SUSTAINING THE STATUS QUO

THE USE OF CONDITIONS IN CHINESE MERGER CLEARANCE

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Abstract

This article investigates the role of conditions or remedies in Chinese merger approvals, drawing conclusions about their use and suitability. The article begins by mapping the changing approach to merger remedies by competition regulators in other major jurisdictions such as the EU, US and Australia. Key trends are noted, such as the decline of a clear preference for structural remedies by regulators and convergence around a proportionality doctrine. The article reviews the operation of the Anti-Monopoly Law (AML) and the more recent merger remedy guidelines (Provisions of the Ministry of Commerce on Imposing Additional Restrictive Conditions on the Concentration of Business Operators (for Trial Implementation)) in this context. Representative Ministry of Commerce (MOFCOM) merger approvals with conditions are examined. These indicate that MOFCOM prefers behavioural conditions which in some instances appear disproportionate or unrelated to the anticompetitive effects of a merger, and tend to maintain the status quo. The article emphasizes how potential reforms to MOFCOM's merger remedy guidelines and the conditions imposed by the regulator might better facilitate proportionate merger remedies, and the efficiencies sought by mergers. The article concludes by considering these issues in a case study of a hypothetical bank merger scenario, set against the background of a socialist market economy and the competitive dynamics of the Chinese banking sector.

I. INTRODUCTION

While there is no standard form for remedies in merger control,[1] the conditions imposed in merger approvals are generally characterized as being either structural or behavioural in nature, or are some combination of both. Structural conditions tend to be executed prior to completion of the merger transaction and generally involve

[1] For example, the OECD noted that Austria uses mainly behavioural remedies, while New Zealand imposes only structural remedies; Competition Committee (Directorate for Financial and Enterprise Affairs, Organisation for Economic Cooperation and Development), *Remedies in Merger Cases*, (30 July 2012, DAF/ COMP (2011) 13), 12.

some form of compulsory divestment or asset transfer.[2] Behavioural conditions "… allow the parties to integrate but then impose certain operating rules on their business behavior so as to prevent competition from being undermined or compromised."[3] In contrast to structural conditions, behavioural conditions continue to apply to the merged entity following completion of the transaction, involving some ongoing oversight and enforcement by the competition regulator.[4] In some mergers, regulators have applied a mix of structural and behavioural remedies, which some regulators refer to as hybrid conditions.[5] There is no international consensus regarding the circumstances in which a behavioural or structural remedy is to be preferred, although it has been found by the Organisation for Economic Co-operation and Development (**OECD**) that regulators tend "to use structural remedies for horizontal mergers and behavioural remedies for vertical mergers".[6] Competition issues are more likely to arise in horizontal mergers, than vertical mergers, leading to structural remedies being more commonly imposed by regulators.[7]

The Ministry of Commerce (**MOFCOM**) has had jurisdiction under Chinese antitrust law, the Anti-Monopoly Law (**AML**), since 2008 to impose conditional merger approvals when reviewing concentrations amongst undertakings operating in China.[8] The merger conditions so far imposed by MOFCOM have included structural, behavioural and hybrid remedies. While the more recent decisions of MOFCOM show an increasing level of sophistication in competition analysis, there has been criticism of the regulator in the past for imposing conditions that are too onerous and negate the

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[2] As noted by the OECD, "Structural remedies may include both the sale of a physical part of a business or the transfer or licensing of intellectual property rights. They can be imposed either as a condition precedent to a merger, or their completion may be required within a certain period from the approval of the merger." *See id*.

[3] J. E. Kwoka & D. L. Moss, *Behavioural merger remedies: evaluation and implications for antitrust enforcement*, (2012) 57(4) THE ANTITRUST BULLETIN 979, 982.

[4] As noted by the OECD, "Behavioural remedies, on the other hand, are always forward looking in that they consist of limits on future business behaviour or an obligation to perform a specific prescribed conduct for a given, sometimes considerable, period of time following the consummation of the merger. They often consist of non-discrimination obligations, firewall provisions or non-retaliation or transparency provisions or contracting limitations." *See* OECD, *supra* note 1, at 11.

[5] *See*, for example, *Glencore/Xstrata* [2013] MOFCOM No 20, 16 April 2013. In this merger, a combination of structural (for instance, divestment of the Las Bambas mine) and behavioural conditions (such as supply guarantees), were imposed.

[6] OECD, *supra* note 1, at 12.

[7] For example, the Australian Competition and Consumer Commission (ACCC) notes in their *Merger Guidelines* that unilateral effects (which occur where a merged entity may exercise market power post acquisition) are more likely to arise in horizontal mergers than vertical or conglomerate mergers; see Australian Competition and Consumer Commission, *Merger Guidelines*, (November 2008), 24.

[8] Fanlongduan Fa (反垄断法) [Anti-Monopoly Law], (promulgated by the Nat'l People's Cong. 2008), art 28, 29 (Chinalawinfo).

dynamic efficiencies to be achieved by the transaction.[9] This article seeks to investigate the basis for this assertion and determine whether there is a need for potential reform of either the AML or MOFCOM's merger remedy guidelines (*Provisions of the Ministry of Commerce on Imposing Additional Restrictive Conditions on the Concentration of Business Operators (for Trial Implementation)*) (**Provisions on Restrictive Conditions**) so as to better facilitate attainment of dynamic efficiencies from mergers.

This article investigates MOFCOM's approach to merger remedies beginning with an analysis of global trends, setting out the renewed emphasis amongst regulators on conditions addressing the specific competitive detriment of a merger, the increasing use of behavioural conditions, and the role of proportionality in merger control. The article then examines closely the structure of the AML and the Provisions on Restrictive Conditions, considering relevant provisions and issues impacting on the design of merger remedies in China, in the context of the political economy. An analysis of past conditional merger approvals of MOFCOM suggests remedies favour behavioural conditions as opposed to structural conditions. Some of these conditions appear somewhat disproportionate to the competition concerns posed by the transaction itself, or unrelated to them in any particular sense. The trend in a number of examples is to maintain the status quo of competitive dynamics. The article proffers potential reforms in light of these findings, before concluding with an analysis of potential merger remedies that could be employed in a Chinese bank merger, an important industry not yet subject to a conditional merger approval. The industry was chosen for its importance, both domestically and globally, to growth and stability. In sum, the article finds that while MOFCOM's conditional merger approvals show increasingly sophisticated analysis, the historic approach of the regulator, in imposing conditional merger approvals that favour behavioural conditions, appears, at times, to impose disproportionate remedies to the actual competition concerns occasioned by proposed transactions. The implications of this for the banking industry are potentially significant. This suggests there is scope for the regulator to subtly reform its merger remedy policy, particularly in light of the approaches adopted in other jurisdictions around the world.

II. THE BASIS FOR MERGER REMEDIES IN COMPETITION LAW

While the appropriateness and efficacy of merger remedies in competition law has long been studied, it is only recently that efforts

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9 *See e.g.*, D. Healey & C. Zhang, *Bank Mergers in China: What Role for Competition*, ASIAN J. OF COMPARATIVE L. (forthcoming), (2016).

towards a taxonomy of principles on which conditional merger approval should be based has emerged.[10] These efforts to produce a coherent theoretical matrix which justifies the imposition of merger remedies by competition regulators has contributed to the development of several key themes across academic literature. Firstly, that the particular form of a merger remedy, whether it be structural, behavioural or some hybrid imposing both structural and behavioural conditions, is a less valuable consideration than determining whether the remedy specifically addresses the identified competition concerns. [11] Secondly, policy convergence in assessing the effectiveness of a remedy to mitigate competition concerns in merger control has led to regulators being increasingly open to behavioural remedies, albeit with some differences in policy stance. Thirdly, when determining whether a merger remedy is fit-for-purpose, it is essential that merger remedies are proportionate to the competition concerns identified by regulators.[12] This article will canvas how these policy influences have impacted on approaches adopted by regulators to merger control in Europe (European Commission (**EC**)), the US (Department of Justice (**DOJ)**) and Australia (Australian Competition and Consumer Commission (**ACCC**)), compared with the approach of MOFCOM in China.

A. Addressing competition concerns through merger remedies

While it would appear axiomatic that the purpose of a merger remedy is to address competition concerns, the emergence of this principle of proportionality as a common feature of merger control is a relatively recent phenomenon across major competition regulators. For instance, it was observed as recently as 2003 that the EC's approach to merger remedies was to "restore or redesign competition with emphasis on dominance and barriers to entry", while the DOJ's approach was focused on "stopping…illegal behavior and preventing its recurrence". [13] The difference in these approaches to merger remedy design may appear an adventure in semantics, however the effect was real and significant. While the EC would take steps to stop offending conduct, prevent it from recurring, and restore competitive tension to a market when designing a merger remedy, historically it had been argued that enforcement practices in the US would be limited

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[10] I. LIANOS, COMPETITION LAW REMEDIES IN EUROPE: WHICH LIMITS FOR REMEDIAL DISCRETION?, (Centre for Law, Economics and Society Research Paper Series 2/2013, January 2013, University College London), 4; *See also*, E. T. Sullivan, *Antitrust remedies in the US and EU: advancing a standard of proportionality*, 48 THE ANTITRUST BULLETIN 377 (2003).
[11] W. Wang & M. Rudanko, *EU Merger Remedies and Competition Concerns: An Empirical Assessment*, 18(4) EURO. L. J. 555, at 562–63, (2012).
[12] *See* Lianos, *supra* note 10; *see also* Sullivan, *supra* note 10.
[13] Sullivan, *supra* note 10, at 378.

to stopping offending conduct and preventing it from recurring without introducing competitive tension to the market.[14] The difficulties with such an approach were noted by the European Court of Justice in the *Tetra-Laval* decision, where it was held that exploring the likely illegality of conduct is "too speculative" to be effective in merger control as quantifying the risk of an antitrust contravention does not lead to merger approvals and remedies being made based on the "economic scenario" that the regulator faces.[15]

In light of these shortcomings with exploring the potential illegality arising from competition concerns and as regulators across different jurisdictions have considered international approaches to merger remedies,[16] there has emerged a consensus that merger remedies must address the competition concerns posed rather than focus on stopping illegal practices or protecting individual competitors. This is noted by the stated purpose of merger remedies in the US being to "effectively preserve competition in the relevant market",[17] in Europe to "resolve competition concerns",[18] and in Australia "to adequately address the potential harm identified".[19] To this end, competition regulators in the US and Australia have disavowed the protection of individual competitors as a relevant consideration in merger control.[20] While the merger remedy guidelines of the European Commission note that the establishment of a viable competitor may be a relevant consideration in merger approval,[21] the European Court of Justice in *Tetra-Laval* established it is a criterion to be considered only in light of the 'economic scenario' the merger presents.[22]

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[14] Sullivan, *supra* note 10, at 420–21; C. A. James, *The Real Microsoft Case and Settlement,* 16 ANTITRUST 58, 60–61 (2001).

