcing the law against government bodies and SOEs, as well as a number of provisions which recognize various dimensions of industrial policy and its interaction with competition law. The relationship between industrial policy and competition will be critical to the success of the AML as a comprehensive competition law, and continuing examination of this issue is important. The six determinations in which MOFCOM gave conditional merger approval discussed below all involved offshore foreign transactions, while the one prohibition also discussed below, involved the acquisition of a prominent Chinese company by a foreign company.[2] No merger involving purely Chinese interests has been made subject to conditions or prohibited.[3] It has, however, been suggested that delay by MOFCOM in determining the Sina Corp acquisition of Focus Media FMNC.O, involving two State Owned Corporations (and possibly arising from reluctance to approve the deal), was the reason for the demise of the deal.[4] During the same time period, many

Commerce on Declaration Documents and Materials of the Concentration of Business Operators] (promulgated by the Ministry. of Com., Jan. 5 2009, effective Jan. 5 2009) 2009 ST. COUNCIL GAZ., 1; Jinrongye Jingyingzhe Jizhong Shenbao Yingye'e Jisuanbanfa (金融业经营者集中申报营业额计算办法) [Rules on Calculating Turnover concerning Concentration; Notification of Financial Operators] (promulgated by the Ministry of Com., Banking Reg. Comm., the Sec. Reg. Comm., the Ins. Reg. Comm., the People's Bank July 15 2009, effective Aug. 15 2009) 2009 ST. COUNCIL GAZ., 14; Jingyingzhe Jizhong Shenbao Banfa (经营者集中申报办法) [Measures for the Undertaking Concentration Declaration] (promulgated by the Ministry of Com., Nov. 21 2009, effective Jan. 1 2010) 2010 ST. COUNCIL GAZ., 16; Jing Ying Zhe Jizhong Shencha Zanxing Banfa (经营者集中审查暂行办法 (征求意见稿)) [Tentative Measure for the Undertaking Concentration Examination (drafted for comments)] (promulgated by the Ministry of Com., Jan. 1 2009, effective Jan. 1 2010), http://www1.www.gov.cn/gzdt/2009-01/21/content_1211769.htm.; Shangwubu Guanyu Shishi Jingyingzhe Jizhong Zichan Huoyewu Bolide Zanxing Guiding (商务部关于实施经营者集中资产或业务剥离的暂行规定) [Interim Regulations on Implementing the Divestiture of Assets or Businesses in the Concentration of Business Operators] (promulgated by the Ministry of Com., July 5 2010, effective July 5 2010) 2010 ST. COUNCIL GAZ. 41.

[2] Coca Cola and Huiyuan Juice, discussed below.

[3] *See Competition Law Development in East Asia: A month in review*, NORTON ROSE (Aug. 2010), http://www.nortonrose.cz/knowledge/publications/2010.

[4] *See*, e.g., *Sina, Focus Media drop $1.4B merger plan*, CHINA DAILY (Sept. 28, 2009), http://www.chinadaily.com.cn/china/2009-09/29/content_8750122.htm; Melanie Lee, *UPDATE 2 Sina, Focus Media drop merger plan*, REUTERS, http://reuters.com/article/idUSLS26092420090928; Melanie Lee, *China Sina, Focus merger application incomplete*, REUTERS (July 16 2009), http://reuters.com/article/idUKTRE56F15S20090716; *Sina-Focus Media Deal Done in by Anti-Trust Authority?*, CHINA STAKES (Oct. 26 2009), http://chinastakes.com/2009/7/sina-focus-media-deal-done-

concentrations of SOEs (several of which are noted below) have occurred without apparent notification.

The second part of the paper reviews the written merger determinations issued by MOFCOM in respect of mergers to date.[5] It considers MOFCOM's approach to market definition, and MOFCOM's analysis of the effect of the proposed mergers on competition, to determine whether MOFCOM has complied with the AML, with its own guidelines and with international competition law practice.

The paper concludes that while there has been some progress by the regulator in implementing the new rules governing mergers, there are a number of areas in which both the interpretation of the AML and the intentions of the regulator remain unclear. There is a lack of procedural clarity in the application of the provisions at two levels. At the policy level, it is too early to see any real trends on the issue of the relationship between competition policy and industrial policy, although there is significant flexibility in the AML and indications provide some evidence of less than equal application to government and SOEs compared to foreign companies. At the procedural level, MOFCOM's determinations contain insufficient information and analysis to allow for proper critical analysis of the regulator's approach to important issues, so it is difficult to understand whether standard competition analysis has been applied.

These are very important issues for companies wishing to participate in markets in China. More information from MOFCOM in its determinations and guidance on the relationship between industrial policy and competition policy would significantly increase the level of confidence of foreign corporations investing in China and carrying on business there.

I. BACKGROUND

Foreign investment restrictions had been implemented prior to the AML, most recently in 2006 to "*safeguard fair competition and the economic security of the state*".[6] The restrictions applied to foreign

in-by-anti-trust-authority.html (Alternatively, the delay may have been caused by inefficient processing of the notification. Whatever the reason, the deal did not go ahead).

[5] The author is grateful to Juan Chen, PhD. student in the Faculty of Law at the University of New South Wales for her translation of five of the original MOFCOM determinations. Individual determinations are discussed in some depth as official translations were not available in all cases at the date of writing. MOFCOM has no obligation to provide written determinations where mergers are approved.

[6] *See* Guanyu Waiguo Touzizhe Binggou Jingnei Qiyede Guiding (关于外国投资者并购境内企业的规定) [Interim Provisions on the Takeover of Domestic Enterprises by Foreign Investors] (2006) (promulgated by the Ministry of Com., the St. Admin. of Foreign Exchange, the St.-owned Assets Supervision. & Admin. of St. Council, the St. Admin. of Tax'n, the St. Admin. for Indus. & Comm., the

acquisitions of domestic enterprises. Foreign Invested Enterprises, as defined, were subject to favorable treatment to encourage foreign investment.[7] The rules provided for foreign investors to report acquisitions in circumstances where: high turnover companies were involved; more than 10 enterprises had been acquired in related industries in one year; either party already held 20% of the Chinese market; or the acquisition would cause the Chinese market share of any of the parties to reach 25%.[8] If the MOFCOM and the State Administration for Industry and Commerce ("SAIC") believed that an acquisition may result in over-concentration, which would harm competition and damage the interests of consumers, they could refuse to approve it.[9] Offshore acquisitions were subject to notification. Additional provisions applied to the acquisition of state-owned assets or equity.[10] A number of authorities including MOFCOM and SAIC had roles in relation to the consideration of foreign investment.

The enactment of the AML in China came after a long period of discussion and consultation with experts from well-established competition law jurisdictions, and the resultant law is strongly influenced by other laws, particularly those of the European Union and the United States. However, China always sought to enact a competition law with Chinese characteristics, and has done so. Ultimately, there is some familiarity in the concepts and wordings used, but there are a number of significant differences in the goals and the economic background of the AML, and the thrust of its provisions, which make comparisons with other jurisdictions of less value.

Sec. Reg. Comm., Aug. 8 2006, effective Sept. 8 2006) ("The Foreign Investment Order"), http://www.mofcom.gov.cn/aarticle/b/c/200902/20090206052587.html?1716423936=2320678451. *See generally* Hui Huang, *China's New Regulation on Foreign M & A: Green Light or Red Flag?* 13 U.N.S.W.L.J. 804, 814 (2007), *available at* http://unsworks.unsw.edu.au/vital/access/manager/Repository/unsworks:1739.

[7] *See generally* Vivienne Bath, *The Company Law and Foreign Investment Enterprises in the PRC-Parallel Systems of Chinese-foreign Regulation,* 13 U.N.S.W.L.J. 803, 812 (2007).

[8] *See infra* Part V, Anti-Monopoly Investigation.

[9] In certain circumstances the parties may apply for exemption from this examination: if an acquisition improves conditions for competition; restructures loss-making enterprises; ensures employment; introduces advanced technology or management talent; enhances international competitiveness; or improves the environment.

[10] *See* Huang, *supra* note 6, at 33 (in these cases the takeover also requires the approval of other bodies).

II. OBJECTS OF THE AML AND THEIR POTENTIAL IMPACT ON ANALYSIS OF MERGERS AND OTHER CONCENTRATIONS

The objects of the AML have the potential to significantly impact its application and interpretation, particularly in the area of mergers, given the economic and political background. The approach of the Chinese Government to industrial policy, and the impact of the significant number of important SOEs on the Chinese economy make the objects of particular importance. Consideration of the objects is relevant to both parts of this paper.

Worldwide the goals of competition law are subject to continuous debate. The usual economic objective of competition law is the maximization of consumer welfare through efficiency in the use and allocation of resources. The extent to which other goals can or should be pursued in competition laws is the subject of continuing policy debate. Views on the inclusion of "political values" have also fluctuated over time and between jurisdictions.[11]

The express objects of the AML are similar in some respects to the objects of other competition laws: preventing monopolistic conduct, promoting market competition and economic efficiency, and protecting the rights of the consumer.[12] The AML, however, has objects of "protecting the public interest" and "promoting the healthy development of the socialist market economy". These objects are more problematic in a competition sense. Economists would argue that the best way to protect consumers and the public interest is to let markets function efficiently. There is some recognition in other jurisdictions that in limited areas of market failure, although rare, the public interest might best be served by intervention rather than letting the market fully function.[13] In the context of the AML, it has been suggested that SOEs are more likely to be able to show public benefit and that they may merit different treatment.[14] Whether this will prove to be correct or not is unclear, because it depends on what is designated as a public benefit under the AML.

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[11] *See*, *e.g.*, CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 11 (Harvard University Press, Cambridge 1965); PAUL P. CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS 936 (2003).

[12] *See* Fan Longduan Fa (反垄断法) [Anti-monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30 2007, effective Aug. 1 2008) art. 1, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68; *The Trade Practices Act 1974* (Cth) s 2 (states that the object of the Act is to "…enhance the welfare of Australians through the promotion of competition and fair trading and the provision for consumer protection") (Austl.).

[13] For example, under National Competition Policy Reform in Australia, this is acceptable if done by way of a transparent process such as authorisation, see Wang Xiaoye, Address at the 3d Asian Competition Forum H.K., Challenges in Enforcing Chinese Anti-monopoly Law the Conflicting Goals of the Law (Dec. 2007).

[14] *See id*. at 3.

