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中国外资并购中的反垄断审查

**Legal Issues of Anti-Monopoly Review
on M&A by Foreign Investors in China**

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Legal Issues of Anti-Monopoly Review on M&A by Foreign Investors in China

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中文摘要

硕士论文《中国外资并购中的反垄断审查》的主要目的在于探索和分析中国《反垄断法》在外资并购审查中的法律问题。本文研究的主要依据是中国《反垄断法》，而国务院和商务部所颁布的作为对该法配套补充的规章，也在本文研究中起到重要的作用。

研究中的其他重要资料包括商务部已公布的申报案件、文章和政府机构的公告。中国《反垄断法》于 2007 年颁布，该法对建立全面规制竞争的法律制度发挥了重要作用。中国的经济体制改革开放的三十年以来，中国一直致力于将其经济融入全球贸易体系。

本文在对有关外资并购审查程序的法律规制进行概述的基础上，进一步考察研究了商务部实施外资并购审查实践中的有关法律问题。本文从一个外国学生的视角，将中国与以欧洲和美国为代表的其他国家的反垄断制度进行了一些比较。主要目的并非阐明中外反垄断制度的差异，而在于集中指出外国投资者在中国进行外资并购可能面临的法律问题。

本文的结论是，中国《反垄断法》的制定标志着中国政府已朝着高度发展的市场经济的方向上迈出了重大的一步，体现出中国政府在外资并购审查实践中秉持透明、公平和合理的理念。

关键词：外资并购，反垄断审查，商务部

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ABSTRACT

The main objective of this master thesis, titled Legal Issues of Anti-Monopoly Review on M&A by Foreign Investors in China, is to find and analyse the legal issues of the P.R.C. Anti-Monopoly Law in the area of merger & acquisition (M&A) review on the foreign investors.

The principal source for this study has been the P.R.C. Anti-Monopoly Law, but other regulations issued by the State Council and the MOFCOM has played an important part in the study as they supplement the law. Other material important for the study has been published MOFCOM declaration cases, articles and statements from governmental agencies.

The P.R.C. Anti-Monopoly Law, enacted in 2007, has played an essential role establishing a comprehensive regulatory regime governing competition. Since the advent of China's economic reform starting to develop three decades ago, China has been moving to integrate its economy within the global trading system.

This thesis provides an overview of the regulatory work promulgated in connection with the introduction of the merger and acquisition review procedure, and further investigates the legal issues connected to the practical execution of an M&A review conducted by the MOFCOM. Given my perspective as a foreign student the master thesis draws some comparisons to other antitrust regimes, mainly the European and American, but the main goal is not to compare the Chinese regime to other antitrust systems, but simply direct the focus on the legal issues the foreign investor may encounter when investing through an M&A in China.

The thesis concludes that through the enactment of the P.R.C. Anti-Monopoly Law the Chinese government made a huge step in the direction of a more sophisticated market economy. And China's continuing willingness to be transparent, fair and reasonable in the practical execution of the system is evident.

KEYWORDS:

M&A by Foreign Investors, Anti-Monopoly Review, MOFCOM

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Introduction

Purpose of the Chinese Anti-Monopoly Law

China's Anti-Monopoly Law of the People's Republic of China (henceforth referred to as the Anti-Monopoly Law or the AML) was promulgated on the 30th of August 2007¹, as an instrument to control the dynamic and fast growing market. In 1978 China decided to reform and open up its economy. This decision, to create a "market economy with socialist characteristics", has amongst other things given room to the foreign business community to place their interests in China, and benefit from the huge Chinese market. The alteration in the market has happened over a tremendously short period of time, and a need to protect certain aspects of the market has become essential.

The Anti-Monopoly Law Article 1 states that the AML is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and the interests of the society as a whole, and promoting the healthy development of the socialist market economy.

The most conducive way to maintain a healthy market economy is to retain fair competition between competitors. There are several measures that can be taken to secure fair competition. As mentioned in Article 1 it is important to prevent and restrain monopolistic conduct between enterprises, and as we will see through this thesis it is important to implement regulations and supervise concentration of

companies. Through such measures the government will enhance economic efficiency and protect fair competition to ensure a healthy market economy to the benefit of the consumer and the society as a whole.

The significance of an anti-monopoly law is inevitable to observe, and the Chinese AML, a solid piece of legislation culminated over thirteen years of debate and drafting, became absolutely inevitable for an economy that eventually had changed from a centrally planned one to a “market economy with socialist characteristics”.

Similar to other competition laws, one of the AML’s main purposes is to protect the consumer’s interests as well as fair competition. But aside from this, the Chinese AML has taken into consideration some factors that some of the larger western competition laws have not accentuated in their laws: the safeguarding and development of the society and public interests, also recognized as non-competitive elements in the AML.²

It must be borne in mind that the Chinese AML is an unique piece of legislation directed towards China, with its distinguished economical and political circumstances. It is self-evident that another culture’s anti-monopoly law would not be entirely suited to take care of China’s needs. In particular, some of AML’s stated goals reflect the special circumstances of the Chinese economy at a place of transition from central planning to a market economy, with large sectors of the economy still controlled by state owned enterprises (SOE’s). Also, an unstated goal of the AML may be to decrease social differences among the Chinese people, to counter the accepted belief that the “real evil is unfairness rather than scarcity.”³

The non-competitive aspects of the law seem to be accommodating the non-market elements of the transitional economy. I believe it reflects the Chinese Government deep assessment of the society as a whole when implementing and working with the AML.

Although the AML has some differences compared to other nations anti-monopoly laws, the AML has indeed been influenced by EU competition Law, and to a lesser extent, the antitrust laws of the United States, Germany, Japan, and other countries.⁴

It is probable that China will continue to be influenced by, and also have its enforcement authorities collaborate with, international anti-monopoly regimes to continue to develop their nascent competition policy, as well as to start influencing other jurisdictions on global competition policy. After all, some of these anti-monopoly regimes has existed for a long time, and have acquired valuable experience, beneficial to other regimes with less developed competition policies.

Why We Need Merger Control on Foreign M&A

In practice of investment activities in the form of M&A transactions, it is easy to form business concentrations which may be faced with anti-monopoly problems and thus creating a negative influence on fair competition of business operators.

Regulating foreign M&A is therefore an important task for the government to sustain a healthy market economy. A subject of this thesis, the Chinese merger or acquisition control scheme, set forth in Chapter 4 of the AML⁵, is by far the most developed area of AML enforcement. The Ministry of Commerce (MOFCOM) and the Anti-

Monopoly Enforcement Authority (AMEA) with responsibility for merger enforcement, was heavily involved in drafting the AML. Moreover, MOFCOM acquired substantial preliminary experience in merger review from the interim merger review process, introduced in March 2003 as part of the Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.⁶

Since the implementation of the AML in 2008 to middle of 2012, the MOFCOM has settled 382 cases, of which has included one prohibition decision, and ten conditional approvals. The 371 other cases were approved without conditions.⁷ As of December 26th 2012 the number of cases filed in 2012 reached 186. 154 cases were tried, and from that 142 concentrations were unconditionally approved. The rest was withdrawn or conditionally approved.⁸ November 16th 2012 MOFCOM announced that it had published the case names and names of the concentrating parties that had been unconditionally approved by MOFCOM. The list contains the name of all 458 concentrations unconditionally approved so far, and shows that amongst the unconditionally approved concentrations there are both foreign, international and Chinese M&A.⁹

MOFCOM's enforcement record so far has resulted in an intensified awareness about MOFCOM and the Chinese merger or acquisition review process throughout the international M&A and competition law communities.

Merger or acquisition control is an important tool to secure a fair and competing market, but it will also lead to inconveniences and expenses for the merging or acquiring companies. It is therefore important to keep the process as manageable and

clear as possible to ease the disadvantages. One way to do this is to enact unambiguous rules easy to interpret and follow, and to publicly disclose previous merger or acquisition decisions to observe how the authorities interpret the law and what they emphasize when they make a decision. The AML Article 30 stipulates that the authorities shall publish all decisions where they prohibit or impose conditions upon a concentration of companies.

The AML Article 27 and MOFCOM's Measures for the Declaration of Concentration of Business Operators¹⁰ (MOFCOM Notification Rules) stipulates the substantive review standards and gives valuable insight into the actual review process. However, MOFCOM still has not provided much visibility into its practical use of these substantive review standards in the actual merger cases. Nevertheless, the published decisions have grown increasingly detailed and reveal that MOFCOM has generally based all decisions they have made in theories and arguments that are consistent with the AML and other relevant regulation as well as those employed in other jurisdictions, including Europe and the United States – although without any details regarding the facts and evidence on which those decisions were grounded that would allow outside observers to completely assess them.¹¹

The Chinese AML has attracted much attention throughout the international M&A and competition law communities, and the MOFCOM decisions made have only strengthened this awareness. The development of Chinese Merger & Acquisition review is still in a very early stage, and it is yet to be seen how the process will advance in coming years.

This thesis provides an overview of the AML, with emphasis on the main legal issues the foreign investor may encounter in the M&A procedure. Chapter 1 consists of AML history, today's legal structure of anti-monopoly policy on M&A for foreign investors in China and a brief introduction of BITs and their possible positive effect on the M&A review procedure. Chapter 2 states today's legal forms of M&A under Chinese foreign investment law, observing that the foreign investor may only legally invest in China through certain company forms. Chapter 3 is the main body of the thesis, examining the process and requirements of anti-monopoly review on foreign M&A. Part IV also contains a brief summary of eight of the seventeen published MOFCOM decisions to date, following an assessment of the cases. Chapter 4 contains a short introduction to the extraterritorial application of the Chinese AML relating to M&A, before the thesis concludes that the implementation of a Chinese anti-monopoly regime has been a necessary step towards a well-functioning market economy. Even more, the introduction of the M&A review has been efficient and without larger problems. M&A review regulation is under constant evolvement as the government becomes more and more experienced, creating a healthy environment for both foreign investment and the Chinese market economy.

Chapter 1 Background and Legal Sources

In August 2007, the National People's Congress of the People's Republic of China, enacted its first comprehensive antitrust law.¹² Because of China's long and on-going transition from a centrally planned economy to a "market economy with socialist characteristics", it had become evident over several years that regulation in this field was indispensable to protect and encourage investment, services and trade.

The implementation of anti-monopoly regulation is also one of the many actions taken over the past decade that reflects China's increasing internationalization in the wake of its accession to the World Trade Organization (WTO).

Though many jurisdictions have implemented antitrust laws over the last decades, none of these laws have engaged the international competition community more than the Chinese AML. One of the reasons may be the incredible growth in China's markets, the vast amount of foreign capital invested in China, the substantial increase in the presence of Chinese businesses in foreign markets, the incredible sale of Chinese goods abroad, and a recognition of the substantial challenge posed by the establishment of free market competition in the Chinese socialist market economy. The enormous interest from the international competition community was handled with a great susceptibility and openness by the State Council, the MOFCOM, National Development and Reform Commission (NDRC), and State Administration of Industry and Commerce (SAIC), all of which solicited and studied a large number

of comments, remarks and suggestions from public and private organizations, companies, and academics from around the globe.