[15] *Commission v. Tetra-Laval,* Case C-12/03, P 2005 ECR I-987 at paragraph 77.

[16] For instance, the OECD hosted a summit on remedies in merger control in 2011 attended by major competition regulators; *See* OECD, *supra* note 1.

[17] Department of Justice, *Division Policy Guide to Merger Remedies*, (June 2011), at 1.

[18] Commission Regulation (EC) No 802/2004, OJ 2008/C 267/1, at paragraph 5.

[19] ACCC, *supra* note 7, at 62.

[20] For example, the DOJ merger remedy guidelines note that "the remedy should focus on preserving competition, not protecting individual competitors" and the Chairman of the ACCC has stated that "the argument that Australia needs national champions…is not borne out by experiences…[f]irms perform best when faced with competition"; *See* Department of Justice, *supra* note 18, at 2, and, Rod Sims, *ACCC: Future Directions*, 19 COMPETITION AND CONSUMER L. J. 79, 86 (2011). This is compared to the AML, per later discussion in this article.

[21] For example, the European Commission guidelines note that divestitures may be appropriate to facilitate "the strengthening of existing competitors" to provide competitive tension; Commission Regulation (EC) No 802/2004, OJ 2008/C 267/1, at paragraph 22.

[22] For example, the decision in *Tetra-Laval* established that the concentration posed risk of 'leveraging', while an earlier decision in *Gencor* had posed a risk of anticompetitive detriment due to the establishment of a duopoly. *See Commission v. Tetra-Laval,* Case C-12/03, P 2005 ECR I-987 at [80]–[84].

B. The rise of behavioural remedies in merger control

The effect of this shift in regulatory focus to one addressing competition concerns in merger control is that there has been a change in regulatory perspective regarding the type of merger remedies that regulators will accept. The EC, DOJ and ACCC are less bound by a binary preference for structural or behavioural remedies in horizontal or vertical mergers, with this shift reflected by these regulators amending guidelines to accommodate behavioural remedies.[23] This trend in merger control has been complemented by the increasing tendency by regulators in different jurisdictions to accept behavioural remedies in merger control, as the discussion of the following regulator behavior indicates.

1. Approach of the European Commission

The European Court of Justice in *Tetra-Laval* established that promises regarding future behavior, if bearing the potential to remove competitive detriment, should be considered by the Commission in conducting merger reviews.[24] As such, it is clearly established that the test of suitability of merger remedies need not be whether such conditions are permitted by Article 82 of the EC Treaty,[25] but rather whether such remedies resolve the competition concerns posed by a merger.[26] The Court of First Instance has gone so far as to note that the particular form of a merger remedy is 'immaterial', with preference being given to whether the proposed remedy addresses competition concerns.[27] While the EC retains a preference for structural remedies,[28] the effect of these judgments has been the EC becoming increasingly open to the adoption of behavioural remedies

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[23] The European Commission has adopted a stated policy that whether a remedy or type of remedy is suitable for removing a competition concern is to be examined depending on the circumstances of the case. *See* Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ 2008/C 267/1, at paragraph 16. This compares to the merger guidance of the DOJ in the US which favors divestitures in the event of horizontal mergers and prefers conduct remedies in vertical mergers, while acknowledging that some behavioural remedies are appropriate in vertical mergers; see Department of Justice, (n 17 above), at pages 4–5. In contrast, the ACCC prefers structural remedies and acknowledges that there is a place for behavioural remedies but that behavioural remedies alone will rarely be sufficient to address competition concerns; Australian Competition and Consumer Commission, *supra* note 8, at 63.

[24] See *Commission v. Tetra-Laval,* Case C-12/03, P 2005 ECR I-987 at [86]; for a discussion of the relevant principles arising from this decision, see A. Ezrachi, *Behavioural Remedies in EC Merger Control – Scope and Limitations*, 29(3) WORLD COMPETITION 459, 469–70 (2006).

[25] *Consolidated Version of the Treaty on the Functioning of the European Union,* art. 82, 2008 O.J. C 115/47.

[26] Case T-158/00, *ARD v. Commission*, (2004) 5 CMLR 14, [201].

[27] Case T-102/96, *Gencor v. Commission* [1999] ECR II-753, [319].

[28] As the EC notes "Commitments relating to the future behavior of the merged entity may be acceptable only exceptionally in very specific circumstances." Commission Regulation (EC) No. 802/2004, OJ 2008/C 267/1, at paragraph 17, *see also* paragraph 69.

in merger approval, along with the reform of merger guidelines to facilitate behavioural remedies. Examples of remedies imposed in transactions since these reforms, in which the EC has adopted behavioural remedies, include the access obligation conditions adopted in the *Intel/McAffee* merger,[29] and a commitment to supply being accepted in *T-Mobile UK/Orange UK*.[30] The EC has drafted provisions in the EC merger remedies notice to provide the means by which behavioural remedies can be given effect, for example, specific provisions govern access remedies and conditions imposed regarding the change of long term exclusive contracts in merger approval.[31]

2. United States: Department of Justice

The Antitrust Division of the DOJ has adopted behavioural remedies in conglomerate mergers (featuring both horizontal and vertical consolidation) and horizontal mergers in more recent years, with the merger remedies imposed in *Ticketmaster-Live Nation,*[32] *Comcast-NBCU*,[33] and *Google-ITA* all featuring behavioural conditions.[34] As has been discussed elsewhere,[35] the clearly more open approach of the DOJ to behavioural remedies in these three mergers led to reform of the Antitrust Division Policy Guide to Merger

[29] In *Intel/McAffee,* the Commission's investigation found that conglomerate concerns would be at risk of arising from the merger given the companies activity in neighbouring and complementary markets (Intel being involved in CPUs and chipsets, McAffee in software for internet security), with a risk of technical tying occurring and a lack of interoperability prevailing. To address this risk, Intel committed to access remedies including permitting competitors of McAffee to continue to run on Intel CPUs and have access to all necessary Intel technical information; *see* EC decision of 26 January 2011, case COMP/M.5984 *Intel/McAffee*.

[30] This merger was approved conditionally on the merger parties amending the existing network-sharing agreement with the smallest mobile network operator in the UK, Hutchison 3G, to provide continuity of that agreement. *See* EC decision of 1 March 2010, case COMP/M.5650, *T-Mobile/Orange*.

[31] Commission Regulation (EC) No 802/2004, OJ 2008/C 267/1, at [62]–[66] (access remedies), [67]–[68] (change of long term exclusive contracts).

[32] Both structural (divestiture of a venue-based ticketing service from the merged entity) and behavioural remedies (mandatory licensing of a ticketing platform to major venues, as well as specific access and firewall obligations regarding the vertical overlaps posed by the merger) were imposed to address competition concerns posed by the merger of the two merger parties, which had overlaps in concert promotion, ownership and operation of large concert venues, and, provision of ticketing services. *See United States v. Ticketmaster Entertainment Inc.* 75 Fed. Reg. 6,715, 6,717 (DOJ, 10 February 2010) (proposed final judgment).

[33] Behavioural conditions creating a nondiscrimination regime were imposed for a period of seven years in this merger which impacted the product market of video programming distribution; *see United States v. Comcast Corp.,* 76 Fed. Reg. 5459, 5461–64 at §§ IV–VI (DOJ 31 January 2011) (proposed final judgment).

[34] Behavioural conditions providing for a variety of commitments for a period of five years were adopted, these conditions included, amongst others, mandatory licensing, affirmative behavioural obligations, and prohibited behavioural conduct. *See United States v. Google Inc.,* 76 Fed. Reg/ 21,026, 21,028–29) (DOJ, 14 April 2011) (proposed final judgment).

[35] *See generally*, Kwoka & Moss, *supra* note 3.