It has also been suggested that the impact of the diversity of legislative objectives on interpretation may be more significant in China.[15] Whether the express objective of developing the socialist market economy is interpreted in any way particular to the AML, or is an objective which is usual in Chinese laws and thus not particularly important in the context of the AML, is yet to be seen.[16]

The real problem with the AML objects is that their scope is unclear. There is no indication at this stage what the public interest might be. Other provisions of the AML suggest a range of possibilities.[17] The AML objectives underpin the competition law agenda and suggest that the approach to competition in the socialist market economy will be different from competition in other jurisdictions. While this difference is not surprising, the extent of the difference will ultimately test the utility of the AML as an effective competition law.

A number of AML provisions reinforce this diversity of goals and a differing approach to market competition. In this sense they can be categorized as "unusual provisions". Article 4, for example, states:

> *"The State shall make and implement competition rules appropriate for the socialist market economy and strengthen and improve macroeconomic measures for a united, open, competitive and well-ordered market system."*

This provision gives lawmakers significant discretion about the types of law which may be made, focussing on competition while emphasizing the background of the socialist market economy. The use of the words "…well-ordered market system", however, brings with it an element which is not usually a goal of competition laws.

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[15] *See id*. at 4 (notes the more significant impact of objects in the interpretation of law in China: "In the EU, the controversy surrounding the goals of competition law may not influence the enforcement of competition law. But in China, laws are more specific and are usually carried out to the letter. Thus, what this law means is fundamental. On the one hand, there are two policies in law- industrial policy and competition policy. Thus, any enforcement authority will have to decide which one is preferable").

[16] As has been suggested to the author by a Chinese lawyer in an interview.

[17] The words of Robert Pitofsky really sum up this issue: "Those advocating a non-economic dimension to antitrust should be as specific as possible about those concerns that they would include in an enforcement equation [There are] some non-economic considerations that do not have a proper role in antitrust enforcement although they undoubtedly have influenced and will continue to influence many courts". The author lists: " (1) *protection for small businessmen against the rigors of competition, (2) special rights for franchisees and other distributors to continuing access to a supplier's products or services regardless of the efficiency of their distribution operation and the will of the supplier... and (3) income redistribution to achieve social goal."* as three areas which *"...play no useful role in antitrust enforcement*". *See* Robert Pitofsky, *the Political content of Antitrust* 127 U. PA. L. REV. 1051, 1052-54 (1979).

Market competition itself should be the regulator, and whether the market is "well ordered" is not usually an issue for comment. A well ordered market is more likely to be a comfortably inefficient market, or even a co-ordinated or cartel market. These words and the views they appear to reflect, coupled with traditional practices in China such as price regulation, have the capacity to impact the workings of the market in a way which is not envisaged in traditional competition laws. Chinese views on "excessive competition" are also unusual in a competition law context.[18] If, however, the words relate to a market which is merely functioning competitively, this may not be an issue. The objective, however, speaks of both competitive and well-ordered, which suggests that well-ordered has an additional purpose in the article.

The idea that orderly markets are a legitimate goal of the AML is also mentioned in Article 11, which focuses on the role of industry associations. Industry associations are a traditional risk area for contraventions of competition laws because of the close proximity of competitors, and the enhanced ability for co-ordinated conduct. While industry associations in China are generally former government agencies charged with supervisory responsibility for a particular industry, rather than bodies made up of independent market participants advancing common interests, it is the concept of orderly marketing which really changes the dynamic. Article 11 exhorts industry associations to encourage their members to compete, but on the other hand it states that they must do so "protecting the order of market competition". This suggests that some artificial limit on competition should be agreed or imposed, and that the object is not the entreaty to truly vigorous competition which might be expected to be made to these groups.

III. THE AML AND INDUSTRIAL POLICY

Industrial policy is the key tool of reconstruction and development in China in its on-going transition from a command economy to a socialist market economy. An important key document in defining the relationship between industrial policy and competition law is a statement of the State Council of December 2006 listing strategic sectors in which the State intends to retain on-going control. These sectors include military related

[18] *See, e.g., Queensland Wire Industries Pty v. Broken Hill Pty Co* (1989) 167 CLR 177 (emphasing the ruthless nature of competition at para 47: "*Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way. ...these injuries are the inevitable consequence of the competition [s46 of the Trade Practices Act] is designed to foster*.") (Austl.).

manufacturing, power production and grids, petroleum, gas and petrochemicals, telecom manufacturing, coal, civil aviation and shipping.[19] This affirmation by the PRC government of its continuing dominant role in these industries foreshadows potential conflict or overlap with the role and coverage of the AML in those areas. While industrial policy to correct market failure is not incompatible with competition law, other industrial policy approaches may be at odds with it. The government's policy of promoting mergers and acquisitions to form large companies which will be internationally competitive, thereby creating national champions, is inconsistent with competition law principles.[20] This approach finds favor in China despite the fact that the effectiveness of the strategy in improving international competitiveness is not internationally accepted.[21]

There are a number of AML provisions which recognize the importance of industrial policy but all fail to conclusively determine priority as between the two areas. A large potential carve out from the AML, and a significant qualification to competition as a market regulator, is contained in Article 7, added in June 2007, just before the AML was passed. It limits the application of the AML to SOEs and others in some industries, commonly known as the "life line industries". It states:

> *"Industries controlled by the State-owned economy and relied upon by the national economy and national security or industries implementing exclusive operation and sales in accordance with the law shall be protected by the State to conduct lawful operation by the undertaking. The State shall supervise and control the price of commodities and services provided by these undertakings and the operation of these undertakings so as to protect the interests of the consumer and facilitate technical progress."*

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[19] *See* Guanyu Tuijin Guoyouziben Tiaozheng HeGuoyouqiye Chongzude Zhidao Yijian (关于推进国有资本调整和国有企业重组的指导意见) [Guiding Opinions for Promoting the Adjustment of State Assets and Restructuring of State-Owned Enterprises] (promulgated by the St.-owned Assets Supervision. & Admin. St. Council, Dec. 5 2006, effective Dec. 5 2006), http://www.sasac.gov.cn/gzjg/xcgz/200612180138.htm.

[20] *See*, *e.g.,* Wentong Zbheng, *New Article on Chinas Anti-Monopoly Law 1 Year after inception,* PRACTICE SOURCE (Jan. 14, 2010), http://practicesource.com/australian-asian-legal-eye/wentong-zheng-final-in-his-article-series-on-chinas-anti-monopoly-law.html (last visited Feb. 1, 2010).

[21] *See* MICHAEL PORTER, ON COMPETITION 197 (2008) (for example, he has stated in this work: "[M]ost national champions are uncompetitive, although heavily subsidised and protected by government. In many of the prominent industries in which there is only one national rival, such as aerospace and telecommunications, government has played a large role in distorting competition.")*.*

This means that where State-controlled industries are important to the national economy or to national security, or where they are operating exclusively in accordance with the law (presumably granted exclusive rights and regulated by industry specific laws), they will have State protection for price supervision and control of their operations to protect consumers and facilitate technical progress.

The second part of this provision applies to the undertakings themselves and not to industries. This encompasses three groups:

industries vital to the national economy;

industries vital to national security;

industries subject to exclusive operation and sales under the law-presumably this means those state-owned and regulated monopolies such as petroleum and tobacco, subject to specific regulation.

This is a large qualification on the application of the AML, even if it is restricted to the traditional "life line industries", but if interpreted broadly it could extend even further.[22] The first and second category will be determined on the width of the definitions given to "importance to the national economy" and to "national security". Special rules for industries important to the national economy are classic industrial policy special treatment. The third category appears to catch those state controlled industries which are exclusive in their areas, where the State has granted exclusivity, and where the State will continue to control the price and the operation.[23] This covers industries which are already the subject of special laws and indicates that the State, not the AML and its regulators, will ensure the lawful operation of these entities. The extent to which this takes account of competition law is unstated, but its importance appears to be limited.

There is a qualification: Article 7 adds that the undertakings must operate "in good faith, in accordance with the law, and in a self-disciplined manner, accepting government and public supervision, and shall not harm the interests of the consumer from a controlling or exclusive dealing position."[24] The meaning of "self-disciplined manner" here detracts from what might otherwise be an important qualification, because it again implies co-ordination of market conduct rather than the regulation of the market by competition.

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[22] 2006 Nian Guowuyuan Zhengfu Gongzuo Baogao (2006年国务院政府工作报告) [Statement of the State Council of 2006] (promulgated by the St. Council Mar. 2006). http://www.gov.cn/test/2009-03/16/content_1260216.htm.

[23] It is unclear whether this will extend past those industries previously nominated in regulations covering acquisitions by foreign companies, mentioned earlier. Acquisitions by foreign businesses may also be subject to a national interest review under Article 34 of AML.

[24] The extent to which other provisions, such as Article. 17 of AML, will continue to apply in relation to conduct other than pricing is unclear.

Of particular importance in the context of mergers is Article 5, added in June 2007. It states that:

> *"Undertakings may concentrate when such an action is in accordance with the law and adheres to fair competition and is a voluntary union that expands the scale of operation and improves market competition".*

This general qualification refers to concentration in accordance with the law, apparently meaning other laws than the AML, which improve competition by improving scale, but the addition of the words "adheres to fair competition" begs the question answered by reference to improvement of market competition. Expanding the scale of operation and improving market competition focus on efficiency, so the conduct may not have offended the AML merger rules in any event. An alternative interpretation of this provision is that it is a general recognition of tests which are incorporated into the other, more specific prohibitions of the AML. This view is supported by the fact that the article is in Part I of the AML, which contains a series of statements summarizing the prohibitions in the body of the law. It could have been put in Part I for more abundant caution. On the one hand it reinforces the idea that market share concentration on its own will fall foul of the AML because in other countries concentrations which "improve market competition" would be unlikely to be prohibited.

This is despite concentration being only one of the factors for consideration under Article 27. The factors relevant to a concentration contained in Article 27 also contain issues which are relevant to industrial policy. Article 27(5) says that the effect of the concentration on the "development of the national economy" must be considered. This factor recognizes the developing nature of the Chinese economy and suggests recourse to some broader overall strategy rather than the mere consideration of the impact of the proposed concentration on markets affected by a merger. While the ultimate test under Article 27 is whether the concentration has the effect of eliminating or restricting competition, the concentration may be allowed where the positive effects on competition are greater than the negative effects, or where the concentration is in the public interest. This clearly provides substantial flexibility for the decision maker. Once again the definition of public interest is the key.

Another qualification on AML application is the second part of Article 51. It provides that where laws or administrative regulations regulate administrative monopoly conduct by an administrative agency, those other provision prevail over the AML

provisions. While not focusing on mergers, this provision is another indication of the breadth of discretion contained in the AML.