As time has passed since the AML came into effect several statues and regulations has been promulgated by the State Council and the MOFCOM to supplement the somewhat more general articles in the AML. These statues and regulations play a large role in the practical use of the AML. Some of the more important ones for the foreign investor are:

- Provisions on Foreign Investors' Merger with and Acquisition of Domestic Enterprises,
- Provisions of the State Council on the Thresholds for Declaring Concentration of Business Operators,
- Measures for the Declaration of Concentration of Business Operators,
- Measures for the Review of Concentration of Business Operators, and
- Guide for the Anti-Monopoly Declaration for Foreign Investor's Merger and Acquisition of Domestic Enterprises.

These are only part of the series of regulations that have been promulgated to match the AML, and many of them will be further discussed throughout the thesis.

Section 1 China's Legal History of Anti-Monopoly Regulation

"Whether a cat is black or white makes no difference.

As long as it catches mice, it is a good cat."

– Deng Xiaoping

In the beginning of the 1960s, Deng Xiaoping declaimed this quintessential maxim of pragmatic economics. To address the extensive destitutions caused by Mao's failed "Great leap forward" policies, Deng turned collectivist farms over to individual farmers. His suggestions to turn to free markets for peasants brought his denunciation as a "capitalist roader", and he was placed under house arrest and exiled. After surviving other attempts of elimination, Deng and his supporters attained power in 1978, two years after Mao's death. Deng almost immediately removed rural agricultural communes, allowing farmers to cultivate family land. Harvest grew promptly, and by 1984, China had reached the ability to be self-sustained on food for the first time in modern history. In addition to this, Deng further pursued other types of economic liberalization, like allowing urban Chinese start small businesses and purchase commercial goods, and opening up the Chinese market to foreign investors.¹³

These policies and subsequent structural reforms were accompanied by legislative implementations. To give an example; the Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People proposed by Deng Xiaoping in 1978, and enacted by National People's Congress in 1988, insured that factories

could no longer depend on state subsidy, and would have to adapt to market competition to avoid bankruptcy.¹⁴ The Enterprise Law of 1988 started an alteration of a system where the government departments were in direct control of industries, to a system where “the state regulate the market, which in turn guides the enterprises”.¹⁵

As early as in the mid-1980 political leaders and legal scholars had considerable deliberations about implementing a competition law in China. The weighing point for many were the necessity to transform the SOE’s into privately held enterprises with the capability to compete efficiently. As early as 1988, legislators reflected on the possibility to incorporate antitrust principles into what would later become the Anti-Unfair Competition Law of 1993 (AUCL).¹⁶ Aside from a defined number of articles, the AUCL’s main attention was directed toward a miscellany of non-antitrust issues, examples being unfair trade practices and prohibition of commercial bribery.

The Company Law, effective as of 1994, was intentionally a tool to establish and keep property rights to be able to induce companies to compete effectively with the intended result of creating a competitive market structure.¹⁷

Around 1993, a group of officials, from the SAIC and the State Economic and Trade Commission (SETC), sat down and analysed competition laws of other jurisdiction with the intent of creating a law with the principal goal to regulate antitrust issues. However, this first attempt to create an anti-monopoly law was shelved by the central

government, who feared the law would impede the growth of SOE's, which were regarded the "key engines of economic development".¹⁸

Around this time, the government enacted the Price Law¹⁹, which outlaws price fixing, predatory pricing, "seeking exorbitant profits", and price deception. The law also stated that the Chinese economy was in transition and that prices would be set by the market at large, whereas some still would be regulated by the government.²⁰

With China entering into the World Trade Organization (WTO) in 2002, a need to comply with the treaty sparked a legislative make over. The anti-monopoly law also came into focus, with the NPC Standing Committee stating that China would draft an antitrust law as part of its preparation for entry into the WTO.²¹

In 2002, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), a predecessor of MOFCOM, implemented draft rules on the notice and approval process for concentrations involving foreign multinationals. These rules were partly based on earlier restrictions on foreign investment.²² The Provisional Merger and Acquisition Rules, setting up China's first premerger notification and approval system, was promulgated by SAIC and MOFCOM in 2003. The provision had several reporting thresholds, amongst others; how many foreign invested enterprises (FIEs) that were controlled by the parties, market shares, assets and sales. Further, in June 2003, the NDRC promulgated Provisional Rules on the Prohibition of Monopolistic Pricing Behaviours (NDRC Provisional Rules). This provision gave additional details to the provisions in the already existing Price Law, and also included some extensional regulations in the area of bidding, resale price maintenance, and numerous forms of price-related abuse of dominant position. The

provisional rules enacted revealed the importance of a law dedicated exclusively to antitrust matters.²³

Several drafts of the AML now emerged. The October 2002 Draft AML, prepared by the SETC, was reviewed by the State Council Legislative Affairs Office in 2003. It included provisions on abuse of market dominance, collusion amongst businesses, abuse of administrative power by government units, and the creation of an Anti-Monopoly Management Body of the State Council. Some foreign critics expressed their concern with regards to the possible foreign-focused enforcement provisions in these early AML drafts.²⁴

The February 2004 Draft AML, expressed the need for a “competent Anti-Monopoly Authority under the Ministry of Commerce”.²⁵ There were some discussions on which agencies should have the enforcement and policymaking competence under the law, which ended up in MOFCOM setting up its own Anti-Monopoly Office in September 2004.²⁶

The April 8, 2005 Draft AML formed the basis for an Anti-Monopoly Authority under the State Council. The newly formed authority was given extensive powers to implement and enforce the law.²⁷ This draft was also the basis for a conference held in Beijing in May 2005, organized by the State Council Legislative Affairs Office (LAO). Among the attendants included high ranked academics and officials representing antitrust agencies from all over the world, as well as representatives from the American Bar Association (ABA) and other non-governmental organizations (NGOs) like UNCTAD and OECD.²⁸ An amended draft of the AML

was then released in July 2005. This draft was then revised by the State Council and submitted to the NPC in June 2006 for its review and approval. The draft went through three readings and some revisions. Most of the revisions reflected policy concerns of the government, especially regarding the protection of SOEs in the strategic sectors and national security concerns on acquisition of domestic enterprises by foreign investors.²⁹ Because of the boom of foreign investment in the form of M&A that happened over the past decade, there were concerns that the foreign multinationals would strip the acquired firms of their capacity to independently develop technology and products, and become dominant in important Chinese industries. The original idea was that the foreign M&A of domestic firms would add their valuable knowledge and bring further development into the Chinese market, but what actually happened was that the already existing knowledge and new development was moved out of China. This development in the M&A sector of foreign investment became a huge problem. The promulgation of the AML thus became even more important, to secure valuable research and development, and to protect vital strategic sectors in China. The idea was also that a more transparent M&A regulatory mechanism would reduce uncertainties and benefit both Chinese and foreign parties in the long run.³⁰

Amendments were made to the AML right up until the time it was submitted for final voting. With regards to Chapter 4 of the AML, which focuses on concentrations, all changes made from the October 2002 Draft AML until the final version of the law, has helped align the regulations with international norms exemplified by the International Competition Network (ICN)'s Recommended Practices.³¹

Section 2 Today's Legal Structure of Anti-Monopoly Policy on M&A by Foreign Investors in China

It is important to understand the policy behind the AML to be able to understand the reason behind the organization of the regulations. Since the late 1990s, foreign investors have been increasingly interested in merging with or acquiring domestic enterprises in China. M&A are key strategic ways to obtain immediate access to distribution channels, customer groups, or to achieve control of domestic enterprises with a prominent future. As a reaction to the fast growing foreign direct investment related M&A within the domestic market, China set up a notification and evaluation system in March 2003, by announcing the implementation of the Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.³² The Provision was meant to “promote and regulate foreign investors’ investment in China and the introduction of advanced technology and management experiences from abroad, improve the utilization of foreign investment, rationalize the allocation of resources, ensure employment, and safeguard fair competition and national economic security”³³. With this Provision, the government expressed their competition policy by stipulating in Article 3, that M&A “shall not create excessive concentration, eliminate or hinder competition, disturb social and economic order, or harm public interests”.

In 2006, MOFCOM and five other government departments amended the 2003 Provision. The 2006 Provision on Mergers and Acquisition of Domestic Enterprises by Foreign Investors³⁴, *inter alia*, added business transactions that lead to *de facto*

control of domestic enterprises in Article 12. Further, it required the merging parties to apply to the MOFCOM if the transaction resulted in control of a well-known or traditional trademark or brand name in China.³⁵

To facilitate the concerned parties to the Provision on Mergers and Acquisition of Domestic Enterprises by Foreign Investors, MOFCOM, SASAC, SAT, SAIC, CSRC, and SAFE issued the Guide for the Anti-Monopoly Declaration for Foreign Investors' Merger and Acquisition of Domestic Enterprises August 3rd, 2007. The guidelines states that the relevant market should include the geographic market dimension as well as the product market. The guidelines further stipulate that both parties also have to submit their own analysis of the competition in the relevant market when they apply for merger approval.³⁶

In 2009, as a consequence of the implementation of the AML, MOFCOM promulgated a revision of the Provisions on Mergers and Acquisition of Domestic Enterprises by Foreign Investors.³⁷ The amendment cancelled Chapter 5 about anti monopoly review, and made sure the Provision coincided with the AML and the Provisions of the State Council on Thresholds for Declaration of Concentrations of Undertakings.³⁸

The Anti-Monopoly Committee of the State Council also promulgated Guidelines of the Anti-Monopoly Committee of the State Council on Defining Relevant Markets, May 24th, 2009. The purpose and basis of the Guidelines is to provide some clues as to what is to be defined in the term “relevant market”, and to increase transparency of work related to law enforcement by the AML enforcement authority of the State

Council.³⁹ See later under chapter VI for a more detailed description of the term “relevant market”.

Within a short period after the AML was effective, MOFCOM started the drafting of China’s Merger Guidelines. The big challenge was to create a set of rules that both complied with the foreign competition practices and the AML. The Interim Regulation on the Assessment of the Competition Effects of Concentrations of Undertakings under the Anti-Monopoly Law was promulgated August 29th, 2011. The Regulation shall provide instructions on the factors that should be considered in a merger review process, as well as MOFCOM’s interpretation of such factors.⁴⁰

With the further opening up policy of China, and the consequential huge amount of FDI inflow, there has been a growing sentiment of economic patriotism since around the mid 2000s. The rising concern over foreign firms attaining dominant, or monopoly positions, in Chinese industries were one of the driving forces behind the enactment of the AML.⁴¹ In short time after the enactment of the AML, an official from the State Council expressed China’s disapproval of “hostile foreign acquisitions” and those foreign acquisitions that harm its national economic security.⁴² A “hostile foreign acquisition” would be a foreign acquisition of a Chinese company that would harm the national economic security, by for example moving valuable technological knowledge out of China, or rising the barrier to entry in that specific market to such a level that it would be impossible for other competing companies to enter into it or to keep up the pace of the technological advancement and thus taking over the entire market in that valuable industry sector.⁴³

China's legal structure of anti-monopoly policy on M&A for foreign investors in China has evolved rapidly over the last decade, showing the governments ability to adapt and conform to a dynamic market. The AML is of course the most important enactment of the few mentioned, but the provisions, interims and guidelines play an important role in elaborating on crucial details essential to the understanding and implementation of the law in practice.