Remedies in 2011.[36] Major reforms in this Policy Guide to the place of behavioural conditions include removal of any specific general endorsement of structural remedies in place of behavioural relief, with a clear place for behavioural remedies in vertical mergers now acknowledged,[37] on the basis that "[i]n certain factual circumstances, structural relief may be the best choice to preserve competition. In a different set of circumstances, behavioural relief may be the best choice."[38] Additionally, the revised Guide contains a separate and expanded section on behavioural remedies,[39] a new section on hybrid remedies,[40] and expands the range of behavioural remedies that the DOJ states it will consider.[41]

3. Australian Competition and Consumer Commission

Historically, the ACCC's treatment of behavioural conditions was one of general opposition to such remedies.[42] For instance, the proposed NAB acquisition of AXA in 2010 was disallowed in part due to the fact that "what initially appeared to be a structural remedy was in fact a quasi-behavioural remedy", with the proposed conditions having uncertain prospects of addressing the competition concerns posed by the merger.[43] While the ACCC remains ostensibly committed to structural remedies, it has accepted behavioural conditions as merger remedies in a number of high profile transactions in recent years,[44] reflecting that the regulator has "arguably become more likely to accept behavioural merger remedies".[45] The shift in the ACCC's policy setting, towards accepting behavioural conditions, may also be influenced by the considerations of the Australian Competition Tribunal in the first merger authorisation case brought

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[36] Department of Justice, *supra* note 17.
[37] Department of Justice, *supra* note 17, at 2; *cf.* Kwoka & Moss, *supra* note 3, at 983.
[38] Department of Justice, *supra* note 17, at 5; Kwoka & Moss, *supra* note 3.
[39] Department of Justice, *supra* note 17, at 12–17.
[40] Department of Justice, *supra* note 17, at 18.
[41] As Kwoka and Moss observe, the expanded range of remedies in the revised guide includes "possible use of mandatory licensing, antiretaliation, prohibitions on certain contracting practices, and arbitration requirements as part of nondiscrimination provisions". Kwoka & Moss, *supra* note 3, at 984.
[42] This attitude to behavioural remedies persists, for instance, the ACCC's Merger Guidelines notes that "[t]he ACCC has a strong preference for structural undertakings." ACCC, *supra* note 7, at 63. It was historically based on the reluctance of the regulator to police on-going behavioural conditions.
[43] OECD, *supra* note 1, at 293.
[44] For instance, Jones *et al.* note that behavioural conditions were adopted by the ACCC in the FOXTEL/Austar merger (conditions were imposed to prevent misuse of market power for a term of eight years), the Nestle acquisition of Pfizer Nutrition (conditions were imposed to require licensing of infant formula to a third party to create a viable competitor), and the joint Woolworths/Lowes acquisition of Danks Holdings Ltd (undertakings were accepted for supply to be maintained on terms no less favourable to existing terms). T. Jones, R. Lapresta & J. Qiu, *China's MOFCOM: Gaining in Confidence and Transparency*, 22 AUSTRALIAN J. OF COMPETITION AND CONSUMER L. 266, 268 (2014).
[45] *Id.* at 267.

under the *Competition and Consumer Act 2010* (Cth) and heard to completion.[46] In that decision, the Tribunal granted authorisation to AGL Energy Limited to acquire the assets of Macquarie Generation.[47] Generally, the Tribunal noted that merger analysis needs to consider actual past behaviour of an acquirer, rather than static industry factors.[48] This has particular implications for the use of behavioural remedies by merger parties, as the Tribunal specifically noted that "[i]t is behaviour that matters, not structure per se".[49] Given that non-structural factors which can be addressed by behavioural conditions, have been considered vital by the Tribunal in determining the competition concerns arising from a merger, the scope for behavioural conditions to be imposed in merger remedies appears set to expand in Australia.

The above discussion establishes that there is a clear and growing place for behavioural remedies in merger control in jurisdictions around the world, partly as a consequence of regulators' renewed focus on addressing the competition concerns posed by mergers. This concurs with a finding of the OECD that "there is a discernible move away from focusing on the type of remedy applied and towards its overall effectiveness".[50] However, as a result of the breakdown between structural or behavioural remedy preferences by competition regulators, there have instead emerged new principles against which merger remedies are assessed against, with a consideration of the proportionality of a proposed remedy being foremost among those principles.

C. Proportionality

There are a number of considerations against which competition regulators assess the suitability of proposed remedies in merger control, with a report by the International Competition Network (**ICN**) identifying these considerations as including the effectiveness of any remedy, the potential burdens and costs of any remedy, transparency

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[46] The merger authorisation process was introduced by the *Trade Practices Amendment Act (No. 1) 2006* (Cth) to provide merger parties with legal protection from court action by the ACCC if the merger parties were to complete a merger. Public benefit is a relevant consideration in authorisation proceedings. *See* Pt III Div 3 Subdiv C of the *Competition and Consumer Act 2010* (Cth).

[47] *Application for Authorisation of Macquarie Generation by AGL Energy Ltd* [2014] ACompT 1 (Mansfield J, G F Latta, Prof D K Round).

[48] For a discussion of the principles to be drawn from the authorisation of Macquarie Generation's acquisition of AGL Energy, *see* S. *Corones, Behaviour v. Structure: Tribunal's AGL Energy Merger Authorisation*, 42 AUSTRALIAN BUSINESS L. REV. 313 (2014).

[49] *Application for Authorisation of Macquarie Generation by AGL Energy Ltd* [2014] ACompT 1 at 77, [369].

[50] OECD, *supra* note 1, at 12.

and consistency, and, proportionality.[51] While, generally, these considerations are weighed by competition regulators in assessing the appropriateness of proposed remedies in merger control, in light of the convergence amongst jurisdictions on merger remedies addressing competition concerns, proportionality has been more explicitly adopted by competition regulators as a relevant consideration in merger remedy design.

Proportionality, generally, is defined as a principle that:

> "…measures adopted by public authorities should not exceed the limits of what is appropriate and necessary in order to attain legitimate objectives in the public interest; when there is a choice between several appropriate measures recourse should be made to the least onerous, and the disadvantages caused (to the individual) should not be disproportionate to the aims pursued."[52]

This broad principle of proportionality in merger remedy design has its origins in doctrines of natural justice. In each of the jurisdictions discussed earlier in this article, proportionality is an established principle relied upon in imposing sentences or penalties generally. For instance, the common law principle of proportionality that impacts the EC is a central principle of European Union law with origins in German law,[53] the US has a specific 'less restrictive alternative' doctrine that requires the appropriateness of a regulation or remedy to be assessed against the underlying harm,[54] and, proportionality is well established as a principle that applies to both civil,[55] and criminal penalties in Australia.[56]

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[51] ICN Merger Working Group: Analytical Framework Subgroup, *Merger Remedies Review Project*, (June 2005, Report for the Fourth ICN Annual Conference, Bonn, Germany), 3–5.

[52] NICHOLAS EMLIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW, (Kluwer Law International), 2 (1996).

[53] It has in fact been held under German law that even constitutional rules must conform to principles of natural law, such as proportionality, or risk attack. *See* Sullivan, *supra* note 10, 415–18.

[54] Proportionality is also a relevant consideration in criminal sentencing in the US, although is not necessarily a constitutional protection. *See* Sullivan, *supra* note 10, 418–19.

[55] For instance, in a significant decision regarding pecuniary penalties for contraventions of the *Corporations Act 2001* (Cth) in *Australian Securities and Investments Commission v. Adler* (2002) 42 ACSR 80, at 115–16, it was noted by Santow J that the penalty should 'be no greater than [wa]s necessary to achieve th[at] object', reflecting adoption of the principle of proportionality in a civil penalties context; *see also* Weinberg J, *Some Recent Developments in Corporate Regulation – ASIC from a Judicial Perspective,* (Paper presented to the Monash University Law School Commercial CPD Seminar Melbourne, 16 October 2013), 15.

[56] As was noted by the High Court in *Hoare v. The Queen* (1989) 167 CLR 348, at 354, where it was said that a "…basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime

Proportionality, specifically in relation to merger remedies imposed by competition regulators, was defined by the ICN as a principle that regulators "seek to implement the least burdensome remedy, or package of remedies, that will be fully effective in eliminating the specific competitive detriments expected from a merger".[57] It is this form of proportionality principle that now prevails in the merger remedy regulation of the EC, DOJ and ACCC. The EC merger regulation specifically limits the nature of the remedy to those which are "proportionate to the competition problem and entirely eliminate it",[58] the DOJ employs the phrase 'preserving competition' throughout its policy guide to incorporate notions of proportionality of merger conditions,[59] and the ACCC specifically notes, albeit in relation to structural remedies only, that such remedies are to focus upon "restoring or maintaining the level of competition prevailing before the acquisition",[60] with the language of restoration of competition being an indicia of proportionality in merger remedy design.[61] That the principle of proportionality is now so ubiquitous amongst competition law merger policy and regulations in different jurisdictions is due to the convergence amongst regulators on addressing the 'specific competitive detriment' posed by mergers. As regulators have broadly made addressing competition concerns the pre-eminent consideration in merger control, adopting the least burdensome remedy to address those concerns has become a foremost consideration in merger control, reflecting the the principle of proportionality in merger remedy design.[62]

However, there are difficulties in implementing a principle of proportionality in merger remedy design. For instance, while the EC merger regulation requires that remedies are both proportionate to and 'eliminate' the competition concerns posed by a merger, the European Court of Justice has held that merger parties should not be restricted to "proposing commitments aimed strictly at restoring the competition situation existing before the concentration", suggesting that remedies are not necessarily required to be proportionate to the competition concerns identified with the decision, instead giving emphasis to

considered in the light of its objective circumstances…". *See also Elias v. The Queen* (2013) 248 CLR 483 at 493 and *Veen v. The Queen [No 2]* (1988) 164 CLR 465.

[57] ICN Merger Working Group: Analytical Framework Subgroup, *supra* note 51, at 3.

[58] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004/L 24/1, at paragraph 30.

[59] For instance, note 2 of the DOJ's Policy makes clear that the phrase 'preserving competition' refers to DOJ policy that will "seek a remedy that will effectively restore competition to the relevant market;" Department of Justice, *supra* note 17, at 1.

[60] Australian Competition and Consumer Commission, *supra* note 7, at 63.

[61] *See* Wang & Rudanko, *supra* note 11, at 562.

[62] Sullivan, *supra* note 10, 421–25.

elimination of the competition concerns.[63] Similar issues arise in the US, for instance, a key criticism of the DOJ's settlement of the *Microsoft* proceeding was that it did not "restore opportunities for competitive choice already lost to the American consumer",[64] with the decision instead focusing on stopping offending conduct. Nonetheless, ostensibly, proportionality remains a relevant consideration in addressing the 'specific competitive detriment' of proposed mergers.

It is against this background of global trends, where remedies are specifically designed to address competition concerns, where there is greater willingness by regulators to accept bespoke, behavioural remedies that specifically address competition concerns, and there is convergence amongst regulators on a proportionality principle in merger remedy design, that this article considers the appropriateness of merger remedies applied by MOFCOM in China.