Given the political and economic organization of China, references to the socialist market economy and recognition of its mechanisms in the AML were to be expected. This distinction between a market economy and the socialist market economy provides the major difference between the competition laws of most other jurisdictions and China. Each of the provisions mentioned is an example of the recognition of industrial policy in the competition law and its ability to override the market as economic regulator. The history of China and its evolution from a command economy to a socialist market economy provides some explanation for the softening of the AML in these respects, but the problem is that the limits of these derogations from market competition are unclear. This leads to some concern by foreign investors that the AML may be applied in a discriminatory fashion against their best interests.

There are a number of situations which illustrate the conflict between competition law and industrial policy in China in the context of mergers. In March 2009, for example, in two industrial restructuring plans issued by the State Council in respect of the steel and automobile industries, it was announced that the top priority in these two industries was to "form extra large companies that are internationally competitive…The restructuring plan for the steel industry states that after mergers and acquisitions, the top five steel companies should account for 45% of the total capacity of all steel producers in China. The restructuring plan for the automobile industry states…to reduce from fourteen to less than ten the number of automobile companies that have a market share of more than 99% in their respective product market. The restructuring plans for both industries do not mention how the planned mergers and acquisitions would comport with merger control provisions of the AML. As a matter of fact, neither restructuring plan mentions the AML at all."[25] In this context it has been suggested that MOFCOM "…may not have the support it needs from high levels within China's Communist Party in order to challenge domestic deals…which align with the Party's policy of encouraging consolidation in domestic markets and building of national champion firms."[26]

Other examples of mergers of SOEs where the AML does not seem to have been considered include the merger between China Eastern Airlines and Shanghai Airlines in July 2009 (the latter

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[25] *See* Zheng, *supra* note 20.

[26] *See China's Anti-Monopoly Law Merger Control Regime-10 Key Questions Answered (Part 2),* MAYER BROWN, http://www.mayerbrown.com/public_docs/ClientUpdate_ChinasAnti-Monopoly-Law.pdf. (last visited Dec. 4 2010).

becoming a wholly owned subsidiary of China Eastern) in a move described by MOFCOM as involving a "consolidation of regional airlines",[27] the merger of telecommunications companies China Unicom and China Netcom in May 2009 (including the sale of the CDMA business to China Telecom),[28] the approval granted to three units of Hebei Steel for a merger to form the country's No 2 listed steel maker in September 2009[29], and the acquisition by China Minmetals Corporation, the country's largest metals trader, of Changsha Research Institute of Mining & Metallurgy and Luzhong Metallurgy & Mining Group in October 2009.[30] In the China Unicom/China Netcom merger, MOFCOM later indicated, when the issue was raised by journalists, that where one SOE takes over another SOE, the usual notification process under the AML should be observed and that the parties should have notified in that case. This suggests that SOEs are not exempted from the AML provisions under a blanket rule, and that the sector specific regulation may not in all cases override the AML, but that the relevant AML provisions will be selectively employed.[31]

It seems that none of the mergers considered by MOFCOM to date has involved an SOE.

It is unclear whether this is because there is no intention for SOEs to notify mergers and reconstructions otherwise approved by the State, whether there is a mistaken view within SOEs that they do not need to notify, or that MOFCOM is unable to force the issue of notification with SOEs, as was suggested above. It would, however, be better for notification to be made, or alternatively for information to be released about individual mergers and reconstructions, explaining why the AML did not apply, or why the reconstruction was allowed. The prominent position of many SOEs in the market makes this an issue of great importance. Many other countries restructure their own undertakings at will without recourse

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[27] *See China Eastern Announces Merger Terms with Shanghai Airlines,* MINISTRY OF COMM. (July 13, 2009), http://english.mofcom.gov.cn/aarticle/counselorsreport/asiareport/200907/20090706395078.htm.

[28] *See Slipping Past the Anti-monopoly Law***,** ECON. OBSERVER (May 26, 2009), http://www.eeo.com.cn/ens/Observer/editorial/2009/05/04/136755.shtml.(noting that the merger came within the AML notification thresholds).

[29] *See China approves Hebei Steel merger plan, Ministry* COM. (Sept. 23, 2009), http://english.mofcom.gov.cn/aarticle/newsrelease/commonnews/200909/20090906530886.html.

[30] *See Minmetals gets nod for miners' purchase,* MINISTRY COM. (Oct. 28, 2009), http://english.mofcom.gov.cn/aarticle/counselorsreport/europereport/200912/20091206707323.html.

[31] *See China Antitrust Update,* HOGAN & HARTSON (May 11, 2009), http://www.hoganlovells.com/files/Publication/d614a44e-5001-4785-8576-e5309e868043/Presentation/PublicationAttachment/83263da6-9b5f-4042-8f6c-555f54594bdd/ChinaAntitrust_May1109.pdf (stating that a written indication to the newspaper by MOFCOM indicated that the parties should have notified MOFCOM of the merger).

to their competition laws. Some do so under other industry-specific laws which specifically take the reconstruction out of the scope of competition law. Consecutive development strategies have adopted industry policies giving special protection and increased investment to nominated industries.[32]

The impact of removing SOE reconstructions from the scope of the AML in China is likely to be more significant than in most other countries, due to the concerted nature of its restructuring and the significant number of very large SOEs involved. SOE mergers in China have the capacity to have a significant impact on competition in the marketplace.

Some restructuring might pass a test based on weighing up anti-competitive impact with public benefit, but the apparent removal of many SOE mergers from the scope of the AML is a significant shortcoming in its operation. Transparent information on intended operation of Article 7 would assist in understanding the likely impact of the AML on mergers. The extent to which the AML does not apply to certain mergers for reasons of industrial policy, whether stated or unstated, and the discretions exercised by the regulator MOFCOM will be the key to the development and the credibility of the AML as a significant and workable competition law.

IV. ANALYSIS OF DETERMINATIONS

A. Market Definition

The efficient functioning of markets is the primary aim of competition law. The value of all analysis and decision making in the context of competition laws like the AML depends upon the accuracy of market definition. In the context of mergers/concentrations this is particularly important.

The wording of the AML takes a traditional view of market, defining "relevant market" as the product scope or territory within which the undertakings compete with respect to a specific product or service during a certain period.[33] This definition itself, however, provides little real guidance on the principles to be employed defining a market, and provides no scope for the consideration of other important issues, such as the impact of potential competition

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[32] *See, e.g.,* VIETOR RICHARD, HOW COUNTRIES COMPETE: STRATEGIES, STRUCTURE, AND GOVERNMENT IN THE GLOBAL ECONOMY 68 (2007).

[33] *See* Fan Longduan Fa (反垄断法) [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2007, effective Aug. 1, 2008) 2007 Standing Comm. Nat'l People's Cong. Gaz. 68, *translated in* http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf.

(the "uncommitted entrant") or the commercial environment going forward. MOFCOM has issued Guidelines on the Definition of Relevant Market [34] for the express purpose of improving the transparency of AML review. These Guidelines stress the importance of methodical, appropriate market definition.

So how are markets defined in other jurisdictions? The usual parameters of market focus on issues of product, geography, function and time.[35] The most basic proposition is that defining a market is merely a construct for measuring the degree of market power or the effect on competition of the conduct being examined-it is a necessary precondition for any assessment of the effect of a concentration on competition.[36] Put simply, market definition is a means to that end. A market is a field of actual and potential transactions between buyers and sellers, amongst whom there can be strong substitution, at least in the long run.[37] Substitution is the key to market definition, either on the demand or supply side, because it indicates the competitive constraints on the behavior of market participants. Whether there is substitution depends on factors like consumer attitudes, technology, distance, and cost and price incentives.[38]

The Guideline focuses on product and geographic market definition, and the concept of substitution, the accepted approach. There is no real mention of functional level-the level in the supply chain which might be affected by the conduct-which is identified in a number of jurisdictions, although this feature is noted in the Guideline in the context of demand characteristics. There is no mention of the period over which, for example, relevant new entry or supply substitution might occur to influence the definition.

Substitution by consumers is the main focus of the Guideline, and this appears to mean consumers of the product at the relevant level and not ultimate consumers. Substitution is considered in the context of characteristics, price and intended use, with a high degree of substitution putting goods in the same market. The geographic market is determined by the area in which the goods compete, with production cycle, shelf life or other seasonal characteristics, such as

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[34] *See* Guanyu Shichang JieDing de Zhinan (关于市场界定的指南) [Guidelines on Definition of "Relevant Market"] (promulgated by St. Council May 24 2009, effective May 24 2009), http://www.gov.cn/zwhd/2009-07/07/content_1355288.html.

[35] Market definition in Australia considers these four factors as foundational issues. Other jurisdictions focus on product and geographic market factors but each of the four is generally considered at some stage.

[36] *See, e.g., Queensland Wire Industries Pty v. Broken Hill Pty Co.,*167 CLR 177 at 187-88 (1989) (Austl.); *see also,* M Brunt, *Market Definition Issues in Australian and New Zealand Trade Practices Litigation, 18 ABLR 86 (1990);* 1997 O.J. (L C 372) (EC).

[37] *See Queensland Co-operative Milling Association* (1976) ATPR 40-012, at 17, 247 (Austl.).

[38] *See id.*

life of an intellectual property right, relevant to this analysis. The Guideline recognizes that the existence of alternative highly substitutable goods imposes the most direct and effective constraints on the market. Demand substitution is the most important consideration, although in some circumstances the Guideline notes that supply-side substitution may also be relevant. In determining substitution, the views of consumers are most important. In relation to supply-side substitution, the smaller the amount of investment required to make the changes which permit competition, the more likely it is that goods are in the same market.

The Guideline states that factors relevant to product market definition from a demand perspective are:

general characteristics and functions of goods;

price differentials;

sales channels for the goods-there is lower possibility of competition between goods in different channels;

brand loyalty, risks and costs of purchasing a replacement, price discrimination, and other factors.[39]

The Guideline states that factors relevant to product market definition from a supply perspective are:

production process and techniques;

various costs of changing to another product.[40]

Factors relevant to defining geographic market from a demand perspective include:[41]

transport costs;

sales coverage of the goods;

trade barriers;

consumer preferences in a specified region, and the volume of goods imported and exported into the region.

In looking at geographic market definition from a supply perspective, the time required and feasibility of other regions supplying or selling the goods or services are an important consideration.

MOFCOM says that it will employ the "hypothetical monopolist test"[42], which it describes as a "well-known tool of competition law" in more developed jurisdictions, in difficult cases to determine the smallest group of goods and geographic area in which a hypothetical monopolist may maintain a price higher than a competitive price.

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[39] *See* Guanyu Shichang Jieding de Zhinan (关于市场界定的指南) [Guidelines on the Definition of "Relevant Market"] (promulgated by the St. Council May 24 2009, effective May 24 2009), http://www.gov.cn/zwhd/2009-07/07/content_1355288.html.