Section 3 BIT's Positive Effect on M&A Procedure

Bilateral Investment Treaties (BIT's) are generally considered as "the most important legal mechanism for the encouragement and governance of foreign investment between developed and developing countries".⁴⁴ BITs are easy to implement, and are utilized extensively in the area of antitrust enforcement.⁴⁵

A BIT between two nations usually focuses on protecting the investors rights and imposing obligations on the host country. The parties may agree to terms such as most-favoured nation treatment, national treatment, interagency assistance and information sharing. Although these agreements do not alter domestic law, they will normally generate enhanced efficiency and transparency in the antitrust enforcement area.

A BIT could not singularly constitute convergence, or prevent divergent merger review decisions due to the fact that the merger agencies in the different antitrust jurisdictions are subject to different legal systems and economic analysis.⁴⁶ But because the BITs are relatively easy to develop and can improve antitrust law

enforcement, particularly where the antitrust agencies interact frequently, scholars argue that they are the most effective solution.⁴⁷ Indeed, such treaties have obtained considerable success in facilitating convergence and adding efficiency to global merger enforcement.

Due to the fact that BITs can not eliminate the threat of significant disagreement between nations, it is important to continue to work towards convergence, and not only engage in BITs, but also other arrangements like international treaties and soft law through multilateral networks. More than a hundred nations have their own competition law, and although BITs present a good starting point for cooperation and convergence, it will be in everyone's best interest to maximize efficiency and minimize costs by unifying antitrust laws as much as possible keeping in mind the specific needs of different nations.

Chapter 2 Legal Forms of M&A under Chinese

Foreign Investment Law

Foreign investment in China has to take place in accordance with the relevant foreign investment laws promulgated by the Chinese government. The following companies are currently the most popular forms of foreign investment enterprises in China:

1. Sino-foreign equity joint venture (EJV),
2. Sino-foreign cooperative joint venture (CJV),
3. Wholly foreign-owned enterprise (WFOE), and
4. Foreign-invested joint stock limited company (FISC).

The common referral to all of these company structures is a foreign invested enterprise (FIE). A FIE is most often in the form of a limited liability company (LLC) in accordance with the P.R.C. Company Law.

With regards to M&A of domestic companies by foreign investors, when the M&A deal is completed by the parties, the target company must be converted into a FIE, with the exception of the CJV. The CJV is sometimes referred to as a contractual joint venture, and is allowed to operate in a much more flexible manner than the rest of the FIEs. For instance, the CJV does not have to be a legal person, and so the parties may agree upon the liabilities when they formulate the contractual terms. All companies involved in M&A have to be legal persons under the Chinese law, and thus it excludes an acquired company from entering into the form of a CJV.⁴⁸

Section 1 Direct and Indirect Acquisition

Practice shows that international companies normally make direct investment in a foreign state in one out of two ways. Either they found a new enterprise, or they invest through M&A of a local enterprise. In China, foreign investors drastically speeded up their investment after China's accession to the WTO in 2001,⁴⁹ and there has been an inclination toward making the investment through M&A of domestic companies.

M&A by foreign investors in China may be divided into two categories, depending on the status of the individual investor. The first is where the investor acquires the Chinese enterprise directly, and the second is where an already existing foreign invested enterprise (FIE) executes the M&A procedure. The first category is currently the dominant one, with its implementation measures further divided into: integral M&A, partial M&A, holding M&A and subscription M&A.

- Integral M&A: According to Regulations to Guide Foreign Investment Directions, Chinese government authorize foreign investors acquiring Chinese companies that engage in business fields within the Encouraged Investment Fields stipulated by the Foreign Investment Guidance Catalogue. After the M&A process is complete the newly formed company shall be registered as a WFOE.
- Partial M&A: Foreign parties may partially acquire Chinese companies in the fields of investment that are categorized as restricted by foreign investment

laws. Examples of such restrictions may be that the investment must happen as an EJV, or the Chinese party must be the holding party. The foreign investor can therefore only acquire a limited proportion of the shares or equities in the desired company. A Partial M&A is also addressed as a Holding M&A if more proportion of shares are controlled by the foreign company.

- M&A through Foreign-Invested Enterprises: A foreign-invested enterprise is defined as a Chinese legal person, and being a Chinese legal person the foreign-invested enterprise may undertake integral or partial M&A over the Chinese company in four ways. Firstly you may acquire foreign-invested enterprises or domestic enterprises, or their shares, through a contractual agreement. Second you may purchase shares or assets of domestic companies that are for public sale at property right exchange markets. Third you can convert your creditor rights into shares according to Chinese laws as well as contractual agreement. And finally you may purchase liquidated assets of insolvent or bankrupted domestic companies at some specific auction markets.⁵⁰

According to Article 1 of the Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, and the relevant provision of AML, it is important to safeguard the economic safety of China. The Chinese government will thus prevent foreign enterprises from merging with or acquiring domestic companies if the national economic interests will be impaired. This was one of the main driving forces behind the promulgation of the AML. The disquiet over foreign acquisitions of domestic enterprises and national economic security were explicitly mentioned by

the Judicial Committee of the National People's Congress at the final readings of the draft AML in June 2007.⁵¹ Because of the AML all foreign direct investment through the form of M&A is now regulated, securing the national interests and healthy market economy, as well as guiding and communicating important knowledge to foreign investors, creating a more predictable investment environment.

Section 2 Asset Acquisition and Share Acquisition

The Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors Article 2 stipulates that an M&A of a domestic company may legally happen through M&A of equity interests or M&A of assets in the target company.

A share acquisition refers to a foreign investor's acquisition of a local shareholders equity in a company other than a FIE, or a foreign investor's contribution to a domestic company's capital increase, resulting in the conversion of the domestic company into a FIE.

An asset acquisition refers to a foreign investor's establishment of a FIE and the purchase through that FIE a domestic company's asset and the operation of such assets, or a foreign investor's acquisition of a domestic company's assets to invest in and establish a FIE to operate the acquired assets.

Choice of investment method determine certain significant effects relating to legal status, absorption of risk, and registration procedure according to the Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.

In accordance with Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors Article 13, in the event of a share acquisition the FIE established shall succeed to the creditor's rights and debts of the merged and acquired domestic company. In the event of an asset acquisition the domestic company that sold the assets will bear its existing rights and debts.

A share acquisition will directly convert the company into a FIE. If the proportional ratio of the foreign capital contribution is more than 25 percent of the registered capital of the domestic company the FIE is entitled to the treatment of FIEs according to Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors Article 9.

An asset acquisition will not automatically change the legal status of the acquired company. Usually the main purpose of an asset acquisition is to form a new company, transferring the domestic companies assets over to the new company. Even though asset acquisition and share acquisition is distinctly different in method, the main goal is usually the same; to establish a FIE in China.

Chapter 3 Process and Requirements of Anti-Monopoly Review on Foreign M&A

Section 1 Starting the Merger Process

When two companies agree to merge or acquire, and they reach the merger review thresholds set by the Chinese government, they have to file a merger notification according to the regulations before they implement the proposed transaction. The AML Article 21 stipulates that when the intended concentration reaches the threshold levels set by the State Council, the undertakings have to declare the concentration in advance of the concentration. They are not allowed to implement the concentration in the absence of such declaration. AML Article 25 further states that the concentration may not take place before the MOFCOM has made the decision not to conduct additional review of the concentration. And finally AML Article 26 stresses that where the MOFCOM conducts additional review of the concentration the parties may not conclude the concentration in the absence of an approval of the M&A. If the government fails to conduct the review within the time limit from 30 days in Article 25, and up to the maximum of 150 days in Articles 26, the undertakings may implement the concentration. There may be some lack of clarity as to what the companies can actually do to prepare the actual execution of the merger or acquisition agreement during the approval process.

As in China the European competition laws stipulate that the transaction in itself must not be completed before the approval from the Commission. However, the

restriction is described further; prior to approval of the M&A by the Commission the parties shall act as independent economic entities, and thus refrain from integrating their businesses or be involved in each other's day-to-day activities. The companies may however perform a due diligence for valuation and audit purposes and the parties may start the planning of the integration, but this must be performed strictly according to appropriate non-disclosure agreements.

Section 2 The Scope of China's Anti-Monopoly Review

I Concentration

Chapter four in the AML addresses M&A procedure and is named "Concentration of Undertakings" which can be deemed as general scope of anti-monopoly. Article 20 further defines "concentration" subject to merger control as:

mergers; gaining control over another undertaking through the acquisition of shares or assets; and obtaining the control or the capacity to exercise decisive influence over another undertaking by signing contracts or other means.

According to Article 21 the undertakings have to file a notification to MOFCOM if the concentration reaches the threshold levels set by the State Council. The notification has to happen in advance of the implementation of the concentration, and the parties may not close the transaction without prior notification and approval.⁵²

II Deviation from the standard for internal group consolidations

As stipulated in Article 22 notification is not necessary for internal group consolidations in which one undertaking owns more than 50 percent of the voting shares or assets of every other undertaking involved in the concentration. This means that related entities under common control will be treated as a single entity for the purpose of merger control.

III Definition of control

Article 20 in the AML does not define the word control as used in its subsections 2 and 3. MOFCOM attempted to propose a definition in a previous draft of rules governing merger notifications that was sent out for public comment in January 2009.⁵³ The definition was later removed from the enacted rules issued in 2009.

However, the draft rules stated that control could be defined as:

- acquiring further than fifty percent of the voting shares or assets of another undertaking, or
- acquiring the ability through any way, including by written contract, to select the appointment of one or more members of the board of directors and to make key management, operation and sales, financial budget, major investment, pricing as well as taking other important management and operation decisions of another undertaking.

Because the foresaid draft of rules did not come into effect, the definition may at best act as a hint or guidance of what the authority define as “control”. It is however important to be aware over the fact that the removal of the definition means that the understanding expressed could be somewhat wrong.

The absence of clarification of the term means that several aspects of the M&A process remain uncertain, thus providing the involved parties and MOFCOM a considerable discretion in deciding the outcome of each M&A review case.