III. MERGER ANALYSIS UNDER THE AML

The AML prohibits mergers and acquisitions that will have a likely anticompetitive impact on the market.[65] Under this law, MOFCOM has made determinations on more than thirteen hundred merger proposals up until 31 December 2015. [66] Most proposals have been cleared but two proposals have been rejected outright and a relatively small number (twenty six) have been cleared with conditions.[67] Public written determinations are only issued where clearance is refused or

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[63] Case T-282/02, *Cementbouw Handel & Industrie BV v. Commission*, [2006] ECR II-319, [307]–[308]. *See also* Lianos, *supra* note 10, at 48–50.

[64] T. F. Bresnahan, *A Remedy That Falls Short of Restoring Competition,* 16 ANTITRUST 67, 70 (2001). *See United States v. Microsoft Corp*., (No. 98-1232, filed 18 May 1998).

[65] The AML refers to "concentrations of undertakings" rather than mergers or acquisitions, but for simplicity "merger" is used throughout this report, *see* Fanlongduan Fa (反垄断法) [Anti-Monopoly Law], art 28; Further, since the commencement of the AML in 2008, MOFCOM has issued guidelines to indicate its approach to merger regulation, some of the relevant guidelines which have been issued by MOFCOM in relation to mergers are: Jingyingzhe Jizhong Shenbao Banfa (经营者集中申报办法) [Rules for Review of Concentration of Undertakings] (People's Republic of China), MOFCOM, 24 November 2009; Guanyu Pinggu Jingyingzhe Jizhong Jingzheng Yingxiang de Zanxing Guiding (关于评估经营者集中竞争影响的暂行规定) [Interim Provisions for the Assessment of the Effects of Concentrations of Undertakings on Competition], (People's Republic of China), MOFCOM, 29 August 2011; Guanyu Jingyingzhe Jizhong Fujia Xianzhixing Tiaojian de Guiding (关于经营者集中附加限制性条件的规定) [Provisions on the Imposition of Restrictive Conditions on Concentrations of Undertakings], (People's Republic of China), MOFCOM, 4 December 2014.

[66] *See* Y. Y. Sobel, *Domestic to Domestic Transactions (2014–2015): A Narrowing Gap in China's Merger Control Regime*, ANTITRUST SOURCE, available at http://www.antitrustsource.com (last visited Dec. 5, 2017), at 3 (2016).

[67] The two proposed transactions blocked by MOFCOM were: *Coca Cola/Huiyuan Juice* [2009] MOFCOM No 22, 18 March 2009 and *Maersk, MSC and CMA CGM* [2014] MOFCOM No 46, 20 June 2014. *See also* Y. Li, *PaRR Statistics: MOFCOM conditional clearances average 199 review days*, (17 December 2015), *PARR* NET.

conditions imposed on a merger. This means only a small number of written determinations are available, however trends in MOFCOM's approach to merger analysis can be discerned.

A. Industrial policy and the AML

The enactment of the AML raised threshold questions about the way competition law would operate in the context of China's socialist market economy with its well-developed industrial policy. The current provisions of the AML expose this tension, for example, the objects and Article 7 of the AML emphasize the role of industrial policy, [68] and MOFCOM is unlikely to depart from this agenda anytime soon, particularly given its position as a developing economy which must carefully balance the equation between economic growth and stability.

The AML has objects which include the development of the socialist market economy , and the State retains the right to exempt certain sectors from competition assessment by specific laws which take precedence over the AML, and which may not necessarily contain industry-specific competition provisions. [69] The AML also contains a number of industrial policy considerations in the context of its various prohibitions. Two implications are drawn from this that may be advanced as major factors in the MOFCOM approach to merger consideration and the nature of conditions it imposes. Firstly, that industrial policy considerations, such as the effect of the proposed concentration on the national economy, consumers and other relevant businesses, are specifically mandated for inclusion as review factors in the merger provisions, provides MOFCOM with considerable legitimate statutory discretion as to how it determines individual notifications. Clearly industrial policy concerns at either a macroeconomic or microeconomic level may be relevant to these decisions given the form of the AML. Secondly, the traditional command and control nature of the economy is likely to be influential in the approach of MOFCOM to formulating the merger conditions themselves: in an economy where government authorities have traditionally made rules about the way industries and individual businesses will be conducted, it is likely to be a small step when

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[68] Article 7 of the AML notes that "the State shall protect the legitimate business activities of the undertakings" in industries dominated by SOEs that have "a direct bearing on national economic well-being and national security", while also recognising an on-going role for the State in price setting. It has been suggested that this provision reconciles antitrust law and industrial policy for the purposes of the AML, with it suggested that the administrative monopoly provisions of the AML keep industrial policy in check; *see* M. Yanbei, *The Uneasy Relationship between Antitrust Enforcement and Industry-Specific Regulation in China*, in ADRIAN EMCH AND DAVID STALLIBRASS (eds), CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS, (Kluwer Law International, 2013) 259, 265.

[69] Fanlongduan Fa (反垄断法) [Anti-Monopoly Law], art. 51.

imposing conditions to develop proscriptive details about how the particular market will be run following a merger.

In this context, MOFCOM has reportedly stated:

> "The reason why people see shadows of industrial policies in the remedies imposed by MOFCOM is because remedies which aim to solve competition concerns can ease industrial problems at the same time."[70]

Published MOFCOM determinations suggest that industrial policy factors are an important feature of decision-making, and in some cases trigger public merger analysis. In some examples, competition issues appear to play little part. The extent to which this approach is reflected in approvals (where there are no written determinations) is unclear but there is no reason to suspect that the approach of MOFCOM would be different in that context. This differs from other jurisdictions considered above, such as Australia, where addressing competition concerns is generally the sole consideration in merger remedy analysis and a weighing of other issues, such as national economic development, may be undertaken in a more restricted parallel processes.[71]

The outcome of this, however, is that focus by MOFCOM on industrial policy considerations risks displacing its consideration of competition concerns in determining appropriate merger outcomes and conditions. For instance, Article 29 of the AML provides that MOFCOM may "attach restrictive conditions for reducing the negative impact of such concentration on competition". While a literal interpretation of this provision would suggest that any merger remedy would primarily be focused on addressing competition concerns, the pre-eminence of industrial policy considerations under the AML suggests that the 'negative impact' which restrictive conditions are to address may also include aspects of national economic development. Further, the absence of proportionality limits on merger remedies

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[70] Reported comments of Mr. Shang Ming, Chief Executive of MOFCOM, at ABA Antitrust in Asia Conference in Beijing 21–23 May 2014, set out in Lisa Zhu, *PaRR Special Report: ABA Antitrust in Asia*, (12 June 2014), *available at* http://www.parr-global.com/%3Fp%3D1264 (last visited Oct. 26 2015), 22.

[71] An example of these parallel processes is seen in Australia where the ACCC's sole focus remains on competition issues, with issues such as national economic development considered by other regulators and the elected Government. This division in regulatory responsibility is evident in mergers which are blocked on grounds akin to national economic development, for example, the blocking of the proposed acquisition of ASX Limited (ASX) by Singapore Exchange Limited (SGX) under the Foreign Investment rules; *see* ACCC, *ACCC clears proposed acquisition of ASX by Singapore Exchange*, (Media Release, 15 December 2010, NR 268/10); and, The Treasury, *Foreign Investment Decision*, (Press Release, 8 April 2011, No. 030).

under the AML, as will be developed in the analysis of merger approvals which follows, allows remedies to be imposed by MOFCOM which appear disproportionate to the specific competitive detriment of mergers.

IV. MOFCOM'S IMPOSITION OF CONDITIONS IN MERGERS

In China, MOFCOM exercises jurisdiction under Articles 28 and 29 of the AML to impose remedies in mergers. The procedure is prescribed by the Provisions on Restrictive Conditions, which took effect relatively recently in January 2015.[72] Under Article 3 of the Provisions on Restrictive Conditions, MOFCOM has three types of remedies at its discretion: behavioural conditions, structural conditions and hybrid conditions, which comprise both behavioural and structural conditions.[73] Generally, MOFCOM prefers to impose behavioural remedies that constrain the future conduct of market participants. This is noted as at December 2015, of MOFCOM's 26 conditional merger determinations, 16 conditional approvals involved behavioural conditions, 6 approvals involved hybrid conditions involving behavioural and structural remedies, and just 4 approvals involved only structural conditions.[74] While other competition regulators, such as the EC, DOJ and ACCC, have become more open to the use of behavioural conditions in recent years, as evidenced by the earlier discussion, the degree of MOFCOM's preference to adopt behavioural conditions in merger remedies distinguishes the approach of the regulator from those in other jurisdictions.[75]

The Provisions on Restrictive Conditions set out prescriptive criteria for the imposition of structural conditions. In order for structural remedies to be imposed by MOFCOM, the buyer must:

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[72] *Provisions of the Ministry of Commerce on Imposing Additional Restrictive Conditions on the Concentration of Business Operators (for Trial Implementation) 2015*, (People's Republic of China), MOFCOM Announcement [2014] No. 6, promulgated 4 December 2014, commencement 5 January 2015. It is to be noted that most of the examples referred to later in this article were decided prior to this document taking effect, however a draft of the Provisions on Restrictive Conditions was released in March 2013, suggesting MOFCOM may have had regard to these provisions in its decision making since that time.

[73] Article 3 of the Provisions of Restrictive Conditions prescribes that structural conditions can include divestiture of tangible or intangible assets and relevant rights or interests. While specific behavioural conditions can include making infrastructure available to the public, licensing key technologies and terminating exclusive agreements; *Provisions of the Ministry of Commerce on Imposing Additional Restrictive Conditions on the Concentration of Business Operators (for Trial Implementation) 2015*, (People's Republic of China), MOFCOM, Announcement [2014] No. 6, art. 3.

[74] *See*Yan Li, *PaRR Statistics: MOFCOM conditional clearances average 199 review days*, (Dec. 17, 2015), *PARR* NET.