[40] *See Id.*

[41] *See Id.* art. 9.

[42] *See Id.* art. 7.

The Guideline notes that in other jurisdictions the "hypothetical monopolist test" seeks to measure the responsiveness of the quantity demanded to small changes in price.[43] The Guideline outlines the operation of the test in the following way: a small but significant increase in price (of 5-10%) is applied to the cost of the relevant product. If the price increase leads to an increase in the purchases of another good that renders the price increase unprofitable, the two goods are included in the same market.[44] The Guideline adopts these standard features and notes that the standard price selected for the purpose of the test should be the competitive price. This is the usual test. The Guideline does not provide any additional assistance by way of example to those looking for indications of the MOFCOM approach.

B. Market Definition in Practice

There are a number of notifications involving mergers under the AML in which markets have been defined by MOFCOM. These are considered below in the order in which they were determined.

This acquisition of beer manufacturer Anheuser-Busch Companies Inc (AB) by In Bev N.V./S.A. (INBEV) in 2008 was allowed subject to conditions.[45] The announcement by MOFCOM was extremely short. It contained no analysis of market, but did discuss the effect of the concentration on the "beer market in China".

1. Coca Cola and Huiyuan Juice Group

This contentious MOFCOM refusal to allow a merger involved the proposed purchase of the China Huiyuan Juice Group Limited by Coca Cola Company of the US for US$ 2.4 billion.[46]. MOFCOM's determination considered the effect of the "Huiyuan" brand on competition in the fruit juice beverage market. The determination

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[43] *See,* 1997 LAW, O.J (LC 372); *see* Horizontal Merger Guidelines, 7 C.F.R. § 26823 (1992); *see Merger guidelines 2008* (cth) reg (Austl.); *see* Merger and Acquisitions Guidelines 2003 (N.Z.); *see* Merger Enforcement Guidelines C.R.C (Can.).

[44] *See* Merger guidelines 2008 (Cth) para 4.19, reg (Austl.) (The Australian Competition and Consumer Commission (ACCC) has traditionally used the SSNIP test in defining markets).

[45] *See* Shangwubu Gonggao 2008 Nian Di 95 Hao (商务部公告2008年第95号) [The 95th Announcement of Ministry of Commerce, in 2008] (promulgated by the Ministry of Com. Nov. 18 2008, effective Nov. 18 2008), http://tjtb.mofcom.gov.cn/aarticle/touzzn/t/200811/20081105906356.html?3200029184=2320678451.

[46] *See* Shangwubu Guanyu Jinzhi Kekou Kele Shougou Zhongguo Huiyuan Gongsi Shencha Jueding de Gonggao (商务部关于禁止可口可乐公司收购中国汇源公司审查决定的公告) [Determination of Ministry of Commerce on Refusal of Acquisition of Huiyuan Juice Group Limited by Coca Cola Company] (promulgated by Ministry of Com., Mar. 18, 2009, effective Mar. 18, 2009), http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html?935563776=2320678451 (last visited on Dec. 4, 2010); *see also* Wang Xiaoye, *The New Chinese Anti-Monopoly Law: A survey of a work in progress*，54 ANTITRUST BULL. 579, 588 (2009).

also mentioned the development of the "Chinese fruit juice industry". In reaching its decision, MOFCOM stated that it had solicited opinions from fruit juice enterprises, upstream juice concentrate suppliers and downstream fruit juice distributors. It looked at the impact of Coca Cola's dominant position in the soft drink market. Although all of these issues seem to be relevant to the merger consideration, there is nothing in the determination about the way these areas of concern about the market were analysed by MOFCOM, or the reasons for its findings on the market.

2. Mitsubishi Rayon Co and Lucite International Group Limited

This merger involved the merger of the two named companies.[47] MOFCOM determined that the relevant market in this concentration was methylmethacrylate (MMA), where the parties were found to have large overlapping shares. MOFCOM also found that there was a slight overlap in specialty methacrylates (SpMAs), PMMA pellet and PMMA sheet products. All of these products are relevant to the manufacture of plastics, although there is no discussion of this fact or their roles in the determination itself. The market for all three products was found by MOFCOM to be national (China). The impact of the concentration on the third products was said to be very limited. The MOFCOM determination contains no discussion of the uses of the products or how each product might relate to another, what other industries the products might be relevant to or impacted by the concentration at an upstream or downstream level.

3. General Motors Co and Delphi Corp

General Motors Co ("GM") proposed to acquire Delphi Corp ("Delphi") in a vertical merger.[48] The GM markets were found to be the markets for passenger cars and commercial vehicles. The Delphi markets were found to be the 10 independent auto parts markets listed below: auto electrical and electrical transmissions system market; auto connection system market; auto electric centre market; auto heating system market; auto entertainment and communication market; auto control and safety market; auto security system market; auto gasoline engine management system market;

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[47] *See* Shangwubu Gonggao 2009 Nian Di 28 Hao (商务部公告2009年第28号) [The 28th Announcement of the Ministry of Commerce in 2009], (promulgated by the Ministry of Com. Apr. 24, 2009, effective Apr. 24 2009), http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html?3502477824=2320678451.

[48] *See* Shangwubu Gonggao 2009 Nian Di 76 Hao (商务部公告2009年第76号) [The 76th Announcement of Ministry of Commerce of the PRC in 2009] (promulgated by the Ministry of Com. Sept. 28, 2009, effective Sept. 28, 2009), http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906540211.html.

auto diesel engine management system market and the auto fuel supply and evaporator product market. MOFCOM found that there was no horizontal overlap between the two companies, but that they had vertical relationships in upstream and downstream markets. MOFCOM determined the geographic market to be the Chinese domestic market. When the competition analysis was completed, however, MOFCOM stated that there were competition impacts in the "global and Chinese auto parts markets", which appears to be the amalgam of all the listed markets. Further explanation as to why this broader market was relevant and what those impacts were would have been useful but was not contained in the determination.

4. Pfizer and Wyeth

The acquisition of Wyeth Inc by Pfizer Inc, both US companies operating in China, contained more detailed information on relevant market, although no more real analysis.[49] MOFCOM determined that the geographic market in this case was the Chinese domestic market excluding Hong Kong, Macau and Taiwan. MOFCOM determined that the relevant products were human pharmaceuticals and animal health products (although these were clearly not the defined product markets), with Pfizer and Wyeth having overlapping products in the Chinese domestic market in the following areas: human pharmaceuticals-specifically J1C(wide spectrum penicillin) and N6A (anti-depression and mood stabilizing drugs), and animal health products, specifically swine mycoplasma pneumonia vaccine, swine pseudorabies vaccine and combination vaccines for dogs. The competition analysis assumes each of J1C, N6A, swine mycoplasma pneumonia vaccine, swine pseudorabies and combined vaccines for dogs are in separate product markets. There was no further discussion of the market.

5. Panasonic Corporation and Sanyo

Panasonic Corporation acquired Sanyo Electric Co., Ltd.[50] MOFCOM's consideration of this concentration involved the range of inquiries specified by MOFCOM in earlier determinations, but

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[49] *See* Shangwubu Gonggao 2010 Nian Di 77 Hao Guanyu 2011 Nian Xitu Chukou Pei' e Shenbao de Gonggao (商务部公告2010年第77号 关于2011年稀土出口配额申报条件和申报程序的公告) [The 77th Announcement of Ministry of Commerce in 2010 on Conditions and Procedures of Declaration for Export of Tombar Thite in 2011] (promulgated by the Ministry of Com. Sept. 29 2009, effective Jan. 1, 2011).
http://wms.mofcom.gov.cn/aarticle/zcfb/n/201011/20101107238231.html?1623364096=2287124019.

[50] *See* Shangwubu Gonggao 2009 Nian Di 82 Hao (中华人民共和国商务部2009年第82号公告) [The 82nd Announcement of the Ministry of Commerce in 2009] (promulgated by the Ministry of Com. Oct. 30, 2009, effective Oct. 30, 2009),
http://fldj.mofcom.gov.cn/aarticle/ztxx/200910/20091006593175.html?2613219840=2320678451 (last visited Dec. 4 2010).

took a broader approach to the issues. It outlined additional inquiries made in respect of areas of overlap, such as evidence of sales data, product differentiation, pricing and strategies, means of distribution, downstream clients, changes in capacity and possible vertical relationships. Ultimately MOFCOM determined that the acquisition would impact on three markets:

rechargeable coin-shaped lithium batteries, which supply back up for cell phones and video recorders;

nickel-hydrogen batteries for general use;

nickel-hydrogen batteries for vehicles.

In each case the geographic market was said to be global. There is no explanation for either the product or geographic determination by MOFCOM in its determination.

6. Novartis and Alcon

This proposed acquisition of Alcon, Inc. by Novartis International AG (two Swiss corporations) involved the usual range of inquiries.[51] MOFCOM notes in its determination that it requested Novartis to submit evidence on a number of issues including market shares for overlapping products in China and worldwide; pricing mechanisms and sales patterns; product properties and quality; relevant regulatory policies; relationships between the parties and other market participants. The relevant product markets were found to be twofold:

> the product market for ophthalmic anti-inflammatory/anti-infective compounds used in treating ophthalmic inflammation and infection, particularly occurring after surgery (the "Compounds Market"); and contact lens care products (the "Care Products Market").

The Compounds Market was a distinct product market, with sales by Novartis under the brand "Infectoflam" and Alcon under "TobraDex" in China. The rationale for the merger was apparently a desire for the combination of Alcon's world leading ophthalmic

[51] Guanyu Fu Tiaojian Pizhun Nuohua GufenGongsi Shougou Aierkang Gongsi Fanlongduan Shencha Jueding de Gonggao (关于附条件批准诺华股份公司收购爱尔康公司反垄断审查决定的公告) [Announcement on conditional approval for Novartis' Purchase of Alcon Laboratories] (promulgated by the Ministry of Com., Aug.13 2010, effective Aug. 13 2010), *translated in* http://www.nortonrose.com/knowledge/publications/2010/pub30647.aspx. (this international merger was cleared in a number of countries with differing outcomes depending upon the market position of the parties in each of those jurisdictions. In Australia, for example, it was cleared subject to enforceable undertakings which required the divestiture of injectable miotic assets (products used in eye surgery to rapidly shrink the pupil of the eye) to Bausch & Lomb because the merger would have left Novartis as the only market participant in relation to this product); Press Release, ACCC (July 29, 2010) (on file with author), *available at* http://www.accc.gov.au/content/index.phtml/itemId/94204.

surgery products with CIBA Vision, which was the Novartis subsidiary specialising in contact lenses and related products. It was intended that Alcon would be the new Novartis eye care division and Novartis would cease supplying overlapping products.[52] The parties' share in China would be 60% and globally 55% following the acquisition. There was no discussion of the reason for the finding of a global market in the determination. The Care Products Market would see the parties post merger share of 60% globally and 20% in China. The complicating factor, however, was the sales and distribution arrangements with Hydron Contact Lens Co ("Hydron"), the largest domestic seller and manufacturer through its wholly-owned subsidiary CIBA Vision Trading Co, Ltd ("CIBA Vision").