IV Joint Ventures

The AML does not specifically address joint ventures. However, in the draft Notification Rules circulated by MOFCOM in January 2009⁵⁴ it is confirmed that the "joint establishment" of a "new entity" by two or more entities forms a concentration under Article 20 of the AML. The language was removed from the final version, but it is informally expressed by MOFCOM that the creation of completely new joint ventures does constitute acquisition of control by contract or other means, not taking into concern the scope or structure of the joint venture. Also, MOFCOM has used Article 20 to embody changes in control of already existing joint ventures, including where one of the parties only achieves joint control.⁵⁵ Finally, on November 10th, 2011, MOFCOM conditionally cleared an establishment of a joint venture between GE (China) Co. Ltd. and China Shenhua Coal Liquefaction Chemical Co. Ltd.⁵⁶ The decision confirmed that the establishment of joint ventures is subject to the AML merger review regime as long as the notification thresholds are met.

Section 3 Mandatory Anti-Monopoly Review Thresholds

You do not find the reporting thresholds in the AML, instead the thresholds are set by the State Council in accordance with AML Article 21, which are reflected as the scope of anti-monopoly review in details. When drafting the AML it was found that

it would be better to not include such thresholds in the law, but to rather implement them as a lower level regulation so it would be easier to adjust them according to the dynamic economic development.⁵⁷ The State Council adopted the Regulation of the State Council on Notification Thresholds for Concentrations of Undertakings (Regulation on Declaration Thresholds) on August 1st, 2008.⁵⁸

The Regulation on Declaration Thresholds requires prior notification with the competent commerce department of the State Council of any M&A meeting one of the following thresholds:

- The combined worldwide turnover of all the undertakings concerned in the preceding financial year exceeds RMB 10 billion, and the nationwide turnover within China of each of at least two of the undertakings concerned in the preceding financial year exceeds RMB 400 million; or
- The combined nationwide turnover within China of all the undertakings concerned in the preceding financial year exceeds RMB 2 billion, and the nationwide turnover within China of each of at least two of the undertakings concerned in the preceding financial year exceeds RMB 400 million.⁵⁹

The thresholds set by the State Council is in consistency with the recommendations given by the International Competition Network (ICN).⁶⁰

In accordance with the Regulation on Declaration Thresholds, MOFCOM may initiate investigations into M&A transactions not meeting the above-mentioned

thresholds even if “facts and evidence collected pursuant to the prescribed procedure show that the said concentration has or might have the effect of excluding or restricting competition”. The wording chosen in Article 4 of the Regulation on Declaration Thresholds makes it clear that the discretion given to MOFCOM is extensive, as the investigation may be based on the concentration “might” having an effect on the competition in the market.

The MOFCOM Review Measures⁶¹ Article 16 opens up for the M&A parties themselves to voluntarily submit a declaration for review in the case the M&A does not fulfil the thresholds mentioned above.

The focus on sales turn-over in the review thresholds set by the State Council, was chosen as a measure because it is “objective, clear, and convenient for operators and the AMEAs to determine,” it “reflects an important indicator of economic strength,” and “most countries in the world use this indicator to determine reporting standards for business concentrations”.⁶² Through these thresholds the State Council attempts to find a balance between underreporting of transactions that may have impact on the Chinese market, and overburdening both parties and the MOFCOM reviewers.⁶³ To facilitate the increasing amount of notifications, there are plans to introduce a simplified M&A review procedure for declarations that concerns simple relevant markets and small market shares.⁶⁴ A draft Interim Measure on Simplified Merger Review Procedures, is currently being discussed according to MOFCOM.⁶⁵

To calculate the accordant turnover relevant for the review, MOFCOM accumulate group-wide turnover across all related entities under common control (excluding

internal sales) and calculates turnover of all products (not only those involved in the proposed transaction).⁶⁶

The MOFCOM Notification Rules⁶⁷, together with the Rules for Calculation of Turnover for the Notification of Concentrations of Undertakings in the Financial Sector⁶⁸, provided some clarification on some important terms⁶⁹:

- “Turnover” is defined to include the income by the relevant business operator from the sales of products or provision of services after deduction of taxes and surcharges.
- All sales to purchasers located in China are considered to be China sales.
- Transactions between the same parties within two years are considered as one transaction.

Section 4 The Review Process

The review process has several stages, and are explained in the AML:

- If the M&A parties meet the thresholds described in the State Council's Regulation on Declaration Thresholds⁷⁰, the parties must submit a filing to MOFCOM prior to implementation of the concentration.⁷¹
- According to AML Article 25 when the filing is submitted, MOFCOM performs a "preliminary review" within thirty days and determines whether further review is necessary.
- If MOFCOM finds that further review is necessary, it shall complete such review within ninety days. Under certain circumstances the ninety days review period may be extended with sixty days. At the end of this review period a decision on whether or not to prohibit the concentration must be made.⁷²

The initial review period starts when the M&A parties have submitted all relevant documentation mentioned in AML Article 23. The documentation needed is extensive, and the preliminary review period does not commence until the documentation is complete and satisfactory.⁷³ Only when MOFCOM has formally accepted the filing the thirty days review period starts running.⁷⁴ Because the AML requires submission of "other documents and materials as specified by AMEA",⁷⁵ MOFCOM may in fact contravene the commencement of the thirty days preliminary review period by requesting additional information from the parties prior to acceptance.

Where the undertakings fail to declare or file the concentration to MOFCOM, and the concentration meets the threshold levels set by the State Council, it will not be able to complete the concentration, according to AML Article 21.

I Filing

The AML does not determine which of the M&A parties that has to file the merger notification. However, the MOFCOM Notification Rules⁷⁶ Article 9 stipulates that where the concentration is formed by way of merger, all the parties involved have to file a notification. If the concentration is formed by one party acquiring another party, the party acquiring control shall file the notification. No filing fee is currently required.

The parties have to file the notification before they implement the concentration.⁷⁷ However, according to MOFCOM Notification Rules Article 10, MOFCOM demands executed transaction documents before it will deem the filing complete. Thus, the earliest time possible to submit the filing is subsequent to the execution of the transaction documents.

The “pre-acceptance phase” may take weeks or months, depending on how complicated the case is, MOFCOM schedule, and other factors. MOFCOM also may have several requests for additional information from both the involved parties, and other relevant government agencies, trade associations, and customers and competitors.

The acceptance of a filing does not have to be published. MOFCOM commonly notifies the parties involved when the filing is accepted as complete.

If the parties have failed to declare the completed M&A transaction the parties will be subject to sanctions, including fines, required disposal of shares and assets, and reversal of the transaction.⁷⁸

II Initial review

Once the filing is accepted as complete, the initial review period commences. The period may last up to thirty days.⁷⁹

During the initial review period MOFCOM investigates the proposed M&A. The investigation can be quite extensive, and includes contacting and requesting information from customers, competitors, the parties themselves, suppliers, and other government agencies. They may also conduct hearings with the relevant parties according to the MOFCOM Review Measures⁸⁰ Articles 7 and 8.

If MOFCOM finds reasons to believe there are competitive concerns with regard to the transaction in the course of the review period, they will inform the parties, which in turn have to address the concerns with evidence.⁸¹

When the thirty days preliminary review period is completed, MOFCOM has to either approve the M&A transaction or initiate further review. MOFCOM has to inform the parties of their decision in writing.⁸²

III Second stage review

If MOFCOM finds that the transaction needs additional investigation they can initiate a further review period of up to ninety days, according to AML Article 26.

The parties shall be notified in writing of the decision.⁸³ Such decisions do not have to be publicized. The parties may not implement the concentration during the second stage review period.⁸⁴

In the case of an exceptionally extensive M&A transaction there could be a need for an extension in the ninety days review period. In those rare cases the AML Article 26 has opened for an addition of sixty days to the review period, also referred to as “phase 3”. The addition to the review period is however subject to the following conditions:

1. The undertakings agree to the extension;
2. The materials submitted by the undertakings are inaccurate and need further verification; or
3. Major changes have taken place after the undertakings made the declaration.

MOFCOM has to make a decision within the time limit. If they fail to do so, the M&A transaction parties may implement the transaction.

Section 5 Detailed Information Requirements

I Merger declaration

To declare an M&A transaction the involved parties has to submit certain documents as stipulated in Article 23 of the AML. These documents includes:

- a written declaration with the names of the undertakings involved, their domiciles, business scopes, the anticipation date for the concentration, and “other matters specified by the authority for enforcement of the (MOFCOM)”;
- the concentration agreement;
- declaration in writing;
- an explanation of the impact to be exerted by the concentration on competition in a relevant market;
- the financial and accounting reports of the undertakings involved for the previous accounting year that is audited by an accounting firm; and
- other documents and materials as specified by MOFCOM.

In the MOFCOM Notification Rules⁸⁵ Article 10, you find more details on the current practice with regards to the declaration documents:

- the written declaration have to specify the names, addresses and scopes of operation of the business operators involved in the concentration. The

declaring parties have to submit their business licenses and incorporation certificates. If the declaring party is a foreign entity they will have to notarize and certify their certificates;

- the parties need a description of and information about the impact the concentration will have on the conditions of market competition. More specifically the information shall include the following:
 - an overview of the transaction;
 - a definition of the relevant markets;
 - the market shares the parties hold in the relevant markets, and their control of those markets;
 - key competitors and their market shares;
 - market concentration;
 - market access;
 - current industry development;
 - the impact of the concentration on the structure of market competition, industry development, technological advances, national economic growth, consumers, and other business operators; and
 - the assessment and basis of the impact of the concentration on relevant market competition.
- financial and accounting reports of the parties involved in the transaction for the preceding accounting year that is audited by an accounting firm.
- concentration agreements and relevant documents, which include specifically all types of M&A agreement documents, such as agreements, contracts and corresponding supplementary documents.

- Other documents and information to be submitted as required by MOFCOM.

With regards to the demand for all of the concentration agreements, there have been some concerns relating to unveiling confidential business information and arrangements from the notifying parties. It seems however, that the matter has been settled in favour of full information disclosure in accordance with the MOFCOM Notification Rules⁸⁶ The MOFCOM is, however, bound by strict confidentiality, and any violations are bound by strict penalties.

The transaction parties may also add other information on voluntary basis to assist MOFCOM in their decision, according to MOFCOM Notification Rules Article 11.

The MOFCOM Notification Rules Article 12 further stipulates that all the documentation handed in related to the declaration have to be in Chinese. In case the main documents are in a different language they have to be translated into Chinese and be admitted with the original. Some foreign observers have commented on this matter and expressed the view that some of the documentation requirements are overly complex and costly.⁸⁷ However, the parties may be permitted to submit a Chinese summary of the documents. In the global concentration notification community it is not unusual to demand translations of notification declaration documents, one example being the U.S. where the parties have to submit English summaries or translation together with the foreign language documents.⁸⁸ Under EU Law, the notification materials have to be in one of the twenty official languages of the European Community.⁸⁹

As already mentioned, MOFCOM is bound by strict confidentiality boundaries when reviewing and assessing M&A declarations. This is also stipulated in the AML Articles 41, stating: “The authority for enforcement of the Anti-Monopoly Law and its staff members are obligated to keep confidential the commercial secrets they come to have access to in the course of law enforcement.” In the case of violation the AML poses strict sanctions in Article 54.