[75] *See*, for instance, the empirical study of Wang and Rudanko which found that transfer commitments, a form of structural remedy, were adopted in 59% of EC merger approvals in the period between 1990 and 2008; Wang & Rudanko, *supra* note 11, at 571.

- be independent of the merging parties;
- possess resources, capabilities and willingness necessary to participate in the market;
- have obtained any necessary regulatory approvals;
- not purchase the divestiture using debt financing obtained from the merging parties; and
- comply with any other requirements specified by MOFCOM.[76]

Additional criteria are imposed by MOFCOM in relation to the use of 'fix-it-first' or 'upfront buyer' structural remedies. This type of remedy is imposed, pursuant to Article 14 of the Provisions on Restrictive Conditions, when divestiture is required before a merger is completed. In these circumstances, MOFCOM may require the divestment obligor to find a potential buyer and sign the sale and purchase agreement before the merger is executed or before the publication of merger review decision. Additionally, MOFCOM may require that alternative structural remedies are provided by the parties in their application for clearance, under a provision that has become known as the Crown Jewel rule.[77] These alternative remedies will be relied on where the first choice of remedy is insufficient to resolve MOFCOM's competition concerns. In these circumstances, the alternative remedies will be more stringent than those originally proposed by the parties, or relate to different assets.[78]

The requirements for binding structural conditions imposed by MOFCOM are to be contrasted with the relative freedom with which parties can propose behavioural conditions to MOFCOM. The Provisions on Restrictive Conditions do not particularly touch on the circumstances in which behavioural conditions may be imposed, only requiring that behavioural conditions "shall comply with existing regulations applicable to structural conditions".[79] Conditions that did restrict the imposition of behavioural conditions in the draft Provisions

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[76] *Provisions of the Ministry of Commerce on Imposing Additional Restrictive Conditions on the Concentration of Business Operators (for Trial Implementation) 2015*, (People's Republic of China), MOFCOM Announcement [2014] No. 6, art. 11.

[77] *Provisions of the Ministry of Commerce on Imposing Additional Restrictive Conditions on the Concentration of Business Operators (for Trial Implementation) 2015*, (People's Republic of China), MOFCOM Announcement [2014] No. 6, art. 7; *see* S. Ning, H. Yin, A. Wu, S. Eder & L. Wei, *Developments to the Merger Control Regime in China: MOFCOM's Provisions on Imposing Additional Restrictive Conditions on Concentrations of Business Operators* (for Trial Implementation), (17 April 2015), *China Law Insight (King & Wood Mallesons), available at* <http://www.chinalawinsight.com/2015/04/articles/corporate/antitrust-competition/developments-to-the-merger-control-regime-in-china-mofcoms-provisions-on-imposing-additional-restrictive-conditions-on-concentrations-of-business-operators-for-trial-implementation/>.

[78] *Provisions of the Ministry of Commerce on Imposing Additional Restrictive Conditions on the Concentration of Business Operators (for Trial Implementation) 2015*, (People's Republic of China), MOFCOM Announcement [2014] No. 6, art. 7.

[79] *See* Ning, Yin, Wu, Eder & Wei, *supra* note 77.

on Restrictive Conditions, such as the requirement that MOFCOM specify a time period to which the behavioural conditions would apply, or a time period of ten years would be assumed, were deleted from the final published version.[80]

In light of the earlier discussion of the role of competition and proportionality in merger remedies policies and regulations of the EC, DOJ and ACCC, there are two key observations to draw from the Provisions on Restrictive Conditions. Firstly, that there is language of proportionality adopted by MOFCOM in Article 1, where it is said that remedies should focus upon "alleviating the adverse impact of concentration on competition". This language is akin to the language of restoration of competition, being an indicia of proportionality in merger remedy design, as adopted by the EC, DOJ and ACCC.[81] Secondly, Article 1 places equal emphasis on the role of merger remedies in "safeguarding the legitimate rights and interests of relevant business operators". The effect of the latter half of Article 1 is that MOFCOM's analysis of prospective merger remedies is not limited to the impact of the proposed merger on competition concerns but extends to protecting the interests of competitors. While this is a relevant consideration adopted by the EC in some instances, as will be seen in the analysis of MOFCOM decisions that follows, it can lead to displacement of legitimate competition analysis and the adoption of disproportionate merger remedies in some instances.

This effect of the Provisions on Restrictive Conditions is that there is arguably greater flexibility for merging parties to propose behavioural conditions than structural conditions. While there are other jurisdictions around the world that favour structural conditions for resolving competition concerns, this approach has not yet been adopted by MOFCOM. The discussion of MOFCOM merger decisions that follows illustrates how the less rigorous procedural access to behavioural conditions, as compared to structural conditions, impacts on the merger conditions imposed.

V. PAST CONDITIONAL MOFCOM MERGER APPROVALS

The effect of industrial policy and MOFCOM's willingness to impose detailed behavioural conditions is seen in a small but significant number of merger determinations in a number of sensitive industries. Conditional merger approvals in some cases suggest a willingness by MOFCOM to seek to maintain the status quo in relation

[80] This requirement for a ten-year time limit was imposed by Article 13 of the Draft Rules; see *Notice of the Ministry of Commerce on Soliciting Public Opinions on the "Provisions on Imposing Additional Restrictive Conditions on the Concentration of Business Operators (Draft for Comments)",* (Ministry of Commerce, 27 March 2013).

[81] *See* Wang & Rudanko, *supra* note 11, at 562.

to pricing and supply of products, facilitating industrial policy objectives while also allowing a merger to proceed. Past decisions show that the form of behavioural conditions can be varied and expansive in strategically important or sensitive industries, with such conditions designed to preserve pricing and supply arrangements for Chinese firms and consumers.

An example of behavioural conditions designed to preserve access and pricing arrangements in sensitive industries is the imposition of conditions mandating on-going licensing arrangements to maintain industry status quo post-merger. This remedy was used in the vertical acquisition of Motorola Mobility by Google.[82] In a technology market important to China, Google made smart terminal operating systems (its widely used Android system) and Motorola Mobility made smart mobile terminals. MOFCOM found that the market for smart terminal operating systems was concentrated, with Google's Android having almost 74% of the market in China and just two other smaller firms (Nokia and Apple) competing for the remaining market share. MOFCOM concluded that Android had a dominant position in the market because smart mobile terminals were heavily reliant on smart operating systems.[83] MOFCOM expected that this strong market position, achieved mainly on a free and open source model, would be maintained over a long period of time as switching costs were high and any change to the model would adversely impact downstream parties. MOFCOM feared that post-acquisition Google would have incentive to favour its subsidiary in future product trials with an adverse competitive impact. MOFCOM thus imposed behavioural conditions requiring:

- the five-year licensing of Android on a free and open source basis to other equipment manufacturers;
- all original equipment manufacturers to be treated on a non-discriminatory basis; and
- compliance with Motorola's existing obligations to license its patents on fair, reasonable and non-discriminatory (FRAND) terms.

The key distinction between MOFCOM and other regulators was the characterisation of Google's incentive to maintain supply of Android on fair terms to third party equipment manufacturers, as US, EU and Australian regulators relied on Google's representations that it would allow on-going FRAND use of its standard essential patents

[82] *Google/Motorola* [2012] MOFCOM No.25, 19 May 2012.
[83] Additionally, MOFCOM considered that Google had a very strong financial position and technical development capabilities.

by competitors.[84] Technology markets are a sensitive industry under industrial policy and as China is a major player in mobile phones, considerations of national economic development and industrial policy may have displaced pure competition concerns in designing the behavioural conditions imposed.[85]

Similarly, in the horizontal Seagate/Samsung merger in 2012, MOFCOM was the only regulator globally to find an anticompetitive impact and impose onerous behavioural conditions.[86] MOFCOM found that the merger would negatively impact consumers in China by removing an important competitor from the hard disk drive (**HDD**) market, undermining the competitive effect of purchasing patterns and increasing the possibility of coordinated effects. MOFCOM imposed behavioural conditions requiring Seagate to keep the Samsung business independent for at least a year. Seagate also agreed to expand Samsung's production capacity within six months; to maintain normal research and development investments (at $800 million annually for the following three years); and not to force any exclusive arrangements upon its customers or suppliers. These substantial behavioural conditions significantly impacted on the ability of the merging companies to take advantage of anticipated efficiencies. Again, the merger took place in a sensitive industry with behavioural conditions aimed at retaining pre-merger market dynamics to improve the position of business and consumers. In contrast, Australia, the Federal Trade Commission in the USA and the EC allowed the Seagate/Samsung merger without conditions on the basis that the transaction was not likely to impact competition,[87] particularly in the

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[84] *See*, for example, the United States Department of Justice, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisition of Certain Patents by Apple Inc., Microsoft Corp., (Press Release, 13 February 2012); Australian Competition & Consumer Commission, "Google Inc – proposed acquisition of Motorola Mobility Holdings Inc.," (Public Competition Assessment, R46736, 21 February 2012); and, European Commission, 'Mergers: Commission approves acquisition of Motorola Mobility by Google' (Press Release, 13 February 2012). Other examples are *Mitsubishi Rayon/Lucite* [2009] MOFCOM No 28, 24 April 2009 and *GM/Delphi* [2009] MOFCOM No 76, 28 September 2009, both discussed in Deborah Healey, *Strange Bedfellows or Soulmates: Merger Regulation in China and Australia Compared*, 7(1) *Asian Journal of Comparative Law* 1, 35 (2012).

[85] A similar approach was adopted in the more recent Microsoft/Nokia conditional approval; see *Microsoft/Nokia* [2014] MOFCOM No 24, 8 April 2014. *See also* Nokia/Alcatel-Lucent [2015] MOFCOM No 44, 19 October 2015

[86] *Seagate Technology PLC/Samsung Technology PLC* [2011] MOFCOM No 90, 12 December 2011.