It is difficult to critically analyze market definition in the case without further information. However, the relevance of the global share to this merger appears to be low without additional information on market impact.

C. Conclusions on Market Definition

Some conclusions can be drawn at this early stage on MOFCOM market determinations to date:

> A national market is the most regular geographic market finding. Market definition in other jurisdictions where mergers are involved is often national, not surprisingly, although there is no discussion of the reason for this finding in any of the MOFCOM determinations. Given the size of China, however, one might assume that a narrower geographic market definition might be warranted in some circumstances, or in relation to some aspects of a merger transaction. To date this does not appear to have occurred. Perhaps this is because the focus has been on international mergers with an impact in China.

MOFCOM routinely takes submissions and has discussions and meetings with upstream and downstream suppliers and acquirers, with industry associations, government and other interested parties relevant to a particular transaction. The nature of these interactions is unclear but this is certainly the group who would make up the range of ""interested parties"" surveyed in many other jurisdictions. In some mergers MOFCOM notes that it referred to "the parties and to experts in law, economics and agriculture by means of solicitation

[52] *See China: Unusual Remedies a Feature of MOFCOM's 6th Conditional Clearance Decision,* MAYER BROWN (Aug. 23, 2010), http://mayerbrown.com/public-docs/Unusualremedies.pdf.

in writing, discussion panels, forums, hearings, on-site investigations, authorized investigations and conversations with interested parties".[53] This is certainly comprehensive consultation. It is unclear what weight MOFCOM gives to the comments of these parties, some of whom are not ordinarily unbiased spectators in a merger situation. It does not appear from the reports that MOFCOM regularly polls competitors. While other regulators often poll competitors, they generally give variable weight to their comments, given their understandable bias in relation to any concentration. Consumer surveys by phone appear to have assumed greater relevance in later determinations.

The parties have the opportunity to address specific MOFCOM concerns prior to a final determination of the matter.[54]

The major concern with the MOFCOM announcements is that they are really conclusions without discussion of the basic analysis of market. Some discussion would be very useful for those seeking to understand MOFCOM's practical approach to defining markets for the purposes of analyzing its approach or advising potential parties. It would also be useful as a means of raising awareness generally about the way in which such analysis is undertaken.

An analysis of the determinations, comparing early to more recent, shows that MOFCOM is approaching market definition with an increasing degree of sophistication, although there remain areas of concern about its approach. Discussion of market definition in the MOFCOM announcements relating to particular cases is limited to conclusions and it would be useful to have a better understanding of the approach in individual situations. It is unfortunate that MOFCOM is not obliged to report on concentrations which it does not oppose, because these would provide a broader range of examples for those defining markets. It is difficult to know without more whether the market analysis in any of these examples has proceeded in a way which provides a sound basis for the best analysis of the competitive effects of the proposals. There is simply not enough information available. The correct tools are in place. More information from MOFCOM would be very useful.

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[53] *See*, *e.g.*, Shangwubu Guanyu Jinzhi Kekoukele Gongsi Shougou Zhongguo Huiyuan Gongsi Shencha Jueding de Gonggao (商务部关于禁止可口可乐公司收购中国汇源公司审查决定的公告) [Announcement: re Coca Cola and Huiyuan Juice of Ministry of Commence] (promulgated by Ministry of Com., March 2009, effective March 2009,); Jing Ying Zhe Jizhong Shencha Zanxing Banfa (经营者集中审查暂行办法 (征求意见稿)) [Tentative Measure for the Undertaking Concentration Examination (draft for comments)] (Jan. 1 2009), http://www1.www.gov.cn/gzdt/2009-01/21/content_1211769.htm.

[54] *See*, *e.g.*, Jing Ying Zhe Jizhong Shencha Zanxing Banfa (Zhengqiu yijiangao) (经营者集中审查暂行办法 (征求意见稿)) [Tentative Measure for the Undertaking Concentration Examination (draft for comments)] (Jan. 1 2009), http://www1.www.gov.cn/gzdt/2009-01/21/content_1211769.htm.

D. Mergers and Acquisitions: Impact of Concentration

The implementation of the merger provisions of the AML by MOFCOM must be considered against the background of merger activity in China. Commentators have noted in the past that some industries have complained about the unfair business practices of foreign participants.[55] There have been allegations by foreign businesses that the provisions will be aimed at them and not applied universally.

Operationally, the AML implements a system of compulsory filing for mergers and acquisitions (and a variety of other similar transactions) over a certain threshold to the regulator MOFCOM. Analysis under the detailed provisions is qualified by the recognition that undertakings may grow by "competing legally".[56]

The provisions relating to "Concentrations" apply to mergers, control of undertakings by way of acquisition of shares, other assets or other means, or acquiring control of, or a decisive influence over, an undertaking by contract or other means (Art. 20). This means that they catch not only mergers and acquisitions of shares and other assets but also control by contract, such as in relation to joint ventures, in some situations. This article refers to mergers but the comments made apply to all types of related conduct caught by the AML.

The thresholds for reporting concentrations set by Article 3 of the Rules of the State Council on Thresholds for Notification of Concentration of Business Operators are where:

> worldwide business volume of all business operators exceeds 10 billion Yuan and the business volume in China of at least two business operators exceeds 400 million Yuan in the last accounting year; or
>
> business volume in China of all business operators involved exceeds 2 billion Yuan in the last accounting year and the business volume in China of at least 2 exceeds 400 million Yuan in the last accounting year.

There is a catch-all provision, which allows the AMEA to investigate any situation where there is evidence to suggest that a concentration outside the thresholds will have the effect of

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[55] *See* MARK WILLIAMS, COMPETITION LAW AND POLICY IN CHINA, HONG KONG AND TAIWAN 211 (2005) (where particular examples are noted) (U.K.).

[56] This is odd because presumably if they are competing legally they would not offend the AML- there would be no anti-competitive impact.

precluding or restricting competition.[57] Businesses do not need to notify, however, where one of the parties already controls more than 50% of the shares or assets of each undertaking involved in the acquisition, or where a business not involved in the acquisition has more than 50% of the voting shares or assets of each business involved (Article 22). There is no need to notify in cases of corporate reorganization or restructure.

1. The Merger Notification Process

The compulsory notification process involves the filing of detailed documents in Chinese, including a report on the effect of the concentration on market competition, as well as the agreements, audited financial reports and other information required by the AMEA, which can request further information.[58] A preliminary investigation is conducted by MOFCOM, which makes a decision within 30 days whether or not to implement further examination. The merger cannot take place before the determination. If no determination is made within the time period the merger is allowed.[59] MOFCOM may undertake an additional examination, which must be concluded within a further 90 day period for more complex situations. MOFCOM must deliver a written determination including reasons if the transaction is prohibited. A further extension for a maximum of 60 days may be implemented if the undertakings agree, or the documents received are inaccurate, or circumstances change after the notification. If no decision is made by the end of the extended period, it is deemed that the concentration is not prohibited.[60]

2. MOFCOM Merger Factors

When examining concentrations, the MOFCOM must consider the following factors:

the market shares and market power of the participants;

market concentration;

the effect of the concentration on market access and technological progress;

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[57] See Guowuyuan Guanyu Jingyingzhe Jizhong Shengbao Biaozhun de Guiding (国务院关于经营者集中申报标准的规定) [Rules of the State Council on Thresholds for Notification of Concentration of Business Operators] (promulgated by the St. Council Aug. 1 2008, effective Aug. 1 2008), 2008 ST. COUNCIL GAZ. 23, http://www.gov.cn/zwgk/2008-08/04/content_1063769.htm.

[58] Fan Longduan Fa (反垄断法) [Anti-monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30 2007, effective Aug. 1, 2008) art. 23, 24, 2007 STANDING COMM. NAT'L' PEOPLE'S CONG. GAZ. 68.

[59] *Id*. art. 25.

[60] *Id*. art. 26.

the effect of the concentration on consumers and other businesses;

the effect of concentration on national economic development; and

other factors that affect market competition, at the discretion of the AMEA.[61]

Article 28 provides that where a concentration will or may eliminate or restrict competition, MOFCOM must prohibit it and give reasons. However, if the parties can prove that the advantages of implementing the concentration exceed the disadvantages, or that the concentration is in the public interest, the transaction may be allowed.[62]

The factors to be considered are typical of many competition laws, including the US, European Union and Australia. Consideration of public benefit in such circumstances is also not uncommon. The nature of some AML factors is, however, more unusual. The effect, for example, of the conduct on consumers and other businesses would usually only be relevant were it to result from a lessening of competition. The effect of a merger on industrial development is less usual as a factor. The interpretation of the factors is unsupported at this stage by decisions or by guidelines elaborating their meaning, and it is unclear whether or not they are to be tied to the earlier consideration of restriction and elimination of competition set out in Article 27, or whether it is intended that they have some wider focus which is not related to competition.[63]

As noted the factors have some similarities with the EU competition provisions[64], but in the EU there is no presumption of dominance based solely on market share. The focus there is on concentrations which would impede effective competition, in particular as a result of the creation or strengthening of a dominant position. The provisions allowing for a concentration where the advantages exceed the disadvantages, or where the concentration is in the public interest, contained in Article 28, are said to be based on German law.[65]

The provision requiring consideration of the effect on the national economy, noted above, again raises the issue of whether the AML

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[61] *Id*. art. 27 (It should be noted that announcements of MOFCOM routinely state that they have looked at each of these factors.).

[62] *Id*. art. 28.

[63] *Id*. art. 27 (an earlier recognition that restrictive conditions might be imposed on a concentration by the AMEA was deleted).

[64] Council Regulation (EC) No 139/2004, 2004 O.J. (L 24) 1.

[65] *See* Wang, *supra* note 46, at 613 (referring to Gesetz gegen Wettbewerbsbeschränkungen, GWB [Act Against Restraints on Competition] Aug. 28 1998 at ch. VII 36(1) and 42(1), *available at* http://wwwiuscomp.org/gla/statutes/ GWB.htm.

will be used as a protectionist measure.[66] Where acquisition of a domestic business is to be made by foreign capital and national security is involved, the transaction will be examined under other relevant regulations of the State, in addition to examination under the AML.[67]

If the parties to the merger or other interested parties are dissatisfied with the outcome of the MOFCOM determination they may first apply for administrative reconsideration and ultimately file an administrative suit in accordance with the law.[68]

V. COMPETITION ANALYSIS IN PRACTICE

The seven MOFCOM determinations made since the commencement of the AML in August 2008 are discussed below.[69] Article 29 states that if MOFCOM does not prohibit a concentration it may impose restrictive conditions to reduce anti-competitive effects arising from the concentration. Another application involving Sina and Focus Media was reportedly withdrawn but is discussed briefly below.