There have been no indications to date that MOFCOM has ever failed to maintain the responsibility of confidentiality, and it thus seems that MOFCOM takes its obligation solemnly.

II Investigation

There are no official regulation or information of what is deemed as relevant information under the subsequent phases of MOFCOM’s review process for the investigation. It is however clear from both issued and draft regulations, and from the published decisions, that MOFCOM requires extensive information from the M&A parties and from other involved parties.⁹⁰

III Third parties

According to the MOFCOM Review Measures Article 6,⁹¹ the MOFCOM may solicit organizational or individual opinions from relevant government authorities, trade associations, consumers and business operators when necessary. These parties may also request MOFCOM to convene a hearing, and to obtain information and

hear opinions. This means that any of these third parties may submit information that may lead to investigation of a specific M&A transaction.⁹²

Section 6 Substantive Standards

I AML Article 28

The predominant substantive test with regards to Chinese merger review is found in AML Article 28 which stipulates that “If the concentration of undertakings lead, or may lead, to elimination or restriction of competition, the authority for enforcement of the Anti-monopoly Law under the State Council shall make a decision to prohibit their concentration.” There is not any guidance on interpretation of “elimination or restriction” in the law, or in any other regulations to date. Further, Article 28 does not give any concrete requirements with regards of the degree of restriction that has to be reached, which means that any restriction of competition in the market may lead to the concentration being prohibited. However, if it is found that the concentration leads to elimination or restriction of competition in the relevant market, Article 28 gives MOFCOM the discretion to still allow the concentration if the advantage of such a concentration outweighs the disadvantages, or the concentration is in the public interest.

II Relevant markets and market definition

The reference to the relevant markets is found in AML Articles 23 and 27, which states that the undertaking has to submit an explanation of the impact to be exerted by the concentration on competition in the relevant market, and that MOFCOM has to take into consideration the market shares of the undertakings involved in the concentration in a relevant market, their power of control over the market, and the degree of concentration of the relevant market, when they assess the merger declaration.

There is a definition of “relevant market” in the AML Article 12, stipulating that “relevant market” consist of the range of the commodities for which, and the regions where, undertakings compete each other during a given period of time for specific commodities or services. Because the “relevant market” definition is so important with regards to the review process, the Anti-Monopoly Committee of the State Council also promulgated the Market Definition Guidelines⁹³ to make the term as palpable as possible. The Market Definition Guidelines applies equally to monopoly agreements, abuses of dominance and the merger review process.

According to Article 7 of the Market Definition Guidelines there is no exclusive method for defining a relevant market. There are however listed several factors which have to be taken into account with the actual situation when assessing each and every case. Article 3 of the Market Definition Guidelines stipulates that a relevant market shall mean the product scope or the geographical scope within which an operator participates in competition during a certain period of time with respect to a specific product or service.

The product scope refers to the **relevant product market**, which means a “market comprising of a group or a category of products which are regarded as interchangeable or substitutable by consumers by reason of the products’ characteristics, their intended use and their price.”⁹⁴

The geographical scope refers to the **relevant geographic market**, which means “a geographical area where consumers obtain products that are interchangeable or

substitutable.”⁹⁵ In other words, the relevant geographic area is the area within which the companies compete with each other.

Because products regarded as interchangeable or substitutable by consumers, or geographical areas where such products are provided, constitutes direct and effective competitive constraint on operators’ acts in the market competition, the definition of a relevant market shall mainly be based on the consumers’ demand analysis.⁹⁶ This means that the degree in which the consumers have an option with regards to choice of products is most important for the relevant market analysis. The Guidelines reference the “smallest market principle”, defining the narrowest range of products or geographic area that represent possible significant anticompetitive effects in the context of considering the “hypothetical monopolist” or “small but significant and non-transitory increase in price” (SSNIP) test.⁹⁷ This method has also been used in the U.S. market, stipulated in the Horizontal Merger Guidelines⁹⁸ § 1.11. In the European market the SSNIP test was first applied in the *Nestlé/Perrier* case in 1992, and was later recognized by the European Commission in 1997, through the Commission's Notice for the Definition of the Relevant Market.

It is somewhat difficult to determine exactly what MOFCOM’s decisions are built upon. The cases mentioned in part f. iii. of this thesis may however give some ideas as to what is decisive to determine the relevant market definition. In the earliest case mentioned, *InBev*, the market was understood as the “Chinese beer market”, with no further interpretation of the term. In another case, the *Coca Cola* decision, MOFCOM discussed the competitive effects of proposed transaction in relation to both the juice beverage market and the carbonated soft drinks market, without any

further discussion on the definition of the product market and the consideration of the percentage of natural juice in the carbonated soft drinks. In *Lucite*, it seems that many chemicals produced by the transaction parties, including MMA, were defined as separate product markets. In *Pfizer*, a specific animal vaccine was defined as a separate relevant market, there was however overlaps in at least one other animal health product and two drugs for humans. In *Panasonic*, three different types of batteries were considered to be in different product markets. And, in *Seagate* MOFCOM regarded the product market to be the hard disk drive (HDD) market. It was easy for the PC manufacturers to switch between suppliers, because the HDD products were homogeneous and the market transparent.

With regards to the geographical market definition there has, according to the published decisions, been a focus on China as being the relevant geographical market without any further analysis, examples being *InBev*, *Coca Cola*, and *Lucite*. In *Pfizer* MOFCOM was more precise, concluding that mainland China was the geographical market, thus excluding Hong Kong, Taiwan and Macao. The market for the products in *Panasonic* and *Seagate* was defined as world-wide.

In accordance with AML Article 23 the M&A parties has to provide documents and materials that defines the relevant markets, this includes definitions on both China-wide and world wide markets.

The Chinese application of “relevant market” is much the same as in Europe and in the U.S., which also divide the term into the “relevant product market” and “relevant geographic market”.⁹⁹

III Anti-monopoly Law Article 27, and MOFCOM decisions

According to AML Article 27 the following criteria should be taken into consideration in the review of concentration of undertakings:

- the market shares of the undertakings involved in a relevant market and their power of control over the market;
- the degree of concentration in the relevant market;
- the impact of their concentration on access to the market and technological advance;
- the impact of their concentration on consumers and the other relevant undertakings concerned;
- the impact of their concentration on the development of the national economy; and
- other factors affecting market competition as deemed necessary by MOFCOM.

These criteria will act as requirements for the anti-monopoly review, and may therefore give some guidance as to what information should be disclosed to an M&A declaration to MOFCOM.

Some of these factors address issues that are not related to the evaluation of competitive effects from the M&A, and are not conventional parts of merger analysis in other leading antitrust jurisdictions. In particular the effect of the M&A on “other

undertakings” or “the development of the national economy” are factors that are not typically a part of leading antitrust jurisdictions M&A review.

It is somewhat difficult to analyse MOFCOM’s review process full out. Only a part of the M&A cases declared are completely published, and the ones being published are rather conclusive in nature. However, it is to some degree possible to evaluate the decisions that have been published. There are seventeen cases published to date, of which one was denied and the rest conditionally approved. Where the MOFCOM finds that a concentration may have negative impact on the competitive market they have the option to allow such concentration with conditions, as stipulated in AML Article 29. The restrictive conditions imposed shall eliminate the negative effects found to be the result of the concentration.

The MOFCOM decisions appear to consider factors consistent with AML Article 27, as well as with those considered by other jurisdictions merger review systems.

MOFCOM’s published judgements does not give an in-depth analysis of the criteria in Article 27 used on the facts of each case, and that makes it difficult to affirm the key deciding factors of each decision. But as more decisions are being published and analysed, we may start to draw some lines, and understand the connection, between the conclusions and the decisive factors that settles the fate of an M&A agreement.

The predictability this creates may contribute to a more foreseeable and cost efficient process for companies contemplating an M&A.

The seventeen cases published to date is: *InBev*¹⁰⁰, *Delphi*¹⁰¹, *Pfizer*¹⁰², *Panasonic*¹⁰³, *Lucite*¹⁰⁴, *Coca-Cola*¹⁰⁵, *Novartis*¹⁰⁶, *Silvinit*¹⁰⁷, *Savio*¹⁰⁸, *Shenhua*¹⁰⁹, *Seagate*¹¹⁰,

*Henkel*¹¹¹, *Western Digital*¹¹², *Google*¹¹³, *Goodrich*¹¹⁴, *Wal-Mart*¹¹⁵ and *Gemalto*¹¹⁶. I have included a summary of a selected number of the decisions in this thesis, in order to form an overall impression of the factors decisive for the result in the Chinese merger review system.

InBev¹¹⁷

MOFCOM's merger decision on the acquisition of American brewer Anheuser-Busch by Belgian-Brazilian brewer InBev was the first decision to be published in China. The acquisition of the American company was approved after imposing several conditions due to each of the foreign companies' ownership in the Chinese breweries Tsingtao Beer and Zhujiang Brewery Group. One of the conditions was a constraint, blocking InBev from acquiring additional shares in the domestic competitors. The announcement of the decision was only a short page, and there is not much of an analysis to study. However, a MOFCOM press release revealed some further details: "the results of the review show that this transaction does not result in eliminating or restricting effect on competition in the beer market in China; therefore MOFCOM decided not to prohibit the transaction. However, in order to prevent the formation of a structure that impairs competition after the transaction, MOFCOM imposed necessary restrictive conditions."¹¹⁸ The press release showed that MOFCOM had deliberated on the terms in Article 27, and reviewed the competitive effect the acquisition would have on both the geographical market and the product market.

Delphi¹¹⁹

On August 18th, 2009, the American corporation General Motors Limited (GM) applied to declare its acquisition of the American company Delphi Corporation (Delphi). MOFCOM published its conditional approval on November 28th, 2009. The decision considers the vertical effects of the transaction and raised a number of foreclosure-related concerns, including: whether Delphi would continue to supply parts to domestic automobile “original equipment manufacturer” (OEM) competitors of GM, whether Delphi could delay or prevent domestic automobile OEM competitors from switching to other automotive parts suppliers, whether GM would have access to confidential information in Delphi’s possession relating to domestic automobile OEM competitors, and whether GM would purchase from competing domestic automobile parts suppliers post-merger. The result was conditions on the mentioned concerns, to prevent discrimination by Delphi/GM against its competitors.