[87] Australian Competition & Consumer Commission, 'Seagate Technology PLC – proposed acquisition of the hard disk drive business of Samsung Electronics Co Ltd', (Public Competition Assessment, R46180, 13 December 2011). Federal Trade Commission, Statement of the Federal Trade Commission Concerning Western Digital Corporation/Viviti Technologies Ltd. And Seagate Technology LLC/Hard Disk Drive Assets of Samsung Electronics Co. Ltd, (9 May 2013), available at: https://www.ftc.gov/enforcement/cases-proceedings/1110122/western-digital-matter; European Commission, "Mergers: Commission clears proposed acquisition of Samsung's hard disk drive business

context of an increased likelihood of co-ordination, as Samsung was not considered 'a meaningful constraint on pricing in a desktop HDD market.[88] This preference for structural remedies was despite those regulators noting similar issues to those found by MOFCOM relating to competitive impacts in similarly defined markets. MOFCOM revised these behavioural conditions in late 2015 in light of increasing competitive constraints from solid-state disks, increasing surplus production capacity in the HDD industry and limited overlap between the merger parties existing.[89] Due to these competitive considerations, MOFCOM removed:

- the hold separate requirements of its initial order, including the prohibitions on integrating sales forces; and
- the requirement for Seagate to maintain production capacity and set "reasonable" production targets based on market supply and demand, and report such targets to a monitoring trustee monthly.

However, as Seagate remained a key HDD player,[90] MOFCOM chose to leave in place other behavioural conditions prohibiting Seagate from: materially changing its business model, requiring customers to purchase hard disk drives exclusively from the company, or limiting supply of an input to rivals. Additionally, MOFCOM continued to require that Seagate maintain recent levels of investment in innovation. However, there was some pragmatism shown by MOFCOM as a two-year time limit was placed on these conditions, which initially had no deadline.

The merger between Japanese trading house Marubeni and US grain merchant Gavilon is another example of an international merger where other regulators did not intervene, and MOFCOM imposed behavioural conditions to keep businesses strictly separate post-merger through subsidiaries. [91] MOFCOM imposed conditions

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by Seagate Technology", (Press Release, IP/11/1213, 19 October 2011), see also Commission Decision, Case No COMP/M.6214, *Seagate/ HDD Business of Samsung*, 19 October 2011.

[88] Federal Trade Commission, *id*.

[89] *Announcement on Changing Restrictive Conditions on the Concentration of Business Operators Concerning the Acquisition of the Hard Disk Drive Business of Samsung Electronics Co., Ltd. by Seagate Technology Co., Ltd.* [2015] MOFCOM No 43, 20 October 2015. At the same time as announcing these changed conditions, MOFCOM also varied the behavioural conditions imposed in the WDC/Hitachi merger, however in that merger, MOFCOM chose to leave many of the conditions in place; see *Announcement on Changing the Restrictive Conditions on Concentration of Business Operators Concerning Acquisition of Hitachi Storage by Western Digital Corporation* [2015] MOFCOM No 41, 20 October 2015.

[90] Seagate held approximately 30% share across all hard disk drive segments and 40% of hard disk drives for certain applications; see *Announcement on Changing Restrictive Conditions on the Concentration of Business Operators Concerning the Acquisition of the Hard Disk Drive Business of Samsung Electronics Co., Ltd. by Seagate Technology Co., Ltd.* [2015] MOFCOM No 43, 23 October 2015.

[91] *Marubeni/Gavilon* [2013] MOFCOM No 22, 22 April 2013. This merger was against the background of significant pressure on local soybean suppliers by imports. *See also MediaTek Inc/MStar*

following a finding of high barriers to entry and a lack of countervailing market power.[92] Despite the very low market share of the merged entity (below 20%) in relevant markets, MOFCOM imposed behavioural conditions which required the merged entity to maintain and operate two China soybean import and distribution businesses through subsidiaries of the merging parties, separate and independent in all respects, including keeping assets, information exchanges and business deals at arms' length, for at least 24 months. The focus of these behavioural conditions is on maintaining the status quo for Chinese soybean purchasers, who were not in a strong position.[93] MOFCOM's enforcement of behavioural conditions occurred despite the relatively small combined market share of the merger parties with the merged entity having shares of 6%, 4.5% and 8.4% in the markets for corn, soybean meal and dried distillers' grains,[94] and was in the context of China's concern for security of supply of a staple food product.[95]

Behavioural conditions imposing substantial limitations on the integration of the acquired entity also occurred in the acquisition of majority control of Newheight Holdings,[96] a Chinese company, by Walmart. MOFCOM was concerned that Walmart would leverage its competitive advantage in the bricks and mortar supermarket business into the online retail business, materially strengthening its market power in the online sector. It was also concerned that the merged entity would rapidly expand its business in value added telecommunications,

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Semiconductor Inc. (Cayman) [2013] MOFCOM No 61, 6 August 2013. There the market shares of the parties were large but the conditions required that the LCD Master TV chip business of MStar be conducted by a Taiwanese subsidiary for at least three years, and other onerous conditions relating to separation of that business. The time limit may have been related to the changing nature of the market.

[92] China's soybean crushers were mainly small enterprises with weak bargaining power.

[93] *Marubeni/Gavilon* [2013] MOFCOM No 22, 22 April 2013.

[94] In contrast, other jurisdictions, specifically the EU and US, did not intervene due to low market shares, as Mayer Brown noted "The US Federal Trade Commission gave the go ahead to Marubeni/Gavilon in November 2012 with an early termination of its review, while the European Commission cleared the deal under its simplified procedure back in August 2012." *See Marubeni/Gavilon* [2013] MOFCOM No 22, 22 April 2013; and, H. Ha, J. Hickin and P. Monaghan, "MOFCOM Conditionally Approves Marubeni/Gavilon: Competition Law and Industrial Policy in the Agricultural Sector", (8 May 2013), *Mayer Brown* (online), <https://www.mayerbrown.com/files/Publication/72a6c518-ad19-4e74-9b18-569f8d253642/Presentation/PublicationAttachment/645e4e9e-cd81-4ee8-8eaf-5d7ae0a33f02/130508-PRC-AntitrustCompetition-MA.pdf>.

[95] Xi Jinping said in November 2013 that food safety is and will always be one of the Government's top priorities. He said China must be able to guarantee the food supply of its 1.3 billion people because 'history has shown that even a huge fortune is of no use if a famine hits us': Z Lei, "Move on reforms, but not rashly, Xi says," (29 November 2013), *China Daily*, <http://usa.chinadaily.com.cn/china/2013-11/29/content_17139905.htm>.

[96] Newheight Holdings was the owner of Yihaodian, the largest online supermarket in China offering more than 100,000 different goods. Yihaodian was also involved in value added telecommunications services, offering online trading platforms to other online retailers; *Newheight/Yihoadian* MOFCOM No.49 of 2012, 13 August 2012.

which would materially strengthen its market power against network platform users in that sector. MOFCOM allowed the merger on the basis of strict behavioural conditions which provided that:

- the business of Newheight was conducted through the Yihaodian website alone;
- Newheight would not use its network platform to provide internet services to other transaction parties for value added telecommunications services without obtaining approval; and
- Walmart was prohibited from using a variable interest structure to carry out value added telecommunications business through Yihaodian.

The effect of these behavioural conditions is the ring-fencing of the business of Yihaodian from that of Walmart following the merger for an unlimited time, such consequences diminishing both the economic rational of the transaction and the dynamic efficiencies that might be realised from the consolidation. This is problematic as such an outcome could in fact diminish consumer welfare and is another example of onerous behavioural conditions in a sensitive industry being imposed, suggesting that not only were competition considerations weighed but that industrial policy considerations were involved.

In another international merger, Glencore acquired Xstrata,[97] both major international organizations in the minerals markets. MOFCOM focused on markets in China for copper concentrate, zinc concentrate, and lead concentrate, where the parties had overlapping activities and market shares of 9.3%, 17.9% and 7.6% respectively. These are market shares that a Commissioner of the Federal Trade Commission noted, are "concentration levels…below what would normally be seen as a potential problem under conventional antitrust analysis".[98] However, MOFCOM determined that the global supply of the minerals in question had a substantial impact on markets in China, as China was the largest market for Glencore mining products and an important buyer of Xstrata's products. MOFCOM found that the merger was likely to have the effect of limiting or restricting competition in the markets for copper, zinc and lead concentrate. MOFCOM imposed sweeping structural and behavioural conditions on the transaction. Glencore was required to commit to significant

[97] *Glencore/Xstrata* [2013] MOFCOM No 20, 16 April 2013.
[98] M K. Ohlhausen, "Antitrust Enforcement in China – What Next?", (Speech to the Second Annual GCR Live Conference, New York, 16 September 2014), *available at* https://www.ftc.gov/system/files/documents/public_statements/582501/140915gcrlive.pdf.

structural conditions including divestment of a large mining project.[99] The behavioural conditions included:

- guaranteeing supply of specified quantities of copper concentrate to China under an annual contract for the next eight years;[100] and
- providing long-term contracts to customers in China on fair and reasonable terms for zinc concentrate and lead concentrate.

In contrast, the merger was cleared in Australia,[101] and the US without conditions; [102] while a combination of structural and behavioural conditions on zinc alone were imposed in the EU.[103] The outcome is notable for the finding of anticompetitive impact where market shares were very low, an apparently disproportionate remedy to the competition concerns at play, and for its imposition of sweeping behavioural conditions reflecting MOFCOM ensuring continuing certainty of supply of an important commodity on reasonable terms to the Chinese market.

In a determination involving the international merger of two US pharmaceutical companies with operations in China, Thermo Fisher Scientific Inc and Life Technologies Corporation, MOFCOM was in general consensus with other regulators, imposing structural conditions involving divestitures, [104] but also imposed additional

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[99] Divestments included the USD $5.7 billion Las Bambas copper project in Peru (expected to produce 400,000 tonnes per annum) within six months from the date of the acquisition.

[100] Including a guarantee of a minimum quantity of 900,000 tonnes of supply by Glencore to mainland China in 2013–14 (equivalent to the average sales of the two companies in the past two years).