A. InBev/Anheuser-Busch

This first AML merger determination, involving InBev and Anheuser-Busch, is notable for a number of factors, including the brevity of the MOFCOM announcement.[70] MOFCOM talks of the merger being "of very large scale", significantly enhancing the competitive strength of InBev, but did not prohibit the concentration. There is no specific discussion of shareholdings of either party in a particular market either before or after the transaction, although some reference is made to shareholdings of the parties in other beer brewing companies such as Tsingtao and Guangzhou Zhujiang

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[66] This part of the review will apparently be performed jointly by NRDC and MOFCOM.

[67] *See* Fan Longduan Fa (反垄断法) [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong. Aug. 31, 2007, effective Aug. 1, 2008) art. 30, 2007 Standing Comm. Nat'l People's Cong. Gaz. 68, *translated in* http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf. (it is reported that this National Security Review will be undertaken by a joint ministerial meeting of relevant officials).

[68] *See* Fan Longduan Fa (反垄断法) [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong. Aug. 31, 2007, effective Aug. 1, 2008) art. 52, 2007 Standing Comm. Nat'l People's Cong. Gaz. 68, *translated in* http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf.

[69] Each of the market definitions have been discussed earlier.

[70] *See* Shangwubu Gonggao 2008 Nian Di 95 Hao (商务部公告2008年第95号) [The 95th Announcement of Ministry of Commerce in 2008] (promulgated by Ministry of Com. Nov. 18, 2008, effective Nov. 18, 2008), http://tjtb.mofcom.gov.cn/aarticle/touzzn/t/200811/20081105906356.html?3200029184=2320678451.

Brewery in the context of the restrictive conditions imposed. MOFCOM imposed conditions on the concentration because of its findings that the competitive strength of InBev would be significantly enhanced by the merger. The imposed conditions were that the merged entity: must not increase its shareholding of 27% in Tsingtao Brewery Co. Ltd and 28.56% in Guangzhou Zhujiang Brewery Group; must promptly notify change of controlling shareholders; and must not seek to hold any shares in China Resources Snow Breweries Co Ltd or Beijing Yanjing Brewery Co Ltd. No reasons were given for the imposition of these particular conditions. In other jurisdictions these types of conditions would ordinarily be issues for consideration by the regulator, if any further acquisitions were considered at a later date. It may be, however, that MOFCOM envisaged that further acquisitions may not fall within the notification thresholds and so would not be subject to further consideration. The written determination provides no further details to clarify this issue.

B. Coca Cola/Huiyuan Juice

In this highly publicized determination, MOFCOM prohibited the acquisition of Huiyuan Juice by Coca Cola. MOFCOM identified the relevant markets as the carbonated beverage market and the fruit juice market, although there was no discussion at all of percentage market share of either party in either market. MOFCOM determined, however, that after the concentration Coca Cola would be able to pass on its dominant position in the carbonated soft drinks market to the fruit juice market, which would have an anti-competitive effect, adversely affecting consumers. For this reason the merger was not allowed. The determination stressed the importance of brand strength, with the "Minute Maid" (CCA juice brand) and "Huiyuan" brands, which were included in the concentration, found to be particularly important in the juice market. MOFCOM found that the brand effect, coupled with the dominant position of Coca Cola in the carbonated soft drink market, would raise a barrier for potential competitors wishing to enter the fruit juice market. The merger would also reduce the chances of survival of mid and small sized fruit juice enterprises, limit the ability of domestic enterprises to compete and innovate in the fruit juice beverage market, and harm the sustainable and sound development of the fruit juice industry in China. In summary, MOFCOM focussed on the impact of Coca Cola's large market share and brand strength in the carbonated drinks market and its ability to leverage that power into the juice market.

Many criticisms have been made about the determination. One relates to its focus on protection of Chinese small and medium fruit juice businesses. These may or may not be warranted. Competition law is not generally about protection of individual competitors except as part of the protection of competition in a market. The determination appears to be focusing on raised barriers to entry which would result from the concentration, rather than the protection of particular classes of individual competitors, although the effect on them is noted. It is not very clear from the determination whether MOFCOM is focusing on protection of competitors per se or protection of competition generally.

Despite discussions, Coca Cola was unable to convince MOFCOM that conditions could be imposed which would make the outcome less anti-competitive and the merger was prohibited.

Subsequent to the formal announcement of the determination, Yoa Jian, a MOFCOM spokesperson, reportedly discussed key issues relating to the decision in a Question and Answer session.[71] The MOFCOM spokesperson emphasized that only competition issues were considered in reaching the decision-the fact that it involved a key Chinese brand was not a relevant factor in the review, although brand itself was an important issue in the context of analysis of the effect of the transaction on competition. The MOFCOM spokesman confirmed that it had reviewed each of the concentration factors listed in the AML. The impact on national development was said to be particularly important, as was the catch-all phrase, which the spokesperson said is limited in its application to competition issues. The market was divided by MOFCOM into carbonated soft drinks and the fruit juice market, made up of pure juices, mixed juices (with concentrations of fruit juice of between 99% and 25% juice) and fruit drinks with less than 25% juice. Coca-Cola had 60% of the carbonated drinks market in China and was dominant by way of capital, brand management and marketing. The products (fruit juice and soft drinks) were not found to be in the same market but the markets were found to be closely related. Coca Cola was found to have the ability to sell fruit drinks and carbonated drinks as a bundle, to impose conditions of exclusivity and to transmit its dominant position in the carbonated drinks market to the fruit juice market. This would severely weaken the ability of other fruit juice manufacturers to compete. The strength of the brands imposed barriers but it was emphasized that this determination was not about protectionism. The fact that one of the strong brands was Chinese

[71] *See MOFCOM Discloses Details Concerning Of Coca-Cola/HuiJuan Transaction*, HOGAN & HARTSON, http://www.hoganlovells.cn/newsmedia/newspubs/PubDetail.aspx?publication=4387.

had no particular relevance to the decision. It was also emphasized that this determination did not indicate that there was a change in the foreign investment rules. The spokesman did say, however, that if a merger or acquisition places a multinational enterprise in a dominant position and leads to restrictions on or elimination of competition, it will actually hinder economic development.

C. Mitsubishi Rayon/Lucite

In its determination of the concentration between these parties, MOFCOM found that the market share of the merged companies in the MMA market would be 64%, much higher than that of the next two competitors. For that reason MOFCOM stated that the post-concentration company would have a dominant position and would be capable of eliminating or restricting competitors. Since Mitsubishi operated in MMA and downstream markets, it would be capable of exerting foreclosure effects on downstream competitors. The downstream markets were not specifically identified. The concentration was allowed subject to the following conditions:

Lucite to divest 50% of annual production capacity within 6 months to a third party purchaser for five years. The purchaser would have the right to purchase MMA products for production costs plus management costs for five years, verified annually by an independent auditor; independent operation of Lucite until the divestment; Mitsubishi not to acquire or establish additional plants for 5 years; post concentration, Mitsubishi must not without prior MOFCOM approval acquire producers of MMA, PMMA or cast sheets in China or establish plants for these products in China.

Once again it is difficult for an observer to understand the role of Lucite in the MMA market, and the effect of the concentration on downstream markets, particularly the effect on PMMA and cast sheet products, without further elaboration in the MOFCOM determination.

D. GM/Delphi

This was a vertical acquisition. GM manufactured cars and Delphi various important auto parts in what were defined by MOFCOM as ten independent auto part markets. MOFCOM noted GM's leading position in the global and Chinese auto manufacture markets. MOFCOM determined that the concentration restricted competition in the following ways:

Delphi was a major supplier to many domestic automakers and there may be issues with stability of supply, price and quality to other acquirers after the concentration;

GM may acquire confidential information about domestic automakers due to its position on the Delphi board after the concentration;

GM/Delphi could make it more difficult for domestic automakers to switch parts supply following the concentration by stalling or other tactics to increase the costs of switching;

GM may take more parts from Delphi making it more difficult for other domestic auto manufacturers to obtain supply.

This discussion of the impact on competition in this determination is far more detailed than had been seen previously and it paints a useful picture of MOFCOM's concerns. Negotiations took place with the parties and the following conditions were imposed by MOFCOM:

After the concentration GM and Delphi must ensure that Delphi continues to supply domestic automakers without discrimination as to service or price, and without any unreasonable conditions;

GM must not seek competitive information of any domestic automakers or that of third parties;

GM and Delphi must ensure that Delphi and its affiliates assist in smooth switching of suppliers by customers;

GM must maintain its policies of using multiple supply sources and non-discriminatory purchases and not favor Delphi at the expense of other suppliers.

Of these conditions, the requirement that GM will not seek competitive information of domestic or third party automakers appears to be very broad, but it appears very likely that it is limited to information from Delphi. The other conditions seem to be entirely logical based on the identified MOFCOM concerns.

E. Pfizer/Wyeth

MOFCOM determined that the markets for human pharmaceuticals, swine pseudorabies vaccine and combination vaccines for dogs were not impacted by the concentration. The concentration was seen to have an anti-competitive effect only in the market for swine mycoplasma pneumonia vaccine, for the following reasons:

After the concentration, the combined parties would have a market share of 49.4%, significantly higher than the second highest participant, Intervet with 18.35%. All other participants had shares of less than 10%. MOFCOM determined that the merged entity would be able to increase its market share by taking advantage of its scale, which would lead to control of product prices.

The Herfindahl-Hirschman Index ("HHI") after the merger would be 2182, an increase of 336. This made the market highly concentrated and this would restrict or eliminate competition.

Market entry was more difficult in the pharmaceutical industry with three to ten years of development and between US $ 2.5-10 million to develop a new product. The technical barrier for a product of this kind was even higher.

MOFCOM imposed the following conditions on the concentration:

Pfizer should divest its mycoplasma pneumonia vaccine business in the Chinese domestic market, including all tangible and intangible assets necessary for the survival and competitiveness of the business, within six months;

if no buyer could be found, a trustee arrangement could be imposed by MOFCOM;

during the six month period, an interim manager would be appointed;

Pfizer has the obligation to provide technical assistance to the buyer for three years, if requested.