Pfizer¹²⁰

The conditioned approval of the American owned pharmaceutical company Pfizer’s acquisition of American owned Wyeth was announced September 29th, 2009. Several products were evaluated, but the only product with a danger of restricting competition in that specific market within China was the swine mycoplasma pneumonia vaccine. Compared to InBev, this decision is much more detailed and reasoned. *Inter alia*, it specifies that the geographical market, referred to as China, exclude Hong Kong, Macau, and Taiwan. MOFCOM also concluded that the merged company, due to its market share, would be able to “expand its market by virtue of its market scale, and would thereby control market prices.” MOFCOM found that the barriers to entry were high. Further, Pfizer would be able to expand its China market

and marginalize other competitors by taking advantage of its magnitude, while restricting the development of other competitors in the same field.

The main condition for the planned acquisition was a divestiture of Pfizer's business in swine mycoplasma pneumonia vaccine in China.

Panasonic¹²¹

January 21st, 2009, MOFCOM received the notification of the Japanese company Panasonic's acquisition of Sanyo, a Japanese electric enterprise. The declaration was approved with conditions, due to the conclusion that the merger would limit the effect of competition in the product markets for lithium coin-cell secondary batteries, consumer nickel-metal hydride batteries (NiMH) and automobile NiMH batteries.

For the lithium coin-cell secondary batteries the concern was that the market for such batteries is highly concentrated. The merger between Panasonic and Sanyo would result in a 61.6 percent market share, and so the merger would restrict the purchaser's right to choose between products and limit sources of supply, which would ensure continuity. The merger would enable the transaction parties to raise prices post-merger. The buyer power did not offset these concerns because many small and medium-sized buyers lacked such power.

With concern to the consumer NiMH batteries the parties would achieve a market-leading share by merging. This would enable the parties to increase the prices unilaterally. Further, the device manufacturers, principal buyers and distributors of

such batteries often require their purchasers to commit to one specific brand of battery, which excludes other competitors.

Panasonic's joint venture with Toyota already had a leading position with the concern of automobile NiMH batteries, with a market share of 77 percent. The only other competitor in this market was Sanyo. Therefore the merger with Sanyo would eliminate all other competition in this product market. MOFCOM thus required the parties to divestiture overlapping businesses in China and Japan, and Panasonic to reduce its stake in Toyota.

The requirement to divestiture Panasonic's business in Japan is the first requirement that is of extraterritorial character, and demonstrates a development in MOFCOM's merger enforcement. The decisions are correspondingly growing more detailed and display an offensive approach to merger enforcement.

Coca-Cola¹²²

On November 20th, 2008, MOFCOM accepted the merger filing of Coca-Cola's acquisition of Huiyuan, a Chinese beverage enterprise. The merger was subsequently denied by MOFCOM due to three principal anticompetitive effects. Firstly, acquiring Huiyuan would give Coca-Cola the power to not only dominate the carbonated soft drinks market, but to transfer this dominance into the juice beverage market.

Secondly, adding the famous Huiyuan brand to Coca-Cola's portfolio of brands, when already holding the strong Minute Maid brand and dominating the soft drinks market would raise barriers to enter the market for other possible competitors in the juice beverage market. Thirdly, the transaction would damage small and medium-

sized domestic juice manufacturers, hinder local manufacturers from competing, and impair innovation.

The protection of small and medium-sized competitors seems to have been an objective when deciding upon the merger declaration, as does industrial policy considerations.¹²³ These considerations are characteristic to China's merger review system. China is still a developing country, and the market economy is still at an early stage of its commencement. Some observers may suggest that the deviation from international rules and practice may be originated in MOFCOM's lack of knowledge compared to the more evolved merger review systems. It is however more likely that the special adaptations made in the Chinese antitrust regime are necessary to facilitate the special circumstances of a country that just some decades ago started implementing a market economy. In order to build a healthy market economy, with competitors that are able to compete on the same terms, China has imposed some necessary measures to guarantee fair play on its own behalf. It may not be popular to foreign investors with the singular intention of making profit, but as China has not implemented a full-on market economy, but a "market economy with socialist characteristics", it should be obvious that the Chinese antitrust system will somewhat deviate from the more evolved antitrust regimes.

The Coca-Cola decision did not indicate which party has the burden to prove dominant position and anticompetitive effect, although it seems clear that it lays with the transaction parties to refute MOFCOM's theory of harm to competition post-merger. In this merger decision Coca-Cola did not manage to rebut MOFCOM's theory of harm, neither did Coca-Cola manage to accommodate the theory with

solutions on how to restrain the unwanted anticompetitive effects, and thus the M&A was denied.

Shenhua¹²⁴

MOFCOM conditionally cleared the establishment of a joint venture between General Electric China (GE) and China Shenhua Coal Liquefaction Chemical (Shenhua) on November 10th, 2011. The decision marks the first time a Chinese entity has been subject to corrective measures under the AML. The declaration is also the first to confirm that joint ventures are subject to the AML merger review regime.

MOFCOM found that GE is one out of three owners of coal-water slurry gasification (CWSG) technology in China, and holds the highest market share in the relevant market. Shenhua's parent company is the biggest supplier of raw coal suitable for the CWSG technology in China. This raised the concern that the entity would control the supply of raw coal by taking advantage of Shenhua's dominant position in the market for raw coal, and limit competition in the market for CWSG technology post-merger.

To impede unwanted consequences MOFCOM requested that the parties commit to not constrain their competitors to use the joint venture's CWSG technology or increase the expenses for competitors that wishes to use a different technology by confining the supply of raw coal or imposing conditions relating to the supply of raw coal.

*Seagate*¹²⁵

MOFCOM conditionally cleared the American data storage company Seagate's acquisition of the South Korean enterprise Samsung's HDD business on December 12th, 2011. The decision is relatively elaborative compared to earlier decisions published by MOFCOM, and shows a positive development towards an increased transparency with regards to the published decisions.

After thorough investigations MOFCOM found that the HDD market is highly concentrated and that the level of concentration has grown over the last couple of decades. At the time of investigation there were five HDD manufacturers in the global market, of which Seagate and Samsung held 33 and 10 percent of the market share respectively. Similar market shares were said to exist in the Chinese HDD market. MOFCOM concluded that the main customers of HDD products are large PC manufacturers and that it takes a small effort to change suppliers. To continue this healthy competitive situation it was found necessary to maintain this procurement pattern in the market.

MOFCOM found it was very difficult to enter the HDD market because of intellectual property rights and innovation.

MOFCOM concluded that the transaction would eliminate an important competitor in the market, resulting in disadvantageous conditions for the consumer. Due to the transparency in the market, and the subsequent possibility to predict competitors' behaviour, the merger would let the remaining competitors exploit the situation by

securing orders simultaneously and as a result decrease the competitive constraints imposed by the procurement pattern in the market.

To restrain the unwanted negative effects on the market, MOFCOM imposed several conditions on the parties. Seagate had to take measures to secure Samsung's brand as an independent competitor. This included not sharing sensitive information, and establishing independent sales team. Both parties had to fulfil their commitments to keep and expand Samsung's production capacity within six months, and thereafter justly determine the production capacity of Samsung's products by evaluating the demand and supply conditions in the market. After completion of the merger, Seagate should not force customers to purchase HDD products from Seagate, or change its business patterns. Further, Seagate was not to force TDK Investment Ltd. to supply HDD magnetic heads exclusively to Seagate, or restrict the supply of HDD magnetic heads to other HDD competitors. Seagate would also commit to spending 800,000 USD over a period of three years on R&D funding.¹²⁶

Google¹²⁷

On May 19th, 2012, MOFCOM published its conditional approval of Google's acquisition of the American enterprise Motorola Mobility (Motorola). MOFCOM's approval of the deal was the last hinder for the implementation of the USD 12.5 billion vertical deal.

MOFCOM defined the relevant product markets as: 1. smart mobile devices, and 2. smart mobile device operating systems (OSs). It was found that the competitive conditions in the two different markets were incomparable. Whereas the market for

smart mobile devices was fragmented, competitive, innovative and dynamic, the market for smart mobile device OSs was highly concentrated and had high barriers of entry.

MOFCOM found that the Google owned Android smart mobile device OS held a dominant market position with its 73.99 percent market share in China. Due to Android's free and open source strategy it has achieved a dominant market position within a short period of time. Because the original equipment manufacturers (OEMs) in a large scale has based their production to suit the free and available Android OSs, there has become a dependency on this OS. MOFCOM concluded that a requirement for approval would be that the new entity continued its free and open source strategy to secure the survival of many OEMs.

Further, Google would post-merger have the incentive and possibility to give Motorola favourable treatment and impose unreasonable patent licensing terms and conditions to other OEMs, hinder competition and in that way damage consumer interests.

MOFCOM imposed several remedies to enable approval of the acquisition. Firstly, Google had to continue to keep the Android OS free of charge and an open-source for at least five years. Secondly, Google should not discriminate any other OEMs for five years. Thirdly, Google should honour Motorola's existing commitment to license its patents on fair and reasonable conditions.

Conclusion

China is a nascent antitrust jurisdiction. However, they have demonstrated a considerable advancement in the few years of enforcement. There is still room for improvement, especially with the concern of transparency with regards to published declarations. But taken into consideration the development from MOFCOM's first published decision, *InBev*, to some of the later published decisions, *Seagate* and *Google*, and the continuing endeavour to clarify the regulations and processes of the AML and merger review, there is evidently a strong will to create an open, functional and efficient system for all parties concerned. It is essential to focus on this matter. Not only is it important to keep foreign investors interested in investing their capital in China, but also to manage with MOFCOM's enforcement capacity constraints and the pressure of balancing the objectives of the AML to protect competition on one side, and promoting the healthy development of the socialist market economy on the other side.

Viewing the seventeen decisions published to this point, we can see that:

- MOFCOM focuses on the impact of the merger of acquisition on competition, in accordance with AML Articles 3 (3), 23 (2), 27, 28, especially with the concern of small and medium sized companies and customers.
- MOFCOM closely investigates the potential and existing barriers to entry, suppliers' and customers' freedom to choose between products, and other constraints on equivalent options in accordance with AML Article 27 and

MOFCOM's Interim Provisions on Assessment of the Impact of Business Operator Concentration on Competition.

- The concentration between entities holding well-known brands, with special regards to popular Chinese brands, may raise objections. Special regulation concerning well-known Chinese brands is found in MOFCOM's Provisions on Foreign Investors' Merger with and Acquisition of Domestic Enterprises Article 12.
- The dependency on the merging companies with the concern of other vertical businesses and customers. Companies have to file information about their vertical collaborations in accordance with MOFCOM's Guide for the Anti-Monopoly Declaration for Foreign Investors' Merger and Acquisition of Domestic Enterprises Article 3.
- R&D investment becomes more important if the merging parties obtain a large market share post-merger. The importance of R&D becomes evident through MOFCOM's Interim Provision on Assessment of the Impact of Business Operator Concentration on Competition Article 8.
- Market shares over 50 percent are likely to cause competitive concerns, even if the addition is insignificant. Important regulation on market share is AML Article 27 and MOFCOM's Interim Provision on Assessment of the Impact of Business Operator Concentration on Competition.
- Other important regulations mentioned in the above MOFCOM decisions are AML Articles 40, 23, 27, 28 and 29.