[101] Australian Competition & Consumer Commission, 'Glencore International plc – proposed acquisition of Xstrata Plc' (Merger Register, R45863, completed 3 July 2012).

[102] The US Department of Justice allowed the Hart-Scott-Rodino waiting period to expire without taking any action or seeking any type of remedy at a similar time to the ACCC's approval of the transaction occurring. *See* J. Tivey and R. Campbell, Glencore's Long March to Take Over Xstrata, (29 April 2013), White & Case, available at: http://www.whitecase.com/publications/alert/glencores-long-march-take-over-xstrata.

[103] In this merger, Glencore committed (a) to terminate its exclusive long-term off-take agreement with Nyrstar, the largest European zinc metal producer, in so far as the agreement relates to commodity zinc products produced by Nyrstar in the EEA, (b) not to buy directly or indirectly any EEA zinc metal quantities from Nyrstar for a period of ten years, (c) not to engage, for ten years, in any other practices which have the effect of materially restricting Nyrstar's ability or incentive to compete effectively with Glencore in zinc metal in the EEA, and (d) to divest Glencore's minority shareholding in Nyrstar of around 7.79 %; *see* European Commission, 'Mergers: Commission approves Glencore's acquisition of Xstrata, subject to conditions', (Press Release, IP/12/1252, 22 November 2012).

[104] The Federal Trade Commission, EU, China and Australia all approved the merger subject to the divestment of businesses relating to gene modulation (particularly siRNA reagents), cell culture and cell media businesses in fairly similar terms. Most agencies based their decisions on the high concentrations post-merger, which would have provided the merged parties with the ability to raise prices, especially given the high barriers to entry; *see*, for example, Federal Trade Commission, 'FTC Puts Conditions on Thermo Fisher Scientific Inc.'s Proposed Acquisition of Life Technologies Corporation', (Press Release, 31 January 2014); European Commission (Competition), 'M.6944 Thermo Fisher Scientific / Life Technologies' (Press Release, IP/13/1167, 29 November); Australia Competition & Consumer Commission, 'Thermo Fisher Scientific Inc. – proposed acquisition of Life Technologies Corporation'

behavioural conditions relating to on-going supply and pricing. MOFCOM carefully considered the impact of the merger on a larger number of potential markets in China using concentration analysis and price increase forecasts, with additional behavioural conditions imposed on markets for SSP kits and SDS-PAGE protein standards. Thermo Fisher agreed to lower the list prices of SSP kits and SDS-PAGE protein standards in the Chinese market by 1% per year for the following10 years while retaining the same level of discounts offered to distributors in China. Thermo Fisher also committed to certain obligations in relation to access of third parties, committing to either supply SSP kits and SDS-PAGE protein standards to the third party on an original equipment manufacturer basis, or grant the third party a perpetual and non-exclusive license to use the technology relating to SSP kits and SDS-PAGE protein standards, at the option of the relevant third party.[105] These terms impose strict behavioural conditions which will shape supply and demand dynamics for SSP kits and SDS-PAGE protein standards, posing a significant restraint on the conditions under which the merged entity can operate.

From the above decisions and other determinations of MOFCOM,[106] it is clear that for businesses operating in sensitive industries where considerations of industrial policy, national economic development and economic stability may be at play, MOFCOM may impose behavioural conditions which include elements such as:

- perpetual licences to use technology;
- prohibitions against business integration, ring fencing all or parts of businesses, and forcing continued independent operation of all or part of the combined businesses;
- forced expansion of capacity or research;
- guarantees of on-going supply to existing customers, possibly on open-ended terms, at specified prices, or with discounts, and in specified geographic locations.

(Public Competition Assessment, R52214, 25 February 2014). The Australian Competition & Consumer Commission in fact noted that the undertakings it accepted related to the Australian businesses which formed part of EU-ordered global divestments.

[105] More recent decisions imposing behavioural conditions related to pricing include the Merck-AZ acquisition (inputs for flat panel displays), and Corun PEVE joint venture (battery systems in hybrid cars) took place in sensitive industries considered important to Chinese economy. Many of the conditional determinations involve areas classified as strategic industries under the current five-year plan. See *Merck KGa and AZ Electronic Materials SA* [2014] MOFCOM No 30, 30 April 2014; and, *Corun, Toyota China, PEVE, Sinogy and Toyota Tsusho* [2014] MOFCOM No 49, 2 July 2014.

[106] *See*, for example, behavioural remedies imposed in the Nokia-Alcatel merger which included a commitment to fair, reasonable and non-discriminatory licensing of standard essential patents (**SEPs**), alongside commitments regarding future transfers of SEPs; see *Nokia-Alcatel* [2015] MOFCOM No 44, 19 October 2015.

Some of these conditions are problematic, given onerous behavioural conditions such as those relating to commitments to future supply and ring fencing of businesses may not only diminish the economic rationale for a transaction, are not proportionate to the specific competitive detriment, and may also negate any dynamic efficiencies or gains to consumer welfare arising from a transaction.[107] In this respect, MOFCOM is quite different to other regulators and it is clear that it does not embrace a proportionality doctrine in merger remedies despite the issues that arise in relation to behavioural remedy design. Whether the conditions imposed destroy the synergies and benefits in a particular merger can best be answered by the acquirer, but having regard to research which shows that the benefits of mergers are generally over-estimated by the acquirer and underachieved, this is an important question.[108] Of course, where international mergers are concerned, acceptance of the conditions may be necessary to achieve a comprehensive result globally, but may still add to the complexities of international business for the acquirer. Local parties may be in a better position to reject onerous conditions outright but there are no real figures on this issue. A further complicating factor is that conditions are generally suggested by the parties, so this suggests that the merger parties are prepared to accept them in the overall context of the merger.

VI. REFORMS TO MOFCOM'S APPROACH TO MERGER REMEDIES

Examination of MOFCOM merger determinations indicates that if it were to adopt merger analysis premised more closely on competition concerns, an approach taken by the EC, DOJ and ACCC, then the implementation of onerous merger remedies, as has occurred in sensitive industries, would likely be avoided and efficiency benefits would be enhanced. Such an evolution in MOFCOM's approach would require a change in mindset, and possible revision of the AML and Provisions on Restrictive Conditions regarding the place of competition concerns (particularly in relation to the place of competitors), and adoption of a clear principle of proportionality in MOFCOM's merger determinations. MOFCOM, for example, may benefit from adopting the approach of the EC towards competition issues. As discussed at the outset of the article, it is clear in the EC merger regulations that competition concerns are the primary consideration of the competition regulator but that the position of

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[107] Regarding the issues that arise in relation to behavioural remedy design, *see generally* Kwoka & Moss, *supra* note 3, 996–1007; Ezrachi, *supra* note 24, 470–75.

[108] *See*, for example, S. A. Christopherson, R. A. McNish & D L Sias, *Where Mergers Go Wrong*, *McKinsey Quarterly*, *available at* www.mckinsey.com/business-functions/strategy-and -corporate-finance/our-insights/where-mergers -go-wrong.htm (published May 2004).

competitors can also be considered in merger control in an appropriate situation. Such an approach would be of some utility in both Article 29 of the AML and the Provisions on Restrictive Conditions to ensure that merger remedies are targeted towards the specific competitive detriment posed by a transaction.

A further potential reform to establish merger remedies better suited to the specific competitive detriment of a merger would be the adoption of either more flexible policies surrounding the means by which structural remedies are proposed under the Provisions on Restrictive Conditions. A more flexible approach to the adoption of structural conditions, particularly in respect of considerations which are difficult to assess such as ''willingness to compete', may provide parties with greater access to structural remedies which could possibly alleviate the frequency with which onerous behavioural conditions are imposed on merger parties.

While the language of proportionality is present in MOFCOM's Provisions on Restrictive Conditions, some merger remedies which have been imposed appear disproportionate to the specific competitive detriment of the transaction, particularly the Glencore/Xstrata and Gavilon/Marubeni conditions, suggesting that there is perhaps a need to state the specific role of proportionality in designing merger remedies in the Provisions. While it is difficult to implement proportional remedies in mergers, as noted by the earlier discussion regarding the hurdles proportionate remedies face being adopted by the DOJ and EC, it would be useful for the Provisions to specifically set out a relevant proportionality consideration, as is present in the EC merger regulations.

Whether these suggestions are realistic at this stage, given the operation of the AML in a socialist market economy context where considerations of national economic development, industrial policy and stability are foremost, is open to debate.[109]

A. Green shoots: MOFCOM's approval of the NXP-Freescale merger

A recent decision of MOFCOM in the NXP-Freescale merger indicates that the regulator is taking a more sophisticated approach to competition analysis in merger clearance and may be adopting some of the above recommendations.[110] In the NXP-Freescale merger clearance, MOFCOM considered the competitive dynamics at play in

[109] For a detailed discussion of how these considerations shape statutory interpretation and application in a socialist market economy, *see* Healey & Zhang, supra note 9. *See also* Deborah Healey & Zhang Chenying, *The Chinese Anti-Monopoly Law: Lessons for Australian Banks and Chinese Regulators,* (CIFR Paper No 81/2015, October 2015), *available at* http://ssrn .com/abstract 2670373.

[110] *NXP-Freescale* [2015] MOFCOM No 64, 1 December 2015.

the merger of two global suppliers of semiconductors. Given the importance of semiconductors to the technology industry, this was a merger impacting a sensitive industry, significant to China.

In this clearance determination, MOFCOM departed from use of China as the default geographic market and chose instead to adopt a global geographic market in light of supply and acquisition of semiconductors globally. While the merging parties had technology overlaps in a number of different semiconductor markets, MOFCOM only took issue with market overlap in the RF power transistor market, where the merged entity would have held shares of 51.1% of the market in 2013 and 54% of the market in 2014.[111] In light of these high market shares, MOFCOM found the merger would remove a leading competitor, reduce supply options and increase procurement risks for customers, detrimentally impact on research and development, and heighten barriers to entry.