This focus in this determination on the HHI, a commonly used tool in other jurisdictions for measuring the competitive impact of concentration, is very encouraging, although its efficacy is always dependent on the selection of an accurate and workable market definition. Recognition by MOFCOM of the particular difficulties associated with the pharmaceutical industry was also useful.

F. Panasonic Corporation and Sanyo

In this transaction between two powerful diversified corporations MOFCOM found major market shares heralding significant competition issues in the rechargeable coin-shaped lithium battery market (61.6%), the market for nickel-metal hydride batteries for daily use (46.3%), and the market for nickel-metal hydride batteries for vehicle use.

Conditions in relation to each of these three were imposed by MOFCOM as follows:

> In respect of the nickel-metal hydride battery market, MOFCOM found that in addition to the large market share, brand loyalty to Panasonic and Sanyo brands would lessen competition and marginalize other brands. Sanyo was ordered to divest all of its rechargeable coin-shaped lithium batteries business.

In respect of nickel-metal hydride batteries for daily use, MOFCOM ordered that either Sanyo was to divest its nickel-metal hydride batteries for daily use business and OEM supply its Sub.C.D.-type batteries to the buyer, or Panasonic was to divest its nickel-metal hydride batteries for daily use business.

In respect of the market for nickel-metal hydride batteries for vehicle use, Panasonic had a joint venture with Toyota. MOFCOM found that the joint venture, Panasonic EV Energy Co, Ltd (PEVE), would be in a position to eliminate competition. Panasonic was ordered to divest its stake in PEVE from 40% to 19.5% and relinquish a number of its shareholder rights. MOFCOM also ordered Panasonic to change the name of the joint venture to exclude "Panasonic".

MOFCOM ordered each of these divestitures (which included all manufacturing equipment, sales, R & D and clients, and the licensing of intellectual property to the buyer) to be carried out within 6 months. During the divestment period the companies were ordered to operate separately and prohibited from disclosing competitive information to one another.

The conditions of this divestiture showed a significant degree of detail and sophistication involving both structural and behavioral aspects, but once again the MOFCOM determination gave little information about the precise ways in which these conditions would address the competition concerns arising from the transaction.

G. Novartis/ Alcon

Information provided showed that in the Compounds Market, the parties had 60% in China and 55% globally, although Novartis had less than a 1% market share in China.[72] Under competition analysis in many countries, this would not be an acquisition which lessened competition, but rather would be a transfer of the market share from one market participant to another and without more it would be unlikely to infringe competition laws. The determination notes that Novartis stated in the submission that it had decided to cease selling Infectoflam in the global and the China market. As to Care Products, the link between the post merger share of Novartis of 20% and its links with the competitor with the largest market share were outlined in the earlier material on market. Comments made in the

[72] Press release, Novartis, Novartis to Acquire Majority Control of Alcon, a Global Leader in Eye Care, and Proposes Merger for Full Ownership (On file with author), *available at* http//www.novartis.com/newsroom/media-releases/en/2010/1369739.shtml. ("Novartis and Alcon have highly complementary product portfolios covering more than 70% of global vision care sector: pharmaceuticals, surgical products, contact lenses and OTC brands." Clearly this merger was likely to receive substantial consideration by competition authorities in a number of jurisdictions).

determination about potential coordination of pricing, supply volume and sales regions between the two entities are understandable.

The following conditions were imposed on Novartis by MOFCOM:

> Compounds Market: MOFCOM determined that Novartis should cease all sales under the name Infectoflam in China by the end of 2010, and not relaunch the product under that name, or any new brand name or supply Compound products sold outside China in the China market for five years. Novartis was also required to report its compliance progress to MOFCOM annually.

In respect of the Care Products Market, Novartis was required to terminate the sales and distribution agreement between CIBA Vision and Hydron within 12 months from the date of the determinations and report compliance to MOFCOM within a week.

There is very little comment in the determination on how competition in these markets would be lessened by the merger (subject to the comments on coordinated conduct) or how the conditions imposed would resolve issues arising. To this extent it is again an example of MOFCOM merely describing the outcome rather than presenting useful analysis.

H. Conclusions

Some early conclusions on analysis of concentrations are set out below:

> In most published announcements by MOFCOM the merger factors set out in the AML are mentioned, but there is no discussion of how they have been applied in particular circumstances.[73]

The determinations do not discuss arguments raised by the parties about alternative markets, or the competitive impact of any proposed concentration. Some information about alternatives considered and why they were rejected would assist in understanding the particular outcome. The reports of many other competition authorities discuss issues of importance raised by the parties but rejected, and this information would provide further guidance to the parties and to potential parties.

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[73] *See* Recommendations and Best Practices, Recommendation of the Council on Merger Review (2005) OECD (The OECD has recommended publication of *". . .reasoned explanations for decisions to challenge, block or formally condition the clearance of a merger*".).

There is a focus by MOFCOM in its determinations on market share, but whether this means that market share is given undue prominence in decision-making, or it is discussed merely because it is a concrete factual matter which cannot really be disputed once market is identified, is unclear from the determinations. It may be that both these alternatives are relevant to the focus.

Industry policy appears to have played a part in the Coca Cola/Huiyuan determination with part of the focus expressly on the effect on national development.

Once again further information about the surrounding facts and circumstances, as well as additional discussion about the reasons for the conclusions reached, would be extremely useful in critically reviewing the MOFCOM determinations. It would also provide significant additional information about MOFCOM's approach to market participants.

VI. AUSTRALIAN APPROACH

By way of contrast to the brief description of market and competition analysis by MOFCOM in the Coca Cola/Huiyuan Juice case, both market definition and competitive impact were described expansively in an Australian clearance in the same industry, similar in some respects to the Coca Cola/Huiyan merger, and said to be influential in the Chinese concentration determination.[74]

A proposal by Coca-Cola Amatil Limited (CCA) to acquire Berri Limited, an Australian juice manufacturer, was rejected in 2003 at the informal clearance stage by the Australian Competition and Consumer Commission (ACCC), the Australian regulator.[75]

As background, the Australian competition law, the Trade Practices Act 1974,[76] does not require mandatory notification of mergers and acquisitions over a specified threshold. Parties may decide to approach the ACCC informally, as was the case in this merger, to obtain a clearance based on the ACCC's analysis of the situation and the likelihood of ACCC enforcement action. Alternatively, they may seek formal clearance from the ACCC based

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[74] *See, e.g.,* Nathan Bush, *Chinese Antimonopoly Law Enforcement: Launching into Stormy Seas*, GLOB. COMP. REV. ("Indeed a MOFCOM spokesman explicitly referred to the Australian Competition and Consumer Commission's 2003 decision to block Coca-Cola's acquisition of Berri Limited on a leveraging theory as influencing MOFCOM's reasoning").

[75] *See* ACCC, http://www.accc.gov.au/ (Since that time and following criticisms, the ACCC has implemented a more detailed process for dealing with these informal clearances to provide more detailed information on outcomes to the marketplace. This involves public competition assessments).

[76] It is proposed that this name will be changed by the Trade Practices (Australian Consumer Law) No 2 Bill 2010 at some stage in 2010. If this Bill is passed as expected, the name of the law will become the Competition and Consumer Act.

on a competition analysis [77] or they may seek authorisation from the Australian Competition Tribunal, based on public benefit which results from the merger.[78]

The CCA/Berri acquisition[79] involved a request for an informal merger clearance and after consultation with the parties and other interested parties, the ACCC refused to clear the merger in the following circumstances: CCA was the manufacturer, distributor and marketer of a range of non-alcoholic beverages such as carbonated soft drink, wholesale packaged water, bulk bottled water, fruit juice beverages, cordial, sports drinks, energy drinks and iced tea. It did not produce or supply fresh fruit juice and had less than 1% of the total national fruit juice and fruit drink sales. Berri manufactured and marketed fruit juice and fruit drinks. It also produced wholesale packaged water, sparkling mineral water, flavoured milk, cordial and water ice products. The merger was thus a conglomerate merger in beverages, with a focus on soft drink and juice, similar to the Coca Cola/Huiyuan juice merger.

The ACCC found that the relevant markets were the national markets for the manufacture and wholesale supply of carbonated soft drink, and the manufacture and wholesale supply of chilled and ambient fruit juice and fruit drink.[80] The SSNIP test, or hypothetical monopolist test, was used to confirm that carbonated drinks on the one hand, and fruit juice and fruit drink on the other, were not close substitutes and did not impose competitive constraints on one another. This meant that they were not in the same product market. Supply side substitutability was limited. At the wholesale level, the products were not substitutes but were complements. The markets were found to be national in scope because the products were advertised nationally, purchased nationally by major retailers, and the products competed nationally. The functional level was the manufacture and wholesale supply of the products. Non-grocery trade channels such as small grocery and convenience stores were particularly important in these markets because of their higher margins, so there was some focus on the effect of the proposal in those markets (supermarket chains carried lower margins for beverage manufacturers).

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[77] This was implemented in 2007 but has not been used as yet.

[78] *Trade Practices Act 1974* (cth.) s 95 AZH (1) (Austl.).

[79] *See ACCC assessment of Coca-Cola Amatil Limited's proposed acquisition of Berri Limited, ACCC* (Oct. 8 2003), http://www.accc.gov.au/content/index.phtml/itemId/866089.

[80] "Fruit juice" is 100% fruit juice made from fresh fruit, concentrate or a blend of both. "Fruit drink" is a fruit juice based drink with anything less than 100% juice and usually about 25% juice.

The merged firm would have 49% of the market for fruit juices and fruit drinks, which was above the threshold which the ACCC set in its Merger Guidelines for considering a merger.

CCA argued that there was limited overlap between the two parties to the merger in the supply of fruit juice and fruit drinks because they were in two different markets. However, the ACCC found that the acquisition would be likely to substantially lessen competition for the following reasons:

> The two beverage products (fruit juice and carbonated beverages) were complementary. From a retailer's perspective they were both part of a range of beverages that they need to carry to meet end-use demand; CCA possessed market power in the carbonated drinks market, due to its high brand loyalty-Coca Cola was a "must stock" brand and a "traffic builder";[81]
>
> CCA had an "unrivalled network of in-store refrigeration equipment" in non-grocery trade channels (small grocery and convenience stores) to distribute its products. CCA supplied these refrigerators to store owners to encourage particularly small stores to fill them with its products. If they were filled with Coca Cola products there was less room in the shop for the products of competitors. The supply of refrigerators could significantly affect the share of shelf space and product sales. In carbonated beverages CCA's overall market share was 67%, and this share was significantly higher in small stores;
>
> CCA would have the ability and incentive to leverage its market power in carbonated beverages to increase distribution of Berri fruit juice and fruit drink products to the exclusion of its rivals in small stores. The ACCC believed that the merged firm would have several means by which it could bundle or tie products to Coca Cola products, and foreclose competition, including the way in which it structured discounts, rebates and promotional offers;[82]
>
> small stores in particular would have a commercial incentive to bundle Berri's fruit juice and fruit drink products with CCA's existing portfolio;

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[81] "Traffic builders" are products which attract customers to stores and encourage sales of other products once the customers are there.