IV AML Article 28 – Pro-competitive effects

AML Article 28 stipulates that if a concentration may lead to, or leads to, elimination or restriction of competition, MOFCOM shall prohibit the concentration. However, if the transaction parties can prove that the advantages of the concentration outweighs the disadvantages, or that the concentration is of public interest, MOFCOM may still allow the concentration.

The seventeen published decisions so far have not indicated MOFCOM's evaluation of any pro-competitive effects or public interests. But because MOFCOM only publishes the conditionally cleared and prohibited merger reviews, it may be hard to tell whether or not the exception in Article 28, second sentence has ever been considered.

Some critics have noted that Article 28 may be used to favour consolidation between Chinese entities, and especially state owned entities. Amongst these critics is Mark Williams, which states that “this discretionary provision allows Chinese authorities substantial leverage when making controversial decisions concerning purely domestic mergers, acquisition of Chinese businesses by foreign undertakings, and business turnovers between two foreign undertakings that qualify the transactions for notification.”¹²⁸ It is rather obvious that this Article's second sentence is easier applied on Chinese companies than foreign ones. A merger between two Chinese companies may enhance technological progress within China, reinforce export, protect jobs and the interests of the society as a whole, and promote the development of the socialist market economy.¹²⁹

The Article creates a fine line between promoting a healthy competitive market and politics. On one side, the Chinese market needs to be built up to withstand the huge amount of pressure from the outside world to be able to develop in a healthy manner. On the other side, it needs to adapt and conform to some international antitrust policies to be able to attract investment, and create a competitive environment. The balance between these two objectives are difficult, and it is vital that the Chinese antitrust regime maintains fair and equal application of the AML to all parties regardless of nationality, to conserve the high esteem it has acquired over the years. Mistrust from the international competition community could be critical for the Chinese economy, as it would be in any antitrust regime. However, it is crucial for outside observers of the Chinese merger review system that they comprehend the unique Chinese features which induces the requirement of certain differences in the Chinese merger review system from other merger review systems.

Section 7 Possible Results of M&A Review

Amongst substantive declarations by MOFCOM you find decisions:

- unconditionally approving the concentration in accordance with AML Articles 25, 26 and 28;
- conditionally approving a concentration according to AML Articles 28 and 29;
- prohibiting a concentration in accordance with AML Article 28;
- ordering the entities concerned to cease implementation of the merger agreement, to dispose of its shares or assets within a given time, to assign its business within a certain time period, to implement measures to reinstate the market situation as it was before the implementation of the merger, and to accept a fine up to RMB 500,000 in case of illegal concentration.¹³⁰

The procedural MOFCOM decisions include a decision to enter into further review of a merger transaction. When such a decision is made MOFCOM shall notify the parties in writing in accordance with AML Article 25, which stipulates that MOFCOM have to notify the declaring parties of its decision after its preliminary review, and Article 26, which stipulates that the declaring parties shall have a notification from MOFCOM following their decision subsequent to their review. According to AML Articles 25 and 26 MOFCOM shall conduct merger review from the time it receives the documents submitted that conform to AML Article 23. MOFCOM may at any point, after accepting the documents, approve the transaction. The filing parties shall be notified in writing.

In that case MOFCOM prohibits a proposed transaction,¹³¹ they must publish the prohibited concentration decisions and give the parties reason for the rejection.¹³²

The parties may not implement or close a proposed transaction preceding of MOFCOM's review and approval, according to AML Articles 25 and 26. If MOFCOM decides not to conduct further review or fails to make a decision within the time limit the undertakings may implement the concentration.¹³³ So far, only one proposed concentration, Coca-Cola's prepared acquisition of Huijuan, has been denied by the MOFCOM.

According to Article 29 MOFCOM may impose conditions as a prerequisite for approval. The conditional approval must be published by MOFCOM.¹³⁴ No court order or consent is necessary to impose such restrictions. If MOFCOM finds that the proposed concentration will have, or may have, restrictive or eliminating effect on competition in the relevant market, they may invite the transaction parties to give suggestions on how to remedy the undesired effects of the concentration. Pursuant to several of the published declarations, MOFCOM seems benevolent to find solutions which may allow the concentration despite the undesirable effects.¹³⁵ This is also in accordance with the MOFCOM Review Measures¹³⁶ Articles 11 to 13, which *inter alia* stipulates that the transaction parties may introduce restrictive conditions to remedy the undesired effects of the concentration. The restrictive conditions proposed must remove or reduce the unwanted effects of the concentration. Depending on the specific circumstances of the transaction, the restrictive conditions may include the following:

- Structural remedies requiring the parties to divest partial assets or operations, like the conditions set by MOFCOM in *Panasonic*;
- Behavioural conditions constraining certain anticompetitive conduct, like the conditions set by MOFCOM in *Google, Seagate, Shenhua, Delphi* and *InBev*; and
- Combination of structural remedies and behavioural conditions, like the conditions set by MOFCOM in *Pfizer*.¹³⁷

The parties may not appeal the MOFCOM decision before MOFCOM has performed an administrative reconsideration of the decision.¹³⁸ It is not clear from AML Article 53 whether procedural decisions by MOFCOM can be the subject of administrative or judicial review, but Judge Lu Guoqiang of the AML Tribunal of Shanghai No. 2 Intermediate Court suggested that such decisions could be reviewed.¹³⁹

The parties have sixty days from the date of a merger decision to petition MOFCOM for an administrative reconsideration according to the Administrative Reconsideration Law Article 9. The Supreme People's Court has indicated that in cases reviewing the AML administrative decisions, the government defendant will bear the burden of proof to establish the foundation for its decision.¹⁴⁰

Section 8 Industry-Specific and National Security Review

The AML has not implemented an antitrust related merger review by specialized industry regulators. Earlier drafts of the AML stipulated that specialized industry regulators were responsible for the AML violations in their own areas, but this

wording was later removed due to the fact that this would create inconsistent enforcement.

With regards to consultation with other agencies, MOFCOM often requests input and advice when performing merger and acquisition review. The MOFCOM Review Measures¹⁴¹ Article 6 stipulates that MOFCOM may solicit organizational or individual opinions from relevant government authorities when necessary.

Where a foreign investor participates in M&A of a domestic company, and this concentration involves a matter of national security, the concentration is not only subject to merger review, but also a review on national security in accordance with the AML Article 31, which stipulates that where a foreign investor participates in the concentration of undertakings by merging and acquiring a domestic enterprise which involves national security matters, the concentration is subject to review on national security as is required by the relevant State regulations, in addition to the review on the concentration of undertakings in accordance with the provisions of the AML.

The national security review is described further in the Circular of the General Office of the State Council on the Establishment of Security Review System Regarding Merger and Acquisition of Domestic Enterprises by Foreign Investors¹⁴² (SRC) and the Provisions of the Ministry of Commerce for the Implementation of the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors (SRP).¹⁴³

According to the SRC the national security review has become necessary due to the increasing development of economic globalization and the further expansion of China's opening up in recent years. The purpose of the security review is to create an orderly development of M&A of domestic enterprises by foreign investors and to safeguard national security. The scope of the security review is M&A of domestic military related entities, and entities whose business is major farm products, energy and resources, infrastructure, transportation services, key technologies, and major equipment manufacturing involving national security matters.¹⁴⁴ The security review is applicable in situations where a foreign investor gains control of a company in such sectors.¹⁴⁵

The State Council has established a joint ministerial panel, referred to as the joint conference, to conduct the review.¹⁴⁶ This panel will assess the impact of the M&A on national security, including the effect on the capacity to produce domestic products, equipment and facilities in relation to national security, and its effect on stability of the national economy and the social order. The joint conference, together with pertinent departments, will conduct security review of merger and acquisition under the leadership of the State Council and be led by the National Development and Reform Commission and MOFCOM in the areas involving mergers and acquisitions by foreign investors, according to SRC, III. This means that separate national security review is required alongside foreign investment approval for M&A transactions and, if required, merger control approval.

If a foreign investor believes the transaction may touch any national security matters, they must file a notification to the MOFCOM.¹⁴⁷ MOFCOM then views the case, and

transfers it to the security review panel if they find it to fall under the scope of the SCR. The panel will then conduct a general review, which may lead to a more in-depth special review.¹⁴⁸ The general review takes up to thirty-five working days, and the special review takes up to sixty working days. If the panel concludes that the transaction will affect the national security, the panel shall request MOFCOM and other agencies to take the necessary steps to eliminate the undesired effects, such as transfer of shares or termination of the M&A.¹⁴⁹

Chapter 4 Extra-Territorial Application of AML

Relating to M&A

Section 1 AML Provisions

AML Article 2 provides that:

“This Law is applicable to monopolistic conduct in economic activities within the territory of the People’s Republic of China; and it is applicable to monopolistic conducts outside the territory of the People’s Republic of China, which serve to eliminate or restrict competition on the domestic market of China.”

Despite criticism from outside observers of the AML Drafts, claiming the Article could be used to support extraterritorial application of the law in cases of insubstantial effects on the Chinese market, the Article was not removed. Nor was the Article given any substantial criteria, which mean that the AML does not require the anticompetitive effect to be foreseeable, direct or substantial.

The AML Article 2 is the foundation for extraterritorial jurisdiction when the proposed extraterritorial merger affects the Chinese market. The Article stipulates that if there is a chance that the M&A may eliminate or restrict competition in the Chinese market, it has to be declared by MOFCOM pursuant to the regulations in the AML. This “effects test” is similar to the method in other antitrust jurisdictions.

A rather discussed topic in the merger review context is whether the jurisdictional test requires an M&A to have the necessary logical relationship, or nexus, to the relevant jurisdiction before the transaction parties is obligated to notify the M&A. The criteria in the State Council's Regulation on Declaration Thresholds Article 3 are clear enough, but the concern is whether the notification thresholds fail to demand necessary nexus with China and thus creates dispensable costs and time delay for certain extraterritorial mergers with no impact on the Chinese market.

Section 2 M&A Cases with Extra-Territorial Nexus

The *Coca-Cola* case was the first, and only to date, prohibited case to involve extraterritorial effect since the AML came into effect in 2008. In this case MOFCOM applied the Chinese anti-monopoly laws to the conduct of Coca-Cola Company, a foreign firm. The legitimacy of this performance by the MOFCOM can be justified by the possible anticompetitive impact of the acquisition of Huiyuan on the Chinese market in accordance with the AML Article 2. The acquisition would without doubt affect the Chinese beverage market, because Huiyuan was a Chinese brand, and thus the acquisition was subject to M&A review by MOFCOM.