Due to the competition issues arising from the proposed transaction, the merger parties submitted a remedial plan to divest NXP's RF power transistor business to a purchaser, JAC Capital, during the merger clearance process. This remedy utilized the 'fix-it-first' conditional resolution by proposing the sale of the business prior to completion of the NXP-Freescale merger. MOFCOM accepted these undertakings and did not impose any further behavioural remedies on the merger parties.

The clearance of the NXP-Freescale merger shows sophistication in relation to market definition and remedies that has not been observed in some past MOFCOM determinations. Given the nuances associated with competitive dynamics in sensitive industries, this decision offers 'green shoots' towards closer analysis of competition issues and more pragmatic remedies being imposed by the regulator when dealing with proposed transactions. The certainty provided by the 'fix-it-first' remedy will better allow merger parties to realize the dynamic efficiencies of acquisitions and consolidations, rather than being bound to observe rigid behavioural conditions that diminish dynamic efficiencies.

VII. CASE STUDY: CHINESE BANK MERGERS

The previous section suggests a possible change in approach to merger conditions by MOFCOM to conform more to global standards and to maximize efficiencies arising from mergers in the jurisdiction.

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[111] The merging parties also manufactured certain components of RF power transistors, LDMOS and gallium nitride process technologies, with the merged entity accounting for 84% market share in these products in 2012, with projections indicating that share would grow to 92% by 2018; *see NXP-Freescale* [2015] MOFCOM No 64, 1 December 2015.

The next section examines the likely impact on an important industry of a continuation of the current approach. MOFCOM had not at the date of this article publicly considered any bank mergers in its written determinations. [112] For this reason, and due to the particular competitive dynamics in the Chinese financial system, it is a particularly useful industry to evaluate the impact of the current approach to merger remedies.

A brief background to the banking industry is important at this stage.[113] There has been significant reform of the Chinese financial system, however interest rates are set by the Peoples' Bank of China (**PBOC**), and the state continues to influence the allocation of capital, with the majority of legitimate funds from larger banks financing State Owned Enterprises (**SOE**). [114] While there is some competition between banks, detailed regulation on the functions of particular categories of banks, and who can invest in them, means that competition tends to be limited to competition between banks performing similar functions. This contributes to the stratification of banks in China into three tiers: the big four SOE banks (Industrial and Commercial Bank of China, China Construction Bank, Bank of China, and Agricultural Bank of China), the joint stock commercial banks, and a third tier composed of city commercial banks, rural commercial banks, rural co-operative banks, postal savings banks, and foreign banks. This regulatory stratification should inform the different market definitions which might be applied by MOFCOM to any potential bank merger.

While the rigid nature of banking regulation creates a stable system, this is at the expense of competition. The difficulties of various potential borrowers outside SOEs, such as SMEs and individuals with obtaining finance, mean that substantial borrowing is driven into the shadow banking system. Shadow banking is credit

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[112] SOEs and local companies had traditionally been reluctant to notify MOFCOM of proposed mergers. This is changing, as penalties, more recently, apply to failures to notify. In late 2014, for example, MOFCOM announced that it had fined Tsinghua Unigroup, an SOE, for failure to notify; *see* Norton Rose Fulbright, (December 2014) 71 *Competition Law in East Asia: A month in Review*, 5, *available at* http://www.nortonrosefulbright.com/knowledge/publications/124572/competition-law-developments-in-east-asia-december-2014. There have been other examples since that time, and more recent developments, including publicly naming those failing to file, appear to have increased the commitment to filing by these companies.

[113] For a detailed discussion of the competitive dynamics which prevail amongst Chinese banks, *see* Healey & Zhang, *supra* note 109.

[114] For example, the PBOC frequently adjusts the required rate of return (RRR) for commercial banks, with the ratio exceeding 20 per cent in mid-2011. The authorities maintain strict capital account controls, especially over portfolio investment, debt financing and foreign direct investment (FDI). Y Huang, R Li and B Wang, *The Last Battles of China's Financial Reform* in L SONG, R GARNAUT AND C FANG eds., DEEPENING REFORM FOR CHINA'S LONG-TERM GROWTH AND DEVELOPMENT (Canberra, ACT, ANU Press), 233 (2014).

intermediation outside the official banking system and is an important element of China's financial system. It contains legitimate and illegitimate players. There is some regulation but the diversity of behavior which falls within the description makes it very difficult to regulate shadow banking comprehensively.[115] Shadow banking provides some competitive tension in financial markets but there is little discussion of the impact of shadow banking in formal documents. Shadow banking is therefore an uncertain competitive constraint in any competition analysis. Further, existing regulation has limited the ability of foreign banks to innovate and fully leverage inherent advantages they may hold, limiting their competitiveness in the banking system.[116]

More recent reforms in banking have been described as indicating a "tangible commitment to change",[117] however the China Banking Regulatory Commission (CBRC) continues to adopt a relatively piecemeal approach to addressing problems related to efficient financial support for rural and agricultural industries by adopting ad hoc regulatory policies and initiatives, which entrench the stratification of Chinese banks. The nature of the system thus fragments competition in banking markets and reinforces the limited competitive tension due to regulatory stratification of the system.[118] This illustrates that industrial policy at a number of levels continues to play a significant role in the financial system.

So how does the approach of MOFCOM impact on potential outcomes of mergers in the banking sector? First it is important to note that there are industry specific merger notification thresholds for the finance industry. These are not problematic in themselves, but are likely to be overly inclusive based on the figures contained in the Guidelines.[119]

Market definition in this context would be critical. MOFCOM has defined markets broadly in the past. A likely outcome of a broad banking market definition, in all respects, may be that only mergers

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[115] *See*, for example, *Circular of the General Office of State Council on Relevant Issues of Strengthening the Regulation of Shadow Banking* (People's Republic of China), State Council Circular No 107, 2013; as to shadow banking generally, *see* S. Gao and Q. Wang, *Chasing the Shadow in Different Worlds: Shadow Banking and Its Regulation in the US and China*, 11 *Manchester J Int'l Econ L*, 421 (2014); R H Huang, *The Regulation of Shadow Banking in China: International and Comparative Perspectives*, 30 BFLR, 481 (2015).

[116] PwC, *Foreign Banks in China,* (January 2014), *available at* http://www.pwccn.com/webmedia/doc/635253186547653351_fbic_2013.pdf.

[117] *Id*. at 10.

[118] An example of this haphazard regulatory approach is seen in CBRC's encouragement of large and medium sized banks to set up special SME units to serve SMEs at a grassroots level and expand institutional coverage through private banks to diversify and assist SMEs; *see* PwC, *id.* at 37.

[119] *Measures for Computation of Turnover for Notification of Concentrations by Business Operators in the Financial Sector*, (People's Republic of China), Ministry of Commerce, 16 August 2009.

between the big four banks would be found to lessen competition. A likely outcome of a narrow market definition may be MOFCOM imposing conditions on a bank merger, with a view to permitting the merger whilst maintaining the status quo amongst sectoral competitors, relying on competition in specific banking geographic and/or product markets. This leads to questions of what types of remedies MOFCOM might impose in a merger determination involving banks operating in the Chinese financial system.

The comments below can be divided into those relating to foreign/domestic mergers and those relating to domestic/domestic mergers. As to the first category, entry barriers to China for foreign banks are high due to complex regulation, which applies in many cases to their domestic competitors. Flexibility to offer new products and services is low and growth is difficult. Policy directives from government often influence lending decisions. As a practical matter, it is usual for other regulators (which in this example would likely include the CBRC) to be consulted by MOFCOM about merger transactions. Given the low thresholds for notification set by MOFCOM, a greater number of merger transactions are notifiable than might be the case in other jurisdictions. In the context of the importance of banking stability to the economy, competition is less likely to play a significant role in merger assessment than issues relating to stability and national economic development. This is relevant to the acquisition of all or part of a domestic bank by a foreign bank. It is also relevant to an international bank merger where there are two international bank parties which have operations in China, even if those operations are relatively small, as such transactions would appear more likely to be reviewed by MOFCOM. For instance, a 2014 study found that while 80% of Chinese M&A deals involving a Chinese target are domestic-to-domestic, only 7.6% of MOFCOM reviewed deals were domestic-to-domestic.[120] Based on experience in other industries, conditions may be imposed that may relate purely to non-competition issues but may still be onerous. In the second category, based again on previous determinations, domestic/ domestic bank mergers, if they are notified, are more likely to be allowed without conditions.[121]

[120] *See* U.S. Chamber of Commerce, Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy, (9 September 2014), *available at* https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf, 28–29.

[121] For a detailed consideration of these issues, *see* Healey & Zhang, *supra* note 109.

VII. CONCLUSION

This article has noted the trend towards accepting the imposition of behavioural conditions in merger review worldwide. It has examined the tendency of MOFCOM in China to impose detailed behavioural conditions in a small but significant number of merger decisions, particularly in sensitive industries. A major distinction between the MOFCOM approach and the approach of other regulators is the extent to which the conditions imposed attempt to redress competition concerns, and their proportionality. In other jurisdictions behavioural remedies are generally imposed to prevent the merged firm from undermining market competition. In China, MOFCOM is able to legitimately consider issues unrelated to competition when imposing conditions under the AML. This means that conditions do not necessarily need to address competition concerns, but may address other issues, such as maintaining the status quo in an industry in a number of respects. It has been recognized in relation to other jurisdictions that behavioural remedies may be problematic in their scope, their intrusiveness, their need for oversight and ultimately their effectiveness.[122] All these issues are also relevant in the context of China, but in that respect there is a further important distinction to be made: the imposition of the conditions may significantly relate to issues other than redressing anti-competitive impact. This makes the process of conditional merger approvals in the Chinese context less transparent and predictable.

[122] *See generally* Kwoka & Moss, *supra* note 3, at 996–1007; Ezrachi, *supra* note 24, at 470–75.