[82] This may occur by conduct which would not breach the Trade Practices Act.

> the merged firm could gain significant cost savings from the acquisition and in the absence of competitive restraints they were unlikely to be passed on to consumers. They could be used to entrench the bundled products. The combined effect of this would be to raise rival's costs;
>
> imports were unlikely to provide a competitive restraint in these markets, and the acquisition would be likely to substantially raise structural and strategic barriers to entry and expansion. A national scale entrant would require significant time and incur substantial costs in establishing a national distribution system;
>
> it was unlikely that customers of the merged firm would have any significant ability to by-pass the merged firm due to the brand strength of CCA and its use by retailers as a traffic builder. The proposed acquisition would give CCA greater leverage against grocery retailers in terms of shelf space for its other products, to the exclusion of competitors;
>
> it was unlikely that a competing bundle of beverages would be successful against the merged firm;
>
> the dynamic characteristics of the market were minimal growth and consolidation, with the current three leading firms in fruit beverages accounting for 70% of the market.

For these reasons the ACCC refused to clear the merger. This determination by the ACCC relied on theory relating to portfolio effects in a conglomerate merger situation. Both strategic and structural barriers to entry were identified, being access to distribution networks and refrigerator space in significant and high margin parts of the market, as well as brand loyalty. While several competitors offered a range of beverages, CCA had the leading "must stock" brands.[83]

Considering the announcement by MOFCOM and the supplementary reasons supplied in the Q & A of 25 March 2009 discussed previously, it is possible to see a number of similarities of approach between the two determinations. The Australian decision

[83] *See* Public Competition Assessment, ACCC (Oct. 8, 2003). http://www.accc.gov.au/content/index.phtml/itemId/866089 (A number of undertakings offered by CCA which would have prevented bundling and tying were considered insufficient by the ACCC to alleviate the anti-competitive detriment arising from the proposed merger, and too difficult to monitor given the large number of stores involved).

is significantly more detailed and the conclusions appear to be bolstered by a number of factors including the substantial investment by CCA in refrigeration equipment in small stores and the substantial strength of CCA's existing distribution network.[84]

VII. OTHER VIEWS ON COMPLEMENTARY CONGLOMERATE MERGERS

The OECD considered the issue of conglomerate mergers uniting complementary products in 2002.[85] Its report recognized that both pro and anti-competitive effects may arise where one of the parties to a conglomerate merger of complementary products enjoys significant market power. It concluded that conglomerate mergers in these circumstances could facilitate forced tying and pure bundling, thus restricting consumer choice. The OECD report noted that while this could initially increase economic welfare, it could also have a negative effect if it eliminated a number of competitors and their capacity.[86]

The report concluded that it was not possible to develop a simple checklist that would allow competition authorities to distinguish harmful from benign conglomerate mergers having portfolio effects. The probability that such a merger would reduce economic welfare is significant, however, if:

> "the parties enjoy considerable market power in the products being united;
>
> the united products are complements;
>
> the marginal costs of producing united complementary products are low; and

[84] The importance of this issue was emphasized in other clearance determinations of the ACCC, see Coca Cola v. Neverfail Spring Water Ltd (did not oppose) 11 June 2003; Coca Cola v. Peats Ridge (did not oppose) 26 June 2003, where the ACCC stated: "*However, given the strength of CCA in the route distribution channels generally, the ACCC will closely examine any future proposals by CCA to acquire other leverage businesses." The ACCC foreshadowed the outcome of the Berri transaction in its submission to the OECD report on Portfolio Effects in Conglomerate Mergers JT00119854, 24 January 2002 at p125. There it stated that it was examining the "… nature and effect of Coca Cola's exclusive dealing arrangements with non supermarket outlets, arrangements facilitated by the dominance in Australia of the Coca Cola brand. Access to a wider portfolio of complementary brands would enhance the likelihood of this type of behavior*..." (Austl.).

[85] OCED, Portfolio Effects in Conglomerate Mergers JT00119854 (Jan. 24, 2002).

[86] The OECD notes a number of factors which make it more likely that a reduction in welfare will occur, based in the main around the tying and bundling of the relevant products at p7-8.

> remaining competitors and new entrants are unlikely to be able to match any efficiencies and bundling advantages that the merging firm might reap."

Based on the more detailed considerations of the OECD report, it is clear that there are significant issues raised under this test by the facts of the Coca Cola/Huiyuan merger.

There is not, however, enough information contained in the MOFCOM determination to confirm that the correct decision was reached.

The reliance by MOFCOM on this Australian decision has been criticized by a number of commentators, although it has been described by one commentator in the following qualified terms:

> "Regardless of the actual motivations behind the decision, MOFCOM's stated grounds for blocking the transaction fall near-though not necessarily beyond-the outer boundaries of international antitrust practice. But because the public notice itself does not detail MOFCOM's actual findings and economic analysis, the rigour of MOFCOM's leveraging analysis remains in doubt."[87]

It is unclear from the MOFCOM determination, for example, whether the key Australian issues of entrenched distribution systems, reliance on sponsored refrigeration equipment in small grocery stores and convenience stores, propensity for bundling, and disparate margins are replicated in Chinese markets. There may be other characteristics of the Chinese market of equal importance to the outcome but this is not clear from the MOFCOM determination.

VIII. ENFORCEMENT OF AML

The enforcement of the AML is clearly as important as its content, and difficulties relating to the enforcement of laws in China generally are well known. It appears that there have been few enforcement actions by any of the three regulators charged with responsibility for the AML to date. Whether the AML will be enforced equally against both foreign and domestic corporations has been raised by a number of foreign commentators, particularly given the focus in the Chinese media about possible foreign domination in some industries. Concerns in China were encapsulated in a SAIC

[87] *See* Nathan Bush, C*hinese Competition Policy: It takes more than a law*, CHINA BUS. REV. , (May-Jun., 2005), www.chinabusinessreview.com/public/0505/bush.html, 13 Nov. 2007.

Report released in March 2004,[88] which suggested that many leading multinational corporations were exploiting their financial and technological advantages to "dominate markets, suppress competition and injure competitors and consumers." Several of the practices listed in the report would not have violated the competition laws of other countries.[89] In a recently reported example, however, the National Development and Reform Commission ("NARDC"), one of the AML regulators, found that domestic rice noodle manufacturers had engaged in a price cartel.[90] 18 producers were involved in the cartel and fines were imposed on both the organizers and the followers.[91] All of those involved were domestic companies. It appears that the slow start to AML enforcement has been occasioned by a number of factors and while it is common for regulators in new jurisdictions to take things slowly, approximately 20 months after the commencement of a new law one might expect more enforcement activity. It is encouraging that enforcement now seems to be underway.

Whether the AML will be enforced against SOEs and government bodies is another issue of interest to international business. Despite admissions by MOFCOM that SOEs are obliged to notify when their concentrations fall within the notification thresholds and many examples of the failure to comply with this obligation, there have been no prosecutions on this issue to date. MOFCOM has been particularly active in looking at concentrations notified to it, but does not appear to have been active in relation to concentrations above the notification threshold which have failed to notify. Penalties for breaches of the provisions relating to concentration are up to RMB 500,000, with the possibility of orders to cease the implementation of the concentration, orders to divest shares or assets or transfer businesses, and orders to take other measures to restore the market to its previous position following an illegal merger.[92] Further action by MOFCOM to ensure compliance with the AML at the notification level would add to its credibility as a regulator and would emphasize the importance of compliance with the legislation.

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[88] Competition-Restricting Behavior of Multinational Companies in China and Possible Countermeasures.

[89] *See* generally, *supra* note 87; see Wang Zhile, *Foreign Acquisition in China: Threat or Security?,* CHINA SECURITY Spring, 86, 98 (2007) for alternative view.

[90] *China Takes First Action against Price Cartel UnderNew Anti-Monopoly Law,* JONES DAY (Apr. 14, 2010), http://www.jonesday.com/antitrust-alert--china-takes-first-action-against-price-cartel-under-new-anti-monopoly-law-04-06-2010/.

[91] The report indicates that the participants breached both the AML and the Price Law.

[92] *See* Fanlongduan Fa (反垄断法) [Anti-monopoly Law] (promulgated by the Standing Comm. People's Cong., Aug. 30 2007, effective Aug. 1 2008) art. 48, 2007 STANDING COMM. NAT'L' PEOPLE'S CONG. GAZ. 68.

MOFCOM hosted a briefing on the second anniversary of the AML and a number of interesting facts were revealed. More than 140 merger notifications were filed between 2008 and June 2010, and 95% were approved unconditionally. State Owned Enterprises did not receive special treatment as all business operators are treated equally by MOFCOM. It was possible that more merger clearance applications had been received from foreign companies due to their financial strength, which more easily triggered the turnover notification thresholds.[93]

IX. CONCLUSIONS

It is clear from the above that significant progress has been made in MOFCOM's dealing with the AML merger provisions. Guidelines have been implemented and the treatment of situations in individual determinations appears to be developing and analysis to have become more sophisticated in a relatively short time. This will surely continue.

Market participants will only truly begin to develop a clear understanding of the way in which MOFCOM approaches issues of market definition and analysis of competitive impact with increased transparency of MOFCOM determinations, which will be significantly assisted by more detailed written outcomes. More written information will address certainty and also concerns raised from time to time about the quality of outcome in individual cases. It may focus criticism on MOFCOM in some cases, but this is inevitable and the position is the same in other jurisdictions. Assuming that MOFCOM's outcomes are solid and defensible transparency should encourage more constructive dialogue about individual decision making, and clarify overall policy going forward.

The industrial policy/competition policy debate is more problematic and one suspects that uncertainty in this area will continue for some time, given the extent of the planned and necessary reconstruction of the Chinese economy. Some further signposts about the relationship between these two important policy areas will appear time to time from clues such as the way in which the AML is applied to SOEs (or not), whether and how it is applied to other domestic entities, and the way in which the AML provisions outlined in this paper are applied in practice. It will take some time to determine the extent of the likely impact of the AML on markets in China and whether substantial efficiency benefits are likely to accrue to its consumers.

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[93] *See China Law Insight,* KING & WOOD (Aug. 13, 2010), http://www.chinalawinsight.com/2010/08/articles/antitrust-competition.