The *Shenhua* case is to date the only published MOFCOM declaration where a Chinese company has been subject to merger remedies imposed pursuant to the AML. The fact that so few of the conditionally approved decisions involve Chinese companies has intensified the concern that the Chinese merger review regime may in practice be applied inconsistently, and in favour of domestic companies.¹⁵⁰ However,

the director general of the Anti-Monopoly Bureau of MOFCOM, Mr. Shang Ming, has stated that the law will be uniformly and equally applicable to both domestic and foreign enterprises of all types without any discriminatory treatment.¹⁵¹

Conclusion

The Chinese AML is general in form, with few clarifying guidelines. However, its general formation has made it less complicated to enact very specific and detailed provisions on lower government levels. The lower level enactments have supplemented the AML to such degree that the M&A review process as of now presents itself as a coherent and complete regulatory.

The MOFCOM decisions published reveals to a great extent how the government agency weights the different regulations when deciding the outcome of each case, but there is still room for improvement in this area. However, the tendency shows a willingness to be more and more transparent, with the increasingly detailed published M&A cases, and the recent announced decision to publish a list of unconditional M&A clearances by MOFCOM.

To date, there have been 458 unconditionally approved concentrations, seventeen conditionally approved concentrations, and one denied concentration. The statistics shows that MOFCOM rarely interferes with any M&A transactions foreign or domestic. The critics' anxiety, that the Chinese government would exploit the antitrust system to create a burdensome and challenging system for the foreign investors, has thus largely been unnecessary.

The Chinese antitrust system has many similarities to other more developed antitrust systems, like the U.S. and Europe, though with certain special characteristics. Most evident is the regulations on non-competitive effects. Many observers have noted that these regulations have little to do with the promotion of a healthy market

economy, and points to the fact that such considerations historically have worked against creating strong markets. But taking China's special situation, being still a developing country thrown into the global market competing with more developed market economies, there is an understandable need to protect certain aspects of the market at this point. The latest expert discussion on the Draft Interim Measures on Simplified Merger Review Procedures shows that the development in the antitrust area moves towards an even more unified global merger review regime.

¹ The Anti-Monopoly Law was adopted at the 29th Session of the Standing Committee of the 10th National People's Congress, and came into effect August 1st 2008. Available in Chinese at http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374672.htm, translated version at http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471587.htm (last visited October 15th 2012).

² AML Article 1.

³ Yong Huang, "Chinese Antimonopoly Law, Growing Along with Market Economics – Background, Legal Framework and Implementation Outlook", 1681, PLI/Corp 51, 19 (2008) (noting that the World Bank reported in 2005 that China reached a Gini coefficient of 0.447 in 2001, far exceeding the internationally acceptable warning limit, and that that coefficient is growing, and that the poorest 20 percent group accounts for only 4.7 percent of total revenues and consumption, while the most wealthy 20 percent accounts for 50 percent.). See in general AML Articles 1-4.

⁴ See "Competition in China: Anti-Monopoly Law Passes Go", Practical Law Company, September 25th, 2007, available at <http://www.practicallaw.com/5-376-3970>.

⁵ *Supra* note 1.

⁶ Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (jointly promulgated by the Ministry of Foreign Trade and Economic Cooperation (now MOFCOM), State Administration of Taxation (SAT), State Administration for Industry and Commerce (SAIC), and State Administration of Foreign Exchange (SAFE), March 7th, 2003, effective April 12th, 2003) 2003 St. Council Gaz. Issue No. 13, Serial No. 1084 (P.R.C.), available in Chinese at http://www.gov.cn/gongbao/content/2003/content_62062.htm (last visited October 15th, 2012), Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (jointly promulgated by MOFCOM, State-owned Assets Supervision and Administration Commission (SASAC), SAT, SAIC, China Securities Regulatory Commission (CSRC), and SAFE March 7th, 2006, effective September 8th, 2006, revised by MOFCOM on June 22nd, 2009) 2009 St. Council Gaz. Issue no. 25 Serial No. 1312 (P.R.C.), available in Chinese at http://www.gov.cn/gongbao/content/2009/content_1407892.htm (last visited October 15th, 2012).

⁷ National Commercial Conference on Anti-monopoly 2012, held in Beijing, published in English and Chinese at <http://english.mofcom.gov.cn/aarticle/subject/cv/lanmua/201201/20120107931146.html> (last visited October 15th, 2012).

⁸ Ministry of Commerce held a press conference on "The Progress of Anti Monopoly Work in 2012" (28 December, 2012) published at: <http://www.mofcom.gov.cn/article/ae/slfw/201212/20121208504842.shtml> (last visited March 7th, 2013).

⁹ The MOFCOM announcement is published at: <http://fldj.mofcom.gov.cn/aarticle/zcfb/201211/20121108437868.html> and <http://images.mofcom.gov.cn/fldj/accessory/201211/1353031118730.pdf> (last visited March 7th, 2013).

¹⁰ Measures for the Declaration of Concentration of Business Operators. Promulgated by MOFCOM on 21st of November 2009, effective the 1st of January 2010.

¹¹ See Mark Williams, "Foreign Investment in China: Will the Anti-Monopoly Law Be a Barrier or a Facilitator?", 45 Texas Int'l L.J. 127, 149 (2009) ("This incongruity (between international and Chinese merger practice) may be explained by the unfamiliarity of the mainland authorities with the in-depth merger review that is practiced in developed economies. It may also be explained by the particular nature of the Chinese political circumstances."); Salil K. Mehra & Meng Yanbei, "Against Antitrust Functionalism: Reconsidering China's Anti-Monopoly Law", 49 VA. J. Int'l L. 379, 384-85 (2008-2009) ("The many critics of China's AML share a feature common with the AML's drafters, namely, a focus on comparison with developed nation competition law (...). In short, these critics have fallen victim to an antitrust functionalism – specifically, an unstated and unwarranted assumption about background similarities between China and elsewhere.").

¹² *Supra* note 1.

¹³ See Richard Evans, "Deng Xiaoping and the Making of Modern China", Penguin 1995.

¹⁴ See Mark E. Monfort, "Reform of the State-Owned Enterprises and the Bankruptcy Law in the People's Republic of China", 22 Okla. City U.L. Rev. 1067 (1997).

¹⁵ "China Enacts Law Giving More Power to Enterprises", AP (August 1st, 1988), quoting Zhang Yanning, Deputy Minister of the State Commission for Restructuring the Economy.

¹⁶ Law of the People's Republic of China Against Unfair Competition. Promulgated by the Standing Committee, National People's Congress on September 2nd, 1993, and effective December 1st, 1993. 1993 Standing Comm. Nat'l People's Cong. Gaz. Issue No. 5. Available in Chinese at http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004600.htm, translated at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383803.htm (last visited October 20th, 2012).

¹⁷ See revised version of the Companies Law of the People's Republic of China, promulgated by the Standing Comm, Nat'l People's Cong., October 27th, 2005, effective January 1st, 2006. 2005 Standing Comm. Nat'l People's Cong. Gaz. Issue No. 7, available in Chinese at http://www.npc.gov.cn/wxzl/gongbao/2005-10/27/content_5354901.htm, translated into English at http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384124.htm (last visited October 20th, 2012). See also, Monfort, *supra* note 10, 1095.

¹⁸ "Action Urged on Antitrust Law", China Daily on September 1st, 1998.

¹⁹ Pricing Law of the People's Republic of China, promulgated by the Standing Comm. Nat'l People's Cong., December 9th, 1997, effective May 1st, 1998. 1997 Standing Comm. Nat'l People's Cong. Gaz., Issue no. 7, available in Chinese at http://www.npc.gov.cn/wxzl/gongbao/1997-12/29/content_1480187.htm, and a translation in English at http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383577.htm (last visited October 20th, 2012).

²⁰ *Ibid.* Article 3.

²¹ "Beijing Amends Laws to Prepare for WTO Entry", Xinhua News Agency, pt. 3, March 7th, 2001.

²² Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2003).

²³ Yee Wah Chin, "Antitrust Considerations in China Mergers", 2003.

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- ²⁴ An example being Lester Ross, "Monopoly Law Must Be Equal: Draft Competition Legislation in China Threatens to Be Cumbersome for Regulators", *Financial Times*, 10, October 1st, 2003.
- ²⁵ H. Stephen Harris Jr., "An Overview of the Draft China Anti-Monopoly Law", 34 *Ga. J. Int'l & Comp. L.* 131 (2005).
- ²⁶ Yan Yang, "Ministry Sets up Anti-Monopoly Office", Published in *China Daily*, on September 17th, 2004.
- ²⁷ H. Stephen Harris, Jr. and Kathy Lijun Yang, "China: Latest Development in Anti-Monopoly Legislation", 19 *Antitrust* 89 (2005).
- ²⁸ A detailed discussion on the provisions in the April 2005 Draft AML is available at:
http://apps.americanbar.org/intlaw/committees/business_regulation/antitrust/jointcomments05supplement.pdf (last visited October 21, 2012).
- ²⁹ See generally MOFCOM, "Interpretations and Applications of the Anti-Monopoly Law of the People's Republic of China", 411-13, appendix 3, "Reports by the Legal Commission of the Standing Committee of NPC on the Revisions of the Draft AML", Law Press China, 2007.
- ³⁰ "Foreign M&As Create Problems" Article in *China Daily*, of November 12th, 2007. Available at:
<http://wto2.mofcom.gov.cn/article/chinanews/200711/20071105219375.shtml> (last visited March 8th, 2013).
- ³¹ International Competition Network, "Recommended Practices for Merger Notification Procedures", available at
<http://www.internationalcompetitionnetwork.org/> (last visited October 21, 2012).
- ³² *Supra* note 6. Available in English at:
http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51173 (last visited October 23rd, 2012).
- ³³ Provisional Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, Article 1.
- ³⁴ Available in English at:
http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=66925 (last visited October 23rd, 2012).
- ³⁵ Sun Nanshen, "International Investment Law", 247-248 (2007).
- ³⁶ Provision on Mergers and Acquisition of Domestic Enterprises by Foreign Investors, Article 3 (12).
- ³⁷ Available in English at:
http://fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=108906 (last visited October 23rd, 2012).
- ³⁸ http://www.fdi.gov.cn/pub/FDI_EN/Economy/Investment%20Environment/FDI%20in%20China/Foreign%20Direct%20Investment%20in%20China/t20090730_109071.htm (last visited October 23, 2012).
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- ⁴⁰ Ping Lin and Jingjing Zhao, "Merger Control Policy Under China's Anti-Monopoly Law", published by Review of Industrial Organization on April 4th, 2012, available at: <http://ideas.repec.org/a/kap/revind/v41y2012i1p109-132.html> (last visited March 22nd, 2013).
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- ¹³⁰ AML Article 48.
- ¹³¹ Article 28.

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- ¹³³ Article 25.
- ¹³⁴ AML Article 30.
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APPENDICES

Appendix 1

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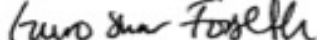
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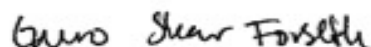
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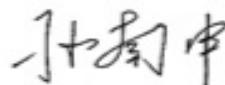
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